

Lecture 5 Topic 2 Torrens

8. Exceptions to indefeasibility
 - o Basic principle
 - Indefeasibility
 - Registered interests take **free from unregistered interests**, such as those arising from a grant by a previous registered proprietor or from a 'defect' in a transaction under which the current or previous registered proprietor took her or his interest.
 - Exceptions to indefeasibility
 - **Circumstances in which a registered proprietor is subject to such unregistered interests.**
 - Note
 - ◆ **Unregistered interests survive only to the extent that they come within an exception to indefeasibility**
 - Often, this will be when the unregistered interest has been granted by the current registered proprietor, so as to come within the in personam exception
 - Risk: current registered proprietor sell to X. X not bound by this unregistered interest unless there is another exception.
 - Unregistered interests, while in existence, can be protected by caveat or priority notice, which means that the registered proprietor who is bound by the unregistered interest remains on the register and a putative registered proprietor, who would not be bound, is prevented from getting on the register.
 - o Sources of exceptions to indefeasibility
 - **RPA s42(1)** opening words
 - Fraud
 - Other estates or interests recorded on the register (not really an exception since they themselves attracts indefeasibility)
 - **RPA s42(1)** opening words
 - (a) interest recorded in a prior folio
 - **(a1) omitted or misdescribed easement, immediately subsisting before land brought under RPA or validly created**
 - ◆ Must be validly created in law i.e. originally registered
 - **(b) omitted or misdescribed profit a prendre, created or existing**
 - (c) wrong description of parcels
 - ◆ Only for first RP, not subsequent purchasers
 - **(d) tenancies not exceeding 3 years**
 - ◆ Lease less than 3 years
 - ◆ Lessee taken possession/immediate right of possession
 - ◆ **New RP has constructive notice of lessee's interest (usually yes since lessee in possession)**
 - *there will be dealt with later in relevant topics
 - **RPA s42(3)**
 - Indefeasibility does not apply where expressly inconsistent overriding statutes
 - E.g. local government Act impose charge for unpaid rates. Charge not registered, but enforceable on current registered proprietor
 - Other provisions of the Real Property Act
 - **RPA s 118(1)(d)(i)** - a person who has been registered as proprietor of the land through fraud, or
 - Must be the fraud of the registered proprietor
 - **Does not enlarge the exception of fraud**
 - **RPA s 118(1)(d)(ii)** - a person deriving (otherwise than as a transferee bona fide for valuable consideration) from or through a person registered as proprietor of the land through fraud [*Cassegrain v Gerard Cassegrain & Co*]
 - Unlike **RPA s 118(1)(d)(i)**, this provision 'enlarge the rights which a person deprived of land by fraud against a registered proprietor'
 - Registrar-General's power of rectification **RPA ss 12, 136**
 - Volunteers? (e.g. s 45)
 - 'Judicially-created' exception – the in personam / personal equities exception
 - A. **Other registered interest**
 - **RPA s42(1)**
 - The registered proprietor for the time being of any estate or interest in land recorded in a folio of the Register shall, except in case of fraud, hold the same, **subject to such other estates and interests and such entries, if any, as are recorded in that folio**
 - Is an interest recorded in a folio?
 - Most of time it is easy to see whether there are other registered interest or not in the folio. Since it is given a distinct number.
 - Sometimes not that easy.
 - **[Bursill Enterprises v Berger Bros Trading]** - even if interest not properly registered on folio, if the dealing which creates the interest is registered and shown on folio, then that interest is registered
 - Facts
 - Owner of land executed a transfer that granted the transferee and his heirs and assigns
 - (a) the right to drive, ride, operate and labour up, down, to, from and upon a roadway on the transferor's land; and
 - (b) such buildings as currently exist on the roadway and the right to pull down such buildings and rebuild others at a height not less than 12 feet from the ground over the road
 - The transfer was registered, and at the time of the proceedings was recorded on the then current folio for the servient land as a 'Right of way created' in a fully identified instrument [Transfer No. 7922]
 - Accurate description of (a), but (b)?
 - **Did part (b) of the grant create something other than a Right of Way?**
 - **(b) is not easement, it is fee simple interest in the building.**
 - As I read the instrument of transfer, what [the transferor] purported to convey ... was a building occupying a horizontal stratum of part of the land of which [the transferor] was the registered proprietor.
 - The existence of a stratum interest could be effectively registered on the folio: for it is well established that such an interest is known to the law.
 - The transfer of a building without any reservation of a right by the transferee amounts, I consider, to a conveyance of the **exclusive ownership of the building**. That is inconsistent with the concept of easement. This is **fee simple interest**. That conclusion is reinforced when the transfer is coupled with an express right to pull down the building granted and build another in its place
 - **Then, is the fee simple interest registered on the current folio for the servient land so that it is binding on subsequent registered proprietor?**
 - YES by Barwick CJ
 - **Folio and dealings are both part of register. Once dealing registered, interest of RP subject to interest created by registered dealing.**
 - ◆ **Here, all terms in Transfer 7922 form part of register.**
 - It seems to me that it was not intended that the certificate of title alone should provide a purchaser dealing with the registered proprietor with all the information necessary to be known to comprehend the extent or state of that proprietor's title to the land. **The dealings once registered become themselves part of the Register Book**. It was therefore **sufficient**

that their registration should be by statement of their nature recorded on the certificate of title.

- ♦ Once the memorial is sufficient to effect registration of the instrument then the interest of the registered proprietor becomes subject to the registered interest

► YES by Windeyer J

– **If it is reasonable for the purchaser to discover an interest (since a dealing which involves the interest is on CT/folio), then it is registered on the folio**

- ♦ What is registered to a prospective purchaser by his vendor's certificate of title is **everything that would have come to his knowledge if he had made such searches as ought reasonably to have been made by him as a result of what there appears.**

♦ Here,

- ♦ A prudent conveyancer acting for the purchaser of the land ... would have **ascertained what transfer 7922 on the vendor's certificate of title in law effected.**

♦ True he might have been surprised to discover all that his search revealed. But surely no prudent person, seeing the reference to a right of way, would neglect to ascertain what exactly was the nature of the right of way, the land subject to it, the persons who could avail themselves of it, for what purposes in what manner and at what times.

♦ The reference on the certificate of title to Transfer 7922 was **constructive notice (not saying that a purchaser who has constructive notice of the fee simple is bound by it. Used only to say that buyer SHOULD HAVE READ AND DISCOVERED the interest when he sees transfer 7922 on the CT)** of what it provided - the land was subject not only to a right of way but also to an interest of the adjoining landowner in the building above the way.

♦ Therefore, the RP of the land that is now Bursill held his title subject to that interest. Berger's has in law a right to the exclusive use and occupation of the building.

► **[Registrar-General v Cihan] - if current CT has reference to previous CTs, any interest contained in previous CTs is reasonably discoverable by purchaser thus registered**

◊ Facts

► Current folio of the register E/23162 (issued 2008)

- Records encumbrance: **Easement affecting the land shown so burdened in Vol 6451 Fol 53**

► Certificate of Title vol 6451 folio 53 (issued 1952) included

- A notification that the land was subject to the 'full and free liberty and licence' for two named individuals and their heirs and assigns etc to 'drive, ride, operate and labor up and down to and fro' over land marked on a plan on the certificate of title; and

♦ This seems like an easement but not really an easement since no identification of dominant land

- A notation: 'Last Certificate Vol 1022 Fol 161'

► Certificate of Title vol 1002 folio 161 (issued 1891)

- Contained a notification identical to the one on Certificate of Title vol 6451 folio 53 dealing with the 'full and free and liberty' provision, except that it also identified the named persons as 'the owners of the land adjoining the south eastern side of the [servient] land ...'

♦ This is a valid easement

► Parties agree that an easement had been created in 1882 (when land was old system).

◊ Is the easement recorded in the current folio?

► Trial judge

- No

♦ The reference in the 2008 folio to the easement in the 1952 Certificate of Title caused the content of the relevant part of that Certificate of Title to be set out in full under s 40(1B).

♦ **However, the relevant part of that 1952 Certificate of Title contains an incomplete or insufficient description of the 1882 easement.**

♦ **The 1882 easement was thus omitted from the 2008 folio of the register therefore enforceable as an overriding interest under s 42(1)(a) so binding on current RP**

♦ Created and omitted, but enforceable against servient land owner.

♦ Owner of land can claim assurance fund.

► Court of Appeal

- YES

♦ The concept here is that **registration is sufficiently made if particulars explicitly stated are such as to engender in the mind of a reasonable reader generally familiar with property and land titles a need for further enquiry by resort to readily available records**

♦ Although 1952 CT has deficiency (not identifying the dominant land) in the description of the easement, the missing information is readily obtainable by means that the available material provided, so easement registered.

♦ Here, after looking at 2008 CT, reasonable to read 1952 CT. Reading 1952 CT, reasonable for someone to read the notation and read 1891 CT. Can find all information.

♦ Position entrenched by **RPA s 40(1B)**

♦ Where, in a manual folio or computer folio certificate, the estate or interest of a registered proprietor is expressed to be subject to:

(a) an estate or interest evidenced by an instrument,

(b) a provision of an instrument, or

(c) an enumerated provision of an Act or of an Act of the Parliament of the Commonwealth,

the whole of the contents of the instrument, provision or enumerated provision, as the case may be, shall be deemed to be set forth at length in the folio or certificate.

B. **Fraud**

- For a fraud to invoke exception to indefeasibility i.e. registered interest is defeasible **[Assets Co Ltd v Mere Roihi]**

□ Fraud means **actual fraud, i.e. dishonesty of some sort**

□ Fraud by whom? - **new RP or his agents**

► When does an agency relationship exist? i.e. when is an agent acting within authority?

♦ If A is B's agent, then whatever the agent, A, does will bind the principle, B.

♦ Two types of agency

► Actual

– B give A authority

► Implied

– Test

♦ **Is there sufficiently close connection between the task and agency's action?**

♦ **Not sufficient for new registered proprietor to be 'passive recipient'** **[Cassegrain v Gerard Cassegrain & Co]**

► Without more, the conclusion that husband had taken the steps necessary to procure registration of the transfer from the company to wife and himself as joint tenants **did not show that his fraud was within the scope of any authority she had, or appeared to have, given to him.**

► Without more, it **did not show that knowledge of his fraud was to be imputed (in the sense of 'brought home') to her**

♦ **Here, she was not actively involved in the transaction. She did not authorize him to conduct the transfer. He is not her agent.**

□ When will someone be liable for fraud?