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## TOPIC 3: Torrens (Unregistered Interests, Caveats, Priority Notices and Priority Contests)

### 1. UNREGISTERED INTERESTS UNDER THE TORRENS SYSTEM

**General rule:** An unregistered instrument will be considered to be an equitable interest.

- **Priorities between unregistered interests:** Unregistered interests are generally extinguished by registered interests, unless protected by caveat or preserved as an exception to indefeasibility (usually the in personam exception)
- Priority between two unregistered interests is generally determined by reference to the principles for resolving the priority disputes; subject to fact that sometimes some unregistered interests are regarded as being legal

#### *Barry v Heider (1914) 19 CLR 197*

An unregistered interest is ineffective to create interest in any land, however, the agreement/obligation accompanying the registration of that instrument is effective in equity. Thus, this brings into existence an equitable interest in the land.

**FACTS**

- Barry (registered proprietor) makes an unregistered transfer to Schmidt (who is not on the register). Before the purchase price was paid, B handed a signed transfer to S, leaving Barry with a vendor's lien. S's interest was equitable, as the CTs were in the possession of the RG while the land was being subdivided.
- S procured the transfer from B by fraud i.e. Schmidt tricked Barry into signing a transfer form saying that he would sell the property for much less than it was worth. Schmidt then used the transfer form/CT to execute an unregistered mortgage to Heider, using the property as security
- To protect his interest, Barry lodged a caveat after the dealing between S and Heider.
- S subsequently granted a second mortgage to Gale. Barry thus sought a declaration to set aside Heider and Gale's interest.
- Barry argued that an unregistered interest doesn't exist on the Torrens system, therefore Heider being unregistered cannot have an interest. The Court rejected that.

**ISSUE**

- Are unregistered instruments inoperative in creating rights with respect to Torrens land?

**HELD**

- No. Torrens legislation does not recognise unregistered interests in land.

- **Isaacs J:** Real Property Acts do not destroy 'the fundamental doctrines by which the Court of Equity have enforced, as against registered proprietors, conscientious obligations entered into by them... consequently, s 41, in denying effect to an instrument until registration, does not touch whatever rights are behind it.
- No legal interest can be created because no legal interest can arise in land without registration, but if equity would enforce the agreement then an equitable interest can arise before registration.

- In Wall, Wall took an instrument because the instrument was registered. Registration gave Wall an interest in the land and that interest was defeasible.

**Chan v Cresdon Pty Ltd (1989) 168 CLR 242**

**S 41** does not deny the existence of an agreement between the parties but denies the efficacy of any instrument they execute until it is registered. The section leaves the agreement behind the instrument intact, so the agreement is still effective to create an interest in the land.

The fact that the lease was not registered did not prevent equity from recognising it as a lease. The contract gives rise to an **equitable interest**, not the instrument itself.

FACTS	<ul style="list-style-type: none"> <li>Lessor, Cresdon, executed a lease of shop premises for a term of 5 years to Sarcourt. The lease provided that the parties would enter into a formal lease that was consistent with Torrens legislation in QLD, however formality requirements were not met as the lease, while in registrable form, was left unregistered.</li> <li>Cresdon sues guarantor of lessee's obligations "under this lease" for non-payment of rent</li> </ul>
ISSUE	<ul style="list-style-type: none"> <li>What is the effect of non-compliance on the interests of the parties?</li> </ul>
HELD	<ul style="list-style-type: none"> <li>Though the unregistered instrument is itself ineffective to create a legal estate in the land, before registration, the section does not avoid contracts or render them inoperative.</li> <li>Thus, a dealing in unregistrable form because of absence of formalities may still create an equitable interest.</li> </ul>

## 2. CAVEATS AND PRIORITIES BETWEEN UNREGISTERED INTERESTS

- Recall:** a newly registered interest will extinguish an earlier unregistered interest. You want to be able to protect that first interest pending some resolution of a dispute you might have with the original RP.

- A caveat is a notice of an unregistered right that represents a claim, though not a right, of interest against property and effectively freezes the title and prevents the registrar from registering further interest in the land until the claim of interest is resolved. Any further dealing with the property cannot proceed without the caveator's approval. **Examples:**
  - Caveat against dealings (s 74F(1))
  - Caveat against improper dealing where CoT has been lost (s 74F(2))
  - Caveat against a mortgagee's improper exercise of power of sale
  - Caveat lodged by the RG to protect the interest of a person under a legal disability or on behalf of the Crown (s 12(1)(e))
- An unregistered interest in Torrens land may be protected by a **caveat** lodged by the Registrar-General. Note that the Registrar-General may also record his or her own caveat. We will be concerned with mainly caveats against private dealings.
- You need a caveatable interest:** a caveat may be lodged to protect any **proprietary interest** in Torrens title land. The claim must be to an interest in land: a caveat cannot be lodged to protect a mere contractual or personal right. **Examples of caveatable interests** include:
  - The interest of a purchaser under a contract for sale
  - The interest of an equitable mortgagee by deposit of the certificate of title as security
  - The interest of a person arising from contributions made to the purchase price
  - The interest of a person arising from an option to purchase
  - The interest of a lessee under a lease
  - The interest in a trust (express or constructive)
  - An unpaid vendor's lien (Barry v Heider)

enjoy. It wasn't so much taking away something from them, the deprivation was that they were not able to achieve what they were entitled to expect.

- The purchaser was therefore deprived of an interest under the Act.

## 6. STATUTORY EXCEPTIONS TO INDEFEASIBILITY

- **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
- **Remember:** 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.)

### 6.1. Sources of exceptions to indefeasibility

#### **Real Property Act 1900 (NSW) s 42(1) Estate of registered proprietor paramount**

(1) Notwithstanding the existence in any other person of any estate or interest which but for this Act might be held to be paramount or to have priority, 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, but absolutely free from all other estates and interests that are not so recorded except:

- (a) the estate or interest recorded in a prior folio of the Register by reason of which another proprietor claims the same land,

...

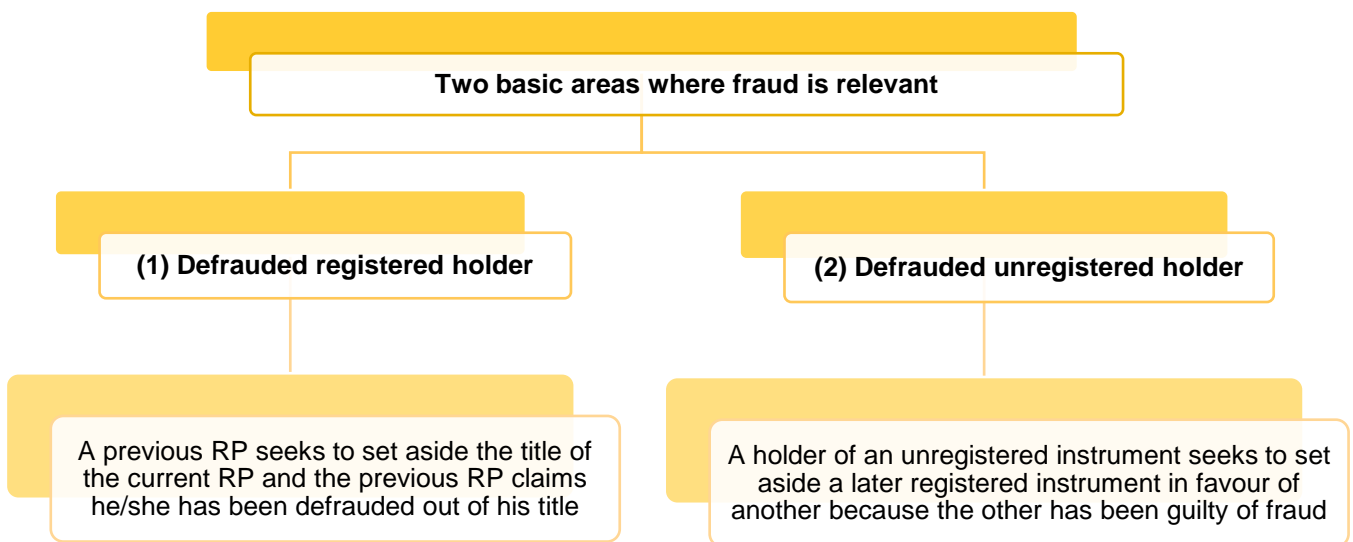
- You're not subject to earlier unregistered interests, you are only subject to the ones that are registered. There are 6 exceptions under this Act, including fraud.

### 6.2. Fraud

- The wording of RPA ss 42 – 43 both include the phrase '**except in the case of fraud**' such that the presence of fraud in a dealing will preclude indefeasibility.
- If the current registered proprietor became registered through circumstances where the previous registered proprietor was defrauded of their registered interest, the current proprietor's interest does not lose its indefeasibility **unless the fraud can be 'brought home' to the current registered proprietor, or their agent** (*Breskvar, Frazer*)
  - So, if they didn't know that the person they bought the land from had obtained it fraudulently, they can rely on indefeasibility.
- **Fraud** in the Torrens system is defined narrowly – some 'dishonesty' or 'moral turpitude' of some sort, which has to invalidate the title of the RP and must be brought home to him or through his/her agent. But, fraud under the RPA requires **actual fraud** (*Davis v Williams*).
  - **The mere fact that the registered proprietor would have found out about fraud if they made reasonable inquiries does not itself constitute fraud i.e.** not constructive or equitable fraud. **But now, s 56C:** Mortgagees must take reasonable steps to establish identity of mortgagor; cancellation of registration of mortgage

- **Actual fraud** however includes ‘**wilful blindness**’ where suspicions of fraudulent activity in the dealing are aroused, but the person abstains from making inquiries for fear of learning the truth (*Assets Co v Mere Roihi*).
- **Victim of fraud must be the complainant:** in order for a fraudulent act to preclude indefeasibility of a registered interest, the victim of the fraud must be the party seeking to set aside the indefeasibility of the registered title (*Bank of SA v Ferguson*). The only exception is when the fraud is against the RG (*Australian Guarantee v De Jager*).
- **Intention to deprive the previous registered proprietor:** in order to constitute statutory fraud, the fraudulent act must be committed with an intention to deprive the alleged victim of their interest in the land rather than some other intention, such as avoiding stamp duties (*Davis v Williams*).
- **When must fraud exist?** Conventionally, in the circumstances leading up to the RP acquiring the registered interest. However, there is some authority suggesting that ‘fraud’ may be found also in circumstances occurring *after* registration as proprietor e.g. where proprietor repudiates obligations that he/she undertook before registration (*Bahr*).

**A finding of ‘fraud’ will deny protection under s 42 and s 43, and s 43A by virtue of a void dealing.**



Type of fraud	Effect
Forgery of a signature to defraud the RP of title	Fraudster’s registered interest becomes defeasible and the defrauded proprietor’s interest will be restored to the register
Forgery of a signature to execute a mortgage	Registered mortgage is set aside
RP has actually signed a mortgage instrument but the mortgagee falsely attests to their presence at the time of signature	Mortgage is deemed as unregistered and becomes an equitable mortgage ( <i>Hickey v Powershift Tractors</i> )
Where there are joint proprietors and one of them signs on their own behalf but forges the	The registered mortgage is set aside but the mortgagee retains an equitable mortgage

## TOPIC 4: Co-Ownership #1

### 1. TYPES OF CO-OWNERSHIP

- **Co-ownership** refers to the state of land being simultaneously owned by multiple parties (thus, doesn't concern lessees).

**Joint tenancy:** Where two or more persons hold *equal* shares and is each said to be seised of the whole land. They can have separate rights between themselves, but they are in the position of a *single* owner. This is made clear in two ways:

- **Right of survivorship:** When one joint tenant passes away, their interest is extinguished so that the land is held in joint tenancy by the surviving tenants, who already own the whole land. A joint tenancy interest therefore cannot be left in a will and cannot form part of the deceased's estate – the rule of survivorship operates as a rule of law. If one joint tenant dies, his interest is extinguished, and the interest of the corresponding joint tenants is **enlarged**. At that point, he is a sole owner.
- **Four unities:** unity of possession; unity of interest; unity of title; unity of time.

**Tenancy in common:** where two or more persons hold a *distinct* and *proportionate* share in the land i.e. each person is seised only of his own share, not of the whole property. Note the shares are **undivided** as each share does not involve an actual physical separation.

- **There is no right of survivorship:** upon their death, that share falls into their estate.
- **Unity of possession:** because 2+ persons hold an interest in the land that are undivided shares *each co-owner is entitled to possession but not exclusively for themselves*, nor can they demand possession of any particular part of the land.

**The four unities:** four criteria that have to be satisfied for a **joint tenancy**, but not for a **tenancy in common**. With a tenancy in common, only the unity of possession is essential.

- **(1) Unity of possession:** each joint tenant is entitled to possession of the land not exclusively himself, but together with his other co-owners. He/she can't demand that he/she has possession of any part of the land, as that would constitute separate ownership. You are owners of the whole of the land.
- **(2) Unity of interest:** each joint tenant has the same *kind* of estate or interest in the land as in theory they both hold the one estate. This can be seen in several ways:
  - There can be no joint tenancy between those with interests of a different nature (i.e. freehold with leasehold).
  - You can't have a joint tenancy between those with similar interests of a different duration (i.e. fee simple and fee tail).
  - The interests must be of the same extent (i.e. party A can't have 1/3 interest and B  $\frac{3}{4}$ ). If you have 10 people you have 1/10 interest. Because of that, the rents and profits of the land must be divided **equally** and any legal act affecting the whole of the land requires the participation of all the joint tenants.
- **(3) Unity of title:** each joint tenant must claim or hold and be conferred their title to land under the same interest e.g. not a joint tenancy where 1 deed conveys to A 50% and a separate deed conveys to B the other 50% (that would be a tenancy in common).
  - Say grantor grants land from A and B, then A conveys to C. Until that happens, A and B are joint tenants. But because A conveys to C, B and C are tenants in common because they have derived their joint interests under different instruments. This carries through to the *breaking* of a joint tenancy or the conversion of a joint tenancy into a



## TOPIC 7: Leases

### 1. THE ESSENTIAL CHARACTERISTICS OF LEASES

- **Lessor/landlord:** owns the land. **Lessee** takes the lease. A **reversion** means the lessor's interest in the land subject to the lease.

**The land must be certain.** There must be a certainty of subject matter (site or property of the lease) ascertainable from commencement. You must be able to point to the premises that are leased. You can't have a lease to store goods in rooms where the rooms in which they are stored can be changed from time to time.

#### There must be certainty of term

- The date of commencement and the actual duration of the term must be certain or capable of being certain through criteria e.g. a lease for 10 years from the 31 December this year (*Prudential*). A lease granted during wartime for the duration of war was rendered void because it was uncertain when the war would end.
- A lease without an ascertainable commencement date is void (*Industrial Equity v Darling Point*). The commencement date is not 'ascertainable' if it states that the lease will commence 'within a reasonable time' (*Harvey v Pratt*).
- **The 'duration' of the lease must be certain or capable of being rendered certain before the lease takes effect.** The maximum duration must be a term less than the duration for which the landlord holds the land if they are subject to time constraints.
  - a) Duration can be subject to a possibility of early termination even if not specified
  - b) Examples of *uncertain durations* contingent upon an 'unclear' collateral act or condition:
    1. Lease contingent upon the duration of war (*Lace v Chandler*)
    2. Lease 'until company ceases trading' (*Birrell v Carey*)

#### The lessee must have a right to exclusive possession (*Wik*)

- There must be a right to exclusive possession of the premises, such that he / she has the right to exclude all persons including the landlord (*Wik*).
  - a) Of course, this is subject to rights that the landlord might have under law or the lease agreement (e.g. right to enter and view the state of repair)
- If you have exclusive possession, you as the lessee has an interest in the land. You have a right *in rem* – this is assignable. In contrast, **licences** are merely *contractual* in nature – only arise *in personam* and are not assignable. A lot of issues about whether what someone has acquired is merely a licence, or a lease.

#### *Prudential Assurance v London Residuary Body* [1992] AC 386

Need certainty of duration.

#### FACTS

- Prudential was granted a lease over a strip of land encompassing a yearly rent, an arrangement which would come to an end upon the Council requiring the strip of land to widen the road. However, the road had not been widened and the Council wanted to terminate Prudential's use of the strip. Prudential argued that the Council could not get possession as it had a proprietary interest that it could enforce to exclude all others including the owner.

#### ISSUE

- Did Prudential have a right to exclusive possession?