
REAL PROPERTY NOTES

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THE ELEMENTS OF TORRENS TITLE

- The torrens system in Australia has a number of elements including
 - The register and its contents
 - Title by registration
 - Indefeasibility of title
 - How to get indefeasibility
 - What to do if you can't get indefeasibility
 - How to protect yourself against people with indefeasibility
 - Exceptions to indefeasibility
- The key principles of torrens system include
 - Mirror principle
 - When we look at the Register, the register reflects the full range of interests that affect that parcel of land at any point in time
 - The register is a representation of legal reality; you see the real view in real time. It should be an accurate and current reflection
 - Curtain principle
 - Behind the clarity and accuracy of the register, there may lurk unregistered interests which will not be binding on new title holders because the register is supposed to be the sole and complete list of interests in the land.
 - You don't need to worry about what is behind the curtain
 - Insurance principle
 - A pay out, financial compensation for loss suffered because of the register. The state can guarantee through the register it's efficacy and accuracy. It underwrites any problems that arise under its operation
 - It is an admission that the torrens system can produce unjust results, e.g. for victims of fraud
- Torrens provides secure interests in land that are safe from interests of the past

THE REGISTER

- The register is comprised of folios, dealings, prescribed instruments and records which the law and regulations require under **s31B1(1)** of the *Real Property Act*
- A folio under **s32** is a record of
 - The description of the land and of the estate or interest in the land
 - A description of the proprietor
 - Any particulars of any other estates or interests affecting the land
 - The folio is given a reference that is quoted in all transaction for the land
- A certificate of title is also issued under **s33 RPA** in an approved form – it is pretty much a copy of the folio of the land in question
 - The registrar can refuse to register a transaction or dealing unless the certificate of title is produced under **s38**
- A dealing is any instrument, other than a Crown grant or a caveat, that is registrable or capable of being made registrable under the provisions of this Act, or in respect of which any recording in the Register is by this or any other Act required or permitted to be made (**s3(1)(a) RPA**)
- Dealings get a distinctive reference and is registered by the Registrar
 - The Registrar also has the power to registrar a dealing that contains **any error therein or omission therefrom** under **s 39(2)** or they can correct any patent error in a dealing under **s39(3)**
- Dealings need to use the approved forms of the Registrar under the RPA
 - There can be departures from the forms if they are not matters of substance (**s104(2)**) – often a matter of discretion for the Registrar
- Upon registration, a dealing has the “effect of a deed duly executed by the parties who signed it” under **s36(11)**

- Deeds mean you can overcome an absence of consideration, extend the limitation period, and bind parties who signed the dealing itself

TITLE BY REGISTRATION

- The cardinal principle of the statute is that the Register is everything (*Fels v Knowles*) – because it is both conclusive and exhaustive
 - Searches or investigation beyond the register are unnecessary
- Therefore, torrens is a system of **title by registration** as distinct from a system of **registration of title**
 - The title itself is derived from the registration not from the execution of an instrument
- Registration also determines priority
 - As between registered dealings, priority is governed by order of registration not date of execution as per **s36(9) RPA**

INDEFEASIBILITY OF TITLE

- Indefeasible = something that cannot be defeated.
- An indefeasible title is “a title that cannot be set aside on the ground of a defect existing in the title before the interest was registered” (Butt’s p 832)
- The source of indefeasibility is **statutory** and comes from **s42**, even though the word indefeasible is never used. It states that:
 - ‘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 the case of fraud [their own 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.... (then lists exceptions)
- Key legislative provisions:
 - **S42(1)** bestows indefeasibility of title on the registered holder of the fee simple but also any other registered lesser title e.g. mortgages, leases etc.
 - **S45** protects a purchaser or mortgagee for value from being deprived of their registered interest
 - **S118** prohibits the recovery of land from the person registered as proprietary except if an exception applies
- The courts have interpreted **s42(1)** as **immediate indefeasibility**
 - An early interpretation was deferred indefeasibility, under which A could set aside C’s title if B committed fraud to transfer the title to C. A wouldn’t lose their right to have the transfer set aside until both C was registered and a third party had purchased bona fide for value from C and became registered (*Gibbs v Messer*)
 - When a non-fraudulent person became registered pursuant to a void instrument, they would be regarded as having a defeasible title even though they were registered
 - Courts would allow former registered proprietor to bring an action against the registered proprietor
 - Deferred indefeasibility was expressly rejected by the Privy Council in the NZ case of *Frazer v Walker*
 - Defective instruments are **validated on registration**
- Immediate indefeasibility gives priority to the policy of making transactions secure in favour of innocent purchasers in the case of third-party fraud (like forgery) ... whereas old system title tends to afford greater protection to the current owner
 - Defective instruments are validated on registration
- Registration can cure voidness from:
 - Forgery

- An instrument executed under a power of attorney that doesn't actually authorise its execution (*Broadlands International Finance v Sly*)
- Proprietor of a subdivision even if the subdivision breaches statutory requirements (*Sutherland Shire Council v Moir*)
- An option to lease even though the option breaches the rule against perpetuities (*Consolidated Development v Holt*)
- An easement even though the procedural requirements for easements had not been met
- S41 of the *Real Property Act* was interpreted in *Breskvar v Wall*
 - The register is how interest in land is created (see Barwick) – torrens is a system of title by registration
- S43 states that if you a registered proprietor or purchaser and have notice of an unregistered prior interest you are still not affected by that notice
 - Under torrens system, having notice is not fraud
- S118 says you cannot claim infeasibility if you are guilty of fraud yourself or you took the interest from someone who registered through fraud.

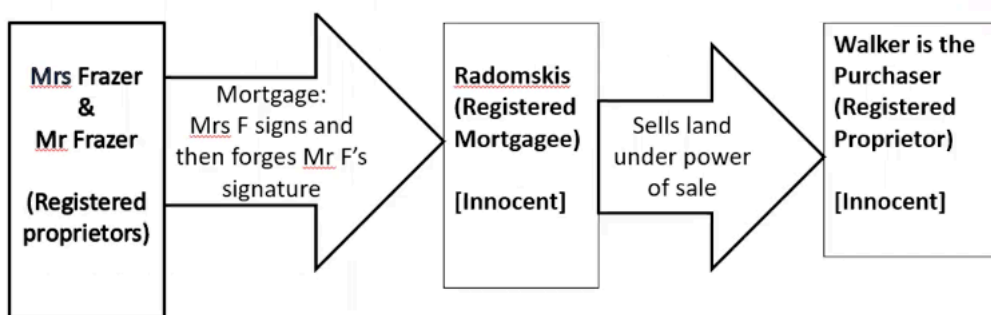
Frazer v Walker (1967) (NZ)

Facts:

- Mr and Mrs Frazer were the registered proprietors of land.
- Mrs Frazer borrowed a sum of money from the Radomskis and as security for the loan, gave them a mortgage over the property – she forged her husbands signature to the mortgage
- Mrs Frazer failed to make her payments, and the Radomskis exercised their power of sale over the property, and sold it to Mr Walker
- Mr Walker became the registered proprietary and tried to obtain possession of the land
- Mr Frazer counterclaimed, contending that the mortgage to the Radomskis was a nullity, and sought cancellation on the Register of the mortgage and interest granted.

Held (Wilberforce L):

- The Court held that Walker's title was indefeasible and could not be challenged despite the unusual facts
 - In *Boyd v Wellington Corporation* the Court upheld the indefeasibility of the title of registered proprietors derived from void instruments
 - The principle of indefeasible title doesn't stop a person's right to bring a claim *in personam* for relief
- When R registered their mortgage, they obtained immediate indefeasibility of title
- "The expression, not sued in the Act itself, is a convenient description of the immunity from attack by adverse claim to the land or interest in respect of which he is registered, which a registered proprietor enjoys." (at 580)
- **In the case of fraud, where any grant, certificate, instrument, entry or endorsement has been wrongfully obtained or is wrongfully retained, the registrar has power of cancellation and correction**



Breskvar v Wall (1971)

Facts:

- The Breskar's were the registered proprietors of a parcel of land. As security for a loan of \$1200, rather than executing a mortgage they gave Petrie the duplicate certificate of title, and an instrument of transfer signed by them
 - However, the instrument did not contain the name of the transferee, and so under QLD legislation it was void.
 - This was common practice at the time. They never intended to transfer the land, always thought it was for security for the loan.
- **Petrie fraudulently** inserted the name of his grandson, Wall, as the transferee and Wall became the registered proprietor
- Before the Breskar's discovered the fraud, Wall entered into a contract of sale to Alban Pty Ltd and had executed a transfer
 - The company had no idea about the wrongdoing.
- Before the transfer to Albany could be lodged for registration, the Breskvars placed a caveat on the register. A caveat freezes the register until the issue is resolved
- Breskvars argued the whole transaction is void for fraud; Albany says they were innocent purchasers and should be allowed to register their title; Wall says he did not commit the fraud it was Petrie that did so, so he should be entitled to transfer his interest as he wishes.

Issue: Who is entitled to register the interest? Who had the better equitable interest?

Held (Menzies J):

- The Court held that both Petrie and Wall had committed fraud in their actions and that Wall's title was illegally obtained by the use of an invalid instrument and his own fraud. However they held that the Breskvar's claim was inferior to that of Alban's
- For the Breskvar's to succeed, they must **show either that Wall had no title at all, or, that their claim is to be preferred to that of Alban Pty Ltd**
 - Alban was a good faith purchaser and gave valuable consideration
- However, **the registered title cannot pass except by the registration of a valid and operative instrument of transfer. It cannot pass by registration alone without a valid instrument, any more than it can pass by a valid instrument alone without registration** (Salmond J in *Boyd v Mayor*)
- The principle is that a prior registered estate or interest, for the removal of which from the register there is no authority but a forged or void instrument, is not destroyed unless afterwards a person, who, according to the existing condition of the register is entitled to do so, gives a registrable instrument which is taken bona fide for value and registered
- The difference between Frazer v Walker and this case is that in that case there was no statutory basis for impeaching the title of registered mortgagees because Mrs Walker forged a signature. In this case, **Wall became the registered proprietor but he did not obtain an indefeasible title because of his fraudulent use of an invalid instrument**
- But, when Wall became registered proprietor, did the Breskar's cease to be registered proprietors? YES
- Whose claim to the land should be prioritised? Breskvar's or Alban?
 - What the appellants signed was not an effective transfer, but once it had been wrongly filled in and lodged with the certificate of title, their claim must be postponed