

Topic 5 → Paramount Interests and In Personam Exception

Non-Statutory Exceptions to Indefeasibility

In Personam Right

- The principle of indefeasibility is subject to an exception for in personam rights
 - Also called the personal equities exception to indefeasibility
- **Personal obligations giving rise to in personam rights can be contracts entered into by the registered proprietor, or trusts, either express or implied over the property**
- **The in personam action is a qualification rather than an express statutory exception to the indefeasibility provisions**
 - In essence it means that registration will not change or affect the personal legal or equitable obligations that registered proprietors may be subject to
 - Thus, a registered proprietor who owes contractual obligations towards the land will remain contractually bound despite becoming registered
 - Any equitable obligations that a registered proprietor may be subject to will not be removed by registration
 - **Frazer v Walker**
- **Thus, despite the principle of indefeasibility of title, a registered proprietor of land may be bound by rights which arise out of their conduct**
 - **Vendor or trustee is bound by contractual rights or trust obligation**
- **Immediate indefeasibility in no way denies the right of a plaintiff to bring against a registered proprietor a claim in personam founded in law or equity for such relief as a court acting in personam may grant → Frazer v Walker**
- **1) Sale**
 - **If a registered proprietor enters into a contract to sell the land, the purchaser can seek specific performance of the contract if the registered proprietor refuses to complete it**
 - **A registered proprietor cannot rely on the fact of registration (resulting in indefeasibility of title) to defeat a claim arising out of the contract**
 - **A court will ensure that vendor upholds the obligation which he has created**
- **2) Trust**
 - **If a registered trustee threatens to deal with trust land in breach of trust, the beneficiary can enforce trust duties against registered trustee who cannot rely on indefeasibility to defeat trust obligations**
- **The in personam exception means that a registered proprietor is subject to contracts he/she has entered into and also to trusts, whether express or implied, over the property**
 - **Registration does not affect or change personal legal or equitable obligations the proprietor may be subject to**
- **The potential scope of the in personam defence is, however, extensive when consideration is given to the fact that a range of equitable actions may be available against a registered proprietor on the basis of the doctrine of notice**

- The difficulty with holding a registered proprietor responsible for these personal equitable actions is that the Torrens legislation expressly exempts registered proprietors from the effect of the doctrine of notice
 - This has created a situation where the dividing line between the enforcement of equitable rights and the scope of the registered title is increasingly ambiguous and unclear
- Generally, there is a distinction made between:
 - **Rights in rem** → enforceable against the whole world
 - **Rights in personam** → enforceable against a particular person (contractual rights)
- to make an in personam claim against a registered proprietor, the facts of the case must demonstrate the existence of a known legal or equitable cause of action, that is enforceable against the registered proprietor
 - **Grgic v ANZ Banking Group**
- the in personam claim is a judicially created exception to indefeasibility of title
- Whether a known legal or equitable obligation exists or not is always a matter of the facts of the particular case
- The legal or equitable cause of action must be such as to make it unconscionable of the registered proprietor to obtain or retain the registered interest contended for → **White v Tomasel**
- The mere fact that a person has acquired a registered interest through a forged document is not enough to give rise to any in personam rights → **Vassos v State**
- A constructive trust arising out of a knowing receipt of trust property is not enforceable as an in personam right → **Macquarie Bank v Sixty-Fourth**
- **The principle case on the in personam exception is Bahr v Nicolay**
 - **It was considered whether, in refusing to uphold the assurance that he would honour an option to purchase, a registered proprietor was bound by the equitable consequences of his actions**

Bahr v Nicolay

- **FACTS**
 - The Bahr agreed to sell their land to Nicolay
 - The contract of sale included an agreement by Nicolay to lease the property back to the Bahrs for three years, and upon expiry of the lease, to enter into a contract to resell the land to the Bahrs
 - Nicolay became the registered proprietor, and sold the land to the Thompsons
 - The Thompsons knew of the agreement between the Bahrs and Nicolay, and at Nicolay's insistence, the contract of sale from Nicolay to the Thompsons contained an express acknowledgment of the Bahr's right to repurchase the land
 - After the Thompsons became registered, they acknowledged the rights of the Bahrs
 - When the Bahrs purported to exercise their option to repurchase, the Thompsons refused to honour their contractual promise, arguing that upon registration their title became indefeasible and could not be set aside merely because they had knowledge of the existence of prior title
- **HOLDINGS BY THE JUDGES:**
- **their honours felt that statutory fraud could include some 'species of equitable fraud' and this would include a breach of contract in circumstances where the agreeing to the clause was a ground upon which the sale was made**

- **Mason J**
 - Based their decision on the **fraud** exception but also considered the application of the *in personam* exception on **trust obligations** imposed upon the registered proprietor
 - Thompsons, who were the registered proprietors, were not in a direct contractual relationship with the Bahrs
 - **HELD that the parties, Nicolay, and Thompson, intended to create an express trust out of the terms of the contract in order to provide adequate protection to the Bahrs**
 - **By agreeing to honour the Bahr's option to repurchase the property as a condition to receiving transfer of the property from Nicolay, the Thompsons became express trustees of the Bahrs, and the Thompsons repudiated the trust**
- **Wilson and Toohey JJ**
 - **Indefeasibility provisions** may not be circumvented
 - The indefeasibility provisions, however, do not protect a registered proprietor from the consequences of his own **actions** where those actions give rise to a **personal equity** in another
 - Such an **equity** may arise from the **conduct** of the registered proprietor **before and after registration**
 - Contractual **acknowledgement** not enough to create an **express trust**
 - Found that the Thompsons bought the property on the **understanding** common to vendor and purchasers that they were **bound** by the **obligation** to resell the property to the Bahrs and the clause was inserted to give effect to that understanding
 - By taking the transfer of the property on the **undertaking** to respect the claim of the Bahrs, the Thompsons became subject to a **constructive trust** in favour of the Bahrs
 - **Personal equity** created in favour of Bahrs enforceable at registered proprietor
 - The indefeasibility provisions would not preclude the enforcement of **equity** not by virtue of **notice** of them by the Thompson's, but because of their **acceptance** of a transfer on terms that they would be bound by the interests of the Bahrs had in the land by reason of their contract with Nicolay
 - **OVERALL → the breach of contract generated in personam obligations making them the constructive trustees of the lease entitlement**
- **BRENNAN J:**
 - A title of a purchaser who has notice of an antecedent unregistered interest and who purchases on terms that he will be bound thereby is subject to that unregistered interest
 - **Indefeasibility** protects transferee from **defects** in title of transferor and does not free him from interests which he has **burdened** his title with
 - A registered proprietor who has **undertaken** that his transfer should be subject to an unregistered interest and who **repudiates** the unregistered interest, when his transfer is registered is acting **fraudulently** in the eyes of **equity** and may be compelled to honour the unregistered interest.
 - **Equity prevents fraud** by imposing a **constructive trust** on the purchaser when he repudiates the unregistered interest
 - 'Fraud' which attracts the intervention of equity consists in the **unconscionable** attempt by a registered proprietor to deny the unregistered interest to which he has undertaken to subject his registered title

Commentary

- the judgments of Wilson and Toohey suggest that mere notice is not enough to attract in personam rights in equity in the form of a remedial constructive trust
- however, their Honours felt that notice coupled with other inequitable conduct, such as a positive assurance that a registered proprietor will be bound, may be sufficient
- their Honours felt that the fact that the Bahrs were not privy to the contractual assurance, did not alter this conclusion
- the fundamental point was that registration cannot protect or immunise a registered proprietor from the consequences of their own actions, particularly where those actions give rise to a personal equitable relief
- the title of a purchaser who not only has notice of an antecedent unregistered interest but who purchases on terms that he will be bound by the unregistered interest is subject to that interest
- equity will compel him to perform his obligation
 - this was achieved via the imposition of a remedial constructive trust
- Mason CJ and Dawson J concluded that it was not necessary to rely upon the remedial jurisdiction of the equity jurisdiction because the circumstances were sufficient to establish that Thompson intended to hold the promise pursuant to an institutional express trust
- The circumstances in which fraud may arise do not include a situation where notice is coupled with action that was not the product of action induced by the other party, but rather the consequence of unilateral action
 - Alan Thomson v Golden Destiny

Applicability of Barnes v Addy Principles

- Circumstances which **potentially** may give rise to an *in personam* claim is where a **registered proprietor** has purchased property **knowing** that the property was **subject to a trust** (he becomes a constructive trustee)
- Under the principles of *Barnes v Addy*, a constructive trust may be imposed where a person:
- takes transfer of trust property **knowing** that it is trust property and the **transfer** is in **breach** of trust ('knowing receipt' – first limb); person is **bound by trust** and holds property **subject** to trust; or
- **knowingly assists** a trustee in **misapplying** the trust property ('accessory' or second limb)
- Prior to Farah Constructions (HC) the **views** of the state courts differed on the role of the first limb in the Torrens system
- *In personam exception* will prevent indefeasibility in circumstances of first limb (**Tara Shire Council v Garner (Q) and Say-Dee v Farah Constructions (NSW)**)
- **Contra Macquarie Bank Ltd (V) and LHK Nominees (WA)**
- As to the second limb, a transfer in breach of trust can be **set aside** where the transferee **participates** in the **breach** of trust
- Principle may be invoked despite registration of the transferee, since such a transfer is treated as **fraudulent**, and fraud is a statutory exception to indefeasibility

Macquarie Bank v Sixty Fourth Throne

- **FACTS**
 - MB lent money to Kandy
 - The loan was guaranteed by 64th Throne
 - A mortgage from 64th Throne to MB was executed to provide security for guarantee
 - Mortgage was a forgery
 - The affixing of the seal and attestation was attended by Kandy and his wife, and they were not authorised by 64th Throne
 - MB undertook a company search but did not check the attesting signatures
 - MB knew that 64th Throne was a trust company, and that Kandy did not own it
 - The mortgage was registered
 - The mortgagor sought to have the mortgage set aside on the basis that the mortgagee's title was **defeasible** (because of fraud or alternatively) as a result of the application of the *in personam* exception
- **The title of the mortgagee was held to be indefeasible despite forgery**
- **ARGUED:**
 - **Acquisition by the mortgagee of a property interest following registration of a forged instrument of mortgage in respect of property that is subject to a trust, amounts to a receipt of trust property**
 - If this argument was possible, the mortgagee can be treated as a **constructive trustee** arising from 'knowing receipt of trust property'
- **ISSUE:** whether the knowledge of MB that it was a trust company, raised an equity?
- Right in personam only includes known legal or equitable causes of action
- **HELD:**
 - **Court held there is no room or need to do so in the Torrens System**
 - If the registration of mortgagee's interest is achieved dishonestly the registration is liable to be set aside because s 42(1) of the TLA recognises that fraud renders the interest defeasible
 - If registration is not achieved by fraud the TLA provides for an **indefeasible** interest
 - There may be such a claim in **equity** to enforce a constructive trust but not under Torrens system
- **Indefeasibility** of title is **not affected** by application of **first limb** of *Barnes v Addy*
- To recognise an *in personam* claim against a mortgagee as constructive trustee by application of the doctrine of 'knowing receipt' would "introduce by the **back door** a means of undermining the doctrine of indefeasibility which the Torrens system establishes"
- It is **inconsistent** with the principle of indefeasibility to treat a mortgagee of property that is subject to a trust, registration having honestly obtained, as having received trust property
- The argument that MB is **liable** as a constructive **trustee** because it has knowingly received trust property should **fail**

****OVERALL IT WAS HELD IN THIS CASE THAT → IT IS NOT POSSIBLE TO TREAT THE HOLDER OF A REGISTERED TITLE AS SUBJECT TO A CONSTRUCTIVE TRUST ON THE BASIS THAT THEY KNEW IT AMOUNTED TO A BREACH OF TRUST → UNLESS IT CAN BE ESTABLISHED THAT IT WAS ACTUAL FRAUD, PERSONAL DISHONESTY OR MORAL TURPITUDE****

Commentary

- It was concluded that it would be inconsistent with the received principle of indefeasibility to treat a registered proprietor in receipt of trust property liable as a constructive trustee on the basis of knowing receipt
- Exclusion of knowing receipt constructive trust on the ground of statutory interpretation is difficult to justify
- Receiving trust property knowing that it constitutes a breach of trust does amount to a species of fraud which equity will protect
- Protection occurs through the imposition of a constructive trust which is a well-established principle
- To exclude knowing receipt trusts is **contrary** to the nature of in personam responsibilities and arguably misconstrues the **relationship** between the equitable jurisdiction and the Torrens system
- **Registration** cannot and did not intend to **eradicate** personal equitable responsibilities

LHK Nominees v Kenworthy

- **FACTS**
 - LHK nominees held land in trust
 - The directors of the company included 3 sons who complied with the wishes of their father, Kenworthy, to transfer the property to him, at which later appeared undervalued
 - Kenworthy held land as a registered proprietor
 - LHK argued that Kenworthy had received the title knowingly that it is trust property and in breach of trust because the property was sold at an undervalue
 - There was no evidence that Kenworthy knew of the Valuer-General's assessment of the property
 - The transferor had offered Kenworthy a justification for sale
- It was argued that Kenworthy was either a knowing recipient of trust property or a knowing participant in a breach of trust and liable as constructive trustee (*Barnes v Addy Limbs*)
- **HELD:**
 - As to the recipient liability limb, the **equity** thus arising is **defeated** by registration of Torrens title in favour of the recipient (title by registration)
 - First limb (recipient liability): Where registration of title is not **dishonestly** obtained, it is not possible, consistently with the received principles of indefeasibility of title, to treat the holder of registered title to property that is subject to a trust as having received trust property (the court preferred the approach in the *Macquarie Bank* decision)
 - **Held that there is no authority for the proposition that the registered interest of a purchaser of Torrens system land is defeasible simply because he became registered with knowledge that the transfer by vendor was in breach of trust**
 - The second limb required a finding of **dishonesty** – knowing what he/she is doing is regarded as dishonest by honest people - fraud for purpose of Torrens system of registration
 - A constructive trust could only be binding upon a registered proprietor where **fraud** or **dishonesty** could be established **beyond knowledge** of breach of trust

- Court acknowledged that the **indefeasibility provisions** has never destroyed **doctrines of equity** whereby conscientious obligations entered into be registered proprietors had been enforced against them
- Right in personam encompasses known legal or equitable **causes of action**
- Right *in personam* does not provide a **blank canvas** on which a plaintiff can paint any picture
- No allegations were made of a **breach of duty** by Kenworthy, that he stood in a **fiduciary relationship** to the Co or that he **knowingly misrepresented** the value

Farah Constructions v Say-Dee

- **FACTS**
 - **Farah Construction was controlled by Farah Elias, the husband and father of Margaret, Sarah, and Jade Elias**
 - F entered into a joint venture with Say-Dee for a property development of 11 Deane Street which they purchased together as tenants in common
 - Council advise Farah Elias, that 11 Deane Street is unsuitable, and that property redevelopment can only proceed by amalgamation with adjoining properties
 - Adjoining and nearby properties were purchased by Elias' wife, daughters, and associated companies
- **ISSUES → Did Elias Breach fiduciary duty to Say-Dee?**
 - **Did the wife and daughters have immediate indefeasibility over adjacent property or was it subject to Barnes v Addy exception in personam (constructive trust for benefit of partnership)?**
- It was accepted that an **exception** operating outside the indefeasibility provisions can **exist** in relation to certain legal or equitable causes of action against the registered proprietor
- Both limbs of *Barnes v Addy* were considered:
- First limb: did Mrs Ellis and daughters had **notice** of breach of duty by Mr Elias?
- Second limb: did Mrs Elias and daughters **knowingly participated** in the alleged fraudulent scheme
- The reasoning of the *Macquarie Bank* case with which four judges in LHK Nominees agreed, was found to be **applicable**
- First limb **cannot** be **used** to overcome indefeasibility. Torrens title is acquired by **registration** (and not an antecedent act) and person acquiring title cannot be seen as 'having received' trust property from a trustee
- **Title** comes from registration and not from a trustee
- It was found on the facts that first and second limb in *Barnes v Addy* **could not** be used to **undermine** indefeasibility provisions
- The **circumstances** under the first limb did not amount to a personal equity which could establish an exception to indefeasibility.
- First limb was not made out: **fiduciary information** did not constitute trust property
- The second limb was also inapplicable on the facts as the relevant breach of trust or fiduciary duty had to be **dishonest** and **fraudulent**
- Thus, registered proprietors prevailed over Say-Dee
- Comment: Second limb may be invoked since transferee is treated as fraudulent and fraud is a statutory exception to indefeasibility

Relationship Between Fraud and Rights in Personam

- Fraud exception to indefeasibility: actual fraud
 - Fraud is defined in s 4 as a consciously dishonest act, and not a mere constructive or equitable fraud
- In personam exception: some actions traditionally regarded as equitable fraud
- In personam rights arise out of conduct of a registered proprietor which falls short of fraud but which the courts consider is sufficiently unconscionable that the registered proprietor should not be allowed to assert his or her title
- The threshold of moral wrongdoing required for in personam liability is lower than for fraud
- A fine line must be drawn between purchasing with mere notice of another's unregistered interest and purchasing with notice coupled with other factors which together constitutes equitable fraud and render the proprietor liable to a claim in personam
 - Prior notice and indication that proprietor will comply but refuses after registration to comply

Requirements

- In order for an in personam exception to be invoked:
 - The right claimed must not be inconsistent with the terms and policies of the Torrens legislation
 - The facts must demonstrate the existence of a known legal cause of action (for example, deceit) or equitable cause of action (for example, undue influence) that is enforceable against the registered proprietor
 - The right claim must have its origin in an act of the registered proprietor or his agents or a person for whom he is legally responsible (agents or employees)
 - It cannot arise out of the conduct of third parties for whose action the registered proprietor is not responsible
 - Cause of action must be such as to make it unconscionable for registered proprietor to obtain or retain registered interest
 - The proprietor's conduct must amount to a breach of some obligation owed to the plaintiff
 - The registered proprietor's conscience must be affected, such that it would be unconscionable for the registered proprietor to assert an unencumbered title

Prior Folio or Certificate of Title/ Erroneous Description of Land → Section 42(1)

Prior Folio or Certificate of Title

- In all States, the Torrens legislation specifically provides that a subsequent registered proprietor's title is defeasible against the interest or estate of a prior registered proprietor who claims the same land under a prior folio or certificate of title (s 42(1)(a) TLA)
- Where two titles cover all or some of the same land, the land that is included within the previous title or folio cannot also be included in a later title or folio and the indefeasibility provisions will not allow the later registered proprietor to acquire this title
 - National Trustees Co v Hasset
- **Paramountcy pr**

Section 42 TLA – Estate of Registered Proprietor Paramount

- 1) Notwithstanding the existence in any other person of any estate or interest (whether derived by grant from Her Majesty or otherwise) which but for this Act might be held to be paramount or to have priority, the registered proprietor of land shall, except in case of fraud, hold such land subject to such encumbrances as are recorded on the relevant folio of the Register but absolutely free from all other encumbrances whatsoever, except—
 - a) The estate or interest of a proprietor claiming the same land under a prior folio of the Register
 - b) as regards any portion of the land that by wrong description of parcels or boundaries is included in the folio of the Register or instrument evidencing the title of such proprietor not being a purchaser for valuable consideration or deriving from or through such a purchaser.

Erroneous Description of Land

- **section 42(1)(b)**
- The Torrens legislation specifically provides that a subsequent registered proprietor's title is defeasible where all or any part of the land is included within the title of folio by wrong description
- Apart from Queensland, Northern Territory and Tasmania, this **exception** will not apply to a bona fide purchaser for value without notice or if he has derived title from a bona fide purchaser
 - **Rationale:** bona fide purchaser who has **relied** on description of land within certificate or folio should not be penalised for error
- Mistakes and erroneous descriptions of land often occur when the land is surveyed
- Where there is doubt as to the correct boundary of land, survey evidence may be referred to
- Land boundaries should be determined by the survey or natural features of the land, not the specific measurements set out on the title deed or registered plan
- **National Trustees Executors v Hassett**
 - Where there is discrepancy between the actual boundaries of the allotment sold, the survey will prevail over the measurements and bearings shown on the grant, map, or plan
 - The reason for this is that the map or plan is intended merely as a picture of what is found on the ground
- In the case of erroneous description, the title to land stays with the true owner
- **Thus, erroneous description amounts to an exception to indefeasibility**
- **Loss suffered as a result of error or misdescription of the Register forms the basis for a compensation claim**

Paramount Interests → Section 42(2)

Section 42 – Estate of registered proprietor paramount

- (2) Notwithstanding anything in the foregoing the land which is included in any folio of the Register or registered instrument shall be subject to—
- (a) the reservations exceptions conditions and powers (if any) contained in the Crown grant of the land;
 - (b) any rights subsisting under any adverse possession of the land;

- (c) any public rights of way;
- (d) any easements howsoever acquired subsisting over or upon or affecting the land;
- (e) the interest (but excluding any option to purchase) of a tenant in possession of the land;

- **Paramount interests are interesting whose enforceability is not affected by the registration of an inconsistent interest because they are considered above registration**
- Thus, they are interests specifically protected against destruction following registration of an inconsistent dealing in land by Torrens legislation
- Paramount interests are interests that **survive** registration without having to be registered
- The title of registered proprietor is subject to paramount interests which effect the land
 - No need to register paramount interests
- Thus, paramount interests are immune from the effects of indefeasibility
- **The breadth and scope of paramount interests depends on their nature and character, and they vary from state to state**

A) Crown Grants

- Reservation by Crown grant means the title of the registered proprietor will never exceed that which was originally granted from the Crown
- This generally relates to the Crown's mineral rights

B) Easements

- **All States recognise the easement as an express exception to indefeasibility**
 - **However, the scope of the protection conferred varies according to each State**
- **An easement is a right annexed to land to use some other person's land in a particular manner, or to prevent an owner of the land from using it in a particular manner**
 - Thus, it is an inchoate right, intangible incorporable, that exists in respect to the land
 - It benefits one piece of land and burdens another
 - The benefitted land holder has the ownership or property interest because it runs with the land
- Easements over Torrens title land may be expressly created in accordance with the prescribed forms set out under the Torrens legislation
- Easements may also be created implicitly and by prescription
- All jurisdictions expressly exempt easements from the application of the indefeasible provisions
- **Once registered, an easement will be noted on the certificate of both the dominant and servient tenement holders**
- **It is not compulsory to register easements, because an unregistered easement will stand outside the indefeasibility provision**
- The scope of the protection varies from state to state

VIC, Tas AND WA

- The protection conferred is the widest and will apply to all easements, howsoever acquired that subsist upon or affect the particular land → s 42(2)(d)

- This means that express, implied easements by grant or reservation which are legal or equitable
- S 42(2)(d) also includes easements by prescription meaning that continuous use of the right has generated a prescriptive easement which is protected and difficult to detect

SA, ACT, NSW, AND NT

- The wording of the legislation is different because the legislation in these states only provides protection to the 'interest of a person entitled to the benefit of an easement if its particulars have been omitted from or misdescribed in, the freehold land register.'
- The rationale for this stems from the idea that protection against the effects of registration should only be conferred upon properly created but omitted rights rather than rights sourced in implication and personal enforcement
- The exact meaning of omission or misdescription is the subject of some **debate**.
 - However, it has been held to **mean** easements that have been **recorded** in the original folio and **left out** in subsequent folios and does not include prescriptive or 'implied easements' that have never been recorded
- In NSW s 42(1) of the Real Property Act sets out that a registered proprietor shall take free from all encumbrances not noted on the title except for "(a1) the omission or misdescription of an easement subsisting immediately before the land was brought under the provisions of this Act or validly created at or after that time under this or any other Act ..."
- **There are two aspect in the NSW provision**
 - **First applies to an easement that subsisted prior to the land being brought under the provisions of the Torrens legislation and that have been left out or not included on the title**
 - **Second applies to easements that have been recorded in the initial folio and then left off subsequent folios**
- **Thus, must establish an omission or misdescription of an easement before registration**
 - **Omission or misdescription in this context means 'left out' → Dobbie v Davidson**
- Also includes easements validly created at the time of registration or subsequent to it
 - Validly created means expressly created easements and does not mean implied or prescriptive easements
- Thus, the exception only **applies to express** easements (created and registered) and will exclude all implied and prescriptive easements

Castle Construction v Sahan Holdings

- The Registrar-General removed an easement from the folios of both dominant and servient tenement at the behest of the owner of the servient tenement and after notice to the previous owner of the dominant tenement, who did not object
- Current owner of dominant tenement requested the RG to restore the easement on the basis of an exception to indefeasibility – easement that was omitted
- **Held: the easement was not omitted but rather removed by the Registrar-General**

- **After removal of easement, that was previously recorded, but is no longer recorded, it was not there – only a snapshot of the state of the register**
- It is more accurate to say that it is no longer there because it was deliberately removed: not a case of omission of an easement
- Because the Real Property Act of NSW provided for title by registration, the **deliberate removal** of an easement created by registration from the Register cannot be treated as a “case of omission of an easement” for purposes of s 42(1) (a1)
- Interest of registered proprietor in land was sold and transferred without benefit of easement.
- **Thus, in this case, it was asked what omission means and it was determined an omission does not include a deliberate removal by Registrar. This means it may be possible for easements to be removed and a court can, especially where easements have become obsolete**

Mcgrath v Campbell

- Registered proprietor of the dominant and servient tenement who created a *Wheeldon v Burrows* easement transferred both tenements simultaneously to different parties
- (Such an easement is created when a common vendor sells both the dominant and servient tenements to separate parties in contemporaneous transactions - *Aldrige v Wright*)
- W v B: **Transferee** of the **servient** tenement can be **required** by the owner of the dominant tenement to enforce the easement by requiring the owner of the servient tenement to **execute** an instrument in registrable form for purposes of registration (**Legal basis** for this principle to be found in the *in personam* exception to the indefeasibility provisions)
- Legal issue: Does a *Wheeldon v Burrows* (implied) easement **trump** the indefeasibility provisions of NSW?
- Court held that s 42(1) (a1) of the Real Property Act 1900 (NSW) exception **does not apply** to such implied easements
- *Wheeldon v Burrows* under common law (old system): ‘... it would seem that a common owner (registered proprietor) is bound by a personal equity to recognise that he or she has burdened the land retained by him or her (the servient tenement) by transferring to another that part of the land having the benefit of an implied easement which he or she has created (the dominant tenement) while both tenements were in common ownership and which it was his or her presumed intention to transfer with that benefit attached. Having **impliedly granted** to the transferee of the dominant tenement the **benefit** of that easement, it would be **unconscionable** for him to derogate from that grant” (CB 715)
- Foregoing may well be the case under **old system title**.
- In present case **simultaneous transfer** alone could not give rise to **equity** where transferee of servient tenement did not **contribute** to the **creation** of the implied easement or acted **unconscionably**
- The court found that the servient owner’s **reliance** on the **indefeasibility** of title was in **no way unconscionable**.
- **Analogy** is drawn with **forgery** where registered proprietor has not contributed to fraud
- The in personam exception may be applicable if there is **some conduct** on the part of the registered proprietor that **contributes** to the **creation** of the unregistered interest or which would otherwise be regarded as **unconscionable**

- **Mere knowledge** on part of owner of **putative servient tenement** that both dominant and servient tenement were to be transferred by the common vendor simultaneously not enough to constitute **unconscionable** conduct
- There was no **conduct** on the part of the transferee of the servient tenement to which any **equity** could attach to bind them personally
- Held that a *Wheeldon v Burrows* easements that would be protected by an in personam exception does **not arise** over Torrens title land
- If prescriptive easements are **trumped** by the indefeasibility provisions the same holds for implied easements because they **arise** in a similar way

Commentary

- Personal equity could not arise purely on the basis of simultaneous title transfers if the new owner of the servient tenement had not in any way contributed to the implied easement or conducted himself in an unconscionable manner
- Not unconscionable for registered proprietor to rely on the indefeasibility provisions and mere knowledge that both dominant and servient tenement were to be transferred simultaneously, did not per se give rise to personal equity
- Equity could arise if conduct of owner directly contributed to the implied intention
- Equity could arise where the registered proprietor transferred the dominant tenement to another, with the presumed intention of transferring the attaching the benefit – it would be inequitable for the proprietor to renege from that intention and derogate from the grant
- Proprietor should be responsible for the equitable consequences of his intention

c) *Adverse Possession*

- **Adverse possession is where possessory title to land has continued for 15 years with both factual possession and an intention to possession**
- The approach taken to the protection of adverse possession under the Torrens legislation differs according to each State
- In **Victoria and WA**, the legislation provides full protection to adverse possession interests both in terms of the title conferred during the possession as well as the title conferred once the limitation period has expired → s 42(2)(b)
 - Adverse possession rights remain effective despite not being registered as an encumbrance on the certificate of title
 - Purchaser becoming registered proprietor takes it subject to the rights subsisting under adverse possession
 - Adverse possessor is entitled to apply to Registrar to have their title registered
- In **NSW** protection will only be conferred if it can be shown that the person in adverse possession of land has been registered (once the full limitation period has expired); bare title that has not reached the limitation period is not protected
 - Registration is only possible over a whole portion of land
 - It does not protect accumulating adverse possessory title
 - Registration is only possible once the full limitation period has expired
- **QLD and SA** only the title of a person who has satisfied the limitation period may be protected

- Personal equity could not arise purely on the basis of simultaneous title transfers if the new owner of the servient tenement had not in any way contributed to the implied easement or conducted himself in an unconscionable manner

d) *Tenancies*

- **A lease is an agreement between parties giving exclusive possession to the land**
- A lease can be registered under the Torrens System in Vic under s 66(1) TLA if it exceeds a term of three years, is created in the approved form, and registered at the Land Titles Office
- Once a lease is registered, it does not automatically follow that all covenants contained in the lease, for example, an option to renew the lease, is protected by the principle of indefeasibility
- Leasehold interests that have not been registered or that are unregistrable will be immune from the effects of a subsequent registration in all states
- **The widest protection is conferred in Victoria where s 42(2)(e) TLA sets out that protection is conferred upon the 'interest of a tenant in possession of the land (excluding any option to purchase)'**
- **S 42(2)(e) → interest of a tenancy in possession – not an option to purchase → includes ALL rights under the lease except the option to purchase**
 - **Option to renew is a paramount interest**
 - **ALSO includes any equity of rectification which may arise → Downie v Lockwood**
- **Downie v Lockwood**
 - **S 42(2)(e) is to be widely construed**
 - **D had an equitable leasehold interest in the land**
 - **He had the right to enforce his true bargain with LL/right to specific performance of his equitable interest**
 - **The right to have the lease rectified was an equitable interest which was preferable to a tenancy, so enforceable against the Lockwoods as it was part of the interest of a tenant in possession per s 42(2)(e)**
 - **NOTE → when LL becomes registered, they are not in a contractual relationship with tenant, but they purchase the land whilst being aware a tenant resides there**
 - **If tenant has been there for a reasonable period of time the LL may want to create a new contract, even though the tenant is protected under paramount interest provision, because they want to enforce the contractual terms and conditions in personam**
 - **Tenant may want to be more cautious with subsequent RP, so they have in personam rights**
- Protection is also given to unregistered leases in all states
- Lease constitutes a paramount interest and remain unaffected by registration
- Purchaser would usually be aware of lease and he may terminate with relative ease after registration
- Requiring registration of all leases would clog up the register
- Scope of protection varies from state to state
- **In Victoria, the rights of all tenants in possession of land, (excluding rights under option to purchase the land), will be protected as a paramount interest**
- The lease must be:
 - A lease and not a licence
 - A valid lease
 - The tenant has taken the lease into possession

- No duration is specified so there is no incentive to register leases
- There is no time limit for the lease in Victoria (s 42(e), unlike other Australian States:
 - For instance:
 - In NSW tenancies of three years or less are protected if the registered proprietor took with notice
 - In SA and the NT, one-year tenancies with actual possession are protected
 - In WA five-year tenancies are protected
 - In ACT three-year tenancies are protected
 - In QLD, tenancies of three years or less are protected
 - In most states, it must be established that the tenant remains in actual possession before the interests will come within the ambit of the statutory exception
 - **The lease exception to indefeasibility also extends to the tenant's equity of rectification arising from a lease (Downie v Lockwood)**

Swan v Ueker and Greaves

- S leased a two-bedroom apartment in St Kilda to U and G pursuant to a one year residential tenancy agreement
- S sought an order for possession (in VCAT) on the basis that the U and G had sublet the apartment in breach of the provisions of the lease because they granted leases to third parties i.e. AirBNB guests, who stayed in the apartment for short term stays
- Third parties booked through the Airbnb website
- **HELD: the test to be applied to distinguish between a lease and a licence is whether or not exclusive possession was granted**
 - **In deciding whether exclusive possession was granted:**
 - **A) the nature of the rights granted**
 - **B) the intention of the parties, have to be considered**
 - intention is determined objectively on the terms of the agreement and surrounding circumstances
 - touchstone remains whether the agreement granted exclusive possession
 - court distinguished between lodger and tenant:
 - lodger – landlord provides attendance or services to occupant which require unrestricted access to and use of the premises
 - tenant – accommodation for a term with exclusive possession and the landlord providing neither attendance nor services
 - **FOUND: a full analysis of the agreement revealed that exclusive possession was granted to Airbnb guests**
- **CONCLUDED that Airbnb agreement was a lease**

e) *Restrictive Covenant*

- a covenant is a promise that requires the doing of a particular act, or a promise that prevents something from being done
- covenants can be used in land planning e.g. to develop land with a particular character or uniform appearance
- as covenants are contractual obligations that attach to land, they are not registered interests on the title, but merely a notation on the title

- restrictive covenants can be noted on the certificate of title of the burdened land under s 88 of TLA

Section 88(1) TLA

- The registrar has the power, and is taken to have always had the power, to record on a folio of the register
- A) a restrictive covenant affecting the parcel or parcels of land to which the folio of the Register relates, if all of the registered proprietors of the land to be affected by the covenant and any mortgagees of such land agree to the creation of the restrictive covenant
- B) any instrument purporting to vary or release the operation of a restrictive covenant
- The purpose of section 88(1) is to simply operate as a **notification** so that persons dealing with burdened land will be aware of the existence of the covenant when searching the title
- S 88(3) “:... a recording in the Register of any such restrictive covenant ... shall not give it any greater operation than it has under the instrument or Act creating it”
- The combined effect of s 88(1) and (3) is to allow a restrictive covenant to be noted on the title of burdened land, but not to confer any registered, indefeasible status on it

Restrictive Covenant

- A restrictive covenant must be created in writing to be noted on the title whereupon the Registrar then attaches this to the burdened land
- As a contractual obligation, there is no need for a covenant to be actually created in a deed
- Covenants are noted on the title but do not gain an indefeasible title as with a registered interest
- If a restrictive covenant is noted on the title, a successor-in-title to the covenantor cannot rely on the indefeasibility provisions to defeat the restrictive covenant
- A covenant noted will be enforceable in terms of equity

Power of Registrar to correct register

- The Torrens legislation in all states confers a general, discretionary power upon the Registrar to correct the register (Vic TLA ss 103(2)(a) and 106(1)(e)) (iii)
- Power is interpreted strictly in most states
- Obvious errors and administrative errors with no substantive importance may be corrected
- The exercise of the power may not prejudice any rights which may have been acquired by a bona fide purchaser prior to the error or omission being corrected
- A valid easement which was omitted can be corrected by adding an easement as an encumbrance
- Registrar is entitled to correct errors made by staff relating to express exceptions to indefeasibility (*James v Registrar-General*)
- In most states (not in Vic), the Registrar has the additional power to cancel or correct a certificate or other entry that has been fraudulently or wrongfully obtained (unless it involves the cancellation of a registration obtained by a bona fide purchaser under a forged transfer)
- Errors should be corrected prior to registration proceedings (have changed with electronic lodgement)

Section 103 – General Provision as to correction of errors

1) In any proceeding in a court relating to any land or any instrument or dealing in respect thereof if the court directs the Registrar to make any amendments to the Register or otherwise to do any act or make any recordings necessary to give effect to any judgment decree or order of the court the Registrar shall obey such direction.

(1AA) In any proceeding in VCAT relating to land or any instrument or dealing in respect of land, if VCAT directs the Registrar to make any amendment to the Register or otherwise to do any act or make any recordings necessary to give effect to an order of VCAT, the Registrar must obey that direction.

(2) (a) The Registrar may upon such evidence as appears to him sufficient correct errors in the Register or in any plan of subdivision or unregistered instrument and supply entries or recordings omitted to be made therein under the provisions of this Act, but in any such case he shall not erase, delete or render illegible the original entry or recording, and shall indicate on that entry or recording the date on which the correction or recording was made

(b) Every correction recording or entry under subsection (2)(a) shall have the like validity and effect as if the error or omission had not occurred, but without prejudicing any rights accrued from any recording made in the Register prior to the actual time of correcting the error or supplying the omitted entry or recording.

Section 44H of the TLA

- Errors arising from a malfunction of the electronic lodgement network are dealt with by s 44H of the TLA:
 - (1) The Registrar may amend the Register to correct errors in the Register and supply entries or recordings omitted to be made in the Register under this Act if the error or omission resulted from a malfunction of the electronic lodgement network.
 - (2) The Registrar must keep a record of every correction under subsection (1).
 - (3) Every correction under subsection (1) is to have the same validity and effect as if the error or omission had not occurred.