

LAWS2017 REAL PROPERTY CASE NOTES

SEMESTER 2, 2024

CONTENTS

TOPIC 2: TORRENS TITLE	1
1. INDEFEASIBILITY	1
(A) REAL PROPERTY ACT, SECTION 41	1
(B) REAL PROPERTY ACT, SECTION 42	1
(C) REAL PROPERTY ACT, SECTION 43	2
(D) REAL PROPERTY ACT, SECTION 45	2
(E) REAL PROPERTY ACT, SECTION 56C	2
(F) REAL PROPERTY ACT, SECTION 118 WHERE YOU ARE RP THROUGH FRAUD AND GIFT	4
(G) FRAZER V WALKER IMMEDIATE INDEFEASIBILITY, TITLE BY REGISTRATION	4
(H) BRESKVAR V WALL IMMEDIATE INDEFEASIBILITY, TITLE BY REGISTRATION, OVERCOMING INDEFEASIBILITY	5
(I) CASSEGRAIN V GERARD CASSEGRAIN & Co PTY LTD SECTION 118 NOT FOR VALUABLE CONSIDERATION FRAUD	5
2. THE REGISTER	7
(A) REAL PROPERTY ACT, SECTION 3A	7
(B) REAL PROPERTY ACT, SECTION 31B	8
(C) REAL PROPERTY ACT, SECTION 32	8
(D) REAL PROPERTY ACT, SECTION 33	9
(E) REAL PROPERTY ACT, SECTION 36	9
(F) REAL PROPERTY ACT, SECTION 117	11
(G) BURSILL ENTERPRISES V BERGER BROS MISDESCRIBED FOLIO'S AND GOING BEHIND THE REGISTER	12
(H) DEGUISA V LYNN NOTES ON BACK OF DOCUMENT OR BEHIND REGISTER	12
(I) MERCANTILE CREDITS V SHELL CO DOES A RIGHT TO RENEW UNDER A CONTRACT ATTRACT INDEFEASIBILITY	13
(J) PROVIDENT CAPITAL LTD V PRINTY ALL MONIES VS TRADITIONAL MORTGAGE	13
(K) IPPIN TEXTILES PTY LTD V WINAU AUST PTY LTD FORGED MORTGAGE AND RP RECEIVES NOTHING	14
3. ASSURANCE FUND	16
(A) REAL PROPERTY ACT, SECTION 120	16
(B) REAL PROPERTY ACT, SECTION 129	16
(C) REAL PROPERTY ACT, SECTION 129A	17
(D) REAL PROPERTY ACT, SECTION 129B	18
(E) REAL PROPERTY ACT, SECTION 130	19
(F) REAL PROPERTY ACT, SECTION 131	19
(G) REAL PROPERTY ACT, SECTION 132	21
(H) REAL PROPERTY ACT, SECTION 133	22
(I) REAL PROPERTY ACT, SECTION 134	22
(J) REAL PROPERTY ACT, SECTION 135	23
(K) DIEMASTERS V MEADOWCORP ASSURANCE FUND FOR BONA FIDE, PURCHASER FOR VALUE WITHOUT NOTICE	24
4. PRIORITIES	25

(A) BARRY V HEIDER LEGAL V EQUITABLE, POSTPONING CONDUCT	25
(B) CHAN V CRESDON PTY LTD UNREGISTERED THIRD-PARTY GUARANTEE	25
(C) HEID V RELIANCE FINANCE CORPORATION PTY LTD.....	25

5. VOLUNTEERS26

(A) BOGDANOVIC V KOTEFF VOLUNTEERS AND INDEFEASIBILITY IN NSW	26
(B) RASMUSSEN V RASMUSSEN VOLUNTEERS AND INDEFEASIBILITY IN VIC.....	26

6. FRAUD AND AGENCY27

(A) ASSETS COMPANY LTD V MERE ROIHI ACTUAL FRAUD AND WILFUL BLINDNESS	27
(B) LOKE YEW V PORT SWETTENHAM RUBBER ACTUAL FRAUD WITH OCCUPIER	27
(C) SCHULTZ V CORWILL PROPERTIES PTY LTD SOLICITOR AGENT	27
(D) DOLLARS & SENSE FINANCE LTD V NATHAN	28
(E) DAVIS V WILLIAMS WAS THE FRAUD BOUGHT HOME?	28
(F) AUSTRALIAN GUARANTEE CORPORATION LTD V DE JAGER WILFUL BLINDNESS, WITNESSING	29

7. RIGHTS IN PERSONAM OR PERSONAL EQUITIES30

(A) FRAZER V WALKER RP MAY HAVE DONE SOMETHING MAKING THEM PERSONALLY LIABLE	30
(B) BARRY V HEIDER EQUITABLE INTERESTS CAN EXIST IN TORRENS LAND PURCHASE TITLE	30
(C) BAHR V NICOLAY RIGHTS IN PERSONAM, TRYING TO REMOVE THE TITLE OF RP FROM REGISTER DISPLACE TITLE	30

8. INCONSISTENT STATUTES32

(A) SOUTHEASTERN DRAINAGE BOARD V SAVINGS BANK OF SA INCONSISTENT STATUTE	32
(B) CITY OF CANADA BAY V BONACCORSO INCONSISTENT STATUTE	32
(C) HILL PALM V HEAVENS DOOR INCONSISTENT STATUTE	32
(D) REAL PROPERTY ACT s42(3).....	33
(E) CONVEYANCING ACT s88K	33
(F) CONSTITUTION ACT s109.....	33
(G) BANKRUPTCY ACT	33

1. INDEFEASIBILITY

- (a) Real Property Act, Section 41

41 Dealings not effectual until recorded in Register

(1) No dealing, until registered in the manner provided by this Act, shall be effectual to pass any estate or interest in any land under the provisions of this Act, or to render such land liable as security for the payment of money, but upon the registration of any dealing in the manner provided by this Act, the estate or interest specified in such dealing shall pass, or as the case may be the land shall become liable as security in manner and subject to the covenants, conditions, and contingencies set forth and specified in such dealing, or by this Act declared to be implied in instruments of a like nature.

- (b) Real Property Act, Section 42

42 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,

(a1) in the case of 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 or a Commonwealth Act,

(b) in the case of the omission or misdescription of any profit à prendre created in or existing upon any land,

(c) as to any portion of land that may by wrong description of parcels or of boundaries be included in the folio of the Register or registered dealing evidencing the title of such registered proprietor, not being a purchaser or mortgagee thereof for value, or deriving from or through a purchaser or mortgagee thereof for value, and

(d) a tenancy whereunder the tenant is in possession or entitled to immediate possession, and an agreement or option for the acquisition by such a tenant of a further term to commence at the expiration of such a tenancy, of which in either case the registered proprietor before he or she became registered as proprietor had notice against which he or she was not protected--

Provided that--

(i) The term for which the tenancy was created does not exceed three years, and

(ii) in the case of such an agreement or option, the additional term for which it provides would not, when added to the original term, exceed three years.

(2) In subsection (1), a reference to an estate or interest in land recorded in a folio of the Register includes a reference to an estate or interest recorded in a registered mortgage,

	<ul style="list-style-type: none"> • Mrs Frazer borrowed money from the bank and as security for the loan provided them a mortgage over the land. • Mrs Frazer, forged her husbands signature and the bank did not know. • Mrs Frazer failed to make payments, the bank exercised their power to sell the land. • Walker bought the property from X and tried to take possession.
Issue	<ul style="list-style-type: none"> • Did Walker obtain title that was indefeasible?
Held	<ul style="list-style-type: none"> • The court held that Walkers title was indefeasible <ul style="list-style-type: none"> ○ The Torrens system is a system of immediate indefeasibility, therefore registration cures defects of title, except in cases of fraud (see below) ○ Title by registration. ○ The court did note that this would not prevent a person from bringing a in personam claim
Principle	<ul style="list-style-type: none"> • Even if the instrument by which you get title is forged, registration cures the defect making it indefeasible unless there is actual fraud.

(h) Breskvar v Wall | Immediate Indefeasibility, Title by Registration, Overcoming Indefeasibility

Facts	<ul style="list-style-type: none"> • Breskvar is the registered proprietor of land. • Breskvar wanted a loan and executed a transfer of property for security purposes to Petrie. • In the transfer documents, the name of the transferee was left blank at the time it was signed. • Breskvar then inserts his grandson Wall in the transfer. • Wall then uses the transfer from to register himself as the registered proprietor. • Wall then tries to sell the land to Alban who is an innocent bona fide purchaser for value. • Breskvar then lodges caveat. • [NB: This is different because Alban is not yet RP]
Issue	<ul style="list-style-type: none"> • Who has priority? Does the postponing conduct of Breskvar mean that Wall's equitable claim is better?
Held	<ul style="list-style-type: none"> • The court held that the Torrens system is one of immediate indefeasibility, and that Alban had better title as Breskvar had engaged in postponing conduct. • Torrens system is a system of registration by title • Postponing Conduct <ul style="list-style-type: none"> ○ Breskvar by arming Wall with the blank transfer documents allowed Alban to be misled and therefore his conduct postpones his interest.
[NB: Walls title was defeasible, as he had acted fraudulently]	

(i) Cassegrain v Gerard Cassegrain & Co Pty Ltd | Section 118 not for valuable consideration fraud

Facts	<ul style="list-style-type: none"> • A company was the registered proprietor of land. • Husband was one of the directors, he fraudulently procured a transfer of the land from the company to himself and his wife as 'joint tenants'. • His wife was not complicit in the fraud. The husband then transferred his half interest to his wife for \$1.
Issue	<ul style="list-style-type: none"> • Was the wife's title defeasible under s118?
Held	<ul style="list-style-type: none"> • The court held that the wife's title was defeasible pursuant to s118 <ul style="list-style-type: none"> ○ This is because, she obtained her title from a person registered as proprietor of the land through fraud (without valuable consideration). ○ \$1 was not sufficient to be valuable consideration.

(a) may pay such amount (which may include amounts by way of costs and interest) as the Registrar-General thinks reasonable, and

(b) may, instead of or in addition to payment of a settlement amount, take other action.

(5) A settlement amount may include any costs incurred by the claimant before the settlement.

(6) The Registrar-General may delegate to a member of staff of the Department the power of the Registrar-General to settle claims under this section.

(k) Diemasters v Meadowcorp | Assurance Fund for Bona fide, purchaser for value without notice

Facts

- Mortgagor attempted to discharge a mortgage by paying mortgagee in stolen and forged bank cheques.
- Mortgagor then executed a contract of sale with a Jane.
- On discovering the fraud, the mortgagee lodged a caveat preventing registration of the discharge of mortgage and registration of the transfer to the purchasers.

Issue

- Could the innocent purchaser receive compensation from the Fund?

Held

- The court **held** that the **innocent party could receive compensation**.
 - ‘It follows that in the ordinary case deprivation is the result of some interest lost as a result of the doctrine of indefeasibility...’. – Windeyer J.
 - **‘Had the land been under Old System title Jain, as bona fide purchaser for value without notice, would have taken a clear title ...** It follows from this that it is because the land is under the Act that the mortgagees have maintained their priority.
 - Thus **the fact that Jain has not obtained unencumbered title is because the land is under the Act**. The question is whether this failure, which has almost certainly caused damage to Jain, arises as a result of the operation of the Act through Jain having been deprived of an unencumbered title as a consequence of fraud.’ – Windeyer J
- ‘...the purpose of compensation by access to the Fund is to **balance disadvantage which can otherwise be brought about by indefeasibility of title.**

4. PRIORITIES

(a) Barry v Heider | Legal v Equitable, Postponing Conduct

Facts

- Barry was the registered proprietor. He executed a transfer to Schmidt (which was not registered).
- This included a document which acknowledged that consideration of \$1,200 had been paid, although it was yet to be paid.
- The transfer was voidable due to fraud on Schmidt's behalf.
- Schmidt then obtained an unregistered mortgage from Mrs Heider.

Issue

- Who was to gain priority, Barry (registered legal) or Heider (unregistered equitable)

Held

- The court **held** that Heider's mortgage was to gain priority over Barry's interest in the land, as there was **postponing conduct** on Barry's behalf.
- In other words 'Barry enabled Schultz to commit the fraud' by stating the whole of the consideration had been paid, Mrs Heider then lent the money on the belief of Barry's own statement that the monies had been paid'

(b) Chan v Cresdon Pty Ltd | Unregistered Third-Party Guarantee

Facts

- A lease included a term according to which a guarantor would **guarantee** the lessee's obligations "**under this lease**".
- The lease was never registered, but the lessee took possession and began paying rent.
- The lessee then failed to pay rent and the lessor, sought to enforce it against the guarantor

Issue

- Was the guarantor clause enforceable?
- Whether guarantee clause 'under this lease' was intended to include obligations under equitable lease?

Held

- Was the guarantee enforceable?
 - The high court **held** that there was **no registered lease, and therefore no enforceable guarantee**.
- Does 'under this lease' include obligations under an equitable lease?
 - The high court **held** that the obligations 'under this lease' referred to obligations under a **legal lease**, and therefore as the current situation was a "common law tenancy at will terminable on one month's notice came into existence" as **there was no legal lease** only a equitable lease they **could not be enforced**.
- Was there a **equitable lease**?
 - The court will treat the agreement as a lease in equity, on the footing that equity regards as done what ought to be done and equity looks to the intent rather than the form, rests upon the specific enforceability of the agreement
- Only a lease **at law** would satisfy the wording 'under this lease'
- It also held that, although the rule in *Walsh v Lonsdale* meant that an agreement to lease gave rise to an equitable lease, it did not create a legal interest. Further, the **operation of the rule depended upon the availability of specific performance** of the agreement to lease. The facts in this case did not support such a finding. The **guarantee of obligations 'under his lease' referred to obligations in a legal lease**. Because no legal lease existed there was no enforceable guarantee.

(c) Heid v Reliance Finance Corporation Pty Ltd

Facts

- H remained on the title but handed over certificate of title to the purchaser.