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TORRENS REGISTRATION SYSTEM

Torrens System

- The Torrens system is a simplified land title system invented by Sir Robert Torrens.
- Replaces old systems by creating title through a single public act of registration, a new Crown grant.
- Governed in NSW by the [Real Property Act 1900 \(NSW\)](#)
- Torrens Register is the central and authoritative record – “the register is everything”: *Waimiha Sawmilling Co Ltd v Waione Timber Co Ltd*.
- Each folio records:
 - First schedule – registered proprietor.
 - Second schedule – encumbrances (Crown rights, mortgages, leases, easements, caveats).
- Full content of a registered dealing prevails over any incorrect summary in the second schedule: [s 40\(1B\) RPA](#).
- NSW now operates fully via electronic conveyancing.
- All land alienated by the Crown after the relevant date is automatically under the Torrens system: [s 13 RPA](#).

Indefeasibility

- **Indefeasible:** undefeated by anything else.
- Upon registration, your title is indefeasible (undefeatable), subject to any other interests on the register.

Immediate vs. deferred

- **Immediate indefeasibility:** registration confers indefeasible title on the current registered owner immediately.
- Immediate indefeasibility determined in *Frazer v Walker*, overturning *Gibbs v Messer* which supported deferred indefeasibility.

Frazer v Walker

FACTS

- Mrs Frazer’s husband’s signature on a mortgage was forged, but the mortgagee and purchaser acted in good faith

HELD

- The Privy Council held the purchaser’s registered title was indefeasible, dismissing Mrs Frazer’s claim to set aside the mortgage or sale.

CO-OWNERSHIP

Determining Co-Ownership

Joint Tenancy

- A right shared for the **whole** of the property.
- **Four unities must be present:**
 1. **Unity of possession:** Entitled to 'occupy the whole'.
 2. **Unity of interest:** Interest of each JT must be same in nature, extent and duration.
 3. **Unity of title:** JTs must derive their interests from same document/ same act.
 4. **Unity of time:** Interests of all JTs must vest at the same point in time.
 - Exceptions: (a) conveyance executed to trustees for beneficiaries; or (b) disposition in a will to joint grantees.
- **Right of survivorship:** ownership cannot be devised under a will (unless severed).

Tenancy In Common

- A right to a distinct (yet undivided) share of the property.
 - An identifiable fraction of the interest which has not yet been formally divided up between them.
- Only the **unity of possession** is an essential element.
- No right of survivorship.
 - Share of a TIC can be transferred, devised, or passed under a will on intestacy.
- Size of each tenant's share is fixed from the time of creation of the interest or by subsequent dealings.

1. What is on the register? (the position at law)

- Presumption in favour of tenancy in common where unclear: [s 26\(1\) CA](#).
- Note: a reference to 'joint proprietors' under the RPA refers to JTs: [s 100\(1\) RPA](#).

2. What is the position in equity?

- Equity generally follows the law, but may presume a TIC (even where JTs at law).
- If purchase price contributions are equal, equity will presume JTs: *Malayan Credit Ltd v Jack Chia-MPH*.
- TIC particularly in the following (but note categories not closed (*Malayan Credit Ltd v Jack Chia-MPH*)):
 - **Business partners**
 - Equity will presume they are TIC in proportion to their contributions.
 - Rationale: a party wouldn't have intended to make a gift of their share to other if they suddenly died.

Assignment of the Lease / Creation of Sublease

1. Formalities

- Reach an agreement and put it in writing: [s 54A CA](#).
 - Grants an **equitable lease**: *Walsh v Lonsdale*.
- Then, execute and register the appropriate Torrens form, a Transfer of Lease form.
 - Grants a **legal interest**. New tenant now the registered proprietor.
 - Receives indefeasible title over the lease: [s 42 RPA](#).
- If registration does not occur, original tenant remains liable for any breaches under the lease: [s 51 RPA](#); *Karacominakis v Big Country Developments*.
- CoT not required.
- **Subleases:**
 - Registration necessary if sub-lease is over 3 years: [s 53 RPA](#).
 - Registration not necessary if sub-lease is less than 3 years (as it will be an exception to indefeasibility): [s 42\(1\)\(d\) RPA](#).

2. What covenants are the new tenant bound by?

- Originally at CL, only those that 'touch and concern' the land: *Spencer's Case*.
- Now – this has become contentious by virtue of [s 51 RPA](#).
 - **One reading:** upon transfer of a lease, you simply change the name – all covenants transfer.
 - **Ross's reading:** *Spencer's Case* remains in force. Because:
 - If first reading were correct, there would be no need for [s 51\(3\) RPA](#).
 - Language of [s 51 RPA](#) that 'all rights, powers and privileges thereto belonging or appertaining, shall pass' – indicates that it is only those rights belonging to the leasehold estate (so does not change *Spencer's Case* as rights that 'touch and concern').
 - This would make the rule the same between assignment of lease and reversion.
 - So argue this is the right view.

3. Who can the landlord sue (between old and new tenant)?

- On breach of covenant, landlord may sue original tenant (privity of contract) and/or assignee (privity of estate), but **cannot recover twice**: *Moule v Garrett*

Original tenant (assignor)

- Under privity of contract.
- The landlord may sue the original tenant for breaches committed by the assignee, unless an express term in the lease agreement states that the new tenant is to be bound instead: [s 70A CA](#)
- For an equitable assignment: original tenants will be liable for breaches of an equitable assignee

Contractual: bargain damages

1. Identify the covenant breached
2. Which scenario does the breach fall into? (types of breach outlined below)

Scenario	Key Principle	Leading Case(s)	Damages Available
Breach but not repudiatory or essential	Damages only to termination date	<i>Shevill</i>	No loss of bargain damages
Breach of essential term (anti-Shevill)	Loss of bargain damages allowed	<i>Gumland Property Holdings</i>	Loss of bargain damages
Lessee repudiates	Lessor may accept, terminate, get damages	<i>Progressive Mailing House</i>	Loss of bargain damages (subject to mitigation)
Repudiation not accepted	Lease continues; landlord sues for rent	<i>Duncan; Tall-Bennett</i>	Rent as it falls due; no mitigation duty
Lessee terminates on repudiation grounds (risk)	Risk of counterclaim if repudiation not proven	<i>Pourzand; Brotherhood of St Laurence</i>	Lessee liable for damages if repudiation not upheld

Types of Breach

Breach of “essential” or “fundamental” term (“anti-Shevill clause”)

- If a lease covenant is expressly designated as essential/fundamental.
- *Gumland Property v Duffy Bros*: HC upheld landlord’s right to terminate and claim loss of bargain damages where timely rent payment was essential.
- Anti-Shevill clauses are now common and can dramatically affect landlord’s remedies.
- Mere covenant to pay rent in advance is not automatically essential: *J & C Reid Pty Ltd v Abau Holdings*

Repudiatory breach

- **Ask**: does party evince an intention no longer to be bound by the contract or does he intend to fulfil the contract only in a manner substantially inconsistent with his obligations? *Tabali* referring to *Shevill*.
- *Progressive Mailing House*: Lessee breached multiple covenants including rent, landlord accepted repudiation, entitled to damages for full unexpired term.
- *Laurinda*: lessor’s failure to register lease was repudiation, enabling lessee to terminate.
- *Pourzand v Telstra Corporation Ltd*: lessee repudiated by terminating lease without valid repudiation by lessor; liable for loss of bargain damages.
- *Brotherhood of St Laurence*: landlord’s persistent breach of maintenance covenant was repudiation, lessee entitled to terminate and damages.

EASEMENTS

Creation

Principle: Rights that attach to land that is benefited (the dominant tenement) and land that is burdened (the servient tenement).

1. How was the easement created?

Express grant or reservation

- Servient owner expressly grants an easement over their land.
- **Under general law:** for an easement to be effective as a legal interest it must be created by deed.
 - Must be in writing and signed: [s 54A\(1\) CA](#).
 - If it does not comply with this requirement, the owner has a mere licence.
 - However, **in equity:** acting on *Walsh v Lonsdale*, equity may regard an informal document or oral contract as effective to create an equitable easement.
 - Must still possess the characteristics of *Re Ellenborough Park* (below) or be supported by sufficient acts of part performance: *McManus v Cooke*.
- **Under Torrens system:** must execute a transfer in the approved form: [s 46\(1\) RPA](#).
 - Transfer must be (per [s 46\(1A\) RPA](#)):
 - (a) Executed by the registered proprietors of the land burdened and benefited; and
 - (b) Accompanied by the written consent of every mortgagee, chargee, etc recorded in the folio of the Register for the land burdened.
 - RG will record the easement on the folios of the Register of the benefited and burdened land: [s 47\(1\) RPA](#).

Plans of subdivision: [s 88B CA](#)

- On registration or recording of a plan of subdivision, any easement indicated as intended to be created shall be created: [s 88B\(3\)\(c\)\(i\) CA](#).
 - Land benefited and land burdened may be in the same ownership at the time the plan is registered: [s 88B\(3\)\(c\)\(ii\) CA](#).
 - Vests in the owner of the land benefited by the easement: [s 88B\(3\)\(c\)\(ii\) CA](#).
- RG will record easement on folios of the Register of the benefited and burdened land: [s 88B\(3A\) CA](#); [s 47\(1\) RPA](#).