

LAWS4107: LAND LAW

key

Start of topic

Section in code

Element

case

or (case)

TORRENS SYSTEM

- The registered proprietor (RP) has an immediately indefeasible title unless an exception applies
- **S 68 Estate of registered proprietor paramount**
 - Notwithstanding the existence in any other person of any estate or interest whether derived by grant or transfer of the fee simple from the Crown or otherwise which but for this Act might be held to be paramount or to have priority the proprietor of land or of any estate or interest in land under the operation of this Act shall except in case of fraud hold the same subject to such encumbrances as may be notified on the registered certificate of title

Frazer v Walker: Mrs Frazer forged Mr Frazer's signature on a mortgage in favour of Mr and Mrs Radomski as security for a loan. Mortgage was registered. Mr & Mrs Frazer defaulted under the mortgage. Mr and Mrs Radomski exercised their power of sale and sold property to Mr Walker. The transfer was registered. Mr Walker sought possession of the property from Mr and Mrs Frazer. Mr Walker was a BFPVW/N. Mr Walker was unaware of Mrs Frazer's fraud at the time of purchase, as were the Radomski. This meant that Mr Walker has indefeasible title.

Breskvar v Wall: The Breskvars owned property as joint tenants. They borrowed \$1200 from Petrie. Hand over Deed and deed of transfer signed in blank (blank form). The man who lent the money inserted the name of his grandson, Wall. The man who registered the transfer then entered into a contract to sell the land. The purchaser inspected the register and swathe grandson was the owner. Before completed, the original owner lodged a caveat saying it was his and the document was fraudulent. He said that the indefeasibility was affected by fraud. Court held that each registration creates a new title. Registration under the Torrens system has the power to cure defects that may have existed in the title prior to the registration. Registration will not be affected by a fraud that the RP has not been personally involved in

TRANSFER OF LAND ACT 1893 (WA)

– 91. Leases

- Less than 3 years do not need to be registered to be legal
- Over 3 years -> need to be registered

– 55. Trusts (allows for equitable interests under torrens law)

- (1) The Registrar shall not enter on a certificate of title notice of any trusts (2) ...
- (3) The Commissioner may protect, in any manner he thinks fit, the rights of the persons for the time being beneficially interested in, ..., a trust.
- (4) ...

– 53 Priority of registration of instruments

- (1) The Registrar shall register an instrument presented for registration in the order, and from the time, of its presentation.
- (2) Instruments purporting to affect the same estate or interest have priority as between each other according to the time of registration and not according to the date of the instrument, notwithstanding any actual or constructive notice.

– 58 Instruments not effectual until registered

No instrument until registered in manner herein provided shall be effectual to pass any estate or interest in any land under the operation of this Act...;
but upon such registration the estate or interest comprised in the instrument shall pass...

– 63 Certificate to be conclusive evidence of title

- (1) No certificate of title ... shall be impeached or defeasible by reason or on account of any informality or irregularity in the application or in the proceedings previous to the registration of the certificate; and every certificate of title created and registered under any of the provisions herein contained ... shall be conclusive evidence that the person named in such certificate as the proprietor of or having any estate or interest in ... the land therein described is ... possessed of such estate or interest ...

– 199 Registered proprietor protected against ejectment except in certain cases

... no action of ejectment or other action for the recovery of any land shall lie or be sustained against the person registered as proprietor thereof under the provisions of this Act except in any of the following cases (that is to say) —

– 134 Purchaser from registered proprietor not required to inquire into title and not affected by notice of unregistered interest etc.

...

no person ... dealing with ... a person who is or becomes the proprietor of any registered land lease mortgage or charge shall be required ... to inquire or ascertain the circumstances under or the consideration for which such proprietor or any previous proprietor thereof was or becomes registered... shall be affected by notice actual or constructive of any trust or unregistered interest any rule of law or equity to the contrary notwithstanding; ...

– 202 Purchasers protected

Nothing in this Act contained shall ... leave subject to an action of ejectment ... any purchaser bona fide for valuable consideration of land under the operation of this Act on the ground that the proprietor through or under whom he claims may have been registered ... through fraud or error or may have derived from or through a person registered ... through fraud or error;...

Gibbs v Messer: Messer owns property, leaves for Scotland, leaves deed with lawyer. Lawyer creates transfer to fictitious person "Cameron". Lawyer sells along to McIntyres, takes off. Messer returns, problem. Who has title to the land?

- Australian court: McIntyre owns the land (**immediate** indefeasibility)
- Privy Council: Messer owns land, McIntyre no standing (**deferred** indefeasibility)

Indefeasibility is deferred. Transactions involving errors outside the register do not give indefeasible title, but the resulting errors in the register do not prejudice subsequent transactions.

INDEFEASIBILITY

- Immediate indefeasibility: when B registers the forged Deed of Transfer and becomes the registered proprietor of the Deed of Title (supported by **s68**) (**Frazer v Walker and Breskvar v Wall**)
- Deferred indefeasibility: indefeasibility doesn't attach when B registers (because they have registered pursuant to a void instrument i.e. fraud) rather, indefeasibility is deferred to one step away from the problem transaction
 - o If B executes a valid deed of transfer to C, and C registers then they can claim indefeasibility of title (**s134 and 202**) (**Gibbs v Messer**)
- If you are dealing with a fictitious registered proprietor then you can DEFERRED INDEFEASIBILITY (affirmed in **ANZ v Barns**)

ANZ v Barns: RP of land that granted a mortgage over that land to ANZ. The mortgage was registered. The company before granting the mortgage had been dissolved (therefore, no longer existed). The court found that the mortgage, from the company ANZ was void as their registration was not valid.

HOW TO ANSWER A PRIORITY DISPUTE QUESTION

IRAC

ISSUE – nature of competing interests

- If the DOT is void (from fraud, forgery etc.) it is ineffective to pass to a third party
- A has retained registered and legal fee simple title

- S63 – the register and certificate of title is conclusive proof that the person named as the registered proprietor holds the legal title
 - B can still have good legal title IF he was unaware of the fraud, forgery etc.
HOWEVER, if he was aware then it is a defeasible legal title
- A now doesn't have legal title HOWEVER, does have the right for the title to be restored in favour as the original registered proprietors of the fee simple estate = unregistered equitable interest in the fee simple
- C has the right to become registered as the proprietor of the fee simple as they have a specifically enforceable contract for the purchase of the land = gives rise to an equitable interest.

RULE

- Situation = Unregistered v unregistered interest / equitable v equitable interest.
- Rule = first in time has priority (**Rice v Rice**) – as long as the person who was first in time, was not guilty of any postponing conduct, that first equitable interest holder has priority.

APPLY

- First interest holder = A
 - Any postponing conduct? – YES – you NEVER hand over your DCoT or DoT (in blank) = inviting fraudulent conduct.
 - Because A is guilty of postponing conduct, applying the rule in **Rice v Rice**, their interest is deferred (postponed) and C has priority.

CONCLUDE

- Result = A must withdraw the absolute caveat so C can register and become the registered proprietor of the Fee simple.

Significance of **Breskvars v Alban**:

- HC decision in which the court affirms, in ratio, immediate indefeasibility.
- Illustrates how the Torrens system works as a system of registration. Title passes on registration even of a void instrument.
- General law principles continue to apply in a Torrens context.

INDEFEASIBILITY

1. State each parties interests

- This is a priority dispute between X (registered/unregistered lease/mortgage/fee simple/easement) and Y (registered/unregistered lease/mortgage/fee simple/easement)
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2. State the priority rule

(a) Registered (fee simple*) vs. registered (any other interest)

- Torrens Methodology: RP has an immediately indefeasible title unless an exception apply (s68; *Frazer v Walker*; *Breskvar v Wall*)
- Focus on the interest being challenged

(b) Registered (other interest) vs. registered (other interest)

- First in time to register has priority (s53 TLA)

(c) Registered (any interest) vs. unregistered (any interest)

- Torrens Methodology: RP has an immediately indefeasible title unless an exception apply (s68; *Frazer v Walker*; *Breskvar v Wall*)

(d) Unregistered (any interest) vs. unregistered (any interest)

- Apply general law principles because unregistered interests are generally treated as equitable
- *Rice v Rice*: provided the equities are in all other respects equal, the prior in time has priority

Why is a life estate / inheritance an unregistered interest?

X has an unregistered interest pursuant to a specifically enforceable contract between X and Y (person who has died). Agreement on essential terms, parties are ready/willing/able, clean hands, s4 SoF (*Marist Bros*) or sufficient acts of part performance.

X also has an unregistered interest pursuant to estoppel / CICT. When Y was alive, Y made a representation to X, X relied on this representation, this reliance was reasonable and X will suffer a detriment if he does not get his life interest as promised. Applying Torrens methodology, Y (RP) had an immediately indefeasible title unless an exception applies (s68, *Frazer v Walker*, *Breskvar v Wall*). Through a cause of action in estoppel / CICT, RIP exception applies and X gained an indefeasible title.

(a) Registered (fee simple*) vs. registered (any other interest) – Torrens Methodology (c) Registered (any interest) vs. unregistered (any interest) – Torrens Methodology

What exceptions apply?

Express exceptions	Non-express exceptions
• Fraud* • Encumbrances on register • Prior certificate of title* • Wrong description of land* • Crown grant reservations • Adverse possession • Easement • Unpaid taxes • Mining leases and licenses • Short-term lease*	• Rights in personam* • Correcting the register* • Overriding statutes* • Volunteers*

(b) Registered (other interest) vs. registered (other interest)

- First in time to register has priority (s53 TLA)
- However the priority and extent / quality of indefeasibility does not necessarily apply to every right that the instrument creates
- Indefeasibility only attaches to terms that 'delimit and qualify' the interest granted (*Mercantile Credits*)
 - Option to renew is protected / indefeasible
 - Option to purchase is not protected because it is a 'separate and independent covenant'

What if the lease is void?

- Indefeasibility attaches to terms that 'delimit and qualify' the interest granted (*Mercantile Credits*)
 - Option to renew is protected / indefeasible
 - Query whether option to purchase is protected → Gibbs J in *Mercantile Credits* says there is no indefeasibility because it is 'separate and independent covenant' however s68(1A) provides that an option to purchase (in a 68 lease) can be protected by registering the lease
 - Gibbs J's comments are only in obiter and *Mercantile Credits* is a South Australian case
 - Therefore applying s68(1A), the option to purchase is indefeasible

What if the lease is illegal?

- Registration of illegal instrument does not have the effect of validating the option to renew (*Travinto*)
 - Option to renew is not protected

What if the mortgage is void?

- Indefeasibility attaches to terms that ‘delimit and qualify’ the interest granted (*Mercantile Credits*)
- Gibbs J in *Maradonna* held that these terms include:
 - Terms that make the land a security for the debt
 - Mortgagor’s personal covenant to repay the debt (*Maradonna*)

Extra considerations:

- What if the value of land is insufficient to cover the mortgage debt?
- What if it is an ‘all monies’ mortgage (e.g. repayment of “secured money”) – *Tsai*
 - No indefeasibility if the personal covenant to repay is not a traditional mortgage – the only way to find out how much owing is by going to an off-register document
 - Note: Young J’s dissenting judgment

(d) Unregistered (any interest) vs. registered (any interest)

- *Rice v Rice*: provided the equities are in all other respects equal, the prior in time has priority
- But you need to consider the role of the caveat:

Has the prior interest-holder’s failure to lodge a caveat been postponing conduct?

- If it is both reasonable and common practice to do so, failure to lodge a caveat = postponing conduct

Did the subsequent interest-holder check the register?

- If yes, they have been misled that the register was clear = postponing conduct (*Butler*)
- If no, the failure to caveat is neutralised = no postponing conduct (*Abigail*)

Who has the dup CT?

- If the prior interest holder hands over the dup CT, they are arming the transferee to appear to the world as the unincumbent owner = postponing conduct (*Abigail*)
- If a bank has the dup CT, it is common practice for them not to lodge a caveat (*J&H Just*)
 - They will be adequately protected because no-one else will be able to reg. without the dup CT
 - Failure to ascertain whereabouts of dup CT = postponing conduct (*J&H Just*)

If there is postponing conduct, the prior in time loses priority

EXCEPTIONS TO INDEFEASIBILITY

– S68 Estate of registered proprietor paramount

(1) ... the proprietor of land or of any estate or interest in land under the operation of this Act shall **except:**

- in case of fraud
- hold the same **subject to**:
- such encumbrances as may be notified on the registered certificate of title for the land;
- but absolutely free from all other encumbrances whatsoever **except**:
- the estate or interest of a proprietor claiming the same land under a prior registered certificate of title
- and **except**:
- as regards any portion of land that may by wrong description of parcels or boundaries be included in the certificate of title or instrument evidencing the title of such proprietor not being a purchaser for valuable consideration or deriving from or through such a purchaser
- S 68 (1A) ... the land which shall be included in any certificate of title or registered instrument shall be deemed to be **subject to**:
 - the reservations exceptions conditions and powers (if any) contained in the grant thereof or transfer of the fee simple or otherwise;
 - and to any rights subsisting under any adverse possession of such land;
 - and to any public rights of way and to any easements acquired by enjoyment or user or subsisting over or upon or affecting such land;
 - and to any unpaid rates;
 - and to any mining lease or licence issued under the provisions of any statute;
 - and to any prior unregistered lease or agreement for lease or for letting for a term not exceeding 5 years to a tenant in actual possession.

Such encumbrances...

- Anything that is registered as an encumbrance of the certificate of title you are subject to such encumbrances
- If you are buying X property, you are subject to that mortgage that belongs to the bank whilst it remains on the certificate of title = an encumbrance – the purchaser is subject to the encumbrance.
- If the purchaser wants to take free of such a mortgage you have to be sure that the encumbrance is removed prior to registration.
- If as a registered proprietor of the fee simple you create a mortgage and have it registered you are subject to that as an encumbrance on the certificate of title.
- Might have two encumbrances (two registered mortgages) you are subject to both of those. As between themselves (the two mortgagees) that priority depends on the time of registration.
 - o Whichever one was registered first has priority. Why? They are two registered interests effecting the same interest in land.

The estate or interest of a proprietor claiming...

- This exception is dealing with the circumstances in which there has been an error.
 - o Registry error, surveying error etc.
- This exception gives priority to the person registered under the prior certificate of title - the one that was issued and registered first.
- Where we talk about a prior certificate of title = a prior certificate of title that is still current, not a cancelled or extinguished certificate of title
- The overlap can be total or partial.
 - o The whole land is on one certificate of title and another separate certificate of title
 - o Part of the land is on one certificate of title and part is on a second certificate of title – illustrated in the case of **Registrar of Title and Esperance Land Co.**

Reg of Titles v Esperance Land Co: Parcel of land owned by Alwood (Alwood = RP). Alwood subdivided the land into two lots and sold one subdivision (1) to Henson. A certificate of title and Duplicate certificate were issued in Henson's name for this subdivision. Alwood sold the second subdivision (2) to Simon. A certificate of title and duplicate certificate were issued in Simon's name, however they erroneously included 1 and 2. Simon sold this land to ELC. ELC was not aware of the error. Error was discovered and called on ELC to return the certificate of title so it could be corrected by removing lot 1- ELC refused. ELC's argument was based on s202 of Transfer of land act. ELC was a purchaser for valuable consideration, you cant eject us from lot 1 on the basis that Simon was registered through error. We have an indefeasible title to lot 1. The court said in relation to s202 argument- section 68 is the leading indefeasibility provision in the TLA and it expressly deals with this kind of situation. S68 preserves the indefeasible title of the person holding under that prior certificate of title. - ELC had to deliver up duplicate certificate of title and it was corrected.

As regards any portion of land...

- In your certificate of title you don't have indefeasible title to that wrongly described property.
- Dealing with surveying/subdivision errors.
- EXCEPTION: Unless you are a purchaser for valuable consideration of the wrongly described land. If this is the case then you do get indefeasible title.

Example:

1 A has 1 st CoT (correct)	2 B has 2 nd CoT (incorrectly includes 1 and 2)
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- Under prior certificate exception, A has priority.
- Under wrong description exception, A has priority- if B IS NOT a purchaser for value of wrongly described land.
- Under wrong description exception, B has priority- if B IS a purchaser for value of wrongly described land.

Medical Benefits Fund v Fisher: Land owned by 3 tenants-in-common and each had a Dup certificate of title. Land was leased to MBF for 3 years. Plus, 3x 3-year options to renew. Lease was registered – indefeasible. Land was sold to Mrs Fisher. New certificate of title was issued to Fisher omitting lease.

Priority Dispute (IRAC):

Issue- nature of competing interest:

- MBF: Unregistered lease.
- Fisher: Registered fee simple.

Rule:

- Torrens methodology:
 - o RP has an immediate indefeasible title (s68, FvW, BvW). Unless an exception applies.
- Possible exceptions:
 - o Encumbrance on the register – no longer an encumbrance on register as lease was removed.
 - o Fraud – Mrs Fisher was aware of the lease when she became registered. Section 134 expressly states that becoming registered with knowledge of an existing interest is NOT FRAUD. (NO FRAUD COMMITTED).
 - o Prior certificate of title - MBF is holding the lease under the prior certificate of title - this was cancelled (no longer current)- this doesn't apply.
 - o Wrong description of land- your land in the CoT has been wrongly described as it has omitted the lease.
 - Court rejected this argument on the basis that the wrong description of land applies to parcels and boundaries (Must be a physical description of land not interests that may exist in respect of the land)- this exception doesn't apply.

Apply:

- Ms Fisher gets the fee simple free of the lease.
- There was however an error on behalf of the titles officer, therefore MBF would be entitled to compensation for what they have lost as a result of the operational error

Reservation exceptions, conditions and powers...

- If in the original crown grant there is a reservation that a portion of land is a nature reserve, then you are bound by that reservation as the fee simple owner.

Any rights subsisting under any adverse possession...

- S222-225 of TLA
- No need to register interest as an AP- still have priority over a RP- can enforce title as against a RP.
- Only two jurisdictions in Australia where there is a full AP exception- many criticisms.
 - o Inconsistent in a system whereby the act of registration creates legal title, to have a rule that title passes just from possession. = inconsistent with title by registration.
 - o Economic theory of property – use the land or lose the land = argument in favour with AP exception.

To any rights of way...

- Easements can arise in a multitude of ways.
 - o Direct agreement
 - o Long-user
 - o Statute
 - o Estoppel
 - o Registration of easement
- Doesn't matter how the easement arose, doesn't matter if registered or not, any easement is an exception to a proprietor's indefeasible title.

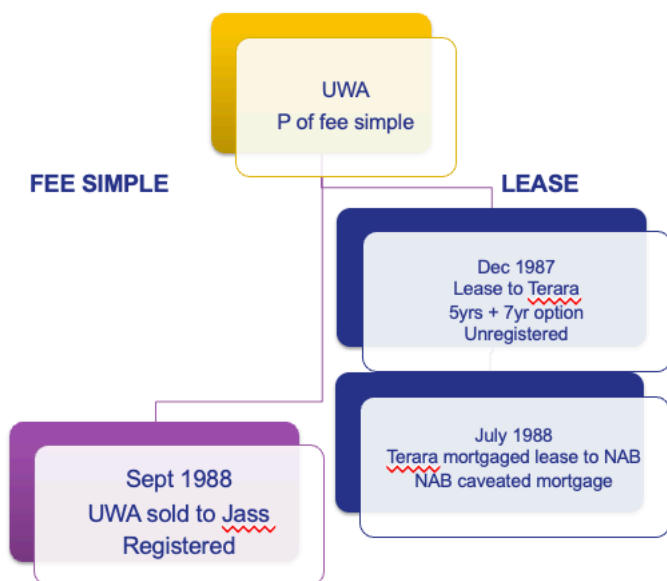
Unpaid rates...

- If you purchase land, and the person has not paid the land taxes, the new purchaser must pay these.
- Section 76 of Taxation Administration Act 2003 – Charge on land to secure land tax.
 - o Land tax is a charge on the land for which the tax is payable, but ceases to be such a charge when it is paid.
 - o If there is a disposition of the land before the tax is paid, the new owner becomes jointly liable with the taxpayer to pay the tax.

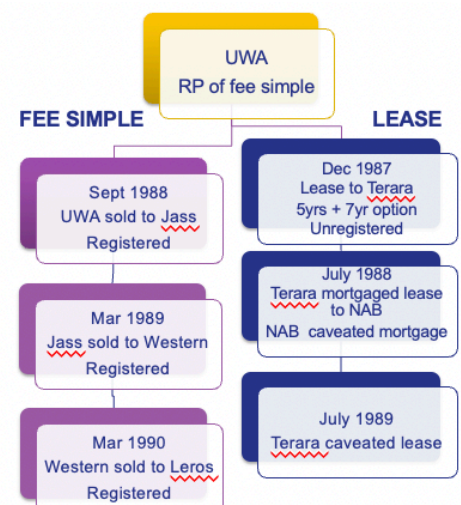
To any prior unregistered lease or agreement...

- Can't register a lease for three years or less. However, tenants still protected.
- As a registered proprietor, you are subject to any lease (if 5 years or less), as long as the tenant is in possession when you become the registered proprietor.
- BUT... NO OPTION OF PURCHASE OR RENEWAL IN ANY SUCH LEASE OR AGREEMENT SHALL BE VALID AGAINST A SUBSEQUENT REGISTERED INTEREST UNLESS SUCH LEASE OR AGREEMENT IS REGISTERED OR PROTECTED BY CAVEAT
 - o The RP is only subject to the initial lease period, not to any option to renew or purchase.
 - Unless the lease is registered or the lease is protected by caveat (which you would know as the caveat would be present on the certificate of title).'

Leros PL v Terara [1992] HCA



Is Leros subject to Terara's lease and option?



Leros v Terara:

- A subject to claims caveat only renders a subsequently registered interest to the interest claimed in the caveat if the interest claimed is valid.
- A caveat intended to protect an unregistered interest must be lodged before the registration of an inconsistent interest. Registration of an inconsistent interest prior to lodging the caveat extinguishes the unregistered interest.
- A caveat to protect a derivative or secondary interest can also protect the main/primary interest to the extent that the derivative interest is dependent on the primary interest.
- In completing a caveat form in WA, mention each estate/interest to be protected definitely and explicitly.
- To protect an option to renew/purchase in a short-term lease, the lease itself must be registered caveated.