

TORRENS TITLE – REGISTERED INTERESTS

Torrens Title is a system of title by registration – **s 41 RPA 1990, Breksvar v Wall (1971)**

Certificate of title –

- Each individual property in NSW, if under *Torrens Title*, has a separate CT created by the registrar general
- **s 39 RPA:** In order to register a dealing, it must be in registrable form

First Schedule – the registered owner	Second Schedule – other types of registered interests in land
<ul style="list-style-type: none"> • <u>Vendor</u> – Named until such time as the purchaser’s name is inserted) • <u>Purchaser</u> – At a time of registration of sale, the vendor’s name is erased from the First Schedule and replaced by the purchaser’s name 	<ul style="list-style-type: none"> • Mortgages – borrowing, with property as security • Leases • Easements – rights on lands, e.g. right of way • Restrictive covenants

1. IS THE DEALING REGISTERED – Title by Registration s 41, Breksvar v Wall

TIME FOR TORRENTS TITLE –

1. Exchange of contracts (contract of Sale)

- **S 54 A Conveyancing Act 1919**– transfer/ interest in land must be in writing
- Vendor and purchaser exchanges contract for sale of land together with an identical counterpart
- Counter part is executed by the purchase, original is executed by the vendor
- Parties are contractually bound once signed/exchanged and the purchaser at this time acquires an unregisterable equitable interest in the land – **Tanwar Enterprises Pty Ltd v Cauchi 2003 HCA**
 - Therefore, able to go to equity to seek equitable remedy of specific performance of the contract

2. Settlement /Completion (transfer) – usually occurs 6 weeks after exchange

- Vendor delivers to the purchaser a signed **transfer** of the property, transferring property from vendor to purchaser, *normal to also give CT*
- Purchaser then pays the outstanding balance on the contract for sale – hands over cheque (most vendors will not transfer until payment is given)
 - NB: sensible vendors don’t transfer until payment
- Note: if transfer occurs, but payment isn’t completed, **the vendor has a “lien”** – an equitable interest in the land with respect to the unpaid purchase price)

3. Lodgement – usually occurs on the same day as settlement

- Purchaser should immediately lodge the transfer (accompanied by CT) with the RG
 - The settlement forms and the CT must match perfectly

4. REGISTRATION – apply ss 41, 42 and 43 of the Real Property Act (“RPA”)

- Once dealing has been lodged, the transfer will be registered, usually within 24 hours assuming the dealing is in registerable form, and the purchaser gets title

2. TORRENTS TITLE IS IMMEDIATELY INFEASIBLE (once registered) s 42, *Mayer v Coe*

Indefeasible priorities under Torrens Title System –

- Registered v registered
- Registered v unregistered
- Unregistered v registered

Indefeasibility of title, *Real Property Act ss 41- 43*

- **S 41** – title by registration
- **S 42** – title is indefeasible (undefeatable) once registered, subject to exceptions
- **S 43** – in TT presumption of correctness: you do not need to track/ascertain the history of the property and how previous owners got title, do not need to be concerned as to whether or not the registered owner was entitled to be so
 - OST says the person who you buy the property from must be the true owner and there must be no forgery, it is your responsibility to know

Rules of Indefeasibility –

- **S 41, 42:** A person registered in the 1st schedule is subject to whatever is registered in the 2nd schedule
- **S 39 (9):** Order of registration is central for persons claiming in the 2nd schedule
- **S 43:** Registered interests prevail over unregistered interests
 - Indefeasibility is immediate upon registration – ***Mayer v Coe (1968)***
 - A forgery is void and ineffective pre-registration but indefeasible post registration – ***Mayer v Coe***
 - Where a registered mortgage secures a forged loan agreement, the registered mortgage secures nothing – ***Perpetual Trustees Victoria v English [2010]***

Mayer v Coe (1968) – indefeasibility: fraud of 3rd party is no exception

- Mayer is registered owner who left CT with dishonest solicitor
- Solicitor represents to Coe that Mayer wanted a mortgage and misappropriates moneys. Mortgage is then registered in second schedule

Held

- Under TT, Coe had indefeasibility (*s 42 RPA*), and the mortgage was valid
 - Under OST the mortgage would have been void
 - If Mayer had sued before Coe was registered, Coe would have no title
- Fraud was of a 3rd party, thus, this did not constitute an exception to indefeasibility.

EXAMPLES OF INDEFEASIBLE INTERESTS IN THE REGISTER – You get registered you get title and title is according to what the registrar says

Bursill Enterprises Limited v Berger Bros HC – highlights the ambit of the registrar

- 2 adjoining two adjoining properties. An early TT property – there was a registered easement for the benefit of the neighbor which granted the neighbor passage
- The fine print of this easement also granted the neighbor exclusive rights to any building more than 12ft above the easement (build, do whatever he wanted above)
 - The neighbors find out about the easement and says it should be limited in scope to a normal easement since an easement could not ordinarily give rights such as those expressed

Held –

- Registered easement for benefit of neighbor as well as the exclusive right to possession above the easement was indefeasible because it was registered

Fels v Knowles (1906) 26 NZLR –

- A landlord holds the land on trust for beneficiaries, trust agreement said he could lease not sell. He issues a registered long-lease with option to purchase at the end of lease
- The trust said that this lease went against the trust, thus option was invalid
 - Note: a trust cannot hold the title/ cannot sell, to a property **RPA s 82**

Held – The option was indefeasible, because it was registered.

- Beneficiaries might have a cause of action against the trustee for breach of contract
 - Trustee, who didn't have write to sell property, only lease it, issues a registered lease with clause that gave tenant right to repurchase (didn't have power to grant option) – **Once it was registered, indefeasibility of title overrides trustee's lack of capacity**, so option to repurchase was indefeasible

Koteff v Bogdanovic (extends to properties as gifts) –

- A **promised** B her estate would be left to her upon death, but when she died the property was left to son, due to A's will.
- **S 42** enabled son to prevail as he had a **registered interest** so was indefeasible, even though received property by way of gift

State Bank of NSW v Berowra Water Holdings (1986) –

- SB holds BWH's mortgage and clerk calculates a wrong payout sum (less than required)
 - Sum is paid and discharge of mortgage is registered
- Held – Registration of a **discharge of mortgage** is binding even if made in error
- Bank may have a cause of action in debt, but the interest in land is dissolved.

3. IS THERE AN UNREGISTERED INTEREST –

An unregistered equitable interest is an interest enforceable in Equity by an order for specific performance – ***Tanwar Enterprises v Cauchi (2003)***

The interest of a purchaser arising from a contract for sale of land

- On exchange of contracts, an unregistrable equitable interest in the property is created

Mortgages created by the deposit of title deeds

- Where no mortgage in writing, there may still be an equitable mortgage where a financier lends money in consideration for the CT being deposited – ***Cooney v Burns***

An agreement to grant a mortgage

- Enforceable in a similar way to the right of a person who exchanged contracts but not yet transferred.

Oral leases for 3 years or less – 23 D

- **S 23 B** – Normally interests in land must be in writing
- **S 23 D** – Provides that a lease can be enforceable although it has been made orally provided 3 conditions are satisfied –
 - o The term of the lease is not greater than 3 years
 - o It is for market value rent
 - o The lessee has an immediate right to possession

Beneficiaries of interests held on trust by a trustee

- These interests need not be in writing
- Trusts may not registered owners/interest-holders

4. EXCEPTIONS TO INDEFEASABILITY – allows an unregistered interest to gain an interest

- Registered party has priority **unless** one of the exceptions to indefeasibility is relevant
- These exceptions apply when at least one party is registered – normal priority may lose if an exception is found

FRAUD EXCEPTION

Ss 42 ad 43 of RPA: fraud as an exception to indefeasibility of title, '*In the absence of fraud*'

General Principles –

- Must show/involves 'personal dishonesty' or 'some moral turpitude' brought home to the registered proprietor – ***Stuart v Kingston HC (1923)*, *Butler v Fairclough***
- Notice of itself (the interest) is not fraud – ***Wicks v Bennett*, *Leros v Terrara***
- There must be a casual link between the fraud and the registered interest – ***Bank of SA v Ferguson***
- Fraud includes the fraudulent acts of an **agent** – ***Breskvar v Wall***
- Fraud may be equitable fraud – ***Bahr v Nicolay***
- Fraud includes fraudulent misrepresentations **prior** to registration – ***Loke Yew v Port Swettenham***

****Note that fraud by a 3rd party** (not by registered interest/party to contract) is **NOT** fraud, where it was not carried out on one of involved parties' behalf/for their benefit – ***Mayer v Coe***

SHORT Rules –

1. Notice of the unregistered interest itself is not fraud – ***Wicks v Bennett*, *Leros v Terrra***
 - Even if knew of unregistered lease, if don't agree to be subject, not fraud – ***W v B***
2. A Fraudulent Misrepresentation/Assurance prior to registration is Fraud – ***Loke Yew v Port Swettenham Rubber Co:***
3. Fraud by 3rd party can be imputed (from agent to principle) – ***Breskvar v Wall***
 - Fraud cannot impute fraud by 3rd party where agent is on own 'frolic' – ***Schultz v Corwill Pty Limited***
 - If acting alone, fraud will not be imputed (contrast B v W to S v C)
4. Fraud must be actual, cannot be equitable or constructive– ***Assets Co v Mere Roihi***
 - Note – ***Bahr v Nicolay*** in one judgment allows for equitable fraud
5. Fraud includes misrepresentations perpetrated against the register general – ***National Commercial Banking Corp of Aust v Hedley***
 - But here must be a casual link between this fraud and the created interest – ***Bank of South Australia Ltd v Ferguson***

Expanded rules with cases:

1. Notice of the unregistered interest in not fraud – *Wicks v Bennett, Leros v Terra*

Wicks v Bennet

- Landlord subject to an unregistered lease: pre s 42(1)(d), short tenancy not in force
- Landlord sells to purchasers who have actual notice of the lease
- P gets registered and evicts tenant. Tenant argued that this was fraud.

Held:

- That purchaser had notice of the lease did not make him subject to it; did not make **assurance** prior to registration unlike case *Loke Yew*
 - Simply knowing about unregistered tenant and getting registered to evict them is not fraud. Could rely on indefeasibility to defeat the unregistered interest

Leros v Terara HC, affirmed Wicks

- Landlord was subject to 5-year lease, with 7 year option (Lease was **unregistered**)
- Tenant exercised 7 year option and landlord put property on market
- L purchased property on condition **he was not subject to the lease**
- Tenant argued he had notice of lease so was fraudulent
 - Vendor completes sale, transfers to purchaser who gets registered – purchaser settled and says not subject to the lease: knowledge but not agreed to be bound

Held –

- L was not fraudulent as had never agreed to be subject to lease – did not make **prior** assurance only have knowledge
 - *Bahr v Nicolay is distinguished because the purchaser in Bahr and Nicolay had agreed to be subject to Bahr, in this case there is writing showing that he does not agree to the subject*
 - No personal equity because there had been no agreement

2. A Fraudulent Misrepresentation/Assurance prior to registration is Fraud – *Loke Yew*

Loke Yew v Port Swettenham - APPLIES BAHR V NICOLAY, PRIOR TO IT!!!

- Eusope sells parcel of land to Loke Yew, who does not register
- Eusope sells rest of land to Rubber who convinces Eusope to transfer all land, **ensuring** they would recognize Loke Yew's interest (Rubber got **registered**)
- Rubber try to evict Loke Yew

Held: This was fraud – the fraudulent intent was formed **prior** to the purchase

- Rubber acted fraudulently in making a prior assurance they never intended to keep; were subject to LY's unregistered interest
 - Note difference from above in that was given more than notice – **made an assurance** prior to registration
 - Court must be satisfied that there was an **intention** not to keep it

3. Fraud by 3rd party can be imputed where an agent was acting on behalf of party –

Breskvar v Wall 1971

- B's were registered owners and borrowed money from Petrie (instead of signing mortgage, he convinced them to sign a blank transfer)
- P writes grandson (Wall) into transfer, as the recipient (became registered owner)
- W then transfers the property to Alban and lodges transfer
 - Alban does not know of the circumstances in which B transferred to Wall, likely believed it was legitimate. Before Alban registers, B Sue

Held –

- Held that the fraud of P was **imputed onto W**, since he acted as W's **agent**
- There was **fraud** and B's were reinstated into the register
- **NOTE** that B's could not succeed against A, since they were **more innocent (B signed transfer)**

4. Cannot impute fraud by 3rd party where agent is on own 'frolic' – *Schultz v Corwill*

Schultz v Corwill Pty Limited

- C owned a number of properties and she was giving her son the legal work
- She had left the title deeds with the son who forged a mortgage to borrow money from P. P really believed it was going to the mother and didn't know of the dishonesty.
 - The son then pocketed the money and then later on fraudulently discharges the mortgage without the money being paid
- P argues that the son's fraud should be imputed to the mum's company as an agent.

Held – son was not an agent. He was acting for his own interests not for the benefit of C

- HC held that Mr. Galea was acting on "a frolic of his own" which did not benefit the company/without the knowledge of the company

5. Fraud **MUST BE ACTUAL** cannot be equitable or constructive fraud – *Assets Co v Mere Roihi* – RELATES TO REGISTERED PERSON NOT KNOWING THERE IS FRAUD, NO EXCEPTION

Assets Co v Mere Roihi – MAY ARGUE WILFULL BLINDNESS, NEED EVIDENCE!

- NZ law prohibited certain types of land sales – Maori sold to Assets in breach of law (without approvals from board that law demanded)

Held

- Fraud must be actual and intentional fraud. It is not enough that it is breach of legislation – Assets Co did not have an "actual appreciation [knowledge] of dishonesty"

RECONSIDERED IN BAHR V NICOLAY* – one judgment allows for equitable fraud**

Bahr v Nicolay: ABOUT A CHANGE OF MIND BEFORE AND AFTER REGISTRATION

- The Bahrs registered owners of land were short on money
 - Transferred property/sold to Nicolay for \$32,000 à who got registered
 - Nicolay leased the property back to Bahr for 3 years with the option to repurchase for \$45,000 right up until the end of the lease period
- Before the 3 years is up, Nicolay on-sold the property to the Thompsons for \$42,000 who got registered on condition that they respect the B's (unregistered) repurchase option à Thompson asserted would respect this and confirmed to B's after purchase
- The house price goes up
 - The Bahrs (unregistered) go to exercise their purchase option
 - Thompson then changes his mind and said the option is no longer valid, said it was void, since they had a registered interest trumps an unregistered interest – argues indefeasibility

Held – Supreme Court held that Thompson was registered and thus his title was indefeasible

OVERTURNED in the High Court – when did the registered T first decide to renege

- Unanimously determined that the Thompsons, although the registered proprietors, were subject to the unregistered interests of the Bahr's

Mason & Dawson JJ (Minority): EQUITABLE fraud, not limited to time before registration

- Held that although notice of unregistered interest is not fraud and it must involve moral turpitude, there is a form of **equitable fraud** that falls within statutory concept of fraud (rejected Assets case) à **EXAMPLE LOKE YEW !!!**
- Not fraudulent misrep because intention to renege occurred after registration
- Having procured the transfer with the condition that he was subject to B, T could not renege promise even after registration on **an equitable basis**

- “The repudiation is fraudulent because it has as its object the destruction of the unregistered interest notwithstanding that the preservation of the unregistered interest was the foundation [...] underlying the execution of the transfer”

Wilson, Brennan and Toohey JJ (Majority) – PERSONAL EQUITY EXCEPTIOIN

- Disagreed and refused to extend fraud to situations where intention to renege on a prior assurance occurred after registration
- Not fraudulent to depart after registration from an assurance given prior to registration, where court is satisfied there was no **intention** prior to depart from it
 - Fraudulent intent must have been formed prior to registration and T had not intended to defraud when he got registered: did T intend to renege on Bahr before T got registered? Based on the facts, T did not have any intention

6. Fraud includes misrepresentations perpetrated against the RG – RELATES TO IF KNOW THAT SIGNATURE IS A FRAUD: BANK DOES NOT HAVE INDEFEASABILITY

National Commercial Banking Corp of Aust v Hedley, SC – does not need to be conscious

- Mr H goes to National Banking to negotiate mortgage, secured by property owned by him and wife (states that wife knew when she didn't)
- Officer approves, requires both to sign – H forged wife signature. Officer, unaware of the forgery, reports he witnessed both signatures (she wasn't there at the time)
- NAB then got registered in 2nd schedule as mortgagee. H unable to pay back money
- NAB goes to wife and says you owe money for mortgage for which she is unaware

Held:

- Would be fraudulent for the bank to rely upon its registered mortgage, in circumstances where the bank had passed off to the R-G as property witnesses a mortgage, which was known not to be properly witnessed
 - Applies where a registered interest lodged a dealing to R-G in the hope of having it registered but knew that the dealing did not comply with the **necessary formalities for registration**
 - Such an act would constitute fraud if it involved either an **intentional misrepresentation** to bring about registration, or **reckless carelessness** about whether formalities were satisfied
- Mrs H wasn't liable and mortgage was removed
 - In equity Mr H was held to a new mortgage for half the value.

7. There must be a casual link between this fraud and the created interest:

Bank of South Australia v Ferguson – MUST BE IN THE MIND OF PERSON DEFRAUDED!!

- F seeks to borrow money from bank, tells financial position accurately, loan disapproved
- Another officer falsifies financial details in order to get the loan approved
 - F knew at all times the exact amount that he was to be lent
 - F never knew the bank changed his figures to allow him to borrow
- After, F can't meet mortgage repayments on the bank's registered mortgage so bank wants to repossess. F's lawyers discover officer's fraud (to the Bank) and allege fraud

Held:

- The fraud was between the Bank and the Officer, and F was not subject to the fraud
 - No causation of loss when F only ever thought he was borrowing a certain amount and that was all he could borrow – fraud did not cause loss
 - Approval of the loan did not constitute financial advice that F could afford repayments.
- "For fraud to be operative, must operate in mind of the person said to have been defrauded."

FRAUD AND MORTGAGES

WHETHER REGISTERED PERSON NEEDS TO BE SUBJECT TO AN INCREASED MORTGAGE

Issue where there is fraud when the bank witnesses a forgery and then attests to its validity by making a false statement

- **Grigic v ANZ** – Court of Appeal found that the bank was not liable for fraud as the bank officer did not know that the mortgagee was an imposter
 - Bank officer attested that he had witnessed the registered proprietor sign a mortgage with the false statement that he knew the mortgagor personally – *the mortgagor was not the registered proprietor*
- FRAUD MUST BE ACTUAL not constructive – **as per Asset's Co (it was not actual)**
 - NOTE: If bank's suspicions were alerted, may be alleged that they registered with wilful blindness, and obtained from inquiry for fear of truth: A type of personal dishonesty as per s 42
 - HOWEVER, mere fact that a mortgagee has registered to protect their interest is not enough to find wilful blindness – **Young v Hoyer**
 - **Assets co** – Do not need to be aware of legislative impediment which should have disentitled the person now registered from being registered
- IF BASED ON FACT NOT ACTUAL, DISTINGUISH NAB V HEDLEY! **HOWEVER à**
- IF BANK KNOWS signature was not properly witnessed and still registers, then there is fraudulent misrepresentation perpetrated against the RG – **NAB v Hedley**
 - Found fraudulent for bank to rely upon its registered property even though it knew the dealing did not comply with the necessary formalities for registration
 - Involved either *intentional misrepresentation to bring about the registration, or reckless carelessness about whether formalities were satisfied!!*

Other Authorities –

- In cases where a registered mortgage has become registered through the failure of another, a mere failure to discover the forgery is not fraud – **Ratcliffe v Watters**
- No fraud unless the registered proprietor has acted with an intention to deprive the defrauded party of an interest – **Russo v Bendigo Bank**
 - **Bank of SA v Ferguson**: HC refused to find fraud where there was a forgery which had no effect on registered proprietor and which was committed to speed up the bank's internal processes - FOR FRAUD TO BE OPERATIVE, MUST BE IN THE MIND OF THE PERSON SAID TO HAVE BEEN DEFRAUDED