

TOPIC 3 – INDEFEASIBILITY OF TITLE

Objectives of Torrens system

- Registration under the Torrens system has the following **objectives**, namely to:
 - provide a register from which persons who proposes to deal with land can discover all the **facts** relevant to the title;
 - ensure that a person dealing with land which is registered is not **adversely** affected by any **defects** in the vendor's title which do not appear on the register;
 - guarantee the **conclusiveness** of the register; and
 - provide adequate **compensation** to any person who suffers a loss as a result of this guarantee

Indefeasibility of title

- The Torrens system operates upon the fundamental principle that registration confers an "indefeasible title" to the registered proprietor
- Meaning of "Indefeasible title" under Land Titles Act (Tas) s 40:
 - "subject only to such estates and interests as are recorded on the folio of the Register or registered dealings evidencing title to land"
- Indefeasibility of title is the **immunity** from attack by an dverse claim to the land which the registered proprietor enjoys (*Frazer a v Walker*).
- Indefeasibility refers to the fact that every time a title is registered, it is created **anew** and acquires a greater level of protection
- It means that at the time of registration, the registered proprietor of an interest in land receives **unassailable** rights to the land which are only **subject** to other interests registered on the title (encumbrances) and statutory or non-statutory exceptions
- Upon registration of an interest it automatically acquires **statutory protection**
- Title is not historical or derivative (ie it does not derive from your predecessor or is not based on historical events. It is created anew.
- Title is a product of registration

Meaning of indefeasibility

- A registered holder will not be affected by the **doctrine of notice** – save fraud (**s43**) – and the **nemo dat non habent rule**

*"The object is to save persons dealing with Registered Proprietors from the trouble and expense of going behind the register". **Gibb v Messer 1891***

The technical meaning of indefeasibility is **indestructibility** or inability to be made invalid:

1. This is true insofar as it applies to the provisions of the Torrens system:
 - Upon registration under the Torrens system, an interest holder cannot have his or her interest defeated by an unregistered interest, even where the interest holder registers with notice of the existence of the unregistered interest- it is indefeasible
2. This is not true insofar as it does not mean that the registered interest is completely indestructible:
 - a) The security that the Torrens system provides is not **absolute**: all registered interest holder will take subject to those **encumbrances** which have already been, or which may in the future be registered on the title;
 - An encumbrance is any right or interest that exists in someone other than the owner of an estate and that restricts or impairs the transfer of the estate or lowers its value. Ex: an easement, a lien, a mortgage and unpaid taxes.
 - The encumbrance must be recorded in folio/a paramount interest to restrict a Torrens estate.
 - b) A registered interest holder is fully capable of alienating his or her interest and, once a subsequent transfer of the interest is registered the subsequent registration will **defeat** the prior registration; and
 - c) The indefeasibility of title conferred upon a registered interest holder is subject to an extensive range of statutory and non-statutory **exceptions** in all states

INDEFEASIBILITY UNDER THE TORRENS SYSTEM IS A RELATIVE CONCEPT:

- it refers to the fact that if a title is examined or attacked at a given point of time, it cannot be defeated or annulled
- it does not mean that the title can never be defeated
- The effect of indefeasibility is set out in the so-called **paramountcy/indefeasibility provisions** of the Torrens legislation of each State
- Paramountcy provisions is the foundation of the Torrens system
- The overall **effect** of the of the indefeasibility is described and **not indefeasibility** as such
- Provisions ensures that a state guaranteed title is acquired subject only to registered interests and statutory and non-statutory exceptions

PARAMOUNTCY PROVISIONS

The statutory provisions which, in combination, have conferred the indefeasible status upon a registered interest holder are known as the “paramountcy provisions.”
In TLA (Vic):

- S 40: **effect** of registration;

- S 41: certificates of title are **conclusive** evidence of title;
- S 42: **conferral** of indefeasible title upon registration;
- S 43: abolition of the **doctrine of notice**; and
- S 44: the effect of **fraud**
- Paramountcy provisions represent the core of the Torrens legislative provisions in each State
- Provisions basically provides three forms of **protection**:
 - a. Priority over unregistered rights
 - b. Protects registered proprietors from the effect of notice
 - c. Protection from interference with possession

Paramountcy provisions in detail:

S 40: instrument not effectual until registered

*s 40(1): "Subject to this Act no instrument **until registered** as in this Act provided shall be effectual to create vary extinguish or pass any estate or interest or encumbrance in on or over any land under the operation of this Act, but upon registration the estate or interest or encumbrance shall be created varied extinguished or pass in the manner and subject to the covenants and conditions specified in the instrument or by this Act prescribed or declared to be implied in instruments of a like nature".*

**s 40(2) has been repealed

Meaning of s 40(1)

- Strict reading: no interest can exist prior to registration (unregistered interests not recognised by the system)
- Unregistered interest however do exist under TS
- Other provisions in statute recognises unregistered interests
- Denial of the effect of a right until registration does not touch whatever right is behind it (*Barry v Heider*)
- Section 40(1) does not preclude the existence of unregistered interests but merely sets out where capable of being registered, the benefits of registration will not be conferred until the instrument is actually registered
- Registered interest is subject to covenants/conditions in instrument or prescribed by the TLA or implied in a similar interest
- Conclusion of contract or execution of a deed will not create a property right in TS.

S 41: CERTIFICATE TO BE CONCLUSIVE EVIDENCE OF TITLE

*“No folio of the Register under this Act shall be impeached or defeasible by reasons or on account of any informality or irregularity in any application or instrument or in any proceedings previous to the creation of the folio or the making of any recording on it; and every folio of the Register shall be received in all courts as **evidence** of the particulars recorded in it and all the recordings of those particulars in the Register, and **shall be conclusive evidence** that the **person** named in the folio as the proprietor of, or having any estate or interest in, or power to appoint or dispose of, the land described in the folio is seised or possessed of that estate or interest or has that power.”*

Meaning of s 41

- Prior irregularities does not make present title indefeasible
- Folio is evidence of the recordings in it as well as recordings of that particulars in register
- S41, the evidentiary provision, sets out every Crown grant or certificate of title is to operate as conclusive evidence of proprietorship existing in a particular folio of land
- Section 41 endorses the fact that Registrar provides conclusive evidence of title
- Prospective purchasers can rely upon the accuracy of the register

S 42: ESTATE OF REGISTERED PROPRIETOR PARAMOUNT

*S 42(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.”

Effect of s 42(1)

- This is the “general rule” of indefeasibility

- The effect of s 42(1) may be summarised as follows, namely that:
- Common law priority rules are abolished if interests
- The registered proprietor acquires a guaranteed statutory title and will only be subject to those encumbrances **actually noted** /recorded on the folio of the Register
- Registered proprietor is free from other encumbrances
- Once registered, the registered proprietor will have priority over the land despite the existence of other interests
- **Fraud** (of registered proprietor) will **vitiates** (extinguish) the priority of a registered proprietor: registration was obtained by proprietors own fraud
- The exact nature of the fraud is not described or elaborated

Meaning of proviso to s 42(1)

- The title will be subject to the exceptions set out in sub-ss (a) and (b):
 - a. The prior folio or certificate of title exception applies where there are two folios or certificates in existence at the same time in respect of the same land.
 - Indefeasible title will not be given if the same land is given to a previous proprietor under a prior folio
 - The “paramountcy provision” protecting the **first registered proprietor** has priority over the “indefeasibility provision” of the second registered proprietor.
 - b. Indefeasible title will not be given if the land is to be included by **wrong description** and the proprietor is not a purchaser for value or has not derived title through such purchaser

S 42(2) INDEFEASIBLE TITLE SUBJECT TO EXCEPTIONS:-

“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;

*(f) any unpaid land tax, and also any unpaid rates and other charges which can be discovered from a certificate issued under section three hundred and eighty-seven of the **Local Government Act 1958**, section 158 of the **Water Act 1989** or any other enactment specified for the purposes of this paragraph by proclamation of the Governor in Council published in the Government Gazette*

notwithstanding the same respectively are not specially recorded as encumbrances on the relevant folio of the Register”.

Meaning of s 42(2)

- Section 42(2) provides a further exception to the primacy of the registered proprietor's title as established in section 42(1)
- Where an interest is classified under sub sections (a)-(f), it is described as a **paramount interest** and all registered interests must take subject to paramount interests
- PARAMOUNT interests (s 42(2)(a)-(f)) - these interests, although even possibly unregistered, are 'superior' to interests that are registered.
- Paramount interests are exceptions to indefeasibility of registered title
- Paramount interests remain enforceable against all registered interest holders despite the fact that they have not been registered on the folio

In addition to paramount interests, there are other exceptions or circumstances that can 'penetrate' the indefeasibility: These are:

- **FRAUD** - where fraud is committed by the registered interest holder (principle of immediate indefeasibility);
- **IN PERSONAM**- where it can be shown that there was some contractual promise or undertaking by the registered party vis-a-vis the unregistered party.

- **INCONSISTENT LEGISLATION**- where legislation enacted after the Torrens legislation is inconsistent with the Torrens legislation, the later will prevail
- **VOLUNTEER** - where the registering party acquires the interest for no consideration (e.g. bequeathed in a will).

S 43: PERSONS DEALING WITH THE REGISTERED PROPRIETOR NOT AFFECTED BY NOTICE

- *“Except in the case of fraud no person contracting or dealing with or taking or proposing to take a transfer from the registered proprietor of any land shall be required or in any manner concerned to inquire or ascertain the **circumstances** under or the **consideration** for which such proprietor or any previous proprietor thereof was registered, or to see to the application of any purchase or consideration **money**, or shall be affected by **notice** actual or constructive of any **trust** or **unregistered** interest, any rule of law or equity to the contrary notwithstanding; and the knowledge that any such trust or unregistered interest is in existence shall not of itself be imputed as **fraud**.”*

Meaning of s 43

- S 42 is reinforced in its effect by s 43.
- Except in case of fraud, a person dealing with register is not required to ascertain the circumstances under which the proprietor/previous proprietor was registered
- A person dealing with the register is also not effected by notice of any trust or unregistered interest
- The aim of s 43 is to abolish the common law doctrine of notice
- As soon as a purchase is registered, the purchaser will take free from any outstanding unregistered interest, even if he or she has notice of its existence prior to registration.
- Mere knowledge that a prior interest existed will be insufficient to constitute such fraud
- Affords a greater level of protection than under general law land: the registered holder may enforce the title, even where they took title with notice of existence of previous title

S 44: CERTIFICATES ETC VOID FOR FRAUD – AGAINST THE PERSON DEFRAUDED

S 44(1): “Any folio of the Register or amendment to the Register procured or made by fraud shall be void as against any person defrauded or sought to be defrauded thereby and no party or privy to the fraud shall take any benefit there from.”

Meaning of s 44(1)

- The purpose of s 44(1) is to set out expressly that any transaction which is procured or made by fraud shall be void as against the person defrauded or sought to be defrauded, and no party who is privy to fraud shall take any benefit.
- Title of a fraudster is void as against the previous and the fraudster's title is defeasible
- Fraudster or person privy to fraud is targeted
- Fraud not defined
- Section 44(1) allows a person who has been defrauded to bring an action against the registered proprietor on the title

S 44(2)

- *“But nothing in this Act shall be so interpreted as to leave subject to an action of ejectment or for recovery of damages or for deprivation of the estate or interest in respect of which he is registered as proprietor any bona fide purchaser for valuable consideration of land on the ground that the proprietor through or under whom he claims was registered as proprietor **through fraud or error** or has derived from or through a person registered as proprietor through fraud or error; and this whether such fraud or error consists in wrong description of the boundaries or of the parcels of any land or otherwise howsoever.”*

Meaning of s 44(2)

- **Registered proprietors that acquired their rights in good faith** and for value are not subject to an action of ejectment or for recovery of damages or deprivation of an estate or interest on the ground that they have derived title from a person registered as a proprietor through fraud or error (ejectment section)
 - This is a qualification of **s 44(1)**- the **fraudster cannot benefit**- a person acting in good faith is protected (a bona fide third party)
 - A is registered proprietor- (bonafide purchaser for valuable consideration), the fraudster (who is also a solicitor) Mr X fraudulently registers the property in their name and subsequently it ends up in the hands of B (who acted in good faith and is bona fide). If you take ss 44(1) in the events between A and the solicitor Mr X, the solicitor cannot benefit from it and the transaction is void visa via the victim (A). The original victim cannot institute these actions against C the bonafide purchaser for value.

- **S 44(2)** qualifies the effect of **s 44(1)** by noting that nothing in the Act is to be read so as to deprive a bona fide third party purchaser for valuable consideration of an estate or interest
- On the wording of s 44(2), it seems that, even where the proprietor from whom the bona fide third party purchaser received the estate is proven to have been registered through fraud, the title of the bona fide third party purchaser will not be invalidated

Combined meaning of s 44(1) and (2)*****

- Section 44(1) and (2) are unique to the TLA (Vic)
- Their exact effect has been the subject of some debate.
- The combined effect of s 44(1) and (2) can be summarised as follows:
 - any registration of title shall be void as against any person who has been defrauded, and no party who is a subject to the fraud shall receive the benefit of registration. The solicitors title is defeasible.
 - The court will uphold the registration, even if acquired by fraud, if voiding the registration has the effect of interfering with an interest acquired by a bona fide third party purchaser
- Where a transaction has been tainted by fraud and that fraud has not been committed by the person seeking registration, section 44(1) is not applicable: “immediate indefeasibility” occurs upon registration.

Conclusion:

Indefeasibility has four features:

1. Registered title is **conclusive** regardless of a defect in prior transactions or the process of registration itself
2. Registered proprietor is subject to statutory and other **exceptions** to indefeasibility
3. Registered title has **priority** over unrecorded interests
4. Registered proprietor is not affected by actual or constructive **notice of any unregistered interest** and is under no obligation to enquire into the circumstances in which the previous registered titles were obtained

IMMEDIATE AND DEFERRED INDEFEASIBILITY

- Paramountcy provisions are subject to different **interpretations**
- In the debate between immediate and deferred indefeasibility the issue is whether **indefeasibility** should attach to a registered instrument if the proceeding **process of transfer** is **flawed**

- One must distinguish between the **process of transfer** (executing registrable documents) and **process of registration** (by Registrar)
- Is indefeasibility obtained **immediately** upon registration of the **flawed transaction** or is it deferred to one transaction after the flawed transaction?
- Example: A, the registered owner of Blackacre, leaves his certificate of title with his solicitor S for safekeeping. S forges A's name to a transfer of land in favour of B. The transfer is registered and B becomes the registered owner. A and B are both innocent. (Does B have indefeasible title or can A maintain an action to recover his land?) B subsequently transfers to C and C became the registered owner. (Does only C acquire indefeasibility?)
- Issue: Whether indefeasibility is acquired **immediately** upon registration subject only to fraud committed or brought home to the registered proprietor or whether defeasible title is deferred where the transaction is tainted by fraud or flawed
- The **answer** depends on whether immediate/deferred indefeasibility is adhered to
 - ANSWER
 - A, the registered owner of Blackacre, leaves his certificate of title with his solicitor S for safekeeping. S forges A's name to a transfer of land in favour of B. The transfer is registered and B becomes the registered owner. A and B are both innocent. B subsequently transfers to C and C became the registered owner.
 - Note: B has become registered under a void instrument because of the forgery. C took under a valid instrument
 - On the theory of **immediate indefeasibility B's** title is indefeasible.
 - On registration a registered proprietor **immediately** acquires an indefeasible title (unless statutory fraud has been committed or brought home to registered proprietor)
 - On the theory of **deferred indefeasibility B'** title is not indefeasible: defeasibility is deferred to one transaction away from the problem transaction. **C's** title would be indefeasible and would not be subject to attack by A.
 - Registered proprietor will have indefeasible title **deferred** in circumstances where the transaction has been affected by fraud which may not have been committed or brought home to the registered proprietor

There are two approaches: -

1. Immediate indefeasibility

- Distinguish **process** of transfer (executing registrable documents) and process of registration (by the Registrar)
- Immediate indefeasibility means that a **proprietor is protected** as soon as his/her title is registered, regardless of the **invalidity** of the process of transfer or the defects in the transferor's title
- Upon registration the title of the registered proprietor is immediately indefeasible
- Immediate indefeasibility means that upon registration based on an **invalid document** the registered proprietor is entitled to the same priority as any other property right
- **A bona fide purchaser** for value whose interest becomes registered obtains good title (immediate indefeasibility) even where the transaction is affected by **fraud**
- Greater credence is given to the **registration provisions** than to the fraud provisions
- Immediate indefeasibility favours the conferral of absolute title upon registration by a bona fide purchaser unless a clear **actual fraud** committed by the person seeking registration can be established
- Fraud can only **set aside** the title of the registered proprietor where the registered proprietor was clearly involved in fraud
 - Torrens system is all about certainty and the RP will always retain title unless there is fraud involved
- The mere fact that the transaction is **tainted by fraud** is insufficient

2. Deferred indefeasibility

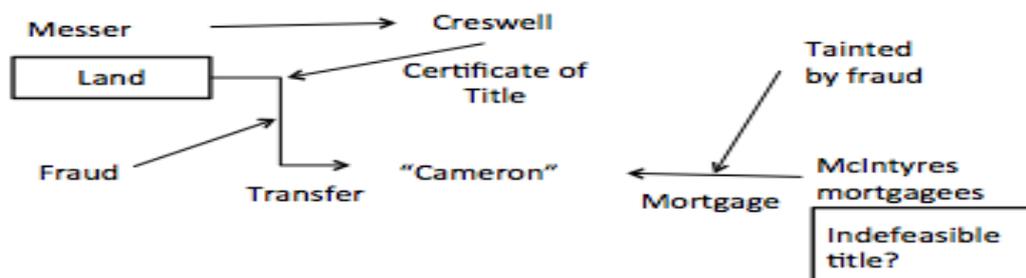
- Under deferred indefeasibility, if the instrument of the transferor is a nullity (forged signature – before registration), the transferee is unable to defeat a claim by the true owner
- Indefeasibility is deferred to **one transaction away** from the problem dealing
- Indefeasibility is deferred where the transaction creating the registration is **tainted by fraud**, even though fraud was not actually committed by the registered proprietor
- Rationalised on the ground that a proprietor should not be allowed to obtain a **benefit** from a fraudulent transaction
 - The register only gives protection to real people and so if a fictitious person is involved then they should not be afforded the same protection
- **Fraud provisions** are given greater credence than the registration provisions
- Thus, under deferred indefeasibility a bona fide purchaser whose interest becomes registered under a forged or void title will not obtain a good title, although protection may be given to a subsequent registered bona fide purchaser

- Deferred indefeasibility means that registration can be **cancelled**, but the cancellation will not affect the indefeasibility of any subsequently registered property right

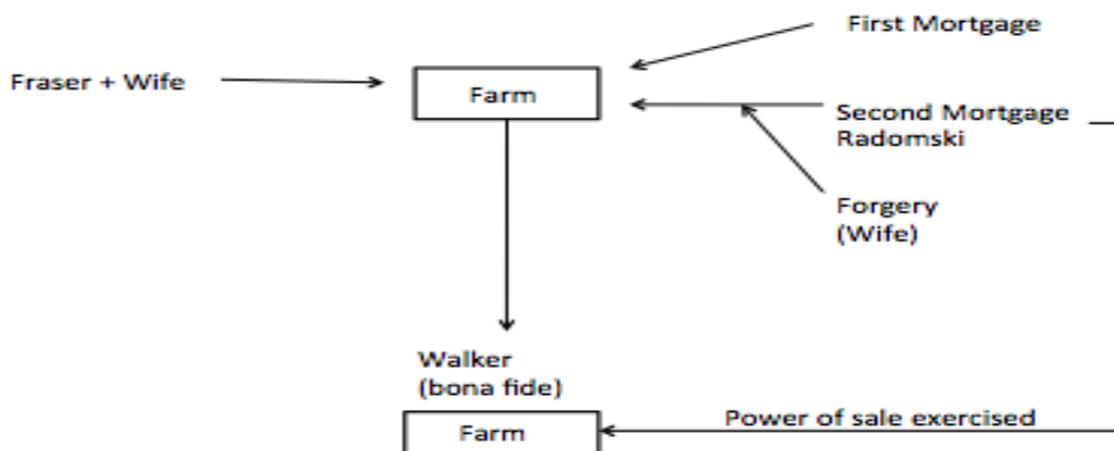
Fictitious person exception

- A fictitious person is an exception to immediate indefeasibility
- It has been **held** where a person transacts with a fictitious person (person made up as part of fraudulent scheme or who does not exist at all), any subsequent registered title will be deferred. If it is a fake person on the register the person will not be protected.
- Rationale: system will only confer protection on a person who has actually derived title from a real person existing on the register (thus a form of deferred indefeasibility)

Gibbs v Messer



Frazer v Walker



Gibbs v Messer (pc) (deferred indefeasibility / fictitious person exception)

FACTS:

- Mrs Messer was the registered proprietor of land. Messer's solicitor was Mr Creswell. Creswell forged a transfer to a fictitious person, "Hugh Cameron". (Registered proprietor did not exist).
- Creswell then purported to act on behalf of Cameron and obtained a loan from the McIntyres. Loan was secured by a mortgage registered over the land of Messer. The mortgagees acted in good faith in registering the mortgage. Creswell absconded with the mortgage moneys.
- Mrs Messer sought to have her name reinstated on title, without the land being subject to the mortgage of the McIntyres.
- Mortgagees claimed that they had an indefeasible title which could not be set aside by the fraud in the transaction

ISSUE:

- Whether the McIntyres held an indefeasible title in mortgage given that registration had occurred pursuant to a fraud involving a fictitious person
- Messer was successful in the application. The PC ordered that her name be restored to title and decided that the mortgage did not enjoy indefeasibility, because it was provided for a non-existent person.

Indefeasibility was to be deferred.

HELD:

- The protection afforded by statute to persons transacting on the faith of the register is limited to persons actually dealing with and derive a right from a proprietor whose name is upon register.
- Those who deal not with the registered proprietor, but with a forger who uses his name, do not transact on the faith of the register
- Those persons cannot by registration of a forged deed acquire a valid title in their own person
- However, the fact of their being registered will enable them to pass a valid right to third parties who purchase from them in good faith and for onerous consideration (**deferred indefeasibility obiter**)
- Hugh Cameron was a myth having no existence: could not execute a transfer nor a mortgage. McIntyres must have understood Creswell and Cameron to be distinct individualities whereas this was not the case
- Mortgage of the McIntyres is a nullity: did not deal with a registered proprietor: rights under null deed not indefeasible
- Lord Watson: no indefeasibility. Fraud in transaction + dealt with forger not real person.

'The McIntyres cannot bring themselves within the protection of the statute, because the mortgage which they put upon the register is a nullity. The result is unfortunate, but it is due to their having dealt, not with a registered proprietor, but with an agent and forger, whose name was not on the register, in reliance upon his honesty.'

Comment:

Decision appears to be:

- Either an instance of "deferred indefeasibility" where the transaction is tainted by fraud or
- An unusual exception, namely a registered title holder cannot claim the protection of indefeasibility where they have dealt with a fictitious person rather than the registered proprietor
- If the latter, the registered title holder can only claim indefeasibility if one takes transfer from a real person
- **Decision no longer followed but has never been overruled**

With regard to *Gibbs v Messer*: It is an open question as to whether it is an historical anomaly or a genuine exception to the principle of immediate, indefeasibility. **But it has not been followed nor overruled.**

FRASER V WALKER (PC) (IMMEDIATE INDEFEASIBILITY)

FACTS:

- Mr and Mrs Fraser were registered proprietors of land. Mrs Frazer borrowed money from the Radomski's, providing her with a (2nd) mortgage over the land. In achieving this, she forged her husband's signature (void). When the money was not repaid under the 2nd mortgage, the Radomskis exercised their power of sale and sold the land to Walker. Walker became the registered proprietor of the land. Mr Frazer resisted registration by arguing that the mortgage was a nullity as his name was forged on the mortgage documents.

ISSUE:

Could the mortgage be set aside given the mortgage transfer was void through forgery?

PC HELD:

- Upon registration of the mortgage, the mortgagee obtained an indefeasible title
- It was held that title of the Radomski's was an indefeasible transaction from the time of registration
- Radomski's took without fraud and the fact that the mortgage was a void document at common law did not affect the indefeasibility of their title
- PC endorsed immediate indefeasibility
- ***Gibbs v Messer* was distinguished** – bona fide purchaser taking from a fictitious person and a bona fide purchaser taking from a real registered proprietor.
- Although at common law, the mortgage was void as a forgery, registration cured this defect by enabling the binding of the mortgage to the land. Registration was sufficient to confer an unimpeachable title
- Indefeasibility does not deny the right of a plaintiff to bring a claim *in personam* founded in law or equity against a registered proprietor (see in later topics)
- Lord Wilberforce: Walker held indefeasible title. If no fraud then intention was to confer full title on registered proprietor subject only to *in personam* obligations

'Registration under the Land Transfer Act 1952 (TLA in Vic) confers on a registered proprietor a title to the adverse claims, other than those specifically excepted.

*In doing so they wish to make clear that **this principle in no way denies the right of a plaintiff to bring against a registered proprietor a claim in personam founded in law or in equity**, for such relief as a court acting in personam may grant.'*

- Mortgagee has passed title to innocent third party purchaser, who, upon registration, acquired protection of the legislation
- PC found in favour of Walker because his title as a registered bona fide purchaser for

BRESKVAR V WALL (HC)(IMMEDIATE INDEFEASIBILITY) NEED TO GO OVER

FACTS

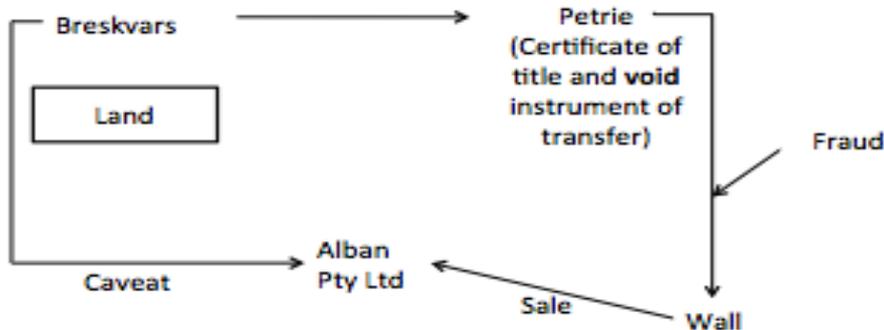
- Breskvars were registered proprietors of land. They obtained a loan from Petrie, providing him with the duplicate certificate of title and a signed blank transfer form
- Section 53(5) of the Queensland Stamp Act of 1894 provided that no transfer “shall be valid either at law or in equity unless the name of the purchaser or transferee is written therein in ink at the time of the execution thereof. Any such instrument so made shall be absolutely void and inoperative ...”
- Thus, due to these legislative requirements in Queensland, the transfer was void because the name of the purchaser was not inserted.
- Petrie subsequently fraudulently inserted the name of his grandson, Wall into the transfer.
- Wall became the registered proprietor and contracted to sell the land to Alban Pty Ltd and executed a deed.
- Before Alban registered their interest, the Breskvars had discovered what had gone on, and lodged a caveat against dealings with the land.
- Breskvars argued that they retained title because registration of a void instrument was ineffective to transfer interest to Wall

HELD:

- Invalidity of process of transfer did not have the effect of preventing the passing of title upon registration
- Torrens system is not a system of registration of title but a system of title by registration. The title which the certificate certifies is not historical or derivative
- It is the title which registration itself has vested in the proprietor
- Consequently, a registration which results from a void instrument is effective according to the terms of the registration
- The reason for voidness is irrelevant – the only relevancy of a property interest is registration of title
- The effect of Stamp Act upon memorandum of transfer is irrelevant to question whether certificate is conclusive of its particulars
- Upon registration of memorandum of transfer title was vested in Wall
- The conclusiveness of the certificate of title is definitive of title of registered proprietor
- “...there is immediate indefeasibility of title by registration of the proprietor’s named in the register”
- **Held that although Wall was party to fraud, this simply meant that his title was defeasible. If he had not been a party to the fraud, his interest would be immediately indefeasible**
- Wall became the registered proprietor when he registered his instrument. His involvement in the fraud deemed his registered title defeasible. Given he had registered title, he was still able to create a valid equitable interest in a third party.
- As the Alban had not registered their instrument, they were not registered proprietors.

- Actually the decision involved a dispute between unregistered interests of Breskvars against equitable interest of Alban under the contract of sale. Breskvars has the right to sue and recover the land and have the register rectified.
- As the Breskvars had armed Petrie with the power to deal with land as owner and thus enabled him to transfer title to Alban, interests of the Breskvars were postponed and resolved in favour of Alban:
 - Memorandum of transfer was executed without inserting name of purchaser
 - Handed over duplicate certificate of title
 - Authorised exercising of powers by mortgagee
- Lost priority to which their prior interest would have entitled because Breskvars armed Wall with means of placing himself on the register (approved **Abigail v Lapin**) – applied **Rice v Rice** test.

Breskvar v Wall



Barwick CJ: ‘The Torrens system of registered title of which the Act is a form is **not a system of registration of title but a system of title by registration**. That which the certificate of title describes is not the title which the registered proprietor formerly had, or which but for registration would have had. **The title it certifies is not historical or derivative**. It is the title which registration itself has vested in the proprietor. Consequently, a registration which results from a void instrument is effective according to the terms of the registration. It matters not what the cause or reason for which the instrument is void.’

Comments:

- If a registered proprietor receives transfer from a fraudulent transferor, and the transaction is tainted by fraud, Torrens legislation will confer immediate indefeasibility on the title of the subsequently registered proprietor if they have not been personally involved in fraud

Criticism:

- It has been argued that a more lenient approach should be taken and that title of registered proprietor should be set aside where the transaction was tainted by fraud, even though the registered proprietor was not directly involved with fraud.
- s 44(1): any folio procured or made by fraud is void (however, s 42(1) refers to fraud on the part of the proprietor)
 - S 44(1) include all kinds of frauds (**Chasild Pty Ltd Taranto**)
 - Fraud in s 44(1) should be the same as s 42(1), namely fraud committed by the registered proprietor (**Vassos v State Bank of SA**); thus immediate indefeasibility
 - i. **Vassos v State Bank of South Australia**, the bank obtained a mortgage over land owned by three tenants-in-common. One of the tenants-in-common subsequently obtained a substitute mortgage for a greater sum by forging

the signatures of the other two tenants-in-common. In this case the bank's mortgage was not obtained as the result of fraud, nor was there an exception under the *in personam* exception. On the *in personam* exception, Hayne J said this case was distinguishable from *Mercantile Mutual v Gosper*. He reaffirmed that more than a mere forgery was required. Even though the bank was negligent in the manner in which it took the forged mortgage, there was, at 333, 'no misrepresentation by it, no misuse of power, no improper attempt to rely on its legal rights, no knowledge of wrongdoing by any other party. ... Even if by making reasonable enquiries the bank could have discovered the fact of the forgery I do not consider that that fact alone renders its conduct unconscionable'.

- If fraud is not **committed by a registered proprietor s 44(1) does not apply**

******Accepted that immediate indefeasibility interpretation is consistent with the aims of the Torrens system*****

City of Canada Bay Council v Bonaccorso Pty Ltd NSWCA

- The CCB council sold two parcels of land and the purchaser registered the transfer of each lot. The council would have **lacked the power** to sell or dispose of the land if the land qualified as "community land" in terms of the Local Government Act, (s 45)
- On the facts it was found by the court that parcels of land were indeed "community land"
- Issue was whether purchaser obtained **indefeasible** title to land upon registration pursuant to the Real Property Act 1900 of NSW, notwithstanding **breach** of section 45 of the Local Government Act
- Found that **until** registration there was opportunity to **set aside** the transaction and prevent registration; opportunity was lost upon registration
- Held there was no implied repeal of indefeasibility provisions by s 45
- S 45(1) merely **deprives** a Council from power to sell "community land"; it does not declare transfer/registered transfer to be **void** nor does it render unlawful the acquisition of title to land by purchaser
- Held that the legislature did not **intend** to deny the transferee of community land the benefit of indefeasibility of title upon registration

Terms in registered instrument:

- Indefeasibility of what? All covenants of instrument?

- Although an instrument is indefeasible when registered not all the covenants in the instrument may be indefeasible
- Distinguish between **personal contractual obligations (defeasible) and land interests (indefeasible)** in instrument
- Indefeasibility only conferred on covenants which are integral to registered interest
- Not covenants which are merely personal
- Test used is 'touch and concern' test
- Registration validates those terms which **delimits** or **qualify** the estate or interest

MERCANTILE CREDITS LTD V SHELL CO OF AUS LTD - this refers to a REGISTERED LEASE

FACTS:

- Shell was granted a five year lease by Celtic Agencies. Within the five year lease there were a number of covenants allowing Shell to renew the lease. The lease was registered.
- Celtic Agencies granted a mortgage over the land to Mercantile Credits. When Celtic Agencies defaulted in making payments, Mercantile Credits sought to exercise the power of sale.
- Shell lodged a caveat prohibiting the registration of any dealing unless that dealing was to be subject to the renewals granted in the lease. Mercantile Credit sought a declaration that the renewals within the lease were not binding on it.

Held:

- **Barwick CJ** held that the title of the registered proprietor of the lease, including the interest in land derived from the covenant for renewal, became absolute and indefeasible
 - **Reasoned: A right of renewal within a lease shall receive the same indefeasibility protection as all other terms and conditions incorporated within the lease**
 - Legislation dealt with registrable instrument rather than registrable interest (right of renewal *per se* not registrable)
 - A promise to renew which is not contained in a memorandum of a lease is not registerable
 - If covenant to renew is part of a memorandum of lease it is indefeasible
 - *Once an interest defeated by subsequent registration is extinguished it cannot be revived against later proprietor: Leros v Terar*
- **Gibbs J:** right of renewal is so intimately connected with the term granted to the lease, which it qualifies and define, that it should be regarded as estate or interests which the lessee obtains under the lease. On registration it is entitled to same priority as the term itself.
 - **Reasoned:**
 - Drafters of Torrens legislation could not have contended the inconvenience that a right to renew could be defeated by a subsequent registration of a mortgage
 - Legislation itself supports the view that right of renewal should be protected

Extent of indefeasibility

- Scope of protection provided by registration extends to include **all associated** interests
- A registered lease will protect all properly created and **attached** covenants, including **options to renew**
- The Act deals with registrable **instruments** not with registrable interests
- A right to renew incorporated into the instrument creating the lease will receive the same level of **protection** from the Torrens system as would be conferred upon any of the provisions contained within the lease instrument
- Right to renew is so **intimately** connected to the term granted to the lessee, which it qualifies and defines, that it should be regarded as part of the estate or interest which the lessee obtains under the lease.
- On **registration** of the lease, the lessee is entitled to the same **priority** as the term itself
- Registration of a **mortgage** will not necessarily result in validation of all terms of mortgage
 - Covenant to pay specified amount of money is integral to mortgage: is indefeasible on registration of mortgage
- Distinguish between personal **contractual obligations** and land interests (limitation or qualification of estate/interest)

Conclusion

- Title is acquired by **registration**
- Registration is **separated** from process of transfer
- Upon registration of a document **title** is acquired by the transferee whatever the **invalidity** of the process of transfer
- If the invalidity of the process of transfer did not amount to **fraud** on the part of the registered transferee the title is **indefeasible**
- If the invalidity of the process of transfer involves **fraud** on the part of the registered transferee, title still vest in the transferee but it is **defeasible**
- A previous registered proprietor who has been defrauded is able to bring an **action** to recover title

Immediate indefeasibility

- Immediate indefeasibility is followed by the Australian courts
 - Immediate indefeasibility is a harsh blunt instrument resulting in the loss of title by the true owners through no fault of their own (Ex Mr Frazer)
- The innocent purchaser trumps the interest of the previous registered proprietor (Ex Walker)
- It, however, provides legal certainty
- Argued that immediate indefeasibility is indefensible and should be altered
- Argued that purchaser of land from a void instrument (such as forgery) should be compensated by money rather than the owners
- Human rights consideration: present value judgement in favour of immediate indefeasibility may come under scrutiny