

TOPIC 2: INDEFEASIBILITY & EXCEPTIONS

1. CONSEQUENCES OF REGISTRATION

1. **Legal title is transferred** upon registration and not sooner: **ss181/182 LTA**
2. Instruments are **accorded priority according to the date of lodgement: s178 LTA**
3. Registered instruments operate as deeds and therefore bind the parties **without the need for consideration: s176 LTA; Cantrick v Thompson**
4. Section 179 LTA implies that the particulars of registered instruments are **conclusive evidence** of:
 - a. The registration of the instrument;
 - b. When it was lodged and registered;
 - c. The content of the instrument;
 - d. All terms stated or implied by the LTA
5. Registration confers **indefeasible title: ss184 and 185 LTA; Frazer v Walker**

Note:

Registered proprietor of a lot means a person recorded in the freehold land register as a proprietor of a lot: **Sch 2 LTA**

Proprietor of a lot means a person entitled to an interest in a lot, whether or not the person is in possession: Sch 2 LTA.

2. INDEFEASIBILITY GENERALLY

- Indefeasibility means that the registered proprietor of a lot holds their interest subject only to other registered interest but free from all other interest: **s184(1) LTA**
- The registered owner is **not affected by actual or constructive notice** of an **unregistered interest: s184(2)(a) LTA**
- The registered proprietor of a lot is only liable to proceedings brought by a registerable proprietor of an interest affecting the lot: **s184(2)(b) LTA**
- The effect of registering an interest is to extinguish all unregistered estates or interests, which, but for registration, would have conflicted with the proprietor's estate or interest unless one of the **exceptions to indefeasibility** applies: **Leros Pty Ltd v Terara Pty Ltd**

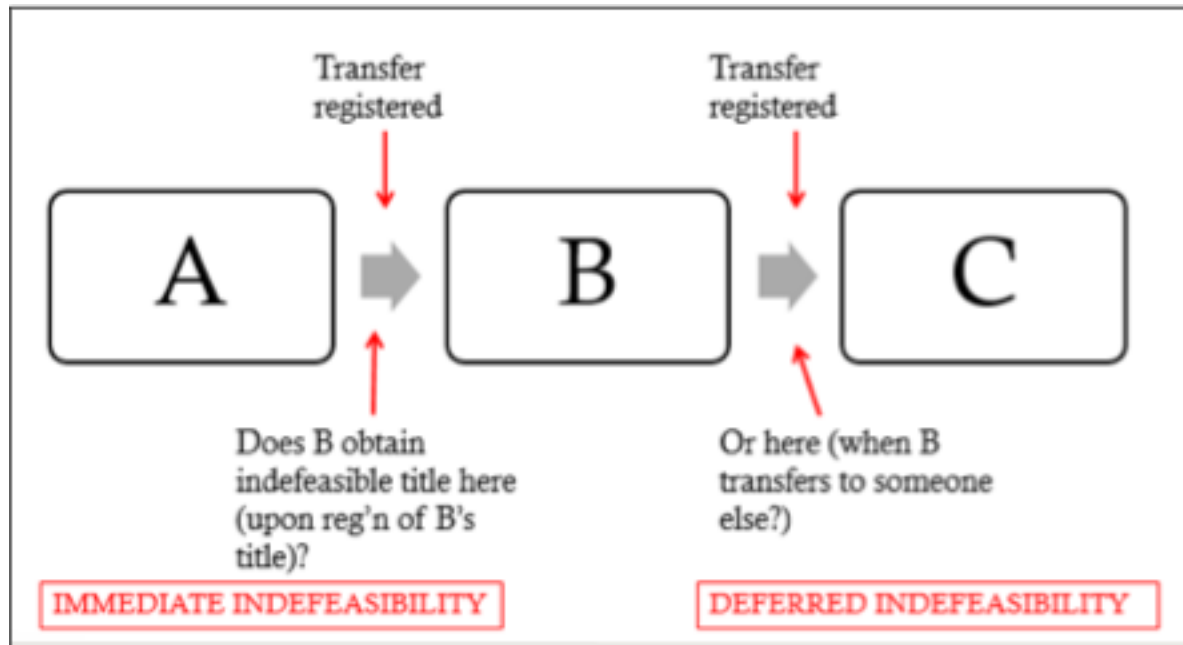
3. DEFERRED VERSUS IMMEDIATE INDEFEASIBILITY

- The determination of when indefeasibility vests in the registrant is fundamental to the concept of indefeasibility.

Deferred Indefeasibility – means that, even in the absence of fraud, the title of a registered proprietor who acquired his/her interest by a void or voidable

instrument **remains open to attack** (indefeasibility deferred) until the moment of time when a transfer to another bona fide purchaser for value is registered.

Immediate Indefeasibility – means that, a bona fide registered purchaser for value acquires indefeasible title **immediately upon registration** even if the instrument under which the registration occurred **was void or voidable**.



3.1 AUSTRALIAN POSITION

- The High Court initially favoured deferred indefeasibility, with the rationale being that the burden of ascertaining whether a person represents himself to be the RP is really the RP should lie upon the person who dealt with him/her: **Clements v Ellis**
- However the High Court in **Breskvar v Wall**, favoured immediate indefeasibility unless an exception is present: **Breskvar v Wall** (affirming the PC decision in **Frazer v Walker**)
- Subsequent Queensland cases have generally applied immediate indefeasibility: **Elroa Nominees v Registrar of Titles**.

3.1.1. FICTITIOUS TRANSFEREE EXCEPTION TO IMMEDIATE INDEFEASIBILITY

- Possible exception to applicability of **immediate indefeasibility** arises in the case of a 'fictitious transferee' which is rooted in the PC decision of **Gibbs v Messer** and was endorsed in subsequent PC decision **Frazer v Walker**
- **Gibbs v Messer** has been heavily criticised though never expressly overruled and arguable does not apply in Queensland: see e.g. **Khan ATF Khan Family Trust v Hadid**. This is because the decision was based upon the reasoning that indefeasibility arises only where a RP deals with a real RP and there is no statutory provision in the LTA which supports this

view. Applying current authority, if same facts occurred today McIntyre's mortgage would be indefeasible by registration.

CASES

Frazer v Walker – Mr and Mrs F were the RPs of farmland in NZ. Mrs F negotiated mortgage with Mr and Mrs R. Mrs F forged Mr F's signature. No repayments made and Rs exercised power of sale to Mr Walker. Mr Walker became RP of land.

Held (PC Decision): Immediate indefeasibility applies. Per Lord Wilberforce: 'registration is effective to vest and divest title and to protect RP against adverse claims' at 584.

Breskvar v Wall – Mr and Mrs B were RPs of property in Acacia Ridge and borrowed money from rogue (Petrie), security involved transfer of land but was void by failing to write the name of the transferee per the Stamp Act 1894 and Petrie put in name of grandson. Wall registered transfer. Petrie sold land to Alban Pty Ltd bona fide for value. Mr and Mrs B lodged caveat before registration of transfer.

Held: immediate indefeasibility applies in Australia. Per Barwick CJ at 385

*The Torrens system of registered title of which the RPA 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.*

Gibbs v Messer – Mrs M was RP of land in Victoria and her husband had power of attorney. Mr M's solicitor, Cresswell, forged a transfer by Mr M to a **fictitious person**, Mr Cameron. Cresswell registered the transfer on behalf of the fictitious Mr C and granted a mortgage to the McIntyres who advanced the mortgage funds to Cresswell. The mortgage was registered.

Held (PC Decision): Mrs M's right to have the transfer to the fictitious Mr Cameron was never questioned. Even though the McIntyres were bona fide, their mortgage was a nullity and their title defeasible.

4. EXCEPTIONS TO INDEFEASIBILITY

Sections 184 and 185 LTA make it clear that the RP holds the interest subject to registered interests affecting the lot: s184(1), and does not obtain a benefit of s184 indefeasibility where an exception arises: s185(1).

