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**Topic 1: The Torrens System and the Land Titles Act**

- **Breskvar v Wall (1971)**- Barwick CJ: Not a system of registration of title but a system of title by registration

- **Purpose of Torrens Title System:**
  a) Should not be necessary to investigate the history of the registered proprietor's title
  b) Everything that can be registered should give, in the absence of (common law) fraud, an indefeasible title
  c) That an interest in land that is registered under the system should either be secure, or else monetary compensation for that interest should be paid.

**Caveat:**

- Issued to protect any interest. Title cannot be granted while this exists.
  Asserts protection over an unregistered interest
- A caveat doesn't enlarge any rights, only protects those existing if there are any: **Butler v Fairclough (1917)**
- Failure to lodge a caveat won't automatically result in the loss of an interest unless it is possible to point to any other disentitling conduct

- **Bahr v Nicolay (No. 2) (1988)** Brennan J- A purchaser who takes with notice of an antecedent equitable interest, who becomes registered without fraud, takes free from that interest
- **S346 (1) PLA 1974:** A purchaser shall not be prejudicially affected by notice of any instrument, fact or thing, unless- (a) It is within the purchasers own knowledge or would have come into the purchasers own knowledge upon reasonable enquiry (b) It has come to the knowledge of the purchaser's solicitors/counsel, or would have if reasonable enquiries were made.

- **S184 (1) LTA:** 'A registered proprietor of an interest in a lot holds the interest subject to registered interests affecting the lot but free from all other interests.'
- **S181:** An instrument does not transfer or create an interest in a lot at law until it is registered.
- **S11A:** A mortgagee of an instrument must take reasonable steps to ensure that the mortgagor is identical with the registered proprietor
- **S176:** A registered instrument operates as a deed, doesn't require consideration.

- An interest is a right, power or privilege over, or in relation to, the land or other property.

- **Indefeasible Title: s46.** A certificate of title is conclusive evidence of the indefeasible title
**Topic 2: Equitable and unregistered interests in land:**

**Legal vs. Equitable Interests:**

- Legal title if registered, equitable title if unregistered.
- Nemo dat quod non habet: you cannot confer what you don’t have.
- Competing equitable interests: First in time has stronger right subject to exceptions e.g. disentitling or postponing conduct.

  Heid v Reliance Finance Co (1983): Mason and Deane JJ: It will always be necessary to characterise the conduct of the holder of the earlier interest in order to determine whether, in all circumstances that conduct is such that in fairness and in justice, the earlier interest should be postponed to the later interest.

- Latec Investments v Hotel Terrigal (1965): The right to have a transaction set aside because it was procured by mistake or fraud. As a mere equity, no competition will arise.

- Pilcher v Rawlins (1872): In a contract of sale to X giving equitable interest followed by a subsequent sale to Y who takes bona fide and for value without notice of the equitable interest the later registered charge will succeed.

- Perpetual Trustees v Smith (2010): The order in which caveats are lodged does not determine how they’re prioritised. It was not necessary for the retirees to caveat their interest in order to alert any future purchaser of their interest in the property, as their occupation was constructive notice. This would prevail even against a bona fide purchaser: Barnhart v Greensheilids (1853)

  - Occupation can be sufficient notice.
  - Therefore in a competition between their competing equitable interests the prior interest of the retirees would prevail: Rice v Rice (1853)

- Wilkes v Spooner: The Doctrine of Successive Effect. X buys land bona fide and for value, which is subject to an earlier equitable interest of Y. X then sells the land to Z who has knowledge of Y’s interest. Z takes title. Wont protect Y if procured by fraud or breach of trust.

- Leros Pty Ltd v Terara Pty Ltd (1992) Mason CJ, Dawson and McHugh JJ: It is an incident of the indefeasibility of title of the registered proprietor not only that he or she holds free from prior unregistered interests, except those specified in s68, but also that he or she has the capacity to transfer a title to the interest of which he or she is proprietor to a successor free from unregistered interests.

  - Prior legal estate will prevail over subsequent equitable interest unless some estoppel operates against the legal interest holder.

  e.g. legal owner is negligent and fraudster obtains the title certificate and mortgages the property: Northern Counties of England Fire Insurance v Whipp
Topic 3: Exceptions to Indefeasibility

#1 Fraud

- S184 (3)(b) LTA: A registered proprietor does not hold free of other interests if there has been fraud by the Registered Proprietor, whether or not there has been fraud by a person from or through whom the registered proprietor has derived the registered interest
- S187 the Supreme Court can make any order that it sees fit in cases of Fraud.

- Fraud:

Bahr v Nicolay (No. 2)(1988): Actual fraud, dishonesty or moral turpitude lie at the heart of the fraud provisions

   The mere fact that the plaintiff might have found out the fraud if he had more vigilant and had made further inquiries, which he omitted to make, does not itself prove fraud.
   A person presents for registration a document that is forged or has been fraudulently or improperly obtained is not guilty of fraud if he honestly believes it to be a genuine document, which can be properly acted upon.

b) Moral Turpitude: Latec Investments v Hotel Terrigal (1965): Kitto J: Designed cheating. Here the mortgagee exercised their power of sale selling it to a subsidiary at a below market price. Held there was a pretence and collusion in the conscious misuse of power.

c) Designed Cheating: Waimihia Sawmilling Co Ltd v Waione Timber Co Ltd: Object of transfer is to cheat a person of known existing right. Facts: No fraud acting on faith of existing judgement and registering interest.

- Notice of prior equity= equitable interest

- QCA Young v Hoger: Fraud can include wilful blindness, an absence from inquiry for fear of learning the truth. Must be causal link between fraud and the defrauded parties loss of an interest in the land. Mortgagee’s solicitor abstained from making enquiries to ensure that the mortgage document was genuine. QLD CCA said that the solicitor wasn’t guilty of actual dishonesty as there was no proof that he actually had a suspicion that the signatures had been forged and abstained from further enquiry despite such suspicion.

- Australian Guarantee Corporation v De Jager (1984): Bank employee knew signature wasn’t properly witnessed but didn’t know it was forged. Held to be fraud.
- Grgic v ANZ Banking Group Ltd (1994): Sons colleague impersonated his father in order to get a mortgage. Held there is not the slightest evidence that either the manage or the assistant were seeking to take unfair advantage of Mr Grgic Snr- a less than meticulous practice as to the identification of persons purporting to deal with land registered under the provisions of the Torrens statute does not constitute a course of conduct so reckless as to be a tantamount to fraud.

- Russo v Bendigo Bank (1993): Son in law forged signature on mortgage false witnessing by young law clerk. Held no fraud on the mortgagee's part as there needs to be a wilful and conscious disregard for the rights of other persons. It was not shown that she knew the significance of her attestation or even that the mortgage was to be submitted for registration.

- National Commercial Banking Corporation of Australia Ltd v Hedley (1984): Acting manager had falsely certified that a mortgage was signed in his presence by a mortgagor knowing that this mortgage was to be submitted to the registrar for registration. Fraud against registrar of titles.

- Hilton v Gray (2007): Mortgagees solicitors didn’t follow their internal procedures to detect mortgage forgery. Supreme Court held that the solicitors were acting honesty, if incompetently- they didn’t act fraudulently. Careless but not reckless. Incompetence does not equal fraud.

- Davis v Williams (2003): Applied De Jager, Hedley and Russo. The test for actions of employees which are not authorised by the employer the test is: Whether the connection between the employees duties and the wrongful act as within the scope of the employment.

- Bank of SA v Ferguson: Fraud must operate on the mind of the person said to have been defrauded.

- Loke yew v Port Swettenham Rubber Co Ltd (1913): Privy Council holds title defeasible for fraud due to fraudulent misrepresentation of position to induce a transfer of title.

- Amendments to LTA take effect after 6 February 2006:
  - S185 (1A): Registered mortgagees interest isn’t indefeasible if the registered mortgage failed to comply with s11A and was forged
  - S11A: Requires a mortgagee to take reasonable steps to ascertain the mortgagors true identity, to compile written record of such steps taken before lodging the mortgage for registration and to retain such for 7 years.
  - S185 (5): Requires mortgagee to prove compliance
  - S185 (1A): Loss of indefeasibility for non compliance with s11A
  - S189 (1)(ab): Loss of compensation for non compliance with s11A

- Fraud post registration: Supervening fraud: Bahr v Nicolay (No. 2) (1988): i.e. says they’ll recognise an unregistered interest and then refuses to do so post registration of title Mason Cj and Dawson J said that the fraud exception may
#2 In Personam Exception

Bahr v Nicolay (No. 2) (1988):

- Bahrs sold to Nicolay on the condition that the land would later be resold to the Bahrs. Nicolays sold it to the Thompsons. This agreement acknowledged the promise of the Nicolays to the Bahrs. Thompsons became registered proprietors and refused to sell back to the Bahrs. Did the Thompsons acquire indefeasible title?

- Mason CJ and Dawson J: Fraud includes fraud in obtaining a transfer or registration and dishonest repudiation of a prior interest, which the registered proprietor has acknowledged.
- The relevant clause of the Thompson Nicolay agreement created an express trust in favour of the Bahrs as third parties. The effect of the trust was that the Thompsons held the land subject to such rights as were created in favour of the Bahrs and in the alternative, the conduct of the Thompsons 'constituted fraud' and fell within the statutory exception.

- Brennan J: the second respondents had been guilty of fraud and their registered title was therefore defeasible because it fell within the statutory exception of fraud.
- The title of a purchaser who not only has notice of an antecedent unregistered interest but who purchases on terms that he will be bound by the unregistered interest is subject to that interest. Equity will compel him to perform his obligation.

- Wilson and Toohey JJ: Was there any relevant sense of fraud on behalf of the Thompsons? Unless there was such fraud the Thompsons hold their title free from any other interest. The Thompsons knew of the interest, but the evidence fell short of proving the objective of the transfer was to cheat the Bahrs out of an existing right. The evidence did establish that the Thompsons took a transfer knowing of the clause and accepting an obligation to resell to the Bahrs and communicating that acceptance.
- Nicolay sold the land on the reliance of that promise being upheld. The Thompsons bought the land on the understanding that they were so bound.
- By taking the land on that basis the Bahrs interest constituted an equitable interest in the land, the Thompsons became subject to a constructive trust in favour of the Bahrs. If the position of the Bahrs under this clause fell short of an equitable estate they none the less had a personal equity enforceable against the Thompsons. This is enforceable not on the basis of the notice of the interest but because they gave their acceptance on terms that they would be bound by the interest of the Bahrs by reason of their contract with the Nicolays.

- Frazer v Walker 1967: Indefeasibility in no way denies the right of a plaintiff to bring against a registered proprietor a claim in personam, founded in law or equity, for such relief as a court acting in personam may grant.
- Bahr v Nicolay 1988: Brennan J: Indefeasibility in Torrens is designed to protect the transferee from defects in the title of the transferor, not to free him from interests with which he had burdened his own title.

- S185 (1)(a): A registered proprietor of a lot does not obtain the benefit of indefeasibility for an equity arising from the act of the registered proprietor.

- Oh Hiam v Tham Kong (1980): The right of rectification of a contract is an in personam right, which is an exception to indefeasibility. Mistake as to subject matter

- Mere notice or forgery is insufficient. Need to show that it’s a claim against a registered proprietor, based on a known cause of action, proprietary interest, satisfied by subjecting the RP’s interest to that of the person bringing the action. Possibly unconscionability.

- Grgic v ANZ: No action for fraud so in personam claimed in the alternative for deceit, breach of statutory duty and an action for negligence
  ‘I am prepared to accept that the ANZ came under a duty to Mr Grgic snr to exercise reasonable care in asserting that the apparent mortgagor was in fact the registered proprietor of the land and otherwise so to act as not to interfere with the rights of Mr Grgic. But the facts do not show that they fell short of exercising the necessary degree of care’

- S184 (2)(a): Prior notice of the interest is not enough. (Brennan J In Bahr)

- S185 (1) A: If less than three years don’t need to register to be indefeasible

- Pty Ltd v Powprop Pty Ltd (1991): Held that by entering into the sale contract with those terms Valbirn notified its acceptance of the terms and conditions in the lease and therefore has undertaken to bind itself.
  Facts: Mecole granted unregistered lease with option to renew to Powprop. Sells interest to Valbirn- registers fee simple interest. Post registration refuses to honour the option acknowledged pre-registration. Consent was given by acceptance of contract

- Bourseguin v Stannard Bros: This contract is subject to the purchasers and their solicitors perusing all leases over the property and being totally satisfied with the terms of such leases. Held: I am with respect to this clause satisfied that the clause did not have the consequence that the second defendant became bound by the leases comprehended by that clause. Unlike Valbirn and Bahr there is nothing in clause 30 or the surrounding circumstances that would justify the conclusion that the second defendant affirmatively undertook to acknowledge, recognise or accept the plaintiffs agreement for lease or to be bound by its terms. BUT silence that preserved by Quin at the time when the documents were handed over to him could be construed by a reasonable bystander to mean only that he accepted without
protest the condition annexed. Doesn't really matter whether this gives rise to a personal equity or fraud action - the boundary is unclear.

- Facts: In the interim between registration of the lease was finalised a sale occurred. Stannards solicitors told purchasers that bourseguins lease had to be registered first.

- The difference between fraud and in personam will turn on whether it can be shown that the defendant had in their mind at the time of registration the intention to deny the rights of the plaintiff

- Mercantile Mutual Life Insurance Co v Gosper (1991): Mr Gosper arranged variation of mortgage on wife's behalf. The appellant was largely but not wholly innocent of the circumstances, which gave rise to the forgery. Of the variation of mortgage on which it now relies. There was no suggestion that it had any reason to suspect the genuineness of the signature to the forged instrument of variation presented to it as that of the respondent.

Kirby: The respondent was the sole registered proprietor of the subject land in which her husband had no legal interest in whatsoever. The appellant never did her the courtesy of communicating directly with her... attitude of a wife as a mere extension of the husband’s property and financial interests.

Mahoney JA: The mere fact of a forgery does not establish a personal equity. In order for the forged variation of mortgage to be registered it was necessary to have the CT presented to the registrar general. But that company had no authority to produce or use the CT for that purpose. The proper conclusion in my opinion is that the company used the CT in breach of its obligation to Mrs Gosper and that its use of it in that way was a necessary step in securing the registration of the forged variation of mortgage.

Personal Equity from Knowing Receipt of Trust Property

- Barnes v Addy (1874):
  Lord Selbourne laid down the principles of third party liability, distinguishing between two types: (limbs)
  1- Liability for knowingly receiving property in breach of trust or fiduciary obligation (This first limb does not create an exception to indefeasibility under the personal equity exception.- 'Would introduce a means of undermining the doctrine of indefeasibility' - Macquarie Bank v Sixty Fourth Throne Pty Ltd)
  2- Liability for knowingly assisting a fiduciary to commit a breach of obligation

- Farah Constructions Pty Ltd v Say-Dee Pty Ltd (2007):
  In personam exception: Legal or equitable causes of action against the registered proprietor. In a case of knowing receipt of trust property the