

UniCramNotes.com

Ace your exams in style with UniCramNotes in town!

Sample Property Law Essay



UniCramNotes.com



Sample Property Law Essay

Immediate Indefeasibility v Deferred Indefeasibility

This paper begins by examining general principles of indefeasibility and its interaction with the fraud and in personam exceptions. From this, it will then critically evaluate the policy arguments in favour of both deferred and immediate indefeasibility, taking into account the competing objectives of certainty, security and efficiency on the one hand, and fairness to holders of unregistered interests and defrauded parties on the other.

Torrens System

The Torrens system is founded on the concept of indefeasibility of title. The central feature of the Torrens system is that it is not so much a system of registration of title, but a system of title by registration.¹ Indefeasibility makes the interest one that is unable to be defeated by claims of prior defectiveness.² There is little disagreement among commentators as to the essential goals of the Torrens system. The first is to provide a register from which persons who propose to deal with land can discover all the facts relative to the title. The second is to ensure that a person dealing with land which is subject to the system is not adversely affected by any infirmities in his vendor's title which do not appear on the register, thus saving the difficulty and expense of going behind the register to investigate the title. The third is to provide a guarantee by the State that the picture presented by the register-book is true and complete.³

In defining the extent of the indefeasibility or protection afforded by registration, the concepts of deferred and immediate indefeasibility have always striven for supremacy.⁴ Under the principle of deferred indefeasibility a title obtained fraudulently can be defeated until it is 'perfected' by a subsequent bona fide transfer for value. In contrast, the immediate indefeasibility theory provides that registration will immediately validate a transfer, even if it is forged or otherwise void or voidable.⁵

Deferred indefeasibility

'The principle... is that a prior registered estate or interest, for the removal of which from the Register there is no authority but a forged or void instrument, is not destroyed unless afterwards a person, who according to the existing condition of the Register is entitled to do so, gives a registrable instrument which is taken bona fide for value and registered.'⁶

¹ *Breskvar v Wall* (1971) 126 CLR 376, 381

² Janice Gray, *Property Law in New South Wales* (2nd ed, 2007) 290

³ Hinde, 'The Future of the Torrens System in New Zealand' in Northey (ed), *The A.G.davis Essays in Law*(1965), 78

⁴ P N Wikrama-Nayake, 'Immediate and Deferred Indefeasibility: The Story Continues' (1993) 8 *LIJ* 733.

⁵ E Toomey, 'Fraud and Forgery in the 1990s: Can Our Adherence to *Frazer v Walker* survive the Strain?' (1994) *Canterbury Law Journal* 424, 425

⁶ *Clements v Ellis* (1934) 51 CLR 217, 237



This supports the proposition that the protection afforded by the legislation is confined to those who actually deal with the registered proprietor, whose name is on the Register, not a forger.⁷

Immediate indefeasibility

However, immediate indefeasibility is now the current position, meaning that registration of a void instrument is, in the absence of fraud, 'effective to vest and to divest title and to protect the registered proprietor against adverse claims'.⁸ The principle was reaffirmed in a later case, holding that '...the conclusiveness of the certificate of title is definitive of the title of the registered 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.'⁹

Fraud Exception

The Real Property Act 1900 lists fraud as an exception to indefeasibility.¹⁰ Section 43 indicates that a narrow definition of fraud is necessary, excluding actual and constructive notice from the definition of fraud.¹¹ As the Real Property Act 1900 does not affirmatively define the term 'fraud', we are dependent on case law, which has found that what is required is 'actual fraud, that is, dishonesty of some sort, not what is called constructive or equitable fraud.'¹²

However, some dicta recognise the continuing relevance of equitable fraud in the Torrens system¹³ holding that 'not...all species of equitable fraud stand outside the statutory concept of fraud'¹⁴. Dishonest repudiation of a prior interest was held to constitute fraud and in so doing they gave support to the view that fraud which occurs after (as well as before) registration may give rise to fraud amounting to an exception to indefeasibility.¹⁵ The approach was repeated by the High Court in *Bank of South Australia Ltd v Ferguson*.¹⁶

Furthermore, wilful blindness, where the registered proprietor or his or her agent 'knew enough to make it his duty as an honest man to hold his hand' and proceeded 'without further enquiry' is also equivalent to actual fraud.¹⁷

The courts have reached varying conclusions as to which form of fraud should be adopted within the statutory fraud provisions.¹⁸

⁷ *Gibbs v Messer* [1891]AC 248, 255

⁸ *Frazer v Walker* [1967] 1 AC 584

⁹ *Breskvar v Wall* (1971) 126 CLR 376, 385-6

¹⁰ *Real Property Act 1900* s42(1), s43(1)

¹¹ Janice Gray, *Property Law in New South Wales* (2nd ed, 2007) 299

¹² *Assets Co Ltd v Mere Roihi* [1905] AC 175, 210

¹³ Janice Gray, *Property Law in New South Wales* (2nd ed, 2007) 301

¹⁴ *Bahr v Nicolay* (No 2) (1988) 164 CLR 604; 78 ALR 1, 6

¹⁵ *Bahr v Nicolay* (No 2) (1988) 164 CLR 604; 78 ALR 1,7

¹⁶ *Bank of South Australia v Ferguson* (1998) 192 CLR 248, 255; 151 ALR 729,732

¹⁷ *Waimiha Sawmilling Co Ltd (in liq) v Waione Timber Co Ltd* [1923] NZLR 1137,1175

¹⁸ S Hepburn, 'Concepts of Equity and Indefeasibility in the Torrens System of Land Registration' *APLJ* [1995] 41, 45



In *Latec Investments v Hotel Terrigal Pty Ltd*¹⁹ it was held that there does not need to be a fraudulent misrepresentation in order to constitute a statutory fraud, however there should be some sort of ‘moral turpitude’. In *Grgic v ANZ Banking Group Ltd*²⁰ Powell JA concluded that if a person has an honest and genuine belief in the propriety of the circumstances then the conduct could not amount to a fraud but in some situations fraud might be constructed where a person has acted unreasonably.²¹

The cases reveal a gradual move away from the need to prove an actual dishonest intention on the part of the person seeking registration. The current approach to statutory fraud appears to represent an indeterminate blend between common law and equitable notions of fraud. Courts are accepting that broader equitable notions of unfairness may apply although still adhere to the language of the common law.²²

The determination of Gray J in the *Chasfield*²³ case brings up considerations of equality; ‘The overwhelming policy consideration was that it would be ‘surprising and, perhaps, disappointing if the state of the law in Victoria allowed the defendants to be dispossessed of their own home by the enforcement of a forged mortgage.’²⁴

Hepburn find this broad approach where a registered interest holder is continually subjected to the prospect of being morally or legally responsible irreconcilable with the Torrens system as it is contrary to the security of title objective.²⁵ However, Fraud under the Torrens system remains a much narrower concept than the equitable fraud of old system title.²⁶

In Personam Exception

Although under the Torrens system certainty of title usually flows from registration, registration will ‘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.’²⁷ These claims, legal as well as equitable, include rights which a registered proprietor creates, whether by contract or by conduct, in favour of another, provided that they are enforceable and not affected by the protection which indefeasibility gives to those who deal with the registered proprietor on the faith of the register.²⁸ In personam claims may result in a court order requiring the registered proprietor to give up the whole or part of his registered interest.²⁹

It is important to note that an in personam right can only emerge if the proprietor’s conscience is affected as the result of a known cause of action which is enforceable against him or her.³⁰ An equity against a registered proprietor arising out of a

¹⁹ *Latec Investments v Hotel Terrigal Pty Ltd* (1965)113 CLR 265, 273-4

²⁰ *Grgic v ANZ Banking Group Ltd* (1994) 33 NSWLR 202

²¹ *Grgic v ANZ Banking Group Ltd* (1994) 33 NSWLR 221

²² Hepburn45

²³ *Chasfield v Taranto* [1991]VR225

²⁴ *Chasfield v Taranto* [1991]VR225, 236

²⁵ S Hepburn, ‘Concepts of Equity and Indefeasibility in the Torrens System of Land Registration’ *APLJ* [1995] 41

²⁶ Janice Gray, *Property Law in New South Wales* (2nd ed, 2007) 301

²⁷ *Frazer v Walker* [1967] 1 AC 569,585.

²⁸ *Breskvar v Wall* (1971) 126 CLR 376, 384-385

²⁹ *Breskvar v Wall* (1971) 126 CLR 376, 385

³⁰ *Barry v Heider* (1914) 19 CLR 197, 213



transaction taking place after he became registered as proprietor³¹ as well as before registration³² may be enforced against him. The scope of the exception is therefore quite wide.

The concept of indefeasibility cannot be used to restrict 'the ability of the court, exercising its jurisdiction in personam to insist upon proper conduct in accordance with the conscience which all men should obey'.³³ However, the mere existence of forgery is not enough to found an in personam claim³⁴ although it is not necessary to show a case of fraud within the statutory exception. Therefore, only a subset of obligations of conscience is potentially enforceable and that subset consists of those obligations which also give rise to known causes of action.³⁵

It has been held that where '...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 obligations.'³⁶

The in personam exception has recently been used to circumvent the immediate indefeasibility principle. The majority decision in *Mercantile Mutual Life Insurance Co Ltd v Gosper*³⁷ seems to mean that the registered interest of the mortgagee may be defeated despite a broad definition of immediate indefeasibility and a narrow definition of fraud under s42.³⁸ The resultant effect could be to include under the rubric of the in personam exception conduct which was traditionally understood to be equitable fraud and, therefore, outside the definition of fraud relied upon by s42.³⁹

One commentator has said:⁴⁰

'The fact that the mortgagee already had possession of the certificate of title should not- in the absence of fraud, or knowledge of fraud, on its part- give rise to a personal equity. Any other result undermines confidence in the Torrens system.'

Policy

In light of the operation of these exceptions to indefeasibility, it is now appropriate to evaluate policy considerations for both deferred and immediate indefeasibility.

Argument for deferred indefeasibility

General principles of the law

A reason for the court's acceptance of deferred indefeasibility is that the Torrens legislation must be read in the light of general principles which related to the voidness

³¹ *Barry v Heider* (1914) 19 CLR 197

³² *Logie v Shoalhaven Shire Council* [1979] 1 NSWLR 537, 563

³³ *Oh Hiam v Tham Kong* (1980) 2 BPR 9451, 9454

³⁴ *Vassos v State Bank of South Australia* [1993] 2 VR 316

³⁵ *Grgic v Australian and New Zealand Banking Group Ltd* (1994) 33 NSWLR 202, 222-3

³⁶ *Bahr v Nicolay*(No 2) 164 CLR 604; 78 ALR 1,35

³⁷ *Mercantile Mutual Life Insurance Co Ltd v Gosper* (1991) 25 NSWLR 32; (1992) ANZCR 27

³⁸ Janice Gray, *Property Law in New South Wales* (2nd ed, 2007), 312

³⁹ P Butt, 'Indefeasibility and Sleights of Hand' (1992) 66 ALJ 596

⁴⁰ P Butt, 'Indefeasibility and Sleights of Hand' (1992) 66 ALJ 596, 597



of document.⁴¹ The principle of immediate indefeasibility would seem to be at odds with the general legal principle that forgeries are ineffectual. Under the principle of immediate indefeasibility the innocent mortgagee or purchaser if registered does obtain a good title and defeats the original owner, even though signature on the mortgage or transfer is forged.⁴²

Threat to the registered proprietor posed by immediate indefeasibility

The holder of a certificate of title is always subject to the possibility that it may be stolen or lost and that an innocent successor in title will prevail even though the signature is forged. Thus it is argued the doctrine of immediate indefeasibility puts all title holders at risk since they can be defeated by a purchaser or encumbrancer that becomes registered⁴³. The principle of immediate indefeasibility means that the registered proprietor must safeguard the duplicate certificate of title with utmost care. The registered proprietor's situation is perhaps vulnerable enough to warrant lodging a caveat to safeguard his or her ownership.⁴⁴ The fact that a registered proprietor should have to even contemplate this demonstrates the vulnerability of Torrens title ownership with the doctrine of immediate indefeasibility. Thus it is argued that the protection of the bona fide purchaser for value or encumbrancer goes too far with the principle of immediate indefeasibility.⁴⁵

The careless searcher

The doctrine of immediate indefeasibility seems to favour the careless searcher. Before someone is denied the benefit of immediate indefeasibility it must be demonstrated that dishonesty or something close to it is involved, although wilful blindness could fall within the fraud exception. Therefore with the immediate indefeasibility theory carelessness bears no sanction since the careless searcher can gain a good title.⁴⁶

The doctrine validates unlawful actions.

The cases are replete with instances of unlawful actions being effectively validated by the doctrine of immediate indefeasibility with registration of a forged instrument creating new obligations.⁴⁷

The cost argument

The argument in favour of immediate indefeasibility, namely, that it reduces transaction costs is a weak one since the cost of satisfying oneself as to the identity and validity of signatures is a small price to pay for the comfort of certainty of title.⁴⁸

⁴¹ A Bradbrook, S MacCallum and A Moore, *Australian Real Property Law* (3rd ed, 2002) 4

⁴² R Edwards, J O'Reilly, 'The Duel between immediate and deferred indefeasibility' [1999] 82 *SJLS* 99

⁴³ T Warrington, 'Scotching *Frazer v Walker*' (1970) 44 *ALJ* 248

⁴⁴ *J & H Just (Holdings) Pty Ltd v Bank of NSW* (1971) 125 CLR 546. Here it was held that a registered proprietor can lodge a caveat without further proof of claims to the land. In *Sinclair v Hope Investments Pty Ltd* [1982] 2 NSWLR 870, in contrast, it was suggested that registered ownership in itself would not support a caveat.

⁴⁵ T Warrington, 'Scotching *Frazer v Walker*' (1970) 44 *ALJ* 248

⁴⁶ R Edwards, J O'Reilly, 'The Duel between immediate and deferred indefeasibility' [1999] 82 *SJLS* 101

⁴⁷ T Warrington, 'Scotching *Frazer v Walker*' (1970) 44 *ALJ* 248

⁴⁸ T Warrington, 'Scotching *Frazer v Walker*' (1970) 44 *ALJ* 248



Emotional attachment

A further reason given in favour of deferred indefeasibility is that it is more appropriate to compensate the transferee than the original proprietor, who may have an emotional attachment to the land. This is particularly so in the case of mortgagees.⁴⁹

Arguments in favour of immediate indefeasibility

Reduction in the cost of investigating title

One of the claims of the Torrens System was that it avoided the lengthy searches associated with the general land law system and would therefore reduce legal costs.⁵⁰ It may be asked whether this would not be inconsistent with one of the main objectives of the Torrens system of registration which is to facilitate transfers.⁵¹

‘Ultimately the most convincing rationale for immediate indefeasibility lies in the proposition that no purchaser of Torrens system land should be required to investigate the history of his vendor’s title or to make inquiries that are burdensome or difficult. Any other view increases the cost and complexity of all conveyancing transaction, as well as detracting from the goal of security of title.’⁵²

All innocent purchasers/mortgagees are assured of obtaining a good title⁵³

As long as a purchaser or mortgagee has not been a party to forgery or dishonestly ignored the forgery he or she will obtain an indefeasible title with the doctrine of immediate indefeasibility. Security of title is thus upheld. With deferred indefeasibility the innocent purchaser or mortgagee is always subject to his or her registration being reversed on the basis that the instrument is void.⁵⁴

Cost

To a lesser extent the courts probably have been influenced by a belief that it is rather easier for a registered proprietor to protect himself against forgery than for a purchaser to do so and, furthermore, that a person defrauded by his own solicitor or relatives should suffer to a greater extent than the other innocent party.⁵⁵ Guarding the duplicate certificate of title against rogues is less onerous and costly than having to satisfy oneself as to the identity of and validity of signature of a vendor or a mortgagor. It seems that current owners are in fact usually best placed to reduce the risks in the most cost effective way, and therefore that immediate indefeasibility is more efficient than deferred indefeasibility.⁵⁶

⁴⁹ R Edwards, ‘Immediate Indefeasibility and Forgery; Is it Really What We Want?’ [1993] 67 *LIJ* 730.

⁵⁰ R Stein, ‘Principles aims & Hopes of Title By Registration’ (1983) 9 *Adelaide Law Rev* 267, 273

⁵¹ Gim Teh, ‘Bresckvar v Wall: The end of deferred indefeasibility?’ [1999] 9 *MULR* 381, 391

⁵² R Sackville, ‘The Torrens System-Some thoughts on Indefeasibility and Priorities’ (1973) 47 *ALJ* 531

⁵³ R Sackville, ‘The Torrens System-Some thoughts on Indefeasibility and Priorities’ (1973) 47 *ALJ* 526

⁵⁴ R Edwards, J O’Reilly, ‘The Duel between immediate and deferred indefeasibility’ [1999] 82 *SJLS* 104

⁵⁵ In *Frazer v Walker* the registered proprietor was defrauded by his wife. See also *Mayer v Coe* (solicitor); *Ratcliffe v Watters* (daughter); *Schultz v Corwill Properties Pty Ltd.* (solicitor who was also a relative of the defrauded company’s shareholders).

⁵⁶ R Edwards, J O’Reilly, ‘The Duel between immediate and deferred indefeasibility’ [1999] 82 *SJLS* 109



Some of the cases involving forgery suggest that the registered proprietors have been careless with the duplicate certificate of title. To safeguard a duplicate certificate of title is not difficult or costly.⁵⁷ Given that many cases involve the rogue obtaining the duplicate certificate of title due to the registered proprietors' naivety or gullibility. One has to therefore ask, who should pay the cost of such carelessness or gullibility, the innocent party who has registered his or her interest or the culpable party?⁵⁸ However, this poses a problem in cases of joint ownership where most frauds of this nature occur.⁵⁹

Therefore, it is contended that it is in the interests of society as a whole for the risk be borne by current owners as potential non-consensual transferors rather than innocent transferees. Hence, while indefeasibility is not absolute (registered proprietors who are parties to the fraud are excluded), application of the immediate indefeasibility theory appears to be more strongly justified on economic grounds than deferred indefeasibility.⁶⁰

Value judgments

It has been said that the case for immediate indefeasibility is not based on irrefutable logic, but instead depends on value judgments concerning the weight of conflicting policies and there is no denying that 'the court's protection of the rare forgery victim has been secured at the very heavy price of disturbing other basic securities and functions of the registration system.'⁶¹

Conclusion

Under immediate indefeasibility, a registered proprietor is insecure to the extent that his signature can be forged to a registrable instrument and his certificate of title can be obtained by the forger. This carries the benefits of minimising transaction costs for transferees. The trade-off is, of course that all current owners of property are subject to the risk of losing their rights in that property in a non-consensual transfer, without any right to take action even where the transaction is discovered before a subsequent transfer occurs.

Conversely, deferred indefeasibility of title reduces the risk of current property owners losing their interest through a non-consensual transfer by essentially giving them time to discover the transaction and to regain title before a subsequent transfer occurs. However, the trade-off is that society would lose the benefits of indefeasibility associated with certainty as any prospective transferee would bear the risk that their transaction may involve some fraud and hence would not gain indefeasibility upon registration. Deferred indefeasibility potentially threatens the security of all titles, since an innocent purchaser always runs the risk of having his title impeached on the ground that registration of his title was based on a void instrument.

⁵⁷ R Sackville, 'The Torrens System-Some thoughts on Indefeasibility and Priorities' (1973) 47 *ALJ* 526

⁵⁸ R Edwards, J O'Reilly, 'The Duel between immediate and deferred indefeasibility' [1999] 82 *SJLS* 104

⁵⁹ Janice Gray, *Property Law in New South Wales* (2nd ed, 2007) 353

⁶⁰ R Edwards, J O'Reilly, 'The Duel between immediate and deferred indefeasibility' [1999] 82 *SJLS* 104

⁶¹ Taylor, 'Scotching *Frazer v Walker*' (1970) 44 *A.L.J.*248, 251



It can be said that *Breskvar v Wall* marks the triumph in Australia of the view that the paramount interest under the torrens system is that of the good faith purchaser. His interests (and those of the community in cheap and efficient conveyancing transactions) are protected by minimising the required investigations of title and reducing the risk of being affected by anterior defects in title (as opposed to future forgeries).⁶²

The recent cases have, at the very least, shown that a blanket application of the doctrine of immediate indefeasibility can, in some cases, produce a result that is far from fair and is likely to undermine public confidence in the system. When the Torrens System was first introduced, the incidence of forgeries was extremely low. Unfortunately the same cannot be said in the 1990s. A system instigated more than a century ago must be made flexible enough to accommodate changes in our society. Moreover, it is essential to recognise that the area of law in question deals with one of the most important assets of individuals in the community- land ownership. Today no-one can realistically expect individuals to accept hopelessly inadequate compensation as an alternative to their being ejected from their property or, as is more likely, to their acceptance of a mortgage commitment. The inflexibility of an absolute immediate indefeasibility principle has surfaced and it would be foolish not to accept that a practical solution must be found.⁶³ It is submitted that a doctrine of 'discretionary indefeasibility' is a constructive alternative.⁶⁴

We hope you have enjoyed this sample law essay.

Don't forget to check out the Law Study Tips we have on our website at

www.UniCramNotes.com

⁶² R Sackville, 'The Torrens System-Some Thoughts on Indefeasibility and Priorities' *ALJ* [1973] 532

⁶³ E Toomey, 'Fraud and Forgery In The 1990s: Can Our Adherence to *Frazer v Walker* Survive This Strain' *Canterbury Law Review* [1994] 427

⁶⁴ J Schultz, 'Judicial Acceptance of Immediate Indefeasibility in Victoria [1993] 19 *MULR* 326