

The Torrens System of Registration: Indefeasibility of Title and Issues of Compensation

Sophia M. Williams, LLB, Dip PSM,
Registrar of Titles, National Land Agency Jamaica¹

Abstract

This paper examines the extent to which the Torrens System of Registration guarantees the indefeasibility of Title and the operation of the Assurance Fund.

The Torrens System was introduced to quieten disputes to title to land and to reduce the cost of conveyancing. It was adopted by Jamaica via the Registration of Titles Act of 1889, introducing the concept of indefeasibility of title to all registered owners. An examination of several Torrens based jurisdictions was undertaken with a study of several pieces of legislation, case law and incidents to determine whether the concept of a *system of title by registration* has been successful, whether the concept of indefeasibility can be challenged and whether the compensation fund, which was established as a complement to the indefeasibility of title is operating as it was intended.

From all accounts, the Torrens System continues to be an effective system of title by registration whereby any member of the general community can rely on the information on the land register as to the rights and interests of parties recorded thereto. There is a perception, however, across jurisdictions, that there is great difficulty in accessing the compensation fund. Some persons are dissatisfied with the way the State vigorously denies any claims of liability which makes the Fund seem virtually inaccessible. It has also been noted that whereas claims made against the Assurance Fund in the local jurisdiction

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have been largely unsuccessful, our counterparts in other Torrens based jurisdictions have settled several such claims for a variety of reasons, principally as a result of incidence of fraud and/or mistake or misfeasance on the part of the Registrar of Titles.

While the Torrens System operates effectively to guarantee security of tenure, the insurance principle of the Act may seem not to be effectively fulfilled. In conjunction with the demonstrable complexities of the language of the Act, claimants face considerable hurdles in ultimately getting compensation. Statutory reform to make compensation easier may result in persons to continue to have confidence in the system.

Introduction

The Torrens System of title by registration was created by Sir Robert Torrens, the colonial Premier of South Australia in 1857.² This system was adopted by Jamaica via the RTA and has been described as *"...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 certified is not historical or derivative. It is the title which registration itself has vested in the proprietor."*³

The system was introduced to quieten disputes to title to land and to reduce the cost of Conveyancing under common law title and the Conveyancing Act by simplifying the title to land. It also introduced the concept of indefeasibility of title to all registered owners. The Torrens system works on three principles:

- Mirror principle - the register (Certificate of Title) reflects (mirrors) accurately and completely the current facts about a person's title. This means that, if a person sells an estate, the new title has to be identical to the old one in terms of description of lands, except for the owner's name.
- Curtain principle - one does not need to go behind the Certificate of Title as it contains all the information about the title. This means that ownership need not be proved by long complicated documents that are kept by the owner, as in the Private Conveyancing system. All of the necessary information regarding ownership is on the Certificate of Title.

² Introduced in South Australian Legislature on the 4th June 1857 and becoming law in South Australia on the 2nd July 1858.

³ Barwick C.J. in *Breskwar v. Wall* (1976) 126 CLR 376 para. 15

- Insurance principle - provides for compensation of loss if there are errors made by the Registrar of Titles

Under the "old" system which existed before (and which still co-exist in Jamaica) persons owning land are capable of establishing a good title to land under a body of law that has developed under the common law and law of equity. Establishing a marketable abstract of title under the common law is an expensive venture involving what has developed into an art by conveyancing lawyers, and even though a perfect title can be abstracted there is always that unknown which may arise to make that title totter.

The deed system relied on the execution of and preservation of original valid documents so that in the event of a deed being invalid, for example through forgery, no transfer is effected. Under the Torrens System, title to land now depends on the registration of documents by an official and not upon the execution of documents. The execution of title deeds (transfers, mortgages) was to be merely the means of obtaining registration and was not intended to affect land or pass any estate or interest until registration. Thus the system has been described as a system of title by registration rather than registration of title. This contrasts with the common-law title, which is based on the principle that a vendor cannot transfer to a purchaser a greater interest than he or she owns. As with a chain, the seller's title is as good as "the weakest link" of the chain of title. Accordingly, if a vendor's common-law title is defective in any way, so would be the purchaser's title. It is therefore incumbent on the purchaser to ensure that the vendor's title is beyond question. This may involve both inquiries and an examination of the "chain of title."

The scheme of title registration was therefore devised to establish once and for all the ownership of parcels of land to be guaranteed by the State. Any person dealing with the registered owner of land, need no longer look behind the Certificate of Title to be

certain with whom one can deal in the land. The Privy Council has postulated the main object of the Torrens legislation thus:

“The object is to save persons dealing with registered proprietors from the trouble and expense of going behind the register in order to investigate the history of their author’s title, and to satisfy themselves of its validity. That end is accomplished by providing that everyone who purchases, in bona fide and for value, from a registered proprietor, and enters his deed of transfer or mortgage on the register shall thereby acquire an indefeasible right, notwithstanding the infirmity of his author’s title.”⁴

In so doing, the concept of the **indefeasibility of title** arises and is provided for in the RTA itself. This guarantee of title integrity forms the basis of title ‘indefeasibility.’ Indefeasibility, therefore, is a legal principle providing that the Register of Titles is conclusive evidence that the person named on title as holding the interest in the land is, in fact, rightfully entitled to that interest and, furthermore, that his holding is not subject to any condition or encumbrances other than those shown on the title Register. It follows, therefore, that a purchaser can rely completely on what it is shown in the Register of Titles, since ‘what you see is what you get’.

The Courts have over the years on occasion used other words to describe the same results, such as ‘unimpeachable’⁵, ‘unexaminable’, ‘conclusive’, ‘incontrovertible’, all of those times have been used to describe that quality which attaches a title when it has been brought under the RTA. A certificate of Title is unimpeachable and indefeasible and shall be received in all Courts as evidence of the particulars therein and is conclusive evidence that the person named therein is the proprietor or has an estate or interest⁶ therein. Any

⁴ *Gibbs V. Messer (1891) A.C. 248 at p. 254.*

⁵ *Assets Co. v Mere Roihi*

⁶ The ordinary meaning of the expression ‘estate or interest in land’ is an estate or interest of a proprietary nature in land. This will include legal and equitable estate and interest, for example, a freehold or leasehold estate, or incorporeal interest such as easements, profits a prendre, or such interest being held by persons in their individual capacity. It does not embrace interest in which the person concerned has no greater claim than any other member of the public. All members of the public have a right to pass freely along or across public highways but none have in their capacity as members of the public any estate or interest in such land.

person dealing with the registered owner of land appearing in the Certificate of Title can do so with the certainty that there is no other person who can challenge the title of the person with whom he is dealing.⁷ Accordingly they need not investigate the title of such owner, for they are not affected by its infirmities. But they must ascertain at their own peril his existence and identity, the authority of any agent to act for him, and the validity of the deed under which they claim. If a binding transaction is made with a real registered owner, the Act guarantees that owner's title but nothing more.⁸ In the aforementioned case of *Gibbs v Messer*, their Lordships stated:

"...the duty of ascertaining the identity of the principal for whom an agent professes to act with the person who stands on the register as proprietor, and of seeing that they get a genuine deed executed by that principal, rests with the mortgagees themselves; and if they accept a forgery they must bear the consequences."

Any Court is compelled to accept the Certificate of Title of the registered owner that cannot be challenged except in the case of actual fraud.⁹ The notion of indefeasibility plays a key role in the system of registration. As a whole, unless fraud is involved a registered proprietor's title is unassailable and is effectively guaranteed by the state.

Registration of Title versus Recording Deeds

It is important to note the difference between registration under the Registration of Titles Act and recording under the Record Office Act or the Companies Act in the Jamaican context. The transfer of legal ownership or other interest under the Registration of Titles Act is affected by the act of registration by the Registrar. The Registrar of Titles (the official, not the individual) is liable to pay damages to any person who suffers loss by the act of registration by the Registrar or any mistake or error of the Registrar. Such damages

⁷ Section 71 of the Registration of Titles Act.

⁸ *Gibbs v. Messer* Supra Note 4 pg. 5

⁹ Section 68 of the Registration of Titles Act, 1889.

are paid out of the Assurance Fund established pursuant to section 18 of the RTA from contributions by applicants to bring land under the operations of the Act.

On the other hand, the Deputy Keeper of the Records under the Record Office Act, and the Registrar of Companies, under the Companies Act, merely copy into the public record, the deeds and other documents passing between individuals, which are intended to create interests in land and other property and which operate to effect the legal transfer by virtue of the deed or document and is not dependent on registration. These officials are not liable if the document does not carry into effect the intention of the parties.

The Torrens System provides for registration of title to land, whilst the Recording System merely enables the recording of deeds evidencing title to land. In other words, under the Torrens System a purchaser may ignore preceding instruments altogether, relying solely on the vendor's title. Under the Recording System he has to look at the preceding instruments themselves. The object is to prevent secret and fraudulent conveyances and to compel registration by conferring on a registered transaction priority over an earlier unregistered one.¹⁰

The Register Book of Titles

To achieve this objective, the Registration of Titles Act established a Register (Register Book). Owners of an estate in fee simple in law or in equity¹¹ were enabled to apply to a public official acting on behalf of the Government for a Certificate that he is the owner of the fee simple estate in land described in the Certificate. The application with the proofs to establish the claim is submitted to a Referee of Titles.

¹⁰ West Kanmantoo Etc. Co. v. E.S. & A Bank 1868 2 SALR 97, 237

¹¹ Section 28 of the RTA lists the persons who may apply. The persons most frequently bringing an application are the person or persons collectively claiming to be the owner of the Fee Simple, either at law or in equity; the Commissioner of Lands, or other officer duly authorized by the Minister, applying to bring land the property of the Crown under the Act. Applications by the other classes of person are extremely rare.

If the Referee is satisfied that the applicant:

- is a person entitled to apply and,
- is in possession of the land by himself or a tenant of the land and,
- would be entitled to maintain and defend such possession against any other person claiming the same or any part thereof, he shall provisionally approve the application.

The Registrar of Titles can then issue a Title as directed by the Referee either as an absolute or qualified title. A proprietor with an absolute title¹² holds the land in fee simple together with all rights, privileges, and appurtenances subject to :-

- (a) incumbrances entered on the Certificate of Title and,
- (b) such liabilities, rights and interest as may subsist over land brought under the Act without being entered on the Certificate of Title as incumbrances, but free from all other estates and interest save only quit rents, property tax or other impost charged generally on lands which have accrued since the land was registered.

A proprietor with a qualified title¹³ is entitled to hold the land except as against a person claiming any estate, right or interest therein arising before a specified date or under a specified instrument. Such a title confers the same rights as an absolute title, but it does not affect the enforcement of any estate, right or interest appearing on the certificate of title to be expected. The proprietor registered with a qualified title may at any time apply to be registered with an absolute title subject to all the provisions relating to an original application save and except that only half the fees shall be payable and the Referee is not obliged to cause such application to be advertised.

¹² Section 26 of the RTA

¹³ Section 27 of the RTA

All dealings in the land thereafter (transfers, mortgages, leases, etc.,) will have effect in law only where such dealings are registered by the Registrar of Titles.

Any dealings lodged at the Office of Titles must be examined and if necessary investigated by the Registrar (normally through delegated authority) for compliance with the Registration of Titles Act and other statutes concerning land transactions. For example, where a duly executed and stamped transfer instrument is presented to effect a change in proprietorship of registered land, the Registrar must be satisfied on the face of the document that it is acceptable for the purpose of registration. The Registrar is not compelled in either case, to look behind the documents presented or to enquire into the nature and details of the dealings between the parties involved. Once the instruments presented to her comply with the requirements of the Act, then the Registrar should not hesitate in certifying title, or endorsing the transfer, as the case may be. This is not to say that the Registrar must not be vigilant against irregularities in documents, for this certainly forms a part of that persons function in ensuring that instruments registered by virtue of the Act, are properly accepted and the integrity of the Register Book is maintained. The Registrar's power is limited to refusal of registration in those cases in which the facts within his knowledge appear to him to show that the proposed dealing is improper.¹⁴

¹⁴ R v. Registrar of Titles ex parte Biggs (1913) V.L.R. 549.

The Assurance Fund

Upon an application to bring land on the register, all applicants are required to contribute to an assurance fund. This fund operates similarly to the principle of insurance. The fundamental concept behind insurance is that it enables those who suffer a loss or accident to be compensated for the effects of their misfortune. The payments come from a 'fund of money contributed by all the holders of individual insurance policies'. In other words, individual risks are pooled and shared, with each policyholder making a contribution to the common fund. To this extent, there is nothing special about the assurance fund. However, under the Torrens System, there is the uniqueness of certain rules which veers drastically from the general principles. Section 18 of the RTA provides for contributions to the Assurance Fund upon first bringing land under the operation of the RTA by applicants. The fee payable is dependent upon the market value of the property.¹⁵ The scheme of the Act indicates that the Assurance Fund is the remedy of last resort. "*The person deprived of land must have pursued his remedies fruitlessly against the wrongdoer or his voluntary assigns if they are accessible*" before claiming compensation from the Assurance Fund.¹⁶

The relevant sections of the RTA in this regard, are sections 162-170. Particular attention must be paid to sections 162 and 164. Section 162 of the RTA is based on provisions of 126 of the Real Property Act which is enacted in New South Wales, The former sets out the remedy available to any person deprived of land, or of any estate or interest in land, in consequence of:

- (i) fraud;
- (ii) through the bringing of land under the operation of the Act;
- (iii) the registration of any other person as proprietor of such land, estate or interest;

¹⁵ See Section 18 of the RTA quote verbatim and 19 – 20 which deals with the account for the Assurance Fund

¹⁶ The Torrens System in New South Wales, Woodman and Nettle at 126.

- (iv) any error or misdescription in any certificate of title; or
- (v) any error in any entry or memorandum in the Register Book.

The remedy provided in section 162, is for the deprived party to prosecute an action for damages against the party responsible for such deprivation. There is no intention to relieve accessible wrongdoers from liability. Further, no recovery lies against the Registrar where land can be recovered. Sections of the RTA provides for the possibility of an action for recovery of land and therefore the section can only be invoked where a deprivation of land has occurred. The proviso to the section sets out the circumstances that may limit damages recoverable by a Claimant,¹⁷ and provides for access to the Assurance Fund in those circumstances.

In the Australian case of *Gibbs v Messer*,¹⁸ the plaintiff Mary Messer claimed compensation from the Assurance Fund by reason of a transfer from her husband's solicitor to a non-existent person under a fictitious name (Hugh Cameron), and by reason of a forged mortgage from such a fictitious person to a registered mortgagee who had advanced money on the security of the land had been deprived on an estate in land. The court held that

"in the present case, if Hugh Cameron had been a real person whose name was fraudulently registered by Cresswell, his certificates of title, so long as he remained undivested by the issue of new certificates to a bona fide transferee, would have been liable to cancellation, at the instance of Ms. Messer; but a mortgage executed by Cameron himself, in the knowledge of Cresswell's fraud would have constituted a valid incumbrance in favour of a bona fide mortgagee. The protection which the statute gives to persons transacting on the faith of the register is, by terms, limited to those who actually deal with and derive right from a proprietor whose name is on the 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; and cannot by registration of a forged deed acquire a valid title in their own person, although the

¹⁷ Where the party responsible for depriving the Claimant of land, or of an estate or interest in land, has transferred it to a *bona fide* purchaser for value, damages are limited to the amount of the consideration actually received.

¹⁸ Supra Note 4 pg 5

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”

In the aforementioned case Hugh Cameron was a “myth”. The Privy Council held that his name was only on the register and having no existence, he could neither execute a transfer nor a mortgage. Although the forged transfer or mortgage, when duly entered on the register becomes the root of a valid title, in a bona fide purchaser, there is no enactment which makes indefeasible the registered right of a transferee or mortgagee under a null deed. The mortgagees could not therefore bring themselves under the protection of the statute because the mortgage, which they put upon the register is a nullity. The plaintiff’s name was restored to the Register and she was therefore not entitled to any compensation.

The case clearly demonstrates that a title acquired by fraud is not indefeasible. So long as the title remains in the name of the wrongdoer or any volunteer claiming through him, the aggrieved party may recover the land and there is no deprivation. However, if the wrongdoer then transfers the property to a bona fide purchaser the title then becomes indefeasible. In *Henriques v Reid*,¹⁹ the defendants J Mason and his wife were the owners of Lot 23 of the Worthington Estate and were in possession of a conveyance in which the lot was described by reference to a plan recorded in the Island Record Office. They agreed to sell the lot to the defendant Reid who demanded a registered title. In their application the Masons described the land by giving measurements and names of adjoining owners, but without any reference to the plan in the Record Office. In fact, the description of the land included not only Lot 23 but the adjoining Lot 22 of which the plaintiff was the owner. The Masons were not aware of the mistake and in due course the Reids received a certificate of title which comprised both lots. The plaintiff brought an action against Reid and the Masons to recover possession or alternatively for damages.

¹⁹ (1936) J.L.R. p 25, 56

It was held on appeal that the plaintiff's right to regain possession of Lot 22 was defeated by section 69 of the RTA because Reid was a purchaser for valuable consideration and there being no question of fraud. The defendant Reid is not liable in damages to the plaintiff. A person who acquires title to land through fraud, error or misdescription is not liable in damages unless it is upon his application that the land was brought under the RTA or the erroneous registration made. The plaintiff was entitled to recover damages against the defendants –Mason as the person who made the erroneous application.

Generally, damages may be claimed from the Assurance Fund by action against the Registrar of Titles as a nominal defendant when a person who is liable for damages under the RTA is dead, bankrupt, insolvent or cannot be found within the jurisdiction. Section 164 states:

"Any person sustaining loss through any omission, mistake or misfeasance, of the Registrar, or any other officer or clerk, in the execution of their respective duties under the provisions of this Act, or by any error, omission or misdescription in any certificate of title, or any entry or memorandum in the Register Book, or by the registration of any other person as proprietor, and who by the provisions of this Act is barred from bringing an action for the recovery of the land, estate or interest²⁰, may, in any case in which the remedy by action for recovery of damages as herein provided is inapplicable, bring an action against the Registrar as nominal defendant for recovery of damages.

Provided that in estimating such damages, the value of all buildings and other improvements erected or made subsequent to the making of a contract of sale binding on the parties thereto, or subsequent to the deprivation, shall be excluded."

The conditions set out by section 164, to entitle a claimant to damages from the Assurance Fund are:

- (i) Loss sustained through a mistake etc. of the Registrar;

²⁰ Bars to bringing actions for recovery of land, are provided in sections 161 and 163 of the Act. The Certificate of Title acts as an absolute bar against actions for recovery of land from the registered proprietor, with certain exceptions provided in section 161. Both sections 161 and 163 protect a *bona fide* purchaser for value, from suit for recovery of land or the payment of damages.

- (ii) The Claimant must be barred by the provisions of the Act, from bringing an action for the recovery of the land (as in sections 161 and 163); and
- (iii) Other provisions of the Act (i.e. section 162) for recovery of damages, do not apply.

Section 164 contemplates compensation by the Registrar for the negligence of his officers in circumstances where a claim for recovery of an interest in land is barred by the provisions of the RTA, and where it is inapplicable to claim for recovery against the person who submitted the application which resulted in the error.

However, in *Fraser v Walker*²¹, which came from New Zealand, Mr. and Mrs. Fraser were the owners of property. Mrs. Fraser purported to charge the entire property to Mr. Radomski by forging her husband's signature. When Mr. Radomski realized on the charge, he exercised his right to sell the property under power of sale and sold to Walker. The Privy Council essentially decided that notwithstanding Mrs. Fraser's fraud in forging a mortgage immediate indefeasibility applied upon registration of the mortgagee's interest. The Privy Council treated the Radomski mortgage as being valid by reason of the innocence of Mr. Radomski and the registration of the document. Mr. Fraser could not prevail against the purchaser at the mortgagee sale as the latter was a good faith purchaser for value. It could be argued that the fraudulent mortgage should not have bound Mr. Fraser and that he had been wrongfully deprived of his land making him eligible to claim compensation from the assurance fund under, under Section 172(b) of the Land Transfer Act²², which provides in part that "any person sustaining loss...by the registration of any other person as proprietor, and who by the provisions of this Act is banned from bringing an action for the recovery of *the* land may, bring an action against the Registrar *as* nominal defendant for recovery of damages". The decision is seen as particular harsh as it deprived Mr. Fraser of his interest, even though he was a victim of fraud.

²¹ [1967] 1 ALL ER 169

²² Similar to Section 164 of the RTA

Research from other Torrens based jurisdiction has shown where that claims made against the assurance fund has increased over the years mainly due to fraud and forgery. In New South Wales, a fraud mitigation Unit was established in July 2007, to develop and implement appropriate strategies to ultimately reduce claims against the Torrens Assurance Fund. The unit has developed a fraud mitigation program which outlined the certain areas of risk. Amongst several achievements, the unit has compiled a comprehensive library of cancelled automated titles which can be used to verify the authenticity of titles lodged, presented proficiency sessions in fraud awareness for staff, completed a fraud risk analysis of over 100 types of real property dealing transactions and developed appropriate risk mitigation strategies where deficiencies were identified. During 2007/08 financial year the Registrar General made several payments in response to claims against the Torrens Assurance Fund totalling \$2,343,361.09. This sum includes compensation payments and legal fees of claimant parties.²³

In 2008/9, the Land Registry in England and Wales, paid out £10,058,945.39 for 1,364 claims, compared with £9,110,218.85 for 1,072 claims in 2007/8.

Table 1: Indemnity Claims, England Wales²⁴

Indemnity claims for 2008/9				
Nature of claim	Number of claims	Substantive loss (£)	Costs (£)	Percentage of total
Extent of registered titles	431	1,018,056.69	713,363.13	17.2
Errors in/ omissions from register entries	175	1,994,887.52	433,617.33	24.1
Sundry plans errors	45	340,128.92	46,290.67	3.8
Fraud and forgery	62	4,257,074.48	815,038.95	50.4
Official inspections of title plans	18	13,358	19,851.29	0.3
Bankruptcy errors	0	0	0	0
Official searches	14	431.94	4,218.95	0.05
Official copies	22	707.85	15,785.28	0.2
Errors in SIMS	40	74,399.53	38,376.27	1.1
Errors in filed extracts	62	12,380.83	19,250.39	0.3
Lost documents/ administrative errors	495	125,434.63	116,292.74	2.4
Land Charges errors	0	0	0	0
Total	1,364	7,836,860.39	2,222,085	
Gross payment			10,058,945.39	
Less sums recovered under Land Registry's statutory right of recourse			89,235	
Net indemnity			9,969,710.39	

²³ Annual Report 2007/8, New South Wales

²⁴ Land Registry Annual Report and Accounts 2008/9: Report to the Secretary of State for Justice and Lord Chancellor by the Chief Land Registrar and Chief Executive on the work of Land Registry for the year 2008/9.

Loss Sustained

The 'loss sustained' as set out in sections 162-170 of the Act, specifically refers to a deprivation of land, or of an estate or interest in land. The Assurance Fund exists only for the compensation of such a loss. The word deprived means irrevocably deprived. For example, a common law owner who fails to get notice that an application has been made for a Certificate of Title is deprived of his lands only when the property passes to a third party for value without notice. So long as the Title remains in the name of the wrongdoer, or from whom the land can be recovered by an action for recovery of possession or any other appropriate remedy he is not deprived. The effect of indefeasibility could deprive the owner of his estate and interest in land but he is not left without a remedy. The owner suffering a loss may make a claim on the assurance fund. It has been described as "a claim for pecuniary compensation in substitution for the right which he otherwise would have had at common law to maintain ejectment, or otherwise to proceed against the person in possession. This transmutation of rights has its ultimate phase in a claim against the Assurance Fund."²⁵

A compensation Fund and is a fundamental feature of the Torrens system of land registration²⁶. Before the Fund can be called upon to provide compensation from aggrieved parties, there must be a loss. In the Australian case of *Oakden v Gibbs 1882 8 VLR (L) 30*²⁷ land had been brought under the Act and the Registrar had omitted to cancel the common law deeds. The applicant obtained the deeds and secured a mortgage against the deeds, although the land, had by that time, been transferred to a purchaser. It was held that the lenders had not acquired an interest in land as the old title deeds were worthless since the land had actually been brought under the operation of the Act. The courts held, by a majority that the plaintiffs could not recover compensation from the Fund because they never had any interest in the land and only damages for loss of land could be

²⁵ John Baalman, *The Torrens System in New South Wales*.

²⁶ It has been suggested that Sir Robert Torrens only introduced the concept of state compensation in order to entice lawyers to accept the Torrens System.

²⁷ *Ibid.*

recovered under the Assurance Fund. Similarly, in *Dempster v Richardson*²⁸ a claim was made on the Assurance Fund when a certificate of title under the Act described the land by means of a diagram. A purchaser, who took a transfer of the property, alleged that the measurements on ground were in fact less than the diagram stated and in reliance of upon the certificate she had commenced to erect buildings up to the boundary given by the diagram, which the adjoining owner had pulled down. The courts held that the purchaser was not entitled to recover damages against the Fund because

- (1) The purchaser had not been deprived of any estate or interest in land through any error or misdescription in the certificate of title but had obtained all the land her vendor could or did transfer.
- (2) The loss alleged to be sustained by reason of acting upon the measurements given in the diagram was not within the remedy conferred by sections 125 & 128 of the Real Property Act (Tasmania).

Sections 162 and 164 of the RTA in particular, are nearly identical to Sections 126 and 127 of the Australian Real Property Act. In relation to the Australian Act, the compensation objective has been stated, thus:

*“The scheme of the Act is to provide a fund for compensating all persons who are deprived of their land by the operation of the Act...The fund is therefore in the position of a quasi-surety, guaranteeing against losses which but for the Act could not occur...the provisions aim to form the second part of the complement that, under the Torrens system, a man is to have either his interest in the land or adequate monetary compensation therefor.”*²⁹

This statement, it is submitted, is directly applicable in the Jamaican context. In this regard the provisions of sections 162, 164 and 168 confirm this, in that they speak specifically to actions for recovery of the land, or recovery of damages sustained through deprivation of land or of any estate or interest in land. The right to compensation is a

²⁸ 1930 44 CLR 576

²⁹ D.J. Whalan, *The Torrens System in Australia* (Law Book Company, Sydney, 1982) p. 345-346.

statutory right and as such unless the loss can be brought within the precise statutory formula, compensation is not payable.

In arriving at the compensation for any deprivation or loss of land, the value of all building and improvements made subsequent to such deprivation are to be excluded. In the Australian case of *Registrar of Titles v Charles Spencer*³⁰ the Privy Council held “*that the measure of damages is full compensation for the loss actually sustained. The person deprived of the land is to be put in the same position, so far as money will do it, as if the wrongful act had not been done, but not in a better position*”. Charles Spencer sought to recover against the Assurance Fund damages for the wrongful issue of a certificate whereby he was deprived of a certain portion of land in Perth, to which he would have been entitled as transferee or beneficiary under a deed of settlement. It was conceded that a certificate of title was wrongly issued and had accrued in June 1903. Mr. Spencer claimed that he was not only entitled to land and buildings but also to all the plant and machinery thereon. The Court held that he was entitled only to the value of the land, buildings and unremoveable portions of the building. The issue before the Court was whether the value of the trade fixtures is to be taken into account. The test is what is the position of the land owner if the wrongful act had not been done? In the Jamaican case of *Henriques v Reid*³¹ it was reaffirmed that the measure of damages is the value of the land and any erections thereon at the date when the cause of the action accrued.

³⁰ [1908] A.C. 235

³¹ Supra Note 19

Fraud and Powers of the Registrar

One side effect of the principle of indefeasibility naturally is that owners of land can lose their estate and interest in land in circumstances where they would have been protected under the common law system. So for example, if the signature of an owner of land is forged to a deed of conveyance in an attempt to transfer the property to B no interest passes to B as the deed was void as a result of the forgery. However, under the principles of the Torrens System of registration it is conceivable that B could get a good title as long as he or she could prove that he was a bona fide purchaser for value without notice of the fraud.

One of the exceptions to this principle of indefeasibility of title is the matter of fraud which undoubtedly requires knowledge and intention, which would defeat the requirement for bona fides.³² A bona fide purchaser for value, who has no knowledge of the fraud, will take a good title which cannot be assailed on the basis of the fraud of the person through whom he claims. This principle is enshrined in the RTA and affirmed in numerous cases.

In recent times, section 153 of the RTA has been advanced by numerous persons as the basis on which the Registrar of Titles should cancel certificates of titles issued under fraud or otherwise. Section 153 provides in part that:

"In case it shall appear to the satisfaction of the Registrar that ...any certificate, instrument, entry or endorsement, has been fraudulently or wrongfully obtained, or that any certificate is fraudulently retained,...may by writing require the person to whom such document has been so issued or by whom it has been so obtained or is retained, to deliver up the same for the purpose of being cancelled or corrected, or given to given to the proper party, as the case require; and in case such person shall refuse or neglect to comply with such requisition, the Registrar may apply to a Judge to issue a summons for such person to appear before the Supreme Court or a Judge, and show cause why such Certificate or instrument should not be delivered up for the purpose aforesaid..."

³² Section 70 of the RTA which deals with the issue of fraud.

Requisitions made under the section must be for one of three stated purposes:

- (i) Cancellation;
- (ii) Correction; or
- (iii) To be given to the proper party.

While the section on its own appears very broad and seems to suggest that the Registrar of Titles has limitless power to make cancellations or corrections in respect of certificates, Section 80 of the RTA set out the powers of the Registrar as it relates to amendments:

“On the occasion of the registration of a certificate of title to registered land or at any time thereafter the Registrar, after such enquiry and notices, if any, as he may consider proper and upon the production of such evidence and the compliance with such requests, if any, as he may think necessary to require or make, may:-

- (a) amend the description of the land by the omission of any general words of description or in such other manner as he may think proper;*
- (b) omit such entries or portions of entries as he is satisfied no longer affect the land or the title thereto;*
- (c) insert, amend or delete the name of any road and the number by which any land on such road is designated;*
- (d) substitute the correct name, address or occupation of any person whose name, address or occupation was incorrectly entered.*

The question of the Registrar’s discretion has been answered unequivocally in numerous cases. In *Thomas and Others v Williams Johnson and Others*³³ the Privy Council stated that:

“Section 153 appears in a separate part of the Act under the heading “Procedure and Practice”. It is unlikely that the legislature would have been intended by such a section to produce for requisitioning outstanding instruments and certificates to confer power on the Registrar to determine proprietorship of land and interests therein when the Registrar’s powers to amend the primary record, the Register are so confined. The true scope of the section is better appreciated if it is kept in mind that a certificate of title issued by the Registrar is just that, a certificate as to the title in the Register.”

³³ Privy Council Appeal No 72 of 1996 (Jamaica).

In *Alric Astor Pottinger v Traute Robinson*³⁴ the section was fully discussed. The Privy Council stated that Section 153 is not concerned with the fundamental matter of the validity of the title of a proprietor whose name appears on the register. Rather, it provides the Registrar with what are, essentially, administrative powers to deal with significant, but less fundamental problems relating to the certificates which evidence that title. The Board outlined fully the import of the section, and concluded that

“... when section 153 refers to a certificate of title being ‘fraudulently or wrongfully obtained’, it is referring quite specifically to the certificate rather than to the title. It is envisaging the kind of case where someone has got hold of a certificate of title either wrongfully, say, without the owner’s consent, or by some fraudulent device. It follows that, contrary to Smith JA’s view, the section does not give the Registrar the far-reaching power to annul a proprietor’s title on the ground that the title has been ‘wrongfully obtained’.”

Allegations of fraud are not a matter for the Registrar of Titles or a matter for which the Registrar has power to cancel or correct. These allegations must be proved in a Court of law on the evidence of the parties. Moreover, as held by the Privy Council in the case of *Assets Company Limited v Mere Roihi*,³⁵ the fraud which must be proved in order to invalidate the title of a registered proprietor is actual, not constructive fraud by the person whose title is impeached. The Court must be called upon to intervene, where a party claims that a registered proprietor has deprived him of land, through fraudulent means. The action must be instituted as soon as the fraud has been discovered and where the remedy sought is the recovery of the land, the action can only be continued if the registered proprietor is the same person who has committed or acquiesced in the fraud. There is no discretion that resides with the Registrar to cancel a certificate of title on the basis of a claim of fraud, unless he or she is directed by a Court to do so by virtue of an Order made under section 158 of the Act.

³⁴ Privy Council Appeal No 64 of 2005 (Jamaica).

³⁵ [1905] A.C. 176.

Under Section 158 of the Registration of Titles Act the court may direct the Registrar of Titles to:

- a) Cancel/amend any Certificate of Title or instrument or any entry in the Register Book;
- b) To issue a new Certificate of Title in the name of specified persons or substitute such title, instrument or entry;

It is unlikely a Court will make such an order unless the Certificate of Title has lost its indefeasibility under subsections (a) (b) (c) (d) (e) or (f) of Section 161, which states that registered proprietor's title to lands is unassailable unless it can be established that he was registered as proprietor through fraud.

Section 161 provides in part that:

"No action of ejectment or other action, proceeding, for the recovery of any land shall lie or be sustained against the person registered as proprietor there under the provisions of this Act, except in any of the following cases, that is to say-

(d) the case of a person deprived of any land by fraud as against the person registered as proprietor of such land through fraud, or as against a person deriving otherwise than as a transferee bona fide for value from or through a person so registered through fraud;

Firstly, the Limitation of Actions Act circumscribes the time within which a person claiming in equity can bring a suit for the recovery of land, of which they have been deprived through a concealed fraud. The suit must be brought within twelve years of the time at which such fraud shall, or with reasonable diligence may, have been discovered. Actions for damages against the Assurance Fund must be brought within the six years as laid out under the RTA from the time when the right first accrued.

Section 168 states in part that

"No action for recovery of damages sustained through deprivation of land, or of any estate or interest in land, shall lie or be sustained against the Registrar or against the Assurance Fund, or against the person upon whose application such land was

brought under the operation of this Act, or against the person who applied to be registered as proprietor in respect of such land, unless such action shall be commenced within the period of six years from the date of such deprivation

Provided, nevertheless, that any person being under the disability of coverture, infancy or unsoundness of may bring such action within six years from the date on which such disability shall have ceased; so, however, that such action be brought within thirty years next after the date of such deprivation."

Additionally under section 168 a person who is deprived of an estate or interest in land being brought unto the register cannot bring an action for the recovery of damages against the Registrar of Titles where the person or person through whom he or she claims was aware of the land was being brought unto the Act and had "*willfully or collusively omitted to lodge a caveat forbidding the same or had allowed such caveat to lapse.*"

Conclusion

From all accounts, the Torrens System is and continues to be an effective system of title by registration whereby any member of the general community, acting in good faith, can rely on the information on the land register as to the rights and interests of parties recorded thereto, and act on the basis of that information. A prospective purchaser is therefore not required to look beyond that record and does not even need to examine the Certificate of Title, the register information being paramount. Dealings with land can take place with confidence and buyers and lending institutions can safely accept the Certificate of Title without looking beyond the face of the Title and can protect themselves by making an official search of the register and requesting a Search Certificate which binds the Titles Office. Within the Torrens system is established a compensation fund which is a complement to the indefeasibility of title.

Notwithstanding, there is a perception that there is great difficulty in accessing the Fund and litigation is often lengthy and frustrating. Some persons are dissatisfied with the way the State vigorously denies any claims of liability which makes the Fund seem virtually inaccessible. In actuality, the compensation principle operates in a very limited extent to the insurance principle. The very narrow definition of loss as interpreted in *Registrar of Titles v Charles Spencer*³⁶ does not seem to contemplate financial losses. Further, the case of *Dempster v Richardson*³⁷ is a good example of the narrow construction for the bases for claiming loss resulting from a departmental error. The Justices implied that the adoption by the Registrar of the erroneous measurements was not contemplated within the meaning of the Act. The Registrar neglect must be the direct cause and not merely a contributing factor.

“Even if it could be said that the adoption of the measurement by the Recorder was an omission, mistake, or misfeasance within the general meaning of these words, a

³⁶ Supra Note 30 pg 18.

³⁷ Supra Note 28 pg 17.

thing which we do not say, yet is clear that it is not such a case that section 128 contemplates."

The narrowness of the compensation provisions of itself is sufficient justification for its review. While the Torrens System operates effectively to guarantee security of tenure, the insurance principle of the Act may seem not to be effectively fulfilled. In conjunction with the demonstrable complexities of the language of the Act, claimants face considerable hurdles in ultimately getting compensation. Statutory reform to make compensation easier may result in persons to continue to have confidence in the system.

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