

The Doctrine of Indefeasibility of Title in Sri Lanka: A Comparative Study with The Law of The United Kingdom and Australia

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Abstract

A definite title to one's land is essential before a person can reap the full benefits of such land. In order to obtain a definite title to a land, a landowner must register such land legally in order for him to fully enforce his rights to such land. The title registration system in Sri Lanka introduced by the Registration of Title Act No. 21. of 1998 aims to provide such secure land titles to proprietors by obtaining an indefeasible title to land. The research explores the doctrine of indefeasibility of title in Sri Lanka with special reference to the doctrine's application in the United Kingdom and Australia. The main objective of this research has been to ascertain as to what extent the judicial and legislative developments in Sri Lanka concerning title by registration has achieved the indefeasibility of title principles that are intrinsic to the Torrens system of land registration and whether such system secures a proprietor's title. The methodology employed uses a mix of both doctrinal research methods such as the reviewing of relevant literature, laws and policies in Sri Lanka in comparison to the United Kingdom and Australia, and empirical research methods to collect data and other information on the title registration process via the use of interviews with officials from relevant government departments. The study will then propose relevant legal and administrative solutions to counteract the obstructions that are hindering the enforcement of the doctrine of indefeasibility of title in Sri Lanka.

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Introduction

Article 17 of the Universal Declaration of Human Rights declares that: “Everyone has the right to own property alone as well as in association with others. No one shall be arbitrarily deprived of his property”. One of the major challenges Sri Lanka faces as a developing nation at present is to transform its economic policies to create a positive and sustained economic growth that will facilitate Sri Lanka to ward off financial calamities, eradicate poverty and lead to the nation’s prosperity. This research is concerned about one of the most significant obstacles to economic progress in Sri Lanka which is none other than the turbulent and unjust state of the land market, which is further promulgated by and disguises itself under the protection of an outdated law under the deeds registration system in Sri Lanka under the Registration of Documents Ordinance Act No. 23 of 1927.

In order to address the challenges posed by land registration, the Registration of Title Act No. 21 of 1998 (hereinafter referred to as the Title Registration Act) was enacted to not only promote the three principles embodied by the doctrine of indefeasibility of title, namely the Mirror Principle, Curtain Principle and Insurance principle, but to also provide a simple, secure and systemized land title registration scheme. An indefeasible title to land essentially signifies that title in such property cannot be defeated, made void, cancelled by any past event, error and/or omission in the title. The research also addresses the concern that whereas the Title Registration Act may have

succeeded in unifying the land registration process, whether this unification has enhanced efficiency, transparency and accountability in title registration in Sri Lanka.

The doctrine of indefeasibility of title was brought in by the Registration of Title Act of 1998 and has not been as successful as its predecessor models such as the Torrens Title registration system in Australia. The lack of proper implementation of the law and the presence of countless loopholes in the law could render the whole doctrine of indefeasibility quite useless. The malfunction of this market is not only an obstacle for the state's economy but also for the ordinary citizens whose sustenance is affected by legal uncertainty and fraudulent claims.

By reviewing relevant literature, laws, policies and the practical approach to indefeasibility of title in Sri Lanka as well as the United Kingdom and Australia this research will explore and investigate the title registration in Sri Lanka and its implementation in practice to ascertain whether it has attained its objective of being a unifying land registration scheme that ensures an efficient, secure and simple system of registration of title of lands in Sri Lanka. The study will also propose and recommend legislative and policy measures and amendments to the Act that are necessary to ensure that Sri Lanka has a transparent and cost-effective land title registration regime.

The Doctrine of Indefeasibility

The doctrine of indefeasibility of title is the core of land title systems which incorporates three principles; commonly referred to as, the mirror principle, which holds that the register is an accurate and up to date mirror of the state of the land title, the curtain principle, which embodies the principle that the need for a purchaser to investigate the history of the past dealings of a land or title depicted in the register is dispelled with, and the insurance principle, where the state is said to guarantee the accuracy of the register and any person suffering a loss as a result of an inaccuracy in the register due to fraud or error is compensated by the state.

These three principles together form the doctrine of indefeasibility of title and is the apex of the land title registration systems. The Torrens' system is a system that operates as such. The doctrine of indefeasibility is a central part of the Title Registration Act of Sri Lanka as a result of the Title Registration Act, which is based on the Torrens system of land registration.

Literature Review

Genesis of the Doctrine of Indefeasibility

In prescribing for a land titles system, Sir Robert Torrens anticipated that all interests could be entered on the registry for each piece of land to which they applied,¹ making each title indefeasible. Despite his vision, the first time “indefeasibility of title” was used to describe the profound effect of land titles registration in the practise of conveyance and substantive real property law emerged in 1859, after South Australia’s legislation had been adopted. Thereafter, Torrens used the term when describing the Real Property Act in pamphlets.

Origin of the term ‘Indefeasibility’

The Torrens title claims to be indefeasible, however the term “indefeasible title” was not widely used in the inception of the Torrens title registration system. The three associated principles of indefeasibility of title, the mirror principle, curtain principle and insurance principle has not been codified in any early enactments by neither Australian nor English statutes. There has been much speculation as to the origin of the term, Theodore Ruoff an Englishman who later went onto be the Chief Registrar of the English land titles system is credited with first using the term

1 Rosalind F Croucher, *‘Inspired Law Reform or Quick Fix?’ Or, ‘Well, Mr Torrens, what do you reckon now?’ A Reflection on Voluntary Transactions and Forgeries in the Torrens system’* [2009] 30 Adel L Rev 291.

“indefeasibility of title”, however maintained that the term originated in the Canadian Supreme Court decision of *Canadian Pacific Railway v Turta*². Ruoff was given much of the credit as it was, he who popularized the term “indefeasibility of title” and coined the terms mirror principle, curtain principle and insurance principle.³

The Mirror Principle

Ruoff describes this principle in his book as “the proposition that the register of title is a mirror which reflects accurately and completely and beyond all argument the current facts that are material to a man’s title.”⁴ Ruoff states that the register book is a reflection of facts that are material to a land owner’s title⁵, however he goes on to later affirm that although the register claims to be ‘correct and complete’ that it is not always the case.⁶ Ruoff identifies that while the land register is of paramount importance and should be a mirror reflection of an owner’s land, one should not completely rely upon it.⁷

2 *Canadian Pacific Railway Company v Turta* [1954] SCR 427; Theodore BF Ruoff, *An Englishman Looks at the Torrens system* (Sydney: The Law Book Co of Australasia Pty Ltd, 1957) 8, 9.

3 Kim S Korven, *The emperor's new clothes: the myth of indefeasibility of title in Saskatchewan* (University of Saskatchewan, 2012) 28
<<https://harvest.usask.ca/handle/10388/ETD-2012-10-522>> accessed 20 May 2018.

4 Theodore BF Ruoff, *An Englishman Looks at the Torrens system* (Sydney: The Law Book Co of Australasia Pty Ltd, 1957) 8.

5 *Ibid* 16

6 *Ibid* 17

7 *Ibid* 81

The Curtain Principle

As per Ruoff the curtain principle ensures “simplicity in the general operation of the Torrens system” To prove his point Ruoff draws judicial conclusions from two cases⁸, stating that:

“The register was not to present a picture of legal ownership trammelled by all sorts of equitable rights in others, which those who dealt with the registered proprietor must take into account”⁹

Furthermore, Lord Watson in *Gibbs v Messer*¹⁰ affirmed that:

“the main object of the Act 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.”¹¹ Thereby simplifying the duties of a disponee or his legal adviser by impeding out dispensable information from their view.¹²

8 *Wolfson v RG of New South Wales* [1934] 51 CLR 300 [308], quoted in Theodore BF Ruoff, *An Englishman Looks at the Torrens system* (Sydney: The Law Book Co of Australasia Pty Ltd, 1957) 8,9; *Gibbs v Messer* [1891] AC 248 [254] quoted in Theodore BF Ruoff, *An Englishman Looks at the Torrens system* (Sydney: The Law Book Co of Australasia Pty Ltd, 1957) 28.

9 *Wolfson v RG of New South Wales* [1934] 51 CLR 300 [308].

10 *Gibbs v Messer* [1891] AC 248 [254].

11 *Ibid*

12 Theodore BF Ruoff, *An Englishman Looks at the Torrens system* (Sydney: The Law Book Co of Australasia Pty Ltd, 1957) 28.

The curtain principle does not act as a complete barrier in itself as it allows parties to look into documents behind a title such as the survey plans to ascertain the genuineness of the title.¹³

The Insurance Principle

As per Hogg¹⁴, England and Ireland use the term ‘insurance fund’ in their land registration statutes, whereas the Torrens system in Australia uses the term ‘assurance fund’ in their land registration statutes¹⁵, however Ruoff chose to label the third principle of the Torren’s system as the ‘insurance principle’ substituting insurance for assurance. Ruoff has been criticized for not being able to distinct between the ‘insurance principle’ and the assurance fund and its implementation.¹⁶

The Torrens system in its initial stages of adoption received a lot of hostility by its critics this is mainly because there was always the possibility that innocent owner could be deprived of their land rights surreptitiously as the system could be manipulated by exploitative individuals.¹⁷ Therefore, the assurance fund was adopted

13 Kim S Korven, *The emperor's new clothes: the myth of indefeasibility of title in Saskatchewan* (University of Saskatchewan, 2012) 28.

14 James Edward Hogg, *Registration of Title to Land Throughout the Empire* (Toronto: Carswell, 1920) 385.

15 Theodore BF Ruoff, *An Englishman Looks at the Torrens system* (Sydney: The Law Book Co of Australasia Pty Ltd, 1957) 32.

16 Kim S Korven, *The emperor's new clothes: the myth of indefeasibility of title in Saskatchewan* (University of Saskatchewan, 2012) 34

17 John Baalman, *The Torrens system in New South Wales* (Sydney: The Law Book Co of Australasia Pty Ltd, 1951) 58.

with the purpose of assuring – not insure- land owners and interest holders that they would not suffer losses as a result of the Torrens system.¹⁸

Korven notes that contrary to what Ruoff claims, the Torren system never ‘carried on literally as an insurance undertaking’ often requiring the party who was benefitted out of the other party’s loss to provide for the indemnity.¹⁹

Thereby, as per the Torren’s system not everyone suffering a loss could claim from the fund as the Torrens system does not instil an insurance fund:

Once the collection of funds for the Assurance Fund by New South Wales has ceased in 1941, over 750,000 pounds has been paid into the fund whereas payments out of the fund has not exceeded 21,000 pounds. In roughly eighty-five years less than three percent of the funds have been paid to the claimants.²⁰ The remainder was transferred to the government’s general revenues. Even though the government continued to assure it would fund claims from its general revenues given the figures the likelihood of it happening in any substantial amount was very small.²¹

As pondered upon by Korven, one of the reasons why the funds remained solvent was because the Land Title’s staff

18 Kim S Korven, *The emperor's new clothes: the myth of indefeasibility of title in Saskatchewan* (University of Saskatchewan, 2012) 35
<<https://harvest.usask.ca/handle/10388/ETD-2012-10-522>> accessed 20 May 2018.

19 Ibid

20 Ibid 36

21 Ibid

was stringent in the examination and acceptance of any instruments.²² Additionally, the written policy which states that staff should act to avoid errors and claims against the fund ensures that very few substantial errors are made in registration.²³

Findings and Discussion

Legislative and Judicial developments in Sri Lanka concerning the Doctrine of Indefeasibility of Title

The Doctrine of Indefeasibility of Title in Sri Lanka

In Sri Lanka registration is said to confer an indefeasible title which is free from adverse claims and encumbrances not stated in the register. The registered title is guaranteed by the state to be good against the world in the absence of fraud or other circumstance as laid down by the Title Registration Act. The doctrine of indefeasibility is incorporated within the provisions of the Registration of Title Act No. 21 of 1998 Sri Lanka. Due to the absence of a statutory definition or case law pertaining to the concept of indefeasibility and title registration in Sri Lanka, it relies on definitions followed in Australia²⁴ which in turn relied on the New Zealand case of *Frazer v. Walker*²⁵ which

22 The Land Titles Act 1906 Saskatchewan, s 78; *Ibid* 37.

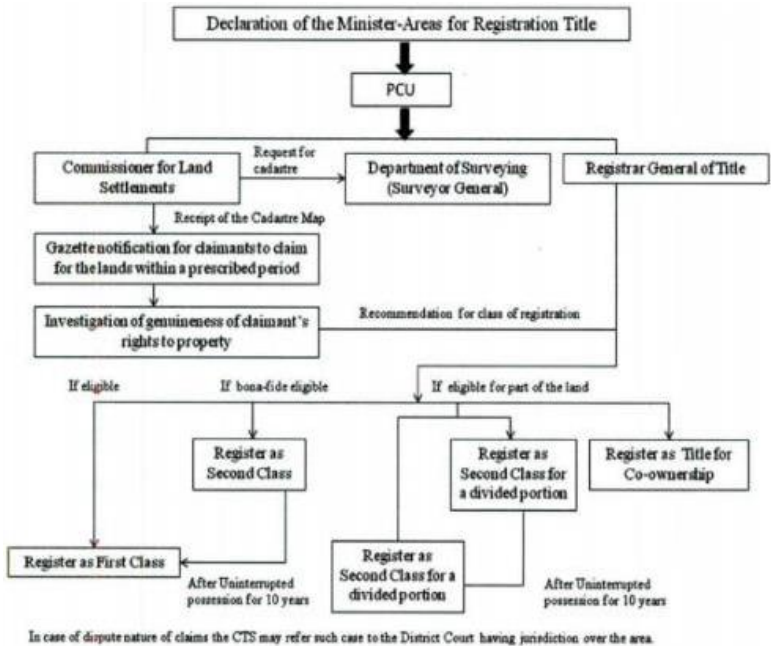
23 ES Collins, *Land Titles in Saskatchewan – a guide to registrars and their staffs* (Regina: Land Titles, 1966) 23.

24 Fernando, Face to face interview with Dharmapala, Commissioner of Title Settlement, Department of Land Settlement, Sri Lanka in consultation with Silva, Legal Officer, Department of Land Settlement, Sri Lanka (Land Commissioner General's Department Battaramulla, 23 July 2018).

25 [1967] AC 569

describes that (indefeasibility of title is): “the immunity from attack by adverse claim to the land or interest in respect of which he is registered, which a registered proprietor enjoys. This conception is central in the system of registration”.

Title Registration Process Figure 1.1



Source: Perera, 2010

The register of titles in Sri Lanka includes all encumbrances relating to a plot of land and the key features such as all interests in a property, including transfers, leases, mortgages, covenants, easements, resumptions and other rights in a single Certificate of Title thereby acting as

a perfect mirror of the title as expected by the doctrine of indefeasibility. Thereby, the need to look beyond that register is not felt in the Sri Lankan context which makes the Sri Lankan title registration scheme also in line with the curtain principle. However, with regards to the insurance principle the Sri Lankan Title Registration context practically does not include the insurance principle as a core element, even though it is recognized in the Act as so. When examining the provisions of the Act – Sections 58, 59, 60 and 62 read together - focussing on the insurance principle it can be clearly seen that the Act explicitly recognizes an assurance fund to provide for any indemnities that may occur in the part of the state as a result of the title registration and further recognizes that such indemnities will be curbed via the assurance fund.

However, even though the Act clearly stipulates as to the existence of such ‘assurance fund’ in the present scenario as stated by the Assistant Commissioner of Title Settlement in the Land Settlement Department such fund does not exist thereby the insurance principle embodied via the concept of indefeasibility in the Act (through the operation of Sections 58, 59, 60 and 62) is not in practice in the practical scenario. So, this brings out the very pertinent issue as to how a person in such a scenario will be indemnified. With the only available option to a victim who loses their land due to an error in registration or fraud being the ability to apply to the land settlement for a change in the title and this change can occur after an investigation Registrar General can amend the register to the correct position or if it is an error in the survey process survey

general can amend the map as so, otherwise the option of going to courts (District Court of Sri Lanka) is available for the change is the registrar sought for or against a fraudster who committed the title fraud.

The Sri Lankan government is unable to maintain a separate fund as an assurance fund much like the Torrens system on which the Title Registration Act is based on. So currently if a party fraudulently deprived an innocent purchaser of property, the only available remedy for such party is to file an action against such fraudulent party in a court of law (ideally in a District Court of Sri Lanka) and thereafter seek indemnification through such fraudulent party or apply to the Land Title Settlement department to have such title reverted back to its original status, thereby the register will be amended to its earlier position. However, if the error or omission occurred due to the registrar as per Section 58 of the Act, in the absence of an assurance fund, it is not possible for a victim who suffered a Section 58 loss to be indemnified if the title cannot be reverted back to the original owner.

The Sri Lankan Act is also not clear as to whether a person registered under title registration obtains immediate indefeasibility or deferred indefeasibility, although what is now currently being used in practise is immediate indefeasibility. The Sri Lankan Act on title registration much like its Australian counterpart does not specify on whether indefeasibility extends to all terms in a registered document such as covenants once it is registered. The Sri Lankan Act is silent as to this matter but if any doubt were

to arise the Australian position on extending indefeasibility to registered documents would prevail as discussed under the subheading of ‘The Doctrine of Indefeasibility of Title in Australia’ which is a subheading under this chapter.

With regards to the application of adverse possession in title registration, title registration based on prescription is recognized in Sri Lanka and via the operation of the Title Registration Act, two types of titles have been recognized, namely, 1) Absolute Title 2) Possessory title, and a person successful in claiming for title registration based on a 10 year prescription period will obtain a possessory title and not the absolute title, and only after obtaining such possessory title can a person apply for the absolute title which will be granted automatically after 10 years passing of such application made for absolute title provided that no disputes to the contrary arises during that period of time.

The enforcement of the Doctrine of Indefeasibility of Title in Sri Lanka in comparison to other jurisdictions such as the United Kingdom and Australia.

The Doctrine of Indefeasibility of Title in Australia

Land tenure systems dealing with ownership of land in Australia include:

General Law (‘Old System’) Title, Torrens (‘Real Property’) Title, Strata Title, Native/Aboriginal Title and Maori Title, and Possessory Title,²⁶the focus of this study

²⁶ Legal Vision, ‘What is indefeasibility of title’ (Legal-Vision Australia) <<https://legalvision.com.au/q-and-a/what-is-indefeasibility-of-title/>> accessed 23 June 2018.

is however on the Torrens title and more specifically on the principles of indefeasibility incorporated in the Torrens title. In Australia a contract of sale for real property does not suffice in itself to transfer the property. After the contract has been signed, the transaction between the parties needs to be registered in the state or territory of the relevant land title office where the property is located. Once registration is completed, the property transfer is finalized.²⁷

The Torrens System has simplified the process of transacting with land, as it depends on the doctrine indefeasibility of title, where a registered interest is given priority over all other interests. Thereby, allowing property purchasers to rely entirely on title registration to ascertain ownership or interest in the real property. Therefore, the need to investigate whether the prior transfer was valid is dispelled with, providing a higher level of security in real property transactions reinforcing the mirror and curtain principle.

In Australia there are exceptions to the concept of indefeasibility of title, which differ from each state and territory. Some of the exceptions include: fraud; forgery; prior registered interests; prior certificates of title; or false descriptions. Therefore, if a title can be proved to have been obtained by fraud, the court can reverse such registration thereby ensuring the insurance principle.

Australia too follows the principle of immediate

²⁷ Ibid

indefeasibility much like Sri Lanka as enumerated in Section 45 of the Real Property Act 1900. As to whether all terms in a registered document would become indefeasible upon registration, it was discussed in the Australian case of *Mercantile Credits v Shell Co of Australia*²⁸ that if a term is closely linked to the estate or interest (that is to say it is part of the interest), the indefeasibility of the registered instrument will thereby extend to the term. On the other hand, if the term is a personal term that does not affect the estate or interest (such as in the case of a covenant of guarantee), the indefeasibility will not extend, this was further affirmed in the case of *Karacomiakis v Big Country Pty Ltd*²⁹ where the court held that the covenant to pay rent is an indispensable part of the interest created at the time of registration.

With regards to adverse possession, in Australia, there have been divergent approaches to adverse possession (both with regards to the common law system for lands and title by registration). Currently, the Australian approach to adverse possession is diverse, contradictory and incomplete. Even within a state, irregularities exist. For instance, in New South Wales Australia it is possible for a person to acquire title by adverse possession (as statutorily modified), however, is barred from acquiring a prescriptive easement over Torrens title land,³⁰ although in South Australia it is challenging for an adverse possessor to

28 (1976) 136 CLR 326.

29 10 BPR 18, 235.

30 *Williams v State Transit Authority of New South Wales* [2004] NSWCA 179; [2004] 60NSWL 286.

acquire Torrens title land, it is however possible to acquire a prescriptive easement.³¹ Such inconsistencies do not herald well for the implementation of the doctrine of indefeasibility.³²

The Doctrine of Indefeasibility of Title in the United Kingdom

The United Kingdom has its own land registration practises and is governed by the Land Registration Act of 2002. The difference between the Torrens system of land registration in Australia and the law in the England and Wales is not very vast. The land law in the United Kingdom does not ensure full indefeasibility unless and until - especially in the context of overriding interests – all interests and encumbrances are registered. In the United Kingdom an overriding interest is an interest in a piece of land that need not be registered to bind a new owner although in conveyancing all interests and rights over a piece of land have to be written on the register entry for that land.

One of the aims of the Land Registration Act 2002 is to reduce the number of overriding interests and to replace as many as possible of them with register entries. This is in line with its overall objective of making the register a complete record of title as practicable.

31 *Golding v Tanner* [1991] SASC 3013; [1991] 56 SASR 482.

32 Marcia Neave, 'Towards a Uniform Torrens System: Principles and Pragmatism' (1993) 1 Australian Property Law Journal 114; Susan MacCallum, 'Uniformity of Torrens Legislation' (1993) 1 Australian Property Law Journal 135.

With regards to adverse possession, it is to be noted that, adverse possession has been statutorily constrained in the English title- by-registration system. The situations in which an adverse possessor may have an opportunity to become the registered proprietor notwithstanding the issuance of a counter notice is subject to three exceptions.³³ Whilst the adverse possessor must prove adverse possession for 10 years and the application of one of the three exceptions.³⁴

The first exception is where attempting to dispose the applicant by the registered proprietor would be unreasonable due to equity by estoppel and the situation is such that the registered proprietor ought to be the applicant.³⁵ The exception is however subject to the nature and extent of the law of estoppel in the course the application was submitted. Taking into consideration the fluidity of estoppels in English law, commentators are of the view that is not quite clear whether an adverse possessor would succeed.³⁶ Further, the minimum equity requirement could signify that a remedy for an applicant will be awarded through monetary compensation over registration, as the legislation states that the applicant must be registered.

The second exception applies when the applicant is entitled to be registered as the proprietor of the estate due to

33 Land Registration Act 2002 (UK) chap 9, sch 6, para 5(2)-(4).

34 Land Registration Act 2002 (UK) sch 6 para 1 and 5.

35 Land Registration Act 2002 (UK) chap 9, sch 6, para 5(2).

36 Martin Dixon, *Modern Land Law* (Routledge, 7th ed, 2010) 429.

different reasons.³⁷The Law Commission was of the opinion that this would arise in instances such as when the applicant was already entitled to the land under a will or intestacy, or the applicant was the purchaser of the land who had moved onto the land but the legal estate was not transferred to him or her.³⁸

The third exception applies when a reasonable mistake has been made by a neighbour with regard to a boundary of a particular land.³⁹ The law allows an owner occupying a land that was not of his/her belonging, where he/she mistakenly and reasonably believed for even a minimum of 10 years that the exact boundaries of that particular plot of land has been fixed, to be registered as the proprietor of that plot of land.⁴⁰

The Land Registration Act 2002 safeguards the interests of the registered proprietor by providing means to repossess the land in such instances. In the past, adverse possession was mainly used to address disputes relating to boundaries,⁴¹the first two exceptions thereby serve no purpose. The two exceptions are a repetition of the position before the Act was passed. The effective application and

37 Land Registration Act 2002 (UK) chap 9, sch 6, para 5(3).

38 Law Commission (UK) and H M Land Registry, *Land Registration for the Twenty-First Century: A Conveyancing Revolution*, (Law Com No 271, 2001).

39 Land Registration Act 2002 (UK) chap 9, sch 6, para 5(4).

40 Kevin Gray and Susan Francis Gray, *Elements of Land Law* (Butterworths,2001) 192.

41 *Norton v London & North Western Railway Co* [1879] 13 Ch D 268; *Marshall v Taylor* [1895] 1 Ch 641; *Neilson v Poole* [1969] 20 P & CR 909; *London Borough of Hounslow v Minchinton* [1979] 74 P & CR 221

operation of estoppel outside property law;⁴²and the second exception which guards a possessor who has a legitimate source of entitlement outside legislation, the protection afforded to the registered proprietor will not override a possessor, where a possessor has a legitimate source of entitlement outside the legislation, the protection of the registered proprietor will not incapacitate such entitlement.

Most commentators are of the view that the statutory scheme of adverse possession has been accepted as a mean to adjust property law concepts to fit into title by registration. As land law as it stands today is no longer governed by possession and relativity of title, the indicator of ownership or dominion is clearly registration.⁴³

Amongst many other measures taken by the Land Registry of the United Kingdom, a designed software package is used by the Land Registry to minimise acts of fraud committed by its staff. In England the Land Registry documents are not notarially executed. In the United Kingdom a solicitor who commits an act of fraud or aids in such act will be prosecuted for fraud and the Law Society will take disciplinary action against such solicitor & dis-enrol the solicitor from the roll of solicitors.⁴⁴

42 Robert Megarry, Charles Harpum, William Wade, Stuart Bridge, Martin J. Dixon, *The Law of Real Property* (Sweet & Maxwell, 8th ed, 2012) 45-6.

43 Kevin Gray and Susan Francis Gray, *Elements of Land Law* (Butterworths, 2001) 444.

44 Sunil Foster, 'Advantages of a Computerised Land Registration Scheme with measures to combat Land Registry Fraud' *The Island* (Sri Lanka, 22 January 2011).

In the United Kingdom a solicitor cannot practice without the annual practising certificate issued through the Law Society. Any person who suffered as a result of a fraudulent act of a solicitor will be compensated by the Law Society's compensation fund which is funded by the contributions of solicitors when applying to the Law Society for the renewal of the annual practicing certificate. Due to a solicitor's negligence, a client has suffered some losses in a transaction; such client can make a claim against the indemnity insurance policy of the solicitor. Without having an indemnity insurance policy, a solicitor is not allowed to practise in the United Kingdom. Solicitors working for a firm are covered by the firm's insurance policy.⁴⁵

⁴⁵ Ibid

Recommendations and Conclusion

Eliminating the legal and practical limitations that hinder the Doctrine of Indefeasibility of Title: Recommendations to Title Registration in Sri Lanka

Digitalized Land Registration System

The digitalization of the title registration process could be suggested as a feasible measure to counteract security issues in the transfer of land, currently the Surveyor Generals department is working on making the cadastre maps available online for the public to access,⁴⁶ if implemented this could aid interested parties could view the lot in which they are interested in and leads to less land frauds occurring, as in the deed system the Notary nor the Transferee will be fully aware as to the extent of such lots in reality, and the online cadastre map assures the extent of such lots.

Further the digitalized system should include an online communication mechanism that for departments involved in the Title registration process, such as the Land Title Settlement Department; Surveyor Department; Register General's Department; Land Commissioner General's Department and the BimSaviya Regional offices present throughout the country, to communicate as well as share records pertaining to Title registration since currently such

⁴⁶ Fernando, Interview with Sarath, Senior Superintendent of Surveys Title Registration, Survey Department, Sri Lanka (Survey Department Narahenpita, 31 May 2018).

sharing of documents still take place via post, which is very inefficient as it takes up a lot of time, establishing such system would make the process of title registration more efficient.

Additional elements of such digitalized land system would include the taking of digital fingerprints of transferors and transferees, so as to prevent fraud in subsequent transfers, as a digitalized fingerprints would further secure the title registration process and further, by providing an online context where applicant for title registration can see which step of the title investigative process would further improve the efficiency of the process as applicants can submit relevant documents depending on which stage they are in. The stages of title registration in Sri Lanka being demarcation of boundaries, adjudication to determine ownership of lands, cadastral surveying of lands and then the registration process where the details collected are entered and finalized into the land title register.

Reforms to the law on Title Registration and Administrative Structure

Definition for ‘Title Fraud’

A rigid definition to ‘title fraud’ should be introduced in the Title Registration Act so far most jurisdictions including that of Australia and the United Kingdom has been relying on case law to define ‘title fraud’, but the outcome of these decisions vary from one case to the other. By having one definition for title fraud, all instances of title

fraud would be approached in a similar manner; this provides proprietors with an assurance against perpetrators of land fraud. The Canadian approach to title fraud which states that title fraud occurs when “the ownership or title of a property is fraudulently changed or documents are forged to allow a fraudster to illegally sell or refinance the property”⁴⁷ can act as the basis for such definition considering Canada’s excellent track record with regards to having a secure titleregistration system.

A Third Category of Title

Currently there are only two categories of title in Sri Lanka: the first-class title known as the Absolute title and the second-class title known as possessory title.⁴⁸ However as pointed out in Chapter 4.3.3 at certain times it can be quite difficult for the Land Settlement Department to determine instances of ownership which do not fall under the purview of either one the aforementioned categories, therefore it is essential that rights of owners of such property or persons occupying such land be preserved as well.

In order to preserve such right a third category of title

47 FCT, ‘Title Fraud’ (FCT Canada) <<https://fct.ca/property-owners/title-fraud/>> accessed 1 October 2018.

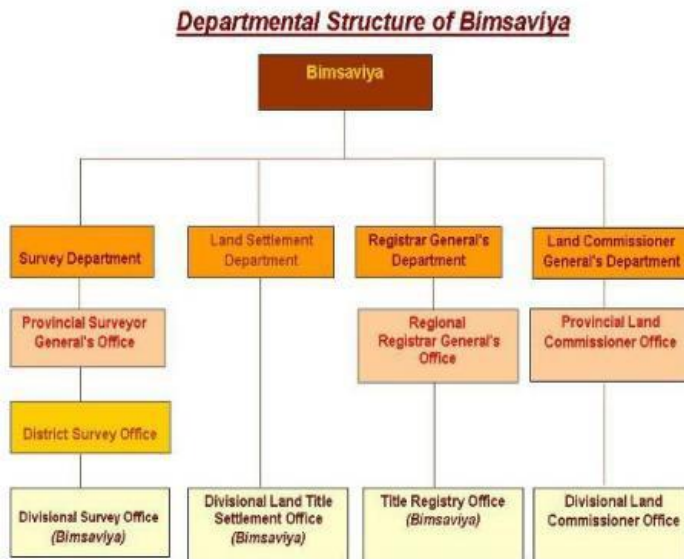
48 Fernando, Face to face interview with Dharmapala, Commissioner of Title Settlement, Department of Land Settlement, Sri Lanka in consultation with Silva, Legal Officer, Department of Land Settlement, Sri Lanka (Land Commissioner General’s Department Battaramulla, 23 July 2018).

needs to be introduced, this category of title can be a temporary title in the form of a 'Rights Title' where in the absence of proof of ownership of such a person his/her rights to such lands are recognized up until such dispute to ownership of such lands has been resolved in courts, so that during the subsistence of a court case to determine ownership to a land the rights of the occupants of such land are not compromised, the third category of title can be applied to and obtained by an application to the Land Settlement Department where after a thorough investigation as to any claim made, a 'Rights Title' can be afforded to a deprived party.

Unification of Departments Involved in Title Registration

A title registration system that provides an indefeasible title to property cannot be fully enforced without a proper title registration process; therefore, it is essential that while the law should sufficiently address title registration concerns the administrative process of title registration should also be in line with such standards. Currently there are four institutional department involved in the title registration process.

Departmental Structure of BimSaviya Figure 1.2



Source: Registrar General’s Department Website

The overwhelming number of Governmental institutions involved in the title registration process as displayed in figure 1.1 can be identified as a hindrance to effective title registration.⁴⁹In Thailand only one institution which is the “Department of Lands” acts as the implementing agency of land titling. The Land Department in Thailand is the government agency responsible for issuance of land title deeds, registration of real estate transactions, land topography and cartography matters thereby this leads to

49 Fernando, Interview with Sarath, Senior Superintendent of Surveys Title Registration, Survey Department, Sri Lanka (Survey Department Narahenpita, 31 May 2018).

the smooth functioning of such procedure as only one government department is involved. The presence of many governmental institutions involved in the process of title registration in Sri Lanka is a liability to the effective implementation of this programme, as of 2016 only 539,359 land parcels (including state lands) have been registered under the Title Registration Act as opposed to the 12 million land parcels present throughout the country, and therefore the total number of land parcels registered had been just 4 percent of the total lands present throughout the country even within a period of 18 years as of 2016.

Alternative means to finance Assurance Fund

It has been well established throughout the research that the absence of the assurance fund within the title registration scheme is a major drawback as it defeats one of the key principles of the doctrine of indefeasibility of title which is the insurance principle. This is because the government had not allocated a separate fund for the purpose of an assurance fund even though the Act explicitly states such, one such way to resolve this matter is to introduce an alternative funding scheme for the assurance fund. It is well known that title registration process is done free of charge and the title certificates are issued on a non-payment basis, however if the land title settlement department were to charge a fee from proprietors when titles are being issued such fee can be allocated to form the assurance fund, thereby satisfying the insurance principle which the Torren's system sought to establish with the introduction of the title registration system.

Conclusion

In conclusion, it can be affirmed that the Doctrine of Indefeasibility of Title in Sri Lanka is merely a myth and not a legal fact. One of the crucial features of the Torrens title registration system, that encouraged land owners to register their lands in the title registration system was the ‘assurance fund’ incorporating the insurance principle as an element of indefeasibility of title. The assurance fund acts as the ‘carrot’ to encourage people not familiar with the Torrens system of lands to convert itself to it from other systems in which they are familiar with. Such assurance fund too forms the basis of the legislation on registration of title in Sri Lanka, however in practice no such fund exists and lawful proprietors who lose their land due to fraud and other circumstances such as errors in registration do not have this essential ‘carrot’ to rely on, therefore this begs the question is the Sri Lankan land title really indefeasible if it does not incorporate one of the key facets of the doctrine of indefeasibility of title? Or is the doctrine of the indefeasible title a mere facade? With regards to the insurance principle, it can be stated that, it has no enforceable effect in the Sri Lankan context although indemnity can be claimed from the perpetrators who initiated the fraud by an order given in a court of law, in instances.

As to the mirror principle, it is said that any land title system that is predicated upon the Torrens model which Sri Lanka follows, such title entered into the title register is to act as a mirror as in that it would reflect all the essential information

related to the title which Sri Lanka has been successful in doing with its title registration regime. On the other hand, the curtain principle is dependent on both the mirror principle and the insurance principle; if one of those two pillars fails the curtain principle will not stand. So, it is evident from the study that the principles of indefeasibility of title brought via the operation of the Title Registration Act No 21 of 1998 in Sri Lanka is not executed in the practical scenario. Therefore, it can be concluded that indefeasibility of title in Sri Lanka is merely a myth and not a legal fact.

Title registration was brought into the Sri Lankan context as a mean to solve issues related to land tenure. But the greatest challenge is how effectively these registration systems can be implemented specially in developing countries. Land title registration systems are implemented to achieve high quality security to the property, to protect property rights, to facilitate transactions in land, and to enable land to be used as guarantee for a loan, standards which only a truly indefeasible land title can achieve. Therefore, any attempt to introduce a land title registration system will be unfruitful unless such system is supported by suitable legislation, that suits the Sri Lankan context, well-co-ordinated institutions, sufficient financial and human resources as well as the social adherence and awareness. The Title Registration Act has been in blind operation in Sri Lanka since 1998 as most of its provisions including but not limited to the principles of indefeasibility do not suit the Sri Lankan context, as it did in a developing country like Australia. The objective of title registration is

to guarantee title, and with the ever-increasing value of properties and fraud which puts this 'guarantee' and associated indemnity into greater risk, Sri Lanka should pay more attention to its title registration system and its underlying principles of indefeasibility if Sri Lanka is to move forward as a developing nation.