

TLA

- **53.** Priority according to time of registration
- **63.** CT = conclusive evidence that person named in certificate is proprietor of land
- **199.** RP protected against ejectment EXCEPT in certain circumstances
- **134.** Notice of unregistered interest NOT EQUAL TO FRAUD
- **202.** Bona fide for valuable consideration purchaser will be protected even if registered through fraud or error.

Immediate indefeasibility

- Deferred indefeasibility position (*Gibbs v Messer*)
 - o RP dealing with a FICTITIOUS person cannot acquire immediate indefeasibility.
 - o Can only transfer good title to 3rd party.
 - o Read strictly – confined to unusual facts: applied in *NSW v Barnes* where mtg acquired from non-existent proprietor
- *Frazer v Walker*
 - o Indefeasible title passes even with void instruments upon registration (mortgage here was nullity as Mrs F forged her husband's signature on the mortgage instrument).
- *Breskvar v Wall*
 - o Emphasised title by registration EVEN of void instrument
 - o Section 63
 - o Because W was guilty of fraud, title was defeasible against B
 - o Court ready to find B at an equitable interest (or at least a mere equity), and A (3rd party) had equitable interest.
 - o Applying *Rice v Rice* – A had priority. General principles still apply with Torrens system.

Express Exceptions s68

(1A)

- Reservation in the grant
- Encumbrances notified on registrar
- Adverse possession
- Public rights of way and easements
- Unpaid rates – will have first charge over land
- Mining lease or licence
- Prior unregistered lease/agreement for lease/letting for term NOT EXCEEDING 5 YEARS to tenant in ACTUAL POSSESSION; **BUT** no option of purchase/renewal in any such lease or agreement shall be valid as against subsequent registered interest **UNLESS lease or agreement** registered or protected by caveat.
 - o *Leros v Terara*
 - T had unregistered lease (5 yrs) with option to renew (7 yrs)
 - Mortgaged leased to NAB
 - NAB lodged caveat protecting own interest in lease – option to renew not mentioned

- T caveated its interest after original RP transferred to another RP (J)
- T's interest within short-term lease exception, thus enforceable against subsequent RP Leros.
- T's caveat INEFFECTIVE – option to renew extinguished on transfer to J.
- NEED TO CAVEAT BEFORE RP REGISTERS AN INCONSISTENT INTEREST
- Bank's caveat INEFFECTIVE – only protected mortgage of lease. Narrow construction of s68. Need to mention EVERY INTEREST to be protected
- LEASE ITSELF NEEDS TO BE PROTECTED BY CAVEAT

(2)

- (b)(i) Prior (and current) certificate of land exception
- (ii) wrong description of parcels or boundaries (PHYSICAL boundaries *MBF v Fisher*) exception UNLESS a purchaser for valuable consideration
 - *Registrar of Titles v Esperance Land Co*
 - When s 202 and s 68(b)(i) prior CT conflicts, s 68 overrides more general section 202.
 - Grey area – what if E claimed under s68(b)(ii)?
 - Not clear how to resolve conflict between (b)(i) and (ii).
 - *MBF v Fisher*
 - Prior CT exception requires for CT to still exist!!
 - Does not apply to interests left out (lease was left off CT in error)

Fraud Exception

1. Fraud?

- Actual fraud (*Assets Co v Mere Roihi*) – dishonesty of some sort against RP or their agents
- Fraud of 3rd party irrelevant unless had notice by RP or their agents. Knowledge of fraud = fraud
- If fraud suspected by enquiries deliberately not made, MAY = fraud
- Where prior UNREGISTERED interest holder defrauded out of their interest, need to prove a **deliberate, dishonest cheat/trick** (knowledge of unregistered interests + engagement in other conduct that is dishonest) *Waimiha*
 - *Loke Yew*
 - Dishonest trick – G's assurance to E was false and fraudulent representation for purpose of inducing E to enter into transaction
 - Made knowing that without such representation, E would not have entered into transaction
 - Following *Waimiha*
 - MORE THAN MERE KNOWLEDGE OF EXISTING RIGHT
- Timing – traditionally refers to fraud prior/leading up to registration.
 - Fraudulent conduct AFTER registration does not raise exception
 - *Bahr v Nicolay*
 - T did not just have notice of B's interest. Undertook in the contract of sale from N to procure registration of that land. Like in *Loke Yew*.
 - **Mason & Dawson J** find fraud – deliberate repudiation of B's interest that they have undertaken to recognise.

- Fraud can capture conduct occurring AFTER registration.
- **Toohy & Wilson J** – Fraud needs to have been committed in the act of acquiring registered title.
- **No fraud before:** no dishonest intent before becoming registered. Only after registration did they decide to repudiate/disavow B's rights to repurchase.
- **Brennan J** – deliberate breach of contract = equitable fraud. Not ACTUAL fraud, therefore not fraud within s 68 of TLA.
- Weight of authority favours traditional view (not certain).

2. Agency

A) Where RP becomes registered through fraud of agent (**Respondeat superior applies**)

- Was agent acting within scope of his/her actual or apparent authority?
- *Nathan v Dollar and Sense*
 - NZ case
 - 1) Is fraudster an agent of RP?
 - 2) Was agent acting within scope of his authority? Or can knowledge of fraud be imputed to RP?
 - What was agent authorized to do? Here: obtain mortgage in registerable form, Dup CT and insurance details.
 - Was Rodney's fraudulent act in forging mother's signature so connected that he can be said to be done in performance of what he was supposed to do? YES – improper mode of fulfilling task
 - **ESPECIALLY:** when criminal act is an **inherent risk** in doing what was authorized.
 - **Note:** Rodney given specific instructions – easier to determine scope of agency!!!!
- *Schultz* – no agency as lawyer found to be on frolick of his own. Not acting within scope of agency. Solicitor not given specific instructions

B) Where agent has knowledge of fraud

- Irrebuttable presumption: agent communicates to P all info that agent has knowledge **in course of transaction**.
- **Exception:** where information sought to be imputed = knowledge of AGENT'S OWN FRAUD or info acquired whilst a party to fraud.
- P can then rebut presumption that such info not communicated by agent.

3. Fraud against the registrar

- Where falsely attested mortgage is lodged for registration (or put on the path for registration)
- Resulting in provision of false representation to registrar of registration of proper mortgage when contrary was known (*Beatty v ANZ*)
- *Beatty* – looked at bank officer's experience and high position (manager of security clearance).
 - Fact that falsely attested document was registered by officer
- Cf. *Russo v Bendigo Bank*
 - Fraud requires: subjective, willful and conscious disregard of rights of another

- None here: Gerada did not understand significance of her false attestation in whole conveyancing process – 17 yo law clerk
- Did not understand that by falsely attesting the document, its registration would be a false and fraudulent representation **to the registrar** that Mrs R signed in front of her when she did not.

Other Exceptions –

Rights in personam

- Cause of action:
 - Estoppel (*Barry v Heider*)
 - Breach of *Bahr v Nicolay* CT (undertaking)
 - Breach of CICT *Rasmussen*
 - Breach of duty of care (*Gosper*; see *Vassos*).
- Rights a person has against RP relating to land that arises out of RP's own conduct
- 3 ways (before or after registration)
 1. Contractual undertaking of RP
 2. RP = trustee of land (s 55 TLA – trustee cannot hide behind indefeasible title as RP to deny rights of beneficiaries); e.g. *Baumgartner*
 3. Conduct of RP; e.g. *Louse v Diprose* – D had right in personam against L for pty, breach of fiduciary duties, undue influence, estoppel, etc.
- **Elements**
 - 1) Claimant must establish known, recognized legal/equitable **cause of action** against RP
 - 2) Appropriate **remedy** of that cause of action must **relate to the land**. Must recognise that claimant has interest in the land.
 - 3) (UNCERTAIN if required) Conscience of RP affected (element of unconscionability in subjective, descriptive sense. E.g. *Baumgartner*, *Louse v Diprose*)
 - 4) Cannot be inconsistent with policy and purposes of Torrens system – *Farrah v Say Dee* knowing receipt cause of action under *Barnes v Addey* cannot apply as in conflict with s134 TLA
- *Bahr v Nicolay*
 - 1) Cl 4 of contract between 1st and 2nd resp acknowledge contract agreement existing between B and N = contractual undertaking by 2nd Resp to be bound by App's interest.
Was the very basis that 2nd resp got their interest
Result of cl 4 – 2nd resp held property ON TRUST for benefit of App (Mason and Dawson J found express trust; Majority found constructive
Breach of trust = cause of action.
 - 2) Remedy related to land
 - 3) Arguably 2nd resp's conscience affected as well.
 - 4) Not inconsistent with TLA
- *Mercantile Mutual v Gosper*
 - Could not attribute fraud against RP through agency principle

- Letter addressed to both Mr and Mrs G – Mr G does not appear to have been appointed as agent of MM
- Argued in personam exception successfully (majority)
 - **Kirby P** – general law reasoning. Mrs G had personal equity from original mortgage which was not altered as forged variation was not effected by valid deed (fraudulent)
 - **Criticised** – not following principled approach
 - **Mahoney J** –
 - 1) Duty of care breached by using dup CT to register forged variation. **BUT** not recognized cause of action!!
 - 2) Unclear what basis the cause of action had – did remedy relate to land?
 - **Meagher J (dissent)** – registration cures all defects, Mrs G liable to pay amount owing under registered mortgage.
- *White v Tomasel (NSW)*
 - T registered though court order subject to implication that registration subject to validity of order
 - T (subsequent RP) found to be subject to W's right in personam
 - THIRD REQUIREMENT NOT SATISFIED – T found to be wholly innocent
 - Cf. Hayne J in *Vassos*
- *Vassos (VIC)*
 - Decided after Gosper decision handed down – heavily criticised
 - Mere fact of forgery of instrument DOES NOT establish 'personal equity'
 - RP here (State bank of SA) did not meet 3rd element of unconscionability – DOES NOT APPLY!!

Correcting the Registrar

- **76.** Dup CTs issued in error, may upon notice in writing, require person who was issued the document to deliver up for correction or cancellation as may require. On non-cooperation, can apply for summons, if again non-compliance, can apply for warrant to be brought before court.
- **188(3)-(6).** Upon direction of Commissioner correct errors in Register or in entries made, or in dup CT. Has effect of as if error never made.
- *Frazer v Walker* – s188(2) only gives power to correct very clear typographical and obvious errors. CAN ONLY AFFECT FUTURE RP
- Courts cautious of extending power in Aus – only in clear cases where no difficult q of law or fact.
- Where difficulty arises, needs to be judicially decided
- 'sufficient difficulty'?
- Section 76 needs to attach to another reason to find RP has no indefeasible title to property to allow amendment
 - Look to some other exception to explain why registrar can correct register and effect proprietor's title.

Overriding statutes

- e.g. *Criminal Property Confiscation Act 2000* s9
- Registerable real property can be confiscated upon declaration
- Will vest in State free from ALL INTERESTS (registered or not), defeats all caveats, and title passes to State.

Volunteers

- Does RP without value (volunteer) acquire indefeasible title free from any UNREGISTERED interest?
- General law: NO
- Torrens:
 - o **Section 202:** 'purchasers protected' – words do not seem to aid volunteers
 - o **Section 134:** 'Purchaser' in heading; text refers to 'persons'.
 - o *King v Smail* (VIC) –
 - Equivalent of s 134, 202 focussed on (following *Gibbs v Messer*)
 - Volunteer exception recognised.
 - Gift there devised to defraud creditors.
 - o NSW *Bogdanovic v Koteff*
 - No volunteer's exception
 - Referring to *Frazer, Breskvar* – s68 (paramountcy provision) as central provision in TLA
 - As s68 does not distinguish between purchasers and volunteers, indefeasible title passed to the volunteer (beneficiary under will)
 - NOTE: volunteer did not have notice of P's interest – s134 of no relevance. Obiter: if K had notice, outcome might be different. Does not have to answer question of whether s 134 would protect a volunteer.
 - o VIC *Rasmussen*
 - Recognised volunteers exception – significant that volunteer had NOTICE of previous unregistered interest
 - o WA *Conlan*
 - Followed *Bogdanovic*
 - But left situation open where volunteer has notice
 - o HIGHLY UNCERTAIN – HC *Farrah Construction* does not recognise volunteer's exception

Extent that indefeasibility attaches

MC v Shell Co. – lease

- Gibbs J – only the rights that affect or are connected with state or interest in land which the instrument creates are indefeasible.
- Here: lease creating leasehold interest – option to renew affects/qualifies/connected with leasehold estate THUS protected! 'so intimately connected'
- ** distinguish option to purchase and option to renew (obiter – Gibbs, Stephen J)
- Qualify,
- And define the estate or interest in land that instrument creates.

PT Ltd v Maradonna – mortgage

- Personal covenant to repay defines the value of security interest – intimate to interest created by mortgage.
- RENDERED INDEFEASIBLE UPON REGISTRATION even if mortgage is void.

Trevinto (HC) – illegal contract

- Option to renew NOT validated by registration of an illegal instrument under statute.

Perpetual Trustees v Tsai – all moneys mortgage

- All moneys mortgage
- Although personal covenant indefeasible, only liable to pay amount owing under LOAN AGREEMENT
- If loan agreement is VOID AND UNENFORCEABLE, nothing will be owing under it,
- Therefore registered mortgage secures nothing.
- Here – obligation to pay not in mtg, in the loan agreement (void)

Transfers of interest in land – what rights pass?

- **82(1A)** – ‘all rights, powers and privileges... belonging or appertaining shall pass to the transferee; and such transferee shall thereupon become the proprietor thereof and whilst continuing shall be subject to and liable for all and every the same requirements and liabilities to which he would have been subject and liable if he had been the former proprietor or original lessee, mortgagee or annuitant.’
- **83.** – includes right to sue upon any mortgage or other instrument
 - o Recover any debt, sum of money, annuity or damages
 - o And all interest in any such debt, etc, shall be transferred so as to vest the same at law as well as in equity in the transferee thereof.
- I.e. right to sue under personal covenant to pay passes onto transferee upon transfer
- *Consolidated Trust Co. v Naylor*
 - o Guarantee by Naylor for repayment of moneys borrowed by Gale to KWM Ltd.
 - o KWM transferred said mtg to Consolidated Trusts
 - o Gale defaulted – CT sought to enforce guarantee by N per s82, 83 equ of TLA
 - o **Guarantee = separate arrangement between 2 different parties!!**
 - o Can only recover under s 82, 83 **rights affecting transaction between mortgagee and mortgagor** – NOT between 3rd party.
 - o NOT intimately connected with rights to property arising out of mortgage.
- *Queensland Premier Mine v French*
 - o Following *Naylor*
 - o Need to assign rights under personal loan agreement for it to be transferred
 - o S 82, 83 only deals with rights under mortgage **as between mortgagee and mortgagor!!!**

Unregistered interests

1. TLA s 58

- *Barry v Heider* (Isaac J) – s58 not to be read to extinguish equitable rights in unregistered interests
 - In personam claim based on estoppel – B = RP; executed transfer of part of land to Schmidt.
 - Transfer to S actually void due to fraud by S
 - S granted unregistered mortgage over that land to Mrs H (unaware of fraud). S didn't have CT, but B signed letter authorizing Registrar to issue CT to her and had executed transfer of land from B to S (representation)
 - Mrs H's equitable interest = exception to B's indefeasible title – held interest in land subject to Mrs H's mortgage.

2. Caveat system

- **137.** Absolute caveats, notice caveats, or subject to claims caveat to protect claims in any estate or interest **in land**.
- **Approved form** – *Leros*: needs to specify explicitly every interest seeking to protect
 - **Indicate basis of claim**
- **137(1B)** – lodger shall, if required by Registrar, support claim by stat dec stating nature of estate or interest claimed and title thereto
- **(1C)** – if not lodged within 7 days from date of requisition, caveat will be absolutely null and void
- **Role of Registrar** – purely administrative (*Kuper v Kuper*).
- **140.** Lodging caveat without reasonable cause shall be liable to make to any persons sustaining damage such compensation as a judge on summons shall deem just and fit.
 - OK if caveator has **honest belief on reasonable grounds** that they have interest in land that is protectable by caveat.
- **138** –
 - (1) RP to be notified by Registrar upon lodgement of caveat
 - (2) RP can summon caveator before Supreme Court to show why caveat should not be removed – priority dispute
 - (3) Where RP notified, but does nothing, then wants to register a dealing: can summon caveator to court to show why caveat should not be removed.
Priority dispute between 2 UNREGISTERED interests. If Caveator does not respond, court lapses in 14 days.
Expense of bringing action in SC!!
- **138A**
 - (b) Does not apply to caveats lodged by or on behalf of a beneficiary claiming under a will or settlement, or
 - (c) Under court order
- **138B**
 - (1) If s138A activated, RP can apply (in an approved form and for prescribed fee) for Registrar to serve caveator with notice requiring caveator to take action as per (2) **within 21 days after notice served** or caveat will lapse

- (2) Exception to (1) – if Caveator obtains from SC order extending operation of caveat (a).

Compensation

‘Deprivation provisions’ S201 Compensation from: <ul style="list-style-type: none"> • ‘Person responsible’ • Assurance fund 	‘Loss provisions’ S205 Compensation from: <ul style="list-style-type: none"> • Assurance fund
Elements of action	Elements of action
<u>1. Person ‘deprived’ of interest in land</u>	<u>1. Person sustained ‘loss’</u>
<u>2. Circumstances of deprivation:</u> (a) in consequence of fraud; (b) through bringing of land under the system; (c) through the registration of any other person as proprietor; (d) in consequence of any error, omission or misdescription in any certificate or in any entry or memorial in the register	<u>2. Circumstances of loss:</u> (a) through any omission mistake or misfeasance of the Registrar or any other officer in the execution of their duties under this Act; (b) by any error omission or misdescription in any certificate of title or any entry or memorandum in the register; (c) by the registration of any other person as proprietor
<u>3A. Action against ‘person responsible’:</u> (a) the person who acquired title through the fraud; (b) the person upon whose application the land was brought under the Act; (c) the person upon whose application the erroneous registration was made; (d) the person who acquired title to the interest through the error, omission or misdescription	<u>3. Person barred by the provisions of Act from bringing ejectment or recovering land</u>
<u>3B. Action against Registrar</u> (a) ‘Cesser of liability’, or; (b) Where the ‘person responsible’ is dead, bankrupt or cannot be found within the jurisdiction	<u>4. Action for recovery of damages is inapplicable</u>
	<u>5. Action against Registrar</u>

**** NOTE: EXCEPTIONS TO COMPENSATION s196

- Breach of trust by RP
- Improper exercise of sale in mortgage
- Persons claiming under unregistered instrument, document or writing, or any equ mtg or charge by deposit or otherwise without writing
- Interest not protected by caveat,

- Where misdescription of boundaries exception apply unless person liable is bankrupt, dead, absconded

Franzon

- Under s 201:
 - o 'Proprietor' = any registered interest holder
 - o 'Fraud' – same meaning under s 68 (actual dishonesty by RP or agents)
 - o 'Registration of any other person' refers to erroneous registration of another proprietor. I.e. **disconformity in mtg instrument and actual registration of mortgage**.
 - o Here: deprivation = partial deprivation as subject to M's mortgage

Parker

- 'Deprivation' referred to as trickery of fraudster + registration of land.
 - o When property taken away from person

Torrens System mortgage

- Torrens: mortgage acts as charge (not conveyance) **s 106 TLA**.

Formalities

- REGISTRATION **s 58**
- **105**. Needs to be in an approved form
- **85**. Instruments signed + registered has same efficacy as deed (legal estate conveyed).
- **53; 68**. Registration => indefeasible mortgage

Equitable Mortgages under TLA

- **58**. + *Barry v Heider* – TLA does not preclude equitable mortgages.
- Same rules apply under general law – specifically enforceable contract; agreement of subject matter, parties, price (**s 4 SoF; s 36(d) PLA** part performance).
- **34(1) PLA**

Right to discharge (right to redeem)

- Mgor has right to obtain discharge of mtg upon repayment of mtg debt.
- Legal right (exercised on contractual date and as per mortgage instrument)
- Equitable right (arising AFTER contractual date for repayment).
- After legal right expires, Mgor still has **equitable right** to redeem PROVIDED Mgee has not sold off land to pay debt, obtain order for 'foreclosure' (**s 121**), etc.

Implied covenants TLA

- **113**. Mgor will repay principal money on due date (even if not covenanted expressly in mtg instrument).
 - o Also requires mgor to keep property in good repair.

- **111.** Right to possession by mgee upon default of payment of principal sum or interest by mgor.
- **116.** Mgee can deal with land as if legal owner (like at general law) BUT WITH PROVISIO: mgor has right to retain possession without interference until default.
- **106-108.** Implied power of sale
- **115.** Duty to insure on Mgor

Implied Covenants **PLA**

- **57.** Power of sale
 - o Duty of insurance on Mgor (at their own costs)
 - o Right to appoint receiver
 - o Generally to remedies available to mgee.
- **131.** These implied covenants can be excluded/modified by contracting parties.

Priorities

- General law:
 - o Prior legal over subsequent equitable
 - o Subsequent legal over prior equitable IF BFPFVWN (*Pilcher v Rawlins*)
 - o *Rice v Rice*
- Torrens
 - o **53.** In order of registration.

Tacking

Tabula in nafragio

- (General law)
 - o Where there is 1 legal mortgage, and other equitable mortgages.
 - o Subsequent equitable mortgages can improve their position (over prior equitable interests) by tacking onto the first legal mortgage.
 - o BUT C cannot have had notice of B's equitable mortgage at the time he acquired his equ mtg.
- Torrens
 - o **53.** Competing legal interest according to order of registration.
 - o No scope to apply TIN – *Holland J Macks Landslide*
 - o If subsequent mortgages are equitable, to gain priority, just have to register their interests.
 - o **Principle based on doctrine of estates!** No applicability to Torrens

Tacking of further advances

- Applicable to Torrens based on contractual right to make further advances in mortgage.
- IF mortgage contemplates making of further advances – e.g. all moneys mortgage, open ended (discretionary).
- *Hopkinson v Rolt*
 - o Can only tack **without notice** of subsequent mortgages

- + first mgee had discretion to make further advances
- *West v Williams*
 - **NO TACKING WITH NOTICE (actual notice – *Donemore*)**
 - Caveat **does not = notice** (*Donemore*).
 - When 1st mgee gains knowledge of 2nd mortgage, obligation to make further advances discharged.
 - Uncles only had priority over 2nd mtg of advances made without knowledge of it.
- *Matzner v Clyde* – building loan
 - Regonised *Hopkinson* applies to **Torrens** (based on justice and fair dealings)
 - Distinguishes building loan to *Hopkinson* and *West v Williams*
 - Those cases – each FA **diminished** value of security of other mgees
 - HERE: FA made only when value of property **increased** – more for everyone else to share
 - If based on fairness, tacking of FA should not be precluded **even if made with notice**
 - **Requirement:**
 - FA needs to be **proportionate** to increase in value as matter of fact
 - Possible requirements: (1) stipulated maximum; (2) FA mandatory.

Sources

- Express: mortgage instrument
- If not:
 - Statutory – inconsistencies and overlap between TLA + PLA

Right to exercise Power of sale

1. **Does Mgee have power of sale?**
 - Registered mortgage? **106, 108, 109** TLA – Torrens system mortgages ONLY
 - Unregistered mortgage BY DEED? **57(1)(a)** PLA
 - Applies to Torrens – registration of deeds
 - If TLA silent, PLA applies
 - PLA applies concurrently with TLA **if not inconsistent!**
 - If PLA inconsistent with TLA covering **same issue** – **TLA PREVAILS!**
 - (PLA more general statute)
 - **WHAT KIND OF MTG?**
 - **WHAT KIND OF STAT PROV?**
 - **WHAT DOES IT SAY ABOUT APPLICATION?**
 - Unregistered mortgages NOT by deed?
 - *Walsh v Lonsdale* argument – unreg mortgage (like unregistered leases) should be enforced on same terms as if were registered.
 - *Chan v Zachariah* (HC) – obiter; doubted argument. TLA only applies to registered mortgages
 - *Theodore v Mistford* (HC) – obiter; accepted argument in mortgage concept.
 - **UNLIKELY!!! LIMITED RIGHTS**

2. Notice requirements? Complied with?

- **59(1). PLA** Regulation of exercise of power of sale
 - o Only upon default
 - o + when notice requiring payment of mortgage money served
 - o Default continues for 1 month AFTER notice served (or any other period of notice expressed in instrument).
- **106. (TLA)**
 - (1) Upon ANY default
 - o Default continues FOR ONE MONTH (or any period expressed in mtg instrument)
 - o Then Mgee can serve notice to mgor
 - (2) 'Proper notice'
 - a. Delivered personally
 - b. Sent by registered post to:
 - i. Address entered in Register as address of Mgor
 - ii. Address known to mgee as current address of mgor
 - c. Notice in conspicuous place on charged land
 - d. Notice sent to number of fax machine of Mgor.
- **108.** A month after notice served as per s106, power of sale becomes applicable.
- **IF NOT COMPLIED = IMPROPER SALE!**

3. True sale?

- Flexibility **s108 TLA**: auction, private contract on terms and conditions Mee deems fit. Can sell whole or part of land
- Mor can still make good the default UP UNTIL Mee enters into contract of sale with third party
- Overriding principle: must be a true sale
 - o Sale by mgee to himself IS NOT a true sale
 - o But sale by mgee to a company in which a mgee has an interest (shareholder) is NOT a sale to himself. Nothing fundamentally wrong (*Farrah*)
 - o BUT, highly suspicious. Onus shifts to mgee to show that it was an independent, fair and honest bargain (i.e. no collusion)
- *Farrah*:
 - o Company not formed when negotiating purchase of quarry
 - o No intention of purchasing quarry at start
 - o Here: independent, fair and honest bargain
 - o No collusion, negotiated independently
 - o John Farrah went to great lengths to ensure very best price achieved for property
 - o Arrangements in place before shares acquired.
- Cf. *Tse Kwong Lam*
- **108 TLA; 57 PLA**: Mgee's right to 'buy in at auction'

4. Mgee meet the standard of care?

- **UK** – Negligence style test; 'reasonable care' *Cuckmere Brick*
- **HCA** – Not decided, but strong dicta suggest 'good faith' test.
 - o Acting honestly
 - o Not wilfully or recklessly sacrificing interest of mgor (*Isaacs J in Pendlebury*)
 - o *Cachalot Nom (WA)* – Smith J favours strict good faith test.

- **Factors (look at nature of property):**
 - *Pendlebury*
 - Farming land in rural VIC
 - Advertising:
 - Did not include salient features in CITY newspapers
 - No advertising in local papers – required as potential buyers would be located in rural areas.
 - Fact tha owner and neighbour didn't know of auction
 - Location of auction
 - Melbourne city office
 - Common practice, but should have been in closest town
 - Gross undervalue
 - NOT NECESSARILY BREACH
 - But: here reserve price set EXACTLY at mtg debt (extremely low)
 - **Remedy:** damages – cannot set sale to BFPFVWO aside. Difference between what property sold for and what it would have sold for.
 - *Forsyth v Blundell*
 - Mgee entitled to prefer own interests over mgor's.
 - BUT: if mgee's own interests not at risk, mgee cannot disregard entirely the interest of mgor
 - Not following up expression of interest of XL = 'calculated indifference'.
 - Needs to put parties in competition with each other.
 - **Remedy:** Can Blundell set aside sale to Shell?
 - Assuming Shell hasn't registered and power of sale exercised improperly by XL, B has REGISTERED INTEREST.
 - **Only entitled to damages if adopting negligence test**
 - Possible injunction to set sale aside if adopting good faith test.
 - *Tse Kwong Lam*
 - Undervalue does not mean improper sale, BUT fact that mgee disclosed minimum price to auctioneer before sale
 - ALSO disclosed reserve price to purchaser before sale
 - Multi-million pound property – 17 days before 1st advertisement and auction; ADVERTISING LEAD TIME insufficient
 - Expert advice/ evaluation?? (none here)
 - Type of property meant purchaser could have sold off in parts to sette mortgage debt.
 - UK NEGLIGENCE APPROACH!

Right to possession and make improvements and expend money TLA

- **111.**
 - Upon default of PAYMENT of mortgage debt!
 - Not any other breach
- **116.**
 - Broader provision
 - WITH proviso – right of mgor to quiet enjoyment

- To: exercise power of sale requires possession first; OR when property is income generating, needs power of possession to enter property to generate income to reduce mtg debt. Property returned to mgor upon doing so.
- Obligations of Mgee:
 - o Account for any rents/profits. Actually, and would have been received, but for willful acts of mgee
 - o Take reasonable steps to perfect, protect and maintain security
 - o 'Reasonable expenditure' in getting property in condition fit for sale (*Maztner*)

Any such expenditure = 1st charge over property.

Right to appoint receiver

- Event of actual or threatened default
- Conferred by s57(1)(c) PLA
 - o (subject to any contrary intention in mortgage) s57(4)
 - o Extends to Torrens registered mortgages s58
- Arises after power of sale exercisable under PLA/TLA (s65)
 - o Notice requirements for power of sale
- Receiver appointed by MGEE but = agent of Mgor s65(2) PLA; can be challenged by mgor where they consider appointment not justified, or is for ulterior purpose.
- EQUITABLE MGEE – needs to apply to court

Right to foreclose

- Last resort
- Mgee becomes absolute owner – debt extinguished, mgor's right to redeem extinguished s53 PLA
- Attaches to legal AND equitable mtg's
- ADMINISTRATIVE PROCESS under TLA (121, 122)
- Judicial process under general law.
- 53. PLA – cannot reopen foreclosure; right to sue on personal covenant extinguished.

1. Is it a lease?

Essential characteristics of leases:

- 1) Demise
 - Grant of possessory interest in the land from lessor to lessee
 - Lessor = owner of fee simple.
- 2) Exclusive possession
 - Grant of right of exclusive possession
 - Parties intend to grant right to exclusive possession (*Radaich v Smith* – 'licence' granted but looking at other provisions, clear that exclusive possession granted => lease)
- 3) Certainty of the term
 - Commencement

- Date must be certain or capable of being rendered certain **before lease takes effect**
- 'As soon as possible in the new year' UNCERTAIN – no lease *Dunlop Olympic v Ellis*.
- Maximum duration
 - Must be certain or capable of being rendered certain **at the time lease takes effect**.
 - *Lace v Chantler* – 'duration of war' UNCERTAIN. Must be a maximum duration
 - Could've saved by adding '5 years or for so long as war ends, whichever occurs first'.
 - 'Until land is required by the purposes of widening the highway' *Prudential Assurance*.
- 4) Rent (usual but not essential)

Types of leases

- Fixed term
 - Expressly created
 - Of certain duration (*Lace*)
- Periodic
 - Run from period to period (cannot exceed 5 years under Torrens System)
 - Expressed in deed form; orally at commencement of agreement;
 - Operation of law – tenant enters into possession and pays rent pursuant to invalid fix term agreement;
 - OR: when fixed term lease expires and tenant remains in possession, WITH consent of landlord and while paying rent.
 - **71. PLA** – Law will not imply yearly periodic tenancy
 - **72. PLA** – when period of periodic tenancy unclear – 1 month notice can be given for termination

2. How was it created?

Formalities

General law

1. Legal
 - Deed: **s9, 31 PLA**
 - Exception: short term lease NOT EXCEEDING 3 years to tenant in actual possession. Can be created orally (**s33(2)(d), s35(2) PLA**)
 - **Periodic lease = legal lease** (either express agreement or implied by law). Each period = separate, distinct lease.
2. Equitable
 - Specifically enforceable contract
 - Final agreement on material terms; no equitable bar; reading, willing and able; specific acts of part performance or satisfying s4 SoF

Torrens legal lease

- Registration
- IF NOT: general law principles
- Equitable lease where there is specifically enforceable contract of lease
- **Unregisterable leases:** leases not exceeding 3 years (**s91 TLA**) – general law principles!! Legal lease.

1. Is it an easement?

- Essential characteristics (*Re Ellenborough Park*):
 - 1) There must be a dominant and servient tenement;
 - Identify
 - DT: Has benefit of the easement
 - ST: burdened by easement.
 - NOT over easement **in gross** (unless created by statute, e.g. *Land Administration Act*).
 - 2) Easement must accommodate the dominant tenement;
 - *Re Ellenborough* – ‘reasonably necessary for better enjoyment of tenement’
 - Connected with, and reasonably necessary for
 - Serve some use that is **ordinarily made** of DT
 - **What is the nature of the right?**
 - **Nature of DT?**
 - **Is the right connected with or reasonably necessary for better enjoyment of DT as ordinarily used?**
 - Cf. right to free entry to Lord’s cricket ground
 - *Moody v Steggles* – commercial property; right to put up sign on wall of neighbouring property to advertise for DT = easement.
 - 3) Dominant and servient tenements must be owned or occupied by different persons;
 - 4) Right must be capable of forming a grant
 - Right must not be too vague/wide
 - Capable of being defined so party knows what can/cannot be done on ST
 - *Re Ellenborough*: right to use a garden, NOT right to wander on grounds.
 - Cannot be purely recreational – needs some utility and benefit
 - *City Developments v Registrar Generals*: right to lake in a development where occupiers could use for swimming and fishing NOT an easement
 - Whether right amounts to possession or joint occupation of ST
 - Yes: NOT easement

- No: OK

2. How did it arise? Properly created?

- Statute
 - May be in gross
 - Usually to public authority
- Express grant/reservation
 - Law:
 - Deed **s33(1) PLA**
 - OR: registration **s85 TLA** (has same efficacy as deed)
 - Equity:
 - Specifically enforceable contract to convey an easement
 - **Section 4 SoF**; or sufficient acts of part performance **s36(d) PLA**
 - *Walsh v Lonsdale*
 - Not precluded by TLA given broad wording of s68
- Implied grant/reservation
 - **Both DT and ST need to have been owned by same person at some point;**
 - **AND severance of one of the property giving rise to easement**
 - **Reservation**
 - Easement of necessity
 - STRICT TEST: only when DT completely landblocked
 - Easement needs to be ‘absolutely essential’ for use of DT – must be no alternative access (not if ‘precarious’)
 - NO EASEMENT if alternative access has been cut off by alleged DT by own acts
 - ST can rebut implication by showing never an intention for DT to have access over their property!
 - Intended easements
 - Per common intention of parties for land to be used in **defined and particular manner**
 - E.g. *Joshua’s Contractors* – JC sold part of property to Vic Electricity Commission knowing to be used as electricity substation
 - NECESSARILY requires transmitting large amount of noise
 - Court found easement intended to allow DT to be fit for intended use.
 - **Grant**
 - Easements of necessity
 - Intended easements
 - Non-derogation from grant
 - Usually for **negative easements** against ST

- *Ward* per Lord Ungood – could still imply positive easement not to derogate from grant (obiter)
- Same rule as per leases *Malzy*; *Aussie Traveller*
- *Wheeldon v Burrows*
 - Grant of part of owner's land (severance)
 - 'Continuous and apparent'
 - *Ward v Kirkland* – need for some obvious and permanent mark or feature on ST observable on inspection of ST
 - Cannot be transitory or intermittent
 - Designed/appropriate for easement
 - E.g. Pathway, gate
 - Necessary to **reasonable** enjoyment of property granted
 - Nature of right?
 - Nature of property?
 - Connection?
 - For DT itself, or some permanent feature on DT enough
 - At the time of the grant used by original owners for benefit of part granted
 - Applied in Aus! *Stevens & Evans v Allan & Armanasco*
 - Inconvenience of using alternative entrance enough to render easement 'reasonably necessary' for use of property.
- General words **s41 PLA**
 - *Ward v Kirkland* appears to have interpreted the equivalent section as able to CREATE an easement – advantage (through licence, or contractual right) converted into an easement upon conveyance.
 - BUT: DT and ST must have ben occupied by different people IMMEDIATELY PRECEDING severance and conveyance
- Implication from description of land
- Simultaneous conveyances by 1 land owner
- Creation of plan of subdivision
- Estoppel
 - Owner of ST represents easement exists
 - Owner of DT relies on representation and acts on it
 - To their detriment (if easement was removed)
 - *Ward v Kirkland* (drain easement) – representation by acquiescence. Although found that drainage only extended to bathwater, did not grant injunction over

drainage of sewage as would not make material difference (discretionary nature of equitable remedies).

- Prescription (like adverse possession)
 - o Loss modern grant (common law)
 - Easement enjoyed for 20 years (uninterrupted)
 - *Gangemi*: distinguish between intermission and interruption
 - Enjoyment 'as of right'
 - Not exercised by violence, secretly, stealth or by asking permission.
 - Asking permission will amount to licence
 - *Gangemi* – operated laneway so often as chose.
 - Period where use was reduced classified as having no occasion to use it.
 - Actual enjoyment of right raises inference that right continued through intermission
 - ST acquiesced in exercised of alleged easement
 - Knew (actual or constructive knowledge) that DT was exercising right and did not do anything to stop it.
 - Duty to act diligently in protection of interest – includes inspection of property from time to time. Would he have obtained knowledge of easement upon inspection?
 - o *Prescription Act*
 - After 40 years – easement deemed absolute
 - Period of enjoyment must immediately precede commencement of action claiming easement s4; see *Gangemi* (pleaded in alternative)
 - No interruption to enjoyment UNLESS DT submits/acquiesces in it for at least 1 year after notice of the fact of interruption and person responsible for causing it s4

3. Has it been extinguished? Once easement arises, continues in perpetuity until extinguished.

- Agreement
 - o Both DT and ST owners sui juris
 - o Extinguish/modify
 - o Legal: deed of release
 - o Equitable: s4 SoF; 33(d) PLA
 - o Apply to court under s129C(1)(b) TLA
- Abandonment by Non-user
 - o Question of intention of owner of DT
 - o Mere non-user not enough! Not conclusive evidence of intention to abandon

- Look at length of time of non-user
 - Partial abandonment ok *Proprietors Strata Plan*
 - Mere non-removal of obstructions NOT enough *Treweeke*
 - Registered leases – *Treweeke* (NSW) will be abandoned if deemed to be so under common law; cf. *Riley v Penttila*, will remain effective as long as registered. Suggested that since WA legislation is equivalent to NSW, *Treweeke* should be followed.
- Alterations to DT
- Merger
 - Common law: when person acquires and occupies both tenements – extinguishes easement
 - Where both tenements owned by same person but one tenement is leased, easement EXTINGUISHED on termination of lease *Richardson v Graham*
 - Unity of title, but BOTH tenements leased to ONE person – easement suspended (not extinguished) during term of lease.
- Resumption for Public Purposes
- Order of Court
 - **129C TLA**
 - Also applies to restrictive covenants
 - BUT: conservative approach by court

4. If not, interference with easement?

- Matter of fact

5. Remedies?

- Damages
- Injunction
- Abatement
 - Do what is reasonably necessary to exercise the right
 - Minimum necessary to put a stop to interference
 - Cannot do anything to put stop to rights of innocent 3rd party
 - Demolishing requires notice to be served
 - Cannot demolish if other lesser alternatives.
- Declaration e.g. *Gangemi*