TOPIC 4: EXCEPTIONS TO INDEFEASIBILITY

4.1 Statutory Fraud

4.1.1 Definition of Fraud

Case: *Assets Co v Mere Roihi* (1905)

Facts: This case was a joint decision based on 3 disputes between aboriginal natives of New Zealand and the registered proprietors of various lots of land. This case occurred less than 10 years after the Torrens System was established in New Zealand. These registered proprietors sought, and were issued, memorials of ownership on the basis they had purchased the fee simple interests to these lots from the local inhabitants. The locals claimed they hadn't transferred the land, nor was there any reason that whatever interest the aboriginal holders had should be superseded by the memorials of ownership.

The Court was asked to consider whether Assets Co, the owner, had acquired good title to the land. The 2 reasons why Assets Co would not have good title were because:

(a) They had procured their title by fraud; or
(b) Their title was invalidated by the decision of a native title tribunal in NZ.

Held:

Assets Co's title was good. However, in coming to their decision, the Courts articulated the now starting definition of fraud -

"Fraud in these Acts (means) ***actual fraud****, ie,* ***dishonesty*** *of some sort, not what is called* ***constructive or equitable*** *fraud … Further it appears to their Lordships that the fraud which must be proved in order to invalidate the title of a registered proprietor for value … must be* ***brought home to the person whose registered title is impeached or to his agents. The mere fact that he might have found out fraud if he had been more vigilant*** *and had made* ***further inquiries*** *which he omitted to make,* ***does not of itself prove fraud*** *on his part. But if it be shown that he* ***abstained from making inquiries for fear of learning the truth, the case is very different*** *and fraud may be properly ascribed to him. A person who presents for registration a document which is forged or has been fraudulently or improperly obtained* ***is not guilty of fraud if he honestly believes it to be a genuine document*** *which can be properly acted upon"* (Lord Linley, at 210).

Case: *Loke Yew v Port Swettenham Rubber Co* (1913)

Facts: 322 acres of rubber plantation in Malaysia was owned by Eusope. Eusope sold parts of the plantation off to other parties. 58 acres were sold to Loke Yew. The transfer instruments held by Loke Yew were defective in that they were not in registrable form.

Eusope then negotiated to sell the rest of the land to Port, who agreed that they were only buying the land which did not belong to Loke Yew. Eusope, being honest and genuine, refused to sign to the transfer of land to Port until he attained a written acknowledgment from Port that they would respect Loke Yew's rights. The agent of Port made a verbal and written acknowledgment to this effect. Upon receiving this acknowledgment, Eusope transferred all 322 acres to Port and the transfer was registered. Importantly, the price paid for the land was such that Port was not entitled to all 322 acres, reflecting the 58 acres owned by Loke Yew.

After title was registered, Port offered Loke Yew $20,000 to surrender his interest in the land (*the land was valued at $70,000*). Loke Yew declined. Port then took action to repossess the land on the basis Port was entitled to all 322 acres. Loke Yew counterclaimed on the basis that Port had claimed their title by fraud.

Held:

The purchaser's agent made a statement to the registered proprietor as to the present and future intention of the purchaser. This statement was falsely and fraudulently made for the purpose of inducing the vendor to execute a transfer for the whole of the land. Where a party promises that an unregistered interest will be preserved in order to induce another party to agree to a transaction, and then goes back on that promise, that party will be guilty of fraud.

Here, the purchaser did not really intend to purchase the land subject to the occupier's right of possession. If the promise was not made, Eusope would not have agreed to the transaction. Thus, Port was guilty of fraud when they went back on their promise. Port is ordered to register a transfer of 58 lots in favour of Loke Yew, *in registrable form*.

Case: *Bank of South Australia v Ferguson* (1998)

Facts: Ferguson was the owner of rural land in SA, over which he granted a mortgage to the Bank of South Australia (BSA) in 1990. The bank mortgage was for $400,000. Almost $250,000 was advanced to Ferguson for a potato growing project. Ferguson eventually defaulted, whereupon BSA claimed possession of the land in order to exercise its power of sale. At the time BSA wished to exercise its power of sale, Ferguson owed over $509,000 on the mortgage. Ferguson counterclaimed on the basis the mortgage was void for fraud. The fraud was said to have perpetrated during the loan application process. The alleged fraud was a bank valuation of the land higher than what Ferguson had stated and a forgery of his signature on his statement of position.

At trial and on appeal, the mortgage was found to have been void for fraud. The High Court later overturned this.

Held:

In order for fraud to be operative, fraud must operate on the mind of the person said to have been defrauded and must have induced detrimental action by that person.

In this case, the Bank's mortgage was not affected by fraud, because the forged documents did not have the effect of harming or otherwise cheating, or being dishonest to Ferguson, the mortgagor. The statement of financial position was accurate, although forged. Furthermore, the alteration of the land value, while dishonest, did not increase Ferguson's liability or injuriously affect his legal obligations under the mortgage. The value of the land was not a term of the mortgage, meaning nothing turned on it. In fact, the fraud aided Ferguson in attaining the money he requested.

Ferguson owes the $509,000 and the interest which accrued over the time legal action was taken.

Case: *Pyramid Building Society v Scorpion Hotels* (1998)

Facts: Pyramid Building Society (PBS) had a registered mortgage over land in Queenscliff. Scorpion Hotels was the mortgagor. In 1993, PBS commenced an action to recommence possession over the land in order to recover debts of $300,000 and enforce its power of sale. Scorpion Hotels responded to that claim by claiming PBS had not validly executed the instrument of mortgage, and that as a result, the mortgage was void. In particular, Scorpion Hotels alleged that the fixing of its common seal had not been properly attested because one of the 2 persons who had attested to it was not a director of PBS, but instead the wife of the director. Scorpion alleged the wife was never given the authority to attest the seal.

At trial, the mortgage was found to be void for fraud and unenforceable. The judge ordered that PBS execute the documents necessary to remove the mortgage from the register. This decision was appealed.*

Held:

The following arguments have been advanced by Scorpion in attesting why the indefeasibility of the instrument could be impeached by fraud:

(1) Prior to settlement of the mortgage, Pyramid did a company search of Scorpion and should have discovered the mortgage instrument was improperly executed.
(2) Settlement occurred without Pyramid obtaining a copy of the company resolution authorising the transaction.
(3) The funds were advanced without citing the agreement for sale of the minority interests.

Scorpion argued that, together or alone, these arguments amounted to willful blindness or reckless indifference, and that amounts to fraud.

However, fraud means actual dishonesty or moral turpitude. It may take various forms, such as in circumstances referred to as 'reckless indifference' or 'wilful blindness'. The relevant enquiry is **an enquiry of actual dishonesty, not want of due care** (*a higher standard*). In addition to actual dishonesty, fraud may also arise in circumstances where a party has abstained from making an enquiry when suspicious.

Here, Pyramid's actions were not dishonest, whether these actions are taken separately or in combination. There was no evidence that Pyramid knew that the attesting witness was not a director, and no evidence that the authorisation for the execution of the mortgage had been given by the mortgagor. At most, Pyramid's actions might show that they or its solicitors failed to take due care in settling the loan and mortgage transaction, or that if enquiry had been made, fraud might have been revealed. While Pyramid may not have acted with 'due care', mere failure to enquire **falls short** of the higher standard needed to make out fraud by reckless indifference or wilful blindness.

Case: *Bahr v Nicolay No 2* (1988) *KEY CASE*

Facts: Bahr acquired land and a business in WA. He occupied adjacent land by licence from the Crown. The license carried with it the right to call for a Crown grant of the fee simple of that lot if commercial premises were erected on it by a certain date. Bahr wished to call for the Crown grant, but needed money to build the commercial premises.

Bahr's estate agent introduced him to Nicolay, who agreed to buy their land for $32,000. Under the agreement, Bahr could retain occupation of the land under a lease (*from fee simple to leasehold*). The property would be leased for 3 years, after which time Nicolay would sell the land back to Bahr for $45,000 (*clause 6*).

Thus, Nicolay had a reversionary interest. After some time, Nicolay sold this interest to Thompson for $40,000, fearing Bahr would not have the requisite $45,000 for repurchase. The sale to Thompson proceeded only on the basis that Thompson would uphold Bahr's interest. The transfer had words in it to this effect (*clause 4*).

Thompson became the owner, without Bahr's knowledge. Thompson then wrote to Bahr confirming the arrangement with Nicolay. Bahr confirmed the original price, sending a cheque for the deposit of 10%.

Thompson then refused to sell to Bahr, asserting he had indefeasible title in fee simple as the registered proprietor. Bahr took action on the basis that Thompson's title was defeasible for fraud. They asked for specific performance of the contract.

Issues:

- *What kind of interests did Bahr have in the land in dispute?*
- *On what conditions did Bahr transfer its interest to Nicolay?*
- *How were these conditions identified when Nicolay transferred the land to Thompson?*

Held:

By majority, the Court found that fraud by actions that occur after registration, where the relevant interest was acknowledged at the time of registration, or in the course of/for the purpose of obtaining registration. ***But not all judges based their reasoning on fraud (read judgment).***

4.1.2 Fraud by Agents and Employees

Case: *Schultz v Corwill Properties Pty Ltd* (1969)

Facts: Corwill Properties became the registered proprietor of land in 1961. In 1963, Mrs Schultz sought to invest in property through a solicitor, Galea. This money was loaned to Corwill.

Galea was also a director of Corwill Properties. Instead of investing the money, he took it for himself and forged the signature of the other director on the instrument, thus giving Mrs Schultz a security interest over that property to the amount of the investment. This mortgage was registered on Corwill's certificate of title which, because Galea owned it, Corwill did not know about.

Shortly afterwards, Schultz died, and Mr Schultz became the registered proprietor of the mortgage by virtue of him being the executor of her will. For some time, Galea made repayments to Mr Schultz, but no one knew this was happening. Eventually he stopped, simultaneously resigning as director of Corwill.

Galea's replacement took over. In 1966, he inquired as to the whereabouts of the certificate of title as the land was due to be sold. Galea eventually produced the title, but before he had done so, he had already approached Mr Schultz and procured a discharge of mortgage. Mr Schultz had signed, but had done so on the basis of Galea's false information.

Mr Schultz claimed the mortgage was indefeasible. Corwill claimed the discharge was indefeasible. Both alleged fraud.

Issues:

- *Was Galea the agent of Schultz and Corwill?*
- *Was Galea's fraud (forged mortgage) brought home to Schultz?*

Held:

There are 2 alternative forms of fraud by agency:

(1) Where fraud is *actually* committed by the agent; and
(2) Where the agent has *knowledge* of someone else's fraud.

The first fraud involves the application of ordinary principles governing the responsibility of a principal for the fraud of his agent. If an agent's fraudulent acts fall within the scope of their authority, the principal will be directly liable. However, if fraud is a question of an immediate act of a person whose title is to be impeached (i.e. the registered proprietor), or someone in the position of the agent, responsibility of the principal is not open to doubt.

The second fraud, on the other hand, does not involve the application of the principle of *respondent superior*. It is generally assumed that if an agent has knowledge of their or someone else's fraud, they will not have informed the principal of this fraud.

In this case, there are 2 circumstances of alleged fraud:

(a) When Galea obtained a mortgage over Corwill property, investing money from Schultz, by forging the signature of the other director on the mortgage instrument;

(b) When Galea obtained the discharge of mortgage from Schultz by fabricating a story about how he, Galea, would pay back the investment once the matter settled.

However, we find these were not circumstances of fraud on the part of Schultz. It was **not personal fraud**, given that Galea's forgery was not within the scope of Galea's authority as agent. It is unlikely Schultz would have requested Galea to complete the mortgage and discharge by fraudulent means. Nor was **knowledge of fraud,** as Galea is not presumed to have communicated knowledge of his fraud to Schultz.

For the same reasons, these circumstances are not to be found as fraud on the part of Corwill, eventhough Galea worked for them. The discharge of mortgage was outside the scope of Galea's authority. Furthermore, the notion of *respondent superior* would not apply as it was Galea's own fraud. In any event, Corwill could rebut the idea they knew anything about the discharge. Thus, Galea's fraud **was not brought home to Corwill**.

Eventhough the instrument was fraudulently executed, this could not be brought home to either Schultz, the mortgagee, or Corwill, Galea's principal by virtue of employment. Thus, neither title is defeasible. This means both the mortgage and discharge stand. Schultz has to follow up with Galea to recover his investment.

Case: *Dollars & Sense Finance Ltd v Nathan* (2008)

Facts: Dollars and Sense (D&S) was a mezzanine lender in NZ. Their solicitor, Thomas, was given the authority to engage in a loan agreement with Nathan on their behalf. The security Nathan offered was his parent's home. Thomas gave documents to Harris, the person who introduced Nathan to D&S, who then gave documents to Nathan to arrange execution of the security by his parents.

However, the parents had split a number of years before, and were now living separately and long distances apart. Nevertheless, Nathan's father signed the instrument. Knowing how far away his mother was and that she would never agree to sign, Nathan proceeded to forge his mother's signature. He then returned the instrument to Thomas, but they were not witnessed upon signing. As a result, Thomas sent the documents back to Nathan to have them witnessed/attested. When Nathan received the instrument for re-signing, he engaged one of his friends to witness the signing, sending it back to Thomas afterwards. Thomas accepted this signing, and the mortgage was registered.

Eventually, Nathan defaulted on this mortgage, whereupon D&S proceeded to exercise their power of sale. At this point, Nathan's father had passed away, meaning his mother was left to counterclaim the power of sale on the basis that the mortgage was defeasible by fraud.

Held:

To make the mortgage defeasible by fraud, D&S is the registered title holder whose interest has to be impeached. To bring home fraud to D&S, Nathan's fraud will have to have affected D&S's title:

Step 1: Was Nathan an agent for D&S? That is, did D&S, in any way, make in Nathan's responsibility to obtain the mortgage documents from the guarantor, thereby creating an agency relationship and prescribing its scope?

If Nathan had acted within his actual or apparent authority when committing the fraud, D&S, as principal, would have been directly liable for the fraud, and their title defeasible. That is, the fraud would be treated as the fraud of D&S, regardless of whether D&S and Thomas knew about the fraud.

On the facts, yes, Nathan was D&S's agent. There was no issue with Thomas ascribing others to fulfill his tasks as solicitor of the mortgagee. He was within his right to appoint sub-agents. In that way, D&S implicitly authorised Nathan to act on their behalf. Giving the mortgage documents to Nathan would not have been enough to create an agency relationship. If this was the case, he simply would have been the conduit. But in reality, Nathan undertook significant tasks for D&S: (a) effectively procuring the mortgage in registrable form, (b) arranging execution by the relevant parties,

and (c) telling his parents, the guarantors, to obtain independent legal advice. These tasks should have ordinarily been undertaken by Thomas or D&S. Thus, when Nathan assumed these responsibilities, he stepped into the shoes of D&S and became their agent.

Step 2(A): What was the scope of Nathan's authority?

The essential question is whether Nathan was acting in the scope of his authority when committing the fraud. The authority Nathan had included the following:

(1) *Broad view:* Procuring a mortgage in registrable form, including having the correct proprietor sign the instrument, having the signing witnessed and procuring a range of supporting documents.
(2) *Narrow view:* Obtaining his parents' signatures on the mortgage.

In either sense, there is an overlap: obtaining the parents' signatures. But were Nathan's fraudulent acts so connected with this authority – obtaining the signatures – so as to be considered a mode of performing the authorised act? ***The scope of agency must be determined in a commercially realistic way in accordance with the circumstances*** (i.e. implied authority). Just because D&S did not authorise forgery, it did not mean forgery was beyond the scope of agency. While Nathan acted in his own interests by procuring the signatures, this does not preclude the conclusion that he was also acting for D&S at that time. D&S had to obtain a mortgage in registrable form to secure the loan. Without execution by the parents, D&S could not become the registered holder of the mortgage interest. ***An act can have a necessary close connection with the authorised act, even if the act is of criminal character and is done with fraudulent intent by the agent. A fraudulent act impacting on a third party may, when compared to the registered holder, can be seen to be done in the scope of agency, even if done for the exclusive benefit of the agent.*** The principal can still maintain the act was unauthorised, but as against a third party, this does not affect the principal's liability for the agent's acts. ***An agent is more likely to step outside the scope of agency if the agency is for a particular or limited purpose than when the agency is in the course of an ongoing relationship.***

Step 2(B): Was Nathan's fraud brought home to D&S?

On the facts, whichever way Nathan's agency is defined, obtaining signatures was central. In this sense, Nathan's forgery of the signatures required is to be considered as implied authority and within the scope of agency because it took place in the course of him undertaking his authorised actions. The loss should lie with the party who places their trust and confidence in the person doing the deceiving. The mortgage is thereby defeasible for fraud.

Cassegrain v Gerard Cassegrain & Co Pty Ltd **(2015)**

Facts: In 1993, Gerard Cassegrain & Co (GC) was paid $9.5m by CSIRO in settlement of a dispute. In the company's books, approximately half of that was said to be owed to the director of the company, Claude Cassegrain (C). In 1996, the company resolved to transfer the farm it owned to C, and his wife, Felicity, as joint tenants. This was recorded in the company books as an offsetting of the money owed to C. In the books, the land was estimated at $1m in value.

In March 2000, C effectively transferred his interest to Felicity only. As a result, Felicity became the sole owner. Consideration was expressed to be for $1. In 2008, proceedings were brought on behalf of the company to have the farm re-transferred to the siblings (*it was a family business*) on the basis that one or both of the above transactions were fraudulent. The claim was made against C as director.

At trial, the court decided that the exception to indefeasibility of fraud did not apply as there was no fraud on behalf of Felicity. However, C was ordered to pay equitable compensation to the company of $1m. This was appealed.

Issue:

- *Could C's fraud be brought him to his wife so that her title was defeasible?*

Held:

Step 1: Was C acting as an agent for his wife? Step 2: Was C's fraud brought home to his wife?

By majority, the Court held there was no agency relationship between C and Felicity. The term agent is mostly used as a term to describe how events happen, rather than as a term attributing legal responsibility for those events. The relevant question is one of fact: that is, what inference should be drawn about how and why the registration of transfer to C and Felicity as joint tenants came about? This is different to an inquiry as to whether Felicity knew of C's fraud or whether fraud could be brought home to Felicity by C himself.

On the facts, there was no allegation of fraud against Felicity, or that she knew about the fraud C had undertaken in getting the land out of the company's name and into their personal name. In that sense, the word 'agent' is the beginning of an enquiry, not the end. The agent in general is considered to do no more than the persons through whom a company operates. The reference to fraud brought home to the person whose registered title is impeached or to his agents should be understood, in the case of the agent, about questioning the scope of authority and the knowledge the agent has of the fraud to be imputed to the principal.

On the facts, C no more than performed tasks to Felicity's advantage. Performing tasks that benefit someone is not in and of itself fraud. Without more, C's fraud can't be shown to be within the scope of any authority that Felicity had or appeared to have given to him. It did not show that knowledge of his fraud was imputed to her. As Felicity could not be knowingly involved in C's conduct, she could not be party to his fraud.

4.1.3 False Attestation

Case: *AGC v De Jager* (1984)

Facts: Mr. and Mrs. De Jager (DJ) were joint tenants of Torrens land. Mr. DJ was in the business of concreting, but wished to buy a gym business in Dandenong. He had a business partner in this endeavour, Forsberg (F). DJ had trouble obtaining finance. As a result, he approached French for assistance. French was a former used car salesman who had helped DJ and F obtain finance for used cars a number of years previously. As a result, they knew French had connections with AGC, so they thought to go back to French for assistance in obtaining finance in the present. French agreed to take on the job, but only on the premise of charging a high rate of commission.

Negotiations ensued and eventually DJ and F entered into possession of the gym as tenants, and began refurbishing the premises. At the same time, they were applying for a loan from AGC with French's help. As security, AGC required:

(1) A secure lease to be in place for the gym equipment.
(2) Security for the loan, asking each business partner and their respective wives to give them a mortgage over their matrimonial homes.

AGC and its employees prepared the mortgages, which were collected by French for execution. French took these documents to the gym in Dandenong for the parties to sign. There was evidence that 3 parties signed at the gym: Mr. DJ, Mr. F, and F's wife. These signings were witnessed by French. Mrs. DJ was not present, and French told Mr. DJ to take the document home for his wife to sign.

Mrs. DJ refused to sign the mortgage. Evidence was led at the time that her relationship with Mr. DJ was fractured, and she refused to have anything to do which would encumber her property for the business. Mr. DJ attempted to get her to sign, but didn't expect that she would, coming back to French empty handed. Mr. DJ then left again, claiming he would force Mrs. DJ to sign. He eventually returned with her signature. French refuted this sequence of facts, claiming Mr. DJ returned the mortgage signed by Mrs. DJ willingly, but that this was un-witnessed.

The Court ultimately determined that Mrs. DJ's signature was forged, but was unsure as to who had did it. They found that after all documents were purportedly signed, they were delivered to AGC by French. AGC employees checked the documents, finding that Mrs. DJ's signature was not witnessed. French told the employees he was not there when she signed, but proceeded there and then with their approval to attest her signature. Notwithstanding knowledge that the signature was not witnessed at the time, employees proceeded to lodge the document for registration and it became registered in favour of AGC in 1979.

Eventually, the business went into bankruptcy and AGC attempted to exercise its power of sale over the matrimonial homes over which it had security. Mrs. DJ contested this, claiming the mortgage was defeasible for fraud. At this point, AGC's solicitor asked for an investigation of the circumstances leading up to the execution of the documents. He was able to obtain related documents the parties had signed. It became obvious to the solicitor that when he received these documents, they bore little relation to the signatures on the mortgage. At length, AGC, through its solicitors, acknowledged that the attestation was false.

Held:

What sort of fraud was raised on the facts? It was clear there was forgery of a signature. A forgery is a species of fraud. But was there any other species of fraud apart from the forgery? *Then, having identified the fraud, can fraud be brought home to AGC?*

Fraud by agency can be committed one of 2 ways: directly by the agent, or where the agent does not commit the fraud, but knows of other people committing the fraud. In terms of actual fraud, it must be determined whether French is an agent of AGC. This was unclear on the facts, nor was necessary. It was not certain whether French knew Mrs. DJ's signature was a forgery. Therefore, it is best if the case is not determined on the basis that French is the agent.

Instead, knowledge of fraud is more relevant, because the employees of AGC caused or allowed the mortgage to be put on the path of registration, despite the false attestation made by French. Witnessing a document for the purpose of making it registrable is not just a formality. A system of land title by registration, as the Torrens system is, depends on the good faith of people presenting instruments for registration. Falsely attesting a document has a substantial effect on that document and the land title system. There is evidence that the responsible employees at AGC knew that the due attestation of the signing of a mortgage was a pre-requisite of its registration, and that this was done incorrectly. The line of reasoning that AGC was not at least suspicious in terms of its circumstances is to be rejected, even if they knew nothing about the forgery. AGC knew the document had been improperly executed.

Effectively, this is fraud against the Registrar of Titles. This outcome is bolstered by the fact that AGC never dealt with Mrs. DJ personally, but always through French. In the circumstances, AGC had abstained from making enquiries about Mrs. DJ's execution of the mortgage for fear of learning the truth. This amounts to *willful blindness*, and that is fraud. The actions in of AGC's employees in allowing the mortgage to go forward for execution knowing it had not been properly executed were thus fraudulent, and the mortgage is defeasible and will not prevail over Mrs. DJ's interest.

Case: *Grgic v ANZ* (1994)

Facts: In 1968, Grgic Snr. became the registered proprietor of land which at various times was mortgaged. When the last mortgage was repaid, he took possession of the certificate of title and the discharge instrument. He did not register the discharge. Instead, he placed both documents in a safety deposit box in a bank.

In 1987, Grgic Jnr. asked his father if he could use his unencumbered land as security for loans. Grgic Snr. agreed, bringing his certificate of title to the bank to make the application for his son. This application was refused. The son subsequently collected the title documents from the bank. Later that same year, the son again asked his father to borrow against the unencumbered land, this time from a different bank and for a smaller amount. The father declined.

Despite this, the son went and bought property that was conditional to finance. He asked his father to provide a conditional guarantee over the property. Again, the father declined. This was a problem, as the son had to get a loan or he would have to default on the transaction. As a result, he took the certificate of title and instrument of discharge, and convinced a friend of his, Mr. S, to impersonate his father. The friend agreed, and the son took Mr. S to the bank. At the bank, the son applied for an overdraft facility of $120,000. At the bank, they produced the certificate of title and discharge instrument, and Mr. S signed as though he was the father, being appropriately witnessed by the bank officers. The officers made a diary note in which they expressed that Mr. Grgic had been informed as to his obligations, was offered the opportunity to take the documents away and consult his own solicitor, and that he had declined this offer.

Over time, several increases were made to the overdraft with the consent of "Mr. Grgic Snr.", which effectively constituted the son signing the forms. Eventually, the business failed and the ANZ sent a letter of demand to the father with a threat to exercise its power of sale. It was at this point that the father discovered there was a mortgage on his title. The father argued the title was defeasible for fraud. The ANZ argued there was no actual fraud and no moral turpitude on behalf of its employees because the impersonator had been introduced to the bank as the father by existing customers of the bank.

Held:

It was clear the father's signature has been forged on the instrument of mortgage by someone impersonating the father. However, can this fraud be imputed to the ANZ to make their registered interest defeasible?

No, there was no fraud on the part of ANZ. The bank officer was not fraudulent in attesting the signature of the impostor on the mortgage. Granted, ANZ were "less meticulous" than they should have been, but this was not fraud. ANZ had want of due care, but they were not recklessly indifferent or willfully blind. There was no evidence that ANZ sought to take unfair advantage of the father, based on the evidence in the diary notes about recommendations of legal advice. Furthermore, the employee's attestations of the father's signature was not fraudulent, turning on the idea that the notion of 'personally knowing' the customer did not require intimate knowledge of the father himself. The employees had still exercised some level of skill or care. In this sense, they had an **honest belief the mortgage prepared for registration was genuine.**

The mortgage is indefeasible against the father. However, there is a limitation on the amount ordered to pay back. He is not liable for the personal covenants in the mortgage. In relation to the amount owed to the mortgagee, he is not liable for the balance, given the value of the house is less than the value of the mortgage. He only has to pay as much as can be recovered from sale of his property.

Case: ***Russo v Bendigo Building Society*** **(1999)**

Facts: Mrs. Russo's signature was forged on a mortgage instrument by his son in law. This instrument purported to secure a business loan for the son in law and his daughter. Eventually, the son in law defaulted on the mortgage, and Bendigo Bank sought to exercise its power of sale. However, when the mortgage instrument was created, it was handled by a solicitor who acted for Bendigo at the time. The purported signature of Russo was falsely attested by that solicitor's law clerk. She was 19 at the time, and had been working there for 3 years. In evidence, she said she did not remember the specific transaction or meeting Mrs. Russo. However, she did say that the solicitor had given her specific instructions never to attest the signature of any person unless that specific person had signed in her presence. She said she had no reason to believe that Mrs. Russo had not signed in front of her.

Held:

The clerk's recollection was faulty, and her attesting signature falsely represented that Mrs. Russo had signed in her presence. The Court determined by evidence that the son in law had forged the signature, and brought the forged document unattested into the solicitor's office where he convinced the law clerk to sign. The solicitor was found to have no knowledge of the forgery or the false attestation. He was not present when the law clerk attested the signature.

Therefore, he assumed the mortgage had been duly executed, writing to the bank certifying the borrower had executed the mortgage.

While the attestation was false, the Court also found that the clerk had not appreciated the severity of signing in the process of conveying title; she thought it was a mere formality, and had no reason to suspect forgery. However, this fell short of fraud. She did not know she was putting a forged document on the path of registration. Therefore, despite the findings in *AGC* and *De Jager*, she was not guilty of fraud because there was no dishonesty. Her principal had put the mortgage on the path of registration with no knowledge of the forgery or false attestation. The bank therefore had no knowledge, actual or constructive, of either case of fraud. The fraud was not brought home to the bank, and the mortgage was indefeasible.

On appeal, the Court found the opposite: the law clerk falsely attested the signature and was aware she should not have, based on the instructions from the principal. It was an oversight, but critical elements of fraud were lacking: there was no dishonesty, no moral turpitude, or seeking to defeat another person's rights. The clerk was not aware of the forgery, and had no reason to enquire about it. All the clerk knew was that she wasn't witnessing someone sign in her presence. She was not aware of the significance of her attestation. She knew it was not accurate, but wasn't advanced enough to appreciate the consequences to her actions. The lack of dishonesty is important.

The bank was not otherwise guilty of fraud either. There was no actual fraud. While the solicitor knew the consequences of false attestation, he did not know that the law clerk's attestation was false and he honestly believed the documents he put forward were genuine and should be acted upon. This put him in the exclusion part of the definition of fraud. However, if the solicitor had been fraudulent, this would have been brought home to the bank.