

EXCEPTIONS TO INDEFEASIBILITY

Fraud

Section 42 *TLA* provides that that the RP will hold their interest subject only to registered interests “except in case of fraud.”

1. Identify the Parties involved

- a. Personal fraud or fraud of an agent?

2. Identify the acts of fraud – is it fraud for the purposes of s 42?

a. *Definition of Fraud*

- i. Dishonesty; Moral Turpitude (*Assets Co*, Lord Linley)
 1. Not constructive/equitable fraud (*Assets Co*; *Loke Yew*)
 2. Need actual dishonesty, not mere want of due care (*Scorpion Hotels*)
- ii. Equitable/Constructive v Actual Fraud: actual fraud must operate on the mind of the person and induce detrimental action (*Ferguson*)
- iii. Timing: equity against an RP arising from a transaction before or after they were registered may be enforced against them (*Bahr v Nicolay*, Mason and Dawson JJ)
 1. No difference between false undertaking which induces detriment and one where it is later repudiated
- iv. Notice: s 43: actual or constructive notice is not in and of itself fraud.
 1. A clause in a contract may be enough, in combination with notice, to constitute fraud (*Bahr v Nicolay*)
- v. Reckless indifference
- vi. Wilful blindness: Abstaining from making enquiries for fear of learning the truth constitutes fraud (*Assets Co*; *Scorpion*)
- vii. Genuine Belief: No fraud if there is an honest belief it is a genuine document which can be properly acted upon (*Grgic*; *Russo*).

b. *Categories of Fraud*

- i. Verbal Assurance/Misrepresentation (*Loke Yew*)
- ii. False Attestation:
 1. Incorrect witnessing not automatically fraud, must show:
 - a. wilful blindness/reckless indifference; and
 - b. operation of the fraud on the mind of the defrauded (*Pyramid*)
 2. If a document is put on path of registration and false attestation known, can constitute fraud against Registrar (*De Jager*)
 3. Must have dishonesty: some kind of moral turpitude (*Russo*)
- iii. Forgery/Impersonation:
 1. A person who presents a document for registration which is forged/obtained by impersonation is not fraudulent if they honestly believe it is a genuine document which can be acted on (*Grgic*)

3. Agency

a. *Is there an agent/employee of the registered proprietor?*

- i. Person who can create/affect legal relationships on behalf of another
- ii. Has the principal conferred the function to represent them in a transaction? (*Dollars&Sense*)
 1. Must be more than merely performing acts to the principal’s advantage, must be actual/implied authority (*Cassegrain*)

b. *Identify the scope of their authority*

- i. Actual authority
 - 1. Express authority (but unlikely to say ‘can’t commit fraud’)
 - 2. Implied authority: do what is necessary to carry out tasks, what is usually done by agents of the kind
 - a. What is the past history of the agent (*Schultz*)?
 - b. Has there been a long relationship between principal and agent? (*Schultz*)
 - ii. Constructive/apparent authority
 - 1. Representation made by the principal and third party relies on it
- c. **Bringing fraud home**
- i. Direct Fraud: Agent directly committed fraud
 - 1. **Approach 1:** Must be within the scope of actual or apparent authority given by the RP, not mere opportunity to commit fraud to be brought home and title made defeasible (*Schultz*)
 - a. Was agent acting for their own benefit, on frolic of their own?
 - 2. **Approach 2:** Were the agent’s actions so connected with authorised act they can be regarded as performed in course of the authorised act? (*Dollars and Sense*, criticism of *Schultz*)
 - a. Can the actions be characterised as a mode of performing the authorised act?
 - i. Can act in own interests + on behalf of principal
 - b. More likely be outside of scope where agency is for a limited/particular purpose cf. continuing relationship
 - c. Person with faith in deceiver should have to cover loss (*Dollars and Sense*; difficult re: *Schultz*)
 - ii. Knowledge: Agent has express knowledge of fraud that occurred in course of the transaction that led to principal becoming RP. Or had suspicions but refrained from enquiring. (*Schultz*)
 - 1. Irrebuttable presumption principal had this knowledge (*Schultz*)
 - 2. If the agent themselves committed the fraud, presumption that they will not communicate this to the principal (*Schultz*)
 - a. *Dollars and Sense*: the fraud should then be dealt with as personal fraud, not a question of knowledge
4. **Fraudulent Mortgages:** doesn’t make it fraud, but may have the same effect
- a. § 74(5) TLA: registered mortgage does not operate as a mortgage/charge on land if it is void/unenforceable at law or equity and mortgagee must discharge.
 - b. § 87A(1): at the time of execution, a mortgagee must take reasonable steps to verify the identity of a mortgagor to ensure that they are the RP.
 - i. (3): If Registrar is satisfied reasonable steps were not taken, may (a) refuse to register mortgage or (b) remove mortgage from the register
 - 1. (4)(a) refuse to register variation (b) remove variation
 - ii. (5) if mortgage removed, mortgagee no longer has an indefeasible interest and the mortgage is void
 - c. § 87B: same idea, but in relation to the transfer of a mortgage.
 - i. Note no ss (4)