

FRAUD

“__ is the registered proprietor of [a mortgage/the relevant prop] so s/he prima facie has indefeasible title subject to exceptions (s 42 TLA). However, P may argue that __’s title is defeasible under the fraud exception”

Is there fraud?

>> Go through each person who was fraudulent and then link to RP later

- **Definition** of fraud per *Assets*: actual fraud, dishonesty, brought home to person whose title is impeached (RP), including a failure to make inquiries
 - o N.b. statutory fraud is wider concept than CL fraud (which requires deceit or fraudulent misrepresentation) and narrower concept than constructive or equitable fraud (*Ferguson*)
 - o Requires personal **dishonesty, moral turpitude, a wilful and conscious disregard or violation of the rights of others**
- S 42 encompasses fraudulent exercise of the **power of sale** by a mortgagee (*Latec*)
- **Not fraud**
 - o Equitable or constructive fraud (*Assets*)
 - o Genuine belief that docs were genuine (*Grgic; Assets*). Can't be brought home
 - o Notice of a prior interest (*Assets; Bahr; s 43 TLA*)
- **May be committed against:** a former RP, holder of an earlier unregistered interest, the registrar (discussed in attestation)

What kind of fraud?

Forgery or impersonation

- Considered actual dishonesty/aiming to defeat another’s interest => clearly fraud (*Grgic; AGC*)

False attestation

- **Attestation clause:** appears at end of doc which stats that doc has been executed in presence of one or more witnesses. Witnesses are said to ‘attest’ the execution
- **Generally, fraud** if the following can be shown (*Russo*) = **subjective test**
 - o D knew that P would be deprived of an interest OR that register would be misled
 - o Understood the significance of the consequences (*Russo*);
 - o Knew they were falsely attesting OR was reckless to mortgagor’s identity;
- Can aggregate knowledge/understanding – see *Russo*
- To lodge an instrument for registration in knowledge that attesting witness hadn’t been present at execution **deprives lodging party of an honest belief that it’s a genuine doc on which the registrar can properly act** (*AGC*)
- A person who presents a forged doc/doc fraudulently obtained for registration, **isn’t guilty of fraud if honestly believe it’s a genuine doc** on which they can properly act (*Grgic*)

Reckless indifference/Wilful blindness

- A failure to make inquiries for fear of what they may find out, when suspicions are aroused (*Pyramid; Assets*) => fraud
 - o **Recklessly indifferent** to the truth of doc submitting (*Assets*)
- But **doesn't include** mere want of due care, **negligence**, less than meticulous practice – even if they would've discovered fraud had they taken more reasonable steps (*Pyramid; Assets*)
 - o Policy issue here in rewarding negligence with indefeasibility

Verbal assurances and making representation to induce a transfer

- Considered an attempt to defeat another's interest => **fraud** (*Loke Yew*)
 - o In *Loke Yew*, D never intended to respect P's interest
- Where the rights of third parties don't intervene, **no person can better their position by doing that which is not honest** to do (*Loke Yew*)
 - o In as much the registration of the transfer of the property wasn't honest, it can't benefit the position of RP against the defrauded person

Repudiation after making genuine representation

- Law unclear, but appears that the better view is that fraud must occur in the acquisition of title, prior to registration (per *Wilson & Toohey in Bahr*)
 - *Mason CJ & Dawson J in Bahr*: **should extend** to situations where someone gets onto the register and then **dishonestly repudiates** a prior interest
 - o Nothing in the language or purpose of s 42 that confines it to fraud prior
 - o **Repudiation is fraudulent where** the object of it is to destroy person's interest in circumstances where preserving that interest was the foundation underlying the transfer to the RP
- ⇒ “[fraudulent person]’s acts in [facts] were fraudulent because they were dishonest etc. which constitutes actual fraud per *Assets*”

Did it operate on the mind of the defrauded?

- It must induce **detrimental action** by P, effectively **harming/cheating** them (*Ferguson*) AND
- Must change their **legal obligations** (*Ferguson*)
 - o A mere formality with no legal effect won't constitute fraud
 - o Has to affect whether mortgage would be obtained, not just whether the loan would be approved
- Can include the defrauding of the register (*Russo; Grgic*)

Can the fraud be ‘brought home’?

“The fraud must be brought home to the person whose title is impeached (*Assets*)”

Establish the Agency

- **Fiduciary relationship:** implied or implicit consent for agent to act on principal's behalf to affect principal's legal relations with TPs, so that principal is bound by agent's actions
- Borrower may be agent of lender (*Dollars & Sense*)
- **Consider:** Relationship (e.g. solicitor/client); If there's a K, Oral evidence, Tasks usually associated with that role (*Schultz*)

RP is fraudulent

- If fraud is the immediate act of the person whose title is impeached, then position isn't open to doubt (*Schultz per Street J*)

RP's agent is fraudulent

Principal is liable for agent's actions if committed within the scope of their actual or apparent authority (*Schultz per Street J*)

Authority

- **Actual authority:** principal has given express or implied authority
- **Apparent authority:** TP relied on principal without knowing that agent wasn't authorised to act on their behalf
- **Mere fact that principal has retained an agent**, and therefore given them some opportunity to be fraudulent, that **alone isn't enough** (*Street J in Schultz*)

Can it be brought home?

- If **personal fraud** (agent is 'out on a frolic' for their own personal interest/benefit)
 - o Generally, not brought home, inherently outside authority (*Schultz*) unless they were actually authorised to do that act
- But *Dollars & Sense* (note that this is NZ authority though): may be brought home if it's an **unauthorised mode of an authorised act** => Were agent's acts **so connected** to the tasks they were asked to do that they could be regarded as a mode of performing them? (*Blanchard J*)
 - o Can have sufficient connection even if of a criminal character
- What acts has P authorised? (e.g. obtain signatures, get CoT, organise insurance, obtain registerable mortgage)
- N.b. *Schultz* test was emphasised as the correct test in *Cassegrain*

RP has knowledge of fraud

- If RP has **actual knowledge of the fraud** of a person before the consummation of the transaction, but proceeds to register their interest => dishonest, fraud, **can be brought home** (*Assets*)

RP's agent has knowledge of fraud

- Can only be brought home if agent is under a duty to communicate knowledge of fraud to principle as employee/agent => Not enough that agent just knows about it (*Schultz per Street J*)

- If there is a duty, **irrefutable presumption** that agent *did* communicate it and principal is imputed with fraud aka brought home (*Schultz per Street J*)
- But if agent is party to TP's fraudulent scheme, principal can rebut presumption if agent was furthering their own interests (*Schultz per Street J*)

Consequences

- If fraud is brought home, the instrument will be void (s 44(1) TLA) and title will become defeasible. Defrauding the register = correct the register. Defrauding unregistered interest = take subject to interest