

LEGAL VS EQUITABLE

As [PARTY] has a registered ____, this is a legal interest and thus attracts indefeasibility as per **s41 and s42** of the TLA, as the Torrens system is a system of title by registration which cures defects (*Frazer; Breskvar*). This means that [PARTY] 's interest is protected, unless __[PARTY B]__ can prove [his/her] interest should be an exception to indefeasibility as per **s42 TLA** or another recognised non-statutory exception.

- NB: This does not change if the RP had **notice** of a prior unregistered interest (**s43**)

EXCEPTION 1: FRAUD

Fraud is an exception to indefeasibility as per **s42(1) TLA**. If ____ can prove that ____ was fraudulent, [he] will be able to enforce his [interest] against [other party].

- NB: Even if fraud, title only defeasible vis a vis the **defrauded party**. Against all others it is good title and so D can transfer his interest to/create an interest in a 3P (*Breskvar*).

1. IS THERE FRAUD? AGAINST WHO?

- As per Lord Lindley in *Assets Co*, fraud requires **dishonesty brought home to the D**. This dishonesty must be **actual dishonesty or moral turpitude** (*Pyramid*), and the fraud must operate on the mind of __[defrauded person]__ and actually bring about detriment to him/her (*Ferguson*)
- Not fraud:
 - Equitable/constructive fraud (*Assets*)
 - Genuine belief that docs were genuine (*Grgic; Assets*)
 - Finding out about another title/mere notice (*Assets; s43 TLA*)

→ TYPE OF FRAUD: Here, P will argue that D has been fraudulent in his/her acts of ____ with these acts falling within the *Assets* definition of fraud as __[insert type of fraud]__, as per the case of ____.

- **Forgery or impersonation →** considered actual dishonesty/aiming to defeat another's interest. Clearly fraud (*Grgic*)
 - Honest belief that doc is genuine does not constitute fraud
 - Fraud is not 'less than meticulous practice'
 - BUT NOTE NOW: **s87A(1) TLA:** Mortgagees must take reasonable steps to verify identity of mortgagor
 - **False attestation →** generally fraud if the following can be shown (*Russo*) - a subjective test:
 - [1] D knew P would be deprived of an interest OR that Register would be misled AND understood the significance of the consequences (*Russo*)
 - [2] Knew they were falsely attesting OR was reckless to the mortgagor's identity
 - [3] May aggregate knowledge of employee of agent, to agent (*Russo*)
 - **Reckless indifference/wilful blindness / failure to enquire for fear of finding out →** Fraud (*Pyramid*)
 - But does **not** include mere want of due care, negligence, less than meticulous practice - even if they would have discovered fraud had they taken more reasonable steps (*Pyramid*) → High threshold test
 - **Verbal assurances & making misrepresentations to induce a transfer →** considered an attempted to defeat another's interest → fraud (*Loke Yew*) But distinguish from...
 - No intention of honouring these assurances
 - **Repudiation after making a genuine representation →** Law unclear if fraud (*Bahr* per Mason and Dawson JJ)
 - But c.f. *Wilson & Toohey JJ* in *Bahr* who believed this is insufficient for fraud - so law remains that **fraud must occur in obtaining registration**
- D will counter-argue that his acts are distinguishable from the case of __, and do not amount to fraud due to __.

→ OPERATE ON MIND OF DEFRAUDED: On the facts, the alleged fraud clearly operated on the mind of [insert party] as it induced the **detrimental action** of ____, effectively harming or cheating them (*Ferguson*) AND it changed

their **legal obligations** by ____ [has to affect whether mortgage would be obtained, not just whether the loan would be approved]__ and as such is more than a mere formality (Ferguson).

- Can include defrauding the Register (Russo; Grgic)

TYPES OF FRAUD CASES

<p>Loke Yew v Port Swettenham (Fraud by written assurance)</p> <p>FACTS:</p> <ul style="list-style-type: none"> - U sold part of land to L. L not RP and title docs held by L in non-registrable form. U agreed to sell rest of land to PS, making clear this did not include L's land. U refused to sign transfer until PS acknowledged in writing L's interest. PS's agent made verbal & written assurances - U transferred land to PS for price that reflected L's interest was excluded - PS then tried to buy L out When L refused, PS sought to eject him, claiming they had indefeasible title over all land <p>HELD: Dishonest assurance to honour prior interests made in order to secure interest w no intention to honour agreement is fraud</p> <ul style="list-style-type: none"> - PS's agent made false statements to induce U to sell land. Ps title defeasible for fraud - Deliberate plan to deprive LY of land
<p>Bank of SA v Ferguson (Operating on mind of defrauded)</p> <p>FACTS</p> <ul style="list-style-type: none"> - F advanced half of his mortgage with BSA. Then defaulted - He claimed mortgage defeasible for fraud due to actions by bank official during loan period who forged F's signature – INTERNAL DOC <p>HELD: Fraud must operate on the mind of the defrauded and have induced them to act to their detriment</p> <ul style="list-style-type: none"> - No fraud: Forgery not intended to cause F detriment and he didn't even know about it, in fact benefitted from it - No one knew of forgery until before trial, including F. This altered value of F's land to be more than worth, meaning he got a bigger loan. - It did not increase his liability or affect his obligations under the mortgage. Purely procedural
<p>Bahr v Nicolay No 2 (Repudiation fraud; in personam)</p> <p>FACTS:</p> <ul style="list-style-type: none"> - B entered agreement w N whereby he would buy their land, they would lease it from him for 3 years and then (under cl6), he would sell back to them for \$45,000. - N sold his interest to T, with condition in their K of sale that T would honour agreement w B (cl 4 of K) - T became registered, but when B attempted to repurchase land, T refused to sell it back <p>HELD: In personam claim is not inconsistent with indefeasibility. Unsettled in terms of fraud</p> <ul style="list-style-type: none"> - Mason and Dawson JJ: said fraud could extend to conduct after reg obtained and therefore would amount to statutory fraud, despite traditional definitions of fraud referred to dishonesty in obtaining an interest - 'Undertaking honestly given which induced execution of transfer and is subsequently repudiated for purpose of defeating prior interest' - Wilson and Toohey JJ: No fraud - no evidence T purchased w intention to cheat B- no fraud in obtaining registration
<p>Pyramid Building Society v Scorpion (Wilful blindness)</p> <p>FACTS:</p> <ul style="list-style-type: none"> - P had reg'd mortgage over S's land. P tried to enforce mortgage and recover debt, S said mortgage not validly executed as not properly attested by their director and argued reckless indifference as the PBS agent/solicitor should have discovered the fraud <p>HELD: Fraud requires more than 'want of due care'</p> <ul style="list-style-type: none"> - No fraud – no arousing of suspicions followed by deliberate abstaining from making inquiries etc - Prior to settlement of mortgage, P did company search of S and should have discovered mortgage not properly executed, settlement occurred w/o P obtaining copy of company resolution doc that authorised transaction. - Court said must be moral turpitude by P or agents – a higher standard than mere 'want of due care' - No evidence that P knew witness not a director, or that execution of mortgage had not been authorised
<p>Russo v Bendigo Building Society [1999] (False attestation)</p> <p>FACTS:</p> <ul style="list-style-type: none"> - R had mortgage to BBS obtained by son-in-law forging daughter's signature. BBS's solicitor handled transaction and his clerk (19y.o) falsely attested signature - She said she had been told never to falsely attest a signature, but could not remember the occasion and had no reason to believe daughter had not signed. But evidence showed she falsely attested as daughter not in her presence - Boss had no knowledge of this. Assumed mortgage was duly executed and wrote to bank saying so. <p>HELD: Inexperience can render a false attestation non-fraudulent for lack of dishonesty</p> <ul style="list-style-type: none"> - Attestation was false, but clerk did not appreciate the severity of her actions and had no reason to suspect a forgery - Did not know she was putting forged doc on path to registration (c.f. <i>De Jagar</i>). – not guilty of subjective dishonesty and Mr R did not know so no fraud to him either. Thus bank had no knowledge and could not be brought home to them. - Critical elements of 'moral turpitude' from s42 was lacking
<p>Grgic v ANZ Banking (1994) (False Attestation)</p> <p>FACTS:</p> <ul style="list-style-type: none"> - G senior became RP of land – did not reg discharge of mortgage over this land but put docs in safety deposit box. Son wanted his father to use land as security for loan. He agreed. Bank refused. Son took docs to ANZ and had S impersonate G - G long-time customer of ANZ. Bank officers explained Mr G had been informed of nature of docs and opp to consult solicitor. - ANZ later tried to exercise PoS – G discovered mortgage and that his signature forged. Could fraud be imputed to ANZ to defease mortgage? ANZ said no personal dishonesty by their agents – seemed to genuinely believe man was G <p>HELD: Less than meticulous practice not fraud. Neither deceit, negligence, MLDC nor breach of stat duty sufficient to give rise to claim in personam</p> <ul style="list-style-type: none"> - No fraud – ANZ employees 'less than meticulous' but not recklessly indifferent or wilfully blind as no evidence that they sought to take advantage of G. - Attestation NOT fraudulent as genuinely believed S was G from what t son told them and he had the title docs/mortgage discharge etc - Note: didn't ask for drivers license / ID docs. But they did have relevant title docs and other docs relating to Mr G

2. CAN THE FRAUD BE 'BROUGHT HOME'?

- The fraud will be brought home IF: the agent's personal fraud was *within their scope of authority*, OR they had *knowledge of third party fraud which ought to be conveyed back to the principal*.

→ **AGENCY:** Here, the fraudulent act has been committed by ____, who may be considered an agent/employee of __ due to ____.

- **Fiduciary relationship:** Implied or explicit consent for agent to act on principal's behalf to affect principal's legal relations with 3Ps, so that principal is bound by agent's actions. Analogue with:
 - In *Dollars & Sense*, the **party receiving the loan/borrower** was found to be an agent of DS as T (DS's solicitor) gave him the task of securing mortgage documents and signature from his parents (guarantors), thus entrusting him w the function of representing DS in transaction with his parents. He undertook '**significant tasks**' on their behalf and nobody from DS attempted to contact the parents separately and they did not have their own solicitor → **IMPUTED AGENCY**
 - In *Cassegrain*, the **husband found not to be an agent of his wife** for purpose of imputing his fraud to her. He performed tasks to her advantage, but she had no knowledge of this herself. His fraud could not be in the **scope of any authority** she may have given him.
 - In *Schultz*, the relationship of **solicitor client** was taken to be an agency relationship, as there was a contract, oral evidence and tasks that are usually associated with that role.

→ **SCOPE OF AUTHORITY – IS IT BROUGHT HOME?** In order for P to have case against RP, [agent]'s fraud must be **brought home** to the RP (Assets). If the agent acted within the scope of his actual/apparent authority, the fraud of agent **becomes the fraud of the principle** under the doctrine of respondeat superior (*Schultz/DNS/Cassegrain*)

- Here, X is acting within the scope of his actual authority as ____
 - Note '**mode of performing**' an authorised act in *DNS*
- Here, X is acting within the scope of his apparent authority, as RP made representations that X had the authority to undertake [_insert acts_] / acting with apparent authority as [_insert job_].
- Here X does not appear to be acting within the scope of actual or apparent authority. [Insert acts] appear to be **personally motivated** in that X is acting for **personal benefit** and not related to X's job, and thus X may be found to be on a **frolic of his own**, and his fraud cannot be brought home to the RP (*Schultz*)
- Note obiter in *Russo* – may be able to aggregate actions to get collective fraud and then bring home to bank – but must find actual fraud – each individual person must be dishonest (c.f. *Batt J* dissent: too remote)

If have time, can make this policy argument:

*D may argue that as [agent] has been fraudulent, his conduct is not within the actual/apparent scope of his authority as fraud is **never a part of an agents work**. This appeared to be the opinion of the court in *Schultz*, however if this was taken to be authority, essentially prevents fraud by agent even being brought home to principal – undermines concept.*

*Therefore, courts may prefer to follow the reasoning **DNS (NZ case)** and find that [agent's] actions were a 'mode of performing' an authorised act, and therefore able to be brought home to D. But this is not binding (in *Cassegrain, Schultz* was confirmed as Aus authority but the process in *DNS* was applied in finding that fraud of husband could not be imputed to his wife who had no knowledge of his actions, as any authority she gave him could not extend to his fraudulent conduct)*

Schultz v Corwill Properties (fraud by agent)

FACTS:

- G was Mrs S's solicitor and director of CP – forged a mortgage over CPs land to Mrs S and reg'd it. Mrs S died and Mr S succeeded her as mortgagee.
- G fraudulently induced Mr S to execute a discharge of the mortgage and registered it.
- S discharged mortgage **on basis of fraudulent info from G** – S claimed **mortgage defeasible**, CP said discharge was **indefeasible**

HELD: *Fraud of an agent is outside the scope of authority and cannot be brought home to RP*

- G was agent of CP as he was their solicitor. He was permitted to act in the usual manner of solicitor procuring mortgage, but **forging a signature outside the scope**.
- **G's fraud could not be brought home to S**, S could rely on reg. It was a 'felonious abuse' of his custody of the CoT. No communication to S. simply because she employed him – NOT ENOUGH → outside scope given by Mrs S – him knowing about the fraud – falls within exception because he committed the fraud.
- **G's fraud could not be brought home to CP**, permitted to act in manner of Director and hold CoT, but discharging mortgage outside scope of agency as he had no authority to approach S for the discharge. No communication to CP.
- **MORTGAGE INDEFEASIBLE**

SCHULTZ LARGELY CRITICISED

Dollars & Sense v Nathan (Fraud by agent → BROADER view)

FACTS:

- DNS engaged T to act on their behalf in loan agreement with N. N gave parents home as security, ut didn't mention mother lived elsewhere. T instructed mutual friend, H, to give mortgage docs to N to get parents signature to execute mortgage
- Father signed, but N forged mother's signature. Returned docs to T, but T sent back because not witnessed. N got friend to witness.
- T accepted docs. Mortgage reg'd. N defaulted. DNS exercised PoS. Father died, mother wanted to stop sale – said mortgage defeasible for fraud

HELD: Fraud by an agent can occur through an unauthorised mode of performing an authorised task

- FRAUD BROUGHT HOME TO DNS – UNAUTHORISED MODE – T did not investigate witnessing – DNS put trust into deceiver → a **sub-agent**
- N fraudulent, YES. Brought home to DNS as agent? T obviously was an agent – he appointed N to secure mortgage docs. N **was therefore an agent** – tasked him with the function of representing DNS in transactions with parents. **Through T, DNS impliedly authorised N to act for them.** N knew they did not have a solicitor. Also didn't attempt to contact parents
- **Within scope?** Authorised to secure parent's signature on mortgage doc (narrow) or procure mortgage in registrable form (broad). Either way – forgery was an **unauthorised mode of ...** Acting for own interest and **acting for DNS as securing a mortgage on their behalf.**
- Fraudulent act impacting upon 3P may, when compared to an RP, be seen to be done within scope of agency, even if it only benefits the agent.
- Acts can have a **necessary connection with authorised acts** even if they are of criminal character, even if done **exclusively for benefit of agent** (c.f. Schultz)

Cassegrain v Gerard Cassegrain (Fraud by agent)

FACTS:

- G won money in dispute settlement, half owned to C.
- Company transferred land estimated to be worth \$1m to C and his wife as JTs to offset this owing – money was actually paid by CSRIO
- C transferred his part of the JT to his wife for \$1 – she became sole proprietor.
- Company brought proceedings against C to have land transferred back to them on basis that one/both transaction fraudulent
- On appeal, considered whether C, who was fraudulent, was agent of his wife. Found he was. On appeal to HC:

HELD: Affirmation of Schultz principle – merely performing tasks for advantage of someone not mean that person guilty of fraud

- Husband can be agent of his wife as agency defined broadly in property law. But here, NOT her agent for purpose of fraud
- All he did was perform tasks to her advantage – this is not fraud of itself. Without more, his fraud cannot be withi the scope of any authority she did/may have give him. No imputed knowledge shown.
- She was merely the **passive recipient of an interest in land**

→ **FRAUD BY THIRD PARTY** Here, the fraud has been committed by [insert 3P]. [3P] does not appear to be an agent of the RP, however, if an **agent of the RP has knowledge** of [3Ps] fraud, they have a **duty to communicate to the RP** and there is an **rebuttable presumption** that the RP is imputed with fraud as per the doctrine respondeat superior (**De Jager**)

- Here, X appears to be an agent of the RP due to ____ and appears to have knowledge of [3Ps] fraud as [insert relevant fact]
- **Rebutted if:** agent was party to the fraud of acquired information whilst a party to the fraud (Would they want to communicate???)

AGC v De Jager (Fraud of the registrar; false attestation; 3P fraud)

FACTS:

- DJs were JTs of land, obtained a loan from AGC and F to help refurbish a gym which they acquired under a lease
- AGC asked for security via mortgage over DJs home and business partner's home. F collected relevant docs prepared by AGC employees. Mr DJ, business partner & wife signed, F witnessed. Mrs DJ did not sign – F returned with doc signed, but not witnessed – her signature forged
- F returned docs to AGC – they said Mrs DJs' signature not witnessed – F attested with approval of employees
- AGC became reg'd mortgagee. Later tried to exercise PoS. Mrs DJ said mortgage defeasible for fraud

HELD: A party will defraud the registrar if s/he knowingly puts a fraudulent document on the path of registration – attestation reqs NOT mere formalities

- **The fraud was putting forward doc for registration knowing it hadn't been properly executed – the lodging, not the false attestation.** Employees allowed mortgage to be **put on path of reg** despite false attest made by F. AGC party to fraud against reg via employees
- AGC's employees (thus AGC) abstained from making inquiries about Mrs D's signature for **fear of learning truth**

3. CONCLUSION

- If fraud is brought home, the instrument will be **void (s44(1))** and title will become defeasible
- If claimant was the previous RP, setting aside the transaction for fraud will result in a change in Register so claimant becomes RP again.
 - EXCEPTION: BFPfVwoN – their interest not invalid **(s44(2))**