

MLL325 LAND LAW EXAM NOTES

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TOPIC 1: INTERESTS IN LAND

LEGAL INTERESTS IN LAND → General Principle: All conveyances or dispositions of legal interests in land (unless they are by will) must be made by a formal deed: **S 52(1)**

- All legal interests [as opposed to equitable] over land must be in the **form of a deed** otherwise not legal: **S 52(1) PLA**
 - Legal Estates → Fee Simple or Life Estate
- EXCEPTIONS to this are set out in **S 52(2) PLA** (*variety of orders*) → *EG, Adverse Possession* [type of interest grounded in a defence, therefore, doesn't have to be created by way of a deed], *EG, Leases* [tenancy agreement]
 - **S 54(2) PLA** sets out that leases not required to be in writing such as **oral leases** for 3 years and under

DEFINITION OF 'CONVEYANCE'

- Requirement of DEED applies to all '**conveyances**' of land
 - **S 18 PLA** defines conveyances broadly to include: 'mortgage, charge, lease, assent, declaration etc' [different transactions you can have with a piece of land]
 - Conveyance not restricted to formal deed or transfer
- *Legal Interest* = Higher title interest than anyone else → you're going to have **PRIORITY** [In the event of a conflict, who takes priority?]

WHAT IS A DEED? → *No Deed = Go back to the contractual/equitable rules*

- Common law **Manton v Parabolic**: Ritual/instrument to signify solemnity of the transaction [enforceable *in rem*, land is a very powerful asset]
- Early times: 'Livery of seisin': vendor removed his battle glove from which he had defended the land and 'vested' the purchaser with it
 - Vendor then dug up a sod and handed it to purchaser along with the knife
 - A Memorandum of events subsequently prepared
 - This Memorandum came to be known as deed – replaced ancient rituals
- DEED: most solemn act a person can perform with respect to a particular property: **Manton** → *Equivalent to settlement*
- **Usually applied to**: conveyances, transfers, mortgages, charges and leases of land [long term leases]
- Common law requires a deed to be: **signed, sealed and delivered**
- It must be executed by the grantor/vendor in presence of the prescribed number of witnesses, known as **instrumentary witnesses**
- A seal must be affixed to it → as long as expressed to be sealed, it is sufficient: **S 73A PLA**

- Originally, affixing seals made persons parties to the deed and signatures were optional, but most jurisdictions outdated seals, and now the grantor and witnesses signatures are primary
- Statute reinforces this: **S 73 PLA** must sign or place mark – sealing alone insufficient → Most important thing with respect to Deed: Make sure that *the signature is WITNESSED*
- **S 73A PLA**: if deed expressed to be sealed shall have the same effect as if it has been
 - * KEY POINT: *Vendor INTENDED to sell to purchaser*
- **TLA S 40(2)** Every instrument – when registered [registration was the same as affixing seals] – shall have the same effect as if it were a deed under seal → NOTE: This is PAST LAW
- Electronic Conveyancing (Adoption of National Law Act) 2012 (NSW) Appendix **S 9(1)** gives electronically lodged registry instruments the same effect as paper documents
 - WHY? *Using digital signatures*

GENERAL LAW (OLD TITLE) & TORRENS TITLE LAND: WHAT IS THE DIFFERENCE?

There are two systems of land registration in Australia:

- i. General Law Land → *Most have now been converted to Torrens Title Land*; &
 - ii. Torrens Title Land
- Means by which you CONVEY General Law Land is different to the means by which you convey Torrens Title Land → Difference between those two types of land interest
 - General Law (**Old Title**) Land represents ***all land grants issued between 1838 and 1862*** which have not been brought under the Torrens system
 - General Law is the original form of land ownership
 - When land was sold or otherwise allocated by the government, a Crown Grant would state that the land described had been given to the person named in the Grant
 - Each time the property was sold a new deed would be added to the Grant
 - These would grow into a chain of deeds
 - To prove ownership, a vendor would have to produce the complete and unbroken chain of titles
 - These days any general law land that is transferred must be converted to modern Torrens title
 - In Victoria the Torrens system first introduced in 1862 pursuant to the Real Property Act (Vic) which is now set out in the Transfer of Land Act 1958 (Vic)
 - Land issued ***after 1862 was Torrens land*** OR land converted to Torrens under the ‘conversion process’ is Torrens land
 - Piece of General Law Land → Land that has not been issued/converted into the Torrens framework

- *The Torrens system IS NOT compulsory*
- Overall, most land is Torrens title → The registration system applies [if not registered go back to General Land priority rules]
- In Victoria today, **most land is now Torrens title**
 - Remaining old title land must, where transferred, be brought under the TLA so that eventually all land will be covered
- General law land is evidenced by a 'chain of title' → Establish the actual format the Title takes
- Torrens title land is evidenced by a CT → Established under a transfer / contract → Transfer executed & registered [equivalent to a deed]
- Chain of title dates back to the original grant
- Understand the ***DIFFERENCE in terms of TITLE***

'SEARCHING A CHAIN OF TITLE' → *Evidence of Legal Interest*

- *Not one single document* → A number of documents that make up the history of that Title
- To verify general law title, **S 44 PLA** sets out only need to search back for the 'good root' of title → EG, Mortgages, Easements, Ect
 - This amounts to documentary title apparent in the **PREVIOUS 30 YEARS** → Not bound anything beyond 30 years
- Purchaser is not affected by any title existing beyond this 30 year period: **PLA S 44(6)**
- Must be aware of titles existing within the 30 year period because will be affected by this
- **No guarantee of title with general law interests**
 - **DEFECT:** Fraudulently misrepresented Chain of Title [EG, taking out Mortgage] → *Apply Nemo Dat rule*
 - One of the reasons Torrens system was introduced, to avoid the defects

TORRENS TITLE INTERESTS

- The ***Transfer of Land Act*** provides for the Register to be in a variety of forms and on any medium, including parchment (old CT's) and a computer → *Computer title information has become very common*
 - The computer title information forms part of the Register and can be updated by registering new dealings on the computer database without having to update any paper title
 - The folio is the original document in the titles office
 - The certificate of title is the duplicate of the folio (known as the duplicate certificate of title)
 - For a computer title, the Certificate of Title is a computer printout

- * You have a unique **volume & folio number** on the certificate of Title for every piece of Torrens land Title → *everyone has access to this*

Computer titles may be created in two ways:

- (1) directly from newly registered plans of subdivision for lots, roads and reserves on those plans. In this situation there is no paper folio for the land, only the computer folio information
 - (2) through the registration of a dealing affecting a paper folio (title) for which there is computer "search" data available. The registration transforms the data to computer folio data, which can be subsequently updated instead of the paper title
- Computer titles do not contain the breadth of detail as the old paper titles
 - They only contain current information (ie not old registered proprietors etc) and they do not contain any detailed diagrams of easements etc
 - Verified: Electronic Conveyancing (Adoption of National Law) Act 2012 (NSW) Appendix – Victorian Act – **S 7 (DOCUMENTS MAY BE LODGED ELECTRONICALLY)** and **S 12** (digital signatures) → Consequence: *You don't need to lodge a paper transfer form*
 - Use digital signature to ensure no one hacks it → *Need secure protocols for digital transactions*

REGISTERED & UNREGISTERED INTERESTS IN LAND → *The facts that it's a Torrens interest in land, DOES NOT mean it is a registered interest in land*

- Both general and torrens title land may be unregistered
- General law interests cannot be registered under Torrens until they are converted
- Torrens title interests may be unregistered because holders choose not to register as the system is not compulsory
- Unregistered interests do not gain the protection of indefeasibility that registered holders of Torrens title land acquire → *Unregistered Torrens interest does not gain the protection of the Torrens system* [priority rules]
 - EG, two unregistered Torrens mortgages → *who gets priority? First bank or second bank?*

EQUITABLE INTERESTS IN LAND → *completely different to legal interest, Equity exists because a Court deems it unfair to not recognise that a person is an interest holder*

- Remember distinction between Legal Interest & Equitable Interest
- Legal Interest [psychical conveyance of estate] at Settlement BUT equitable interest when enforceable contract entered
- Settlement period necessary to organize finance; investigate title
- Contract will generate equitable interest (constructive trust/equitable lien) if specifically enforceable → *you get rights regarding the enforceability of contract*
 - Must have entered in VALID contract & CONSIDERATION has occurred

- Specific performance available if damages inadequate and parties ready and willing and the contract is valid
- Orthodox type of equitable interest: constructive trust: vendor qualified trustee and purchaser holds beneficial title
 - Vendors trusteeship qualified by vendors lien (**Lysaght v Edwards**)
- **Tanwar** dicta revises this: suggests no constructive trust but purchaser holds **EQUITABLE LIEN** over deposit bc description of purchaser as constructive trustee conceals the contractual relationship and this analysis is 'bedevilled by circularity'

EQUITABLE INTERESTS IN LAND: THE STATUTE OF FRAUDS

- *GENERALLY, 2 PROVISIONS FOR A VALID EQUITABLE INTEREST*: Contracts in land **must be in writing/signed**: **S 126 Instruments Act / S 53** (to enforce any contract for sale of land or any interest in land)
- *DIFFERENCE*:
 - * **S 53**: About **creation** of contract / validation
 - * **S 126**: About enforcing contract for sale of land / about **enforceability**
 - EXCEPTION to formality requirement: **Oral contract** which are specifically enforceable may be valid if **satisfies doctrine of part performance**: **S 55(d) PLA**: 'Nothing in the last two preceding sections shall- ...(d) affect the operation of the law relating to part performance' → WHY? Not allowing S 126 to be used as fraud
- These provisions derived from Statute of Frauds which will render a non-compliant contract or interest in land unenforceable (note that unenforceable does not mean that the interest is extinguished)

THE DOCTRINE OF PART PERFORMANCE → *Not easy to establish*

- **PART PERFORMANCE**: The Australian position is the strict test as set out in **Maddison v Alderson**: must prove acts unequivocally referable to agreement was endorsed in **Millet v Regent**
 - The doctrine of part performance requires that the **plaintiff must be able to show** that he or she has **made a substantial commitment to the contract** so that it would be **unconscionable to allow the defence**
 - NOTE: that it must be the acts of the *plaintiff*
 - The doctrine is based on the idea of unconscionability generated by the plaintiff's reliance on the existence of a contract
 - Acts of the defendant which show that there is a contract therefore do not count
- **WHAT ACTS OF PART PERFORMANCE WILL SUFFICE**: generally the taking of money alone is insufficient → *Money & possession generally sufficient to establish part performance*
- However, it is not necessary for the entire contract to be performed and generally, **taking possession of land will raise a part performance action**

BOUNDARIES OF LAND OWNERSHIP → *how much land are you actually purchasing?* → *WHY RELEVANT? Adverse possession*

- PHYSICAL MEASUREMENTS: Boundary defined according to **survey lines**
 - If survey lines removed may establish boundary lines **according to adverse possession** (where proven) → EG, House built on land that belongs to the next door neighbour [happens with old property]
 - You only acquire the land set out within the Certificate of Title
- Own up to the heavens and down to hell: *cuius est solum maxim* BUT Crown reserves certain rights which include minerals and now – regulation of bore water
 - EG, do you own the gas in the land? Gold in the land? Use to, but don't now because the State owns it now [public resource ownership] → *they don't own the land itself, just what's underneath*
- IF MEASUREMENTS INCORRECT: General law land will result in defective title
- Torrens title land no indefeasibility for registered holder of land 'wrongly described' unless can prove are a bona fide purchaser for value

BOUNDARIES ABUTTING WATER → *State controls our water resources*

- **Tidal Waters**: High Water mark is the boundary subject to public rights to fish and navigate
- **Non-tidal Waters**: Middle Line approach – abrogated by statute in Vic to vest river bed in the Crown: Water Act 1989, **S 327(1)**
 - Riparian entitlements now also vested in the Crown
- **Accretion/Avulsion**: Land with 'ambulatory borders' may acquire or lose land where there is erosion or accretion which is gradual and 'imperceptible' rather than sudden and dramatic: **Williams v Booth** → *Don't need to go into great detail on the exam*

ENCROACHMENT

- Property rights only extend to physical boundaries of land
- Any encroaching property which is affixed to the land will be owned by the adjoining land owner **pursuant to doctrine of fixtures**
- If encroachment not affixed, adjoining owner may claim damages for intrusion → EG, large trees, buildings
- Encroachment includes land and airspace
 - RULE: Determine boundaries, respect them, doctrine of fixtures may apply if encroachment is affixed

WHY DO WE NEED PRIORITY RULES → *Basic legal rules that exist under Legal & Equitable principles for dealing with conflicts between land interests*

WHY DO CONFLICTS OCCUR?

- Jurisdictional Fragmentation increases chance of conflict → *Input of equity increases chances of conflict*
- MOST conflicts deal with equitable interests
- Must determine which interest is entitled to priority
- Priority dispute will arise where two or more interests in conflict, whether partial or direct, over one piece of land
- Priority only conferred to EXTENT OF CONFLICT → *how much is involved & what the value of security is*

DIFFERENT SOURCES OF PRIORITY RULES

- Land Interests exist under ***common law, equity and statute*** – so do priority rules [different sources]
 - General Law rules: common law and equity apply as base rules and TLA superimposed on this
 - Torrens title priority rules are superimposed over general law rules where land interest is registered under Torrens system
- ***IN EXAM: Is the land REGISTERED?***

PRIORITY RULES: PURE LEGAL INTERESTS

- Legal interest in land ***by deed or per exemption***
- TORRENS LEGAL INTEREST – registered **S 40(2) TLA**
- OLD TITLE LEGAL INTEREST – chain of title representing all transactions over that land since first issued by Crown
 - **NEMO DAT RULE:** (1) *A person cannot transfer title they do not have* and
 - * (2) *A person can only transfer the title which they actually have*
 - **NO TWO COMPETING LEGAL INTERESTS B/C NEMO DAT RULE** → One valid interest & One invalid interest → EG, At end of Auction, Purchaser 2 says 'I'll pay you \$100k more than what you just sold it for', **not possible because once you settle**, it belongs to Purchaser 1 → WHAT SHOULD YOU HAVE DONE? Settle with Purchaser 2 [could proceed with breach of contract, *Problem?* They can't get specific performance because Legal Title has passed]
 - * EXAMPLE: Page 561 of Textbook
 - * Understand basic rules & see how Torrens changes it
 - **Caveat:** Statutory injunction preventing the registration of particular dealings with real property [no other interest inconsistent with your claim can be made, you will be notified & you can deal with it in a timely matter → [EG, seek specific performance / seek damages] → *Only applies to Torrens Title Land*
 - * Can be penalised for lodging a caveat for no reason

PRIORITY RULES: EQUITABLE INTERESTS

- Equitable interest in land is a right to compel legal owner to hold legal rights in accordance with equitable obligations
- Right based character of equitable interest – allows for multiple creation of equitable interests against same land
- ***Nemo dat not applicable to equitable interests as title and possession not conferred***

SUMMARY

- ***No priority rule between Legal interest*** → Nemo Dat
- ***Subsequent Equitable Interest*** → **Northern County & Whipp** → Prove that the legal interest holder contributed to the creation
- ***Prior Equitable Interest*** → Prove that the legal interest holder was took with notice or lacked bona fides or was a volunteer

1. PRIORITY RULES FOR PRIOR LEGAL & SUBSEQUENT EQUITABLE INTEREST

- **RULE: LEGAL ESTATE HOLDER** WILL ALWAYS TAKE PRIORITY IF **BONA FIDE** AND **HAVE NOT CONTRIBUTED TO THE SUBSEQUENT CREATION OF EQUITABLE TITLE** (northern counties fire insurance v whipp)

PRIORITY RULES: LEGAL / EQUITABLE CONFLICT → A priority dispute will arise where there is a direct conflict between two or more interests in land & there is a need to determine which interest has first right of preference over land

Northern Counties Fire Insurance v Whipp → **Competition between legal mortgage**: Northern Counties **and equitable mortgage**: Whipp

- **ISSUE:** *Who owns it to begin with & how do things change?* Prior legal mortgage, subsequent equitable mortgage

HELD

- Fry LJ: The prior legal interest holder must have fraudulently contributed to the creation of the subsequent equity
- Mere carelessness or negligence not enough to set aside the institutional priority that a bona fide estate occurs → *Must be gross negligence, bordering on fraud*
- Negligence implies duty of safe custody over title documents and this does not exist
- Carelessness or want of prudence insufficient to postpone prior legal mortgage
 - **This situation unlikely to occur in Torrens system** → *WHY? Electronic documents, only one document*

- 2. **RULE: IF SUBSEQUENT LEGAL INTEREST HOLDER IS A BONA FIDE PURCHASER FOR VALUE WITHOUT NOTICE THEY WILL TAKE PRIORITY: **Pilcher v Rawlins** → Doctrine of Notice important here**

Pilcher v Rawlins

- **Competition between prior beneficiaries and subsequent legal mortgagee** → Apply the three fundamental aspects of this rule

HELD

- Legal mortgage was bona fide and no notice
- Prior trustees 'roguish' and subsequent trustee honest investment motivation
- Beneficiaries lost out because '**If you trust your property to a man who turns out to be a rogue, it stands to reason that you may lose it**' → Seems unfair, but the Court has to decide who bears the loss → Mortgagee has a more powerful interest & they had no idea about the Fraud

3 FUNDAMENTAL ASPECTS OF THIS RULE:

- (1) **BONA FIDES:** Is the subsequent legal interest holder bona fides
- (2) **CONSIDERATION:** Is the subsequent legal interest holder a purchaser (ie not a volunteer)
- (3) **NOTICE:** Has the subsequent legal title holder taken without notice of the existence of a prior equitable estate

DOCTRINE OF NOTICE

- Will bind a subsequent legal interest holder to any equity actually or constructively aware of
- ACTUAL NOTICE – actually been informed
- [the issue] CONSTRUCTIVE NOTICE- should, had you performed usual protocols, have discovered: **IGA Distribution** [Page 574 of Textbook] → '**REASONABLE PERSON TEST**'
 - **S 199 PLA** incorporates both actual and constructive notice → Doesn't define Constructive notice

ISSUE OF TIMING ... When did you find out about the interest?

- TIMING: Did legal interest holder **receive notice of prior equity before acquisition of the equitable interest or after**
 - Will only be bound if it is before → *WHY? Wouldn't be fair & equity is all about fairness*
- TIMING: In a **sale context** – must receive notice before entering into contract and acquiring antecedent equity: **Blackwood v London**
 - Will be taken to be aware of all interests **reasonably apparent from inspection** – DOES NOT INCLUDE INTERESTS ARISING FROM ORAL CONVERSATION, EG, right to rectify not in document: **Smith v Jones**
 - * Conversation will arise a mere equity → *The mere equity isn't something that the subsequent legal interest holder will have notice of*
- EFFECT OF NOTICE: Once receive notice – cannot remove it: **Jared v Clements** → *If you go beyond a 'reasonable' inspection, you are still bound by it*
- Equitable interests arising from co-occupation may have 'constructive notice'
- **Kingsnorth** – **Not a reasonable inspection** to ascertain whether any co-occupant lived in the property and held equitable rights: **timing and failure to follow up**

EXCEPTION TO THE DOCTRINE OF NOTICE: Wilkes v Spooner

- **RULE:** When a **legal interest holder** who has taken without notice of the existence of a pre-existing equitable title passes that legal title on to a **bona fide purchaser** who does have notice of the equitable interest, the latter will take good title
 - *Why? Should not restrict first legal title holders ability to sell → It would be punishment, ensure value of legal estate remains*
- **EXCEPTIONS:** ***trustees in breach of trust*** OR if ***subsequent acquisition due to fraud***
- 3. **PRIORITY RULES: COMPETING EQUITIES** → *Happens in unregistered interests, Torrens Title mortgages, often competing unregistered interests*

RULE: THE INTEREST WHICH IS **PRIOR IN TIME** WILL TAKE PRIORITY IF BOTH INTERESTS ARE **EQUAL IN MERIT**. 'QUI PRIOR EST TEMPORE POTIOR EST JURE': **Rice v Rice**

- Not the status of the interest, look at the ***TIMING***

Rice v Rice

FACTS

- Michael Rice purchased lease from George and Lydia Rice
- Michael paid portion of price but balance outstanding → *Relatives, so trusted each other*
- George and Lydia transferred full title indicating full purchase moneys paid → *Full Legal Title = Nothing to indicate that any money is owing*
- Michael then deposited transfer with Ede and Knight to secure a mortgage → *Not paid the rest of the balance to George & Lydia*
- ***Competition between prior equitable lien that George & Lydia had for unpaid purchase price and subsequent equitable mortgage interest that Ede & Knight have***

HELD

- Kindersley VC: Focus upon initial merit assessment – are both equities equal?
- **Priority of time is the last resort**
 - **FIRST THING TO LOOK AT** → Are they both equal in MERIT?
- **In examining relative merits consider: nature and condition of equities , the circumstances and manner of their acquisition and whole conduct of each party** → *Is there anything in the special circumstances to give one a 'better' equity?*
- **CONCLUSIONS ON THE FACTS OF RICE V RICE – defendant has better equity as holder of title deeds**
- Acquired the deeds because the vendors '*voluntarily armed the purchaser with the means of dealing with the estate as the absolute legal and equitable owner, free from every shadow of incumbrance or adverse equity*'
 - If you enable something to have Full Legal Title despite not paying the full balance, you will have LESS merit

- Not protecting their own interest, but contributing to the loss of Ede & Knight [3rd party]

FACTORS RELEVANT TO MERIT ANALYSIS:

- Arming purchaser with indicia of title
- Carelessness by prior equity AND generates an **estoppel based reliance** for subsequent holder
→ *Estoppel based upon you making a representation and a person relying on that representation to their detriment*
- Arming purchaser with 'false colours' of title = indirect representation and estoppel: **Heid v Reliance**
- Not protecting prior equity with any means available
- Merit assessment based upon broad and flexible assessment – not rigid principles
- No one factor should be prioritised over another**
- NOTICE can be relevant but **not determinative** in a merit assessment → Would have notice changed the way you would have behaved? → *holistic analysis*

4. PRIORITY RULES: MERE EQUITY & SUBSEQUENT EQUITY → RULE: MERE EQUITY DEFEATED BY A **BONA FIDE PURCHASER FOR VALUE WITHOUT NOTICE: Latec v Terrigal**

- Mere equity not the same value of equity

Latec v Terrigal

- Difference approaches Judges took:
- Kitto J: mere equity pre-dates full equity and any priority principle based upon competition between mere and full – **bona fide purchaser rule**
- Menzies J broadly agreed and added that merit rule not applicable
- Taylor J: mere equity not an independent proprietary title therefore no competition
 - Combine Kitto & Menzies

Ruthol v Mills → Confirming the priority analysis set out in **Latec v Terrigal**

- **Competition between prior mere equity** of Mr and Mrs Mills and **subsequent full equity of Tricon**

HELD

- TJ Palmer J held Mr and Mrs M held an equity bc R could not take advantage of its own wrong
→ Classified as a full equity
- **Crt of Appeal disagreed:** Sheller JA held Tricon did no wrong to Mills → Did not categorize interest of Mills as mere or full equity
- Analogized with Latec – **equitable interest of Tricon acquired without notice therefore priority**

HAVE THEY GOT INDEFEASIBILITY?

STEP 1: *Who's registered?*

STEP 2: *When have they been registered?*

STEP 3: *Has that registration changed?*

STEP 4: *Is there any way you can attack the indefeasibility associated with that registered Title?*
[exceptions to indefeasibility]

- Separate the REGISTERED PROPRIETOR from the MORTGAGEE [*Mortgagee usually Bank*]
→ They are the two primary forms of registration that will exist in the context of the Torrens framework
- Caveat is noted on the original folio NOT on the duplicate Certificate of Title

DO ANY QUALIFICATIONS TO INDEFEASIBILITY APPLY?

- **STATUTORY FRAUD:** Has the interest been REGISTERED? [PAGE 30]

NOT REGISTERED? Apply equitable principles ... **Rice v Rice** [PAGE 16 & 31] → DO NOT reference indefeasibility principles

- **REGISTERED INTEREST: APPLICATION OF STATUTORY FRAUD:** An express exception to indefeasibility → **S 42(1)** makes fraud an exception [PAGE 34] → **S 44(1)** states the CONSEQUENCES of fraud (*State these statutory provisions, make them clear & explain how they operate* → Read these statutory provisions together)
 - * **S 44(1)** [PAGE 34] allows the defrauded party to object the registration, as **S 44(1)** states that anyone who has been defrauded can seek to have the registrar amended & the registration won't be enforceable against that person
 - * **STEP 5:** Has the **person who's been registered** been involved DIRECTLY in ANY fraud in terms of conscious impropriety or any behaviour that would attract the species of equitable fraud? → **Bahr v Nicolay** [PAGE 35] // **Russo v Bendigo Bank** [PAGE 36]
 - * **STEP 6:** Is it the **registered proprietor that's been fraudulent or the mortgagee**? → Is there a conscious impropriety // Is there some sort of assurance?
 - **Bahr v Nicolay** [PAGE 35] ... Court talking about some 'species of equitable fraud' will be relevant here
 - **Loke Yew** [PAGE 35] ... Failure to uphold express assurance = fraud
 - **Bank of South Australia v Ferguson** [PAGE 37] ... High level for what constitutes 'conscious impropriety'
 - It CAN'T just be notice, it has to be something more than that [**S 43 TLA ABOLISHES THE DOCTRINE OF NOTICE**] → Looking for that element that would attract equity, that would make it unconscionable to allow this person to rely on the indefeasibility provisions

- **IN PERSONAM** [PAGE 46]: Non-express exception to indefeasibility → IN PERSONAM RIGHTS can be *contracts entered into by the registered proprietor, or trusts, either express or implied, over the property* → A product of the fact that a registered proprietor continues to be responsible for legal & equitable obligations EXCEPT for
 - * **Barnes v Addy** Constructive Trusts [PAGE 50] (RECEIVE PROPERTY {BE IN RECEIPT} AND KNOW THAT THE RECEIPT WAS A BREACH OF TRUST) → ISSUE:
Based on NOTICE {abolished in **S 43 TLA**}

STEP 7: What have they done? → is it DETRIMENTAL? ... **Bank of South Australia v Ferguson** 'fraud must operate on the mind of the defrauded party to induce detrimental behaviour' [PAGE 37]