

# PROPERTY LAW

<b>TOPIC 1: CONCEPT OF PROPERTY .....</b>	<b>3</b>
WHAT IS PROPERTY? .....	3
<i>License</i> .....	3
<b>TOPIC 2: PERSONAL PROPERTY.....</b>	<b>4</b>
POSSESSION OF PERSONAL PROPERTY .....	4
ACTIONS FOR INTERFERENCE WITH POSSESSION OF PERSONAL PROPERTY .....	5
FINDING GOODS .....	6
CONSENSUAL TRANSACTIONS TO PASS TITLE TO GOODS AND 'NEMO DAT' .....	7
FIXTURES .....	7
<b>TOPIC 3: FOUNDATIONAL CONCEPTS OF LAND LAW .....</b>	<b>9</b>
DOCTRINE OF TENURE .....	9
POSSESSION, SEISIN AND TITLE .....	10
FREEHOLD ESTATES AND FUTURE INTERESTS .....	10
<i>Freehold Estate</i> .....	10
<i>Future Interests</i> .....	11
LEASEHOLD ESTATES.....	11
<b>TOPIC 4: ADVERSE POSSESSION.....</b>	<b>14</b>
<b>TOPIC 5: NATIVE TITLE.....</b>	<b>17</b>
<b>TOPIC 6: INTRO TO TORRENS &amp; FORMALITIES .....</b>	<b>19</b>
FORMALITIES AND TRANSACTIONS.....	19
LEGAL INTERESTS IN LAND: GENERAL LAW LAND AND TORRENS TITLE .....	20
EQUITABLE INTERESTS IN LAND .....	21
<b>TOPIC 7: VARIOUS INTERESTS IN LAND.....</b>	<b>22</b>
INTRODUCTION TO SECURITY INTERESTS .....	22
MORTGAGES .....	23
OPTIONS.....	26
EASEMENTS.....	26
PROFITS À PRENDRE .....	28
RESTRICTIVE COVENANTS .....	29
CO-OWNERSHIP .....	30
<b>TOPIC 8: PRIVATE TITLE TO LAND – REGISTRATION.....</b>	<b>34</b>
INDEFEASIBILITY .....	34
EXCEPTIONS TO INDEFEASIBILITY .....	35
<i>Statutory Fraud</i> .....	35
<i>In personam claims</i> .....	36
<i>S 87A-E TLA</i> .....	38
<i>Volunteers</i> .....	38
<i>Express Statutory Exceptions</i> .....	39
<b>TOPIC 9: UNREGISTERED &amp; EQUITABLE INTERESTS .....</b>	<b>40</b>
SPECIFIC PERFORMANCE.....	40
PART-PERFORMANCE .....	42

MERE EQUITIES .....	43
<b>TOPIC 10: PRIORITY BETWEEN CONFLICTING INTERESTS.....</b>	<b>45</b>
TWO REGISTERED INTERESTS .....	45
PRIOR REGISTERED VS SUBSEQUENT UNREGISTERED .....	46
EQUITABLE VS LEGAL .....	46
CAVEATS.....	46
EQUITABLE VS EQUITABLE; UNREGISTERED VS UNREGISTERED .....	48
MERE EQUITY VS SUBSEQUENT UNREGISTERED INTEREST .....	51

## Topic 8: Private Title to Land – Registration

### Indefeasibility

Indefeasibility of title is central to the Torrens system and describes the immunity enjoyed by a registered proprietor from attack by adverse claim – **Frazer**

Note: In *Frazer v Walker*, the court held in favour of the theory of immediate indefeasibility → subsequently applied in *Breskvar v Walls*

- The Radomiskis had taken without fraud on their part and the fact that the mortgage document was void at common law did not affect the indefeasibility of their title

Rule: Upon registration, X gains indefeasibility of title (ss 40-44 TLA; *Breskvar*)

Exceptions to indefeasibility include:

1. Statutory fraud (s 42(1); s 44(1))
2. In personam claims
3. Section 87A–E, TLA
4. Volunteers
5. Express statutory exceptions (s 42(2), TLA)

**Note**: People who have lost property rights because of Torrens principles are able to be compensated (ss 109–110, TLA; *Fairless*).

## Exceptions to indefeasibility

### Statutory Fraud

Note: always start with fraud in exam; in personam is often pleaded as an alternative  
 Note: also consider whether any of the other exceptions may apply, even if you can only make out one

Rule: The TLA refers to fraud as an exception to the indefeasibility of registered title (ss 42(1), 44(1)).

“X may argue that Y’s fraudulent conduct furnishes an exception to Y’s indefeasibility of title (ss 42(1), 44(1))”

Rule: Courts have interpreted fraud has having a high bar of moral turpitude (Pyramid)

- **Waimiha**: ‘wilful and conscious disregard and violation of the rights of the other person(s)’ [picked up subsequently in *Pyramid*]

1. Make an argument about the conduct:

Fraud	Not fraud
<ul style="list-style-type: none"> <li>• Respondent’s agent, Glass, gave verbal assurance to Eusope that they would make their own arrangements as to Loke Yew’s land; PC found that this was a statement of present intention falsey and fraudulently made to induce Eusope into the conveyance – <b>Loke Yew</b></li> <li>• Petrie wrote down his grandson’s name in the blank transfer document and registered the interest – <b>Breskvar</b></li> <li>• Collusion when exercising the power of sale under a mortgage (‘collusive and colourable sale’ – Kitto J) – <b>Latec</b></li> <li>• If suspicions were aroused and the person then abstained from making inquiries for fear of learning the truth – <b>Assets Co</b></li> <li>• The repudiation is fraudulent because it has as its object the destruction of the unregistered interest notwithstanding that the preservation of the unregistered interest was the foundation or assumption underlying the execution of the transfer – <b>Bahr per Mason CJ and Dawson J (MINORITY VIEW)</b></li> <li>•</li> </ul>	<ul style="list-style-type: none"> <li>• Acquiring a title with notice of an existing unregistered interest – <b>Mills, s 43 TLA</b></li> <li>• Registration with the aim of defeating a possible interest arising from litigation – <b>Waimiha</b></li> <li>• A want of due care or the failure to make further inquiries – <b>Pyramid</b> <ul style="list-style-type: none"> <li>○ In this case, mortgage was fraudulently executed by an improper affixation of the company seal by a person who was not a director of the company</li> <li>○ Pyramid failed to review shareholder agreements or request to confirm board minutes (which are normal practices) → reckless indifference</li> </ul> </li> <li>• <b>Ferguson</b>: bank officer forged the signature of an applicant for a mortgage on an internal bank document, which was used by a regional office of the bank in considering whether or not to approve the loan                     <ul style="list-style-type: none"> <li>○ HC dismissed claim that mortgage could be set aside for fraud</li> <li>○ Document was not prepared for and was not used for the purpose of and did not have the effect of <u>harming, cheating or otherwise being dishonest</u> to the mortgagor</li> </ul> </li> <li>• <b>Vassos</b>: Third tenant-in-common forged signatures of the other two tenants and sought greater mortgage than agreed; bank was not held to be fraudulent</li> </ul>

2. The fraud has to induce the transaction behind the registration

- **Loke Yew**: 'but for' Glass' representations, Eusope would not have entered into the contract of sale
3. The fraud must happen before the registration (there is ambiguity in the authority here)
- Post-registration conduct could just be a change of mind, which doesn't amount to misconduct
  - BUT you can take into post-registration conduct to prove pre-registration state of mind
    - **Loke Yew**: Court noted the speed with which there was a change of heart after registration; the fact that Glass was absent in the trial (Jones v Dunkel inference)
  - **Broader view**: Mason and Dawson JJ dissent in *Bahr v Nicolay* – suggest that post-registration conduct of fraudulent party may be considered
4. The fraud must affect one of the three categories of defrauded parties:
- A prior registered proprietor – **Pyramid; Ferguson**
  - A prior unregistered interest holder – **Loke Yew, Bahr, Waimiha**
  - The Registrar

Conclude: Consequently, Y's title [will/will not] be indefeasible against X.

EFFECT: "X will be entitled to..."

- The remedy will usually be a rectification of the Register
  - **Loke Yew**: If Loke Yew had a registered interest, the Court could have ordered the Registrar to change the CT to reflect the pre-fraud position
- If the defrauded party is an unregistered interest holder, courts will usually declare a constructive trust on the registered proprietor (declaring them as trustee for the benefit of the unregistered interest holder) – **Loke Yew**
  - But the court does not actually rectify the Register itself

## In personam claims

Rule: Indefeasibility does not deny the right to bring against the registered proprietor a claim *in personam*, founded in either law or equity – **Frazer per Lord Wilberforce**  
 "On the basis of [insert relevant conduct of the party], X may seek to establish an in personam claim against Y, which is not precluded by indefeasibility (Frazer)"

To make out an in personam claim, there are three requirements:

1. **Known cause of action**
  - a. Usually either contract or trust/estoppel (see *Bahr*) → but cannot be a mere acknowledgement
    - i. Can the conduct be characterised as a collateral contract? (Brennan J, *Bahr*)
  - b. Analogise:
    - i. **Bahr**. (is this a case of one person acknowledging the rights of another?)
      1. Wilson and Toohey JJ: by undertaking to respect the Bahr's claim, the Thompsons became constructive trustees