

⇒ **UNLESS** the covenant to repay is indefeasible

#### Common Law Position

- **VIC:** In Victoria, the position is that the mortgagee can sue the defrauded mortgagor in debt if the personal covenant is indefeasible, despite the RP not giving consent to the mortgage (*Pyramid*).
- **NSW:** Registration of the fraudulent mortgage charges the land with the debt, but doesn't make the owner personally liable to repay (*Grgic*)

#### Statutory Law Position

- Tension resolved by Statute: **s 87D, S 87E and S 110(4) TLA**
- There have now been statutory amendments however through: **s 87D, S 87E and S 110(4) TLA** which appear to **limit the liability of a defrauded mortgagor**
- **S 87E:** achieves the same purpose as **s 87D** but for when the property has been sold
- Their maximum liability is to pay the property price at the time the fraudulent mortgage was taken over their property (which protects them from the shortfall) → They can then claim from the compensation fund (see topic 6).
  - **Example**
    - ⇒ Cost of loan was \$900,000
    - ⇒ Value of property atm is \$600,000
    - ⇒ Thus, bank will only be able to take \$600,000 to discharge their security interest, meaning no shortfall can be chased from Addison
    - ⇒ Addison will be able to claim the same from Compensation Fund

### Topic 6: Exceptions to Indefeasibility of Title

Under the Torrens system, registration confers indefeasible title, meaning a registered proprietor's ownership is secure and cannot be challenged, even if there were defects in the acquisition process. However, this principle is not absolute and is subject to limited exceptions.

- A **registered proprietor** enjoys indefeasibility of title upon registration (**s 42(1) TLA**), regardless of their knowledge of any unregistered interest (**s 43 TLA**).

- **Examples**

- ⇒ A purchaser of land who registers their title.
- ⇒ A bank who registers a mortgage.
- ⇒ A tenant who registers a long-term lease (usually over 3 years).
- ⇒ Even a volunteer (e.g. someone who receives land as a gift) — though this is contested in Victoria (see *Smail* cf *Zekry*).

Under **s 42** of the **TLA**, a registered mortgage (banks security interest in the land) is usually indefeasible — you can't challenge it, even if there was some dodgy behaviour before registration.

BUT — fraud is an exception.

If the mortgage is procured by actual fraud (e.g. impersonation), and that fraud can be brought home to the party relying on indefeasibility (like the bank), then the title is defeasible — meaning the mortgage can be set aside. — **IS Banks Security Interest in land indefeasible?**

## 1. Fraud

Fraud is an express exception to indefeasibility under the TLA (**s 42 TLA**). Fraud under the TLA requires **actual fraud**, and requires **actual dishonesty, moral turpitude** (wrongdoing) or **willful blindness** (*Assets*; *Pyramid*), which must be brought home to the registered proprietor (*Schultz*; *Pyramid*). The fraudulent conduct/actual fraud/intention of conduct must occur prior to registration (*Bahr*, per Wilson Toohey JJ, Brennan CJ, Cf. Mason and Deane JJ) and must be brought home to the RP, meaning the RP must themselves be guilty of, or complicit in, the fraud (*Schultz*; *Pyramid*).

### 1.1 Is the Conduct Fraudulent? (s 42 Statutory Fraud)

GO THROUGH EACH INDIVIDUAL

Fraudulent conduct + moral turpitude or actual fraud

#### (a) **Willful Blindness (or Failure to Make Enquiries)**

- Notice of a prior interest is not taken to be fraud (**s 43 TLA**) however, the RP will be fraudulent where they had knowledge of the fraud or were **willfully blind/recklessly indifferent** as to making enquiries (*Assets*).
- If an interest-holder suspected fraud (HAS TO SEE IT) but abstained from making inquiries **for fear of learning the truth**, this will be sufficient

knowledge for fraud to be ascribed to them (**Assets**).

○ **Want of Due Care - Carelessness is not fraud**

- Court affirmed in **Pyramid** that the enquiry for statutory fraud was **actual dishonesty** or **moral turpitude**, not a want of due care.
- Mere carelessness or lack of vigilance will not constitute fraud (**Pyramid**)
- A failure to make the **usual** enquiries is not fraud as this is not **willful** blindness (**Pyramid**)
- Even if you would've discovered the fraud if you had made enquiries, this does not make you fraudulent (**Assets**)
- Even if you were 'less meticulous than you might otherwise have been' in identifying the **mortgagor**, this is not fraud, as there must be dishonesty (**Grgic**)
- Even **extreme recklessness will not amount to fraud** (**Pyramid**)

⇒ May amount to equitable fraud but that is not captured under **s 42** so not relevant for the response.

**(b) False Representations Inducing Course of Action – *Loke Yew*, *Cf Bahr***

- Where representations are made (such as verbal assurances or written documents), that are made falsely and fraudulently **to induce the party to undertake a course of action** (e.g. affect the transfer), and the party wouldn't have taken such course of action **but for the statement**, then this will be fraud (**Loke Yew**).
  - In **Loke Yew**, D never intended to honour their representation, thus was liable for fraud
    - ⇒ This is quintessential moral turpitude.
  - **E.g.** Sarah tells James she'll return the land later but never intends to. James transfers it, and she registers it in her name and keeps it. This is fraud (**Loke Yew**) because the lie was made to induce the transfer.
- **NB:** the dishonest intention regarding the misrepresentation must be formed **prior to registration** – See **Bahr** below
- The fraudulent conduct **must occur prior to registration** (**Bahr**, per Wilson Toohey JJ, Brennan CJ, Cf. Mason and Deane JJ)

- In **Bahr**, Nicolay sold land to Thompsons, who had promised to **respect** Bahr's repurchase option over the land (equitable interest)
- Thompsons later sold to TP
- The court did not find **s 42** fraud as Thompsons had all intentions to honour Bahr's repurchase option **AT THE TIME OF REGISTRATION**
  - ⇒ They only formed an intention to renege after registration
  - ⇒ Majority found that actual fraud must occur prior to registration

### (c) Forgery/Fraudulent Documents

- Forging documents or signatures is dishonest and meets the **Assets** test, so is fraud (**Grgic**)
- Where a document that is forged or fraudulent and is lodged for registration, it is not fraud if you **honestly believe it to be a genuine document** that could be relied upon (**Assets**)
- If an interest-holder presented a document to the register, which they knew was forged or fraudulently obtained is guilty of fraud – fraud against the registrar (**Assets**)
  - **E.g.** John forges his wife's signature to sell their house to Michael. Michael has no idea it's forged and registers the transfer. Michael doesn't know John's wife's signature was forged and has no reason to doubt it → Not fraud (**Assets**).

### (d) False Attestation

- All mortgages require attestation (witnesses) that the document had been appropriately signed.
- Where the attesting individual does not comprehend the legal consequences of false attestation, this is not fraud (**Russo**)
- If someone witnesses a signature (attests it) but doesn't really understand that lying about it is legally serious, then it's not considered fraud — because they didn't have dishonest **intent** (**Russo**).

#### ○ **Lodging a document for registration with a known false attestation**

- Where you lodge a document **known** to be falsely attested, this gives a false representation to the registrar and is fraud, attestation is not a mere formality (**De Jager**)

- Where a document is falsely attested, but you lodge it honestly believing it to be a genuine document that could be relied upon, this is not fraud (*Grgic*)

#### (e) Improper Mortgage Sale - *Latec*

- Where the mortgagee consciously misuses their power of sale to sell to a **related party**, this is fraudulent conduct (*Latec*).

#### (f) Impersonation

- If somebody has impersonated the RP to induce the transaction (e.g. when signing documents) this is clearly fraudulent conduct (*Grgic*)
  - But normally this is irrelevant as they are not the titleholder.

### 1.2 Fraud must be Operative

**Situation 1: Where the documents have been properly executed but entered on false pretenses – Analogue to *Ferguson***

**Would you have been entered into the agreement had it not been for fraud? → This is how you assess whether the fraud is operative (*Ferguson*)**

- The fraud **must operate on the mind of the person** said to have been defrauded and said to have **induced detrimental action** (*Ferguson*)
  - ‘Operate on the mind of the person’ in *Ferguson*
    - The fraud was about internal bank documents, not something that Ferguson saw or relied on.
    - So, **it didn’t change the his decision** — it didn’t operate on his mind — and the court said: no statutory fraud.
- Must be considered whether the actions were carried out to harm, cheat or otherwise be dishonest to the defrauded party (*Ferguson*)
- Consider if there is a causal connection between the fraud and some sort of detriment suffered by the RP/defrauded party (*Ferguson*)
- This test has been **criticised by later authorities**; ‘the operating on the mind’ aspect does not sit well with cases where people have been defrauded ***without any personal involvement*** at all. It only seemingly covers plaintiffs who have actively been tricked.