

LAW5018 - ADVANCED PROPERTY EXAM NOTES

PRINCIPLES OF INDEFEASIBILITY

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<p>Indefeasibility refers to the registered proprietor's immunity from attack by adverse claim to the land (<i>Frazer</i>).</p> <p>Registered interests generally take priority, except for the exceptions in s 42.</p> <p>Early authority suggested that deferred indefeasibility, that is, the notion that the purchaser's indefeasibility is deferred until mortgage the purchaser sells to a third party, should apply (<i>Gibbs v Messer; Clements v Ellis</i>), however <i>Frazer v Walker</i> and <i>Breskvar v Wall</i> later paved the way for immediate indefeasibility, which holds that when a fraudulent instrument is registered by the innocent purchaser, the purchaser's title will become indefeasible upon registration.</p>	
INDEFEASIBILITY PROVISIONS	<ul style="list-style-type: none"> ★ s 40(1) instruments do not pass title, registration does ★ s 41 certificate is 'conclusive evidence' of title ★ s 42 'paramountcy' or 'indefeasibility' provision <ul style="list-style-type: none"> ○ Provides exceptions to indefeasibility ★ s 43 'notice' provision - RP is not affected by notice of a prior unregistered interest. <p><i>Basically s 43 negates the general law</i></p> ★ s 44 protection of bona fide purchaser provision ★ s 34 priority according to date of lodgement & s 44P
COMPARISON BETWEEN <i>Breskvar v Wall</i> AND <i>Frazer v Walker</i>	
SIMILARITY	Both cases involve fraud. However, <i>Frazer v Walker</i> highlights the immediate indefeasibility of title upon registration, even if fraud exists, whereas <i>Breskvar v Wall</i> deals with the limits of indefeasibility where fraud is directly perpetrated by the registered proprietor.
APPLICATION ANALOGY	If a party with equitable rights (e.g., a prior mortgagee) challenges registration, consider whether the registered proprietor was complicit in fraud

	(<i>Breskvar</i>) or merely a bona fide purchaser without notice (<i>Frazer</i>).
STEP 1: SCOPE OF INDEFEASIBILITY	
<p>The estate of a registered proprietor will be indefeasible where it is registered and subject only to encumbrances noted on register (<i>s 42(1) TLA</i>; <i>Breskvar</i> per Barwick CJ).</p> <p>An instrument will not be effectual until it is registered (<i>s 40</i>) and a certificate can be considered conclusive evidence of title (<i>s 41 TLA</i>).</p> <p>As [X] is registered, the [MORTGAGE/INTEREST] is indefeasible pursuant to <i>s 42(1) TLA</i> and so [Y] will be bound by it unless an exception to indefeasibility applies.</p>	
REGISTERED LEASES:	
<p>Leases and subleases exceeding 3 years are registerable (<i>s 66 TLA</i>), and if registered, the lease is generally accepted as indefeasible. However, it is not always clear if every clause in the lease is indefeasible. Registration does not give indefeasibility over every covenant in a lease.</p>	
ANALOGISE WITH <i>Mercantile Credits</i>	<ul style="list-style-type: none"> • Compare to a situation where a party attempts to register a transfer in violation of a registered restriction (e.g., a caveat or statutory condition). While the registration confers indefeasibility, it does not negate enforceable limitations explicitly noted on the title. • Contrast with a situation where the restriction was unregistered or equitable (e.g., an unregistered caveat). In such cases, the registered proprietor may still enjoy indefeasibility against unregistered interests.
<p>A right to renew a registered lease is intimately connected to the estate of the lessee and thus attracts the quality of indefeasibility (<i>Mercantile per Gibbs and Stephen JJ</i>). However, the option to purchase does not attract indefeasibility as it is ‘essentially different’ to the option to renew lease (<i>Mercantile</i>).</p> <p>Gibbs J in obiter found that a personal right or covenant which in no way affects the land will <u>not</u> be indefeasible, even where it is contained in the registered instrument. <i>However</i>, Barwick CJ in <i>Mercantile</i> held indefeasibility of a covenant to renew is dependent upon the enforceability of option to renew at general law. Taking <i>Mercantile</i> a step further, only a specifically enforceable option to renew is indefeasible against subsequent RP’s who takes title subject to either registered, or registrable covenants.</p>	

REGISTERED MORTGAGES

- a. RP is not expected to reimburse fraudulent mortgage where mortgagee failed to properly verify authority and identity of the person transacting with.
- b. **Pre-2015** – In VIC, a RP who was the victim of a forged mortgage (unknown imposter, or known person), may still have been bound by the terms of that mortgage.
- c. **Post 2015** – If ID requirements not complied with, and mortgage not granted by RP, mortgagee loses benefit of indefeasibility of RM and Registrar will remove mortgage from Register. RP will not have to pay for a discharge of mortgage and thus will not need to claim compensation from the State.

S 44 TLA gives the mortgagee proprietary interest over the land.

All moneys mortgages enable the borrower to draw money as it is needed, and the mortgage secures all money that the borrower uses **from time to time** until a certain specified limit is reached. Although B may raise that the mortgage part of the transaction is abbreviated and contained in a separate loan agreement that is not registered, **the bank will nonetheless have indefeasible title over the mortgage if the mortgage is legitimate**. Therefore, the **mortgage itself is indefeasible, but the title itself is not secured** (i.e. the indefeasible title is not over any specified property). This is because **NSW cases** have held that these mortgages do not adequately incorporate a forged loan agreement, as indefeasibility can only exist over what has been registered.

- **NSW Position:** indefeasibility only attaches to the registered instrument and not the off-register loan agreement lending the money (**Perpetual**). There is still an indefeasible mortgage, just not one that secures the loaned amount.
- **VIC position:** off-register loan agreements whereby the money is lent may be brought under the umbrella of indefeasibility if the registered mortgage is appropriately worded to incorporate the off-register agreement (**Solak**).

Traditional mortgages specify a precise amount that is borrowed. The borrower (in this case A) acknowledges that [he/she] has received \$X and will pay it back. This picks up indefeasibility when registered, and all rights will attract indefeasibility.

EXCEPTIONS TO INDEFEASIBILITY

STEP 1: ESTABLISH EXCEPTION

There are several exceptions to the indefeasibility of title, and [PARTY] may seek to raise the exception of:

1. **Fraud** (*s 42 TLA*, Look at *Assets* definition & *Schultz* agency principles)
2. **VOI mortgage provisions (2014 onwards)**
3. **In Personam** – alternative to a fraud claim
4. **Paramount interests - Tenant in possession *s 42(2)(e): Downie***
 - A. *Perpetual v Smith* creates equitable priority dispute
 - B. *Balanced v Bianco*: where mortgage predates lease, mortgagee must consent in writing for exception to apply: *ss 77(4), 87C, 88A*
5. **Volunteers**
6. **Inconsistent legislation – *Horvath/Calabro***

Where an exception to indefeasibility is established, title will be defeasible.

However, it is possible that exceptions may not apply where the rights of third parties are likely to be affected (*Loke Yew*).

FRAUD

STEP 1: INTRODUCTION

Make sure you described the indefeasibility principle, the statutory fraud exception

Prima facie, [X's] [instrument] is indefeasible as it has been registered [*ss 40, 42(1) TLA*]. This confers immediate indefeasibility, which means X's title is guaranteed by statute and cannot be destroyed or invalidated (*Breskvar v Wall*). A registered proprietor's title **will not be defeasible merely because they have notice of another person's unregistered/equitable interest in that land** (*s 43 TLA*).

[X] will need to establish that an exception to indefeasible title exists. [Y] will argue that [X's] instrument is defeasible for fraud [*s 42(1) TLA*] and thus the amendment is void against the person

defrauded (*s 44(1) TLA*).

STEP 2: IDENTIFY CONDUCT

Identify the conduct in the fact scenario that constitutes fraud + Meaning of Fraud

TEST FOR FRAUD

The test for fraud is subjective (inquiry into the wrongdoer's motives, knowledge and intent). There are 2 steps to establishing fraud under the Torrens System, using the definition from *Assets Co*.

A person who presents for registration a document which is forged or has been fraudulently or improperly obtained is not guilty of fraud if he honestly believes it to be a genuine document which can be properly acted upon (*Assets*).

MUST BE ACTUAL FRAUD OR WILFUL BLINDNESS

Limb 1: ACTUAL FRAUD

Firstly, it must fall within one of the limbs of fraud:

(a) Actual fraud

Hayne J in *Pyramid* provided a summary of meaning of fraud for purposes of express exception to indefeasibility:

- In *S 42*, “fraud” means actual **dishonesty** or moral turpitude
- A proof of dishonesty is essential and **must be brought home to the person whose registered title is impeached** (or a person acting on its behalf).
- Title to a registered interest is not defeated on grounds of fraud if the RP of that interest was not a party to the fraud.

Loke Yew: a **dishonest misrepresentation amounts to fraud**

The *TLA* does not define fraud; however, the defrauded party must establish dishonesty or moral turpitude for there to be statutory fraud, with a wilful and conscious disregard or violation of rights of others (*Lord Linley in Assets Co*).

**ANALOGISE
WITH:**

- In *Russo*, fraud said to mean “dishonesty or want of probity”, a “willful and conscious seeking to defeat or disregard another’s rights” or “reckless indifference” thereto
- A false undertaking to respect an equitable owner’s rights amounts to

	<p>fraud: <i>Loke Yew</i></p> <ul style="list-style-type: none"> Where fraud takes place prior to registration, that registration will be void (<i>s 42 TLA</i>; <i>Bahr v Nicolay</i>). Where fraud occurs after registration, the weight of authority favours the view that title is indefeasible. <ul style="list-style-type: none"> If Mason CJ and Dawson J's reasoning in <i>Bahr</i> is correct, fraud can be imputed on the RP such that indefeasible title can become defeasible by subsequent fraud. Wilson and Toohey JJ's view is more conservative, suggesting that the fraud is only relevant when committed in the process of obtaining title by a strict reading of the provisions of the <i>TLA</i>. The decision in <i>Ferguson</i> confirms that majority's view in <i>Bahr</i>, however when viewed together the judgements suggest <u>proximity</u> of the fraud to registration is a relevant consideration when determining fraud. It will be more difficult to defeat a registered interest where the proprietor commits a fraud some time after registration, and thus the prevailing view is that the relevant fraud must occur before registration (<i>Loke Yew, Bahr</i>).
EXAMPLES	
	<ul style="list-style-type: none"> Where transfer is procured by statement of future intent, which RP intends not to comply with, there will be fraud: <i>Loke Yew</i>. Fraud can also be proved by showing that a false statement has been made without belief in its truth or, 'recklessly, careless whether it be true or false': <i>Pyramid</i>. Registration of a forged instrument: The forgery of the signature of another, or registration of an instrument that the party registering that instrument knows to be forged will constitute fraud: <i>Pyramid</i>. Repudiation of a prior interest: Akin to the doctrine of proprietary estoppel, Mason CJ and Dawson J's minority judgement in <i>Bahr</i> suggests fraud includes the 'dishonest repudiation of a prior interest which the RP not only knows about, but has either acknowledged or agreed to recognise as a basis for their obtaining title.' That is, repudiation of a prior interest when there is something more than notice under s 43 TLA.

<ul style="list-style-type: none"> ○ Includes fraud that occurs subsequent to the transaction which gives rise to registration ○ Acknowledgement is more than just notice (<i>Bahr</i>) 	
<p>If a registered proprietor is bona fide and has paid valuable consideration for that interest, their title is not defeasible, even if it was acquired from a person who was party to fraud: s 44 TLA</p>	
<p><i>Limb 2: WILFUL BLINDNESS</i></p>	
<p>(b) <i>Wilful blindness: your suspicions are aroused but you fail to make inquiries for fear of learning the truth.</i></p> <p>A registered proprietor who is wilfully blind as to the existence of fraud, meaning that he ‘abstained from making inquiries for fear of learning the truth’, will be guilty of fraud per Lord Linley in <i>Assets Co</i>. The key question is whether [PARTY]’s suspicions were aroused (<i>Pyramid</i>).</p>	
<p>However, [PARTY] may raise that there is a difference between turning a blind eye and failing to make inquiries – mere carelessness or negligence does not amount to fraud (<i>Pyramid</i>), but instead the person must know or ought to know of the fraud.</p> <p>The mere fact that a person might have found out fraud if further <u>inquiries</u> had been made does not of itself prove fraud (<i>Assets</i>). Inquiry must be for actual dishonesty, not for want of due care. Reckless indifference rather than mere carelessness (<i>Pyramid</i>). A lack of diligence is not sufficient (<i>Pyramid</i>).</p>	
<p>FALSE ATTESTATION <i>can discuss under limb 1 and/or 2</i></p>	<p>False attestation of a document will constitute fraud, as will allowing registration of a document known to be fraudulently attested (<i>AGC</i>).</p> <p>Where a false attester is not familiar with conveyancing procedures, and falsely attests a document, there will not be fraud (<i>Russo</i>).</p> <p>The threshold for actual fraud for false attestation is extremely high and requires actual dishonesty or a willful and conscious seeking to defeat another’s rights. Fraud must have an element of wickedness: <i>Russo</i>.</p> <ul style="list-style-type: none"> ● Attestation requirements are not mere formalities (<i>AGC</i>) ● To lodge an instrument for registration in the knowledge that the attesting witness has not been present at execution deprives the lodging party of an honest belief that it is a genuine document on which the registrar can properly act (<i>AGC</i>)
<p>STANDARD ATTESTATION</p>	<ul style="list-style-type: none"> ● "Signed, sealed and delivered by the said in the presence of" ● “Signed in my presence by the mortgagor who is personally known to

CLAUSES	<p>me”</p> <ul style="list-style-type: none"> • “Signed in the presence of both of us being present at the same time, and we attested his/her signature in the presence of him/her and of each other”. (<i>For a Will</i>). • The consequence of fraud is that it exposes the RP’s title to attack from the defrauded party i.e. claim to have the transfer set aside for fraud • But it does not prevent the RP from dealing with its title <i>vis a vis</i> third parties e.g. <i>Breskvar v Wall</i>
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STEP 3: WAS THIS ALLEGED FRAUDULENT CONDUCT DIRECTLY ATTRIBUTED TO THE REGISTERED PROPRIETOR WHOSE TITLE IS NOW BEING IMPEACHED (either as owner or mortgagee)?

- If yes, **the fraud exception is established, and the title is defeasible.**
- If not, **can fraud be brought home** to the registered proprietor?

The fraud must be brought home to the RP (includes registered mortgagee) or his/her agent (*Asset*). If the registered mortgagee was not a party to the fraud, then the mortgage cannot be set aside for fraud – the mortgagee has indefeasibility.

Bringing Fraud home to the RP

1. This can occur through the **registered proprietor’s actual knowledge of the fraud committed by the previous registered proprietor.**
2. Or it can occur through the registered proprietor’s **constructive knowledge**, that is, **if the registered proprietor’s suspicions were aroused and they abstained from making further enquiries out of fear of learning the truth.**
 - a. If not, was fraud committed by the RP’s **agent** and can be imputed?
 - b. If fraud could not be established under any of these heads could the in personam exception apply?

AGENCY if there is FRAUD

2 ways to bring fraud home where **agent involved**:

1. **Agent Fraudulent**
2. **Agent has Knowledge of Fraud**

AGENT FRAUDULENT	<ul style="list-style-type: none"> • If fraud is committed by the RP's agent, the principle of <i>respondeat superior</i> applies: • Acts of agent committed <u>within his actual or apparent authority</u>, except where agent is off on frolic of own or taking benefit for self, bind the RP.
	AGENCY RELATIONSHIPS
	<p>As [X] had no involvement in the fraudulent activity, an agency relationship must be established to bring the fraud home to the RP. An agency relationship exists as [agent] is acting on behalf of (principle) to create or affect legal relationships by...</p> <p>Street J in <i>Schultz</i> discussed two possible scenarios in which agency or employment becomes relevant in the context of fraud – where the agent has personally committed fraud, or knows that fraud has been committed.</p>
	SCOPE OF AGENCY RELATIONSHIPS
	<p>Where it appears the RP's agent has personally committed the fraud, the question is whether the agent acted within the scope of their actual or apparent authority. This is a question of fact and depends on the circumstances.</p> <p>If so, the fraud of [Agent] may be brought home to [RP] and title may be defeasible.</p> <p>Per <i>Schultz</i>, an agent is prima facie acting outside their authority where they act in furtherance of their own interests, even if their actions otherwise fall within the scope of authority. Under this argument, the NZ view expressed in <i>Dollars and Sense</i> reflects the more traditional agency principles. Although <i>Dollars and Sense</i> has a greater scope to attribute fraud back to the principle, this NZ case is merely persuasive and therefore not authority in Australia. This may also only be limited to situations where there is less reason to trust the agent, as in <i>Dollars and Sense</i> the borrower was tasked with the responsibility of obtaining the security over his parent's property. However, the primary issue with <i>Schultz</i> is that fraud is generally committed in the furtherance of one's own interests and</p>

	<p>fraud of an agent will generally reside outside the actual or apparent scope of their authority when viewed in this light.</p> <p>The scope of [agent's] authority appears to be [explain X's conduct].</p> <p>[PARTY] will argue that [AGENT] had [express agency/implied agency/constrictive agency, like in <i>Breskvar</i>] to do so because....</p> <hr/> <p>CAN THE FRAUD (FALSE ATTESTATION) BE BROUGHT HOME?</p> <hr/> <p>Per <i>Schultz</i>, it should be considered whether the agent's fraudulent acts were so connected with his authorised acts that they can be regarded as merely a mode of performing them. As [agent's] actions were committed within the scope of [his/her] actual/apparent authority, the [agent's] fraud becomes the fraud of [the principle] (<i>Schultz</i>).</p> <p>Like how forging a co-director's signature was acting outside the scope of the director's authority in <i>Schultz</i>, [PARTY] may argue that because the fraudster was on a 'frolic of his own'. Given that [FRAUDULENT PERSON] did not receive any personal gain, the fraud is unlikely to be brought home.</p>
<p>AGENT HAS KNOWLEDGE OF FRAUD</p>	<p>There is an irrebuttable presumption that the agent has communicated knowledge of a fraud to the principal if it was within the scope of their authority. If agent acting within scope, agent's knowledge of third party's fraud imputed to principal – only re knowledge of third party's fraud, not own fraud.</p> <hr/> <p>High Court in <i>Cassegrain</i> endorsed <i>Schultz</i> principles</p> <ul style="list-style-type: none"> • The mere fact that an agent knows of the fraud will not establish fraud on the part of the principal – the fraud must be capable of being brought home to the principal. For this to occur, the agent must possess fraudulent intent or be recklessly indifferent as to the existence of fraud (<i>AGC</i>). • Where the agent has <i>a duty to communicate knowledge of the fraud to the principal</i>, a rebuttable presumption arises that the agent communicated the information and the principal knew of the fraud; the fraud was brought home (<i>Schultz</i> per Street J). • However, an exception exists where the fraud was personally

	<p>committed by the agent or part of a scheme, in which case the principal may rebut the presumption by proving that the principal did not know of the fraud, as it is also presumed the agent would not communicate their own fraud to the principal (<i>Schultz</i>).</p>
	<p>ANALOGISE WITH</p>
	<p><i>Assets Company Ltd v Mere Roihi</i></p> <ul style="list-style-type: none"> Compared to situations where fraud arises solely from negligence or oversight. Such scenarios would not meet the threshold for fraud as established in <i>Assets Co</i>. Contrast with cases where the registered proprietor knowingly engages in fraud (e.g., <i>Bahr v Nicolay</i>). <p><i>Loke Yew v Port Swettenham Rubber Co</i></p> <ul style="list-style-type: none"> If a purchaser knowingly disregards a prior equitable interest to gain priority, they may lose the protection of indefeasibility, similar to <i>Loke Yew</i>. Contrast with <i>Assets Co</i>, where mere knowledge without intent to deprive someone of their rights is insufficient for fraud. <p>TO BE CONTINUED ALLYSIA</p>

STEP 5: OTHER REMAINING STATUTORY EXCEPTIONS TO INDEFEASIBILITY

- Where 2 titles cover all or some of the same land, **the land included in the previous title cannot be included in later title: s 42(1)(a) TLA**
- Where **all or any part of land is included in the title by wrong description** that interest is **defeasible: s 42(1)(b) TLA**
 - unless the proprietor is bona fide purchaser for valuable consideration** or derived their title from such a registered proprietor
- Registration is **defeasible by any rights subsisting with respect to any adverse possession** of the registered land: **s 42(2)(b) TLA**
- Registration is **defeasible by all easements** howsoever acquired which subsist on or affect the registered land: **s 42(2)(d) TLA**
- Registration is **defeasible by the interest of any tenants in possession of the registered land** (excluding an option to purchase): **s 42(2)(e) TLA**

STEP 6: CONCLUSION

IF FRAUD:

Ultimately, if fraud is made out the [instrument] is rendered void (*s44(1)*), and title is defeasible. [X] will be returned to the register.

Where fraud is established with respect to a registered mortgage and the mortgage is rescinded, the loan will still be recoverable free from the security: *Ferguson*.

Statutory fraud is not itself directly generative of legal rights and obligations: *Ferguson*. It merely qualifies the doctrine of indefeasibility and alters the arrangement of registered interests.

NO FRAUD:

As there is no fraud, the title remains indefeasible.

VERIFICATION OF IDENTITY [VOI] - MORTGAGES

From 2015, the Verification of Identity (VOI) Requirements comes into effect.

Alternatively, [X] may rely on *s 87A* verification of identity requirements and argue that [Y] has failed to take reasonable steps to verify the [identity/authority] of the mortgagor (*s 87A(1)*).

Per *s 87A(2)* and *s 106A*, [Y] must [prove reasonable steps were taken].

Reasonable steps for paper conveyancing transactions, per *s 87A(2)* and *s 106A* include:

- Face-to-face interview between verifier and person being identified
- Must be reasonable likeness in photos
- Produce original documents in a category (refer below)
- Verifier must be satisfied an earlier category cannot be met before using a subsequent category
- Verifier must retain copies of documents
- Documents must be current, except expired passport must be within 2 years
- Where party is a company the person signing must produce an ASIC company search to verify the company details and the authority of the person signing
- If party is signing on someone else's behalf they must hand over a copy of the power of attorney

On this basis, [**reasonable steps were not taken...**] and [**X's**] **mortgage** can be removed from the Register [**s 87A(3)(b)**] and is void and defeasible [**s 87A(5)**]. This can be amended by the Registrar [**s 106A**].

If reasonable steps were not taken and the RP did not grant the **mortgage** the Registrar can:

- Refuse to register the mortgage **s 87A(3)(a)**
- Remove the mortgage from the register **s 87A(3)(b)**
- Mortgage is void and no longer indefeasible **s 87A(5)**
- **A void mortgage must be discharged as soon as practicable s 74(5)** – the difference between this section and **s 87A** is there has been no judicial interpretation of **s 75(5)**, so focus on **s 87A**