

Indefeasibility

Indefeasibility	<ol style="list-style-type: none"> 1) Indefeasibility: The registered proprietor is absolutely free from any other interests that are not recorded: S 42(1) of RPA. <ul style="list-style-type: none"> • S43: Owner of registered interest is not affected by notice expect fraud. 2) Immediate Indefeasibility: The Torrens System is a system of title by registration, and thus a registration which results from a void instrument is indefeasible once registered: <i>Breskvar v Wall</i>. <ul style="list-style-type: none"> • E.g of void Instruments: <ul style="list-style-type: none"> ○ Forgery <i>Breskvar v Wall</i> ○ Alteration of mortgage (but didn't affect rights) <i>Morton v Black</i> ○ Document registered under the power of attorney when has no power: <i>Broadlands International Finance v Sly</i> ○ Mortgage wrongly executed by a person without the power of attorney: <i>Spina Consolidated Development v Hol</i> 3) indefeasibility of the terms in a registered instrument: needs to runs with the land, i.e., whether the covenant <u>touches and concerns the land</u>: <i>Stephen J</i>; so intimately connected with the term granted to the lessee, which it qualifies and defines , that it should be regarded as part of the estate or interest <i>Gibbs J Mercantile Credits</i> <ul style="list-style-type: none"> • E.g. of Indefeasible covenants: option to renew (<i>Mercantile Credits</i>), option to purchase (s53(3) of RPA; <i>Mercantile Credits</i>) • E.g. of defeasible covenants: Personal covenants under a mortgage <i>Corozo v Total Australia</i>; where the terms are illegal. 4) When indefeasible? —four stages of an assignment of interest in land <ol style="list-style-type: none"> 1. Oral agreement-----contractual obligation 2. Written contract--s54A(1) C.A.-----equitable interest 3. Settlement-----still equitable interests 4. Registration-----legal interests protected by indefeasibility
Volunteer	<ol style="list-style-type: none"> 1) Volunteer obtains an indefeasible title: <i>Bogdanovic</i> 2) Deriving from fraud: proceeding can be brought against a volunteer deriving from a person registered as proprietor of the land through fraud: s 118(1)(ii); <i>Cassergrain</i> 3) Defraud creditor: if a volunteer receives a property from a person conferring the interest for defrauding creditor, the transaction is voidable: s 37A of CA
Fraud	<ol style="list-style-type: none"> 1) Fraud is an exception to indefeasibility: s 42(1)/s 43(1) of RPA 2) What kind of fraud? Fraud must be actual fraud which requires personal dishonesty or moral turpitude: <i>Russo</i>, followed by <i>Davis v Williams</i> in NSW <ul style="list-style-type: none"> - made a statement of present intention falsely and fraudulently <i>Loke Yew</i> - must be operative--the forgery was not prepared for, or for the purpose of , or had effect of , harming, cheating or otherwise being dishonest to the mortgagor. <i>Bank of SA v Ferguson</i> - false attestation of signatures (typically mortgage): <ul style="list-style-type: none"> ○ generally, yes when bank clerk attested that signature was signed in his presence and turned out to be a forgery <i>Westpac v Sansom</i> ○ No when bank officer clearly believed the impersonator was the person he purported to be and in attesting the signature, did not act with conscious knowledge nor with reckless indifference to the truth or falsity <i>Grgic v ANZ Banking Group</i> ○ No when she <u>was not a person of professional training or long experience</u>--she didn't appreciate that putting the mortgage forward on the path to registration, or the significance of her attestation in such a process, and the lodging of the mortgage would convey a representation to the contrary to the Registrar <i>Russo</i> 3) Fraud must be brought home to the reg'd ppt or to his agent: <ul style="list-style-type: none"> • Constructive notice or actual notice of the prior interest are not fraud in the statutory sense s43 of RPA <ul style="list-style-type: none"> ○ Here, some circums may suggest not mere notice but fraud exists, e.g., buying a property at an undervalue, in a speedy manner, <i>Efstratiou v Glantschnig</i> • Purely constructive knowledge is not sufficient: the mere fact that he might have found out fraud if he had made further inquiries does not prove fraud: <i>Asset v Mere Roihi</i>

	<ul style="list-style-type: none"> • Notice of fraud is fraud: If he knew, or his <i>suspicions</i> were aroused and he abstained from making inquiry for fear of learning the truth, it is fraud: <i>Assets v Mere Roihi</i> <ul style="list-style-type: none"> ○ A person is not guilty of fraud if he honestly believes the document is genuine: <i>Assets v Mere Roihi</i> ○ In mortgage case:: a mortgagee must before lodging a mortgage for registration take reasonable steps to ensure that the person who or on whose behalf, the mortgage was executed is or will become the registered proprietor. --failure to do so would empower the R-G to cancel the recording RPA s 56C 1/11/2011 <p>4) Fraud must be operative in the sense that it caused the person to be defrauded and to be induced detrimental action: <i>Ferguson</i>.</p> <p>5) Agency:</p> <ul style="list-style-type: none"> • Agent's conduct fell in the scope of authority: <i>Schultz; Cassegrain</i> <ul style="list-style-type: none"> ○ The agent's act is so connected to the tasks he or she was asked to do. • If agent actually committed a fraud, agent's fraud can be imputed to principal: <i>Schultz; Cassegrain</i> • If principal was suspicious of the fraud but wilfully blind, imputed. • But if agent has only mere knowledge of the fraud, may not imputed unless actual knowledge was passed to the principal <p>NOTE: in <i>Cassegrain</i>, HC held: to establish agency relationship you need some evidence, either agency agreement or some representation by words or conduct—mere acting for his interest is not enough.</p> <p>6) Third party liability: <i>Farah v Say-Dee</i>: KA yes, KR no.</p>
Rights in personam	<p>1) <u>Indefeasibility doesn't protect a RP from the consequences of his own actions where those actions give rise to a personal equity in another:</u> <i>Bahr v Nicolay</i>.</p> <p>2) Cause of action. The plaintiff must have a known legal or equitable cause of action: <i>Grgic v ANZ</i>.</p> <p>3) No addition requirement of unconscionability (although equity may require): <i>Harris v Smith</i>.</p> <p>4) Knowing recipient/assistant in Torrens system <i>Barnes v Addy</i></p> <ul style="list-style-type: none"> • If KA—fraud by its definition <i>Farah v Say-Dee</i> • If the K recipient notice of fraud, it is fraud: <i>Assets V Mere Roihi</i> • If the k recipient merely knew the property is trust property, he is not affected by notice: s43 of RPA <p>5) Type of rights in personam:</p> <ol style="list-style-type: none"> a) Undertake/trust: The purchaser undertook the plaintiff's right to repurchase, so the purchase held the property for P in an express trust or constructive trust: <i>Bahr v Nicolay</i> b) Bailment: Husband forged signature of the wife. The bank is not authorized to use the certificate of title and thus breach its obligation as custodian of wife's COT: <i>Mercantile v Gosper</i> note that there is an existing relationship. c) Unconscionable: <i>Abody v Ryan</i>: transferees took advantage of an elderly vulnerable transferor--right in personam to set the transaction aside d) X-Negligence is not a cause of action that can arise a personal equity, claims for damages only: <i>Pyramid</i> e) X-Mistake: in the absence of fraud, common mistake not sufficient <i>Merrell Associates</i>
Tenancies	<p>1) Short-term</p> <ul style="list-style-type: none"> • Duration. Term of tenancy must not exceed 3 years: s42(1)(d)(i) <ul style="list-style-type: none"> ○ The total of original term and option term cannot exceed 3 years: s42(1)(d)(ii) • Possession. Tenant must be in possession or entitled to immediate possession: s42(1)(d) • Notice. The purchaser must have had notice of the tenancy before registration. <ul style="list-style-type: none"> ○ Including constructive notice and imputative notice: s164 of CA. <p>2) Implied tenancy: s127 of CA, implied by payment of rent.</p>
Omitted easement	See easement
Over ridding statues	<p>1) Issue is whether there is inconsistency between legislations which will be depends on construction of the latter act: <i>Horvath</i>—strong presumption to reconcile</p> <ul style="list-style-type: none"> • Sequential approach: instrument void at law but still indef upon reg'n.