ADVANCED PROPERTY EXAM NOTES

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EXCEPTIONS TO INDEFEASIBILITY

State: Registered interests are protected by indefeasibility (*s 42 TLA*); when you obtain registered title, you take it free of all unregistered interests and your title is unimpeachable unless an exception to indefeasibility is present (*s 42(1) TLA*). • Exceptions strip a registered interest of its indefeasibility allowing it to be attacked (often leading to a priority dispute)

Exceptions to indefeasibility include:

- Fraud
- Verification of identity
- In personam
- Paramount interests
- Volunteer
- Inconsistent legislation

EXCEPTIONS TO INDEFEASIBILITY – FRAUD

Exceptions to indefeasibility - fraud	
State: Fraud is an express exception to indefeasibility (*s 42(1) TLA*). Registration confers title despite fraud (*Breskvar*), but it will be a defeasible title. → [RP] will argue they have acquired an indefeasible title free from any unregistered encumbrances. → [Aggrieved party] will argue that [RP/RP's agent] acted fraudulently in obtaining the title, attacking [RP's] indefeasible title by rendering it defeasible (*s 42(1) TLA*). → [Aggrieved party] may seek to have [the mortgage removed/their title returned/a priority dispute between the two equitable interests]	
Step 1 – Define statutory fraud	• <u>**State:**</u> 'Fraud' in *s 42(1) TLA* means 'statutory fraud', which is interpreted as actual 'dishonesty, moral turpitude, a wilful and conscious disregard or violation of the rights of another' (*Assets Co*). Personal dishonesty is required on the part of the person on the register (or their agent) → use this rule (lecturer used this in class) • 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
Step 2 – Identify the fraudulent conduct	• Test for fraud is subjective (inquiry into the wrongdoer's motives, knowledge and intent) • The fraudulent act in this case is [state]. • This falls under the definition of 'statutory fraud' under *s 42 TLA* because [RP's/RP's agent's] [state behaviour/motives/knowledge/intent] evidences they acted with [dishonesty/a conscious disregard for the rights of another/moral turpitude] (*Assets Co*)
	Examples of fraudulent conduct

<table>
<tr><td></td><td>Notice of fraud</td><td>

Notice of fraud may constitute fraud (Assets); but mere notice of a prior unregistered interest is not fraud (s 43 TLA)
Four categories to aid in determining when notice of fraud may constitute fraud itself:

<table>
<tr><td>Actual knowledge (fraud)</td><td>

Where the registering party subjectively knows there has been fraud
Pyramid – “registering an instrument which the registering party knows is forged is an obvious example” → conscious disregard to someone’s rights
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<tr><td>Wilful blindness (fraud)</td><td>

Where the registering party does not subjectively know there has been fraud, but their suspicions have been aroused and they choose to ignore it for fear of learning the truth
More than “mere carelessness”, at least “reckless indifference”
Pyramid – held that wilful blindness is fraud only if the failure to inquire is actually dishonest. Requires reckless indifference which is more than mere carelessness, a lack of diligence is not sufficient
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<tr><td>Negligence (NOT fraud)</td><td>

Where the registering party does not know of fraud but would have discovered it had they been more diligent (i.e. mere carelessness) (Pyramid)
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<tr><td>No knowledge/genuine belief (NOT fraud)</td><td>

Where the registering party has no knowledge of fraud, and reasonably believes the document is genuine
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<tr><td></td><td>Impersonation</td><td>

Impersonating the registered proprietor to induce a transaction is fraud (Grgic)
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<tr><td></td><td>Forgery</td><td>

Forging a party’s signature to induce a transaction resulting in registration is fraud (Grgic; Dollars Sense)
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<tr><td></td><td>Fraudulent / dishonest misrepresentation (must be made <u>before</u> registration)</td><td>

A fraudulent misrepresentation made prior to registration to obtain registration may be statutory fraud (Loke Yew)

Loke Yew – owner sold only on the condition that they would not disturb Loke Yew’s possession of the part of the land. The purchaser lied to obtain registration (never intended to abide by the promise); thus transfer obtained by fraud

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<tr><td></td><td>Fraud <u>after</u> transaction</td><td>
Dissenting opinions

Traditionally accepted view: Dishonest intent formed before registration (i.e. no evidence intended at the time of purchase) = NO fraud (per Wilson & Toohey JJ, with whom Brennan J implicitly agreed in Bahr v Nicolay)
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    ○ See also - a representation is made in good faith and honestly, merely changing your mind after registration will not be fraud (as there has not been ‘moral turpitude’ or ‘personal dishonesty’) (Loke Yew)
• Minority opinion: Dishonest intent formed after registration = still fraud/dishonest (Mason CJ & Dawson J in Bahr v Nicolay)
    ○ N/B: HCA obiter that may be developed in the future
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<td rowspan="3">False attestation</td>
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• Lodging a document for registration that has a false attestation constitutes ‘fraud on the register’ (De Jager)
• <u>EXCEPTION:</u> Unless attesting witness didn’t fully appreciate the legal consequences of registration / didn’t know they were misleading the register (Russo)
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<td>1. Explain why false attestation is fraud under s 42 TLA</td>
<td>• False attestation requirements are not mere formalities and may be fraud under s 42 TLA because if the person who lodged the falsely attested document knew it was falsely attested, they are knowingly making a representation which deprives the register. As a result, they are considered to have engaged in dishonest conduct (De Jager)</td>
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<td>2. Analogise to case law</td>
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• In this case, FA is likely/not likely fraud under s 42 TLA because, similar to Da Jager/Russo... [apply facts]
• N/B: in both cases there was FA but fraud only found in Russo (consider e.g. knowledge of the importance of FA & whether there was a benefit)

Da Jager
Requirements
1. Must know it was falsely attested
2. Must know the importance of FA (they would be essentially defrauding the register)
Facts
• Mrs DJ’s signature forged (unsure by who) then falsely attested (not by an agent)
• Court combined knowledge of employees to find agent knew of the false attestation; some knew of the false attestation and some who knew of the important of why documents need to be properly witnessed a fraud
Held
• Lodging a transfer when they knew witness wasn’t there when it was signed was enough to constitute fraud
• C.f. In Russo, the fact that the secretary didn’t know the document was “on the path to registration” meant her behaviour wasn’t actually dishonest

Russo
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			Test: Did [RP/RP's agent] **understand** the importance of the situation? → Consider employee's seniority in role / age / knowledge / experience
			Facts
			• Gerada (19-year old law clerk who had worked for three years) was not aware of the
			• fraud and falsely attested the document
			• Her employer, Reichmann (agent) did not know of forgery or the false attestation
			  ○ N/B: If he did, it would be easy to bring home as he had knowledge of importance
			• Court did not aggregate knowledge like in De Jager (all were agents in that case; here it was an agent and an employee of an agent)
			Held
			• Held Gerada's FA not fraud under s42 (applied broad definition)
			  ○ She had no reason to believe the signature had been forged and did not understand the importance of FAing the document (just that it was wrong)
			  ○ Did not know she was making a misrepresentation to the register
			  ○ Even though she was acting falsely, she was not acting dishonestly (subjective)
			  ○ Did not act with a willful or conscious disregard for the rights of another

Step 3 - Bring home fraud The mere existence of fraud is insufficient, it must be brought home to the proprietor/ person you are trying to attack	**Rule:** The fraud must be 'brought home' to [RP], either through them or their agent (*Assets* per Lord Lindley; *Schultz*)		
	Through proprietor	RP's fraudulent conduct	• **Rule:** If [RP] committed the fraud themselves = fraud brought home • **Exam tip:** state the specific conduct committed by RP
		RP's knowledge / wilful blindness	• **Rule:** If [RP] had actual knowledge of the fraud = fraud brought home • **Rule:** If [RP] had suspicions of fraudulent conduct but purposely refrained from making further enquiries for fear of finding out the truth = fraud brought home (a RP would have tried to find out) (*Assets*) ○ → The mere fact that a person might have found out fraud if further enquiries had been made did not of itself prove fraud (*Assets*)
	Through proprietor's agent	Where the fraudulent conduct was committed by the registered proprietor's agent, the registered proprietor will have indefeasible title unless their agent's fraud can be imputed on them (*Schultz*). There are two limbs to agency considerations (*Schultz*):	

<table>
<tr><td rowspan="4"></td><td rowspan="4"></td><td rowspan="4">1. Respondeat superior - Agent's fraudulent conduct</td><td rowspan="3">1. Are they an agent?</td><td colspan="2">Rule: An agent is a person with authority to act on behalf of their principal</td></tr>
<tr><td>Clear relationships</td><td>Employee = agent</td></tr>
<tr><td>If unclear whether they are an agent, analogise to case law</td><td>Dollars and Sense analysis (state that D&S is a NZ case, persuasive only) to determine whether agency relationship exists OTF
Analogise/distinguish
Court held that Rodney was an agent to DS on the facts:
D&S delegated significant tasks to Rodney that went beyond asking for a signature
D&S had no contact with RP, only Rodney
Rodney obtained his parents' signatures to the 'disclaimer' document that got legal advice *most significant*
Rodney obtained the title and insurance details
D&S knew Nathan's did not have a solicitor + the only person they were dealing with was their son Rodney
→ be careful, whether its bringing back usual documents that borrowers provide vs. extra documents</td></tr>
<tr><td>2. What is the scope of their</td><td colspan="2">Rule: Only an act performed by an agent within the actual or apparent scope of their authority will bind the principal</td></tr>
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			authority ?	**State:** In this case, [RP's agent's] scope of authority is acting as an agent for the purpose of [state purpose]	
			3. Was what they did within the scope of authority ?	**Rule:** Where the agent has engaged in fraudulent conduct. If the agent acted within the scope of their actual authority, their fraud can be brought home to the registered proprietor. **State:** [RP's agent] [did not commit/committed] fraud within the actual or apparent scope of their authority according to the [Dollars and Sense/Shultz] approach because...	
				Dollars & Sense approach (persuasive only, NZ case) → broad view	• Where the agent's actions are so connected to the tasks they were authorized to do, they can be regarded as an improper mode of performing them, the agent's fraud can be brought home (*Dollars & Sense* - OTF, the agent tasked with getting signatures, forgery is a risk of this task, principal has vicariously liability / bound) • → from practice exam: better view is that forging a mortgage is NOT a mode of performing her duties as loans manager.
				Schultz approach (binding in Australia) → narrow view	• If they are 'on a frolic of their own' (*Schultz*) (i.e. furthering of their own interests), their conduct will be outside the scope of authority

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<td>4. Bring it home</td>
<td>Rule: If the fraud was actually committed by [RP’s agent], the principle of respondeat superior applies: acts of an agent committed within his actual or apparent authority binds [RP] even if the agent is acting fraudulently = fraud brought home (Schultz)</td>
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<td>2. Knowledge - Agent’s knowledge / wilful blindness

(irrebuttable presumption)</td>
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General rule – actual knowledge: If [RP’s agent] had actual knowledge of the fraud = fraud brought home to principal b/c agent has a duty to communicate this to the principal thus principal assumed to know (Schultz)
General rule – wilful blindness: If [RP’s agent] had suspicions of fraudulent conduct but purposely refrained from making further enquiries for fear of finding out the truth = fraud brought home (a RP would have tried to find out) (Assets) –

→ <u>ASK:</u> did he get the knowledge in the course of this transaction?
→ If [RP’s agent] acted negligently to not find out there was fraud but did not have knowledge / suspicions = NOT FRAUD; lack of due diligence etc is not enough to satisfy this test
Assets – if you think a document is genuine = NOT FRAUD

<u>Exception:</u> Where the agent commits fraud, the presumption above is rebutted, because it isn’t expected that an agent would communicate their own fraud to their principal (Schultz) (NB: Dollars & Sense criticizes this, because if the agent has committed fraud, it should fall under Respondeat Superior)
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<td>Step 4 – Consider compensation / Indemnity provisions</td>
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S 110(1) Any person sustaining loss of damage shall be entitled to be indemnified if the loss was suffered by:

(a) Bringing the land under the Act;
(b) A solicitor’s failure to disclose in their certificate a defect in the title;
(c) An error, omission, or misdescription on the register
(d) Registration of another person as proprietor (fraud exception)
(e) Payment or consideration given on the faith of the register
(f) Loss or destruction of documents at the Titles Office

s110(2) - a person entitled under s110(1) may bring action against Registrar as nominal co-defendant
s111 - administrative settlement of claim by application to Registrar, apply by writing (i.e. You can make an application to the registrar for indemnity without commencing proceedings)
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	• *S 109(3)(a)* - The registrar can sue the person actually responsible (the fraudster)
	
	EXCEPTIONS – WHERE NO INDEMNITY PAYABLE
	• *s110(3)(a)* states that no indemnity is payable "where the claimant his legal practitioner or agent caused or substantially contributed to the loss by fraud, neglect or wilful default"
	• → Onus of proof is on the claimant
	• → Interpreted by Ct of Appeal in *Fairless*
	    ○ Facts - F was duped by his neighbour Mr D into signing a transfer to Mr D, who reg'd & mortgaged land. On default, the mortgagee (who was innocent of fraud) sold the properties to bona fide 3rd parties. F sought comp'n & Reg'r raised s110(3)(a) defence
	    ○ Issue –
	        ▪ 1. Was F guilty of 'neglect' under s110(3)(a) in signing the transfer w/out reading it & allowing himself to be duped?
	        ▪ 2. Was F disentitled to compensation under s110(3)(a) due to the fraud by Mr Doran i.e. was D acting as his agent ?
	    ○ Court held:
	        ▪ Case the claimant had been led by fraud into 'a false sense of trust and understanding'
	        ▪ Neglect by a claimant needs to be more than a contributing factor, if not the sole cause it needs to be considerable, big/large contribution before entitlement lost
	• If payment made out of the fund, Registrar entitled to sue 'the person actually responsible' to recover the amount: *s109(3)(a)*
	
	LIMITATIONS ON AMOUNT
	• *s110(4):* amount of compensation is limited
	    ○ E.g. *s 110(4)(c)* - Can recover the amount payable to discharge the mortgage only up until the value of the land right before the mortgage was registered (i.e. cannot recover full mortgage debt if it exceeds the value of the land).

Step 4 – Conclude	• On the facts, it is likely the exception of fraud [will/will not] be established. If fraud is established, RP's title is defeasible and [AP] may apply to have [mortgage will be removed; title returned; enforce an unregistered (equitable) interest against a registered (legal) interest]
Step 5 - VOI	• If can't bring fraud home, consider VOI (consider both anyway just in case; but VOI usually isn't relevant if there hasn't been fraud) • → Or if the agent was reckless then consider in personam

Loke Yew	• Facts –
	    ○ E (RP), Loke Yew purchased 58 (out of 322 acres). LY was an **unregistered** owner of the fee simple.
	    ○ Purchaser – PS
	    ○ E says do not want you to buy this land without respecting Loke Yew's rights (equitable interest, not listed on title, want to make sure LY is taken care of)
	    ○ PS' lawyer lied (dishonest misrepresentation comes into play) to induce E to sell the property (i.e. represented that he would take care of LY).
	    ○ Port sold & registered, PS has indefeasibility subject to exceptions.
	• Court held – there was fraud
	    ○ Due to dishonest representation

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PC held that undertaking was false and was given fraudulently to induce E to transfer
Key examinable points
If you have a promise/representation to respect an equitable interest holder's rights & that promise/representation is dishonest, then the fraud exception applies

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<td>Bahr v Nicolay</td>
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Facts

Bahrs bought land and obligation to develop it; Bahrs could not afford to develop it at that time. Have an unregistered option to purchase
Nicolay bought the land, leased back to Bahrs with an option to purchase (at the end of the period)
After 1 year, Nicolay sold to Thomsons, N agreed to acknowledge B's option to purchase
NB: there is NO contract between N and B

Main difference between the two cases:

Thomsons did intend to honour Bs purchase right when they bought land
Once they became the registered proprietors, the Ts refused to honour the agreement with Bs. Bs lodged a caveat.

Held

HCA unanimously found in favour of Bahrs on grounds of in personam action (covered in part 2) → i.e. equitable outcome
<u>Conventional understanding is fraud must occur prior to registration</u>
HCA disagreed (split decision)

Mason CJ & Dawson J (minority): A dishonest intent formed after registration to repudiate agreement inducing transfer is fraud – supervening fraud is Torrens fraud
Wilson & Toohey JJ: no Torrens fraud because there is no evidence Ts intended, at time of purchase, to repudiate B's interest – any fraud must be fraud in the act of acquiring registered title
N/B: & Brennan J implicitly agreed with Wilson & Toohey JJ (thus forming majority opinion), lecturer → for the purposes of this trimester Brennan J agreed with Wilson & Toohey JJ

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<td>Pyramid Building v Scorpion</td>
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Facts

SH (RP), gets a mortgage from PBS (RM), mortgage signed by someone who was NOT the company director (i.e. not a valid mortgage)
Peter Lewis (Director) wants to buy out the other two people, wife signs the mortgage, she is not authorised to sign the mortgage
Pyramid Building Society goes into liquidation. Lawyer for Pyramid Building Society, did a company search, did not bother to search whoever signed the mortgage was a company director. Lawyer for Pyramid Building Society asked to see minutes of the meeting (but didn't follow up). Also asked to see the agreement for sale of minority interests (i.e. agreement to purchase other's interests) but again did not f/u
Similar to Frazer & Walker – fraud in relation to a mortgage but instead of an individual, have it being a company

What happens if the underlying document is invalid/void?

Doesn't matter that the underlying contract is invalid at law
Once the bank registers the mortgage, attracts indefeasibility, set to cure the defect
Notion of indefeasibility, so important to operation of the Torrens System; Indefeasibility can only be found if there is an exception to set it aside

Peter Lewis –
Not an agent of the bank/PBS, acting on his own interest – dishonesty

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	o 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) → i.e. must be brought home to Peter • Mr Carr – o Acting for the bank o Is he wilfully blind? He was just slack / merely careless ▪ Note: difference between reckless indifference and mere carelessness • Obiter statements o *Pyramid*: registering an instrument which the registering party knows is forged is an obvious example o *Loke Yew*: a dishonest misrepresentation amounts to fraud
Dollars & Sense	• **Facts** o Son wanting borrowing money to buy a pub. D&S said you don't have money, need security on parents property. Dad agreed, mum never agreed. o D&S sent documents to mother via son. Son forged mom's signature. o D&S hired a lawyer, lawyer got loan documents from son, sent letter directly to son. Lawyer hired a sub-agent to obtain signatures (noting that all parties were several hours apart from each other) • **Issue** o Was the son an agent of D&S? • **Held** o The Court says there is a two-stage inquiry: ▪ Ask what acts has the principal authorised? ▪ Are the agent's acts so closely connected with the authorised acts that they can be regarded as a mode of performing them? • Here the agent tasked with getting signatures, forgery is a risk of tasking someone, principal has vicariously liability, principal bound • Does not require express authority to conduct a forgery…if the act is so closely linked then the principal may be bound o If so, then the acts fall within the scope of the agent's authority o Court stated that liability does not depend on the imputation of R's knowledge to D&S but arises because R's fraudulent act is one for which P is vicariously liable
Schultz v Corwill Properties → all about the scope of agency	• CP (registered proprietor), G (solicitor) who has a client Mrs S who has money to invest. G says you can grant a mortgage to a company and earn interest for this investment. • Mrs S becomes registered mortgagee over CP, G is acting as her agent for the transaction. G is also acting the as the agent for CP (even though he has not been authorised) • Mrs S dies, I've inherited my wife's property, G says its been very successful/discharge the mortgage. Convinces husband to discharge mortgage from property. CP now has an unencumbered property. • Mr S sought a declaration that he was still entitled to the benefit of the reg'd mortgage i.e. he wanted the discharge set aside for fraud • Court held o G was not authorised by CP to sign the mortgage, his forgery o G was taking a benefit for himself (off on frolic of own, taking benefit) hence his actions did not bind the principals