3 Torrens Title

A. What interest does each party have?

1. Registered – see C. **OR** Unregistered – see F. (can be equitable or legal interest, mere equity or nothing).

B. For each REGISTERED interest:

*As [property] is Torrens land, X will acquire **title by registration**, as distinct from the registration of title under the Old System (**Brevskar; s 42(1)** Real Property Act 1900 (No 25) (NSW) (**RPA**)).*

OR

*As X is the **registered proprietor** of Torrens Title [property], he has a fee simple interest in the land, which is the maximum interest in which a person could have in land, as they have the right to exclusive possession (**Brevskar; s 42(1)** Real Property Act 1900 (No 25) (NSW) (**RPA**)).*

1. Is X's interest **indefeasible**?

*Registration of the interest per **s 41(1) RPA** under the Torrens system generates indefeasible title (**s 42 RPA; Breskvar v Wall; Fraser v Walker**). Indefeasibility is subject to **fraud** on the part of the newly registered proprietor (**Brevskar**), and listed **exceptions** in **s 43 RPA**.*

- For **mortgages –** see further E. below.
    - *Under the Torrens system, a mortgage does not transfer the fee simple; it operates as a **statutory charge** on the land (**s 57(1)**).*
    - *Indefeasibility attaches to **the charge** created by the registered mortgage, even where the mortgagor's execution was forged (**Printy,** [57]). The mortgagee's registered interest is safe.*
    - *The power of sale must arise under **s 57(2)** – the default must be of an obligation **in the mortgage,** not some **separate unregistered document.***
- For **leases** – see F. below.

2. Are any **exceptions to indefeasibility** engaged?

a. Statutory exceptions? (s 42(1))

i. (a) the estate or interest recorded in a **prior** folio of the Register;
    1. i.e. where RP makes a mistake and issues 2 folios for one piece of land, the **earlier folio takes priority**.

ii. (a1) omission or misdescription of an easement subsisting immediately before the land was brought;

iii. (b) in the case of the omission or misdescription of any profit à prendre created in or existing upon any land;
    1. '**Profit'** – right attached to the land held by someone other than the owner to enjoy part of the nature e.g. soil, timber, wild animals.
    2. '**Omitted**' – if transferred from the Old System and left off, or if TS – where the RG failed to put it on register.

iv. (c) as to any portion of land that may by wrong description of parcels or of boundaries be included in the folio;
    1. E.g. overlapping strips of land, or where the register is not conclusive as to boundaries (***Michael v Onisforoui***).

v. (d) short-term tenancy – lease plus any option does not exceed three years.
    1. **Note**: **s 53 RPA** requires leases for >3 years to be registered.
    2. **NB**: this section provides the exception to indefeasibility, while **s 23D(2) CA** provides that it is a **legal interest**.

b. **Fraud?

*X's interest may be **defeasible** if deemed to have been acquired through fraud (**ss 42, 43 RPA**). Prima facie, fraud only occurs when the person registered or to be registered is **party** to the fraud (**Frazer v Walker**). Here, fraud was on the part of Y, who [...].*

1. **Was there **actual fraud?**

*The fraud must involve some form of **personal dishonesty or moral turpitude** of the **registered proprietor**, and is more than mere disregard of rights of which the person had notice (**Wicks v Bennet** at 91; **Anderson v Anderson** at [33]). Fraud must be **actual**, not constructive or equitable (**Assets Co. v Mere Rohi** at 210).*

On the facts, [describe fraud]. This is analogous to [insert case from below] because [...].

*However, it is arguable that [insert **Davis v Williams** analysis from below].*

- **Where there is actual fraud –**
  - a. **Willful blindness:** where RP had suspicions as to the existence of fraud and **abstains** from inquiring in fear of discovering the truth (***Assets Co v Mere Roihi***).
    *Wilful blindness requires 'the deliberate shutting of one's eyes' (**Giorgianni**); carelessness does not suffice (**Grgic; Davis v Williams**).*
    - i. In ***Asset Co v Mere Roihi,*** the PC ruled that there was '**no fraudulent statement made by the company's agent** … nor any bribery, corruption or dishonesty'.
    - ii. **[Counter i.e. Constructive fraud]** The mere fact that the RP might have found out about the fraud if RP had been **more vigilant**, and made further inquiries does NOT by itself prove fraud on their part (***Pyramid Building Society***).
      1. A person is NOT fraudulent merely because they are 'not as diligent' as they could have been.
  - b. **Deliberate plans to defraud:** conduct by RP that goes beyond mere knowledge of an earlier unregistered interest and amounts to a **deliberate plan to deprive the prior interest holder** of their unregistered interest (***Loke Yew v Port Swettenham Rubber***).
    - i. In ***Loke Yew***, the assurances that PS made to Eusope were for the purpose of inducing Eusope to execute the transfer of the land and amounted to a **deliberate plan** to deprive LY of his interest.
  - c. **Fraudulent misrepresentation** – misrepresentation by the new RP to induce the previous RP into passing title (***Pyramid Building Society***)
  - d. **False witnessing**
    - *i. The facts are also similar to **AGC v De Jager**, where the RG was defrauded as AGC had falsely represented to RG that the wife's consent to the mortgage had been witnessed.*
      1. ***E.g.** Here, X knew that Y (original RP) had no capacity to enter into an agreement, and forged his signature to enter into an agreement, clearly constituting actual fraud.*
    - ii. In ***NCB v Hedley***, the mortgagee's officer falsely stated that he had personally witnessed RP's signatures
- **Where there is no fraud –**
  - **e. Lack of knowledge / no moral turpitude**
    - i. **[Counter]** *Arguably, the [mortgagee's] lack of knowledge in [falsely accepting the **forged** mortgage document] was **not dishonest** given his state of mind and knowledge about conveyancing processes.*