PROPERTY

LAWS50030

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Abbreviations

The following abbreviations are used throughout to facilitate concise legal analysis and efficient issue-spotting.

- LL = Landlord
- P = Plaintiff / Claimant / Client
- D = Defendant / Wrongdoer
- RP = Registered Proprietor
- K = Contract
- NT = Native Title
- NTR = Native Title Rights
- EP = Exclusive Possession

Colour-Coding Guide

The following colour-coding system is used throughout these notes to distinguish legal principles, statutory provisions, case authorities and analytical prompts.

- Statements of law, legal rules, principles and applicable legal tests.
- Analytical prompts, key considerations and questions to guide issue-spotting.
- Legislation, statutory provisions and relevant legislative requirements.
- Case law, judicial authorities and relevant case illustrations.

Quick Reference Glossary

Term	Definition
Real Property	Legal interests in **land** and things legally treated as land.
Personal Property	Legal interests in **things other than land**.
Land	According to the *Interpretation of Legislation Act,* land Includes the land itself, buildings and structures fixed to it, land covered by water, and any legal interest in land (e.g. estates, easements).
Corporeal hereditaments	**Physical, tangible land interests** involving possession (e.g. owning or occupying land).
Incorporeal hereditaments	**Non-physical rights over land** that do not involve possession (e.g. easements, profits).
Chattels real	Leasehold interests in land; historically distinct, but now treated as **estates in land** (term largely outdated).
Chattels personal	Personal property consisting of **things**, either physical or non-physical.
Choses in possession	**Physical movable objects** that can be possessed (e.g. books, furniture).
Choses in action	**Intangible rights** enforceable by legal action (e.g. debts, shares, patents, copyright).
Grant	A formal written doc or act that creates or transfers a legal interest in land from one person to another.
Deed	A formal signed legal document (binding without consideration; not a K) and can operate as a type of grant when it transfers an interest in land.

Rights *in rem*	Rights *in personam*
A right over a *thing* that is enforceable against the world at large. Binds third parties, not just specific individuals.	A **personal right** enforceable only **against a specific person**. Does *not* bind the world at large.
EG: Ownership (fee simple), lease, easement, mortgage, profit à prendre.	**EG:** Contractual rights, licences, debts.
Remedy: Proprietary remedies (e.g. injunction, recovery of property).	**Remedy**: Personal remedies (e.g. damages for breach K)
Important Qualification: Property ≠ all rights attached to land: Even where land is owned (a property right exists), some rights relating to that land may be non-proprietary and operate only *in personam*.	

Which Interest has priority?

Litigation Posture

A has an earlier equitable/unregistered lease over land.
B is the RP of a fee simple estate over land.

Torrens Land Priority Resolution

P has a registered mortgage. Upon registration, the instrument takes effect as a deed (**52 PLA**) and the Register conclusively evidences P's interest (**41 TLA**), giving P immediate indefeasibility (**Frazer**) free from notice (**43 TLA**) and unregistered interests except recognised exceptions (**42 TLA**).

Does a Statutory Exception apply?

P may argue the [fraud] exception to indefeasibility under [s 42(1)].

1. ***Registered interest*** — 42(1) TLA: The RP holds their interest subject to already registered interests
2. ***Rights under adverse possession*** — 42(2)(b) TLA
3. ***Easements*** 'howsoever acquired subsisting over the land'— 42(2)(d) TLA → priority
   Tenants in possession of the land 42(2)(e) TLA → priority
4. ***Volunteer*** → *no dispute*
5. ***VOI exception*** → *no dispute*
6. ***Statutory fraud*** → *no dispute*
7. ***In personam claim*** → *no dispute*

Is RP a volunteer?

- RP became RP of land via will and gave no value.
- P may argue that RP's volunteer status is an exception to indefeasibility (Rasmussen).
- However, the Victorian position is unsettled. Although *Farah* and *Zekry* appear to support indefeasibility for volunteers, *Farah* addressed the issue only in passing obiter, and *Zekry* was resolved by an in-personam claim.
- Hence, unless and until *Rasmussen* is expressly overturned, the better view is that in Victoria, volunteer does not obtain a fresh indefeasible title against P; she takes previous RP's title subject to the same equities and limitations affecting previous RP.
- Thus, the decisive issue is whether previous RP's title was defeasible against P.

Choose below the fact-scenario

1. ***Irrelevant because P can claim directly against the volunteer RP —***
   a. The volunteer exception is only useful where P's interest would bind the predecessor, but would not otherwise bind the new RP. if P has an easement protected by s 42(2)(d), or adverse possession under s 42(2)(b), or tenant in possession under s 42(2)(e), the volunteer exception is unnecessary bc those exceptions can operate directly against the current RP.
2. ***Predecessor grants P an equitable lease / option / mortgage***
   a. If the volunteer exception applies, Nevada takes subject to that prior equitable proprietary interest.
3. ***Before the predecessor died, they signed a specifically enforceable COS*** (an equitable interest in land)
4. ***In personam claim*** (refer to contrastive trust notes below)
5. ***Fraud***
   a. P may argue that previous RP's title was defeasible bc it was procured by statutory fraud (42(1) TLA)

Improper VOI Exception (87A TLA).

Alternatively, P may argue that Bank's registered mortgage is defeasible bc the mortgage was obtained by fraud and Bank failed to take reasonable steps to verify the mortgagor's identity [or authority] (87A TLA).

1. ***Did the bank take reasonable verification steps?***
    a. genuine due diligence OR obviously cut corners?
    b. such as conducting an in-person interview, checking P's identity, searching the title, reviewing the certificate of title, and ensuring the mortgage documents were signed and executed in person?
2. ***Here, the Bank likely took reasonable VOI steps***
    a. because it [conducted an in-person interview / checked P's ID / searched the title / reviewed the certificate of title / ensured documents were signed in person].
    b. Although [suspicious fact] may suggest poor practice, it is unlikely to amount to a failure to take reasonable VOI steps.
    c. **Held:** s 87A is unlikely to apply, and the mortgage likely remains indefeasible.
3. ***Here, the Bank likely failed to take reasonable VOI steps***
    a. because it [failed to check P's ID / did not conduct an in-person interview / ignored suspicious facts / allowed documents to be signed remotely without verification].
    b. Consequently, the Registrar may remove the mortgage from the register under s 87A(3), meaning the mortgage does not obtain indefeasibility and is "void" under s 87A(5) as the true RP never granted

Statutory Fraud

P may have a statutory right to challenge the fraudulent registration under s 44(1) TLA and seek rectification and restoration of title.

- s 44(1): A fraudulently procured registration is void against the defrauded party, and no party privy to the fraud shall benefit'.
- Fraud in this context requires 'actual dishonesty' (moral turpitude) or wilful blindness that induces detrimental action leading to rego; mere negligence [or failure to investigate] is insufficient (Loke; Pyramid).
- Fraud must be brought home by RP = P must show that RP itself [or its agent] was guilty of fraud (Assets).

1. ***A BFPFV (without notice of fraud)***
    a. retains indefeasible title despite fraud of an earlier RP (44(2) TLA).
2. ***Merely acquiring land w notice of an unregistered interest***
    a. [even knowing registration will defeat it] is not itself statutory fraud (43 TLA).
3. ***Mere Negligence?***
    a. [Fraudster conduct] should have raised suspicion and precautionary investigation. However, this is consistent w negligence by failing to follow best practice. Thus, like in Pyramid, absent actual knowledge or deliberate abstention from inquiry, it is unlikely to amount to statutory fraud.
    b. ***Pyramid:*** Pyramid registered a mortgage over Scorpion's land (gaining indefeasible mortgage), but the mortgage was improperly executed by someone without valid authority. Pyramid argued wilful blindness, reckless indifference = fraud. **this was not Torrens fraud because (a)** no actual knowledge of the defect **(b)** mere carelessness or failure to inquire is insufficient, and **(c)** no deliberate avoidance or wilful blindness amounting to actual dishonesty.
4. ***Wilful blindness?***
    a. [Facts] suggest that D had strong grounds to believe fraud had occurred, but deliberately failed to inquire and proceeded with registration anyway; that wilful blindness amounts to actual dishonesty and therefore Torrens fraud.
    b. "deliberate avoidance of the truth"
5. ***Fraud infecting acquisition / Actual dishonesty?***
    a. [facts] suggest that buyer knew of P's prior interest, actively lied or gave a false assurance to induce vendor to execute the conveyance, and then used rego to defeat P's interest; this likely amounts to Torrens fraud (Wilson and Toohey JJ in Bahr); acted with a dishonest design to defeat the prior interest
    b. ***Loke Yew*:** the company knew Loke Yew had a prior unregistered interest, promised the vendor it would protect Loke's interest to procure the registration, and then attempted to evict Loke after obtaining rego over the whole land. **This was Torrens fraud bc (a)** the company knew about Loke's interest, **(b)** it falsely promised to protect that interest, and **(c)** it used registration to defeat the interest dishonestly.
6. ***Changing your mind (Timing)***
    a. **Later dishonest repudiation after honest acquisition**
        i. On the facts, Buyer honestly promised to honour P's prior interest, and but for that promise, the conveyance would not have been executed. Buyer later became RP and repudiated the promise.

ii. The HC in *Bahr* was split on whether this later repudiation constitutes statutory fraud.
iii. On **Wilson and Toohey JJ's approach**, this is not fraud, bc fraud must infect the acquisition of registration; a later change of mind or refusal to honour that interest is not fraud later, but may be evidence that Buyer had a dishonest design when acquiring title.
    1. arguing fraud **before registration** is generally stronger.
iv. On **Mason CJ and Dawson J's approach**, the later repudiation may be statutory fraud, bc Buyer is dishonestly using rego to defeat the very obligation that formed the basis of acquiring title.
v. Therefore, P should argue statutory fraud by relying on Mason CJ and Dawson J's broader approach, but the outcome is uncertain given the split in *Bahr*. P should also plead constructive trust / in personam equity as the stronger alternative ground.
vi. Better view is Wilson and Toohey, because otherwise you can engage in fraud after rego, and then lose your rego when.

7. **Held**: The fraud exception is [un]likely made out
    a. **Fails** — B's title remains indefeasible.
    b. **Suceeds** — B's registered title is void as against A under s 44(1) TLA. Ther is no compeititon between the two parties as B has no interest against A. A can therefore seek rectification of the Register & restoration of title.

In Personam Claims

P may bring an in personam claims against D, which is an exception to indefeasibility (*Bahr*).

1. First, P must establish a recognised COA in law or equity against the RP. Specifically, P would claim [insert]
    a. ***A proprietary estoppel against D,***
        i. arguing that D's 'arming conduct' in [giving Ben her identity docs and C/T] made a representation that [the mortgage was valid] (*Barry*).
        ii. In reliance on this, P did X.
        iii. If D departs from this assurance, P would suffer detriment because X.
    b. Breach of K against D
    c. Negligence against D
    d. ***That D holds Land subject to a constructive trust*** and/or personal equity, and refusing to honour her profit would be a breach of that trust.
        i. This could encompass actions before or after registration (*Bahr*)
        ii. P said 'I will sign if you honour my profit'. D accepted the offer.
            1. This is analogous to Bahr, where the Thompson was bound bc it accepted the transfer on the condition that Bahrs' unregistered interest would be honoured. Here, P would not have executed the deal & handed over the CT but for D's insurance.
        iii. **Held**: RP is likely personally bound in equity, and thus takes title subject to P's prior interest.

2. Second, in Victoria, unconscionability might be an additional requirement for the in personam exception, whereby the RP's own conduct must make it unconscionable for RP to rely on indefeasibility (Vassos).
    a. There's [no] unconscionability bc allowing breach of K left unremedied = general unfairness
    b. In *Vassos*, no in personam claim arose because **(a)** the Bank made no misrepresentation, misused no power, and had no knowledge of the forgery; and **(b)** mere failure to detect the forgery was not enough to make reliance on its registered mortgage unconscionable.
    c. ***Fails*** —although it is arguable that unconscionability is not a separate requirement, P's claim likely fails in Vic under *Vassos*. Or unless the court decides there is no unconscionability requirement this claim fails on the ground that there is no unconscionability.

3. **Held:** In personam claim is [not] made out
    a. ***Wins*** — RP is likely personally bound in equity, and thus takes title subject to P's prior interest.
    b. ***Fails*** — RP retains indefeasible title [subject only to any other recognised TLA exceptions]