EXCEPTIONS TO INDEFEASIBILITY

Step 1 – Introduction

- The mortgage has been registered on the land title of [address] creating a legal interest (s 74(1)(a) TLA).
- As [RP]'s interest [mortgage?] is registered and therefore effectual (s 40 TLA), any defects in [Instrument] are be cured (s 41 TLA), and their title will be protected by indefeasibility unless there is an exception such as fraud (s 42(1) TLA; *Frazer v Walker*; *Breskvar*). Hence, [RP] will be able to enforce [Interest] subject to any exceptions to indefeasibility being present.
- [P] could argue that [D's] interest [likely mortgage] is defeasible for [Fraud / VOI / Paramount interests], based on [[X's] forgery / [Y's] false attestation].

Step 2 – Fraud Exceptions

- Fraud under s 42 TLA means actual dishonesty, wilful blindness, or moral turpitude (*Assets Co*; *Pyramid*) and must be brought home to the [RP / interest holder] or their agent to render their interest defeasible (*Assets Co*).
- BoP is higher in fraud cases (serious allegation) (*Briginshaw v Briginshaw*).

Step 2A - Fraud Prior to Registration

- [RP]'s actual or constructive notice of an existing unregistered interest is not fraud and the RP is not required to investigate the predecessor's title and won't affect their indefeasible title (s 43 TLA; *Frazer v Walker*).

  OR

- [D] appears to have committed fraud by giving an undertaking that they will [describe their promise relating to an unregistered interest] for the purpose of inducing [vendor] to transfer the land with no intention from the outset to honour that undertaking (*Loke Yew*).
- Given [D] is the registered interest holder and committed the fraud, the fraud is brought home, and their interest is defeasible (s 42(1) TLA; *Assets Co*). [Go to conclusion – Step 4A].
- If no fraud, [P] should seek compensation from the assurance fund [go to Step 4B].

Step 2B - Fraud After Registration – Actual Dishonesty

- Acquiring land with notice of an unregistered interest is not of itself fraud (s 43 TLA; Majority: *Bahr v Nicholay*).
- Despite the majority's view in *Bahr*, [P] could still argue that repudiation of a K after registration is still fraud as it results in a bypass of s 43 TLA relating to notice of an unregistered interest (Minority: *Bahr*).
- [D] as the registered interest holder would be found to have committed the fraud, the fraud could be brought home, and their interest is defeasible if a court accepted the minority's view from *Bahr* (s 42(1) TLA; *Assets Co*).
- If the court reject the minority view in *Bahr*, [P] should seek compensation from the assurance fund [go to Step 4B].

Step 2C - Fraud at Registration – Classic Fraud

Fraud by RP (Husband Forges Wife's Signature / Unknown Fraudster)

- [X] has committed fraud by [impersonating / forging a signature] to the previous RP removed from the title which is actual dishonesty (*Assets Co*).
- Fraud is brought home if the RP personally commits fraud (*Assets Co*).
- [P] is seeking to have the [registered interest / mortgage] removed however the RP of that registered interest is not party to the fraud. Therefore, it would not be possible to bring home the fraud to the RP who is an innocent party.

OR

- [P] is seeking to have the [registered interest / land transfer] rectified and it appears [P] was removed by [X's] fraud. Given [X] has personally committed the fraud, it would be possible to attribute the fraud to the RP and have that interest set aside.
- [P] should seek compensation from the assurance fund [go to Step 4B].

Agency – Attribution or Actual Fraud

- Fraud/wilful blindness committed by [RP]'s agent can be brought home to the [RP/mortgagee] where the agent's acts occur within the scope of their actual or apparent authority (*Schultz*).
- The agent appears to have [express / implied by context / constructive (no consent / holding themselves out)] authority [explain why] to [arrange the mortgage documents].
- **Test:** [RP]'s agent's tortious act has a sufficiently close connection with the task [insert their task] so that the commission of the tort can be regarded as the materialisation of the risk inherent in that task (*Dollars & Sense*).
- If they are pursuing an activity purely in furtherance of their own interests, on a 'frolic of their own' then this is not within the course of their authority (*Schultz*).
    - [Identify the scope and confirm if their conduct is within the scope].

Two Types of Fraud by an Agent:

- Fraud committed by RP or agent (forging doc):
    - Principal is liable for acts of agent if it is within scope of authority.
- Agent has knowledge of another's fraud in the same transaction:
    - Where agent has knowledge and is **under duty to communicate**, then it is irrebuttable presumption that agent has communicated. Fraud can be brought home to principal (*Schultz*).
    - **Exception:** Where agent has committed fraud, then no presumption of respondent superior because no expectation that agent would communicate own fraud to principal (*Schultz*) – **CONTESTED.**
        - C/f: can be 'brought home' if factually similar scenario to *Dollars & Sense* (fraudster is also agent of RP because RP required fraudster to obtain parent's signature for loan).
- If no Agent fraud, [P] should seek compensation from the assurance fund [go to Step 4B].

False Attestation

- [P] will argue that [X] falsely attested [instrument of mortgage] when they witnessed without [P] in their presence.

Requirements

- **1.** Putting an instrument on the path to registration knowing that it contains a false attestation is fraud (*Russo*).
    - Knowing that [X] falsely attested the document (*AGC v De Jager*).
    - C.f Attesting witness not fully appreciating legal consequences is not fraud (*Russo*) (law clerk case)
- **2.** False attestation of a registrable instrument is fraud on Registrar of Titles (*Russo*; *De Jager*).
- **3.** Cannot aggregate knowledge of different people to make one dishonest agent (*Russo*).
- Fraud/wilful blindness committed by [RP/RP agent] can be brought home to the [RP/mortgagee] where the agent's acts occur within the scope of their actual or apparent authority (*Schultz*).
- If no FA, [P] should seek compensation from the assurance fund [go to Step 4B].

Wilful Blindness

- [X] could argue that [Y] (agent of the mortgagee) has committed wilful blindness which is actual dishonesty (fraud) (*Assets Co*) by [explain what they ignored]. Wilful blindness occurs when RP/agent suspicions have been aroused but they refrain from making enquiries for fear of learning the truth (*Pyramid*).
- [Y] [appears / does not appear] to be acting within the scope of their employment and therefore it [may / may not] [explain why] be possible to attribute the fraud to [RP/mortgagee] (*Schultz*).
- Mere careless is not enough, must be actual dishonesty or reckless indifference (*Pyramid*).
- Not enough to show that a reasonable person in their position would be suspicious (*Assets Co*).
    - Consider if the agent receives anything.
- Fraud/wilful blindness committed by [RP/RP agent] can be brought home to the [RP/mortgagee] where the agent's acts occur within the scope of their actual or apparent authority (*Schultz*).
- If no WB, [P] should seek compensation from the assurance fund [go to Step 4B].

Collusion

- It is fraud for a purchaser to collude in a transfer designed to cheat a person out of a known existing right.
- RP defaults on loan to mortgagee, mortgagee executes s 77 TLA power of sale then sells to friend for a lesser price.
- Given [D] is the registered interest holder and committed the fraud through collusion, the fraud could be brought home, and their interest is defeasible (s 42(1) TLA; *Assets Co*).
- If no collusion, the [P] should seek compensation from the assurance fund [go to Step 4B].

Step 3 - Other Exceptions

Step 3A - VOI

New Mortgage

- Since 24 September 2014, the Verification of Identity (VOI) requirements mandate that a mortgagee must take **reasonable steps** to verify the identity and authority of the person executing a mortgage (s 87A(1) TLA).

Reasonableness of Verification

- In *C&F Nominees*, "reasonable steps" considers:
    - The relationship between the parties.
    - Any unusual features of the transaction.
    - The knowledge and expectations of the mortgagee.
    - Reasonable steps includes 100 points of ID (s 87A(2) TLA).
- Onus on mortgagee to prove reasonable steps were taken (s 87A(1) *TLA*).
- Here, [Mortgagee / Agent] took no independent steps to verify [P's] identity and relied solely on [third party / solicitor]'s word. Relying on a third party's representation of identity, without any documentation or direct verification, likely fails to meet the VOI standard (*C&F Nominees*).
- Failure to meet the VOI requirements means the Registrar may remove the mortgage (s 87A(3) *TLA*), leaving the mortgagee's interest void and defeasible (s 87A(5) *TLA*).

  OR

- Failure to meet the VOI requirements means the Registrar may [must] remove the variation to the mortgage (s 87A(4) *TLA*), leaving the mortgagee's interest void and defeasible (s 87A(6) *TLA*).
- The [Mortgagee]'s failure to independently verify the [mortgagor's] identity likely voids the mortgage, as the mortgagee did not satisfy VOI standards.

OR

- If cannot make out VOI, [P] should seek compensation from the assurance fund [go to Step 4B].

Transfer of Mortgage

- Since 24 September 2014, the Verification of Identity (VOI) requirements mandate that a mortgagee must take reasonable steps to verify the original mortgagee took reasonable steps or they themselves take reasonable steps to verify the identity and authority of the mortgagor to ensure the person who executed the mortgage is the same person who is the RP of the land (s 87B(1) TLA).

Reasonableness of Verification

- In *C&F Nominees*, "reasonable steps" considers:
  - The relationship between the parties.
  - Any unusual features of the transaction.
  - The knowledge and expectations of the mortgagee.
  - Reasonable steps includes 100 points of ID (s 87B(2) TLA).
- Onus on mortgagee to prove reasonable steps were taken (s 87B(1) TLA).
- [Mortgagee / Agent] took no independent steps to verify [D]'s identity and relied solely on [third party / solicitor]'s word. T Relying on a third party's representation of identity, without any documentation or direct verification, likely fails to meet the VOI standard (*C&F Nominees*).
- Failure to meet the VOI requirements means the Registrar may (must) remove the transfer of mortgage (s 87B(3) TLA), leaving the mortgagee's interest void and defeasible (s 87B(4) *TLA*).
- **Conclusion on the Mortgage**: [Mortgagee]'s failure to independently verify the [mortgagor's] identity likely voids the mortgage, as the mortgagee did not satisfy VOI standards.

Mortgagee Consent for Leases / Restrictive Covenants / Easements

- Creation, variation of lease/RC/easement with respect to mortgaged land is not valid nor binding unless mortgagee/ annuitant has consented in writing to it (s 87C TLA).

Step 3B - *In Personam* as Alternative to Fraud

- [P] could bring a claim against [D] *in personam* to hold [D] accountable to their conduct [K entered / trust created (protecting a prior unregistered interest)] whether it is before or after registration (*Bahr*). Indefeasibility under s 42(1) TLA does not deny [P]'s right to bring an action against [D] *in personam* for relief (*Frazer v Walker*).
- *In personam* requires a known legal or equitable cause of action and the RP's conduct must be unconscionable in the circumstances (*Pyramid*; *Vassos*).

Step 1: Cause of Action

- Undue influence (*Johnson*); Deceit (*Garafina*); Breach of fiduciary duty (*Vassos*).
- Misuse of CoT where it is held by the RP / Bank (*Gosper*).
- Breach of trust (constructive / express) (*Bahr*).

No Cause of Action

- Mere forgery is insufficient (*Vassos*).
- Negligence is insufficient (*Pyramid*) Even if negligence was sufficient, you are limited to an award of damages, not setting aside the mortgage (*Pyramid*).
- Mere notice of a prior equitable interest is insufficient (s 43 TLA). Compare facts and minority view in *Bahr*.

Step 2: Unconscionability

- Has there been a misrepresentation by the RP: abuse of power, or knowledge of wrongdoing by any party (*Vassos*).

Outcome

- On a successful claim *in personam*, the court may make an order that deprives the RP of part or all of his registered interest. If no *in personam,* [P] should seek compensation from the assurance fund [go to Step 4B].

Step 3C – Volunteers (Gifts or Wills with no Consideration)

If Seeking to Defeat a Volunteer

- [P] could argue that [D] received their interest as a volunteer (not a bona fide purchaser for value) which is not recognised under the principles of indefeasibility under the TLA in Victoria (*Rasmussen*).

If Seeking to Defend a Volunteer

- Outside Victoria, volunteers take ownership free from unregistered interest (*Farah*, Obiter) which may persuade the court and would align with the approach in NSW which allows indefeasibility for volunteers (*Bogdanovic*).
- If no volunteer, [P] should seek compensation from the assurance fund [go to Step 4B].

Step 3D - Paramount Interests (Only Applies to Equitable RC/Lease)

- Notwithstanding the principles of indefeasibility of a registered interest, that interest shall be subject to:
    - Reservation exceptions, conditions and powers contained in Crown grant (s 42(2)(a) TLA).
        - Oil / gold / resources remain property of the Crown.
    - Any rights subsisting under any adverse possession of land (s 42(2)(b) TLA).
    - Public rights of way (s 42(2)(c) TLA).
    - Easements affecting land (s 42(2)(d) TLA).
    - Interest of tenant in possession (except for option to purchase) (s 42(2)(e) TLA).
        - Tenant who is actually living in residence.
        - The way you live out the lease is true exception (lease says $60 but paying $260pw) (*Downie*).
    - Unpaid land tax (s 42(2)(f) TLA).
- [Choose which one of the above is relevant (most likely s 42(2)(e)). Then go to the step below].

Tenants in Possession Under s 42(2)(e) TLA

Step 1: [P] Has a Valid Lease on Foot

- The tenant exception to [D's] registered interest is to be widely construed to include an unregistered lease interest provided [P] is in possession (s 42(2)(e) TLA; *Downie*).
    - Tenant includes life tenants and written unregistered interests and any rights which are connected to lease itself (no obligation to pay rates and premiums) (*Downie*).
    - A tenant may have their lease rectified in equity to express their common intention (wrong price in contract) (*Downie*).
    - Includes option to new lease but not option to purchase (*Mercantile*).

Step 2: Did the Tenancy or Mortgage Exist First?

Tenancy Before the Mortgage

- A prior unregistered (equitable) lease will render a subsequent registered (legal) mortgage defeasible (s 42(2)(e) TLA), converting the legal mortgage it to an equitable mortgage. The competing equitable interests are to be resolved by the application of priority rules (s 42(2)(e) TLA; *Perpetual*).
    - Priority time is the time of creation of the mortgage in equity (execution), not the time of its registration because mortgage registrations may be delayed for several commercial reasons (*Perpetual*; *Bianco*).

Mortgage Before the Tenancy

- [P]'s lease interest is subject to [mortgagee's] equitable mortgage interest which was executed prior to the lease, despite registration of the mortgage occurring after the lease (*Balanced*).
- Given the [mortgagee]'s written consent was not obtained for the [registered] lease, the [tenant]'s interest is not protected by s 42(2)(e) TLA and can be defeated by the mortgagee upon exercise of their power of sale under s 77 TLA or occupation under s 78 TLA (s 87C(1)(a) TLA; *Balanced*).
    - Mortgagee can only execute rights once mtg is registered (*Balanced*).
    - Where consent is not obtained prior to registration of the lease, variation of the lease or surrender of the lease, the mortgagee may apply to the Registrar to have the lease removed (s 88A(1)(b) TLA).

  OR
- Given the [mortgagee]'s written consent was obtained for the lease, the [tenant]'s interest is valid exception to indefeasibility (s 42(2)(e) TLA; *Balanced*).

Step 3E - Inconsistent Legislation

- Subsequent legislation may override the TLA either expressly or by implication where the statutes operate in the same sphere (*Horvath*; *Calabro*). The later statute must be so inconsistent with the essential provisions of the TLA that it's provisions cannot stand with the latter (*Horvath*).
- The following assessment will determine if there is an inconsistency (*Horvath*):
    - First find earlier and later statute.
    - Is there inconsistency?
        - Do the two acts cover the same subject matter? (*Horvath*; *Calabro*).
        - Court will take a narrow approach to try and prevent overlap (*Horvath*).
        - TLA's sphere of operation is registered interests → s 42 grants RP indefeasible title.
        - Is the TLA in conflict with an act that governs or vests land in local government?
    - If there is no inconsistency → apply both acts.
    - If there is inconsistency, can the TLA and new act be reconciled and operate in parallel?
        - There is a strong presumption that parliament does not intend to contradict itself, but rather that they intend the acts to operate in different spheres (*Horvath*).
    - If there is inconsistency, are the two acts so inconsistent or repugnant they cannot stand together (*Horvath*)? [Apply statutory interpretation to determine which act will prevail].

Statutory Interpretation Rules

- Statutory and public rights will typically prevail over private rights (*Calabro*).
- A later act repeals earlier act to extent of inconsistency.
- Where there is conflict between general and specific provisions, the specific provisions prevail.
- Each act is to be read as a whole.
- General matters constrained by reference to the specific (*ejusdem generis*).

- Express reference to one indicates that the other matters are excluded.
- S 109 between state and Cth.

Step 4 - Conclusion

Step 4A – Registrar's Power of Correction (If Interest is Defeasible)

- If a court finds that [D's] registered interest is defeasible and void (s 44 TLA), [P] could seek an order requiring the Registrar amend the title Register to remove [D's] interest (s 103 TLA).
- Registrar may delete, create or make amendments to folio where necessary (s 106(1)(e) TLA).
- Powers of registrar can derogate indefeasibility of title but unlikely to do so. Registrars power is 'limited to the period before a bona fide purchaser acquires title under the latter section' (*Frazer v Walker*).

Step 4B – Compensation (If Interest is Indefeasible)

- [P] may not be able to defeat [D]'s registered interest in the land. [P] could seek compensation for their loss.

When You Are Not Entitled

- The Consolidated fund is not liable for breach of trust or misdescription of parcels (s 109(2) TLA).

When You Are Entitled

- If a **RP** has been affected by fraud, is not party to that fraud, and is entitled to be indemnity, the amount payable to the mortgagee by the RP to discharge the mortgage must not exceed the amount of compensation under s 110(4)(c) (s 87D TLA).

  OR

- If a [**mortgagee**] has been affected by fraud, is not party to that fraud, is entitled to be indemnity, and the land has been sold under a mortgage in accordance with s 77 TLA, the amount payable to the mortgagee must not exceed the amount of compensation under s 110(4)(c) (s 87E TLA).

Entitlement to Indemnity

- [P] is entitled to apply to the Registrar directly for compensation (s 111 TLA), bring an action against the Registrar as a D or join them for an action (s 110(2) TLA) to be indemnified under the assurance fund if they sustain damage as a result of (s 110(1) TLA):
  - (a) Bringing land under the Torrens System.
  - **(b) Any amendment of the register.**
  - **(c) Any error/omission/misdescription of the register or the registration of any other person as proprietor.**
  - (d) Any payment or consideration given on the faith of the register.
  - (e) The loss or destruction of any document lodged at the Office of Titles.
  - (f) Any mistake/omission/misfeasance of the registrar (or an officer).
  - **(g) The exercise by the registrar of any power conferred on him, where the person suffering loss or damage has not been a party or privy to the application.**

Amount of Indemnity

- Where Register is not amended, indemnity shall not exceed the value of the estate or interest at the time of error, mistake or misfeasance which cause the loss (s 110(4)(a) TLA).

- Where Register is amended, indemnity shall not exceed the value of the estate or interest immediately before amendment (s 110(4)(b) TLA).

No Indemnity for Neglect

- [P] may not be eligible for indemnity if they (or their lawyer / conveyancer / agent) caused or substantially contributed to the loss by fraud, neglect or wilful default (s 110(3)(a) TLA).
- The neglect must be the sole cause of the loss or a contributing cause (*Fairless*).
- Where neglect is a contributing cause, the contribution to the loss must be large or big. Neglect may include a failure to take care of your own interests or failure to do something you are obliged or required to do (*Fairless*).
- Have regard to previous dealings and level of trust (*Fairless*).
- **Fraud of agents:** Fraud by an agent will only disentitle the aggrieved party where the fraud was committed in the scope of their actual authority (express or implied) (*Fairless*).

Limitation

- An action must commence within 6 years from the date of deprivation (s 5(1)(d) LAA).

Step 4D - Contractual Consideration

- The mortgagee may still be able to pursue [P/D] for contractual obligations.
- This may not be possible given [P] has not actually signed the contract.

Step 4E - Equitable Mortgage

- For equitable title to pass, the requirements of equity must be met which includes the presence of a valid K, evidence of that K, and the K must be specifically enforceable.
- There is an offer to [buy/sell], acceptance by [x taking the money / entering K], and valid consideration [money for property / deposit]. The agreement contains sufficient certainty as the site is defined, the amount is agreed and there is a date for transfer. There appears to be the required intention to create legal relations evinced by the K and its terms.
- By executing the K, an equitable mortgage exists (*Barry v Heider*).
- For there to be sufficient evidence of a K, the K must be in writing or there must be an oral agreement supported by sufficient acts of part performance (s 126 IA; *ANZ v Widin; Regent v Millett; Pipikos*)
- There will be a SE contract where there are no bars in equity:
    - Cannot cause undue hardship to D.
    - P must come with clean hands.
    - Cannot require constant supervision of parties.
    - P is ready, willing and able to perform K.
    - Damages would be inadequate.