

## PRINCIPLES

**Key conflict** = s 62 (just fraud) vs s 183 (fraud, error, void/voidable instruments). Do void instruments have the same status and effect as fraud?

### Deferred indefeasibility

= registration of void instrument only root of good title, needs further transaction. *Gibbs, Boyd* minority Still relevant where person registers through fraud (in that case it's an s 183 situation, so no indefeasible title until further transaction).

### Immediate indefeasibility

= registration of void instrument immediately confers good title in the absence of fraud.

*Assets* (implied), *Boyd, Frazer*

*Breskvar*: one step further, even fraudster gets legal title under void instrument although defeasible by the person defrauded, registration not only perfects but creates title which didn't exist before.

*Westpac*: not entitled to have a void instrument registered even if doing so validates the instrument & gives title.

All find that *Gibbs* is confined to situations of fictitious persons.

Confirmed in LTA 2017, BUT limited by:

### Sections 54-57 LTA 2017

Step back from immediate indefeasibility, court has power to correct/cancel title in cases of void instruments. Potentially very wide power.

*Gibbs v Messer*: Husband gives power of attorney to C, C inserts HC's name, mortgaged to McIntyres, *Assets*: Cooper facilitates transfers, non-compliant with MLA, *Beale*: improper NLC division of Maori land, transfer to Burt then Beale, *Boyd*: tramway proclamation void, *Frazer*: mortgage to Radomski, sale to Walker, *Breskvar*: blank memo of transfer, W's name fraudulently inserted, Bs place caveat, A Pty Ltd purchase but not registered because of caveat, competing equities, *Westpac*: W's loss not from C's negligence but from fact the instrument was void.

## STATUTORY EXCEPTION

(1) express statement? (2) did Parliament "by proper implication" intend LTA to be overridden (*Miller*)? *Housing Corp/Warin* factors: legislative history, wording, objective, public policy, practical considerations

### LTA vs TTWMA: s 55(4)(c) LTA 2017

= for Maori freehold land, court can consider whether a person has failed to comply with TTWMA when deciding whether to cancel registration.

But insufficient to fix conflict: only one factor, not mandatory, only void instruments, not if there's another transaction (s 56), must be manifest injustice as well.

*Miller*: company gets mineral rights/licence, rights assigned to Crown, are mining licences registrable under LTA or MA separate code? *Housing Corp*: HC has mortgage over Maori land, no endorsement pursuant to MAA, *Warin*: purchase of Maori land, transfer nor confirmed pursuant to TTWMA, LTA overrides because legislative intent, cf. BFPV under s 183, LTA register clearer than MLC records, objective of retaining Maori land not absolute, TTWMA anticipates Maori land will be converted into general land.

## FRAUD EXCEPTION

Provided in s 62 LTA 1952, s 52(1)(a) LTA 2017

"Fraud" defined in s 6 LTA 2017: must be brought home to RP or agent.

**(a) Against RP**. Actual fraud in sense of dishonesty. Mere omission to inquire not fraud, but suspicion + omission to inquire may be fraud (*Assets*), uncertain what "dishonesty" is.

**(b) Against holder of unregistered interest**. Harder to show. Only if RP/agent had actual knowledge or wilful blindness of interest AND intended to defeat it at time of registration. Constructive notice not enough! "Intention" ambiguous: *Bahr* = "designed object to cheat" only and knowledge of interest or knowledge that registration will defeat is not dishonest, *Salmond J in Assets* = would an honest person go ahead with the transaction, knowing what he/she knows?

NO SUPERVENING FRAUD: s 6(2)(b)

Note: s 63 LTA 1952 = fraud where title derived from or through a person registered through fraud (*Cassegrain*)

*Loke Yew*: undertaking & repudiation, *Harris*: no fraud as no knowledge of longer lease, *Esftratiou*: purchaser suspicious & didn't inquire = fraud but very arguable case (s 6 says constructive notice not enough, *Assets* says failure to inquire not enough), *Sutton*: right of way, purchasers honest in mistaken belief, no undertaking, no intention to defeat, *Dollars and Sense*: N's forgery = fraud and N was DS's agent, *Cassegrain*: C's title as sole RP = s 63 LTA 1952, no s 183 as no consideration.

## IN PERSONAM EXCEPTION

Confirmed in *Frazer*. Conceptually not an exception anyway. Often through constructive trust.

Requirements from *Duncan/Nathan*:

(1) not inconsistent with Torrens

(2) unconscionable conduct on part of current RP eg. breaching a code of practice (*Dollars & Sense*), giving an undertaking and later repudiating (*Bahr*), an unconscionable outcome (*Duncan*)

(3) recognised cause of action = evidence of relationship independent of the LTA.

Upholding RP's personal obligations, not challenging title.

*Taitapu*: reservation of mineral rights, omitted by mistake, constructive trust, *Bahr*: right of repurchase, undertaking, constructive trust, *Duncan*: contract illegal but LTA overrides ICA so court finds that the outcome is nonetheless unconscionable, *Nathan*: DS didn't adhere to codes of practice, unjust enrichment, *Regal*: s 60 PLA 1952

## LEASES

**Licences:** not registrable, personal right only, only to extent of permission given, can't assign.

**Requirements:** (1) fixed/periodic term (2) certain premises (3) EP (4) formalities (5) rent not essential.

Fine if limitations on use of land OR landlord can enter/inspect IF in the lease agreement (*Fatac*)

**Negating EP:** no intention to be legally bound, pursuant to something extraneous to occupation such as an employment relationship, small portion of larger area, section not designated, landlord can come whenever, labels irrelevant except as evidence of intention to be bound (*Fatac*)

**Assignment:** original lessor liable for all covenants, original lessee/subsequent assignors liable for rent and all covenants (s 241 PLA 2007), new lessee liable for rent and all covenants (s 240(3)), burden and benefit of all covenants pass to new lessor (ss 231, 233)

### QE: Elements

(1) substantial interference with tenant's possession

(2) by the landlord or those claiming under: landlord can generally be liable for wrongdoing of another party eg a tenant

(3) not attributable to pre-existing condition: can't be something that existed before lease (*Southwark*)

(4) remedy available eg. injunction, damages, cancellation of lease.

Overall = act on lessor's part preventing lessee from enjoying premises for purpose for which they were leased (*Kalmar*). "Enjoyment" = full benefit of rights not deriving pleasure. Substantial interference, need not be physical (*Kalmar*). Excessive noise can be enough (*Southwark*)

### NDG: *Tram Lease* elements

(1) activity on land also owned by landlord

(2) activity done/permitted/controlled by landlord

(3) substantial interference with use of premises

(4) frustrating the purpose for which the lessee took the premises.

Overall = rendering premises "materially less fit" for the purpose for which the premises were leased (*Nordern*). Court can imply a term which landlord cannot derogate from (*Kalmar*, *Tram Lease*). Breach always enough to justify cancellation (*Nordern*)

**Repair:** standard = that required by "reasonably minded tenants of the kind envisaged at the commencement of the lease" (*Proudfoot*). Generally don't have to place premises in good condition if they didn't start out like that (s 223 PLA 2007). But, not always sufficient to maintain in current condition (*Mobil Oil*). Doesn't require transformative change (*Mobil Oil*)

**Frustration:** only if unforeseen event renders performance/purpose of contract fundamentally different from what parties contracted for. Very rare. Narrow purpose or short lease = easier to frustrate, and vice versa (*RCB*)

## COVENANTS

**Benefit:** CL only passes if "touches and concerns" land BUT now s 301 PLA 2007 = all covenants pass unless agreed otherwise.

**Burden:** CL doesn't pass BUT equity binds BFP with notice (*Tulk*: only if "touches and concerns" land and there is a common intention that the burden will run with the land) AND now s 302(2) all covenants pass unless agreed otherwise.

**Versus easement:** Covenant = promise regarding one's own land, created through a promise in a deed/instrument, only equitable, can't be registered, only noted under s 307 PLA 2007. Easement = a right over someone else's land, can be registered, can be legal, created through grant. But, very similar (especially negative covenants and easements).

**Covenants in gross:** not recognised/don't pass (*AFFCO*) BUT s 242 LTA 2017 does recognise them. Alternative way of enforcing is to register a memorandum of encumbrance.

## EASEMENTS

### Requirements (*Re Ellenborough Park*)

(1) dominant and servient tenements

(2) easement "accommodates" dominant tenement: right connected w/ purpose of dominant T, attaches to land not individual, not just increase in value

(3) dominant and servient owners different: now not necessary in NZ

(4) right capable of forming the subject matter of grant: not too broad/vague, of some utility or benefit, not inconsistent with proprietorship/possession of servient owners.

**Scope:** what's provided in grant and no more (*Barry*). Dominant owner can't have the objective of taking advantage (*Peacock*).

**PLA 2007 Part 6 Subpart 3:** landlocked land, order for reasonable access. Test from *Squally Cove*:

(1) s 326 landlocked?: reasonable access = physical access of kind reasonably necessary to use land for purpose granted. Physical access in fact, present fact, current need, legal access (not dependent on goodwill), need not be "best" access (*Murray*), characteristics of area, not always vehicular.

(2) s 329 order for reasonable access? Parties' knowledge of access at time of acquiring, how land became landlocked, conduct of parties, hardship to either party.

(3) s 330 conditions on reasonable access?

**Modification:** ss 316 & 317 PLA 2007, includes enlargement, power is broad, only servient owners can apply (*Harden*)

**Rectification:** only if common intention inconsistent with registered instrument, cannot prejudice BFP w/o notice (*Davey*)

## MORTGAGES

Mortgagor obliged to pay: principal (debt), interest and expenses.

Covenant and security are separate (*Westpac*). Where registration renders a void instrument valid, any covenants are enforceable to the extent needed to secure repayment BUT not enforceable against the mortgagor personally if it's not the mortgagor's loan (*Duncan*).

Right of redemption can't be hampered/crippled (*Fairclough*). Once redeemed mortgagor free of all obligations.

**Types of clogs:** right of R illusory, long postponement (but equity won't interfere with freedom of contract if parties are at arm's length: *KET*), restraint of trade, mortgagee's option to purchase (but can be in a separate agreement: *Jones*), collateral advantage (if unconscionable, goes beyond term of mortgage = clog, or inconsistent with right of R: *Kreglinger*. After debt repaid automatically becomes a clog).

**Sections 97 & 98 PLA 2007:** mortgagor has right to redeem any time before sale BUT has to pay interest for remainder of term.

**Section 120 CCCFA:** oppression is broader than unconscionability, includes breach of reasonable standards of commercial practice, depends on what the mortgagee knew, mortgagee need not inquire further if they know the mortgagor has received independent legal advice (*GE Custodians*).

**Section 176 PLA 2007:** mortgagee owes duty of reasonable care to obtain the best price reasonably obtainable at time of sale. Only arises once mortgagee decides if and when to sell, "reasonable care" depends on facts, "best price" = in relation to purpose of s 176 to protect vulnerabilities (*Apple Fields*)