Indefeasibility of Title

Principles of Torrens System	Previous ways of recording title: • Old statute of fraud: Ks for the sale of land must be evidenced in writing. Reflects policy that transfer of land must be written down. One transfer was record of title by **private conveyance**. Buyer and seller have copy of the K. Third copy deposited with the lawyer. Land records scattered everywhere. Not good. • **Registration of deeds:** Central system that registers deeds. All copies of private conveyances held. We have this still: Deeds Registration Act 1908. Historical now. • **Torrens System:** Registration of *titles*. Different to other 2 systems. Deed registration means the Ks are copied and stored. LTA based on idea of title by registration. Torrens focuses on the parcel of land itself and NOT the transactions. Unit of land is the basis of record rather than recording the K. Land units defined carefully – includes survey of land boundaries. "Title" is created when Crown Grant made. Records all transaction that affect the land. Current situation is ascertainable at a glance e.g. encumbrances, mortgages. Now computerised. **Background** Created by Robert Torrens. Supported radical reforms to English conveyancing. Lead to Real Property Act 1858 in South Australia. Copied by NZ. After 1870, all Crown Grants under TS. In England, only the land owning gentry owned land – leased this to tenants. No freehold market at the time. Deeds system was therefore sufficient. But difficult and costly to get lawyers to check title. No need for cheap, fast and efficient system of statutory conveyancing. Australia and NZ – people wanted to acquire land easily and quickly. Cheap conveyancing necessary therefore. Premable of the Real Property Act: says that transfer system is complex, inefficient and unsuitable to requirements of State inhabitants. Wanted cheap, fast, and effective system. NZ principles reflected in **s 3 of the LTA:** • Provide security of ownership i.e. State guaranteed title. • Facilitate transfer and dealings with land • Compensate for loss resulting from system • Provide register of land the describes and records ownership **What is on the TS?** General land but not Maori customary land. Maori freehold land is subject to own law. But also registered under the TS and recorded in the Maori land court recording system. Dual recording system. Records can conflict. Crown land usually not on TS – only registers land that has been granted from the Crown. But PWA allows Crown and LocGovt to compulsorily acquire land. If so, the title will be destroyed and it will fall back into the Crown's pool of land. Exceptions: Crown owns State housing. These are registered.	

	Interests: Equitable interests are not registered. LTA only registers legal interests – s 128 LTA 1952. Under 2017 LTA: • Section 153 – Trusts must not be registered. Has no effect if registered. Land held under Trust BELONGS to trustees. Equity still enforceable against the trustee in personam however. • But you *can* note restrictive covenants (which are equitable). • Caveats (s 138) are	
LTA Key Principles and Sections	**Changes to the Common Law of Property** *Nemo dat rule* changed – under this rule, defective title remains defective. LTA removes this rule. Title protected by the LTA. Main purpose of the TS is to ensure that a person dealing with land is not affected by any defects in the vendor's title. Bona fide purchaser gets good title – the registration itself validates C's title. System favours purchasers/mortgagees. This is through creating an *indefeasible title*. Substantive change to the law. **Three core principles of LTA** **1.** Mirror principle: The record is a mirror that reflects accurately and completely the current facts material to the title. **2.** Curtain principle: Register is the source of info. Purchasers do not need to go beyond the register and concern themselves with trusts and equity behind the curtain. **3.** Compensation: State guarantees your title. If LTA causes you to lose land, then State will compensate you. Removes need for private insurance. **LTA 1952 and 2017** Main changes: (1) Overrules *Gibbs v Messer*: (2) Defines fraud; (3) Narrow's registrar's power. Old Act allowed wide power to cancel or correct the title – a "time-bomb" to indefeasibility under old power; (4) Judicial discretion regarding void instruments. Key sections: • Section 24: Title does not pass until registration of the instrument. Signing K/executing memorandum does not pass title. Until registration, there is only an equitable interest. Legal interest conferred by registration. Bona fide purchaser without notice of the equity can easily defeat equity. • Section 35: Priority of instruments. Priority is based on registration rather than on signing the instrument. Flows from s 24. This substantially modifies nemo dat rule. • Together, ss 24 and 35 mean that a registered instrument always trumps an unregistered one. Signor merely has an equitable interest. Bona fide purchaser without notice beats unregistered person. If both unregistered, then there are 2 competing equities and we usually look to priority based on which equity came first. **System of title by registration.** • Section 44: Evidentiary effect of documents. Effectively, images of registered instruments are conclusive	

	evidence of what it contains. Image of record of title is conclusive evidence of the **title.** • Section 51: Title by registration. Registered titles cannot be set aside. RPs title is paramount – this restates s 62 of the 1952 Act. This states the law from the cases. Registration doesn't just perfect defects in the vendor's title. It ALSO means that you get whatever is on the title. The RP holds the title as notified on the register. Once on the register, you hold the estate absolutely and free from everything not on the title. This is the **indefeasibility** idea. Subsection (5) says nothing impacts the in personam jurisdiction of the Court though. Consolidates the case law. • Section 52: If the RP or agent acquires the title through fraud, then it is no indefeasible. Also subject to states or interests noted on the title. Old Act: • Section 62: RP protected against ejectment – title cannot be set aside. • Section 62: Fraud and other exceptions. • Section 182: Purchaser from a RP is not impacted by notice. B not required to check how vendor got title. If B gets registered, title is not impacted by notice of trusts or unregistered interests. Knowledge that this exists cannot be imputed as fraud. **Applies in the new Act in s 6(4) under fraud definition: says that equitable doctrine of constructive notice does not apply**. • Section 183: Protects bona fide purchasers. BFP cannot be taken off register just because they have transacted with someone who has acquired title by fraud. Removes nemo dat rule. Not reproduced in 2017 Act. New Act **Void/Voidable Instruments in 2017 Act** Courts have largely settled on immediate indefeasibility. But New LTA includes some protections: • Section 54: Can apply to the Court to alter the register. • Section 55: Court can only make an order in cases of manifest injustice. Parliament gives bigger power to Court to decide void/voidable instruments cases. • Section 56: Must not make any order if the estate/interest is transferred to a third party.	
Gibbs v Messer	**Facts** Mrs Messer is the RP in Australia. Leaves for a while. Husband gives Mr Cresswell power of attorney. Cresswell transferred to Hugh Cameron who was a fictitious person. Documents showed that Messer sold the land to Cameron. Cresswell got the documents registered. McIntyres loaned money to Cameron as mortgagees and the property was mortgaged. Cresswell fled with money. Messers land now belonged to HC with mortgage to McIntyre. **Issue** Was the mortgage indefeasible? Did the McIntyre's have good title? **Dicsussion** Under nemo dat rule, the Ms would not have good title because bought off a fraudster. But LTA changes the rules.	The objective of the TS is to save persons from having to go beyond the register. This is accomplished by protecting bona fide purchasers who transact on the faith of the register and purchaser property. Protection for purchasers is limited to those who actually deal with and derive rights from the RP. The McIntyres were not transacting on the faith of the register itself (which concerns title to the land) and

	Messers had 2 claims: (1) Argued the mortgage was invalid; (2) If mortgage valid, then argument for compensation from the State. Under either claim, the Messers not out of pocket. But if McIntyres lost, then they don't get compensated. They didn't lose out because of LTA; lost out because of void mortgage. Under s 183, innocent bona fide purchasers get secure/good title even if the vendor's title is defective. Here, if HC was real, the Ms are protected and mortgage indefeasible. Problem: HC was made up person and mortgage forged by HC. Mortgage instrument void. Therefore, Ms not in position of "C" (i.e. s 183), but in position of B who registers under a void instrument. Tried to argue that HC was actually Cameron so that they could be person C. Privy Council rejected and said HC represented as agent of Cameron and never claimed he himself was Cameron. Void/voidable interest question: • Object of TS is to save persons having to go beyond the register. Accomplished by protecting bona fide purchaser who rely on the register and purchase property. • If HC were *real* whose name Creswell fraudulently registered, his title would be liable to being cancelled if Messers challenge because obtained by fraud. Furthermore, the mortgage would have been protected under s 183 and be a valid encumbrance on the land. • But protection for purchasers is only limited to those who actually deal with and derive rights from a proprietor. People who deal with a person who is using forged name are not dealing with the RP and not transacting on the faith of the register itself. • Cannot obtain indefeasible title by registering a void instrument but they CAN pass on valid title to third parties. They will have good title. • Forged instrument registered can become the root of a valid title for a bona fide purchaser by force of the Statute. There is no enactment, which makes indefeasible the registered right of a person under a null deed/VI. • Duty of ascertaining the identity of the principal who an agent purports to act for and ensuring that a valid deed is executed lies on the purchaser/mortgagee. **Later cases use this as a way of narrowing the ratio of the case**. Purpose of the TS is to save person from going behind the register. Why should the Ms need to check? Could argue they weren't going behind the register – instead they were ascertaining the identity of the mortgagor. **Key point from Ruiping revision note**: PC said that s 183 protects people who deal with a person who has obtained title by fraud or registered under a void/voidable instrument. But no protection under s 183 here as there is no further transaction. Instead, the McIntyre's have registered under a void instrument and so their mortgage is not indefeasible. The Ms are not person C. This issue was caused by a loophole in the drafting of ss 183 and s 62/63 of the LTA 1952.	were not dealing with the RP. Cannot obtain indefeasible title by registering a VI. VIs can be the root of a good title for a bona fide purchaser by force of the statute. But there is no statutory provision that perfects a defective instrument and confers indefeasible title upon those registering under a null deed. (Drafting loophole between ss 62/63 and 183 exposed). The duty lies on the purchaser to ascertain the identity of the principal who an agent purports to act for and ensuring that a valid deed is executed. (This is the "identity" issue).

Assets v Mere Rohoi	**Facts** Key point: this is a classic case of indefeasibility. • Assets was a UK coy to take over the City of Glasgow Bank's assets. Rohoi represented Maori. • Case dealt with three different blocks of land. • Native Land Act at the time imposed rules for alienating Maori customary land. Required there to be investigation, memorial of ownership, memorandum of transfer (must be approved by the Native Land Court), certificate of completion of sale, order of freehold tenure, then Crown grant. • Cooper was the owner of all three blocks of land and all land ended up with Assets. Maori respondents raised allegations of fraud against Cooper, and fraud by Assets in obtaining registration. • Court proceedings also defective – it acted without jurisdiction. E.g. memorial of ownership not signed, transfer issued without this memorial etc. • Registration under LTA was based on void documents therefore. • Assets was alleged to be fraudulent because of backdating of documents by the Chief NLC judge. **Court of Appeal (NZ)** Edwards J was critical of the MLC. Title should never have been issued. Found fraud on Assets' part. **Arguments** Assets argued that registration is conclusive proof of title. Also argued that the LTA should take priority over the defects in the NLC in breach of the NLA. Maori argued that the land was not transferrable unless compliant with the NLA. Registration instrument was defective and there was fraud. **Privy Council Discussion** Started by discussing the LTA: • Certificate is conclusive evidence of title – s 44. • Once on the register, your title is not impeachable • No action can lie against the RP to recover the land. Registration is an absolute bar – s 62/s50 • Fraud exception • Registration vests title – s 24. • No unregistered instrument vests title. • Registrar's power to correct/cancel is large but cannot be exercise to the prejudice of a registered bona fide purchaser. If s 183 applies, then registrar cannot cancel. Cannot set aside a Crown grant either. <u>Lack of compliance with the NLA issue</u> The PC said that the rules for alienating Maori land under the NLA are just formality issues and they do not change the substance of the rights. Backdating by the Chief Judge was fine – the judge was just completing the formality	The Courts judgment was founded on the idea that registration is conclusive evidence of title. Once registered, you have a perfected and indefeasible title. This was based on a reading of s 44 (conclusive evidence of title), the bar on claims against the title (s 62), the idea that registration vests title (modern s 24) etc. ***Conclusiveness of registered title absent fraud***. <u>Non-Compliance with NLA</u>: Court said the rules for alienating Maori land were mere formalities and do not change the substance of the parties' legal interest in the land. Backdating was fine. Sidestepped Rohoi's argument that non-compliance meant it was a VI and title never passed. Registrar doesn't need to check the instrument for validity. Also, confined *<u>Gibbs</u>* to ficitious persons. <u>Trusts:</u> Trusts can be superimposed onto the RP's title e.g. relationship property context. Nothing in the LTA impacts the in personam jurisdiction of the Court. But Courts are unwilling to *burden* the RP's title by superimposing a trust. But if the beneficiary is a rival claimaint who can prove no trust apart from their own alleged ownership, then recognising a trust would unduly burden the title and defeat the benefits of registration. There must be dome external relationship to the LTA. <u>Fraud:</u> Fraud means "actual dishonesty" by the RP or their agent. Does not mean constructive fraud – unconscionable conduct. Fraud must be brought home to

	requirements. Maori argued that because it was a void instrument, the land was not passed out of their hands. Court says the Registrar does not need to go behind the order and check for validity. Once registered, the title is indefeasible. Court narrows Gibbs to its particular facts. Case was only about forgery and transferring to a non-existent person. Privy Council didn't overturn *Gibbs*: instead, narrowed the ratio to fictitious persons. This is how they get around the argument by Maori that the void instruments meant the land never passed out of their hands at all. Court didn't engage in the issue of Vis at all. Trusts Maori argued that Assets as RPs held the land on trust for the Maori people. Although Assets was the RP, it was burdened by a trust and had fiduciary duties to the Maori beneficiaries. Privy Council reluctant to allow trusts be superimposed over the RPs. Courts do impose trusts in some circumstances though – e.g. relationship property context where the wife makes a contribution to the deposit, but the man is the only one registered on the title to the property. Courts will impose a constructive trust over the house and the wife will be a beneficiary of the trust. Court refuses to recognise the Trust in these circumstances. Trusts can burden RPs in the in personam jurisdiction. But if the beneficiary is a rival claimant who can prove no trust apart from own alleged ownership then treating as a beneficiary is to destroy the benefit of registration. Cannot burden RP's title just because you are a rival claimant. There must be some external relationship that demonstrates a trust relationship exists independently of the LTA. Fraud This definition was adopted in the new LTA. Fraud means "actual" fraud – dishonesty and NOT constructive/equitable fraud. Constructive fraud is where the Court declines to allow the K to be enforced because of unconscionable conduct. This doctrine is too uncertain in the land context. Fraud must be brought home to the person whose title is impeached, or to their agent. Have to "know" or be connected to the fraud in some way. Just because you could have found out doesn't mean you have the obligation to investigate. BUT if suspicions aroused and abstained from making inquiries for fear of learning the truth, this can be fraud i.e. **wilful blindness.** "Forgery is more than fraud". PC trying to distinguish *Gibbs* – implies that forgery is its own category. This is very confusing. The new Act recognises forgery as a type of fraud contrary to *Assets*. PC rejected all factual arguments of fraud. Constructive fraud influenced the CoA's decision too much. PC doesn't think Assets had any actual dishonesty.	the person whose title is impugned or to their agent. Must have knowledge of the fraud or be connected in some way. Constructive notice is insufficient (s 182 of old LTA; s 6 of New LTA). Just because you could have found out doesn't mean you are fraudulent. But wilful blindness is fraud. "Forgery" is more than fraud – *Gibbs* is its own category.

	<u>Conclusions</u> Court based whole judgment on the conclusiveness of the registered title absent fraud. Courts recognise a conflict between the NLA and the LTA. PC effectively says that the LTA prevails. PC didn't talk at all about void/voidable instruments. This is just our analysis. The PC didn't discuss this really. Court didn't engage in assessment of the competing Acts either.	
<u>Beale</u>	**Facts** Classic s 183 case. The Maori owners were in possession of the property. Beale (the RP) sought to evict the Maori owners. Land was fraudulently sold to Mr Burt. Maori owners applied for a rehearing – didn't deal with other application. Burt mortgaged then defaulted. Land sold to Mr Simmonds. Simmonds onseold to Beale. Beale is now RP. Court held that Burt was fraudulent. **Decision** Turned on s 183. The Court said that Beale purchased from Simmonds, who was a bona fide purchaser who	Classic s 183 case. Mr Burt (original RP) was fraudulent in obtaining the land, and there were irregularities in concerning the NLA. But the Court held that Mr Simonds and Mrs Beale were bona fide purchasers without notice and were thus protected under s 183 of the Act. They had indefeasible title to the property unless any

	purchased from Burt (who was fraudulent). Beale is *also* a bona fide purchaser and therefore obtains an indefeasible title. Solely turns on s 183. Adverse possession: Argument also rejected. Maori argued that even if Beale's title was protected, the Maori were in adverse possession. But section says that land can only be defeased by adverse possession argument if it is the first time the land has come under the LTA. Court says that this argument does not apply to the current case. Notice argument: Beale knew that Simmonds had never been in possession and PROBABLY knew the Maori were in possession. Court didn't deal with notice because already held that Beale purchased with good faith and was protected by s 183. • Section 182 says that notice of a trust or unregistered instrument does not impact the RPs title. Knowledge of this shall not be imputed as fraud. • But a fine line between knowledge/notice and wilful blindness in *Assets*. • Edwards J held that Beale had no knowledge of the fraud or irregularities in the NLA. • But Judith Binney research found that Beale might have had knowledge. If case determined today, Court would likely look harder at these factual questions. Interface between LTA and NLA: Court didn't consider this. But if the provisions of NLA weren't complied with, why did the LTA take priority? Court assumed the LTA prevailed. But the LTA is not a constitution and doesn't necessarily need to take priority in every situation. **Unfair/harshness:** Beale demonstrates how harsh the system can be. Beale (because of s 183) was able to evict the Maori village.	of the exceptions applied. Fraud/notice: Beale knew that Simmonds was never in possession and probably knew that the Maori were always in possession. Edwards J held that Beale had no knowledge of the fraud or irregularities in the NLA. Therefore she purchased in good faith. Court thus did not look into the idea of having notice of the Maori possession (s 182 barred) or wilful blindness of fraud. Judith Binney research challenges this and suggest that Beale may have had actual knowledge and been fraudulent. Interface: Court didn't go into this. It assumed the LTA took priority and conferred indefeasible title despite defects in the NLA process. Unjustified to assume – the LTA is not a constitution. Unfairness: This is the key point of the case. Because of s 183, Beale was able to evict the Maori owners.
Boyd v WCC	**Facts** Boyd owned land in Wellington. City Council acquired the land under legislation. Council registered the land under the PWA. Challenged legality of taking to get the property back. PWA said that if the land had a house on it, the Council had to get the approval from the Governor-in-Council or get the consent of the owner. Council didn't do this. Therefore, the proclamation was void. Registration was under a VI. **Discussion** Central issue: If the proclamation was void, did the Council have a good title? The Council rested its title on a void proclamation – similar to the position of the Ms in *Gibbs*. The Council has also not on sold the property so s 183 does not apply. Boyd argued that this is deferred indefeasibility. Majority judgment • **Assets** case applies. No need for Court to consider the validity of the proclamation and whether it is void. Regardless, the Council will have good title as the title was registered absent fraud, which is conclusive evidence	**Majority judgment** *Assets* case was applied. *Assets* says that registration confers indefeasible title absent fraud, and is conclusive evidence of title. The validity of the instrument is irrelevant post registration. *Gibbs* confined to its facts and where there is any conflict, *Assets* prevails. There is no issue of forgery of fictitious persons here and so *Gibbs* does not apply. **Minority – Stringer J** The majority misinterpreted *Assets*. This case was only about s 183 and bona fide

	of title. Conclusive authority the Court must obey. • Assets stands for the principle of indefeasibility of title obtained absent fraud. • *Gibbs* distinguished and only applies to fraud and forgery, and fictitious persons. If any conflict between the 2 cases, then *Assets* prevails. Because the Council did not forge any documents, then *Gibbs* was not applicable to these facts. • Majority conclude that the Council can rely on its registration as granting indefeasible title. Minority judgment – Stringer J • Majority misinterpreted Assets – this case concerned bona fide purchasers for value absent fraud. Was a s 183 situation, and so doesn't apply here. • *Assets* also misinterpreted *Gibbs*. Gibbs talked about 2 issues: (1) Identity issue; (2) Void title issues. Assets only considered the identity issue, which is wrong. *Gibbs* is actually authority for DI also. Minority judgment – Salmond J • Defines DI: a void instrument is null and void between the parties (if no third party has been involved) regardless of registration and creates NO indefeasible title unless a third person has purchased in good faith on the faith of the registered instrument has supervened. Only becomes a root of good title where a s 183 situation has occurred. Otherwise, your title is defeasible. • Council became RP under a void instrument between Boyd and the Council. Registration does not perfect a void instrument. Therefore, Council does not have a good title. • Registration alone cannot pass title – there **must** be a valid instrument. Just like land cannot pass by a valid instrument without registration. Objectives of the TS: • DI is more consistent with the objectives of the TS than immediate indefeasibility. • Abolition of nemo dat rule: object of TS is to save persons dealing with the RP from having to go behind the register to investigate the history of the author's title. Section 183 secures this objective by protecting bona fide purchasers from defects in the vendor's title. Section 183 abolishes the nemo dat rule for this purpose. • Imperfect title and imperfect transactions are distinct. Registration perfects an imperfect title but NOT an imperfect transaction/instrument. Fixes defects in title (e.g. fraudulent) by abolishing nemo dat rule. But not designed to perfect bad instruments. Immediate indefeasibility is an extension of the doctrine of indefeasibility. • *Gibbs* should apply here. False distinction between forged instruments and void instruments. Case lays down principle that registrations of VIs do not give good title. • *Assets* didn't say anything about VI – never said the immediate indefeasibility was the approach. It also didn't overrule *Gibbs*. The entire case was decided based on the principle of bona fide purchasers. Have to read these cases as consistent with one another. Statutory interpretation:	purchasers absent fraud, and did not concern VIs. *Assets* misinterpreted *Gibbs*. In that case, there were 2 issues and one of them was the idea of DI. *Gibbs* is therefore authority for the DI approach. **Minority – Salmond J** Makes 3 core arguments: (1) Property legal arguments; (2) Objectives of the TS arguments; (3) Statutory interpretation. Property arguments: Registration does not pass title without a valid legal instrument any more that a valid legal instrument cannot pass title without registration. VIs remain null and void inter se even post registration. VIs do not create indefeasible title: they are only the root of a good title where s 183 applies. Objectives of TS: TS abolishes nemo dat rule to save persons dealing with RP (and deriving rights therefrom) from having to go behind the register to investigate the history of their author's title. Section 183 is introduced for this purpose. TS will perfect defective titles but there is no provision that perfects defective instruments. Imperfect title and imperfect transactions are distinct. Registration fixed defective titles (e.g. fraud) only. Immediate indefeasibility is an extension of the doctrine of indefeasibility. *Gibbs* should apply. Statutory interpretation: Section 183 specifically states that bona fide purchasers get good title despite defects in the vendors title (e.g. fraud) and despite

	• Looks at ss 62, 63 and 183. Section 183 specifically says that if you get title from a fraudulent person or from someone who registered under a VI then you get good title. • Key point is that there is a legislative GAP. Section 183 implies that VIs are an exception (much like fraud in s 63) to the RP's otherwise indefeasible title. • BUT if a person who registers under a VI (i.e. immediate indefeasibility) gets good title, then you don't need to protect third parties deriving title from these people under s 183. • Registration under a VI cannot therefore destroy the interests of an innocent prior registered owner. Registrar should rectify this by removing the wrongful entry as long as s 183 doesn't apply.	the vendor registering under a VI. But ss 62/63 say nothing about VIs. Statutory gap. Implied that VIs are an exception to an otherwise indefeasible title as otherwise s 183 is redundant. Registration under a VI cannot destroy the rights of an innocent prior registered owner.
Frazer v Walker	**Facts** Frazers owned property. Wife borrows money from the Radomskis and mortgages the land to them. Wife signed the document on her husband's behalf even though he had no knowledge – she forged his signature. Lawyer also signed and claimed he witnessed both signatures – false. The mortgage was registered. Wife defaulted and Rs sold the house by mortgagee sale to Mr Walker. Mr Walker is the RP and wanted to take possession. The husband was still in possession and challenged the mortgage and the sale to Walker. The CoA held for Walker. Regardless of DI or II, Walker got good title because he was the bona fide purchaser for value and knew nothing about the forgery. Protected under s 183. Walker is especially protected under II as the mortgagee's title is valid. **Privy Council Decision** Overall, the PC says that the Radomskis have good title. PC was trying to settle the debate on DI vs. II. Structure of the LTA: • Sections 42, 157 and 164: Set out responsibilities of the registrar. Section 42: Non-compliant instruments are not to be registered. Section 157: All instruments must be signed and witnessed or cannot be registered. Section 164: certification of instruments. Mortgagee documents do not meet these requirements. Frazer argued that this demonstrates that the void documents should not attract the full benefit of registration. PC disagrees. Registration must attract the indefeasibility consequences despite being void. Registration itself vests and divests title and not the correct signing of the documents etc. These provisions merely direct the Registrar to do certain things. Breaches do not change the rights of the RP. • Sections 62 and 63: Both sections make fraud a clear exception. Privy Council endorses *Assets* definition of fraud. Radomskis were not fraudulent so no issue here. • Section 75: Certificate is conclusive evidence of the RPs title. • Sections 81 and 85: Section 85 is Court's power to order cancellation or correction. PC says the power is limited: can only correct pursuant to s 63 e.g. fraud, boundaries etc. Section 81 about Registrar's power. Not a big issue now. • Sections 182 & 183: Protect bona fide purchasers. Frazer's claim that a "mortgagee" is not a proprietor is an attempt to attack Walker's title, which is barred under s 63. Only fraud and the exceptions can defeat the RP's	The Walkers were protected by s 183. Court took the opportunity to pronounce on the II/DI debate. The PC found that II was the correct approach and was implicit in the legislative design and structure of the LTA. • First block of sections set out responsibilities of the registrar: instruments cannot be registered unless signed; non-compliant instruments cannot be registered; instruments must be certified. Court says that these provisions are merely directions to the registrar and that registration attracts the full indefeasibility consequences despite non-compliance. Does not alter substantive rights. • Second block: ss 62/63 prove say RP takes the property free of any interests not registered/noted and gets indefeasible title unless fraud. Confirms *Assets*. • Third block: certificate conclusive title. • Fourth block: Court's power to cancel or correct but is limited to situations where one of the s 63 exceptions applies. • Fifth block: ss 182/183 protect bona fide purchasers.

	title. Also, mortgage creates a charge over land, which the LTA treats as an interest in land and therefore RPs. Section 183 therefore applies to Walker. Key reason that PC finds II is that the Radomskis as mortgagees have an interest in the land. Trying to attack the interest is barred by s 63, as it is a claim against the title of a RP. Therefore their title is indefeasible. **Discussing *Assets*:** Court referred to the division in *Boyd*. PC approves the majority opinion's perspective of *Assets*. RPs title is indefeasible even if derived from a VI. LTA structure supports the view of II. II is implicit in the LTA provisions. **Discussion *Gibbs*:** PC confines *Gibbs* to facts concerning fictitious persons. Distinguished between bona fide purchasers buying from real persons and those buying from fictitious persons. No similar facts in *Assets, Boyd or Frazer*. Still correct law if the 'RP' is fictitious: if you buy from this person, then you do not get good title. E.g. transferring title to a company that has been wound up and no longer exists. **LTA 2017** Section 51 says on registration, you get good title even if the RP acquired the property from fictitious persons. Therefore, if *Gibbs* decided today, the McIntyres would have a good title. Or the company example above also protected. **In personam jurisdiction** The PC says that the II principle does not deny πs the right to claim against the RP under the in personam jurisdiction. This is effectively an exception therefore. **Section 51 confirms this in LTA 2017.** **Summary** Anyone that comes onto the register has indefeasible title unless fraud or one of the other exceptions applies. Registration (regardless of whether the instrument is void) vests and divests title. Protects RP against adverse claims. Once off the register your title is also gone.	These provisions demonstrate that the RP's title is indefeasible once registered, even if they register under a VI. ***Registration itself vest and divests title.*** The PC confirmed the majority view in *Boyd* and confirmed that *Assets* was authority for registration conferring indefeasibility. Anyone that comes onto the register gets indefeasible title. Confirmed that *Gibbs* is only good law where fictitious persons issue exists. Court confirms that LTA does not impact the in personam jurisdiction of the Court.
Manifest injustice provisions	The key sections are ss 54–57. New Act endorses immediate indefeasibility but gives the Courts discretion to recognise deferred indefeasibility approach in certain circumstances. • **Section 54**: Makes clear that the section applies where person A has been deprived of land due to person B registering under a void instrument OR A suffers loss or damage by registration of B under a VI. • **Section 55:** Strictly limits Court's discretion. Can only make an order where manifestly unjust for Person B to remain the RP. Existence of forgery or dishonest conduct does not of itself constitute manifest injustice. Must also not be able to be addressed by compensation or damages. There are factors the Court can look to take into account. Discussion of s 55 factors	

	• Circumstances: knowledge of Maori possession in *Beale* might be taken into account. • Failure to comply with statutory rules etc: This is the *Boyd* situation. Arguably Boyd could just have been compensated. • Failure to comply with the TTWMA: key point is that the New LTA does not resolve the interface between the LTA and the TTWMA. Gives Court discretion to cancel title when the TTWMA is not complied with. Perhaps *Assets* and *Beale* might be decided differently? Provision probably written with this in mind. Although, they would be decided the same under this provision because of s 183 applied. • Identity of person in occupation • Nature of Estate or Interest: e.g. mortgage vs. fee simple? Maybe if mortgage, Court could take DI approach? Maybe entitlement of protection is different for these people due to the stronger interest people have in *ownership*? • Length of time of occupation/ownership • Use of land by A or B: in *Boyd*, land was taken for a train way in war-time. Might play into discretion? • Nature of improvements by A or B • Special characteristics of the land: Maori land means more to Maori people in *Beale* and *Assets* than the purchasers and land speculators. • Conduct of A or B in acquisition: Question can be whether someone has done something wrong OR even who is *more* innocent. **Section 56:** Court cannot make an order if B has transferred interest to a third person who has acted in good faith (i.e. s 183 situation). **Section 57:** Registrar must give effect to the Court's order.	
Breskvar v Wall	**Facts** Key point is that the competition in previous cases has been between the previous owner and the current RP: the current title is being challenged. Here, the competition is between two unregistered parties. Neither was the RP. B gave blank memo of transfer to Petrie to secure a loan. B could effect the transfer to protect himself if B defaulted. This breached the Stamp Act. P transferred the land to his grandson Wall. He was acting as Wall's agent. Then immediately transferred to Alban. Alban was bona fide purchaser and knew nothing of Wall's fraud. Alban didn't register straight away. B found out was no longer registered so lodged a caveat. **Court decision** B was the π and wanted land back. Real competition was between B and Alban. If A were registered, would be protected by s 183. But this wasn't so. Therefore, Wall's title had to be determined first.	To win, B had to show either that Wall had no title at all (because then nothing could be passed), or that B's claim was to be preferred to A's. Wall's title: Wall has a valid legal interest in the property. The property was acquired through fraud and so between B-W, B can compel W to transfer the title. This is an equitable interest. However, W still gets a legal interest despite fraud and registering under a VI. *Frazer* confirmed registration under a VI still confers title: registration vests and divests title. Registration confers

	Court held that Wall's title was impacted by Petrie's fraud. Between B and W, Wall doesn't have a good title. If there hadn't been a transfer, B could get the land back. Resolving the competition between B and A: • B attacked W's title on 2 grounds: (1) Fraud; (2) Registered under a VI. Because W had no valid title either way, then W could not pass any title on. A must be registered to receive protection. • Menzie J summarised the issue: First objection is that W's title was obtained illegally by a VI. Second objection is that it was obtained by fraud. B must show that W had NO title at all (because if so, then cannot pass anything on at all), OR that B's claim is to be preferred to A. • Court said that despite the fraud and VI issue, W had a title that it could pass on. Wall still had a legal interest in the property. The title was defeasible, but he still had a title that conferred a legal interest in the land. Court followed *Frazer* and said that Wall had a valid title despite registering under a VI. • Between B-W, B can win. But Wall still has a title that is enforceable against all the rest of the world. Certificate of title is conclusive evidence that Wall is the legal owner of the land as TS is title by registration. Registration confers the title no matter whether you register under a VI or are fraudulent. But if you are fraudulent, you are bound to convey the title back to the defrauded party. The register is not just a system for lodging titles – it is what confers the legal interest. The title is not just the title the previous owner had; it is the title that registration itself has vested in the proprietor. • Once on the title, you get immediate indefeasibility absent fraud. B could sue to recover the land from Wall. B's title would therefore trump Wall's if no further transfer. Against everyone else, W has a legal title. W can pass title on therefore. B has no legal interest because has come off the register – registration divests title. But he has an equitable interest because defrauded. Competing against A who has an equitable interest from the K. Alban is not trying to rely on a VI instrument: Wall's transfer was legitimate. B's interest will usually prevail, as it was the first equity (priority). But A won because B lost land from his own fault by granting a blank instrument, which tempted Petrie to defraud. B also still owed money. Alban was more innocent overall. Fraud If Petrie was not acting as Wall's agent when he obtained the property, or just forged Wall's signature, then Wall's conscience would not have been impacted by the fraud. Therefore, Wall's title would not have been defeasible by B.	legal rights to the property regardless of fraud or VI. Once on the register, you get II. The register is not just a system for lodging titles – it is what confers the legal interest. Therefore, W has an interest that it can pass on. Competing equities: B has no legal interest in the land. Registration vests and *divests* title. B has come off the register and so has no legal interest. But has an equitable interest as has been defrauded. Alban has no legal interest because the caveat prevented registration. But A has an equitable interest based on the contract to purchase the land. The instrument between W-A is valid. Normally the first equity prevails – but this presumption can be displaced. Here, A was more innocent as B lost the property from his own fault (tempting Petrie to defraud) and still owed money. Alban therefore won.
Westpac v Clark	**Facts** The mortgage was not registered. "Fenech" wanted to mortgage house. Produced evidence of identification to get a mortgage. But this person was actually an imposter. Mr Clark was the imposter's lawyer – he knew nothing of the fraud. Mr Clark was also acting for Westpac. The imposter executed the memorandum of mortgage and the bank	Registration of a VI does confer indefeasible title (II) per cases such as *Frazer*. But this does not mean the party is *entitled* to the registration of the void

	loaned the money. Clark forgot to register the mortgage. Wetspac became suspicious of the mortgage and rang the registrar. The registrar placed a caveat on the mortgage. Bank couldn't sue the real Fenech. Mortgage not registered, which meant Westpac couldn't sell the house either. So Westpac sued Clark for negligence. Clear DoC, breach and clear loss. Question was causation. **Arguments** Westpac: if the mortgage were registered, it would be infeasible. Bank could force a mortgagee sale and wouldn't suffer loss. This was the hypothetical scenario if the mortgage was registered. Despite the mortgage being void (because signed by imposter), if registered it becomes indefeasible. Mortgage would have burdened the real Fenech. Court recognises that if registered, the mortgage would have been valid according to *Frazer*. **Supreme Court Judgment** Blanchard J said it was an all obligations loan rather than a fixed sum. Loan agreement and mortgage instrument are separate things. The mortgage instrument refers to "you" and "your" debt. The "yous" are different. The registered moretgage would secure nothing even though it was valid. The loan agreement was the loan to the imposter, whereas the mortgage is a charge on Fenech's house and Fenech is not responsible for the imposter's loan. The two "you"s refer to different people. Mortgage only secures the REAL Fenech's debt. So the mortgage secures nothing. Elias CJ takes a different approach: • Mortgage may be valid if registered. But this doesn't mean Westpac is ENTITLED to have the mortgage registered. LTA directs the Registrar NOT to register void documents. • Failure to register did not cause the loss. Until registration, mortgages provide only an equitable charge over the land. But here, there is no equitable charge at all as it is a forged document. This made the mortgage void. No valid mortgage pre-registration therefore. • The reason Westpac suffered loss therefore is because it was VOID and not because it wasn't registered. • II doesn't impact the position of an unregistered interest. It remains a null deed and the person who wants the benefit is not entitled to its registration. This is different from *Breskvar* as Alban's transaction with Wall was legitimate – the instrument was sound. Here, the instrument is void and Westpac is therefore not entitled to registration. Salmond J distinguished between bad transaction and bad title. This *Frazer* said that the LTA says that VIs cannot be registered. The PC in *Frazer* said that this is just a directive to the Registrar not to register these instruments. But once registered, the title is perfect and registration vests/confers title. *Westpac* is the flip side of the coin.	instrument. Statutory sections (ss 42, 157 and 164) say that the registrar must not register VIs. *Frazer* held that this was just a directive to the registrar but once registered, II exists. Elias CJ's judgment is the flipside – the registrar must not register these instruments, and before this there is no entitlement to registration. Causation of loss: Because the instrument was void *and* unregistered, it created NO interest in the land. Only an equitable instrument if it was validly created. Cause of the loss was not the failure to register, but rather the VOIDNESS of the instrument. If it had been valid, it would have created an equitable charge on the land giving Westpac rights. Contrast with *Breskvar* where Wall-Alban had a valid instrument and therefore it did confer equitable rights. Policy:

	Policy considerations General considerations discussed. Perhaps in *Gibbs*, Ms may have lost because the PC was protecting the State compensation fund. In *Assets*, may have been relevant that the company was British and set up to protect British investments. Here, if mortgage had been registered, the loss would have fallen on Fenech. But she would be covered by the compensation fund so would fall on the public. Bank is suing Clark to try get him to pay from private liability insurance. Bank is trying to claim effectively that it can transfer its loss to the public compensation fund OR to compensation funds. Banks have information and resources. They should be obligated to check the identity of people they are lending money to. Draft clause included in the new LTA to this effect – imposed responsibility on the banks. This was taken out at the last moment. Section 55(4)(e) (manifest injustice) allows the Courts to draw a distinction between owners and people with lesser interests (e.g. mortgages). Perhaps policy considerations could fit into this section such as the policy considerations discussed above.	
Statutory Conflict and Indefeasibility		
Statutory exception	The LTA is not a constitution. Where two acts conflict, the Courts need to resolve which Act prevails. Some Statutes are express. PLA (s 8) says that the PLA is *subject* to the LTA. If in conflict, LTA prevails. PRA (s 4A) says every Act must be read *subject* to the PRA. Therefore, the PRA prevails over the LTA. Relationship property owned in 50/50 split. Therefore, if husband has name on the title, you cannot kick them out under LTA.	
Miller v Minister of Mines	**Facts** Crown grant of land to K Mason. Crown grant did not reserve any mineral rights to the Crown. Mason owned all the land and the minerals etc. Mason sold to a new owner, who assigned mineral rights to a mining coy. Mining company signed assignment agreement and acquired a permit under the Mining Act. Mining Company then assigned mineral rights and licence to the Crown. Land has been sold again to Miller. Certificate of title did NOT contain any reference to Crown's rights to the minerals. Miller objected and took to the PC. **Arguments** Miller is the RP. Certificate of title says nothing about minerals – he owns everything in and on the land. Claims his title is indefeasible. Relied on fact that he is the owner and the RP. Registration system = estate or interest appearing on the register is indefeasible under the Act. His estate is paramount unless another statute specifically says otherwise. Miller should hold land free of mining interests, as it is not on the title. Miller emphasised **s 182**. Persons taking transfer from RP need not inquire into any unregistered interest Crown 3 arguments: 1. Mining interest is not registrable	Argument: Miller argued that he is the RP and the title is silent on the Crown's mineral rights. According to the doctrine of indefeasibility, Miller's title is therefore paramount and is unencumbered by any interests not noted or registered on the title. He need not inquire into any unregistered interest per s 182. Ranking statutes: The Court found that the MA overrides the LTA. First, mining licences were not registrable under the LTA as the Crown granted them – only agreements inter se were registrable. If the interest was registrable, then Miller would have had an indefeasible title.

	2. Mining Act provides its own separate code 3. Special statute overrides a general statute **Registrable?** If it was registrable and not registered, then Miller is entitled to assume that he acquired all of the Estate when it was transferred to him. Because it wasn't on the certificate, he is not encumbered. Crown argued that the LTA did NOT apply because the mining interests are not registrable to show the legislative intention for the Mining Act to supplant the LTA. PC said that this was the central issue. If registrable but not registered, then Miller is entitled to take the land free of the Crown's purported mining interests. But if the mining interests are NOT registrable, then the question is whether the Mining Act is intended to override the LTA indefeasibility provisions and whether the mining rights can burden Miller's title: • Instruments must be between the parties for registration. But the Crown issued the mining licence. Therefore according to the MA it is not registrable. Crown argument on this point wins. • Court said the Mining Act is its own code. If the LTA overrode the mining act and gave Miller paramount title, then ALL mining licenses would lose their value except between the original parties. • Court said the Mining Act is not intended to be overridden by the LTA. Mining Act overrides the LTA. Ranking statutes – an express intention to override does not need to be discoverable on the face of the legislation. It can be by "proper implication" – the proper intention of Parliament. **This is the ratio of the case**. **We take a holistic approach. If a proper implication, the Court will give effect to the overriding statute because this indicates Parliament's intention. LTA is not a constitution.** **Impact of whether there interest is able to be registered** Another key point: if the particular interest is NOT registrable, then it is much more likely that Parliament intended the LTA to be overridden (i.e. because not intended to be governed by the LTA rules on registration of interests etc.) BUT Tipping J disagreed with this in *Regal* case. Although speaking in the in personam context, he said that just the fact that the interest is not registrable does not impact the paramount title afforded by s 62. Section 51 of the 2017 LTA says that interests that are not registered OR that are not capable of being registered do not affect the RP's title. *Miller* case might be decided differently today therefore.	The Mining Act overrides the LTA. **The Courts take a holistic approach to ranking statutes. It is not necessary that an express intention to override be discoverable on the face of the legislation.** Instead, the Courts will compare the statutes and assess whether it is the proper and necessary implication that Parliament intended one to overrides the other. The LTA is not a constitution. Court said that if the MA were overridden by the LTA, then mining rights would lose their value except between the original parties. Therefore, the MA must override the LTA. Registrable interests: this was a key part of the Court's reasoning. Tipping J disagreed in *Regal* and said the fact that an interest is not registrable does not impact the paramountcy of title afforded by s 62. Confirmed in s 51 of the LTA 2017.
Housing Corp	**Facts** Maori Trustee owns Maori freehold land. This is a statutory role. Resort hotel built on the land. MT borrowed money from NatWest and Housing Corporation – land was mortgaged to BOTH the lenders. The lenders ranked the mortgages equally (pari passu). Maori trustee had other creditors also. Priority was important therefore. HousingCo's mortgage instrument was defective and didn't comply with the Maori Affairs Act (predecessor of the TTWMA). Required the Maori Land Court to endorse the mortgage. NatWest complied but not Housing Corporation. But	To resolve the statutory conflict, the Court looked at 4 key points: (1) Legislative history; (2) Policy considerations; (3) Case law; (4) Conflict of laws rules. • The Māori Affairs Act was passed and amended against the background of

	HousingCo's mortgage was registered regardless. Housing Co discovered the oversight. Asked the Maori Land Registrar to endorse its copy to fix and also for the Court to endorse. Both declined. Housing Corp applied for JR and sought to validate its mortgage. **Key issues** Registration of void instruments is fine: a RP registering under a VI gets indefeasible title. These facts are different though as concerns a conflict with another statutory scheme. Instruments didn't comply with the MAA – similar to *Assets*, but the PC here didn't consider the competing statutes argument. **Judgment** Court started with II and the exceptions. Said that fraud and in personam did not apply here. Conflicting statutes: • **Legislative history of the MAA**: Passed in 1953 and amended in 1967. This was against background of *Boyd* and *Frazer*. Parliament would have been aware of the II approach. But it still did not choose to override the legislation (the LTA). Inference that the II rule was to apply despite conflicts with the Act. • **Policy**: Endorsement and recording at the MLC were purely administrative functions. Designed to promote administration rather than change the substance of peoples rights in land. No Parliamentary intenton to override the LTA by these sections. • **Case law:** *Breskvar* held that statutory breaches do not override the indefeasibility rules in LTA. This is because in this case, Wall was found to have title DESPITE the fact that the instrument breached the Stamp Act. • **Conflict of laws rules:** Usually, special overrides special and later overrides earlier legislation. Theoretically, MAA should override. But Judge says this is just a general rule and not decisive. *Frazer* has II rule and there is no legislative intention to override this rule. Therefore the LTA should prevail. Housing Corp cannot have the mortgage endorsed BUT it already has a valid mortgage as it has been registered.	*Boyd* and *Frazer,* which stood for the principle of II. Parliament would have been aware of this principle and could have expressly provided that the MAA overrides the LTA. Because they didn't, it must be Parliament's intention that the normal II rules were to apply. • The process of endorsement by the MLC is designed to promote efficiency of administration. Not intended to change the substance of rights. Non-compliance is not meant to deny a person a legal interest that they would otherwise have in the land. • *Breskvar* demonstrated that non-compliance with a governing statutory framework does not necessarily mean that you do not get II. • The rules of "special"/"general" and "earlier"/"later" are not decisive and are merely guiding tools. • *Frazer* showed II rule. The LTA prevails here and so HousingCo has an indefeasible mortgage.
Warin	**Facts** This case concerns the new TTWMA (follows the MAA). This included a provision that REQUIRED approval of the Courts for alienation/mortgages. Section 126 of TTWMA says the Registrar shall not register an instrument impacting Maori land unless the instrument has been confirmed by the MLC. More substantial power than under the previous Act. Warin bought land from Maori trustee. There were breaches of the MLA. Maori trustee needed consent of the beneficial owners AND needed to give first right of refusal to the preferred class of alienee. These requirements were not made out. Sale went through anyway and land registered. Warin later tried to sell the land. Potential purchaser found out the land was Maori freehold land under the MLC records. The records were inconsistent. Warin asked the MLC to amend records – the MLC refused. The Maori Appellate Court refused also. Case went to the HC on appeal.	Starting point: It is not enough to show that registration occurred under a void instrument (due to non-compliance) as *Frazer* has settled the law on II. Need to show that the TTWMA overrides the LTA. Statutory conflict: The Court looked at a number of factors to resolve the conflict. Ultimately held that the TTWMA was not intended to override the LTA: • **Express wording:** Mr Bell argued that

	The main arguments came from another party that argued the preferred class had the right to the land. **Issue** Whether after the transfer was registered, the Warins got an indefeasible title upon which they can rely in the face of claims made by the people Mr Bell represented (i.e. the class of alienees). General rule is that this is indefeasible title. But there is a conflicting Statute – the TTWMA. Not sufficient to show that the instrument is void because it didn't comply with the TTWMA. This doesn't help case post *Frazer* and II. Focus is on which Act prevails. **Judgment** First argument by Bell: Legislation said that alienation of Maori land must be in accordance with the Act and no alienation can be made without complying. Bell argued that the registration by the registrar was disposal of land, and therefore amounted to "alienation". Tried to show that this expressly overrides the LTA by saying that it cannot be registered except in compliance with the TTWMA. Court rejects. It says that the act of registration is not "disposal" of land. The person who "disposes" is the person with the right or interest in the land. Second was the construction of the Acts: • Court said that it has to consider implied overrides also, per *Miller*. • **Purpose of the Act:** Bell argued the objective was to provide Maori land. Court said it was to facilitate the retention of Maori land in Maori hands. • **Legislative background:** Passed after Housing Corp. If Parliament wanted the TTWMA to override the LTA, s 126 would say expressly that registration of instruments that do not comply with TTWMA do not confer good title. Parliament cannot have intended the TTWMA to override the LTA therefore. • Act also provided procedure for Maori land to become general land. Retention in Maori hands of their land is not absolute – legislative contemplation that land will change hands. • **Policy:** If Maori land cannot be passed even if registered (due to non-compliance), then subsequent bona fide purchasers would not have a good title because the land is still Maori land and owned by Maori. These bona fide purchasers would be in a worse position than people who purchase from a fraudster who would get good title under s 183. • **Practical points:** The MLC register is cumbersome. The LTA is streamline and efficient. The LTA registration system is to be preferred therefore. Easier for potential purchasers to check. Therefore protects the public better. • **Other considerations here**: The Maori beneficiaries did not object to the sale. It was just the class of alienees. In future cases, the Maori owners may be deprived of land – for these people; compensation will not be enough because land is taonga. **This is very relevant for s 55 in the LTA 2017.** • Also, Warin has been in possession for a decade. **Section 55 says that length of possession is important. This consideration as relevant here!** • Another consideration raised by the LawCom IP cited in the judgment was that the abilty for Maori land to be	the provisions stated that alienation of Māori land must comply with the TTWMA. Argued that the registrar had "alienated" Māori land through disposal and that this provision expressly overrode LTA. Court disagreed. "Disposal" only occurs if you have a legal interest in the property. • **Legislative background**: Passed after *Housing Corp*. Section 126 transferred into a requirement but Parliament could have expressly stated TTWMA overrides. They chose not to. • **Purpose:** TTWMA is designed to retain Māori land in Māori hands but also to facilitate the sale of Māori land – this was contemplated by the Act. Would be inconsistent to say that non-compliant transactions are ineffective. • **Policy:** Unfair if bona fide purchasers down the line receive no good title. Inconsistent compared with fraudsters. • **Practical points:** MLC register is cumbersome. LTA register is a streamlined model of efficiency and is easer for purchasers to check. Relying on this register protects the public better. Also, Māori cannot effectively participate in the economy if their land cannot reliably be used for mortgages. • **Other:** Maori beneficiaries did not object to the sale. Warin had been in possession for a decade.

	defeasible may actually negatively impact Maori. For example, may make it very hard to use Maori land as security for loans because of the threat of defeasibility. Without fraud, purchaser of Maori land who becomes registered without compliance still gets indefeasible title (and successors in title). No legislative intention to override.	
Summary lecture points	*Miller* says it is a matter of ascertaining Parliament's intention by placing the 2 statutes side by side and assessing whether it is the proper implication that one is to override the other. Overall holistic assessment. *Housing Corporation* and *Warin* look at the legislative background, the Court's pronouncements on indefeasibility, whether Parliament has subsequently amended the legislation or done something contrary to case law, case law on competing statutes (e.g. *Breskvar*), the wording of the legislation and whether any provisions explicitly govern the other Act (e.g. in *Warin* whether alienation includes registration by the registrar), objectives/purpose of the Statute (e.g. MLA is to protect Maori land ownership, but also contemplates that Maori land will be sold), public policy considerations (e.g. fairness: should bona fides lose their title down the line because of non-compliance with Statute? Disruption?), practical considerations (e.g. hard to access MLC register and records. Very important to know of the new provisions in the LTA (s 55). *Warin* was a special case where the Maori owners did not object to the sale. In another case where such objection did exist, this could be important. Also the length of time was important in *Warin* – the Warins had been in possession for over a decade. Special characteristics of the land etc. Interface between the TTWMA and the LTA: there is a special provision in s 55, which says that Court (when considering whether to make an order) can take into account non-compliance with the TTWMA. This probably isn't sufficient to resolve this interface issue though: • Section 55 only invoked where there is registration under a VI. Most of the Maori cases satisfy this criterion however. • Manifest injustice – we don't know what this means yet. *Assets* and *Beale* might meet this threshold? But cases like *Housing Co* probably don't meet this – just concerned ranking of mortgages. Similar in *Warin* as Maori owners had no problem with the sale. Would not help here. • Section 55(4)(c) cannot be invoked if there is a further transfer according to s 56 of the Act. • Also this power is discretionary! There are other factors the Court will consider. • Section 55(4)(c) is therefore not sufficient to resolve this interface issue.	
The Fraud Exception		
Intro lecture	Contained in ss 62/63 of the old Act and s 52 of the New LTA. Section 52 says acquired through fraud by the RP or their agent. *Assets* defines fraud as actual dishonesty. Constructive fraud doesn't apply in LTA context. Fraud must be brought home to the RP or agent (this is now in the new Act). Failure to make further inquiries is not fraudulent unless wilful	

	blindness. This is carried through into s 6 definition of fraud: • Forgery or other dishonest conduct. Abolishes the *Assets* distinction between forgery and fraud. • Must be by the RP or the agent in *acquiring* an estate or interest in land. Gets rid of supervening fraud. • Type A and B fraud. A is against the RP of an estate or interest in land e.g. Messer, Frazer, Breskvar. Deprived of title. • B is against the owner of an unregistered interest. Notice of unregistered interest is not fraud (i.e. s 182 of the Old Act; constructive fraud also abrogated in s 6 of the new Act). E.g. Maori owners in *Assets*; people in *Loke Yew*. Will be fraud if the RP or agent had actual knowledge or was wilfully blind to the existence of the unregistered interest AND intended at the time of registration to defeat the interest. • Constructive notice does not apply – s 6(4). All of this consolidates the case law except for the timing issue of at the time of registration getting rid of supervening fraud.	
Loke Yew	**Facts** Eusope had large piece of land and sibdivided the land and leased. One piece leased to Loke Yew – perpetual lease. Effectively, Eusope passed the whole of his interest in this part of the land to Loke Yew. There is no reversion either – effectively subinfeudation which we don't have anymore. LY had an unregistered interest therefore. Eusope wanted to sell land to a rubber company so repurchased all of the land except LY's, who didn't want to sell. Deed of conveyance to the Rubber Company included ALL of the land included LY's land. Refused to sign deed because had no right to sell LY's land. Rubber Company's rep put in writing that he promised to buy the land from LY so that Eusope could sign the deed. Rubber coy was registered as the owner and immediately tried to eject LY. **Judgment** PC said rubber coy was fraudulent in obtaining the registration. Without making the promise, Eusope would not have signed the deed and the company would not have been able to register. Rep knowingly gave a false representation to intend to secure Eusope's signature so could then defeat LY's interest after registration. This is type 2 fraud. The Company argued that LY's interest was not registered and not on the title, and therefore it has good title. But PC said this was fraud and therefore Company has no good title in respect of this part of the land. As long as no further transaction, the company cannot shelter behind the registration and indefeasibility to avoid consequences of own fraud. **Important**. If the coy had sold the land again, purchaser would be protected by s 183 etc. Clear case of fraud.	Argument: Rubber Coy argued that LY's interest was not noted/registered on the title and therefore the RC took the land free of LY's interest – had good title per the rules of indefeasibility. Fraud: This is a case of Type B fraud against the owner of an unregistered interest. The Court held that the RC knowingly gave a false representation to induce Eusope to sign the contract so that they could then intentionally defeat LY's interest through registration. This is a clear case of fraud and therefore the title was defeasible. Constructive trust: Alternatively, the Court held it could superimpose a CT over the RP's title. The RC took the land *knowing* of LY's interest and registered regardless. They were therefore trustees and LY was beneficially entitled to the land.

	Constructive Trust Approach Alternatively, a trust could be imposed. Because the coy purchased with full knowledge of LY's interest and registered the land regardless, the company was said to hold the land on trust for LY as LY's trustee.	
Harris v Fitzmaurice	**Facts** F leased a shop with a 5-year lease and right of renewal for another 5 years. Unregistered lease. Only an equitable interest/lease therefore. Harris bought the land that included the leased shop. Harris was told there was a weekly tenancy – this was wrong. Was also told that the purchase would be subject to this tenancy. Harris bought the land and registered. F continued to pay rent. Later, H found out it was a 5-year tenancy. H challenged and said the 5-year tenancy was not binding on him, as it was not noted on the title. Trying to rely on his indefeasibility of title. **Arguments** F claimed it was fraud because the agreement said the purchase was subject to existing tenancies. Cannot claim the agreement is not binding now. Claimed that even if he thought it was only a weekly tenancy, he can't now try defeat F's rights now that he knows it is a 5 year tenancy. Created 2 issues: (1) what is fraud? (2) Timing issue – is this supervening fraud? (Not discussed in the case really but we discussed here). When registered land, H intended to recognise F's rights. Later he tried to refuse to recognise the rights. **Judgment** Court applies the *Assets* test for fraud. Whether there is actual dishonesty. Court found no fraud at the time of registration. The π was told it was only a weekly tenancy. The π therefore intended to recognise the weekly tenancy. Not fraudulent at the time of registration – no dishonest intention at this point. Court rejected the argument that H *became* fraudulent after registration. Key reason was that there was no dishonesty on the part of H. Didn't really engage in the supervening fraud discussion however. Distinguished ealier case on supervening fraud – in that case, the knowledge was acquired *before* registration and the intention formed after. Here, H only acquired the knowledge later. **Difference between this case and Loke Yew** Both the purchaser gave an undertaking to protect the unregistrered interest of the impacted parties. But in Loke Yew, the intention to defraud was formed *before* registration occurred. Whereas in *Harris*, H made the undertaking based on a mistaken belief regarding the unregistered interest.	Another case of Type B fraud against the owner of an unregistered interest. Fraud: The Court adopted the test from *Assets*. Required actual dishonesty. Court said that the π was told there was only a weekly tenancy (was actually aware of this) and intended to take the land and register subject to that weekly tenancy. But no actual dishonesty/fraud because Harris took the land subject to a mistaken belief regarding the nature of the tenancy. No fraud at the time of registration. Judge didn't engage in the supervening fraud discussion. Held that this was not dishonest conduct because there was merely a mistaken understanding of F's tenancy. Difference from LY: In LY, undertaking was intentionally made so as to defeat LY's interest upon registration. Here, an undertaking to respect F's tenancy was made, but it was based on a mistaken understanding and so there was no fraud/dishonest conduct to terminate the lease.
Efstratiou v Glantschnig	**Facts** E was the purchaser. Mrs G was the wife of Mr G. Couple had a house. Wife contributed half of the deposit. House registered under the husband's name. Before PRA so no provision about 50/50 split. Court approach is usually to find a constructive trust in these circumstances – house subject to the trust. Couple broke up. Mr G jealous of wife living with a new man. Husband went to Real Estate agent and managed to sell the house in 3 days to E. Sale price was	Must be fraud *by* the RP or their agent – must be party to the fraud in some way. Mr E had no dealings with the wife. Therefore, it had to be shown that Mr E was party to the fraud carried out by Mr G

	significantly cheaper than real value. E registered. Mrs G sues husband, RE agent and purchaser for fraud. Wanted house restored to husband's name so that she can get constructive trust argument. **Issue:** Is E's title defeasible by fraud? Or is it indefeasible? This is fraud against the wife's unregistered interest. Difficult because we know that notice of UI is not fraud – s 182. This is a case of Type B fraud. Because E had no dealings with the wife, it needs to be shown that he dealt with Mr G, Mr G breached trust, and E was aware of this and party to it. **Judgment** Husband <u>was</u> a trustee. Court found a constructive trust and therefore the wife had an equitable interest in the House. Husband sold house with intention to deprive equitable interest – clear breach of trust. Court accepted this breach by the husband, especially because he sold the house undervalue and then used the proceeds to pay off debts depriving the wife of any value. Wilful breach of trust. Would normally entitle the wife to restoration of the property. RE Agent played a part in the transactions. Court held that he knew the problems between the couple, knew of the fight, had lent the money to the husband to fly back to NZ in the first place, knew of the injunction and knew the wife had a claim on the house. Also must have known the true value of the house. Found a purchaser within hours. Therefore, Court said the agent was **party** to the fraud because he knew so much. Real question is: how much did E know? Didn't know the couple, so no knowledge of their fight. He knew that Mr G was the RP. Court seemed to have inferred that E knew Mr G breached trust and was therefore party to the fraud. Four key factors: 1. **Price**: Knew that it was worth significantly lower than true value. 2. **Speed of sale:** Husband sold the house within a day from the injunction. E agreed to settle the following day also. House was registered the day after. Amazingly fast. 3. **Inspection:** E didn't even check the house. 4. **Continued living:** E allowed Mr G to live in the house after having purchased it. Court noted that previous cases were reluctant to find that fraud defeated the RP's title. They cited law from <u>*Assets*</u>: particularly no constructive fraud, and wilful blindness. Court said that E's suspicion was aroused. So extraordinary circumstances that trial judge was justified in finding that E was party to the scheme. Also cited <u>*Waimiha*</u> case which set out a test: • Test is not knowledge of the adverse right • It is whether the Δ knew enough to (1) Make further inquiry; (2) Refrain from purchasing; or (3) Purchase subject to the right. • Court said that what E had knowledge of is ENOUGH for E to not have bought the house or to have made further inquiries.	and the RE agent. <u>Mr G:</u> Clear fraud. Mrs G had an equitable interest in the land as she had contributed half of the deposit price. Although Mr G was the RP, he was a constructive trustee for his wife. Selling the land was clearly intended to defeat wife's equitable interest in the property = BoT. Also, he spent the proceeds, which deprived the wife of the value of the property. <u>RE Agent:</u> Party to the fraud. Knew the problems between the couple, knew of the fight, paid for the husband's flight, knew of the injunction, knew the wife's claim to the house, knew the house's true value, found a purchaser rapidly. Knew of fraud. <u>Mr E:</u> The Court cited the test from <u>*Waimiha*</u> which said the test is not knowledge of an adverse right, but it whether the Δ knew enough to inquire further, refrain from purchasing, or purchase subject to the right. Here: • **Price:** Knew it was below value. • **Speed:** Extraordinarily fast. • **Inspection:** Didn't even inspect. • **Continued living:** Allowed Mr G to continue to live in the house. Court cited <u>*Assets*</u> and said that this was a case of wilful blindness therefore, and Mr E was fraudulent. He should have not bought the house or should have made inquiries. **Critique**

	Overall, E was found to be a party to the fraud and the house was set aside. **Critique of the case** *Assets* says that fraud is actual dishonesty. Mere knowledge of the UI is not fraud. LTA now confirms clearly the constructive notice does not apply for fraud. Court here may have just been finding constructive notice and therefore fraud. Also, E didn't even know the Gs – why would he have any intention to defeat an interest therefore? New Act requires the intention to defeat an UI. E probably didn't have this intention at all.	Court likely blurred line between constructive notice/fraud and actual LTA fraud. Also, New Act requires *intention* to defeat a UI. Why would Mr E intend to defeat Mrs G's rights when he doesn't know her?
Sutton v O'Kane	**Facts** Suttons and O'Kanes are neighbours. O'Kanes need a right of way to get to their house. Original owner of the undivided land intended to create an easement. But the solicitor made a mistake and failed to register the easement. Suttons ultimately purchased the house. Found out that the O'Kanes had no legal easement, when they originally thought a legal interest actual did exist. Didn't want the O'Kanes to use the RoW so they fenced off the land and prohibited access. **Judgment** Court said there was clearly an equitable easement as the parties originally intended to create an easement. Only way for the O'Kanes to win was to prove that the Sutton's were fraudulent and intended to defeat the UI. Timing issue: if the Suttons knew at the time of registration that there was an UI and intended to defeat this, then they are clearly fraudulent. Problem is they didn't acquire this knowledge until after registration. *Assets* required dishonesty. What does dishonesty mean? • **Wild CJ:** whether the change of attitude was fraudulent depends on the Sutton's mental state and knowledge of the true position. No evidence that Suttons had ever undertaken to allow the OK's to use the RoW. Suttons merely had a mistaken understanding. They did take advantage of the mistake, but this was not fraud. Suttons never promised anything – they simply "stood on their rights." This is not dishonest. • **Turner P**: LTA fraud is sui generis. This is true. But Turner P says that "dishonesty" means conduct "forbidden by honour". E.g. if you find money and then decide to keep it, this is dishonest. This is a moral judgment and not a legal judgment essentially. **Section 182**: Suttons had more than mere notice. The Suttons knew about the details, knew they use the RoW and rely on it, knew the driveway was sealed for this purpose etc. Knew the land was subject to an encumbrance and tried to disregard this right = fraud. Suttons also paid a lower price because of the RoW – A LOT MORE than mere notice. *This probably blurs the line between a legal and a moral test*. • **Richmond J**: Agrees with Wild CJ. Says Turner P is wrong – only mere notice. No difference between knowing the right exists and knowing the details. No distinction should be drawn – knowledge is not sufficient for fraud. Richmond J found no fraud because the Suttons did not know the RoW was not registered. They honestly believed the OK's had the RoW. Probably just inconsiderate, unreasonable and selfish but NOT dishonest.	Key facts: The easement was not registered. Therefore, there was only an equitable easement that can be defeated by a bona fide purchaser absent fraud. Only binding on the Suttons if the O'Kanes can show that the S's were fraudulent. This is a type B fraud situation. Wild CJ: whether the change in attitude is fraudulent depends on the mental state of the Suttons and their intentions. Suttons had mere knowledge of the UI but did not intend to defraud. Their change of attitude was founded on a mistaken belief that a legal easement existed. While immoral, standing on their legal rights is not fraud. **The Sutton's never undertook to protect the O'Kane's interest (in personam).** Turner P: Fraud is sui generis in LTA. Actual dishonest means conduct forbidden by honour. Moral judgment not legal. Also, Sutton's knowledge was *more* than mere notice under s 182. Knew the extent of reliance on the easement, driveway sealed, only access to garage etc. They knew the details. Overall, this was fraud as S knew about the encumbrance, purchased with this knowledge, got the property at a discount because of it, and attempted to

	Sutton is similar to *Harris* in the sense that there was a mistaken belief (it is the flip side of the coin). **Supervening fraud issue**: Ruled out by LTA 2017. Fraud must be at the time of registration per s 6. Got rid of this because supervening fraud is likely unnecessary. Blanchard J writing extra judicially said that all supervening fraud could be dealt with in the in personam jurisdiction. This happened exactly in the *Bahr v Nicolay* case: half the bench decided on in personam and other half decided on fraud.	deny. Dishonourable = fraud. Richmond J: Only mere notice. False distinction between notice and knowing more/details. They honestly believed the interest was registered. Change of mind is not fraud/dishonest. Flipside of *Harris*.
D&S v Nathan	**Facts** Nathan wanted to get a loan from D&S. Mortgaged his parent's house as security for the loan. D&S got lawyer – Thomas – to secure the mortgage. Thomas gave Nathan the documents to take to his parents for signing. He obtained father's signature and then forged his mother's signature. Document was registered. Nathan defaulted. D&S tried to enforce the sale. Parents took action: the wife alleged fraud. **Issue** Is the mortgage defeasible? The instrument was void. But registration of VIs still gives good title. Issue is whether fraud or in personam exceptions apply. The CoA used in personam; the SC used the fraud exception. **Judgment** *Assets* requires actual dishonesty by the RP OR his agent. Wilful blindness may be fraud. Here there are 2 RPs: (1) parents are RPs of the house; (2) D&S are RPs of the mortgage. The parent's title is not protected unless D&S title is obtained through fraud. This is type A fraud because both registered. Fraud has to be by the RP of his agent. Clear that Nathan was fraudulent. For D&S to have been fraudulent, either they needed to be wilfully blind to Nathan's fraud OR Nathan was acting as their agent. Only agency was argued in the Supreme Court. **Agency Test** If A gives B authority to act on A's behalf in performing some act, then A will beheld responsible for B's conduct in carrying out that act. Has come up before e.g. *Breskvar*, *Loke Yew*. Key limbs for agency: 1. **Was RN D&S' agent?** Court distinguishes between acting as an agent and as a conduit for delivering documents. Agent has more tasks than just delivering documents. Nathan was asked to get the signature, to obtain certificate of title, get insurance policy document, fulfil statutory duties of initial disclosure, get his parents to sign a statement of covenantor. This statement says that the Nathans relinquish their right to legal advice. All of this is a lot more than just delivering documents – in-fact, they were directed at perfecting the lender's security. Supreme Court found agency made out. 2. **Was the act (the forgery) committed within the agency?** D&S did not have actual knowledge about the fraud and didn't authorise fraud either. But fraud can still be inside the scope of the agency. We don't look at the	Case of Type A fraud. D&S had no connection or dealings with Mrs Nathan. Need to show that RN was acting as D&S' agent for their title to be defeasible under s 63. Or that D&S was wilfully blind. Agency test: The Court found that RN was D&S' agent. Used a structured test: • **Agency relationship:** Court said there is a difference between being an agent and being a mere conduit for documents. RN was an agent as he was given a series of tasks all designed to obtain a perfected security for D&S. Included getting signature on mortgage documents, getting insurance documents, obtaining the certificate of title, get his parents to sign a statement relinquishing right to legal advice etc. • **In scope of agency:** The act must be in the scope of the agency otherwise not attributable. Need not be actually authorised – can be an unauthorised mode. The act must be proximately connected to the task the agent was to perform. This was satisfied. • **Imputation:** No need for the principal to have knowledge of the fraud. No need to impute knowledge (cf *Cassegrain*) as the principal is liable through vicarious liability. Also wrong on policy grounds:

	authority to commit fraud but whether the conduct fell within the scope of the task the agent was tasked with performing. As Nathan's task was to secure the signature, his forgery is so connected to the task he was tasked with performing. Doesn't matter that it was not the authorised mode because the proximity to the task was so close. 3. **Imputation of knowledge?** Argument made that fraud is not sufficient to defeat title if the Principal does not know about the fraud. Cases were cited in support of this proposition – Courts held that no knowledge of fraud by the principal meant no fraud. The SC rejected this approach. No need to impute knowledge – principal impacted by agent's fraud through vicarious liability. Imputation of knowledge theory wrong for policy considerations. Principals who fail to check their agents' conduct should bear responsibility and cannot be transferred to an innocent person. Also practically, agents will nearly never tell their principals that they were fraudulent. 4. **Policy and corporate practices:** If lenders had followed good practice recommendations, they would likely be protected against fraud like this. D&S therefore responsible for Nathan's fraud. This is so despite the fact that D&S probably didn't know that Thomas would give Nathan the authority to do anything – this was effectively sub-agency. Courts think that corporate lenders should bear their own loss and not be able to transfer loss to third parties. Shows Court's special approach to dealing with mortgagees. **Cassegrain Case (contrast)** GC Co owned dairy farm. Claude and sister were directors. They sold dairy farm to Claude and his wife Felicity for $1M. Title was registered. C&F didn't pay though – Claude fabricated a $1.5M debt and then debited the title against this debt. Therefore, title obtained for free by fraud. Claude then transferred his 50% share to F for $1. GC Co sued F to get the land back. First transaction: Was C acting as F's agent when he acquired the land through fraud? Or did the joint tenancy issue impact her title? HCA said imputation of knowledge is sufficient. *This approach has been rejected in NZ in D&S.* Regarding joint tenancy, Majority of the HCA found that F's title was not impacted by another JT's fraud. This is different to normal JT law where the JTs are treated as one tenant. Therefore, just because one of the JTs is fraudulent does not mean the other JT is impacted. Knowledge has to be brought home to the person on the title. Higher standard under registration context so cannot treat the parties as one. The dissent said that there is only ONE title. Therefore once one JT commits fraud, the whole title is impacted. **Cf *Regal*.** F's title therefore not impacted by C's fraud either by agency or by JT. Second transaction: Statute requires (for s 183 scenarios) that you are a bona fide purchaser for VALUABLE consideration. Because F got the land for only $1, this is not valuable consideration and so she is not a bona fide purchaser.	agents will not tell their principals that they have been fraudulent. Principals that fail to oversee their agent's conduct should be responsible. Loss not transfer. • **Policy:** If D&S followed normal commercial practice, they would have been protected against this kind of fraud. D&S responsible for RN's clearly fraudulent act. **Cassegrain contrast** Joint tenancy: HCA held that for the first transaction, F's title was not impacted/tainted by C's fraud. Despite being JTs, LTA fraud has a high bar and fraud must be brought home to the RP. Cannot treat the title as one and make it defeasible. Dissent said there is only *one* registered title. *NZ COURTS TREND TOWARDS A DIFFERENT APPROACH IN REGAL AND TRUST ISSUE.* Knowledge: HCA requires the principal to know of the fraud, but they say that imputation of knowledge is sufficient. Valuable consideration: HCA says that to be a bona fide purchaser, you must purchase with valuable consideration. $1 is not sufficient to be bona fide. *REJECTED IN REGAL AND IN S 51 LTA 2017.*

	But in *Regal*: Tipping J says that valuable consideration is not required. This is made clear in the New LTA in s 51(4) – doesn't matter whether you are a volunteer or not.	
Fraud sum up	Fraud is a major exception. But there is an outer limit – it stops when there is a further transfer (the s 183 scenario). When there is a further transfer, the defect in the title is cured. Section 6 defines fraud. Consolidates case law. The only change is the exclusion of supervening fraud. No constructive notice (s 182 in old act and also s 6 new act) but *Assets* wilful blindness law still applies. Definition of "actual dishonesty" is very unclear. • *Loke Yew* – fraudulent undertaking to protect an UI. • *Harris* – undertaking based on a mistaken belief. Court said no fraud. • *Efstratiou* – Court said no evidence to show that E had intention to defraud. But circumstances gave rise to conclusion of fraud. • *Sutton* – Mistaken belief and no undertaking. Brought home to RP or agent in New LTA: confirms D&S agency approach. NZ seems to move away from the JT law in *Cassegrain*.	
In Personam Exception		
Intro lecture	In personam are personal rights: a personal action (e.g. K, tort or equity). *Frazer* stressed that indefeasibility does not deny the π's right to bring an in personam action. **Is it an exception?** Probably not. TS does not abolish the law of obligations. LTA doesn't add or take anything away from the in personam jurisdiction. But the LTA does change the law on remedies. For example, remedies (such as specific performance) may be limited because of an on-going transfer. Where no on-going transfer, the Courts can compel the party who owes the obligation to perform their obligation. E.g. A sells property to B. They execute K. Before registration, A changes mind and gives money back and keeps house. B has an in personam right to sue for SP to convey the property. A cannot rest on RP to defeat action for SP. Only 2 parties here so SP is okay. E.g. A after the K sells property to C and C is registered. C is bona fide purchaser without notice and can rely on registration. B's remedies are limited and can only get things like damages. LTA limits a person's right to get the property where there is a further transfer – i.e. the s 183 situation. But if the situation is just between A and B, the Court will compel the RP to transfer the property if there is a prior relationship and circumstances give rise to a right to re-convey.	

Taitapu v Prouse	**Facts** The π sold land to the Δs. The K reserved minerals to the πs (vendor). But there was an oversight and this right was not registered. According to the title, the Δs owned the land with no encumbrances. The Δs refused the request to rectify the title, relying on indefeasibility of registration. **Comparison with *Miller*:** Here, there was an on-going transfer. Therefore there was no direct K relationship between Miller and the Crown. In this case, the parties are both subject to the K. **Issue** Can the π get the title rectified to get rights to the mineral? **Judgment** Question was whether there was a RESERVATION or an EXCEPTION. If the vendor only reserved the minerals, this is just the reservation of a non-exclusive right. If the sale was the land EXCEPT the minerals, then the K was that the vendor retained property in the minerals. Don't worry about this for exam. The π also tried to argue the fraud argument from *LY*. By refusing to rectify the register, they may have been fraudulent i.e. supervening fraud. Judge rejected and said the proper inference was that there was just a mistake and no fraud. No one was trying to deprive the πs of their rights upon registration. Discussing the Court's power to rectify under s 85: The Judge said that the LTA does not change the law of obligations between parties. This was a transfer of property by mistake without fraud. Common mistake – all parties were under the same wrong impression. No BoC, just a mistake. How does equity intervene: • *Assets* said that you cannot superimpose a trust relationship merely based on an adverse claim. • You need to show a pre-existing in personam interest that is external and independent of the LTA. • Judge said that equity says it is unconscionable to hold onto something that you only got through mistake e.g. mistaken transfer. Creates a right in equity that exists outside the LTA. • In *Assets*, the Maori argued the coy held the land on trust. PC rejected. Here, the Court saw a distinction. Maori owners were merely the rival claimants. Here, there was a K. • Therefore, there was a constructive trust. The Δ held the minerals on CT for the π. An alternative avenue was that of unjust enrichment. Cited *LY* in support for imposing a CT here. The Δs did not pay for the minerals and therefore holding onto them was unjust enrichment. **Remember: s 183 is an absolute bar**. **Fact variation:** Prouse on-sold the property to a third person that became the RP. The new purchaser has an indefeasible title per s 183. But P's personal obligations to Taitapu still exist – these obligations are not altered. But the nature of the remedy changes. The property cannot be compelled back. The remedy is confined to damages.	**Key point:** The only reason there could be a CT here was because there was no on-going transfer to a third party, triggering protections under s 183. If this had occurred, the π's remedies would have been limited e.g. damages. The property would not able to be compelled back to the π who had the equitable rights. Fraud: No fraud here, which is the opposite of *LY*. The judge found that there was no intention to deprive the πs of their interest upon registration. It was merely a mistake and no fraud. In personam: The Court held that the LTA does not alter the law of obligations. *Assets* confirmed this and held that you cannot superimpose a trust relationship on a RPs title merely because of an adverse claim to ownership. There must an external equitable relationship independent of the LTA. Here, there were 2: • Unconscionable in equity to hold onto something that you acquired through mistake. Equity will compel the person to convey the property back to its rightful owner/ Therefore; the Court imposed a CT for the minerals. • Unjust enrichment was also available. The Court cited *LY* here and said that as the Δs did not pay for the minerals, it was impermissible to allow them to retain the property, as this would be unjust enrichment. Under both arguments, the π has an equitable right to the property and so the right to the minerals was re-conveyed.

	LTA does not change the obligations; it changes the remedy.	
Bahr v Nicolay (HCA)	**Facts** Bahrs sold property to Mr Nicolay. Sale was subject to a collateral K that N would lease the property back to the B's. The Bs were given the right to repurchase the property after 3 years. Bs were to pay rent to N. This was a financing agreement. But the certificate of title did not include any of the collateral Ks. Based on the title N owns everything. N sold the property to the Thomspons. N is allowed to sell the property under the K. The N-T agreement acknowledged that an agreement exists between N and B. Ts became registered and then wrote to the Bs saying they agreed to be bound. Undertook to accept the arrangement. B's solicitor wrote to the Nicolay's to ask to enter into a K to repurchase. At the end of the term, they sent a notice with the 10% deposit and noting that they were exercising their option. The Ts returned the deposit and refused to sell the property. **Issue** Whether the Bs are entitled to specific performance to repurchase the property? Ts are RPs and the only statutory exception is fraud. Where in personam and no further transaction, the Court can compel conveyance. Fraud Timing is important. If there was any fraud then it was supervening fraud. • **Wilson and Toohey JJ:** Didn't think there was supervening fraud. Two steps: (1) Dishonesty? (2) Supervening? HCA cited the PC decision in *Waimiha* (wheras E case cited Salmond J's test). Judges said that mere notice of a UI and refusal to recognise this interest is not fraud. Even having actual knowledge that registration will defeat this interest is NOT fraud. It has to be your intention/designed object to defeat the UI. • The Ts took the property subject to the Bs rights. No designed object to cheat in the transfer – no intention to defeat their rights. This line of thinking is consolidated in s 6 of the New LTA: requires **intention** to defeat the UI. • **Brennan J:** Equity will subject the interest of a purchaser in land to the pre-existing interests that the purchaser had notice of. But under the LTA there is a difference: merely taking a transfer with notice of a UI and the consequences of registration is NOT fraud. Distinction between equity and LTA is clear. RPs that undertake to protect a UI and then repudiate (i.e. the Ts conduct) is in EQUITY fraudulent. Equity prevents this by imposing a CT on the repudiator. BUT this is not LTA fraud. In personam Start by saying that in personam rights do not conflict with the idea of indefeasibility. Cited *Frazer* and *Assets* in support. Title is still conclusive – but does not protect the RP from the consequence of their conduct either before or after registration. **The equitable interest:** Bs had equitable interest based on the K. Between N-B. The K did not prevent N from	Fraud: The Majority found that there was no fraud on these facts: • **Wilson and Toohey JJ:** No fraud. Must show both actual dishonesty and whether supervening fraud is sufficient. Notice of an UI and refusal to recognise the interest is not fraud. There must be an *intention* to defeat the UI through registration. The T's took the property subject to B's rights nut did not intend to cheat them in the transfer. This is the s 6 LTA 2017 approach to fraud. • **Brennan J:** Emphasised the distinction between LTA and equitable fraud. In equity, if you buy the land with knowledge of an interest, then you are equitable bound to respect that interest. Under the LTA though, mere knowledge is not enough. You must also intend to defeat the UI. Repudiating an undertaking is fraudulent in equity but not in LTA fraud context. In personam: Court confirmed that the LTA does not interfere with the in personam jurisdiction, as confirmed in *Assets* and *Frazer*. Equity will not allow a RP to shelter behind their indefeasible title to avoid the obligations that arise from their own conduct. The cl in the B-T agreement discharged N's obligations to the Bs. Equitable rights were created because of the T's conduct: • They signed the N-T agreement with the contractual clause as otherwise; N was not going to depart with the property.

	selling. But N still owed the obligation under the K to allow option. N discharges obligation either through reconveying the property OR making a means to compel the purchaser to re-convey. This is what cl 4 does. N has therefore discharged obligations. The Bs had in personam rights against the Ts because of their conduct: • The Ts knew that N wouldn't sell unless the Ts agreed to be bound. Similar to LY. Common understanding. Cl 4 of the N-T agreement acknowledge this. • Furthermore, the Ts undertook to be bound by writing a letter. • Also, the Ts had tried to negotiate twice with the Bs to try and buy some of the property. This was an attempt to extinguish the Bs right to repurchase. Demonstrates they knew they were bound. Wilson and Toohey JJ said that there was an in personam claim based on the T's own conduct therefore. Brennan J took a similar approach and said that it confers an equitable interest on the Bs and not just a K right. N therefore had the obligation to compel purchaser to reconvey. T's purchased the property subject to cl 6. Cl 4 was more than acknowledgement – it was a contractual term itself, coupled with the subsequent undertaking. Therefore subject to the unregistered interest. People are bound by their undertakings. **Unconscionable conduct:** Brennan J says that the high bar for the fraud exception should not act as a cloak for unconscionable conduct. People who act unconscionable should not be guaranteed a good title. **Remedy:** Equity imposes a CT so that the RP holds the property on trust for the beneficiaries. In personam is not impeaching the title but enforcing the undertaking. **Relevance of undertakings in the in personam jurisdiction** The rubber coy in *LY* gave an undertaking to protect and respect the property interests of LY. Breach of this undertaking led to an in personam claim. In *Sutton*, Wild CJ said expressly that there was no agreement or undertaking to honour the RoW. If there was an undertaking, the result might be different. In *Bahr*, the Court placed a big emphasis on the T's undertaking. Wilson and Toohey JJ said that the undertaking made by the letter was sufficient for in personam purposes. They didn't think that the contractual term was enough without more.	Similar to *LY* – common understanding. • They expressly undertook to the Bs that they agreed to be bound. • They attempted to negotiate to extinguish the B's interest in the property, demonstrating that they knew they were bound. Wilson and Toohey JJ said that the Ts were bound by their own conduct and that the Bs had equitable rights in the property. Brennan J went further and said the Ts purchased the property subject to cl 4 which was more than an acknowledgment of the B-N agreement but a contractual term in itself. Coupled with the undertaking, the Ts were bound to respect the Bs UI. **The high bar for the fraud exception should not act as a cloak for unconscionable conduct and protect people against the equitable consequences of their own conduct.** A CT was imposed.
Duncan v McDonald	**Facts** Nigerians told a group that $30M was available if they paid $285,000. The NZers borrowed money to do this. They went to Duncan – a solicitor of Simmond's estate. Agreed to loan money in exchange for security. McDonalds granted security over the loan, and the mortgage was registered. The money was lost and the Estate tried to enforce the mortgage against the McDonalds. The McDonalds tried to resist. **Issue:** Was the mortgage valid or invalid? The Court found that although a scam, the NZers (including the	Conflict of statutes: The ICA meant that the Ks were invalid. Whereas the LTA says that once registered, VIs gives indefeasible title. Demonstrates an apparent conflict. But the ICA s 6 says that it is subject to other enactments.

	McDonalds) were engaged in a venture to defraud the Nigerian government. Therefore the contract was illegal under the Illegal Contracts Act. The mortgage was thus illegal under s 6 of the ICA. McDonalds relied on the Act to resist the mortgagee sale. If upheld, the beneficiaries of the Trust lose without any fault – although they would have personal actions for Breach of Trust against Duncan. What happens with indefeasibility though? **Judgment** <u>Conflict of Statutes</u> The ICA says that these Ks are invalid. Whereas the LTA says that once registered, these Ks are valid. This is a conflict. But s 6 of the ICA says that the provision is subject to any other enactments. Therefore the LTA prevails and the registered mortgage is valid. <u>Fraud</u> There is no fraud between the parties. Duncan did not trick the Ms into giving the mortgage. <u>In personam</u> Blanchard J developed the test for the in personam jurisdiction under the LTA: 1. Recognised cause of action e.g mistake (*<u>Taitapu</u>*), BoC, BoT, unjust enrichment, breach of an undertaking etc. 2. Cannot use in personam jurisdiction to defeat the principles of the LTA. Court cannot allow the claim just because the RP would have had no good title under the Common Law. TS has already changed the law – cannot use equity to revert back. Must uphold the key principles of the LTA. Question of fact and degree whether the equity is strong enough to override the RP's title. More than mere notice of third party interests is required. More of an irregularity relating to the instrument (e.g. VI) is required. 3. Must show unconscionability of the RPs conduct. Although there doesn't need to be dishonest conduct. Distinction between unconscionable conduct and LTA fraud. Application to this case: • Unconscionable for Estate to enforce the mortgage. Mr Duncan was not acting as the Estate's agent – he was acting as the *principal* because he was the trustee and therefore legally owned the property. • As the legal owner, he acted unconscionably in making an illegal and fraudulent contract. Therefore, unconscionable for the Estate to enforce the mortgage completely, despite it being valid. • Equity Court will not permit transference of loss where the prior conduct of mortgagee made it unconscionable to use the legal title in this way. If Ms lost, they have no recourse. Court seemed to be thinking that it was unfair to transfer the loss to the Ms. • Beneficiaries here were completely innocent though. • The Court apportioned the loss between the parties. Estate recovers a certain amount from the Ms and Duncan pays the rest. If D cannot pay enough, then the Beneficiaries can get recourse to the rest of the property.	<u>Fraud:</u> No fraud between the parties. Duncan was not fraudulent in obtaining the mortgage. **In personam conditions** 1. Recognised CoA e.g. mistake, BoC, BoT, unjust enrichment, and undertaking 2. Must not be inconsistent with the principles of the Torrens System. The IPJ cannot be used to defeat the principles of the LTA – cannot allow a claim just because the RP does not have good title under the CL position. The LTA has changed the law. Question of <u>fact and degree</u> whether the equity is strong enough to override the RP's title. More than notice is required and more than a VI is required. 3. Unconscionable conduct by the RP. No need for dishonest conduct however. **Application** Court said it was unconscionable for the Estate (Mr Duncan) to enforce the mortgage when he acted unconscionably in making an illegal and fraudulent contract in the first place. Unconscionable *<u>consequences</u>* as this would permit the Estate to transfer its loss where it had already acted illegally and the Ms would have no recourse. *Demonstrates that the Court was focussing on unconscionable <u>outcomes</u> rather than unconscionable conduct per its own test.* No clear CoA recognised. But the Court seems to have invoked s 7 of the ICA, which allows the Court to grant relief from the effects of illegal contracts. Suggests s 7

	Critiques But was Duncan's conduct actually <u>unconscionably</u>? Probably not. The Court was focusing on the unconscionable RESULT that would occur, despite setting out a test requiring unconscionable conduct. Also, what is the cause of action? The Court was unclear. Alternatively, could invoke s 7 of the ICA, which allows the Court to grant relief in situations of illegal contracts to negate the consequences of s 6. But the mortgage was already valid per LTA. Seems to say that s 7 goes both ways and can protect the Ms and the beneficiaries. Confusing.	can be used to protect the Ms and the beneficiaries. Court apportioned the loss between the parties. Estate gets some from the Ms, Duncan pays the rest. If cannot pay, the Ms pay the rest.
<u>Nathan v D&S</u>	**Judgment (CoA)** The Court set out the conditions for in personam claims: 1. Not inconsistent with the objectives of the TS 2. Involve unconscionable conduct on part of the current RP 3. Recognised cause of action In application, the Court reached different conclusions. <u>First Condition</u> WYP said that in personam actions founded on nothing more than the fact that the instrument is invalid is not enough on its own. This would be inconsistent with the principles of the TS, as the cases have already found VIs once registered give indefeasible title. **Majority agreed with this.** Majority also said that mere notice is not sufficient for a claim in equity, as this would violate s 182. <u>Second Condition</u> WYP said that *neglect* does not amount to unconscionable conduct. The lawyer was just negligence and should not have given Nathan the authority to get the signature. But otherwise, there was no misrep, no misuse of power, no improper attempt to rely on legal rights, and not knowledge by D&S. WYP concluded there was no unconscionable conduct by the bank. Majority disagreed. Majority said that if a lender knew a borrower might exercise undue influence to secure guarantee and failed to do anything about it, then this is unconscionable in the context of sureties law. Banks here gave Nathan the chance to forge the instrument – this conduct is thus unconscionable. This is based on public policy considerations. The Courts have enforced standards of conduct on financiers taking security for loans. Corporate lenders who breach these codes of conduct cannot then take the benefit of breach. Because D&S did not follow this and gave Nathan the change to forge, this limb is made out. <u>Third Condition</u>	The Court reinforced the conditions from *<u>Duncan</u>*. But they reached different conclusions in application. **Inconsistent with LTA?** The majority and minority agreed that there must be more than just an invalid instrument to found a claim under the in personam jurisdiction. *<u>Frazer</u>* (and etc.) have recognised that VIs confer II. Must be more than mere knowledge of an equitable interest/obligation as otherwise this is inconsistent with s 182. **Unconscionable conduct** WYP found that there was no unconscionable conduct. Neglect is not sufficient – therefore giving Nathan authority to get the signature is not enough. No dealing between D&S and Mrs Nathan, no misrepresentation, no misuse of power, no knowledge of fraud. Majority found unconscionable conduct. In sureties law, if a lender knows a borrow might exercise undue influence to secure a guarantee and doesn't do anything about it, the it is unconscionable. Bank gave Nathan

	WYP said there was no cause of action here, especially as no misrep by D&S and no contact between D&S and the Nathans. Majority said there was a claim in **unjust enrichment**. Didn't explain this cause of action though … D&S did not get enriched, they were out of pocket by losing money. Seems instrumentalist. <u>Public policy considerations</u> WYP said no need for in personam here as Mrs Nathan could get State compensation here. Majority showed that policy is very important in some cases, because they effectively allowed in personam claim here even though the conditions are not made out.	the chance to forge the instrument so therefore acted unconscionably. Also breached standards of practice. If you breach standard practice, you cannot be entitled to claim the benefit of your breach. Unconscionable. **Cause of Action** Majority claimed a CoA of unjust enrichment. Unclear how this works though.
<u>Regal v Lightbody</u>	**Facts** Lightbody owned Capro, a business. Regal supplied Capro. R effectively provided C working capital. Reached a debt restructuring agreement in which the interest was waived. C was to repay in monthly instalments and L was *personally* responsible for the debt. Ls set up a family trust and sold the house to the Trust. But the purchase price was not to be paid until 2005. A deed was also executed to waive the debt. This meant that the house was basically transferred to the trust for free. Capro still owed a *lot* of money and was ultimately placed in liquidation. Only valuable asset was the house. R wanted recourse to the house so sued the Trust for intention to defraud creditors. **PLA 1952 s 60**: Every alienation of property with intention to defraud creditors is voidable unless bona fide purchaser without notice of the intention. Creditors can ask for the transaction to be cancelled and for the property to be re-conveyed back to the owner so the creditor can have recourse to the property. **Issue** Can R challenge the Trust's title under s 60? • The SC found intention. Intention is different from motive or desire. • The Trust was not bona fide purchaser. L was the person trying to defraud creditors AND he was a trustee. Mrs L also knew of the difficulties and took transfer with the notice of the intention to defraud creditors. • The solicitor trustee didn't know. But Blanchard J said that Mr L's knowledge taints all of the trustees when receiving the property. The trustees must all be treated as ne purchaser with knowledge of the fraudulent intention. This is **different to <u>*Cassegrain:*</u> Blanchard J says they should all be treated as one joint tenant. Although this is in the context of s 60 PLA and NOT the LTA. But good hint.** • Tipping J agrees. Also says that the Trust was not a purchaser. • Section 60 therefore satisfied so is voidable. But the title has been registered and so is indefeasible. <u>Fraud</u>	<u>PLA s 60:</u> The first question is whether the cause of action under s 60 can actually be made out. The Court held that the intention was to transfer the house on trust to defeat Regal's interests. Mr and Mrs L both were aware of this fraudulent intention. The solicitor was not aware of this intention. BUT **contrary to <u>*Cassegrain*</u>, Blanchard J said that Mr L's knowledge of the fraud trains all of the trustees who receive the property**. This moves away rom the JT approach from <u>*Cassegrain*</u>: although this is in the PLA context and not the LTA. Section 60 satisfied. But as the property has been registered, indefeasibility applies. One of the exceptions must exist therefore. <u>Fraud:</u> Not applicable here. Must be fraud by the RP (or agent) against the previous RP or the owner of an UI in land. Regal was not the previous RP and had no interest in land. Just had a personal interest – the repayment of a debt. <u>Competing statutes</u>: • Elias CJ saw no clash/conflict between s 60 PLA and the indefeasibility

	Fraud in s 60 of the PLA is different LTA fraud. LTA fraud has certain criteria to be fulfilled. The fraud must be against a RP – so must be either a previous RP OR owns an UI. Here, Regal was just a creditor of Mr L. Was not an RP and does not have an UI. Therefore, LTA fraud not applicable. Regardless, 2 judges said there was not LTA fraud anyway. Blanchard and Tipping JJ said the trustees have not committed LTA fraud. No clear reason why this is so however. <u>Competing Statutes</u> The PLA provides that it is subject to the LTA. On the face of it, the LTA ought to prevail. But the judges all took different approaches regardless. **Elias CJ:** There is no conflict. This is not a case of defeating a registered title. Section 63 of the LTA is a right in rem – indefeasibility of title is a right in rem and cannot be set aside unless there is a valid exception. Conversely, s 60 of the PLA is a right to enforce a personal obligation and compel the RP to re-convey. Not an attempt to assert a defect in title. Indefeasibility of title does not interfere with personal obligations of an RP. **Demonstrates how in personam is not an "exception" theoretically**. **Blanchard J:** Seems to think that s 60 is *not* subject to the LTA. But this is a historical issue because at this point, the PLA 2007 had been passed and the New Act specifically provides that the LTA does not override this position. **Tipping J:** Takes the orthodox view and says that LTA prevails. Voidable *until* registration but NOT after registration – at this point, the LTA takes over. Stated that there is no express or implied override. **McGrath J:** Tried to reconcile the 2 provisions. Could read s 60 fraud into LTA fraud. <u>In Personam</u> What is in personam? IP claim against an RP looks to the state of the RP's conscience and denies him the right to rely on his/her indefeasible title if they have conducted themselves in a way that is unconscionable to rely on the register. *This implies that unconscionable outcomes are allowed* (similar to <u>*Duncan*</u>). Not an assertion that the title is defective and not a challenge to the title – it just so happens that the remedy is re-conveyance. Emphasises the purpose of the TS. IP must *not* impinge on the purpose of the TS. RP who is registered without fraud is free of non-registered interests. **RP is not free of interests, which his own conduct binds him to acknowledge.** Three conditions: 1. Cause of Action: There must be a basis for attacking that arises separately from the LTA relationship. Here, s 60 is this claim. 2. Unconscionable: Must show that it is unconscionable for the trustees to rely on their indefeasible title. Court found that knowledge can be imputed and therefore it is unconscionable.	provisions of the LTA. Indefeasibility provisions confer rights in rem that cannot be set aside except where an exception exists. Conversely, s 60 confers a personal right to compel the fraudster to re-convey the property to satisfy their personal obligations. No attempt to assert a defect in the vendor's title. **Demonstrates the distinction between the in personam jurisdiction and LTA system**. • Blanchard J saw as historical issue. • McGrath J tried to read s 60 fraud into LTA fraud to reconcile the conflict. • Tipping J said that the LTA prevails. <u>In personam</u>: In personam claims against an RP look to the state of the RP's conscience and denies him the right to rely on his/her indefeasible title if they have conducted themselves in a way that makes it unconscionable to rely on the register. No assertion that title is defective. RP is not free of interests that his own conduct binds him to acknowledge. Conditions: 1. CoA: s 60 of the PLA. 2. Unconscionable: Unconscionable for the trustees to rely on their indefeasible title because they were aware of the fraudulent transfer. 3. Not contrary to the LTA: very important that s 183 not infringed (or other LTA protections). **Other information** Joint tenancy – court moved away from thi approach.

	3. Not contrary to the policy and the purpose of the TS: important that no innocent third party involved as per s 183. Remedy through imposing a CT over the land, similar to Taitatapu, Bahr etc. **Other points to remember** Joint tenancy – seem to trend away from the *Cassegrain* approach, although in a different context i.e. s 60 of the PLA. Volunteer's title – Tipping J says that volunteer's should get good title. Registration creates title rather than record existing titles. Indefeasible title is conferred by the act of registration. No exception should be drawn just because you are a volunteer. Confirmed in new LTA.	Volunteers – Tipping J said that even volunteer's should get good title. Registration *creates* title and indefeasibility is conferred by registration. No exceptions merely because you are a volunteer. Confirmed in new LTA s 51(4).
Leases and Licences		
Intro to Lease/Licence	**Essentials for a lease** 1. **Fixed or periodic term**: Leasehold is an estate less than freehold because the term is fixed/can be fixed. Can be fixed (e.g. 10 years) or capable of being ascertained (e.g. determination of an event that is sufficiently defined, such as when you are awarded an undergraduate degree). Important: for "event" leases, the event must occur within 10 years: on the 10th anniversary, the lease terminates. "Event" leases cannot be registered: these are jut equitable leases. Lease term can be as long as you want or as short as you want, but you cannot have a lease that lasts forever i.e. no perpetual lease. If you try do this, it might be a statutory lease OR a grant of fee simple subject to payment of rent. You can have a perpetually renewable lease that renews every 21 or 42 years = "Glasgow Lease". Renewal mechanism means this is not a "perpetual lease". PLA has a code for short term leases which are for a term of 1 year or less. Also a thing called a "statutory" tenancy – usually where the term of the lease has expired but the tenant remains in possession = "holding over" period. Tenancy at sufferance is different to statutory tenancy – it is where there is NO indication from the lessor whether the tenant can continue in occupation. Tenancy at will also exists. Confers upon the occupier exclusive possession for a definite period but terminable at any time by either party. Just a personal right and not a property right. 2. **Certain premises**: The spatial extent of the lease must be clearly defined and identifiable. 3. **Exclusive possession**: Leases are estates carved out of the greater estates. For the fixed period of time, you have possession and can exclude everyone else including the landowner. This is crucial. 4. **Proper creation**: Must comply with s 24 of the PLA formality requirements. Must be in writing. Oral Ks are not enforceable. Doctrine of part performance will also apply here. Leases are registrable. Long-term leases must be registered to be a legal estate: if not registered, they can be defeated by a RP who purchases without notice. Exception to this rule is short-term leases: s 24 says short term leases are excepted from writing requirement. They can be created orally (s 208). Under s 209, lessees who occupy the land have a legal interest in land, even though created orally and NOT registered. But even though it is a legal estate, it can be defeated by a bona fide purchaser without notice because indefeaibiltiy and RP take priority. If you register your "short term lease" it is no longer a short term lease.	

	5. **Rent not essential:** But the absence of rent can be interpreted as a lack of intention to create legal relations.	
Fatac v CIR	**Facts** Puhinui has a property that includes a quarry. P grants Atlas the right to operate the quarry for 12 years and a renewable right. P sold property to Mt Wellington. The K noted the arrangement with A and says if the right to A was a licence rather than a lease, then Fatac (related to Mt W) had to pay GST. Otherwise, no GST required to be paid. CIR asked for GST but F refused. **Judgment** CoA said the important part was distinction between lease and licence. Traditional approach was to ask whether the occupier had exclusive possession. The right to exclusive possession points to lease. In the *Glenwood* (?) case, the right to use an area for the cutting of timber was found to be exclusive possession of area. Then in *Waimiha*, there was a different result: cutting timber and removing was found to be a licence only because no EP. English Courts departed for a while under Lord Denning and looked just at parties intention. But then returned to the EP test. NZ departed too and followed Lord Denning for a while. Judge in this case said time to return to orthodoxy. Parties' intentions only matters to figure out whether they intend to confer a right of EP. Intention to legal classification is irrelevant – doesn't matter whether they classified as a lease or a licence or intended to do this. Right to EP turns on the effect of the instrument. Refinements to the EP test: • Defined term: Possession that is terminable at the will of the owner is NOT EP. Necessary incident of EP is therefore a defined term, whether fixed or periodic. • Rent: Relevant to the intention to be legally bound. Indicates whether the parties intend to create a lease arrangement and be legally bound, but not decisive. • Restrictions: Limitations/restrictions on the use of land by the occupier do not negate existence of a lease. Lessee has EP and enjoys rights of ownership temporarily: this does not mean the lessor cannot impose restrictions on use of land. EP is not the same as unqualified use and possession of the land. • Cases where EP but no lease: (1) Statute forbids granting of a lease; (2) Landlord's right of entry – if the right of entry is inconsistent with EP e.g. can enter at *any* time; (3) Other legal relationships – relationship between owner and occupier is different to landlord-tenant e.g. employee occupies the employer's premises to perform their duties; or occupying property due to holding office; mortgagee in possession; (4) Small portion of a bigger area – if only EP of a small portion of a bigger area of land that is subject to the agreement e.g. mill site, tramways, dams. This is the *Waimiha* situation: they had right to cut the timber, but did not have EP of the whole land. Another example is the *Brooks* case where Mrs B had a store in a theatre with the only key to the store. But she did not have control of the electricity to the fridge or lighting, or a key to the front door. This meant no EP so no lease. So **control** is important: if someone else controls the use of the premises, then you do not have EP.	Legal test in NZ: The Court confirmed that the governing test was whether the occupier had exclusive possession of the property. The right to EP suggests the arrangement is a lease rather than a licence. The UK under Lord Denning briefly shifted to a new test, which assessed the intention of the parties and whether the parties intended to create a lease or a licence. But in this case, the CoA decides to "**return to orthodoxy".** Two cases illustrate this test. In *Glenwood*, the occupier had the right to use an area to cut timber and transport it. This was found to be EP. In *Waimiha*, the occupier had a right to cut timber in a certain area but it was only found to be a licence because they had no EP of the entire area, just a small portion of it. Relevance of intention: Parties intention as to classification is irrelevant. The right to EP turns on the *effect* of the instrument. The parties' intentions are only relevant to the extent that they elucidate whether the instrument was intended to confer a right to EP or not. **Refinements to the EP test** There were a number of refinements: • Defined term: Possession that is terminable at the will of the owner is not EP. A necessary incident of EP is that there is a defined term: fixed or periodic. • Rent: Rent is not essential. But the absence of rent may indicate whether the

	Words and terms of Ks is the last qualification of the EP test: • Doesn't matter that the K referred to a "licence". Terminology and intention only useful to the extent that it speaks to intention regarding EP. E.g. an **express right** to enter and inspect the property, this is an express authorisation by the tenant which provides a foundation that, unless authorised, the landlord is not authorised to enter = EP. • Conversely, if a term requires you to shift around the property according to the directions of the owner, then this points away from EP. Parking permit example: if you have no allocated slot, then this might point away from EP. Application: • Atlas did not have EP because the landlord had a general right of entry to the land so long as they didn't interfere with Atlas' work. This points away from EP. • Also, Mt Wellington had an agreement with Atlas. It said that MW had the right to quarry materials as well as Atlas, to stockpile and remove materials, to set up a quarry area etc. Points away from EP. • Duration of term and definition of area lacking. • Overall, was a licence and not a lease. Lease vs Licence: • Nature of rights is different. Lease is an interest in land that creates a property right. Licences are merely a permission to be on the land or to use the land for a certain purpose. This is not a property right: it is merely a personal right. • Leases involve giving up possession of land for a stated period. Tenants therefore enjoy the fundamental ownership rights for this period. Licencees can merely enter and use land to the extent that permission has been given. • At CL, licences can be revoked whenever, subject to damages. Modified now by PLA. • No creation requirements for licences. Failure to comply with formality requirements for leases can lead to the creation of a licence instead. Why does the distinction matter? • Tenants/lessor's are protected from eviction because they have property rights. But the PLA 2007 has extended protections to licencees also. PLA sets out a cancellation code for cancelling leases: s 206 extends these provisions to commercial licences. Section 206 says though that this does not convert licence to a legal interest in land. • Proprietary interests against third parties if you have a lease. Can sue trespass and nuisance. • Right to assign or sublet leases. Licencees cannot alienate their rights unless specifically permitted. Liability to pay local body rents under lease. • Leases are registrable but licences are not.	parties intended to be legally bound, and whether they intended to confer EP or not. This is not decisive. • Restrictions: Limitations/restrictions on the use of land do not necessarily negate the existence of a lease. Lessees merely have a temporary right to ownership: but this is not the same as unqualified use and enjoyment of the land. Leaseholds are carved out of the freehold estate and the owner of the estate can imposed restrictions on its use to protect the reversion etc. • Qualifications: (1) Statute forbids granting a lease. (2) If the landlord has an unqualified or extensive right of re-entry, then this is fundamentally inconsistent with EP. (3) Other legal relationships e.g. employer/employee; MP officeholder; mortgagee in possession. (4) Small portion of a bigger area is not EP e.g. *Waimiha*. Also **control test** is important e.g. *Brooks* case where there was no control over electricity to the fridge or lighting, and no key to the front door of the theatre. • Terms of the K: Classification as a licence or a lease is irrelevant. Terminology only useful to the extent that it reveals an intention to confer EP e.g. creating specific scenarios in which the landlord can enter the property.
Dual	**Nature of leases**	

character of leases	Leases continue to have a contractual element because they are created by contract. Parties to the lease have a contractual relationship and thus have privity of contract. K imposes rights and obligations. There is also a tenurial relationship between the landlord and the tenant because leases are estates in land. This is privity of estate. Landlord has the right to receive rent and right to the reversion. Tenant has most of the rights of the owner for a limited period of time. Estates can be alienated: either by the landlord or the tenant. Assignment of leases occurs by the registration of a memorandum of transfer. If formalities not applied with, then the assignment is an equitable assignment. Sub-lease: • In this relationship, the original lessee becomes the "head" lessee. • PoE and PoC between the lessor and head lessee. PoE and PoC between the head lessee and the sub lessees. No relationship between the sub-lessee and the lessor. • Sub-lease is carving a portion out of the original lease. In CL therefore, a sub-lease must not transfer the *whole* of the leasehold, as this is an assignment. Consequence: sub-lease in CL must end *before* the original lease ends. • The PLA allows the sub-lease to end at the same time as the original lease.	
City of London Corp v Fell	**Facts** Fell leased premises from City of London Corp for 10 years with rent review after 5 years. Lessee promised to pay rent. Fell eventually moved elsewhere and assigned the lease to Grovebell. Rent was increased according to original K. Lease expired but G continued in possession for a while. Then CLC regained possession after the holding over period. The holding over statutory provision says that the tenancy continues after expiration of the lease. But G did not pay rent during this period. CLC sued Fell for the rent. **Issue** Does F's obligation to pay the rent end at the expiration of the lease or does it extend into the holding over period? **Judgment** Argument by Fell: Lease involves a K between original landlord and tenant, and the grant of an estate. Once tenancy assigned, liability to the landlord only lies under the contract and not under privity of estate. Assignee's liability lies only in privity of estate (unless a new K is entered into): so is only liable for the covenants in the lease K that touch and concern the land. Assignee not bound by all covenants in the original K. Court agreed: • Disagreed with the QB approach, which distinguished between term and tenancy. The "term" is an integral part of the tenancy: if one is continued, so is the other. • Leases give rise to privity of K and privity of estate. Obligations that touch and concern the land are imprinted on the term of the reversion – they bind the current lessor and current lessee and successors in title.	What does this case demonstrate? The case demonstrates the distinction between privity of contract and privity of estate. Leases involve a K between the original landlord and tenant, and the grant of an estate in land creating a tenurial relationship. After assignment, the original parties remain subject to the obligations in the K but are not longer subject to the tennurial relationship. **Obligations that touch and concern the land are imprinted on the term of the reversion – they bind the current lessor and current lessee and successors in title**. Application: The original tenant is bound by the K but not bound by any obligations after the termination of the K. The tenancy post 1986 existed by force of statute and independent of the contract. Fell had only covenanted to pay rent during the term of

	• Original tenant is bound by the K but not bound by the tenancy if it goes beyond the K. The tenancy post 1986 exists because of the Statute and not because of the K that they are bound by. Only covenanted to pay during the contractual term. Therefore, not liable for the rent post 1986 which is not provided for in any of the terms in the K.	the lease. Therefore, was not liable for the rent beyond the end of the contract.
Herbert Duncan v Cluttons	**Facts** HD leased premises to Cluttons. Lease to run to 1990. Cluttons assigned to Warringtons. After expiration, lessor didn't want to extend the lease. A judge imposed an injunction and imposed new rent rate, which was very high. W continued in possession until 1991 but only paid the *old* rent and not the new rent imposed by judge. W owned lots of rent money because of the increase. Cluttons had agreed in the K to pay rent for the "term": but the K defined term as including any statutory holding over periods or common law holding over periods. **Judgment** PoE and PoC apply. Because of the term IN the K, the original lessee was responsible for the rent during the extended period. But the original lessee is not responsible for the amount of rent above the rent stipulated in contract. The rent increase was by a judge and not by K. Thus Cluttons was not responsible for this rent increase. [NB: The new lessee might enter into a new K with the lessor, forming a new PoC with the lessor.]	
Effect of assignment in NZ under Statute	**Lessor's successor in title** PLA s 231: Burden of lessor's covenants run with the land. New owner of the land (new lessor) is bound by the covenants of the original lessor. Lessee and assignees can enforce these covenants. PLA s 233: Benefits of lessee's covenants run with the land. The new lessor can enforce the covenants. Effect of these sections is that the transferee of the reversion has the benefits and the burdens of the original lessor – inherits their rights and obligations. **Original Lessor** PoC continues to apply. In absence of any agreement to the contrary, the original lessor remains liable for his own covenants throughout the duration of the lease, notwithstanding that he assigned of transfer the reversion. Bound by own K. **New lessee** At CL, the benefit and burden of covenants that touch and concern the land are automatically binding on the assignee of the lease. Established in *Spencers* case. "Touch and concern" = if a covenant is incidental to the landlord-tenant relationship. E.g. covenant for quiet enjoyment, to pay rent, to repair. Covenant not to operate a competing business is not "touching and concerning" the land. Section 240(3) of the PLA abolishes this. Lessee must observe ALL covenants of the lease and may enforce ALL covenants of the lessor. **LTA s 75** does the same thing.	**NEED TO GO OVER THIS!!**

	Original lessee PLA section 241: The transferor/assignor of the lease (lessee) continues to be liable for the original covenants and for rent. This includes intermediate assignees. But if the new lessee and the lessor agree to new terms that vary the lease, the original lessee is not bound by any increases in liability not provided for by the lease at the time of transfer/assignment. **Example (from diagram)** [NEED TO GO OVER THIS EXAMPLE TO UNDERSTAND MORE CLEARLY] Summary lecture The "touch and concern the land" requirement is removed. Intermediaries are also liable. Exception is where the current lessee and lessor reach a new agreement and vary the terms. The original lessee is not liable for the obligations over and above what *their* contract stipulates. All of this only impacts leases post 2008. Before this date, the CL applies.	
Rights and obligations	Contracts usually stipulate the rights and obligations of the parties. The CL implies certain terms into agreements, as they are inherent to the landlord-tenant relationship. Implies where the lease is silent on the matter. • Tenant's right to quiet enjoyment; implies landlord covenant of quiet enjoyment. • The grantor must not derogate from the grant; landlord obliged not to do anything inconsistent with the use to which the lease is entered for. • Implied obligation on parties to do everything necessary to carry out the relationship; this may require landlord to do positive acts. • Tenant pays rent; CL implies this obligation if the lease is silent. • Tenant to use the premises in a tenant-like manner. • Tenant must yield possession when the lease expires. • Tenant's obligation not to commit waste. Voluntary and permissive waste. Voluntary = positive acts that cause damage. Permissive = omissions by the tenant, such as allowing to deteriorating. Have to preserve the state of the premises. Common law implied covenants now replaced by covenants implied by statute. Section 281(2) of PLA, CL implied covenants are abolished. PLA schedule 3 sets out the covenants. Key point: Parties can negative, vary or extend the covenants per s 279. The agreement will take priority. **Covenant of quiet enjoyment** Fundamental. Undertaking by the lessor against interruption in the possession of the leased property. "Quiet" means	**Section 218(2) of the PLA** states that implied covenants are abolished at CL. PLA schedule 3 sets out the statutory implied covenants. Parties can negative, vary or extend the covenants per **s 279** – the K takes priority. ***[Use the definition of covenant of quiet enjoyment here to form the cheat sheet and flesh out with the content from the cases]***

	peaceful and free from interruption/interference. "Enjoy" refers to exercise and use of the right/full benefit. Protects the tenant from breaches by landlord or persons claiming under the lessor. Lessor not responsible for other people unless under or through the landlord e.g. cannot control neighbours. The impugned conduct must amount to a "substantial interference" with the tenant's ability to use the premises in an ordinarily lawful way. Doesn't matter whether the act is rightful or wrongful. For landlord to be responsible for people claiming under the landlord, the act must be *rightful*. Tenant can sue the people claiming through where there acts are wrongful – here they sue in tort. Covenant is *prospective*. *Southward v Tanner*: the state housing was not soundproof. Tenants complained about noisy neighbours in building. Court said lessor had no obligation to improve the state of the building unless the lease K had a term obliging the landlord to improve the building. Breaching this covenant might also amount to derogation from the grant. Covenant of quiet enjoyment covers most things that are covered by non-derogation from the grant.	
Kalmac v Delicious Foods	**Facts** Colloney owns a small shop. Above is another story; the shop is joined to a 3-story building. C leased the shop for a term, which was assigned and re-assigned until reached Delicious Foods. C sold property to Kalmac, which knew of DF's possession. K tried to terminate lease but DF refused. DF got renewal of lease from C. The sale to K was made subject to the lease and K knew of this. K started to demolish the building *except* DF's part. DF tried to get injunction. **Judgment** K and DF clearly inherited the rights and obligations of the original parties. Court found that there was an implied covenant to maintain the existing building throughout the term of the lease: • Clause regarding council rent said that rents are calculated based on the proportion of the leased section compared to the entire building. This meant the building should remain throughout the lease. If the other parts of building are demolished, how do you calculate? • Clause referred to insurance for the *entire* building also. • Therefore the premises meant the shop as *part* of the building. Implied covenant not to alter the building. Based on this covenant, the Court considered non-derogation: • If a grant is on the condition that the whole building will remain, then demolishing it derogates. Quiet enjoyment: • Court says that this covenant and the derogation covenant are closely related. • Covers any act by the lessor, which prevent the lessee enjoying the premises for the purposes it was leased. "Enjoy" means exercising and having full benefit of the right. • Breach can occur without physical interference. Just need substantial interference/interruption with the purpose of	Non-derogation from the grant: First step was to ascertain what was actually granted and what the purpose of the grant actually was. The Court found that there existed an implied covenant that the landlord would not alter the building and that it would subsist in its present form. Based this on the clause regarding calculation of council rent based on the proportion of the leased premises compared to the entire building; and the clause that referred to insurance for the entirety of the building. Demolition breached this implied covenant and therefore amounted to derogation from the grant. Covenant of quiet enjoyment: Closely related to the covenant of quiet enjoyment. "Quiet" covers any act by the lessor, which prevents the lessee from enjoying the premises for the purpose for which it was leased. "Enjoy" means exercising and having the full benefit of a right. Breaches can occur without physical interference – just need a substantial interference/interruption with the purpose

	the lease. • Demolition caused noise, vibration, difficult access and obstructed DF's business. Therefore there was a breach. Remedies: Can be damages, injunction and cancellation of lease. Prima facie, DF is entitled to an injunction here. Court had to balance out the competing interests and see whether damages are sufficient or whether an injunction is required instead. Court said K was highhanded and also difficult to assess damages. Court went with an injunction as the trial judge did this.	of the lease. Demolition breached the covenant as it created noise, dust and vibrations, and it interfered with DF's business and obstructed access to their property. Remedy of an injunction was granted.
Nordern v Blueport	**Facts** N leased a building in Auckland. B was a personnel agency. B leased the third floor of a building. 4th floor was leased to a couple. These tenants assigned the lease to an escort company called Karisma (which turned out to be a brothel). Panda/B quit and refused to pay rent to N. N sued B for the rent and expenses between then B quit and the place was re-let. **Arguments** B argued that N breached the covenant and quiet enjoyment *and* non-derogation from the grant, and thus the lease was cancelled. **Judgment – Non-derogation** Non-derogation from the grant: • Grantor not permitted to derogate – this is a rule of common honesty. Applies where premises are "let for a purpose that will be rendered unfit by use of adjoining premises retained by the landlord or let by the landlord to another tenant." • In lease context, derogation is caused by use of adjoining premises owned by the same landlord, which they retain OR lease to another tenant. This applies on these facts. • Application of this principle does not depend on a *specific* covenant in the lease – it is implied. Covenant for quiet enjoyment does not oust this covenant. They can co-exist. Nordern's 3 arguments: (1) No derogation as the lease purpose was not frustrated; (2) Landlord not responsibility for the tenant's activities; (3) Even if in breach, it was not sufficiently substantial to allow cancellation of the lease. First argument: Elias J says the derogation need not be physical interference. If inconsistent use renders the premises unfit for the purposes of the lease, it is derogation. It must be a substantial interference and not just interference with amenities or convenience are not enough e.g. privacy, tranquillity. Other examples that aren't enough e.g. act that increase likelihood of fire and insurance costs; changing residential address to a hotel; introducing a competing business. Interference does not need to be so serious as to render the purpose of the lease impossible – not this high. Just needs to be unfit or materially less fit that is a question of fact and degree. Elias J found derogation. There was shit and urine in the shared areas; customers of the brothel went to B's floor by	**Law on non-derogation** • The grantor is not permitted to derogate from the grant – this is a rule of common honesty. Applies where premises are let for a purpose that will be rendered unfit by use of adjoining premises by the landlord OR let by the landlord to another tenant. • Application does not depend on a covenant in the lease. This principle is implied. The Covenant for Quiet Enjoyment does not oust this covenant, as they can co-exist. • Derogation need not be physical interference. Any inconsistent use that renders the premises unfit for the purpose of the lease is sufficient. • Must be a substantial interference and not just an interference with amenities or convenience e.g. privacy, tranquillity, increasing likelihood of fire and insurance costs, changing residential address to a hotel, introducing a competing business. Needs to be unfit or materially less fit = matter of fact and degree. • Interference does not need to be so substantial that it renders the purpose of the lease impossible. • Landlords can be responsible for the *wrongful* acts of their tenants where the

	accident often; and customers propositioned staff there. Second argument: Argument was that the landlord should not be responsible for the *wrongful* acts of the tenants because they did not authorise these acts AND B has the option to sue in tort. In quiet enjoyment covenant, we said landlord only responsible for *lawful* acts of people claiming through them. This is usually so for non-derogation also. But the Court held the interference was SO SUBSNTANTIAL that N should be responsible, especially because the brothel was illegal. Nordern knew and refused to exercise powers to terminate the brothel and its consequences. Lessor themselves had derogated from the grant here. Elias J also says here that by shutting their eyes to how Karisma was using the 4th floor, the landlord was in breach of quiet enjoyment covenant also. Third argument: Court said that substantiality is a matter of face and degree. If a lessor has derogated, the breach is already sufficiently substantial and cancellation is allowed. Covenant of quiet enjoyment must be substantial – but degree of substantiality may vary. Sometimes a breach of this covenant will not be enough to cancel. Whereas for derogation, any breach is enough to justify cancellation.	interference is substantial. Especially compelling where the use of the premises is illegal and the landlord shut their eyes to the use and could have intervened or terminated the lease. • If the lessor has derogated, the breach is sufficient to allow cancellation. **Quiet enjoyment** • Shutting eyes to breaches can also breach the covenant of quiet enjoyment as in *Nordern*. • Breaches of the covenant of quiet enjoyment must be substantial – but the degree of substantiality may vary. Sometimes it will be sufficient to cancel whereas sometimes it won't be sufficient.
Tram Lease v Croad	**Facts** C was assigned a Glasgow Lease over the 'shoe repair site'. The land all used to belong to one person. The building on the shoe repair site leans on a wall that sits on the KFC land. Originally there was an easement of support, but this expired. Tram Lease acquired fee simple to both blocks and tried to buy the lease from C but failed. TL managed to get the KFC person to give up their lease however, so has full fee simple on that part. Tried to get judgment saying that C's right to the wall had ended and that they could remove the wall therefore. C claimed this would be derogation. **HC Judgment** Judge found no breach of either covenant. **CoA** Discussed the law: • Grantor must not do or permit something that is inconsistent with the grant and substantially interferes with the grant. • In application to leases: (1) Activity causing derogation is done on other land the lessor has; (2) Activity is done by the lessor or permitted by the lessor. If not the lessor, the lessor must have control and choose not to intervene. The interference needs to be substantial; (3) Activity must frustrate the purpose for which the lessor knows the lessee is taking the premises or is likely to use them for. • Wall supports the shoe repair building but is on the *other* land. At CL, there is no right of support. Implied	**Law on non-derogation** The grantor must not do or permit something that is inconsistent with the grant and substantially interferes with the grant. The conditions: 1. Activity causing derogation is done on other land the lessor has. 2. Activity is done by the lessor or permitted by the lessor. If not, the lessor must have control and choose not to intervene (similar to *Nordern*). 3. Activity must frustrate the purpose for which the lessor knows the lessee is taking the premises or is likely to use them for. **Application** The wall supports the shoe repair building on the neighbouring land. There is no CL right of support. BUT the Court implied a

	obligation to not derogate. • Also a central idea that you need to ascertain the terms of the grant – you need to know this first so you can assess whether there is a derogation. E.g. in *Klamac* there was an implied covenant to maintain the building for the whole lease. • Here, the Court implied a restriction on the use of neighbouring land. Question is not whether this was agreed to but whether it was *necessary* to imply to avoid undermining the grant. • Court will look at surrounding circumstances also. Removing the wall will cause the building to collapse, will undermine security, and will disrupt the business. Court found that removing the wall would be derogation therefore.	restriction on the use of the neighbouring land – this was *necessary* to avoid undermining the grant. Court will always look at the **surrounding circumstances**. Removing the wall would cause the building to collapse, would undermine security, and would disrupt the business. Removing it would therefore amount to derogation from the grant.
Covenant to Repair	**PLA** PLA schedule 3, s 13 includes implies a lessee's covenant to keep the premises in existing condition. Lessee has to keep the premises in the same condition they were in when the lease started AND return the premises in this condition. Except for wear and tear. You can replace the implied covenant with an express covenant. This might include setting out the standard of repair. *Proudfoot v Hart*: repair with regard to the age, character and locality of the property that would make it reasonably fit for "the occupation of a reasonably minded tenant of the class who would be likely to take it." This is a loose standard. No reference to the actual state of the building at the commencement of the lease – just a reasonableness requirement. Might require going beyond the state in which the property was received.	**PUT PROUDFOOT ON CHEAT SHEET.**
Mobil Oil v Development Auckland	**Facts** Property on reclaimed land used for storage of oil for 100 years. Lease ultimately taken over by Mobil Oil NZ. DAL was successor of original lessor. Mobil signed agreement with original lessor, which said they would keep the premises in good order, clean and tidy. Mobil handed back the premises to DAL. Land was heavily contaminated with oil and would costs $10,000M to clean up. Surface soil to 3.5m needed to be replaced. DAL wanted Mobil to pay by arguing that the K covered contamination. **Background** HC: "Clean and tidy" does not extend to the subsurface. CoA: "Clean and tidy" *does* extend to the subsurface. Lease didn't authorise contamination and future tenants might not accept the condition of the land. **Arguments** Three issues: (1) Did "clean and tidy" require Mobil to fix contamination?; (2) Is Mobil liable for cost because of breach of implied term not to commit waste?; (3) Does obligation relate only to contamination post the agreement OR all the way back to original lease? (Not the focus). **Mobil arguments:** "Clean and tidy" means free from dirt, everything organised, and looking nice. Superficial.	**Law on keeping in good repair** Key points are that the Court will look at the context of the lease and the lease instrument itself. "Keep" may obligate more than just maintenance of status quo at time of commencing the lease. Might require work to repair the premises beyond the original state it was in. But this does not extend to transformative change. This is also an on-going obligation and does not just apply at the end of the tenancy. "Good order"/"Clean and tidy" are usually in residential leases and do not require you to go under the subsurface.

	Obligation to fix contamination does not come under this. Also argued that DAL had no issues with previous land that had lots of contamination. Finally, the cost claimed was what was needed to bring the land to residential use – but the land has only been used for industrial purposes. Land was also created from rubbish products and was reclaimed land – this had to be taken into account. **DAL Arguments:** Not aware of regular contamination and how serious this would be. Regulations and bylaws prohibited spilling of fuel – so the spilling and contamination was unlawful and not permitted by the lease K. Requirement of "good order" which goes deeper than just superficial. **Judgment** Context of the case: Court looked at the context of the land = created from a rubbish dump. When the obligation was imposed, it was industrial land and no one thought the land would be intended for residential use. No one realised the need to clean up the subsurface and the extent of the contamination. Lack of knowledge of the contamination *might* be because the Board was just not aware of the extent of contamination. BUT it could be because the lessor was not thinking of potential commercial/residential use. Originally, the lessor accepted contaminated land back and never complained. Also some of the source was from neighbouring land. Lease instrument: • "Keep" may obligate more than just maintenance of status quo at time of commencing the lease. Might require work to repair the premises beyond the original state it was in. But this does not extend to transformative change. E.g. you lease a property with a bad roof – you might need to repair it because the leaking may cause extensive damage to the house; or if fence broken, if you don't do anything it might entirely collapse and the lessee could be responsible. • Thus, if land built on contaminated rubbish pile, lessee might be required to do *something*, but not to clean up entirely because this is transformative. • "Keep" is also an on-going obligation and does not just required tidying at the end of the tenancy. But there were buildings on the land during the tenancy, which means it was impossible to fix the sub-surface of the land during the tenancy. Therefore, the K cannot have required this and the parties cannot have intended this. • "Good order" and "clean and tidy": Usually used in residential leases and not industrial/commercial leases. These leases do not require you to go under the surface. Summary of obligations: Cited *Proudfoot*. • Two qualifications. • (1) Obligations to keep in repair are construed by reference to the "reasonably minded tenant of the kind envisaged at the commencement of the lease." Court says that reasonably minded does not require the satisfaction of *every* possible tenant. Just need to satisfy the tenant of the particular class/kind. Part of the land was subsequently leased to an industrial user, which meant that it was clearly acceptable for a reasonably minded	Added 2 qualifications on *Proudfoot*: • Obligations to keep in good repair are construed by reference to the "reasonably minded tenant of the kind envisaged at the commencement of the lease." **Test**. • "Reasonably minded" does not require the satisfaction of *every* possible tenant – just tenants of the particular class/kind. • Standard of repair is based on what was within the reasonable contemplation of the parties at the commencement of the lease.

	tenant of the relevant class. • (2) Repair clauses are confined to what was within the contemplation of the parties at the commencement. We have to look to what the parties thought was required at the time of the lease. **Summary** The lessee may need to go beyond the original status of the property when the lease was entered into. But the standard of repair has to be construed by reference to the condition that would be required by reasonably minded tenants of the kind envisaged at the commencement of the lease. Does not require transformative changes. Section 223 of the PLA expressly says that lessee is not required to put in good condition if not in good condition at start of lease. Context of lease may require otherwise though. Therefore the case law is still applicable.	
PLA s 223	**Provision** Act says the lessee does not need to put the premises in good condition if not in good condition at the start of the lease. This alters ***Proudfoot***. But it says unless the context otherwise requires. In certain contexts, the lessee may have to go beyond what is required in s 223.	
Renewal and termination of leases	**Renewal** A key question: whether the lease grants a right of *renewal* or an option for *extension*. The distinction matters because a renewal is a new lease; an extension just extends the term of the current lease. Depends on the wording. This is important for assignments. If lease is renewed, then the original lease ends and the lessees/lessors and intermediaries are free of obligations. Renewal must comply with formalities. **Termination** 1. Expiry: expires after the term is over. If no term regarding expiry, then the law implies a statutory tenancy and it can be determined by will. 2. Surrender: the lessee gives the leasehold back to the lessor before the term expires and the lessor accepts this. Consensus to end lease before term expires. 3. Occurrence of determining event: even cannot be a breach of covenant by either party. This is a cancellation and not occurrence of an event. 4. Break clause: term that gives a right to terminate the lease early. 5. Notice to terminate: usually applies in periodic tenancies. Give notice and terminate e.g. s 210 of PLA, if holding over then either party can give notice. 6. Merger: leasehold and reversion held by the same person. 7. Cancellation: party entitled to cancel because of conduct of another party. Governed by the PLA in the cancellation code. Lessee's right to cancel in the Act is unclear. But the CCLA gives rights to cancel. Lessor's rights are a lot clearer. In ***Nordern***, the lessee was entitled to cancel.	

	8. Frustration: premature determination of the lease because of the happening of an unforeseen event that is so significant to the contract so as to destroy its whole basis. HoL has observed that frustration in leases hardly ever applies.	
Roman Cathollic	**Facts** RFD owned a building with several units. The Church occupies one of the units and the Bishop is the registered lessee. The leasehold is of a unit title = stratum estate (fee simple in your unit and tenancy in common in undivided share in the common areas). Leasehold was 999 years at rent of $1 – Bishop had given up freehold close by in exchange for the leasehold. Earthquakes damaged the building. RFD decided not to repair because the Govt offered to purchase to build a convention centre. Entire insurance for 7.8M. Bishop's interest in unit was around $1M. Insurance coy paid out the indemnity for the building = 1.5M. Bishop was apportioned about 200K. Crown ultimately paid RFD $9M for acquisition of the entire property. Bishop wants money. Argues that the lease continued in existence until the Government compensation and so therefore deserves part of the compensation. RFD claims that the Bishop's interest ended when the insurance was paid. **Issue:** Does the Bishop have a share in the Crown payment? Did the lease subsist or was it frustrated? **Judgment** Context of lease: Court says the lease cannot be terminated by default. The lease K is silent on termination. Therefore, cannot imply that the lease will terminate. Lease was a perpetual lease given in exchange for freehold interest in land. Unit title also relevant. Owner of the unit title gets common area also. Because Bishop's interest includes this area, the value is larger than *just* the interest in Unit A, especially given perpetual lease. RFD argues that the purpose is defeated because the premises are destroyed. Court disagrees. Using the chapel just for worship is only *one* purpose. There are other alternative purposes. Court concludes that the lease subsisted. Intention for the lease to subsist even after the earthquake etc. occurred. Frustration Contractual doctrine. "Prevention of the carrying out of a K where the K obligations have become incapable of being performed." Only operates whether the K makes no provision for the circumstances that have arisen/supervening event. Test: Whether the RP might think the K is different in the circumstances and cannot be performed? Lease context: Leasehold interests can be freustrated due to the dual character of leases. BUT leases are also estates. Previously, UK had refused to allow lease to be frustrated. But then in **National Carriers (HoL)** case, the Court said that leases can be frustrated, but this is very rare and hardly ever happens.	Context of the lease: The Court first looked at whether the lease was terminated based on the terms of the lease agreement itself. Leases cannot be terminated by default. As the K was silent on termination, the Court refused to imply that the lease was designed to terminate in these circumstances. The Bishop's interest in the leased land was strong – had a "perpetual" lease with nominal rent, and had a unit title so accompanying legal interest in the land and common areas. The purpose of the lease was not just confined to worship and could include alternative purposes such as exchanging for freehold. Therefore, the lease subsisted. **Frustration Law** Frustrating is a contractual doctrine. Test: "Prevention of the carrying out of a K where the K obligations have become incapable of being performed. Based on a reasonable person test. Only operates where the K makes no provision for what is going to happen in the circumstances. Leases can be frustrated because of the dual character – they are contracts too. HoL in **National Carriers** said that leases could be frustrated but only very rarely. The purpose of the lease must be destroyed. **Test: "**Contextual judgment based on the relationship of the frustrating event to the purpose and of the lease and the extent of the impediment imposed."

	Purpose of the lease is most important: is the purpose destroyed or frustrated? • If purpose is destroyed, then no need to continue the leasehold merely because of the estate in land. • **Useful test from the Court:** Contextual judgment based on the relationship of the frustrating event to the purpose of the lease and the extent of the impediment imposed. Application: • Context of lease is a perpetual lease for nominal rent. • Were the obligations so altered? The Crown offer to buy was not certain – it was just a proposal. Cannot say that the lease was frustrated pre-acquisition in light of this uncertainty. • Legislative scheme: under the CERA 2011, "owners" include lessees. RFD's interest is worth less than the Bishop's lease. Would be unjust enrichment to allow RFD to take all the money. • Purpose: not *just* worship. One of the purposes could include exchanging the freehold for the leasehold. Court held that there was no frustration.	**Application** Context of lease: perpetual lease for nominal rent. Obligations altered? Crown offer to purchase land was not certain – it was merely a proposal. Cannot say that pre-acquisition the lease was destroyed. RFD's interest is worth less than the Bishop's interest. Unjust enrichment to allow RFD to take all the money. Purpose is not just worship.
Easements		
Intro lecture on easements	**Definition** A right annexed to land to utilise other land of different ownership in a particular manner (not involving taking part of the produce of the land or part of its soil) or to prevent the owner of the other land from utilising his land in a particular manner. **Nature** Easements are interests in land. They can be passed on to successors and can permanently bind the land. **Creation/disposition** Because they are legal interests, they must comply with formality requirements. Part performance applies e.g. *Salt of the Earth* case. Easements are registrable. Registration under s 108 of the LTA 2017, they must be registered on the title of both the ST and the DT. If registration not complied with, it is an equitable interest only and can be defeated by a bona fide purchaser without notice e.g. *Sutton v O'Kane*. Must be an act of creation. You cannot just acquire an easement because you have enjoyed a particular right for a long time. Different to adverse possession. Section 296 of the PLA says you cannot acquire easements by proscription e.g. using neighbour's driveway for 30 years is irrelevant. **Requirements and other** Section 291 of the PLA allows easements in gross. Will burden the ST and bind successors.	**COULD USE THE EASEMENT DEFINITION HERE ON MY CHEAT SHEET?**

	Different people must own the adjoining lands because easements are rights over *other* people's lands. At CL, this means that if you acquire the neighbouring land then the easement is extinguished. This is changed by the LTA 1952: allows easements to be registered even though both bits of land owned by the same person. **Easements and natural rights** Natural rights are rights that automatically exist as part of an estate. E.g. right to possession. Easements *must not* amount to joint possession of the land under Common Law. Natural water flow. Right of person on the higher ground to naturally discharge rainwater onto lower land. No need for an easement here. Right of support to the <u>land</u>. Neighbour cannot excavate and undermine your land. But no natural right to buildings on the land. Easements are needed for building support. Easement and licence – licence is personal and easement is property. Lease is different because it includes possession.	
<u>Re Ellenborough Park</u>	**Facts** Whitecross estate includes park and surrounding land plots. Right granted to purchasers of each plot. Promised never to build on park – would maintain the park as a playground. W estate was passed to Davis subject to conditions. Issue arose regarding the nature of the right: was it an easement or was it a right granted only to the original purchasers? **Judgment** If house owners are entitled to enforce against the current owner, it must be an <u>easement</u>. Characteristics of easements: 1. Dominant and servient tenement (but see PLA 2007 s 291 easement in gross) 2. Easement must accommodate the dominant tenement 3. Dominant and servient owners must be different persons (except see LTA 2017 s 108(3)) 4. Right must be capable of forming the subject matter of the grant. <u>Second condition</u> Must exist the required connection between the right granted and the land itself. It must be appurtenant to the land. Connection: • **First:** The benefit of the right must be attached to the ownership of the land and not the person • Must be appurtenant to the land. Cannot be lawfully enjoyed by other persons. Right limited to the owner of the land.	**Legal test for easements** Four requirements: 1. DT and ST (except s 291, PLA 2007) 2. Easement must accommodate the DT 3. DO and SO must be different persons (except see LTA 2017 s 108(3)) 4. Right must be capable of forming the subject matter of the grant. <u>Second requirement</u> Three sub-limbs: 1. The benefit must be attached to the ownership of the land and not the person – it must be appurtenant to the land. Cannot be lawfully enjoyed by other persons. Look to the language of the conveyance instrument and see whether the substance of the grant is to create a legal right intended to be annexed to the land and not a privilege personal to the possessors. 2. Connected to the enjoyment of the

	• Look at language of the conveyance instrument and look whether the substance of the grant is to create a right connected to land that was meant to be passed on. Intended to be annexed to the premises and not a privilege personal to the possessors. • **Second:** Must be connected to the *enjoyment* of the property. Not just connected to the land but connected to the *enjoyment* of the DT. Otherwise, it is a mere contractual right. • **Third:** Primarily a question of fact and depends on the nature of the DT and the right granted. • Usually needs to be some physical connection. Here, the surrounding owner's rights to use the park qualify – it is very different to using a local zoo or cricket ground. <u>Fourth requirement</u> There are 3 questions: 1. Whether the rights are too wide or too vague? 2. Whether the right is inconsistent with the ownership or possession of the ST 3. Whether it is a mere right of recreation without utility or benefit **First:** The right here is well defined and only covers a limited number of houses. **Second:** Court discussed <u>*Copeland v Greenhalf*</u> where trucks were constantly parked on the RoW. Court held in this case that it amounted to joint possession and was not an easement therefore. Here, the Court found that using the park was fine. **Third:** Concept of jus spatianti: means a right to go all over the park and enjoy its amenities without limit. Not recognised in civil law and probably not CL. Right for recreation cannot be subject matter of an easement. But Court held that this is different – distinguished. But there is an element of jus spatianti. Court discussed *AG v Antrobus* that the present Court found was not inconsistent with existence of jus spatianti. Looked also at <u>*Duncan v Louch*</u> which concerned walking a path just for pleasure, which was found to be an easement. Court used this to show that using the park was capable of forming the subject matter of the grant.	property rather than merely connected to the land. Otherwise, it is a mere K. 3. Question of fact and degree. Usually requires some aspect of physical connection between the DT and the right granted. <u>Fourth requirement</u> Three sub-questions: 1. Rights too wide or too vague? 2. Whether the right is inconsistent with the ownership or possession of the ST. For example in <u>*Copeland v Greenhalf*</u> where trucks parked on RoW so often that it amounted to joint possession. 3. Whether it is a mere right of recreation without utility or benefit. Concept of jus spatianti not recognised in CL per <u>*AG v Antrobus*</u>. But <u>*Duncan v Louch*</u> held that a right to walk a parth just for pleasure can be an easement. Therefore, using a park is capable of forming the subject matter of grant.
<u>*Barry v Fenton*</u>	**Facts** Concerned an easement for vehicular traffic only. Barry applied for injunction to stop Fenton using RoW except for vehicle traffic e.g. walking. Engaged the "greater" right argument. **Judgment** Court looks at the civil law and easements. Three main historic types: (1) Footway only; (2) Foot and horse way; (3) Foot, horse and cart way. This doesn't represent English law.	**Law on scope of easements** Scope of the RoW depends on the construction of the conveyance deed and must be exclusively determined by the language of the deed. <u>*Ballard v Dyson*</u>: creates a legal interpretive presumption that the grant of a greater right is evidence of the grant of the lesser right also. But language takes priority and this

	Matter turns on the construction of the conveyance deed. Scope of the RoW must exclusively be determined by the language. *Ballard v Dyson* says that the grant of a greater right is evidence of a grant of the lessor right also: this is a legal interpretative presumption. But the language takes precedence. Language clearly restricted to vehicles – therefore the DO cannot exceed the grant. "Vehicle" is used in wider sense so includes a huge array of vehicles.	presumption can be displaced. **Application** Language here was clearly confined to vehicular passage *only*.
Peacock v Custins	**Facts** Custins has 2 plots of land: red and blue. Red has easement of RoW over Peacock's land. C's tenants use RoW to go to red land and then to blue land. The lands are farmed as one unit. Used RoW about 2 extra times per year to get to Blue land. P claims no right to use to access other land. **Judgment (CoA)** Issue: whether owner of DT possess RoW for all purposes over a ST to access the Blue land not covered by the RoW? How much can you do this? P argues that doing so is outside the scope of the grant and is trespass. C counters and say it is only trespass if the RoW is primarily used to access blue land. Case law: • ***Harris v Flower:*** DO had 2 lands. Pink had RoW over ST and white didn't. Factory built spanning both lands. Court said that using the RoW to enter pink land is fine; but if true purpose is to enter the white land, this is outside the grant. Court will not allow the burden of the ST to be increased without consent beyond the terms of the grant. • ***Jobson v Record:*** RoW granted for agricultural purposes. DO use the RoW for storing and transporting timber. This wasn't allowed because outside scope of the grant. • ***Williams v James:*** DO stored hay on land. DO transport hay through the RoW. Wasn't allowed to do this – but got off on other reasons. Key is the object of the DO. The objective cannot be to pass over the land for the purpose of accessing the other land. You can – after lawfully reaching the DT – pass onto different land however. The reason for this is that to allow for access to different lands will increase the burden on the ST. Any additional use is a burden. More importantly, trespass is uses of RoW not permitted by the grant. Anything beyond the scope of the grant is illegal. Remedy for unlawful use is injunction or damages. But here, P only wanted a declaration so they granted this. C illegally use RoW.	**Law on scope of easements** The objective of the DO in using the easement/RoW cannot be solely for the purpose of accessing the other land. It is permissible after lawfully reaching the DT to pass onto different land however. This is because allowing access to different lands increases the burden on the ST – and any additional use is a burden that exceeds the scope of the grant. ***Harris v Flower***: Factory case. If the true purpose of using the RoW is to enter the other land, then this is outside the scope of the grant. Court will not permit the burden of the ST/SO to be increased without consent beyond the scope/terms of the grant. ***Jobson v Record***: RoW for agriculture. DO used to store and transport timber. Outside scope. ***Williams v James:*** DO stored hay on land. Outside scope of grant.
PLA	**Implied covenants** Implies covenants in vehicular rights of way. SO and DO have right to pass and re-pass; to establish and maintain driveway; land restored after party complete repair etc.	

	Granting relief Court can grant relief for wrongly placed structures e.g. *Tram Lease*. One of the reliefs is granting an easement. Landlocked land – can create an easement to address landlocked land.	
Kingfish Lodge v Archer	**Facts** Surrounded on all sides by Archer's land and sea. Archer has easement to the road. Kingfish owners wanted to develop the lodge and extend accommodation. District Council approved plan. This would increase transport – so the owner's tried to negotiate the granting of an easement. Failed. Went to Court claiming landlocked. **Judgment** Section 362 of PLA 2007: Landlocked land is land with no reasonable access. Reasonable access means physical access that is reasonably necessary for the use and enjoyment of the land. CoA said that "physical access" means access in fact as opposed to legal access. Paper road example – just because legal access across the road, land is still landlocked because no access in fact. • Kingfish has been using the sea for access for years • Therefore the Court found that there was access in fact Next question is whether the access is reasonable: • CoA said this is a value access. • Lack of vehicular access and use of sea access may be inconvenient. • But Kingfish in application for resource consent said the sea access was fine. Demonstrates that Kingfish thought the access was reasonable. Second stage: discretion to grant relief. • Court commented on s 329(b): circumstances in which the land became landlocked. Subdivision? Sudden event? • At HC, Court said the purpose of the act was to remedy historical accidents. • CoA disagreed that this was the sole purpose, but said it will be very relevant. • Also s 329(d) balances the inconveniences to *both* parties. Substantial hardship will remain in this case for the neighbours i.e. privacy concern, increased traffic, security concerns, need to negotiate over maintenance obligations etc. Therefore no easement granted. Key points: Physical access is access in fact rather than legal. Reasonably necessary is a value judgment. We compare inconveniences to all parties.	**Law on landlocked land** (1) Is it landlocked? "Physical access" means access in fact rather than legal access *(changed in Squally Cove case – requires both)*. Used paper road example to illustrate. Access must be reasonable. CoA said this is a moral and value judgment. Inconvenience is not necessary enough. (2) Discretion to grant relief? CoA said – while not determinative – one of the Act's purposes was to remedy historical accidents. Concerns s 329(b). Section 329(d) balances the inconveniences to both parties. Court looked at things such as privacy, increased traffic, security concerns, and the need to negotiate maintenance obligations etc. **Application** Kingifish had been using the sea access for years and so there was physical access. Kingfish had also said in the resource consent application that sea access was sufficient. Demonstrates that the parties though that this access was reasonable.
Murray v	**Facts**	**Landlocked land law**

BC Group	The Murrays owned land in Ngaio. Using pedestrian access for 20 years. Also had a free carpark for while but now withdrawn by new tenant. Neighbours have a reciprocal RoW: the M's opposed this RoW and said they wanted to be away from traffic. Now they want access because they are old. They claim it is landlocked. **Judgment** Reasonable access: • "Reasonable access" does not always mean vehicular access. But in most cases, "reasonable access" will require vehicular access. • Reasonability to be determined in light of contemporary living and the topography etc. Contemporary living requires cars; but Welly is hilly. • Must be reasonable but does not require best access. Court considered s 329(a) which concerns the nature of the access at the time of acquiring the land. Relevant for granting relief but can ALSO use it to decide the first step about assessing landlocked nature. Knowledge that there is no access when you acquire might mean that the parties think/thought there was reasonable access initially. If the situation hasn't changed, then you can't claim it is now not reasonable access.	(1) Is it landlocked? "Reasonable access" does not always mean vehicular access. But in most cases, it will require this to be reasonable. Reasonability is to be determined in light of contemporary living and topography etc. Does not require the best access. Court said that s 329(a) (nature of access at time of acquisition) is also relevant to whether land is landlocked. Knowledge that there is no access at acquisition might suggest that the parties initially though there was reasonable access. If the situation hasn't changed since then, they cannot change their minds maybe?
Squally Cove	**Facts** People only have access to their properties because of good will of neighbours. Happy to grant a licence but the owner's don't like the terms of the agreement. Other property owners have a RoW over purple road, but it is not passable. Applied for relief. **Judgment** There is a 3-step test: 1. Is it landlocked? Section 326 2. Should access be granted? Section 328 with reference to factors set out in s 329. 3. On what conditions (or not)? Is it landlocked? There are 9 core principles: • Physical access in fact • Question of present and not future fact. Purple road does not provide physical access because currently impassable. This is even if the property owners are negligent themselves. Might impact relief though. Property owners also do not have use of the yellow road because this has just been *offered*. • Access at the whim of an adjoining owner is not reasonable access. Red and blue road don't work then. This is different to *Kingfish* which said legal access is not important. This Court says there needs to be BOTH LEGAL AND ACCESS IN FACT. • Concerned with existing and not potential use. If access meets the *current* need, then it is sufficient E.g. in *Kingfishi,* the access has always been sufficient for their present use.	

	• Reasonable access is not necessarily the best access. • Value judgment including consideration of locality, topography and contemporary transportation requirements. Similar to *Murray*. • Circumstances existing at time of acquisition of land, which is evidence, for what the parties thought was reasonable at the time of acuiqisiton. • Doesn't necessarily mean vehicular, but non-vehicular access is likely not okay. Here, the owners have had *de facto* access but it was not sufficient. In *Kingfish*, they had access for decades and the parties thought it was sufficient. • No presumption in favour of non-interference with the neighbour's title. Property owners do not have reasonable access. Purple road impassable. Access at the whim not enough. The offer is not enough either. Therefore, it is landlocked. Granting access? CoA decides not to grant access. Even if they have legal access over the *red* road, they won't have access over the blue road. Not effective to grant RoW over the red road therefore. Alternative access over yellow cove was reasonable. No relief granted. Section 329 → Parties had attempted to negotiate and had offered reasonable access.	
Variation, modification, rectification and extinguishment	**Variation** Variation must comply with formality requirements. **Rectification** Can be rectified if the memo of transfer contains material defects in the rights described. Equitable remedy where the K does not reflect the true agreement/intention between the parties. **Modification** Can modify under PLA. **Extinguishment** Surrender: RP of easement (DO) may surrender complying with formality requirements. Merger: if owners are the same, the easement is merged. But our PLA changes this e.g. territorial authority can approve plan of subdivision. Easement cannot be merged here without consent. Occurrence of event: instrument might specify. Abandonment: Usually this doesn't apply to easements. Sometimes not extinguished even if you don't use forever. LTA makes easements indefeasible. Redundancy: BUT abandonment can be proof of redundancy. LTA says these can be extinguished. Court order: under legislation: PLA ss 316–317.	

Harnden v Collins	**Facts** Collins owned land – subdivided and sold off. Harnden and neighbours have a RoW and are Dos over several properties. Sub-division means they apply to modify the easement. Wanted to modify and make RoW go from E–H–G. **Judgment** Issue: Whether the Court has jurisdiction to make the modification? Issue is the meaning of "modify" and whether changing the line is a modification or the creation of a new easement? Can you regard the easement as a composite whole OR are F and H treated as individual parts? Composite whole: some owners are Dos *and* SOs at the same time. Properties so interconnected that any obstacle impacts access. Therefore, have to treat each easement as an interconnected and composite whole. Nature and extent of modification is to be considered in the context of the entire easement. This is not conclusive though – s 316 has other limbs to be satisfied. Jurisdiction under s 316: Only the "person bound" can apply for modification. Person bound means the SO according to the Court. Also, s 317 says that Court can order compensation to the person impacted by the modification. Court says this compensation is meant to go to the dominant owner. The dominant owner loses out from modification, which means that the person that applies must be the SO. In relation to the part they want to modify, 2 of the applications are Dos and 1 is the SO. Only the SO can apply. Extinguishing F is fine. Part H goes over C's land – he is the SO. None of the applicants can apply to modify this part then, because none of them are SOs. Scope of power to modify (obiter): Can easements be *enlarged* by modification? Traditionally, Courts have been conservative. Recent authorities more relaxed. Purpose of power is remedial and therefore modification must include enlargement. Therefore modifying the easement here would be permissible even though it is enlarging the easement. **Critique** Enlarging doesn't make sense with compensation. DO benefits from enlargement so why should they also be entitled to compensation?	**Law on Modification** (1) Is it a modification or creation? Have to consider whether or not you are modifying an easement or whether you are creating an easement – creation not permitted. Court looked and said that the series of easements were one composite whole. Properties were so interconnected that any obstacle impacts access. Nature and extent of modification is to be considered in the context of the entire easement as a composite whole. (2) Jurisdiction to modify? Only the SO can apply for modification: • Section 316 says "persons bound" • Section 317 compensates those impacted by modification = DO. Suggests that if the DO *loses* from modification, then the applicant must be the SO. (3) Scope of power to modify Court held that easements could be *enlarged* through modification. Previous Courts have been conservative but recent authorities more relaxed. Purpose of the power is remedial and therefore enlargement through modification is permissible.
Davey v Baker	**Facts** Daveys reached an agreement with Mr P where he would grant an easement over a part of the farm track as a RoW. P sold land to the Baker's. The D's discovered there was a mistake and the RoW ran over a different part of the land. Over this RoW there were lots of trees. D's want modification or rectification. **Judgment** Court found rectification was not available. There was not enough clear evidence to show that there was a consensus. Davey's fault that he didn't check. Baker's were bona fide purchasers without notice and rectification would intrude	**Law of modification** (1) Jurisdiction Only SOs can apply for modification. Purpose of modification is to allow the ST to relieve some or the entire of the easement burden. Some qualifications: • Previous cases have allowed the DO to apply where they have been bound by

	on indefeasibility. Modification and jurisdiction: • Only person bound can apply for modification – the D's were not bound as they were Dos. • They tried to get around and argued they were bound by a restrictive covenant. They cannot go beyond the scope of the easement. Also bound by a positive covenant to maintain the RoW. • Court rejected. Purpose of modification is to allow ST to relieve some or the entire easement burden. ONLY refers to the SO. • Court looked at precedents. There are some cases where applicants have been Dos. But the Court says that all of these people were bound by covenants in relation to their *own* land. Here, there were no binding covenants regarding the D's own land. • But the definition of "covenant" in the PLA includes covenants in easement instruments. D were obliged to maintain the road based on covenant in the easement instrument. Theoretically, they were therefore bound and can apply. • Court says true. BUT you can only modify the things you are actually bound by. They were only bound by the covenant to maintain and were not bound by the easement itself. They could modify their obligations but not the easement therefore. Scope of the power to modify: Courts note <u>*Harnden*</u> and ability to enlarge. Court said if true, they *could* move the easement to the farm track. They don't expressly rule on this point. Instead, they warn against widening easements because of sanctity of property rights. Modifying easement interferes with indefeasibility of the B's title. Also inequitable to modify here because D failed to check the easement and they still do have a RoW and the Bs have done nothing wrong.	covenants in relation to their own land. • "Covenant" in the PLA includes covenants in easement instruments. • Court said if bound by covenants, you can apply to modify. But the key test is what you are *actually* bound by. E.g. here, the Davey's were only bound by covenants relating to maintenance and were not bound by the easement itself. They could modify their responsibilities but not modify the easement. (2) Scope of power to modify Courts noted <u>*Harnden*</u> and didn't expressly rule on whether this was correct. Cautioned against widening easements because of the sanctity of property rights. Modifying/expanding easements might also interfere with indefeasibility of title.
Covenants		
Intro lecture	**Definition** PLA s 4 defines as a promise expressed or implied in an instrument. But in this topic we are just looking at freehold covenants. <u>Positive covenant</u>: Promise to do something on one's on land for the benefit of the covenantee's land e.g. building a common driveway; keeping road in good repair. <u>Restrictive covenant</u>: Promise not to do something on the covenantor's land for the benefit of the covenantee's land. E.g. covenant not to build on land; or not to demolish structures. Covenants are different to easements. They concern your own land rather than giving rights over your land to someone else. **Enforcement**	

General historical rule was that covenants were not enforceable outside the contract between the original parties. Changed now.

Benefit at CL and PLA

At CL, benefit of C passes with land but not the burden. Covenantee can transfer to successors. Conditions:

- Only Cs that touch and concern the land would pass.
- The covenantee must have the legal estate in the land to be benefited. If only an equitable interest, then the assignee does not get the benefit.
- Enforcer had to have the same estate as the original covenantee e.g. if you have fee simple and then lease, the leasee doesn't get it.

PLA s 301 changes the CL. Unless contrary intention in the instrument, covenant is enforceable by the covenantee, successors in title and persons claiming through them (which means including lessees).

Burden at CL and PLA

At CL, burden does not pass. Covenantee and successors can only enforce against the original covenantor. New lessor is not privy to the contract and so cannot have burdens imposed upon them.

Equity intervened in *Tulk v Moxhay*: Covenant can in equity bind the conscience of a bona fide purchaser of the seervient land with notice:

- T owned land around a square. Purchaser Elm's promised to maintain the garden and give a key to surrounding properties so they can use the vacant ground. Ultimately the land was sold to Moxhay who wanted to build on the land.
- M knew about the covenant but claimed it didn't run with the land. This was the CL position.
- Court said it could enforce the covenant between T and E because this is privity.
- If covenantor can sell the land and the new owner can disregard, then the promise is pointless. Covenant would have impacted the purchase price. Inequitable to allow someone to get the benefit of reduced price and refuse to comply with the covenant.
- Key question is whether the person who has notice of the covenant when they purchased can be exempted from the obligation to comply. Court said the person who purchases with notice stands in the shoes of the person who made the promise. Equity will impose an obligation therefore.

Later cases limited the application of *Tulk* to restrictive covenants. Successors in title must have notice AND the covenant has to be restrictive in nature. But PLA 1952 was amended and the "restrictive covenant" requirement was removed.

Requirements for covenant to run with the land in equity

1. **There must be benefited land:** (1) Needs dominant land (but now we have covenant in gross); (2) Needs to

	"touch and concern the land". This means it must impact the nature, quality or value of the land OR the mode of enjoyment of the land. "Value" = benefit must impact value so that the owner gets *more* because of the covenant. No requirement that DO and ST are contiguous. But if they are not proximate enough, then there is no clear benefit and so no "touch and concern". DT not sufficiently defined, then difficult to identify benefit e.g. in *Re Ballard's Conveyance* where property was 1700 acres. Too vast for the covenant to actual benefit. (3) Definitions – **see lecture notes**. 2. **Intention to run with the land:** Must be a common intention that the covenant will run with the land. Usually expressed by covenantor in the deed. 3. PLA has intervened in s 302: covenant binds the covenantor, successor and person claiming through unless the parties have agreed otherwise. **Nature of covenants** They are equitable interests. Cannot be enforced against a bona fide purchaser without notice. But PLA s 308 and LTA 2017 s 116 allows for noting of covenants on the register. If noted, it is a discoverable interest and so means people will nearly always have notice. Once purchased with notice, then *Talk* applies. **Difference from easements** Differences are conceptual. Easements (positive) allow DO to do an act on ST. Positive covenant is a promise by the SO to do some impacting the ST. Creation: Easement is a grant. Covenant is a binding promise by the SO impacting their own rights. E.g. *Re Ellenborough* was a grant of a right; whereas in *Tulk* it was a promise. Easements are created by grant or K. Covenants are created by promises in deeds or Ks. Easements are either legal or equitable interests. Covenants are only equitable interests and can only be noted. Negative easements/covenants Difference is mainly down to history. Negative easement restricts right of ST to exercise a right that would otherwise be exercisable. A RC is identical. NEs are used for things like light and air. But everything else is by covenant e.g. privacy, right to a view. Statutory provisions bring Es and Cs closer together anyway e.g. power to modify easements also apply to covenants.	
ANZCO v AFFCO	**Facts** AFFCO is a meat coy. Closed their meat processing plant and sold land to Manawatu Foods including a covenant not to use for meat processing for 20 years. AFFCO registered a memo of encumbrance. Ultimately, M leased to Riverlands and sold the reversion to ANZCO. AZNCO knew of the covenant but wanted to set up meat works through its subsidiary coy, Itoham. **Judgment**	

	Contractual promises that restrict ability to use land are enforceable inter se. This is the accepted position. Normal RCs have a ST and a DT and the burden and benefit can run with the land and be enforced. RC in gross have no DT. These can be enforced between the parties, but debatable whether the burden runs with the land and can be enforced against the ST: • *Staple v Corby* (old NZ case): held that the burden of a RC in gross can run with the land. • Court goes the other way, mainly because England and Australia don't have RC in gross. • Also the LTA 1952 does not allow for noting covenants in gross on the register. Indicates Parliament does not intend for them to run with the land. • Also, covenants must BENEFIT land to run with the land. They cannot benefit the land if there is no DT. • Conveyancing techniques can be used instead. Can use memo of encumbrance, which includes mortgage, liens, trusts etc. These are registrable. Covenants in these instruments become enforceable and remedies (such as mortgagee sale) are available for breaches of the covenant. • AFFCO had registered a MoE, which took effect as a mortgage. AFFCO has mortgagee powers to prevent breach of encumbrance. Registration of the encumbrance means that whoever owns the land is bound i.e. ANZCO. Also responsible for people claiming under and through them i.e. lessee likes Itoham. Conversely, Riverlands cannot be held accountable. Itoham has no direct relationship with AFFCO and so no direct action *unless* the Court pierces the corporate veil. Modification of Encumbrances CoA refuses the claim.	
LTA 2017	**Recognition of Covenants in Gross** Section 242 of the LTA 2017 inserts ss 307A–307F into the PLA 2007. Provisions say that CIGs can be positive *or* negative that benefits persons but is not attached to DT. Enforceable by covenantee and persons claiming through them. Binding on the covenantor, successors in title and persons claiming through them. Can be noted on the register. Remains an equitable interest. **CIG vs Memorandum of Encumbrance** MoE may be more desirable sometimes. CiGs are equitable interests that can be noted but not registered. MoEs *can* be registered and function as a mortgage. In some ways this grants greater protections. Conversely, MoE bind the *owner* of the land. Whereas CiG can bind the *occupier* of the land also. In *ANZCO*, this would have meant Itoham would have been bound also.	
Mortgage		
Intro	**Background** Banks loan money. They ask to provide security for the loan – usual way is through mortgage. Lender will sign a	

lecture	loan agreement and a mortgage agreement. There are covenants to repay money and perform obligations = personal covenants to the bank. Also a security for securing the performance of the obligations. Bank has a proprietary interest in the mortgaged property. Therefore 2 elements: a Contract and a security. **Usual operation of a mortgage** E.g. I owe $100,000 and this is secured against my house. I default. Bank sells my house for $80,000, realising their security. I have an outstanding debt of $20,000. The bank can sue me on my personal covenants (also contained within the mortgage) to recover this amount. <u>*Duncan v McDonald*</u>: • Mortgaged property to secure loan. Mortgage was invalid because of illegal contract. But it was registered and therefore valid per indefeasibility rules. • If not void, the instrument would be effective in its entirety. Covenants are different in mortgages because they secure a limited purpose. Mortgage is security and a registered mortgage is a legal charge *just for* the particular purpose of securing performance of the obligations. It is just security. • If a mortgage is invalid but registered, the charge is effective but mortgagor is not *personally* liable for covenants. Bank can sell the property, but cannot sue on the personal covenants to reclaim the money. Mortgage is valid *only to the extent of the charge on the land*. In <u>*Westpac*</u>: if forged but registered, the bank can sell but cannot recover the shortfall against the lender. Covenant to pay and the security are separable. **Mortgage in NZ** In NZ, mortages take effect as a charge on the land. Mortgagor retains the legal title. Mortgagee has a power of sale over the land. Just takes effect as security and confers *merely* a charge over the land. In CL: • Mortgage by transfer = title to the estate is transferred to the mortgagee. Mortgagor retains an equitable interest in the land. The covenayance has a term promising to transfer back. • Mortgage by demise = you are the lessee. Lender promises to surrender the lease when repay. Mortgages must comply with formality requirements. Can be created only by registration of a mortgage instrument – needs to be in writing and registered. If so, indefeasibility applies. Equitable mortgages are those that do not reach these requirements. Confers same rights but can be defeated by bona fide purchaser without notice.	

	Forged mortgages and indefeasibility Fixed sum mortgage → Fixed sum secures a specific loan e.g. $100,000 and interest. Bank can sell the house to satisfy this debt. Everything left over you can keep. All obligations mortgage → Ruiping pretends to be Laura. L signs loan agreement for $100,000. Bank asks L to sign a mortgage document that includes a covenant that "you" must repay all debts that you have now and in future. This is all registered. Question is whether the instrument secures all of LAURA'S debt or all of RUIPING'S debt.	
Westpac v Clark	**Facts** Imposter forged a mortgage over Mrs Fenech's land. **Judgment** Blanchard J looks at hypothetical of *if* the mortgage was registered. By incorporation, the mortgage secured all amounts "you" already owe use or may owe us in future. All obligations mortgage. What happens if registered? Westpac argues everything owed is recoverable. Court disagrees and says you have to look at what is secured. If a fixed sum mortgage, then what is owed is what is secured. More confusing if all obligations. Blanchard J says "you" refers to Mrs Fenech but the "you" in the loan agreement refers to the imposter who signed the agreement. The "you" in the mortgage is against the RPs house and therefore secures the RP's debt. The loan K is separate and not registered – it is the imposter's loan only therefore. HCA in *Salt Lake* says that "yous" are the same. But Blanchard J disagrees. **Summary/explanation lecture on this point** Fixed sum mortgage: • Debt owed is the debt secured • Secures the amount specified in the mortgage instrument e.g. instrument secures $100,000, and then bank can sell to recover. • But the innocent party cannot be sued for the shortfall on the covenants in the mortgage. All obligations mortgage: • Valid charge when registered. Distinction between security and the covenants. The RP is not personally responsible for the debt of the imposter. • The "you" in the mortgage document is the RP. Because the RP *owes* nothing, then the charge secures nothing. • Incorporation by reference – if the mortgage instrument referred to the imposter's loan K, then this debt would have been secured.	**Void Mortgages and Indefeasibility** • "Registration of a mortgage confers indefeasibility of title on a mortgagee. It validates the terms and conditions which delimit or qualify the estate or interest in the mortgaged land." • Therefore, registering a void mortgage perfects the charge over the land. But the mortgagor is not *personally* liable for covenants. Bank can sell the property, but cannot sue on the personal covenants to reclaim the money. Mortgage is valid *only to the extent of the charge on the land*. • Have to assess what is secured by the mortgage. The Court held that as this was an all obligations mortgage and the loan agreement was separate and referred to "you" [the imposter's loans], then the mortgage secured NOTHING. Whereas the "you" in the mortgage document was confined to the RP and the Court declined to extend this to include the fraudster parading as the RP. • Possible that if the loan agreement was incorporated by reference into the mortgage, then it may have been enforceable. • If a fixed sum mortgage, then the property would be charged up to the value of the land.

Implied covenants, powers and conditions	**PLA** Section 95 of the PLA allows the parties to vary or negate the implied obligations etc. Schedule 2 sets out the implied powers e.g. implied that you will repay, power of sale. **Equity of redemption** Once the debtor repays the debt in full, the lender is obliged to reconvey the property. If the debtor fails to meet the due date, they lose the property forever even if just one day late. Equity compels re-transfer after the due date – different to the CL. Equitable right to redeem even though mortgagee became the legal owner of the property. This is how we get the equity of redemption. Mortgages can never be irredeemable therefore. No clog on the equity of redemption – once a mortgage always a mortgage. Demonstrates that mortgage is a SECURITY ONLY. What is a clog? • Illusory – it *looks* like there is the right to redeem, but not really. *Fairclough.* • Postponement – mortgages often made for a long period. Sometimes the period is too long and becomes a clog. Must be long enough that it defeats the equity of redemption or renders illusory. *Knightsbridge*. • Doctrine of restraint of trade – if places unreasonable constraint on future ability of borrower to conduct business, it might be a clog. • Options to purchase – you cannot obtain an option in the same transaction. • Collateral advantages – impermissible if binding for a period beyond the end of the mortgage. Clog if extends beyond repayment. *Noakes v Rice*. Clog of redemption largely replaced by remedies against unconscionable conduct. But people still think this doctrine exists because it is so important.	
Fairclough v Swan Brewery	**Facts** Leases a property and mortgages. Mortgage said you couldn't repay the debt early. Also required that you buy beer from the brewery the entire way through. **Judgment** House of Lords states that you cannot make the mortgage irredeemable and you cannot clog or hamper. Here, the mortgage was irredeemable. The mortgage is for almost the whole term of the lease – only 6 weeks not subject to mortgage. Redemption is not advantageous at all therefore. Practically, the mortgage is irredeemable.	**Law on Clogs** Cannot make the mortgage irredeemable and cannot clog or hamper the equity of redemption. Making the property only redeemable 6 weeks before the expiration of the lease meant that the redemption was not advantageous at all and was merely illusory.
Knightsbridge Estates Trust	**Facts** K borrowed money from a company. Then wanted a better deal. Reached a new deal with a new coy – would repay the money in 40 years. K wanted to repay early. Argued the provisions of the mortgage were illegal because made	**Law on Clogs** The test is not whether or not the terms are "reasonable". Equity only intervenes to stop

	it irredeemable for an unreasonable amount of time = clog. **Judgment** Provisions that hamper redemption are not permitted. Redemption is a necessary element. Court will not interfere with freedom of contract. Court refused to consider "reasonableness" of terms without regard to the business realities. "Reasonable" period of time is **NOT** the test. Equity ensures no oppressive terms but does not interefere with unreasonable contract. If the right does actually exist, then a long length of time is not inconsistent with equity of redemption. **This is the key I think**. The focus should be on whether there is oppressive or unconscionable conduct. In the present case, it was a K made between competent parties with legal advice who knew their business. They were at arms length, and there was no oppression or unconscionable conduct.	oppressive terms from being enforced – it does not interfere with unreasonable contracts. Focus is on whether there is oppressive or unconscionable conduct. If the right of redemption actually exists, then a long length of time is not inconsistent with the equity of redemption. Courts didn't want to intervene with freedom of K as the parties received legal advice, knew their business, negotiated at arms length, and there was no unconscionable or oppressive conduct. Must make redemption oppressive or illusory to be breach.
PLA ss 97–98	**PLA** Under our statutory regime, redemption means the mortgagor's interest in the mortgaged property and the right to have the mortgage discharged upon payment. Section 97 = mortgagor has right to redeem *any time* before the mortgaged property is sold by mortgagee. You can repay before the due date and after the due date etc. This gives a *larger* right than *Knightsbridge.* Section 98 says you need to fulfil all obligations, including paying the interest on the principal for the unexpired portion of the term.	
Jones v Morgan	**Facts** Jones was an investment broker. The Morgans had beneficial shares in a farm and were also trustees of the land. Wanted to develop land as a nursing home. Borrowed from J and mortgaged the farm. M *also* agreed to transfer 50% share of the coy that was to be set up to hold assets. This was never set up. In 1997, got a new K for residential flats. Entered into K with J where he promised he would pay sale price of part of the land he was selling to J (he wanted to sell to raise money but couldn't do so without J's consent). This repays most of the debt. Also promise to transfer 50% of his shares to J in the property. WM repaid but J wanted the half share of the property even after the debt was paid. **Judgment** Court cited *Patagania Meat* case. Sets out 3 conditions: (1) Provided collateral advantage is not unconscionable; (2) is not a clog; (3) does not violate mortgagor's K and equitable rights, then collateral advantages are okay. Unconscionable conduct/duress CoA said no to both. Cannot be unconscionable unless one party has imposed the terms in a morally evil manner.	**Collateral advantages** Collateral advantages will be permissible where the 3 requirements from *Patagonia Meat* are met: 1. It is not unconscionable 2. Not a clog 3. Does not violate the mortgagor's contractual or equitable rights. Unconscionable/duress Cannot be unconscionable unless the party has imposed the terms in a morally evil manner. Duress requires coercion that violates consent. Receiving legal advice makes it less likely there is unconscionable

	Hasn't happened here. Duress must be coercion = violation of consent. Nothing here. Morgan was also receiving legal advice. *Jones did not need to have any business knowing what legal advice M received*. (Relevant for next case). Clog on redemption Court cited *Noakes v Rice*. Collateral advantages not enforceable *after* redemption. *Patagonia Meat* also cited: mortgagee cannot enter into a K or get an option to purchase any part of the premises in the same instrument as the mortgage. This is because mortgages are ONLY securities and destroy the right to redeem. Arrangement to give 50% of the property is inconsistent with redemption. But it *must* be a term of the mortgage itself. Subsequent transactions are okay. Transference of 50% property was in the 1997 K and not the 1994 K. • Doesn't matter if they are in physically separate documents. You need to show they were in substance one undivided agreement. Chadwick LJ finds this is a clog as one agreement. • Phillips MR thinks clog is redundant now. But still agrees with Chadwick LJ. • Pill LJ says it was an independent bargain.	conduct Parties need not inquire as to the legal advice the other party is receiving. Clog on equity of redemption According to *Noakes v Rice*: Collateral advantages are impermissible if they extend beyond the right of redemption. According to *Patagonia Meat*, will also be a clog if the mortgagee obtains an option to purchase – or actually obtains an interest in – any part of the mortgaged premises in the same instrument as the mortgage. Destructive of equity of redemptions mortgages are ONLY securities. Can be physically separate documents. Must be in substance one undivided agreement and not an independent deal.
Reopening of oppressive mortgages	**Oppressive mortgages** VERY important protection for mortgagors. Equitable jurisdiction to interfere with and remedy oppressive contracts. Credit Contracts and Consumer Finance Act creates a parallel statutory jurisdiction to reopen oppressive Ks, including mortgages. Conditions for re-opening are set out in s 120: • Mortgage is oppressive • Party has exercised a right or power conferred by K in an oppressive manner • Party as induced another to enter the K in an oppressive means Oppressive is defined in s 118: Oppressive, harsh, unjustly, burdensome, unconscionable, or in breach of reasonable standards of commercial practice.	
GE Custodians v Bartle	**Facts** [Get out of lecture notes] **Judgment** Was it oppressive? Court held that "oppressive" is wider than "unconscionable" – doesn't have to be unconscionable in equity. It needs to be in contravention of reasonable standards of commercial practice = objective standard.	**Law on re-opening** "Oppressive" is wider than "unconscionable" – it is a lower threshold. Needs to be in contravention of reasonable standards of commercial practice, which is an objective test.

	Here: • The loan was not out of the ordinary. The terms were relatively normal. But you MUST go to the wider circumstances. • BlueChip scheme was very risky and the Bs couldn't repay the loan. • Principle: If lender knew the borrower couldn't repay, then the mortgage is probably oppressive/unconscionable. <u>Knowledge of the scheme? Did TML know? Did GE know or should they have inquired?</u> Supreme Court said credit contracts should not be seen as oppressive unless the lender has a basis for knowing that to be so. There needs to be circumstances, which mean the lender, should know the mortgage is oppressive. A lender cannot properly be said to have entered into a credit contract in breach of commercial practice if what it did was in accordance with those standards in light of the knowledge it (or its agents) had or ought to have known. **This is the KEY LAW**. • If borrower has legal advice, then the lender doesn't need to make any inquiries. The legal advice can be assumed to be competent – similar to *<u>Jones v Morgan</u>*. • Exceptions to the legal advice rule = (1) Solicitor not independent e.g. conflicted; (2) Lawyer is missing or dones't have access to important information; (3) The terms are SO bad for the borrower that the lender should have acted to protect the borrower. Nothing bad on these facts though. What did GE know? • GE knew the age of the Bs but their application said they were investors. Looks like they can borrow and repay. • GE and TML didn't know about the BC scheme. • The later loans … rental of the apartment was not enough to pay the loan but the Bs had cash to pay and had been meeting repayment obligations. GE couldn't know they weren't able to repay. • Apartment's value was more than the second and third loan. Nothing to cause GE to be alared and check. • Big emphasis was on the legal advice. The solicitor should have been the one making the advice regarding the risky scheme. GE had no obligation to inquire further in light of this knowledge. Policy: • Lenders can only know what borrowers choose to tell them and shouldn't have to extensively investigate borrowers. Inefficient and unfair.	General rule: If the lender knew the borrower was unable to pay, then the mortgage will likely be oppressive. <u>Knowledge</u> Credit contracts should not be seen as oppressive unless the lender has a basis for knowing that to be so. Lender cannot be said to have entered a credit contract in breach of commercial practice if what it did was in accordance with those standards in light of the knowledge it (<u>or its agents</u>) had or ought to have known. If borrower has legal advice, then the lender doesn't need to make inquiries. Legal advice can be assumed to be competent – similar to *<u>Jones v Morgan</u>*. Exceptions: • Solicitor not independent i.e. conflict • Lawyer is missing or unable to access key information. • The terms are so bad that the lender should have known and acted to protect the borrower. Policy: lenders can only know what borrowers choose to tell them and shouldn't have to extensively investigate borrowers, as this is inefficient and unfair. Factors here: • GE knew the age of the Bs but their application listed them as investors. • Lenders didn't know of BC scheme • Bs had cash to pay and have been meeting their repayment obligations • The value of the secured property was more than the second and third loan.

		• Received legal advice
Power of sale	**Power of sale** Most powerful remedy against default. Implied in the PLA. Section 176 of PLA says that mortgagees are under a duty of reasonable care when exercising this power. Includes a duty to mortgagees under a subsequent mortgage – this is where there are multiple mortgages on the same property. You CANNOT K out of s 176.	
Applefield v Damesh	**Facts** AF had land. There were 2 mortgages – one to Damesh and one to ANZ. ANZ wanted AF to sell the land. Mr Hughes was the potential buyer. Under coy constitution, sale needed approval of NZX and shareholders UNLESS it was a mortgagee sale. The created a Plan B, which was a mortgagee sale. Damesh conducted a mortgagee sale and sold to Mr Hughes. At the same time, the land was rezoned so that the land value increased. AF sued Damesh later saying that Damesh owed DoC to obtain the best price of sale and that Damesh needed to exercise its power in good faith. **Judgment** Main claim was that it didn't seek the best price over a period of time and that Damesh had a 50% interest in the acquiring coy. Court says that the duty is not JUST the equitable obligation of good faith, but also reasonable care to get true market value of the property at the time of sale. Legislation affirms the standard of DoC as analogous to the DoC in negligence. Coexists with good faith obligation – but most of the time the DoC is more onerous. DoC triggered *after* the decision to sell – the mortgagee can decide if and when to sell. No DOC required governing decision to sell. DoC = obtaining best price reasonably available at the time of sale. No general rule that a selling mortgagee must take advice and market the property over a period of time. BUT must take all reasonable steps to obtain the best price. The mortgagee has to prove this. Best price is against the market. AF was the person that wanted to sell at the time. They negotiated the price with Mr Hughes. Sale secured a big ANZ debt write off. Damesh was reasonable therefore. **Legal summary** Duty to take reaosonable care to obtain the best price. Trigerred after decision to sell. Determination of "best price" must be assessed against the purpose of s 176. Where mortgagee has an interest in the purchasing coy or has association with the purchaser, as long as can prove it has met the DoC then it is okay.	**Duty of Care/Good Faith Law** Duty of Care and the equitable obligation of good faith can coexist. Most of the time the DoC is the more onerous obligation. Duty = duty to take reasonable care in obtaining the best price reasonably available at the time of sale. No general rule that the mortgagee has to take advice and market the property over a period of time. Mortgagee must prove. Best price is assessed against the purpose of s 176. Standard of care is analogous to negligence standard. DoC trigerred *after* decision to sell – the mortgagee can decide if and when to sale and there is no DOC governing this decision. Permissible for the mortgagee to have an interest in the purchasing coy as long as they can prove they fulfilled their DoC. **Application** AF was the person that wanted to sell at the time. They negotiated the price with Mr Hughes. Sale secured a big ANZ debt write off. Damesh was reasonable therefore.
Downsview	**Privy Council**	

Nominees v First City Corporation	Council stressed the obligation of good faith but rejected to extend DoC (this was before s 176 – we follow AF on this point). Key discussion: mortgage principles are that it is a security for payment of a debt and that security for the payment of a debt is *only* a mortgage. Powers conferred on the mortgagee must be exercised in good faith and can be exercised even if there are disadvantages to the borrower (this is discussing mortgagee sales.) Think: "Mortgage is a security". A mortgage is just a means of obtaining security over the land to secure obligation to repay the debt. Security gives the mortgagee a range of powers – the most powerful are the ones implied in the PLA. BUT ALSO a security is only a mortgage. Law has developed clog rule to ensure the borrower can get their property back. Law imposes obligations of good faith and a DoC in mortgagee sales to protect the mortgagors. Also other protections such as re-opening oppressive contracts.	