Interests in Land

Leases (and licenses)

Essentials for a valid lease

1. Fixed or periodic term

- Leasehold is an estate less than freehold because the term is fixed.
- It can be fixed for a certain amount of years OR
- Can be capable of being ascertained on a specified event, so long as it is sufficiently defined.
    - The event must occur within 10 years
    - This cannot be registered, just equitable leases.
- Leases can be as long as you want but a lease cannot be perpetual - last forever.
    - If this is done it will either be a statutory lease OR a grant of fee simple subject to payment of rent.
    - However, you can have a perpetually renewable lease that renews every 21 or 42 years (e.g. Glasgow lease)
- Short term leases (s 207):
    - A lease for a term of 1 year or less OR
    - A periodic tenancy for periods of 1 year or less OR
    - A statutory tenancy AND
        - Usually where the term of the lease has expired but the tenant remains in possession = 'holding over' period. Implied tenancy.
    - Unregistered.
- Tenancy at sufferance
    - Where there is no indication from the lessor whether the tenant can continue in occupation, but there is a holding over period (without consent).
    - Different to statutory tenancy, can be kicked out at any time.
- Tenancy at will: personal right, NOT proprietary right
    - Confers upon the occupier exclusive possession for a definitie period but terminable at any time by either party, no notice required.
    - This is not a transferrable right.

2. Certain premises:
    a. The spatial extent of the lease must be clearly defined and identifiable.
    b. Normally by a plan or reference to title number.
3. Exclusive possession:
    a. Leases are estates carved out of greater estates. For the fixed period, lessee has possession and can exclude everyone else including the landowner.
4. Proper creation:
    a. Must comply with s 24 of the PLA formality requirements.
        i. In writing. Signed?
        ii. Oral K's are not enforceable.
        iii. Doctrine of part performance applies - if some of the obligation has been performed under the contract but formality requirements are not made out e.g. if not signed? but they have carried out K as if it was complete, there is still an enforceable contract.
    b. Leases are registrable
    c. Long term leases must be registered to be a legal estate.
        i. If not, RP who purchases without notice can defeat the leasehold interest.

d. Exception: Short term leases (s 24)
    i. Do not need writing requirement. They can be created orally (s 208).
    ii. S 209: lessees who occupy the land have a legal interest in the land, even though the lease was **created orally and not registered.**
    iii. But this legal interest can be defeated by a bona fide purchaser without notice because indefeasibility and RP takes priority.
    iv. Once a short term lease is registered, it is no longer a short term lease.

5. Rent is not essential
    a. 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 sells property to Mt Wellington. Sale agreement was subject to "license" granted to Atlas.
    - P set up a screening plant for processing scoria for gardens. They did this in a way that would not interfere with Atlas' quarrying operations. Landlord was reserving to itself the right to go on the land that Atlas were given right to occupy.
    - Didn't have express provision in lease, but for commercial leases there is no right for landlord to come onto land anyway, don't need to be expressly written into K.
- If the Atlas's right was a license rather than a lease, Fatac (related to Mt Wellington) would have to pay GST. But if it is a lease they don't.
- CIR wants Fatac to pay GST but they refused.

Issue

- Is the grant to Atlast to operate the quarry a lease or license?

Held

- LAW

1. Traditional approach - exclusive possession test
    a. Does occupier have exclusive possession? If yes, this suggests there is a lease. If no exclusive possession it must be a license.
    b. *Glenwood* Case: the right to use an area for the cutting of timber was an exclusive possession of the area.
    c. *Waimiha:* cutting timber and removing it was a license only because there was no exclusive possession.
    d. Judges in England and NZ departed from this for a while, and only looked at whether the parties intended there to be a lease or a license, but like UK, NZ is now going to return to this test.
    e. Intention is only relevant to work out: was the instrument intended to confer a right of EP?
    f. Intention to classify the agreement as a lease or license is irrelevant. It is about more about the substantive effect of the instrument.
        i. But you can consider both the effect of the K and the intention of the parties.
2. Modern refinements to the exclusive possession test
    a. <u>Defined term:</u> possession that is terminable at the will of the owner is not EP. Thus, it is a necessary requirement for EPT that there is a defined term, either fixed or periodic.

b. Rent not essential: Rent can be relevant to the intention to be legally bound and thus, confer EP and create a lease arrangement, but this is not decisive.
c. Restrictions on the occupier do not negate the lease: Limitations/restrictions on the use of the land by the occupier do not negate the existence of a lease. Just because Lessee has exclusive possession, does not mean they have to right to unqualified use and enjoyment of the land. The leasehold interest is carved out of the freehold estate so the owner should be able to impose restrictions on its use to protect the reversion, it can't mean lessor cannot impose restrictions on the use of land.
d. Cases where EP but no lease:
    i. Statue forbids granting of a lease
    ii. When you are about to buy a house but haven't completed purchase, but you are living in the house.
    iii. Landlord's right of entry - if the right of entry is inconsistent with EP e.g. they can enter at any time.
    iv. Terminated because of some extraneous relationship - relationship between owner and occupier is different to landlord-tenant. Examples: employee occupies the employer's premises to perform their duties, occupying property due to holding office, mortgagee in possession where occupation is incidental to the holding of an office.
    v. Small portion of a bigger area that is subject to the overall K - if only EP of a small portion of a bigger area of land that is subject to the agreement e.g. they have EP over a mill site, tramway, dams (*Fuller)*
        1. If you have a K over A and you have exclusive possession of A - but landlord owns larger area = lease.
        2. If you have a K over a larger area, but only exclusive possession of A = license.
            a. Question: how much of the larger area to do have possession of?
        3. This explains *Waimiha:* they had the right to cut timber, so had EP over a small portion of the land, but they did not have EP over the whole land.
        4. *Brooks*: Mrs. B had a store in a theatre with the only key to the store. She did not have control of the electricity to the fridge, lighting, or a key to the front door, so she can't have had EP or a lease interest in theatre.
    vi. Underlying idea: if there are limits to your control over the land, then you cannot have EP.
e. Terminology may indicate exclusive possession (but it may not)
    i. Classification as a licence orr a lease is irrelevant. Terminology is only useful to the extent that it reveals an intention to confer EP.
    ii. An express right to enter and inspect the property is an express authorisation by the tenant which provides a foundation that, unless unauthorised, the landlord is not authorised to enter = even if it says license, it is a lease.
    iii. If the term requires you to shift around the property according to the directions of the owner, then this points away from EP = license, even if says lease.

- 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.
- Mt Wellington had an agreement with Atlas that said that Mt Wellington had the right to quarry materials as well as Atlas, to stockpile and remove materials, to set up a quarry area etc. This suggests Atlas did not have EP as well.
- The duration of the term and definition of area subject to the "lease" was lacking.
- There is a license, not a lease.

License v Lease

- Nature of rights is different.
    - A lease is an interest in land that creates a property right. Licenses are merely a permission to be on the land or to use the land for a certain purpose (not a property right, just personal right)
    - Leases involve giving up possession of land for a stated period. Tenants, therefore, enjoy the fundamental ownership rights for this period. Licensees can merely enter and use the land to the extent that permission is given.
    - At common law, licenses can be revoked whenever, subject to damages. PLA modifies this now though.
- Creation
    - No creation requirements for licenses. Failure to comply with formality requirements for leases can lead to the creation of a license instead.
- Why does this distinction matter?
    - If you have a lease = proprietary right, if you have a license = personal right that only binds the other party to the contract.
    - If you have a lease you can hold out your proprietary interests against third parties e.g. trespass or nuisance.
        - Lease has exclusive access to land, so gets rights in relation to this e.g. trespass. A license just says you have rights to be there but the court is unlikely to deny a licensee a defence against trespass action too.
            - But licensee wouldn't have any standing to mount the action in their own name, would have to ask licensor to sue for trespass.
    - You can assign or sublet a lease. Licenses cannot alienate their rights unless specifically permitted.
    - You are liable to pay local body rents under a lease.
    - Leases are registrable = indefeasible. Licenses are not.
        - But you can claim an interest in the land and launch a caveat on the register if you have a license.
    - Before: lessor's were protected from eviction because they had property rights. But PLA 2007 extended protection for licensees also.
        - S 206: granted licensee's same protections that a lessee would have when it comes to granting a lease.
        - S 244-264: cancellation code for leases is extended to commercial licenses. But this does not convert a license into a legal interest in the land. Still equitable.

- License is still protected by whatever contract they have entered into though e.g. conditions have to be met before licensor cann revoke the K, so unlikely licensor could just kick licensee off the land.

Test for leases vs. license

Fatac

1. What is the landlord's right of entry?
    a. If they have an unqualified right to enter the land or if right to entry doesn't seem like ordinary rights landlord might keep on tenancy = no EP.
    b. This can include persons acting on behalf of the landlord e.g. their employees or agents.
2. What was the proportion of the total area that tenant has rights over?
    a. Note: as long as they have EP over the part of the land granted, it can be a lease.
3. Any restrictions on the use of the land?
    a. Serious restrictions on the use of land don't negate the lease necessarily if they still have exclusive possession.
4. Any use of license/lease terminology?
    a. [but note NZ cases have said this is essentially irrelevant]
5. Rent is not essential, but can be persuasive of a lease
6. Agreement needs to have a defined term to be a lease
    a. Otherwise owner can cancel the arrangement at any time, inconsistent with EP.

Note:

- if you contract to have a certain space in a warehouse it is a license
- Unqualified right to enter the land by landlord = EP.

Dual Characters of leases

General

1. Privity of K = Leases continue to have a contractual element because they are created by contract. Thus, parties to a lease have a contractual relationship. K imposes rights and obligations.
2. Privity of estate = there is a tenurial relationship between the landlord and the tenant because leases are estates in land.
    a. Landlord has a right to receive rent and a right to the reversion (goes back to them).
    b. Tenant has most of the rights of the owner for a limited period of time.
    c. Both can alienate the estate by transfer of the reversion or the lease, or assignment of reversion or lease.

Assignment of leases = registration of memorandum of transfer. If formalities are not complied with, assignment is equitable.

Assignment v Sublease

- Traditionally assignment of the leasehold is a transfer of the whole interest. You are giving away all of your rights. Sublease traditionally is a lesser interest, it is only part of the lessee's interests.
- Assignment:
    - Initial position: Landlord and lessee have privity of K and privity of E.
    - Second position: When lessee assigns their lease to the new lessee (assignee)
        - Landlord and lessee = privity of contract.
        - Lessee and assignee = privity of contract.
        - Landlord and assignee = privity of estate.

- Third position: Landlord then transfers their reversion to a new landlord.
    - Old landlord and new landlord = privity of K.
    - New landlord and lessee = s 233 and 231 PLA = new landlord inherit rights and obligations of the original lessor, so they don't need to enter into a new contract. But because the new landlord has not entered into any new K, they only have privity of estate (when lessee is still lessee but not once it is assigned), not privity of K. Privity of K stays with Adam and Eve.
    - New landlord and assignee = privity of estate, but no privity of contract.
        - Practical reality = when lease is assigned, landlord will enter a new K with new tenant.

- Sublease
    - Initial position: Landlord and lessee have privity of K and privity of E.
    - Second position: Lessee subleases to the sub-lessee. Original lessee becomes "head lessee".
        - Lessor and head lessee = privity of contract and privity of estate.
        - Head lessee and sublessee = privity of contract and privity of estate
        - Lessor and sublessee = no relationship.
    - Here, the sub-lease is carving a portion out of the original lease. Sub-lease must not transfer the whole of the leasehold - otherwise it is an assignment and they owe obligations to the land.
        - Common law = the sub-lease must end before the original lease ends
        - PLA = allows sub-lease to end at the same time as the original lease.

Effect of assignment in NZ under statute

Note: any changes under PLA/LTA apply to leases that were created after 2008, leases from an earlier date are subject to common law rules.

Transferee of the reversion/lessor's successor in title: ; s 233.

- PLA s 231(a): burden of lessor's covenant runs with the land. New owner of the land 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.
    - These sections allow the **transferee of the reversion to have benefits and burdens of the original lessor** - inherit their rights and obligations.

Original lessor

- Privity of K 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 or transferred the reversion.

Assignee of the lease/new lessee

- *Spencer's case:* the benefit and burden of covenants that touch and concern the land are automatically binding on the assignee of the lease (privity of estate).
    - "Touch and concern the land" = if covenant is incidental to the landlord-tenant relationship e.g. for quiet enjoyment, to pay rent, to repair. Need to be careful to distinguish between covenants that are more about personal obligations, not the land, e.g. do not operate a competing business.
- PLA s 240(3)/LTA s 75: abolishes the common law rule. Lessee must observe ALL covenants of the lease and may enforce ALL covenants of the lessor.

Original lessee (and subsequent assignor):

- PLA s 241: the transferor/assignor of the lease continue to be liable for the original covenants and for rent. This includes intermediate assignees (if assignee X, then assigns to another assignee Y, Eve will still be liable under the original covenants until the lease ends)
- But if the new lessee and the lessor agree to the 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 assignment/transfer.

City of London Corp v Fell

Facts

- Fell leased premises from City of London Corp for 1- years with rent review after 5 years. F promised to pay rent under K.
- Fell eventually moved elsewhere and assigned the lease to Grovebell (new lessee).
- Rent was increased according to original K.
- Lease expired, so CLC regained possession after the holding over period but G continued in possession for a while.
- Holding over statutory provision says that the tenancy continues after the expiration of the lease where lessee remains in possession. But G did not pay rent during this period.
- CLC sued Fell for the rent for holding over period.

Issue

- Does F's obligation to pay rent end at the expiration of the lease or does it extend into the holding over period?
    - Fell: lease involves a K between the original landlord and tenant, and the grant of an estate. Once tenancy is assigned, liability to the landlord only lies under the K and not privity of estate. Assignees liability lies only in privity of estate (unless a new K is entered into).
        - Thus, F is only liable for the covenants in the lease K that touch and concern the land and assignee is not bound by all covenants in the original K.

Held

- QB: Distinguished between term and tenancy. Tenancy was extended, but not term of the contract.
- CA: disagreed with the QB approach. 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.
- Privity of K: covenants bind parties to the K, till the K ends, which is March 1986.
    - Original tenant is bound by the K up until March 1986, so not bound by the tenancy if it goes beyond this time. The tenancy past the end of the lease on K exists by statute, not because they are contractually bound.
- Privity of estate: covenants of K/obligations that "touch and concern" the land are imprinted on the term of the reversion and bind lessor, lessee and any assignee and transferee (future successors in title).
    - There is no privity of estate between Fell and LCL so we cannot say that Fell is bound by covenants that touch and concern the land.
- Overall, Fell is not responsible for rent after March 1986 because the covenant only required them to pay rent during the contractual term that ended in March 1986, being liable in a holding over period was not contemplated by the K.

Overall

- This case shows the difference between privity of contract and privity of estate.

- After assignment, the original parties remain subject to obligations under the K but are no longer subject to the tenurial relationship.

Herbert Duncan v Cluttons

Facts

- HD leased premises to Cluttons. Lease to run to 1990. In the agreements, covenants said that the lessee "yielding and paying therefore unto the lessor during the said term".
- Cluttons assigned their lease interest to Warringtons in 1988.
- After expiration of the lease, HD did not want to extend the lease.
- Judge imposed an injunction (for what?) and imposed new rent rate that was quite high.
- W continued in possession until 1991 but only paid the old rent and not the new rent imposed by the judge.
- Cluttons had agreed in 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.
- HD sues Clutton for rent not paid by W.

Issue

- Does Clutton's obligation to pay rent include the rent owed from the holding over period at the higher rent rate imposed by the judge?

Held

- Both privity of K and privity of estate apply. The term in the K means that 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 K, as the rent increase was by a judge, not by K. If would not have been liable if the new lessee had entered into a new K with the lessor after the period was over.
- Thus, Cluttons are not liable for the amount owed by W that they had not paid (at the increased rate).

Parties rights and obligations

Where do we find rights and obligations?

- Contracts usually stipulate the rights and obligations of the parties.
- Inherent in a landlord-tenant relationship, implied by the common law when the lease is silent on the issue.
    - Landlord:
        - Tenants right to quiet enjoyment implies landlord covenant to quiet enjoyment.
        - Grantor must not derogate from the grant = landlord obliged not to do anything inconsistent with the use to which the lease in entered for.
        - Implied obligation on both parties to do everything necessary to carry out the relationship: this may require landlord to do positive acts.
    - Tenant:
        - obligations to pay rent
        - Tenant to use premises in a tenant-like manner
        - Must yield up vacant possession when the lease expires
        - Obligation not to commit waste that is voluntary (positive acts that cause damage) and permissive (omissions by the tenant, such as allowing deterioration).
        - Preserve state of premises as you found them relatively.

- Implied by statute: PLA Schedule 3
    - A lot of these common law implied covenants are now set out in schedule 3.
    - S 218(2) abolishes common law implied covenants.
    - S 279: Parties can negative, vary or extend the covenants. The K will take priority.

Covenant of quiet enjoyment/non-derogation

General

- This is fundamental. Undertaking by the lessor against interruption of the possession of property.
- Quiet = peaceful and free from interruption/inference.
- Enjoy = exercise and use of right/full benefit.
- It protects against breaches by the landlord or persons claiming under or through the lessor. However, if other people are disrupting this covenant the landlord is not liable e.g. neighbours.
- TEST: Impugned conduct = "substantial interference" with the tenant's ability to use the premises in an ordinary lawful way.
    - If person doing conduct is landlord = Doesn't matter if act is rightful or wrongful.
    - If conduct is done by person claiming under the landlord = must be rightful. If acts are wrongful, then the tenant can only sue the person claiming themselves in tort.
- Covenant is prospective (specified in the future)
    - *Southward v Tanner:* the state housing was not soundproof. Tenants complained about noisy neighbours in the building. Court said lessor had no obligation to improve the state of the building unless the lease K has a term obliging the landlord to improve the building.
    - Tenant takes the house as they find it. If there was already noise, can't come under covenant because T knew what they were getting into when signing the lease.
- Quiet enjoyment v derogation from the grant:
    - Covenant of quiet enjoyment covers most things that are covered from a non-derogation from the grant, so if you find a breach of non-derogation, you will likely find a breach of quiet enjoyment as well.

Kalmac Property Consultants v Delicious Foods

Facts

- Colloney owns a small shop. The shop is joined to a three story building and it was at the bottom. C leased the shop for a term to Roitero, then assigned lease to NZ Enterprise and re-assigned it to Delicious Foods.
- C sold the property to Kalmac after the assignment to delicious foods, having knowledge of DS's possession.
- Kalmac tried to terminate the lease but DF refused. DF had got a renewal for the lease when it was still owned by C and K bought the property subject this lease, they had knowledge of it.
- Kalmac started to demolish the building except DF's part.
- DF tried to get an injunction.

Issue

- Was there a breach of C's right to quiet enjoyment or non-derogation from the grant?

Held

- **Non-derogation from the grant**

- What was actually granted and for what purpose? → 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 other parts of the building are demolished, you cannot calculate this.
    - Clause also referred to insurance for the entire building.
    - Thus, right to "premises" meant the shop as part of the building, and there is an implied covenant not to alter the building.
- Was there a breach?
    - If a grant is on the condition that the whole building will remain, then demolishing it derogates from the grant.
- **Covenant for quiet enjoyment**
    - Court says that this covenant and the derogation covenant are closely related.
    - What is quiet enjoyment?
        - Quiet = any act by the lessor which prevents the lessee from enjoying the premises for the purpose for which it was leased.
        - Enjoy = exercising and having the full benefit of the right.
        - Covers any act by the lessor which prevents the lessee enjoying the premises for the purposes it was leased for etc. as above.
        - Breach can occur without physical interference. Just need substantial inference/interruption to the purpose of lease.
    - Demolition caused noise, vibrations, it make the shop difficult to access and obstructed DF's business = breach.
- Remedies
    - Can be damages, injunction or cancellation of the lease.
    - Prima facie, DF is entitled to an injunction. But the court has to balance out the competing interests of the tenant and landlord, and see whether damages are sufficient to rectify the breach or whether an injunction is required instead.
    - Court went with an injunction in this case, same as trial judge.

Nordern v Blueport

Facts

- N leased a building in Auckland. B was a personnel agency. B leased the third floor of a building. Fourth floor was leased to a couple. This couple assigned the lease to an escort company called Karisma (which was a brothel). B left the property (permanently) and refused to pay rent to N. N sued B for the rent and expenses owed in between when they left and when the property was re-let.

Arguments

- B argued that N breached the covenant of quiet enjoyment AND non-derogation from the grant - thus the lease was cancelled.
- N argues that 1) no derogation as the lease purpose was not frustrated, 2) landlord is not responsible for tenant's activities because they were *wrongful* acts of the tenants. They were not authorised by N and B has an option to sue in tort 3) even if in breach, it was not sufficiently substantial to allow cancellation of the lease.

Issue

- Did B breach the two covenants alleged?

Held

- Law: Grantor is not permitted to derogate. Applies where premises are "let for a purpose that will be rendered unfit by the use of adjoining premises retained by the landlord or let by the landlord to another tenant". Does not depend on specific covenant of the lease, it is implied.
- Covenant of quiet enjoyment exists simultaneously to this covenant, they don't contradict.
- Lease purpose was not frustrated?
    - Derogation does not need to be physical interference.
    - If inconsistent use renders the premises unfit for the purposes of the lease, it is derogation.
    - It must be substantial inference and not interference with amenities or convenience e.g. privacy, tranquility.
    - Not enough if act will increase likelihood of fire and insurance costs OR if act is changing residential address to a hotel or introducing a competing business.
    - Interference does not need to be so serious as to render the purpose of the lease impossible - not this high threshold. Just needs to render premises unfit or materially less fit for the purposes as a question of fact and degree.
    - Elias CJ: there is derogation. There was faeces and urine in the common areas, customers of the brothel went to B's floor accidentally often, and customers propositioned staff. This also clearly breaches quiet enjoyment.
- Landlord not responsible for tenant's activities as they were wrongful acts?
    - The rule for quiet enjoyment is that the landlord is only responsible for lawful acts of people claiming through them. This normally applies for non-derogation also.
    - But in this case the interference was so substantial that N should be responsible, especially because the brothel was illegal at the time and Nordern knew and refused to exercise powers to terminate the brothel and its consequences.
    - Thus, N themselves have derogated from grant.
    - By shutting their eyes to how Karisma was using the floor, the landlord was in breach of quiet enjoyment covenant. So breach of this too.
- Not sufficiently substantial breach for cancellation?
    - Court said that substantial breach is a matter of fact and degree.
    - If the lessor has met the threshold for derogation from grant, the breach is already sufficiently substantial and cancellation is allowed.
    - If it is quiet enjoyment, the breach must be substantial but degree of substantiality may very. Sometimes a breach of this covenant will not be enough to cancel. Court has to weigh the interests of all parties.
- There was clearly a breach, so they don't have to pay for the remaining rent. Lease was cancelled.

Tram Lease v Croad

Facts

- C was assigned a Glasgow Lease over a '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 they have complete fee simple on that part.
- T tried to get a ruling that C's right to the wall had ended and that they could remove the wall.

- C claimed this would be derogation of the grant or breach of quiet enjoyment.

Held

- HC: there was no breach of either covenant.
- COA:
- Grantor must not do or permit something that is inconsistent with the grant and substantially interferes with the grant.
- What are the terms of the grant (actually granted and the purpose)?
    - Need to ascertain terms of the grant because you first need to know this to then later assess whether there has been derogation - *Kalmac*
    - Wall is a support for the shoe repair building, but it is on other land so they have no right to support in CL.
    - But there can be an implied obligation not to derogate.
    - Test: Was it necessary to imply this obligation as a term of the grant to avoid undermining the grant as a whole? [It is not whether the obligation was agreed to]
- Requirements for breach of clause?
    - Activity causing derogation is done on other land the lessor has.
    - 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)
    - Interference must be substantial
    - 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 court implied a restriction on the use of neighbouring land.
    - Removing the wall will cause the building to cappse, will undermine security and will disrupt the business, so removing the wall would be a derogation from grant.
    - [Note: Both tests sort of feed into each other, aren't exactly distinct when applying]

Test Considerations for breach of NDG or quiet enjoyment

1. Quiet enjoyment

- These obligations are fundamental so cannot be excluded or reduced in scope by any contractual term.
- *Southwark v Tanner* - don't need to improve the property to provide for quiet enjoyment.
    - Lessor has no obligation to improve the state of the building unless the agreement contained something about the landlord improving it.
- Was there substantial interference here? (Kalmac)
    - Note: Elias CJ said in obiter statement that a lower standard may be applicable.
    - Is this an objective reasonable person test or is it about whether the person was actually substantially affected (even if they are particularly sensitive)?
- Was the actions rightful actions of tenants that landlord can be liable for?
- Is the interference attributable to the existing condition of the premises? The interference must be prospective.
- What would remedy be? S 33, 36 AND 37 of CCLA
    - Injunction or damages.
    - If breach makes it materially less fit for purpose you can have a cancellation.
    - But you don't automatically have cancellation.

2. Non derogation from grant

- Lessor must not prejudice the rights that are created, can't do anything with rights that are inconsistent with the purpose of the premises has been left in.
    - Might look at substantial interference analysis to help do this analysis.
- Narrower than quiet enjoyment
- Breach if the lessor makes the premises less fit for the purpose for which they were let.
- Doesn't have to be a total frustration where it is impossible to perform the lease. Frustration is a smaller subset of this obligation, a material inconvenience is enough.
- Remedies
    - You will have the right to cancellation (but it may not always be appropriate to cancel, other options might be better for both parties).

Covenant to repair

General

- PLA schedule 3, s 13: implied covenant for lessee 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.
- Exception: ordinary for wear and tear is fine.
- This covenant can be replaced with an express covenant which specifies further obligations on the lessee e.g. 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 reasonableness requirement. Might require going beyond the state in which the property was received.

Mobil Oil v Development Auckland

Facts

- Property on reclaimed land is used for storage of oil for 100 years. Lease ultimately taken over by Mobil Oil NZ.
- DAL was successor of the original lessor.
- Mobil signed agreement with original lessor, which said that they would keep the premises in good order, clean and tidy.
- When Mobil's lease ended, land was heavily contaminated with oil and would cost $10,000 million to clean up. The surface soil to 3.5 metres needed to be replaced.
- DAL wanted Mobil to pay by arguing that the K covered contamination

Issue

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?

Arguments

- Mobil:
    - "clean and tidy" means free from dirt, everything organised and looking nice. Superficial requirements.
    - Contamination does not fall under this. Also DAL had no issues with previous land that had lots of contamination.

    - The cost claimed was what was needed to bring land to residential use - but the land has only been used for industrial purposes. It should be taken into account that the land was created from rubbish products and was reclaimed land.
- DAL:
    - 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" goes deeper than superficial niceness.

Held

- HC: "clean and tidy" does not extend to subsurface.
- CA: "clean and tidy" does extend to the subsurface. Lease didn't authorise contamination and future tenants may not accept the condition of the land.
- Interpretation - Context of the case:
    - Context of land was that it was created from a rubbish dump.
    - When the obligation was imposed, it was industrial land and no one though the land would be intended for residential use. No one realized the extent of the contamination or the need to clean up the subsurface.
    - This lack of awareness could be because board was not aware of the extent of contamination but it could be because the lessor was not thinking of potential commercial/residential use of the land.
    - Originally the lessor accepted contaminated land back and never complained. Some of the source was from neighbouring land.
- Interpretation - 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. So if land built on contaminated rubbish pile, lessee might be required to do something, but not necessarily clean up entirely as this would have a transformative effect.
        - 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 which lessee would be responsible for.
    - "Keep" also suggests an ongoing obligation and does not just require tidying at the end of the tenancy. However, it was impossible to fix the subsurface issues during the tenancy because there were buildings on the land. Thus, K cannot have required this and parties cannot have intended this.
    - "Good order" and "clean and tidy": are usually used in residential leases, not industrial/commercial leases. Residential leases do not require you to go under the service, more superficial.
- The standard of keeping the demised property in a particular state (obligations)
    - *Proudfoot* rule applies with 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".
    - 2) 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 tenant of the relevant class.
    - 3) Repair clauses are confined to what was within the contemplation of the parties at the commencement of the lease. We have to look at what the parties though was required at the time of the lease.
        - Note: this means that the lessee may be required to improve the property beyond its original status when the lease was actually entered into, but only to the extent that the condition would be the kind that would be required by a reasonably minded tenant when this lease was commenced. So it will never require transformative changes.
- S 223 PLA
    - 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* rule].
    - Exception: unless the context otherwise requires. So may have to improve it to beyond what the condition of the property was at the start of the lease in limited/extreme circumstances. So under this section, common law comes back in.
- Overall, find that Mobil did not have an obligation to pay for damage to subsurface.

Test

1. Proudfoot v Hart
    a. Mobil - obligation to keep good tenantable repair is not discharged by simply maintaining the property
    b. This rule is normally construed by reference to the condition which would be required by reasonably minded tenant at the time of the commencement of the lease.
    c. Keep and repair clauses are confined to what must have reasonably been within the contemplation of the parties at the demise of the lease (don't have to transform land into something that it is not)
2. S 233 PLA
    a. A covenant to keep the leased premises in good condition does not require the lessee to put the premises in good condition if they are not in good condition when the lease begins.
    b. No transformative action, replacement of things, unless it is in reasonable contemplation of the lessee when they took the lease.

Renewal and termination of leases

General

Renewal

- Key question: whether the lease grants a right of renewal or an option for extension?
    - Renewal = a new lease.
    - Extension = extends the term of the current lease.
- This makes a difference for assignments because if the lease is renewed then the original lease ends and the original lessees/lessors and intermediaries are free from obligation. If it is extended, then old lease still continues and obligations remain.
- To work out which is which:
    - Depends on the wording of the grant.
      Has to apply comply with the formalities of lease to be a renewal.

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: if the event cannot occur, this cannot be a breach of covenant by either party, it is cancellation.
4. Break clause: a term that gives right to terminate the lease early.
5. Notice to terminate: usually applies to 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, so lease cannot exist anymore.
7. Cancellation: party is entitled to cancel because of conduct of another party: PLA cancellation code.
    a. Lessee's right to cancel in the Act is unclear. Lessor's right is a lot more clear.
    b. But CCLA gives rights to cancel for lessee.
    c. Nordern: 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 it's whole basis.
    a. HOL - frustration in leases hardly ever applies: high threshold.

Differences between frustration and other ones.

- It is a premature ending, not when the lease is over like expiry.
- It is not necessarily a voluntary ending of the lease, it derives by operation of law and one party can seek a declaration of frustration from the court.
- Frustration is not like breach clause or occurence of a determining event where the thing that occurred may be contemplated by the K. Frustration is when an event happens that is unforeseen so it is not contemplated by the K.
- Frustration is when an external event happens which frustrates the purpose of the lease, it is different to cancellation where the lease terminates because of breaches of express terms in the lease or implied covenants by one of the parties that is so serious e.g. non-derogation that it can warrant cancellation.

Roman Catholic

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 for 999 years at rent of $1 - pretty much freehold. Bishop had given up freehold close by for this leasehold.
- Earthquakes damaged the building. RFD decided not to repair because the government offered to purchase to build a convention centre.
- Entire premises was insured for 7.8 million. Bishop's interest in unit was around $1 million. Insurance 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 a cut off this profit from the Crown purchase because the lease continued in existence until the government compensation and therefore deserves part of the compensation.
- RFD claims that Bishop's interest ended when the insurance was paid.

Issue

- Does Bishop have a share in the Crown payment? Did the lease subsist or was it frustrated?

Held

- Was there an implied term to terminate?
    - Default: Court says the lease cannot be terminated by default. The lease K is silent on termination. Therefore, we cannot imply that the lease will terminate. Lease was a perpetual lease given in exchange for freehold interest in land.
    - Value of leasehold - Unit Title Act: = owner of the unit title gets common area also. As Bishop's interest included this common area, the value is larger than just the interest in Unit A, especially given the perpetual lease.
    - Purpose of the lease: RFD argues that the purpose is defeated because the premises are destroyed/frustrated, but the court disagrees. Using the chapel for worship is only one purpose of the lease, they are other purposes.
    - There was intention for the lease to subsist, even after the earthquake had occurred.
    - No implied term to terminate.
- Frustration
    - Contractually principled doctrine = "Prevention of the carrying out of a K where the K obligations have become incapable of being performed".
        - Test - whether a reasonable person might think that K is different in the circumstances and cannot be performed?
        - This only operates where the K makes no provision for the circumstances that have arisen/supervening event.
    - In a lease context: leasehold interests can be frustrated due to the dual character of leases (privity of K) BUT leases are also estates.
        - As an estate in land, it should not be impugned by contractual doctrines.
        - Case law: Previously in UK, they had refused to allow a lease to be frustrated. But then *National Carriers (HL)* found that leases can be frustrated, but this very rare.
        - The purpose of the lease must be destroyed or frustrated?
            - If the purpose of lease is destroyed, then there is no need to continue to hold leasehold simply because it is an estate in land.
        - "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.
    - The Crown's offer to buy was not certain - it was a proposal, so we cannot say that the lease was frustrated pre-acquisition in light of this uncertainty.
    - Legislative scheme: under CERA 2011 - "owners" include lessees. RFD's interest is worth less than the Bishop's lease, so it would be unjust enrichment to allow RFD to take all the money.
    - Purpose of worship was just one of the purposes of the lease, one of the purposes could be exchanging the freehold for the leasehold.
    - Thus, there is no frustration.

Test

1. Starting presumption = leases are an interest in land, as well as K, so we should be reluctant to frustrate them.
2. Factors

a. How big/extensive is the interest that you have?
    i. Extent of interest in the greater estate?
    ii. Rent paid?
    iii. How long is the lease?
b. What are all the purposes of the lease? Have they been destroyed?

Easements

General - Intro

Definition/Nature/Types

- A right annexed to land to utilize other land of different ownership in a particular manner (not involving taking part of the produce of the land or part of it's soil) [**positive easement]** or to prevent the owner of the other land from utilising his land in a particular manner [**negative easement]**.
- Easements are an interest in land. They can be passed on to successors and can permanently bind the land.

Terminology

- Servient tenement = land that is limited or affected by the easement.
- Dominant tenement = land that benefits from the easement.
- S 291 PLA allows easements in gross = without being attached to or benefiting other land.
    - Will burden of covenantor (servient tenement) and bind successors.

Creation and disposition

- As legal interests, they must comply with formality requirements.
- Doctrine of part performance applies - *Salt of the Earth*
- Easements are registrable under s 108 of the LTA.
    - They must be registered on the title of both the dominant and servient tenement.
    - If registration is not complied with, easement is an equitable interest only and can be defeated by a purchaser without notice - *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. - s 296 PLA.
- Different people must own adjoining lands because easements are rights over *other* people's land.
    - At common law, this means that if you acquire the neighbouring land then the easement is extinguished.
    - LTA S 108(3) 1952: allows easements to be registered even though both bits of land are 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.
    - 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 land = neighbour cannot excavate and undermine your land. But no natural right to buildings on the land, easements are needed for building support.
- Easement = property right to utilise land. Different from a license = personal right to utilise the land for some purpose. [Lease is different because it includes possession].

Working out whether a grant is an easement

Re Ellenborough Park

Facts

- Whitecross estate includes park and surrounding land plots. Right granted to purchasers of each plot that they would never build on the park and would maintain the park as a playground. It was used as a collective garden.
- W's estate was passed to Davis subject to conditions. Maybe D wants to do something with the park?

Issue

- Was the right an easement (property) so that the current house owners can enforce the right. or was it a right granted only to the original purchase (contractual/personal right)?

Held

- Characteristics of easements:

1. Dominant and servient tenement (exception: s 291 PLA easements in gross)
2. Easement must accommodate the dominant tenement.
    a. Condition: there must be a connection between the right granted and the land itself "appurtenant to the dominant tenement". :
        i. The benefit must be attached to ownership of the land, not the person.
            1. Right cannot be enjoyed by other persons, it has to be limited to the owner of the land.
            2. Look at the language of the conveyance instrument and look at whether the substance of the grant is to create a right connected to the land that was meant to be passed on. Intended to be annexed to the premises and not the privilege personal to the possessors.
        ii. Must be connected to the enjoyment of the property, not enough to just be connected to the land. Otherwise it is just a contractual right.
        iii. Primarily a question of fact considering the nature of the alleged dominant tenement and nature of right granted.
            1. Usually needs to be some physical connection.
3. Dominant and servient owners must be different persons
    a. exception: LTA s 108(3):the owner can be the same for both DT and ST.
4. Right must be capable of forming the subject matter of the grant.
    - Whether the rights are too wide or too vague?
    - Whether the right is inconsistent with the ownership or possession of the servient tenement?
        - Must not amount to a claim of joint occupation
        - *Copeland v Greenhalf*
    - Whether it is a mere right of recreation without utility or benefit?
        - *Just spatianti: AG v Antrobus; Duncan v Louch*
        - *Regency Villas:* recreational activities can be the subject matter of an easement so long as they provide utility.
        - There can be an easement for recreational purposes.

- Application
    - There is a dominant and servient land (plots vs. public space)

- There is a connection between right granted and land itself, so that it accommodates the dominant tenement. Surrounding owners right to use the park qualify as having a physical connection to their land, not like a local zoo or cricket ground.
- They are different persons (plot owners vs. Davis)
- Whether the right was capable of forming the subject matter of the grant
    - The right here was well defined and only covers a limited number of houses, os is not too wide or vague.
    - Court discussed *Copeland v Greenhalf* where trucks were constantly parked on the right of way. Court held that it amounted to joint possession and was not an easement. But here, the use of park cannot be said to be inconsistent with the ownership of the servient tenement, doesn't amount to joint possession, more about having open space and being able to walk on it/picnics etc.
    - Concept of jus spatiandi: means a right to go all over the park and enjoy its amenities without limit. But doesn't seem like it is recognised in common law through *AG v Antrobus.* This suggests right of recreational use of the park cannot be the subject matter of an easement/ it does seem like a mere right of recreation without utility.
    - BUT the court held that there is only an element of jus spatiandi in this case, and this case can be distinguished from *AG v Antrobus.* More like *Duncan v Louch* - walking a path just for pleasure was found to be an easement.
    - Because of this case law, the park is capable of forming the subject matter of the grant, the park has enough utility and benefit, it isn't mere recreation.

Scope of easements

Barry v Fenton

Facts

- Concerned an easement for vehicular traffic only.
- Barry applied for injunction to stop Fenton using right of way except for vehicle traffic e.g. walking.

Held

- Court looks at civil law and easements. Three historic types (but this doesn't represent english law)
    - Footway only.
    - Foot and horse way
    - Foot, horse and cart way.
- Matter turns on the construction of the conveyance deed. Scope of the right of way must exclusively be determined by the language.
    - Fenton tried to argue - *Ballard v Dyson:* says that the grant of a greater right is evidence of a grant of the lesser right also; legal interpretive presumption.
        - E.g. the grant of vehicular right is evidence that if you can do that you have the right to walk on right of way.
    - Court said that while prima facie, a greater right will encompass a lesser right, language takes precedence. So if the grant can be constructed to exclude it, the grant will be limited.
        - Shows that it is important to be specific about what you are granting.

- What is the meaning of "vehicle"?
    - Here, the language is clearly restricted to vehicles - therefore the dominant owner cannot exceed the grant and use the right of way for walking.

Peacock v Custins

Facts

- Custins has 2 plots of land; red and blue.
- Red has easement of right of way over Peacock's land. Custin's tenants use the right of way to go to the red land and then the blue land because the lands are farmed as one unit. They used the right of way two extra times per year to get to the blue land.
- Peacock claims that they have no right to use the right of way to access the blue land, only the red land.

Issue

- Whether owner of dominant tenement possesses right of way for all purposes over the servient tenement to access the blue land not covered by the right of way easement?
    - P argues that doing so it outside the scope of the grant and is trespass.
    - C argues that it is only trespass if the right of way is primarily used to access blue land.

Held

- LAW
- Cases:
    - *Harris v Flower:* dominant owner had 2 lands. Pink had right of way over servient tenement and white didn't. Factory built spanning on both lands. Held: using the right of way to enter the 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 servient tenement to be increased without consent beyond the terms of the grant.
    - *Jobson v Record:* Right of way granted for agricultural purposes. Dominant owner used the right of way for storing and transporting timber. This wasn't allowed because it was outside the scope of the grant.
    - *Williams v James:* Dominant owner stored hay on the land and would transport hay through right of way. They weren't allowed to do this under the easement but got off for other reasons.
- Focus: what is the object of the dominant owner in using the right of way?
    - If the objective of using the right of way is to pass over the dominant tenement land to access some other land, then that is outside the scope of the easement.
    - However, if your objective is to use the right of way to go to the dominant tenement land, and then you pass onto different land, that is not outside the scope of the easement.
    - To allow for the use of access for other lands not party to the easement is unfairly increasing the burden on the servient tenement, and it is trespass as it is not permitted by the grant/beyond the scope.
- APPLICATION
    - Custin's was clearly using the right of way for the purpose of accessing the blue land, so it was outside the scope of the agreement and trespass.
- REMEDY
    - Normally remedy for unlawful use is injunction or damages. But here, P only wanted a declaration that C illegally uses the right of way, so they granted this.

PLA- schedule 5

- Implied covenants in vehicular rights of way: Servient owner and dominant owner have the right
    - to pass and repass;
    - to establish and maintain a driveway;
    - land restored after party complete repair etc.

Note: policy arguments

- Is the easement to vague or undefined?
- Or would it be too difficult to enforce it strictly? How do you know if everyone who is using the right of way is using it to go only to one property and not the other.

Power to grant easement for relief

PLA - schedule 6

- Court's power to grant relief of an easement in certain circumstances
    - For wrongly placed structure (part 6, subpart 2) e.g. *Tram lease.*
    - Landlocked land (part 6, subpart 3)

Kingfish Lodge v Archer

Facts

- Kingfish Lodge's land is surrounded on all sides by Archer's land and sea. Archer has an easement to the road.
- Kingfish want to develop the lodge and extend accommodation. THe district council approved the plan, but this plan would increase transport os the owners tried to negotiate the granting of an easement. Archer refused.
- Kingfish go to court to try to get an easement for relief of right of access as their land is landlocked.

Held

- <u>Is the land landlocked?</u>
- S 326 PLA: Landlocked land is land with no reasonable access. Reasonable access = physical access that is reasonably necessary for the use and enjoyment of the land
- Do they have access?
    - The court says this means access *in fact* as opposed to legal access.
        - (later *Squally cove* case changes this and requires both though)
    - They found that the kingfish has been using access by the sea for years, therefore they had access in fact.
- Was this access reasonable?
    - This is a moral and value judgment. Inconvenience is not necessary though.
    - Lack of vehicular access and use of the sea access may be inconvenient, but Kingfish's application for resource consent from the council admitted that sea access was sufficient, so it appears access via sea is reasonable.
- Do the courts have discretion to grant relief?
    - S 329 PLA: have to consider the nature and quality of the access (if any) to the landlocked land at the time the applicant purchased/acquired the land, the circumstances under which the land became landlocked, the conduct of the parties, including any attempts they have made to negotiate reasonable access to the landlocked land, the hardships that would be caused to the applicant by the refusal of

an order, in comparison with the hardship that would be caused to any other person in making the order, and any other relevant matters.
    - HC: 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.
    - In this case, the privacy concern, increased traffic, security concerns, need to negotiate over maintenance obligations for Archer meant that the inconvenience of the court granting an easement over their land was more than the inconvenience for King Fisher Lodge - who had been using the sea access for years, which was reasonable access.
- No easement was granted.

Murray v BC Group

Facts

- The Murray's owned land in Ngaio and have been using pedestrian access for 20 years.
- Also had a free car park for awhile but now this use has been withdrawn by the new tenant.
- Neighbours have a reciprocal right of way: the M's opposed this right of way and said they wanted to be away from traffic. But now that they are older they want access and claim the land is landlocked.

Held

- Is the land landlocked?
    - In working out whether the access to the land is reasonable, it does not always mean vehicular access. But in most cases, reasonable access will involve vehicular access.
    - Reasonability to be determined in light of contemporary living and the topography.
        - Contemporary living requires cars and welly is hilly?
    - Reasonable access ≠ best access.
    - The factor under s 329(a) of what the nature of access was at the time of acquiring the land can be a consideration for whether land is landlocked - knowledge that there is no access when you acquire land might mean that the parties think there was reasonable access initially. If the situation hasn't changed (e.g. some subdivision or sudden event that changed the access to land) then you can't now claim there is reasonable access.
- Therefore, the land is not landlocked because the land had the same limited access when they bought the land and they were fine with this for 20 years.

Squally Cove

Facts

- People only have access to their properties because of the good will of the neighbours. The neighbours are happy to grant them a license over the yellow road but the owners are not happy with the terms of the agreement. They want a right of easement over the red road.
- One of the owners has a right of way over the purple road, but it is not passable because they need to access the blue road (one of the neighbours roads) to get to the purple road.

Held

1. Can court grant reasonable access? S 328 PLA.
    a. There are 9 core principles:
        i. Physical access in fact
        ii. Question of present, not future fact

1. Purple road does not provide physical access because it is currently impassable. This is even if the property owners are negligent themselves (although if they were negligent may impact relief??)
2. Owners also only have use of the yellow road because this has just been offered.

iii. Access at the whim of an adjoining owner is not reasonable access.
1. You need legal access and access in fact.
2. Red and blue road aren't effective to say they have reasonable access because they only can use them because of the generosity of neighbours.
3. Not like in *Kingfish* which said legal access is not important.

iv. Concerned with existing and not potential use. If access meets the current need, then it is sufficient
1. In *Kingfish access* has always been sufficient for present use. They hadn't built the hotel on the land yet, so they didn't really need more access than by boat at the current time.

v. Reasonable access is not necessarily the best access

vi. Value judgment including considerations of locality, topography and contemporary transportation requirements. - *Murray*
1. Do not know to what extent we can consider other things in this judgment e.g. value of a car?

vii. Circumstances existing at the time of acquisition of land, which is evidence for what the parties thought was reasonable at the time of acquisition - *Murray*
1. They knew the access was only by boat when they bought the land and they regarded this as reasonable access as they didn't do anything about it for some time.

viii. Reasonable does not necessarily mean vehicular access, but non-vehicular access with likely not be reasonable.
1. The owners have de facto access but it was not sufficient
2. In *Murray,* they had access for decades and party thought this was sufficient.

ix. No presumption in favour of non-interference with the neighbour's title.
1. The court is even handed. It doesn't need to be demonstrably unreasonable for the court to step in and grant the easement.

b. Overall, the property owners do not have reasonable eaccess, purple road is impassable, access on a whim is not enough and the offer is not enough either, so land is landlocked.

2. Can the court grant access?
a. COA decides not to grant access weighing up factors.
b. Even if they have legal access over the red road, they won't have access over the blue road. Not effective to grant right of way over the red road.
c. Factor weighed highly was that parties had attempted to negotiate and had offered reasonable access.
i. The alternative access offered over the yellow road under the license was reasonable.

Test

1. What is the basis for S's claim in law?
    a. PLA 327: landlocked land
    b. PLA 328: court has power to grant reasonable access.
2. Can court grant access?
    a. Is there reasonable access?
    b. Squally Cove 9 Factors
3. If so, should reasonable access be granted?
    a. PLA s 239
    b. What did landlocked person know about when they acquired the land?
        i. *Murray* and *Kingfish* note that they knew about lack of access when they bought the property so might not grant access - it was their own fault.
    c. How did land become landlocked?
        i. If it was by mistake or inadvertently there is a strong argument for relief.
        ii. If mistake is caused by the applicant it is less likely because why should neighbouring landowner have to suffer restrictions on their land because of the other person's mistake.
    d. Did applicants behave reasonably in trying to resolve the dispute?
    e. Would the hardship of making the order or not making the order be worse in comparison to the hardship of the other?
        i. For example, if the access is only granted on the whim of a neighbour, it is an undue hardship is neighbour turned around and said that you no longer can use this land.
        ii. Especially where the hardship to the servient tenement would not be that great.
    f. If you had an agreement and other person changed their mind.

Variation and extinguishment

Variation, Rectification and Modification

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 = Registered proprietor of easement (dominant owner) 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.

Occurence of event = instrument might specify whether it is extinguished if event doesn't occur, or what alternative timeframe is.

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 = PLA ss 316 - 317.

Harnden v Collins

Facts

- Collins owned land - subdivided and sold off.
- Harnden and neighbours have a right of way and are dominant owners over several properties.
- Sub-division means they apply to modify the easement to make right of way go from E-H-G.

Issue

- Whether the court has jurisdiction to make the modification under s 316?
    - What does "modify" mean?
    - Is changing the line a modification or creation of a new easement?
    - Can we regard the easement as a composite whole or are F and H treated as individual parts?

Judgment

- What is the scope of the easement? Is it a modification or creation?
    - Are you modifying the easement or creating the easement? We cannot use this provision if you are creating an easement.
    - Some owners are dominant owners and servient owners at the same time. Properties are so interconnected that any obstacle impacts access. Therefore, we have to treat each easement as interconnected and a composite whole.
    - The nature and extent of the modification is to be considered in the context of the entire easement - it isn't creating a new easement.
    - This is not conclusive though - s 316 has other limbs
- Who can apply for modification or extinguishment? Court's jurisdiction
    - S 316: Only the "person bound" can apply for modification = the servient owner.
    - S 317: court can order compensation to the person impacted by the modification.
        - Compensation is meant to go to the dominant owner.
        - Dominant owner loses out from modification, which means a person that applies must be the servient owner.
    - The part that Harnden wants to modify - 2 applications are by the dominant owner and one is by the servient owner. So the court only has jurisdiction to grant modification to the one servient owner.
        - Extinguishment of F is fine = application by dominant owner.
        - Part H goes over C's land and he is the servient owner, so no applicants can modify this part of the land since they must be the dominant owner.
            - H is in the middle of these blocks, so the court can't grant a modified right of way.
- Scope of the power to "modify" (obiter)
    - Can easements be enlarged by modification?
    - Traditionally, courts have been conservative, but recent authorities have been more relaxed.
    - The purpose of the power is remedial and therefore modification must include enlargement.
    - Modifying the easement here would be permissible even though it is enlarging the easement. So modifying the easement would be permissible even though it is enlarging the easement.

Critique

- Enlarging doesn't make sense with compensation. Dominant owner benefits from enlargement so why should they also be entitled to compensation?

Davey v Baker

Facts

- Daveys reached an agreement with P where he would grant an easement over a part of the farm track as a right of way. P then sold the land to the bakers. D discovered that there was a mistake and the right of way ran over a different part of the land (issue with maps used on the register). There were lots of trees over this right of way registered so wouldn't really use it.
- D wants modification or rectification of the easement.

Held

- Rectification is not available.
    - There is not clear enough evidence to show that there as consensu between D and P to that particular area of land he alleged was meant to be the right of way. It was D's fault that he didn't check. B are bona fide purchaser without notice and recitication would intrude on indefeasibility.
- Modification
    - Issue is the court's jurisdiction that the person applying for the modification needs to the person bound. D was not bound as they were the dominant owners (they get the benefit of the easement).
    - They tried to argue that they were bound by a restrictive covenant as they cannot go beyond the scope of the easement and are also bound by a positive covenant to maintain the right of way.
    - Court rejected this argument. The purpose of the modification is to allow the servient tenement to relieve some or the entire easement burden, so it can only refer to the servient owner.
    - Court looked at precedent
        - There are some cases where applicants have been dominant owners. But the court says that all of these people were bound by covenants in relation to their own land. But here, there were no binding covenants regarding the dominant owners own land.
        -
    - Definition of covenant in PLA includes covenants in easement instruments. Dominant owner was obliged to maintain the road based of covenant in the easement instrument, so theoretically they were therefore bound and the modification jurisdiction can apply to them.
        - But the court says that you can only modify the thing that you are <u>actually bound by.</u> 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.
- Other issues? Scope of power to modify
    - Courts note *Harnden* and ability to enlarge the easement as a form of modification. They said that this means if D could apply for modification, they could move the easement to the farm track.
    - But they warn against widening easement because of the sanctity of property rights - modification interferes with indefeasibility of the servient owners (Bakers) title.

- They also say that it would be inequitable to modify the easement here because D failed to check the easement and they still do have a right of way and the Bakers have done nothing wrong.

Covenants

General

PLA s 4

- Covenant = a promise, expressed or implied, in an instrument.
- We are focusing on freehold covenants.

Terminology

- Covenantor = land affected.
- Covenantee = benefiting from the covenant.
- Positive covenant = promise to do something on covenantor's land for the benefit of the covenantee's land e.g. building a common driveway, keeping roads in good repair.
- Restrictive covenant = 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
- Covenants are different to easements. They concern your own land rather than giving rights over your land to someone else.
- Covenant is a promise about the land in freehold, it is not referring to a covenant within a lease or K. But covenants are not enforce outside of the privity of K.

Enforcement of covenants

The benefit

- General rule = covenants are not enforceable outside the contract between the original parties.
- Common law: benefit of covenant passes with land but not the burden. Covenantee can transfer right to successors on conditions:
    - Only covenants that touch and concern the land would pass to successors
    - 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: unless contrary intention with the instrument, covenant is enforceable by the covenantee, successors in title and person claiming through them (which means including leases).
    - [but still needs to touch and concern the land and have a legal estate?]

Burden

- Common law: burden does not pass. Covenantee and successors can only enforce against covenantor, but their successors are not privy to the contract and so cannot have burdens imposed upon them.
- Equity: *Tulk v Moxhay* intervened to say that the burden of covenants are binding on successors of the covenantee.
- Later cases limited the application of *Tulk* to restrictive covenants.
    - Successors in title must have notice AND the covenant must be restrictive.
- PLA 1952: removed restrictive covenant requirement, just need notice like in *Tulk.*

Tulk v Moxhay

Facts

- T owned land around a square. Purchaser E 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 did not run with the land, burden does not pass to him as the new owner- common law position.

Held

- **A covenant can in equity bind the conscience of a bona fide purchaser of the servient land with notice.**
- Court can enforce the covenant between T and E because this is privity.
    - If covenantor can sell the land and the new owner can disregard the covenant, then the promise is pointless.
    - The covenant would have impacted the purchase price.It is inequitable to allow someone to get the benefit of reduced price and refuse to comply with the covenant.
- TEST: whether the person who has notice of the covenant when they purchased can be exempted from the obligation to comply?
    - It must touch and concern the land
    - It will affect the quality of the land and there must be a common intention that the burden will run with the covenantor of the land.
    - This is an exemption, starting position is that the person who purchases with notice stands in the shoes of the person who made the promise - equity imposes an obligation.

Enforcement of the burden

1) What is the nature of B's interest?
    a) Positive or restrictive covenant?
2) A covenant must benefit the land
    a) Needs a dominant land (unless covenant in gross exception)
    b) Needs to touch and concern the land
        i) It must impact the nature and quality or value of the land or the mode of enjoyment of the land.
            (1) Value = benefit must impact value so that the owner gets more because of the covenant.
        ii) Physical proximity: The dominant and servient tenement does not have to be sharing a common border but if they are not proximate enough, then there is no clear benefit that we could say touches and concerns the land.
        iii) If the dominant tenement is not sufficiently defined, then it is difficult to identify the benefit - *Re Ballard's Conveyance:* property was 1700 acres so too vast for a covenant to actually benefit the land.
3) Intention to run with the land
    a) There must be a common intention that the covenant will run with the land. Usually expressed by covenantor in the deed.
    b) PLA s 302: covenants bind the covenantor, successor and person claiming through unless the parties have agreed otherwise.

Nature of covenants v easements

Nature

- They are equitable interests. Cannot be enforced against a bona fide purchaser without notice.

- PLA 308 and LTA 116: allows for noting of covenants on the register. If noted, it is a discoverable interest which means people will nearly always have notice.
    - Once purchased with notice, *Tulk* applies.

Differences to easements

- Positive easements/covenants:
    - Positive easement allow dominant owner to do an act on the servient tenement.
    - Positive covenant is a promise by the servient owner to do something on their land/impact the servient tenement for the benefit of the dominant tenement.
- Negative easements/covenants:
    - Negative easement restricts rights of servient tenement to exercise right that would otherwise be exercisable on their land. This is used for things like light and air.
    - Restrictive covenant is the same, but it used for things over than light or air, like privacy or right to a view.
- Form of creation:
    - Easement is created by a grant or a K.
    - Covenant is created by a binding promise in deeds or K by the servient owner impacting their own rights.
        - *Re Allenborough* was a grant of a right, where as *Tulk* it was a promise not to build on land, to keep it vacant.
- Nature of interest:
    - Easement is either a legal or an equitable interest
    - Covenants are only equitable interests, so can only be noted on the register, cannot be registered on title.
- Statutory treatment:
    - It brings easements and covenants closer together e.g. power to modify easements also apply to covenants.

Jansen v Mansor

Facts

- Mansor's created a restrictive covenant in favour of their company to protect the view. Property across the road was not allowed to erect any building exceeding one story of a height of 25ft.
- Ms. Janson bought the property, one of the flats. She wanted to add another story. She did not know about the covenant so started work on it.
- Mansor's saw work starting, so they got an injunction and Ms. Jansen had no choice but to bring an action for modification of the easement to legitimate the work she was half way through doing - s 317

Held

- <u>Was there a breach of the covenant?</u>
- Jansen's argument - it was a secondary story, but it will not exceed 25 feet.
- Judge said that there must be a good reason why the mansor's put in the dual covenant (not two stories and not over 25ft), so both elements must be considered.
- She clearly breached the covenant because she built a second story.
- <u>Can the court intervene with s 317 jurisdiction to modify the easement?</u>
- So she tries to argument that there have been changes to the neighbourhood since the covenant was made.
    - The nature of the changes do not justify modification.

    - It would be different if she was building a skyrise that effectively blocked the Mansor's view, what she was doing was not really making a difference.
- They say that they will not modify the easement. She may have remedy elsewhere for failure to be warned of the covenant e.g. all the fees gone into starting the building and having to demolish it.

Big River Paradise Ltd v Congreve

Facts

- Congreve bought properties in Wanaka.
- Clearly bought the property across the river bought by x, it had a covenant on it that the property could not be subdivided in any more than 3 lots, with one dwelling on each allotment.
- Clearly wants to subdivide the land into 52 lots, but he could not divide the land into that many freeholds under the covenants. So he got around this by leasing the 52 lots for 30 years (not a subdivision) to people who put houses on them.
    - His argument for doing this was that under the RMA, "subdivision" also included a lease of part of the lot, which includes renewals, could be for a term of more than 35 years. So if he was leasing for less, it would not be a subdivision.
- Congreve argued that he was subdividing the land, you have to interpret "subdivision" with it's ordinary and plain meaning - RMA definition is irrelevant.

Held

- Interpretation of covenants: "subdivision"
    - Legislative framework of RMA
        - If it were right to construe the restrictive covenant by reference to the RMA, we know that in the absence of contrary wording he would have been in breach of RMA anyway.
        - BUT there is no reason why the definition of subdivision should be construed under the RMA. Statutory definitions of words are unhelpful to ascertain their ordinary meaning when used in a contractual setting.
            - RMA uses it to do with control of how land can be used - doesn't make sense to apply it to a restrictive covenant.
    - Purpose of covenant - to preserve immunities of congreve's property from adverse development of the clearing property e.g. development, houses built.
        - A purposive approach to this interpretation.
    - "Static" or "mobile" meaning - it doesn't have this, so it is not an abuse of the language to define what Mr. Clearly did as a subdivision of his property.

Covenants in Gross

ANZCO V AFFCO

Facts

- AFFCO is a meat company. They closed their meat processing plant and sold the land to Manawatu Food including a covenant not to use the land for meat processing for 20 years.
- AFFCO registered a memo of encumbrance.
- M leased to Riverlands and sold the reversion to ANZCO.
- ANZCO knew of the covenant but wanted to set up meat works through subsidiary company, Itoham.

Issue

- Does the encumbrance bind ANZCO, Itoham or Riverlands?
- Can the court modify it?

Held

- LAW
- Contractual promises that restrict ability to use land are enforceable inter se.
- Normally restrictive covenants have a servient and dominant tenement and the burden and the benefit can run with the land and be enforced.
- Restrictive covenant in gross = no dominant tenement. These can be enforced between parties, but it is debatable whether the burden runs with the land and can be enforced against the servient tenement.
    - *Staple v Corby:* the burden of the restrictive covenant in gross can run with the land.
    - But this court thinks that restrictive covenants do not run with the land, mainly because England and Australia don't have restrictive covenants in gross.
    - LTA 1952: does not allow for noting of covenants in gross on the register. This indicated Parliament does not intend for them to run with the land.
    - Covenants must benefit land to run with the land (part of the definition of touch and concern the land as above). If there is no dominant tenement, it cannot benefit the land.
    - Maybe there can be covenants in gross that run with the land but it won't bind successors in title.
- Instead <u>conveyancing techniques</u> can be used e.g. memo of encumbrance These are registrable.
    - S 4: encumbrance is a charge on the land and the definition is quite broad. It includes a mortgage, trusts, securing the payment of money, a lien.
    - Through these instrument covenants become enforceable on successors title and remedies (such as mortgagee sale) are available for breaches of the covenant.
- APPLICATION
- ANZCO = Registration of the encumbrance by AFFCO means that whoever owns the land is bound, such as ANZCO.
- Itoham = ANZCO are also responsible for people claiming under and through them ie. Lessee like Itoham.
- Riverlands cannot be held accountable. Riverlands has no direct relationship with AFFCO and so no direct action unless the Court pierces the corporate veil.
    - So Riverlands are not bound by the encumbrance?
- They refuse to modify the encumbrance as well.

Statute

- PLA s 317: modification of covenant
    - Application must be by the servient owner.
    - Court can order compensation to the person impacted by the modification. Compensation is meant to go to the dominant owner.
- LTA s 242 inserts ss 307A and 307 F into the PLA:
    - Covenants in gross can be positive or negative that benefits persons but is not attached to dominant tenement.
    - Enforceable by covenantee and person claiming through them.
    - Binding on the covenantors, successors in title and person claiming through them.
    - Can be noted on the register.

    - Remains and equitable interest.
- Memorandums of encumbrance may be more desirable sometimes that a covenant in gross.
    - Covenants in gross are equitable interests so they cannot be registered, only noted.
    - Memorandums of encumbrance can be registered and function as a mortgage so in some ways it grants greater protections.
    - Conversely, memorandum of encumbrance only bind the owner of the land, where as covenants in gross can bind the occupier of the land also (e.g. lessee).
        - In *ANZCO*, this would have meant Itoham would have been bound also.

Mortgages

General

What is a mortgage?

- Where a bank loans money to a homeowner they provide security for that land over the house.
- Lender will sign a loan agreement and a mortgage agreement.
    - Contract = A loan is a covenant to repay money and perform obligations/personal covenants to the bank.
    - Security = But bank also has a proprietary interest in the mortgaged property because they have security over the house for performance of obligations.
    - If the proprietary right does not allow you to satisfy the full debt owed, then a contractual debt of whatever it left over remains (personal claim).

Covenants to pay and security are separable

Difference to mortgages

Covenants are different in mortgages because they secure a limited purpose.

- Registered mortgage = a legal charge just for the particular purpose of securing performance of obligations.

Duncan v McDonald

Facts

- Mortgaged property to secure a loan. Mortgage was invalid because of an illegal contract. But it was registered and therefore valid per indefeasibility rules.

Held

- If the mortgage was not void, the instrument would be effective in its entirety.
- If a mortgage is invalid but registered, the charge is effective but mortgagor is not personally liable for covenants. So bank can sell the property but cannot use on the personal covenant to claim any debt that was not satisfied by the sale.
- **Where mortgage document is void/invalid, mortgage is valid only to the extent of the charge on the land.**

Westpac: If the mortgage is forged but registered, the bank can sell but not recover the shortfall against the lender.

How can you get a mortgage in NZ?

Mechanisms

- Statute:
    - By charge: mortgages can take effect as a charge on the land. Mortgagee has a power of sale over the land which just takes effect as security, but otherwise the Mortgagor retains the legal title.

- Common law
    - By transfer: title to the estate is transferred to the mortgagee. Mortgagor retains an equitable interest in the land. The conveyance has a term promising to transfer back.
    - By demise: you are the lessee. Lender promises to surrender the lease when you repay.

Legal and equitable mortgages

- Mortgages must comply with formality requirements. Must be in writing and registered.
- If this is satisfied, the mortgage is indefeasible.
- Equitable mortgages = those that do not meet these requirements. Confers the same rights but can be defeated by a bona fide purchaser without notice.

Obligations secured by a mortgage

Principal

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. Registering a void mortgage perfects the charge over the land, but the mortgagor is not personally liable for covenants.
TEST: what is secured by the mortgage? To work out what is owed

- Fixed sum = secures a specific loan and interest specified in the mortgage instrument. Bank can sell the house to satisfy the debt, but anything left over the borrower/mortgagor can keep. Debt owed is a debt secured.
    - Innocent party cannot be sued for the shortfall of the covenants in the mortgage if the mortgage document is void/invalid.
- All obligations = the mortgage agreement says that the mortgagor must repay all debts to the bank that they have now and in the future, and all these debts are registered.
    - It is a valid charge when registered.
    - There is a distinction between security and covenants (mortgage and the laon agreement).

Westpac v Clark

Facts

- Imposter forged a mortgage over Mrs Fenech's land.

Issue

- What type of mortgage is it, and would there have been a valid mortgage on registration?
    - Westpac: everything owed in recoverable.

Held

- LAW
- If the mortgage was registered, by incorporation the mortgage secured all amounts "you" already owe and may owe the bank in the future = all obligations mortgage.
- But everything owed would not be recoverable, you have to look at what is secured.
    - If a fixed sum mortgage, then what is owed is what is secured.
    - For all obligations, that is owed is all that "you" owe.
- APPLICATION
- In the loan agreement. "You" is meant to refer to Mrs. Fenech but the agreement actually refers to the imposter who signed the agreement.
- The "you" in the mortgage is against the registered proprietors house and therefore secures a debt from the registered proprietor (Mrs. Fenech)

- They do not agree with *Salt Lake* where the HCA found that the "you"'s are the same, they are different. Therefore, the loan agreement is a separate agreement to the mortgage that is not registered - it is the imposter's loan only therefore.
    - So if it was registered, there is still a distinction between security and covenants (the mortgage agreement vs the loan agreement). The "you" in the mortgage document is the RP, but the RP actually owes nothing as they have not gained any debt under the loan agreement (that was the imposter). Thus, the charge secures nothing.
    - The registered proprietor is not personally responsible for the debt of the imposter as per the loan agreement.
    - Equally, we cannot say that the "you" under the mortgage agreement extends to the fraudster parading as the RP, it is clearly the actual RP.
    - Incorporation by reference - if the mortgage instrument referred to the imposter's loan K, it is possible this debt would have been secured, rather than "you".

Interest Expenses

Implied covenants, powers and conditions

PLA

- Schedule 2 sets out implied powers/obligations e.g. that you will repay, power of sale.
- S 95: allows the parties to vary or negate the implied obligations of covenants.

What is the rule?

- Common law: 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. You have an equitable right to redeem even though mortgagee became the legal owner of the property.
- Thus, mortgages can never be irredeemable. There must be no clog on the equity of redemption - once a mortgage always a mortgage. Demonstrates a mortgage is a SECURITY only.

What is a clog?

- Illusory = it looks like there is a right to redeem, but in practice it severely restricts the mortgagor from repaying the debt.
- 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 it illusory - *Knightsbridge*
- Doctrine of restraint of trade = if the mortgage places unreasonable constraints on future ability of borrower to conduct business, this may be a clog.
- Options to purchase - you cannot obtain an option to purchase in the same transaction.
- Collateral advantages - impermissible if binding for a period beyond the end of the mortgage. Clog if it extends beyond repayment -[*Noakes v Rice:* pub was mortgaged to a brewery and terms contained covenant that mortgagors would only sell products of the mortgage during the term of the lease whether or not the amount owing had been paid off.]
    - But if you pay off early, you are still bound to collateral interest due to K.

[Note: the clog of redemption rules have been largely replaced by remedies against unconscionable conduct, but people still think this doctrine exists because it is so important].

Illusory clog

Fairclough v Swan Brewery

Facts

- Leases a property and takes a mortgage over it. Mortgage said you cannot repay the debt early and required that the lessee buy beer from the brewery the entire way throughout the lease/mortgage.

Held

- PLA s 98 - you can have redemption before the due date
- You cannot make the mortgage irredeemable and you cannot clog or hamper.
- Making the property irredeemable 6 weeks before the expiration of the lease meant the redemption was not advantageous at all and was merely illusory.

Knightsbridge Estates Trust

Facts

- K borrowed money from a company. They wanted a better deal, so reached a new deal with new company - where they would repay the money in 40 years. K wanted to repay the money early, but the mortgagee said they couldn't.
- K argued that the provision of the mortgage was illegal because it made the mortgage irredeemable for an unreasonable amount of time (clog).

Held

- LAW
- Provisions that hamper redemption are not permitted. Redemption is a necessary element of a mortgage.
- But equally the court will not interfere with the freedom of contract.
- Court refused to consider "reasonableness" of terms without regard to the business realities, and said that a "reasonable" period of time is not the test. Equity steps in to ensure no oppressive terms are being enforced but does not interfere with unreasonable contract.
    - This suggests that focus should be on whether there is oppressive or unconscionable conduct or whether the right of redemption is illusory.
    - If the right of redemption actually exists, then a long length of time is not inconsistent with the equity of redemption.
- APPLICATION
- It was a K made between two competent parties with legal advice who knew their business. They were at arms length, and that K entered into this agreement because it was a better deal is evidence of this business savvy-ness. Therefore, there was no oppression or unconscionable conduct.

PLA

- Redemption = mortgagor's interest in the mortgaged property and the right to have the mortgage discharged upon payment.
- S 97 = mortgagor has the right to redeem any time before the mortgaged property is sold by the mortgagee. You can repay before the due date and after the due date.
    - This is a larger right than in *Knightsbridge.*
- S 98 = however, if you pay back the mortgage early you still need to fulfill all obligations, including paying the interest you would have paid to the principal for the unexpired portion of the term.

Test

1. Were they commercial parties?

2. If redemption can only occur at the very end of the term it is held to be irredeemable for practical purposes?
    a. Objective reasonable test on the agreement to decide if the period of time you cannot pay off was reasonable or not?
3. Difference between lease and mortgage?

Mortgagor's Equity of redemption

Jones v Morgan

Facts

- Jones was an investment broker. The Morgans had beneficial shares in a farm and were also trustees of the land.
- 1994 agreement - M wanted to develop land as a nursing home, so they borrowed from J and mortgaged the farm to secure the loan. M also agreed to transfer 50% share of the company that was to be set up to hold assets (however, this company was never set up).
- 1997 agreement - M got a new K for building residential flats on the land, so entered into K with J that released the 1994 mortgage enabling him to sell part of the farm. 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 so this was the deal for sale). This payment repays most of the debt, only 50k owing left.
- He had also promised to transfer 50% of his shares to J in the property. Even though mortgage was repaid by M but J wanted a half share of the property even after the debt was paid, as this was promised under the K.

Held

- LAW
- *Patagonia Meat:* 3 conditions for a collateral advantage to be okay
    - Provided collateral advantage is not unconscionable
    - It is not a clog
        - Mortgagee cannot enter into a K or get an option to purchase any part of the premises in the same instrument as the mortgage because mortgage are ONLY securities and destroy the right to redeem.
        - *Noakes v Rice:* collateral advantages are not enforceable after redemption.
    - Does not violate mortgagor's K and equitable rights.
- APPLICATION
- Was the collateral advantage unconscionable conduct or duress?
    - CA said no to both. Cannot be unconscionable unless one party has imposed the terms in a morally evil manner, and the terms weren't imposed in this way.
    - Duress must be coercion = violation of consent. Nothing here.
    - Receiving legal advice makes it less likely that there is unconscionable conduct. Morgan was receiving legal advice - Jones did not need to have any business knowing what quality/kind of legal advice M had received
- Clog on redemption?
    - 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 not that 1994 K.

        - But it doesn't matter if they are physically separate documents, we can say they are in substance one undivided agreement and therefore a term of the mortgage.
    - Chadwick LJ: this is a clog as it is one agreement.
    - Phillips MR: the clog is redundant now, but agrees with Chadwick.
    - Pill LJ: it was an independent bargain.

Reopening oppressive mortgages

Credit Contracts and Consumer Finance Act

- Reopening oppressive mortgages is a very important protection for mortgagors. It is an equitable jurisdiction to interfere with and remedy contracts.
- In cases where the mortgage is otherwise void but because of legislation its valid, the court may separate the personal covenant aspect from the security aspect of the mortgage.
- CCCFA creates a parallel statutory jurisdiction to reopen K's, including mortgages, s 117.

CCCFA

- S 120: court's power to reopen oppressive mortgages are on the conditions that
    - Mortgage is oppressive or
    - Party has exercised a right or power conferred by K in an oppressive manner or
    - Party as induced another to enter the K in an oppressive means
- S 118: oppressive = harsh, unjustly, burdensome, unconscionable, or in reasonable standards of commercial practice.

GE Custodians v Bartle

Facts

- Bartell's were an elderly couple, they had a pension of 21,000 coming in between them annually. They owned a modest home worth $400,000. They had $48,000 in savings. They had a campervan and a car. Asset rich but cash poor. Wanted some extra disposable income to supplement their lives. They had an opportunity represented to them by X, that Bartell would take a mortgage over their home, and with that mortgage property developers would use funds to build a property development. Bartell burrowed $630,000 to purchase a unit in the development for $552,000, this was secured over the unit not built yet and their home. Blue chip property developers would give them weekly payments to supplement their income in exchange for this. When the unit was finished they would get the unit and get their money to pay off their mortgage. However, the scheme failed, they ran out of money. The Bartell's defaulted on their mortgage payments. Mortgagee's wanted to sell the Bartell's house. Had the mortgagees known about the Bartell's true situation they would not have lent the Bartell's the amount of money that they did because the Bartell's did not have sufficient assets to secure it. The developers had often Bartell's to sign a declaration that they were financially competent, so that's why mortgagees didn't know, and Bartell's and developers could fast track the mortgage.

Issue

- Was the mortgage oppressive?
    - Did TML or GE have knowledge of the scheme or should they have inquired, and so the contract was oppressive in light of this knowledge?

Held

- COA: found in favour of the Bartell's.
- S 117/118: CCFA allows court to reopen an oppressive contract.

    - Was it in line with reasonable standards of commercial practice?
    - S 124 guidelines
        - Relative bargaining power of the parties
        - Form of the arrangements
        - Have they complied with lender responsibility principles.
            - S 9C: making reasonable inquiries, exercising care, helping borrower reach an informed decision.
- Court held that "oppressive" is wider than "unconscionable" - so it is a lower threshold, if it is unconscionable, will definitely be oppressive.
- It also needs to be in contravention of reasonable standards of commercial practice (objective).
    - Here, the loan was not out of the ordinary. The terms were relatively normal but you must go to wider circumstances.
    - BlueChip scheme was very risky and the Bs couldn't repay the loan.
- General rule = If lender knew the borrower couldn't repay, then the mortgage is probably oppressive/unconscionable.
    - Credit contracts should not be seen as oppressive unless the lender has a basis for knowing that to be so. There must be circumstances which mean the lender should know the mortgage is oppressive given the reasonable standards of commercial practice.
    - A lender cannot properly be said to have entered into a credit K 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.
    - If borrower has legal advice, then the lender does not need to make inquiries. Legal advice can be assumed to be competent - *Jones v Morgan*
    - Exceptions to the legal advice rule:
        - Solicitor is not independent e.g. conflict of interest
        - Lawyer is missing or doesn't have access to important information
        - The terms are so bad for the borrower that ht elender should have acted to protect the borrower.
- What did GE know on the facts?
    - GE knew the age of the Bs, but their application said they were investors, so this looks like they can borrow and repay.
    - GE and TML didn't know about the BC scheme.
    - Rental of the apartment was not enough to pay the loan but the B's 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 alarmed or check.
    - Legal advice = The solicitor should have been the one making the advice regarding the risky scheme. No issue with 3 exceptions here.
    - Overall, GE had no obligation to inquire further in light of this knowledge, and they did not know that the lender could not repay the mortgage.
- Policy:
    - Lenders can only know what borrowers choose to tell them and shouldn't have to extensively investigate borrowers. This is inefficient and unfair.

Mortgagee's power of sale

General

- This is the most powerful remedy against defefault.
- S 176 PLA: Implied obligation - mortgagees are under a duty of reasonable care when exercising the power of mortgagee sale. This includes a duty to mortgagees under a subsequent mortgage (multiple mortgages on the same property)
- You cannot contract out of this provision.

Applefield v Damesh

Facts

- AF had land. There were 2 mortgages - one to Damesh and and one to ANZ.
- ANZ wanted AF to sell the land. Mr. Hughes was a potential buyer. Under company constitution, sale needed approval of NZX and shareholders UNLESS it was a mortgagee sale.
- So the plan was that 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 owned a duty of care to obtain the best price of sale and that Damesh needed to exercise its power in good faith.
- Damesh had a 50% interest in acquiring the property as he had an association with the purchaser.

Held

- LAW
- Duty is not just the equitable obligation of good faith, but also the reasonable care to get true market value/best possible price of the property at the time of sale.
    - Legislation affirms the standard of duty of care as analogous to the duty of care in negligence.
    - These two obligations co-exist, but most of the time the duty of care is more onerous.
- However, duty of care obligation is triggered AFTER the decision to sell has been made by the mortgagee. The mortgagee can still decide if and when to sell, that decision is not governed by the duty of care obligation.
- There is no general rule that a selling mortgagee must take advice and market the property over a period of time. BUT they must take all reasonable steps to obtain the best price as against the market value. The onus is on the mortgagee to prove.
- 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 did act reasonably in the sale.
- Where mortgagee has an interest in purchasing the company? Or has association with the purchaser, as long as they can prove it has met the duty of care obligation it is okay.

Legal principles

- Mortgagee owes both obligations of good faith and duty of care. Duty arises after the decision to sell.
- S 176 PLA: "a reasonable care to obtain the best price reasonably obtainable as at the time of sale" - codifies *Apple fields*
    - (2) Mortgagee may not become the purchaser of the property. May be someone else.
- Purpose: to protect the interests of mortgagors.

Downsview Nominees v First City Corporations

Held

- The court stressed the obligation of good faith but rejected to extend duty of care.
    - Now we have s 176 - so we follow Apple fields on this point.
- Mortgage principles are that it is a security for payment of a debt and that security for the payment of the debt is only a mortgage.
    - The common law developed a clog rule so that the mortgagor can always get their property back. Law imposes obligations of good faith and of duty of care ales to protect mortgagors and reopening oppressive contracts.
- Powers conferred on the mortgagee must be exercised in good faith but can be exercised even if there are disadvantages to the borrower.

How does the law protect the mortgagor and the mortgagee respectively?

Protection of mortgagor

- Cannot have a clog on equity of redemption/your right to redemption can't be illusory.
- A mortgagee had a duty of good faith and care when exercising its power of sale.
- *Appleseed:* you need to take care and you need to sell property when you are exercising your right to sell to recover what is owed and the interest.
- The court has the power to reopen oppressive mortgages under CCCFA s 117.

Protection for mortgagee

- A mortgage is going to be indefeasible when it is registered, your interest can't be defeated.
- You get a security which gives you the power of sale.

LTA

LTA History

Pre-LTA

Livery of Seisin

- the people would pass something over, like a stick or a handful of soil. Once you had over the thing on the land in front of a witness (hand over ceremony) this signifies transfer of title.
- This has been abolished under s 58 of PLA.
    - There has to be some form of writing, and a contract alone is not enough to pass title. Have to register the instrument.

3 ways of recording title

1. Record of title by private conveyance
    a. Contract transporting property from one owner to another.
    b. This cost a lot of money and time, difficult to find K's.
2. Registration of deeds
    a. All private contracts were stored in one registry, just registering instruments.
3. Torrens system - LTA
    a. Focus ≠ on the transactions or collection of transactions but on land itself.
    b. Prioritises and protects the purchaser to facilitate land transactions.
    c. Unit is defined carefully in a document and you have title to that parcel of land if you are registered to do so on the land register.
    d. This changes the substantive law.
    e. You can find out what kind of title it is, what property rights it is subject to etc. instantly.

Why have the torrens system?

- English tenure system = narrow class of people own all land, no freehold market. Land passes from generation to generation. There was a registry but it just collected instruments. Not a big deal because property never changes hands.
- In colonial Australia - needed to acquire land quickly, cheaply and easily, the current system was complex, cumrous and unsuitable.

Changes to common law

- Making a contract to sell isn't enough, you need registration to transfer title.
- It removes the application of nemo dat rule - no can give what they do not have. If title is defective it will remain defective forever, so current owner could be ejected if a rightful owner came along. You could also not pass on something better than you have.
    - LTA s 51: you can pass on something better
        - Once you obtain title, it cannot be set aside if you are a bona fide purchaser with notice.
        - Now title can be indefeasible upon registration.
    - LTA s 52: but in the case of fraud, nemo dat still exists
        - Limited exception to total abolishment of nemo dat.
    - Also law of priorities have changed; under the CL, if two competing instruments, the person who had priority would be the person with the earlier contract.
        - But under LTA - it is about who registers first (whoever registers has priority)
- Contract and title are distinct
    - Contract doesn't pass the title anymore, K is simply about paying money.
    - Registration is what creates title now.
    - If there is a contract but no registration, you only have an equitable interest in the land not a legal interest.
    - Point of making title by registration is that anyone can see that someone has title on the register, so can avoid situations where the same property is sold twice.
- Remedies
    - If a party misses out on getting title because of some mistake of the register, the state will compensate them.
    - If you have equitable title you can still sue for breach of contract or go to the court and get specific performance (but if someone else has good title you couldn't get this remedy)
    - Or if the failure to register was the fault of the lawyer, could sue the lawyer in negligence.

The Land Transfer Act

Purpose - section 3

- Provide security of ownership (owner of land is not effected by any defects in title, if they are not part of fraud, they have indefeasible title)
- facilitate the transfer of estates, fast, cheap, easy (encourages purchase)
- provide compensation for losses arising from the operation of the system from state
- provide register where anyone can easily see property interests.
    - Protects most interests in land e.g. mortgages, not just freehold.

Land categories

TTWMA gives best list of categories of land under s 129

1. Māori customary land (this doesn't really exist anymore) - not subject to LTA
2. Māori freehold land
3. General land owned by Māori
4. General land
5. Crown land - not subject to LTA
6. Crown land reserved for Māori.
    a. Trusts can't be registered unless an act of parliament that says the trust is registrable.
    b. Leases, easements and mortgages can be registered.
    c. Covenants can be noted on the register.

Ngati Apa decision and Foreshore and Seabed said that no crown or person is capable of owning the common marine and coastal area.

What is on the register?

1. Land
    a. General land
    b. Māori freehold land
        i. Although this is also governed by Māori Land Act and subject to Māori land court. Sometimes LTA and MLA can conflict.
    c. No crown land on register
        i. Torrens system records "crown granted land".
        ii. If the land was taken under the Public Works Ac the certificate would be destroyed.
        iii. But state housing has a title registered under the system, even though crown owned.
2. Interests
    a. Equitable interests are not registered, system only concerns legal interests.
        i. S 153 - On register, trustee is the owner of the land. But this doesn't mean equities are not enforceable, beneficial interests are just protected by equity not the LTA.
        ii. Exception: covenants can be registered - *Tulk v Moxhay*

Three principles

Simpson v Landlord Registration

1. Mirror principle - Register of title is a mirror that reflects accurately and completely the current facts that are material to the title.
    a. We know what burdens are on the land, no surprise for purchasers.
2. Curtain principle - register is the only source of information for purchaser. Purchaser does not need to concern themselves with the trusts or equities which lie behind the curtain.
3. Compensation principle - state guarantees title or compensation where there is loss of title to the land not because of fault of the registered proprietor but because of fault of the operation of the register.

LTA 2017 V LTA 1952

- The new act has not changed the fundamental principles of the old act, but it has updates with modern principles and clarifies the law.
- Registered owner under new act means any owner of an interest in land, not necessarily the biggest bundle of rights.
- Material changes for us:
    - Overrules *Gibbs v Messer*

- Defines fraud
- Narrow registrar's power
    - Under the old act, registrar had wide powers to correct the register (but this seemed to defeat the point of indefeasibility and registrar would rarely exercise this power).
    - Now they can only change clerical errors.
- Judicial discretion in cases of manifest injustice is introduced.
    - Now instead, courts have discretion to adjust the registry in cases of manifest injustice.

Key sections

- Effect of registration - s 24
    - Title does not pass until the instrument is registered.
- Priority of instruments - s 35
    - Registered instrument will always have priority over an unregistered party, this is a mere equitable interest.
    - If neither of them are registered, then unregistered interest that occurred earlier in time takes priority.
    - If both are registered, the first one that is registered has priority.
- Evidentiary effect of documents - s 44.
    - Conclusive evidence if person has title if
        - A document that appears to represent an instrument registered or noted
        - A document that appears to represent an electronic record of title
        - A copy of an instrument certified by the registrar
- Title by registration s 51.
    - Registered title cannot be set aside, it is paramount and projected from ejectment.
    - Registration does not perfect a common law property right, but it confers title so that once you are registered you have indefeasibility.
    - Exception: title of registered person is subject to
        - S 52 - 56 manifest injustice rules
        - Adverse possession
        - Competing statutes if they override the LTA.
    - It is irrelevant whether you get title for valuable consideration or from a fictitious person.
        - *Cassegrain v Cassegrain* - he fraudulently transferred the companies property to him and his partner, and sells his half to the wife for $1. Her land is indefeasible because she was not a party to the fraud.
            - Held: the second half is not indefeasible because the sale was not for valuable consideration.
            - Today - this would not matter.
    - However, this does not affect the in personam jurisdiction of the court - people can still have personal claims, just not proprietary ones (e.g. return of land)
- Exceptions and limitations s 52
    - FRAUD - if you acquired the title fraudulently as the registered owner or registered owner’s agent then you do not have good title upon registration.
    - If there is a title already registered on the record at the time of registration - the early registered interest will take priority.

Void and Voidable instruments

CASES

- Void = invalid instrument because it is defective e.g. forged or breaches statutory requirement.
- Voidable = after examination of the court it could be found to be void.

Gibbs v Messer (PC)

Facts

- Messer went to Scotland and gave his land title to his solicitor.
- Solicitor fraudulently transfers the title to Hugh Cameron (made up person)
- Then he acts as Hugh's solicitor and mortgagees the land to McIntyre. MI knew nothing about the fraud or forgery.
- With cash, Solicitor leaves.
- MI wants to sell the land but Messer rejects this.
- Messer wants land back (but if he loses will still get compensated under land register by government)

Held

- **AUSHC:** McIntyre has best interest in land.
- **PC:** Messer had best interest in land.
- If Hugh Cameron was real and was a party to the fraud = McIntyre would have indefeasible title.
- However, Cameron was not real, so McIntyre registered his mortgage interest under a forged/void document. Thus, he cannot have valid title.
- If he had sold is mortgage interest to someone else they would have good title.
- Basically saying it was McIntyre's responsibility to check the identity of the mortgagor.
    - If you register under a void instrument, irrespective of whether you knew about fraud, you do not have good title.
    - If you get title from a person who was fraudulent or who registered under a void instrument, you have good title (although fraudulent person did not have good title).

Criticism

- Later cases disagreed with this result, and said that once you register you have good title provided you weren't fraudulent, it doesn't matter whether you registered under a voidable instrument. But they can't really say case is wrong.
- *Gibbs v Messer* has been distinguished by saying that it is limited to cases where a person registers title transferred to them by a fictitious person that an innocent purchasers title will be defeasible (e.g. where a company who is de-registered gives a title, or person is dead).

Outcome if LTA didn't apply or today

- At common law it would have also been a void mortgage.
- Difference is if the mortgage interest had been transferred again, then on common law it would be void still but under LTA it would be indefeasible.
- If decided today, s 51(4) would apply so even if it was registered by a fictitious person, the title would be indefeasible. The other person would get statutory compensation.

Assets v Mere Roihi (PC)

Facts

- Statute at the time was LTA 1956.
- Assets is a UK company which was set up to take over assets of glasgow bank that had investments in different british colonies, that had been liquidated.
- Assets were the registered owner of three blocks of NZ land that was Māori land. They were originally related to Cooper - a land speculator, but ended up with Assets.
- Native Land Act requirements to extinguish Māori customary land
    1. Investigation - Māori Land Court has to investigate who is the rightful owner of the land considering competing claims.
    2. **Memorial of ownership** - MLC would have to issue a memorial of ownership to the Māori owner that it recognised
    3. **Memorandum of transfer -** Māori owners would then make a memorandum of transfer which was approved by the MLC.
    4. Certificate of completion of sale - MLC would issue this certificate and endorse it onto the memorial of ownership.
    5. Order of freehold tenure - Court would issue this order to extinguish the native title and confer a new right on the purchaser and authorise a crown grant.
    6. Crown grant
- **W2 AND 3 BLOCK:** It is agreed by all parties the NLC/MLC acted in breach of the Native Land Act. In W 3 block, the memorial of ownership was not signed because the required survey plan was not there. But the court issued a memorandum of transfer, despite no memorial of ownership. Cooper then registered the land and mortgaged it, and it was eventually sold to Glasgow Bank. AFTER THIS, the chief NLC judge signed the memorial of ownership to the Māori owners and freehold owner and backdated it to 1876 to perfect the documents and enable Assets to register their interest in the land.
- This breach of the act means the registration of the LTA was done on defective/void instruments.
    - Māori respondents raised issues of fraud by Cooper, however fraud by Cooper does not affect the title of new owners under the LTA.
    - <u>BUT they also claim that Assets was fraudulent in obtaining the registration</u> because of getting the memorial of ownership back dated so they good make good of the defective process and register.
- Māori sued Assets with a claim to cancel their registered title, so that land would be reverted to Māori customary land.

Issue

- Māori - Māori land was not transferable the registration instruments were void as they had been fraudulently back dated.
- Assets - registration is conclusive evidence of title, the company was the registered owner and in possession. THe defects that occured in the NLC should be compensated elsewhere.
    - ***Underlying argument:*** *the Native Land Act should be subordinate to the LTA, or otherwise why should the title be able to stand = competing statutes issue, although this wasn't expressly argued.*

Held

- COA: Māori owners win, but the court is split. Two judges find there was fraud.
    - Edwards J: they say the NLC were incompetent and title should nnever had been issued or allowed to stand.

    - NZ courts were willing to treat the case as constructive fraud (broad treatment: fraud that is easier to show than actual fraud).
        - PC disagree that there is fraud, use a conceptualisation of fraud that is closer so s 6 LTA that we have now.
- PC: **"The conclusiveness of registered title in the absence of fraud"**
- Key provisions from the LTA
    - Equivalent so s 44: registration is conclusive evidence that the person named in it was entitled to the land. Only exception is fraud.
    - Equivalent to s 51: no action for possession or action for recovery should lie against the registered proprietor.
- Jurisdictional error/defects in documents
    - Māori owners argue that it is more than a formality and goes to the courts jurisdictional discretion to render it's proceedings of freehold tenure void.
    - The PC find that the memorial of ownership was not completed, but these are just formality issues. The important thing is that judicial proceedings were complete and nothing more was required than the administrative act of signing the formal document. No further exercise of jurisdictional discretion was required.
    - View backdating as an administrative act, not exercise of jurisdictional discretion
    - There is no duty for registrar to go behind the order. They do not need to inquire into the validity of a crown grant e.g. whether it was legal/procedures were followed. Indefeasible title in the absence of fraud is conclusive that their title is valid.
    - They distinguish this case from *Gibbs v Messer* because that is confined to forgery in a fictitious transfer from a fictitious transferee.
- Trusts
    - Māori respondents argue that Assets, as the registered owner, holds the land on trust for Māori and had fiduciary duties.
    - If the land is further transferred by Assets, they are personally liable to the beneficiaries in equity but the person who buys the land is protected by the LTA (unless they know of the fraud) as they have indefeasible title, beneficiaries cannot trace property.
    - PC say that if alleged beneficiary is a rival claimant who can prove no trust other than an alleged beneficial ownership, to treat it as a trust would destroy the benefit of registration.
        - You have to show there is a real trust that arises independently of the system, can't just burden registered owner with a trust because you are a rival claimant. This would be doing what the LTA is trying to prevent, so it would undercut the system if we allowed a trust here.
        - How could a new owner because the new trustee when they have no other relationship except rival claimants for the land.
    - They will impose obligations in equity because someone has been a former owner and the system cannot add or subtract duties owed under existing laws that stand outside the register.
        - Also they initially argued they were the registered proprietor, now say they were not RP but are mere beneficiaries. So contradictions in their argument.
- Fraud
    - Fraud, s 2 = actual dishonesty of somesort, not constructive or equitable fraud.

        - Constructive fraud = there is fraud because situation is unconscionable.
        - Law of restitution = where people are dealt with unconscionably or there is unjust enrichment.
    - Under the NL, fraud must be brought home to the person whose registered title is impeached or his agent. Thus, fraud by Cooper does not affect Assets title unless Asset had actual knowledge of Cooper's fraud - it doesn't matter if title was void.
        - That Assets might have found fraud had they been more vigilant ≠ knowledge of fraud to make them fraudulent. But if their suspicion had been aroused and they were willfully blind to the truth, then they are fraudulent.
    - *Gibbs v Messer* - doesn't apply because fictitious person and it is forgery (although irrelevant distinction between fraud and forgery, they are the same under s 6 LTA)
    - The PC says that the equitable doctrine of constructive fraud weighed too much on the COA to say that Assets was fraudulent. There is no proof that liquidators or assets companies refrained from making inquiries an honest person would have made.
    - Weigh up interest in protecting Māori against unfair and oppressive dealigns vs. do not disturb registered title, especially where they have had a long occupation and have invested in the land.
- NLA v LTA - not discussed.
    - But the court is implicitly taking a position that the LTA takes priority over the LTA.

<u>Four KEY issues</u>

1. Distinguished *Gibbs v Messer* and decided the case on the basis of the conclusiveness of registration in the absence of fraud by the registered proprietor or their agent.
2. You cannot allege a trust on the basis of a rival claim only - you need something else that establishes a trust relationship outside the LTA scheme.
3. Fraud has a high threshold of actual dishonesty - mere notice of an unregistered interest is not enough but wilful blindness may be fraud.
4. [Implicit] LTA overrides NLA. Under NLA, if requirements are not fulfilled, land was not effectively transferred. Under LTA, if the title is registered without fraud title is indefeasible. This is contradictory, has land transferred or not? Courts say the LTA prevails.

Beale v Tihema Te Hau

Facts

- In 1878, a memorial of ownership was issued to 150 Māori owners. 80 years later there was a partition order and the land was sold to Mr. Burt without the knowledge of the rest of the owners. Māori owners made two applications to the MLC for a rehearing. NLC dismissed one application and never dealt with the other application at all.
- 1889 Burt was registered as the owner of the land. Burt mortgaged the land to Probert, followed by a mortgagee sale to Simmonds, who then sold the land to Beale.
- However, throughout this whole time, the Māori remained in possession of the land and had a whole village there.
- Beale sues Māori to eject them from the land.

Held

- Burt was fraudulent and proceedings at the NLC were a miscarriage of justice.
- The people from whom Mrs. Beale bought the property were bonafide purchasers.
- Clear no matter what previous people did, Beale has good title.
- Can they argue adverse possession?
    - They have lived on the land for a long time.

    - But this wasn't successful.
- Argued under old provision that if land was first brought under the LTA by the "applicant proprietor" and someone else is possessing the land then the first registered proprietor might be defeasible.
    - But they say that "applicant proprietor" is an owner who applied to have the land registered. Here, they obtained a crown grant and through this process they became registered so this section can't apply.
- The court noted that the plaintiff knew her vendor was never in possession and new Māori owners were never out of possession.
    - But mere knowledge or notice of an unregistered interest is not fraud. She wasn't being willfully blind because she didn't know about the earlier fraud or irregularities at NLC.

Comments:

- Evidence that Mr. Beale was actually associated closely with the tribe, so Beale may have known more about what was going on. Courts today would do a better investigation of fraud.
- Whole village was evicted from their land, but government stepped in and bought another piece of land for them to move to. This is still a major injustice to Māori even though it is clear law. Maybe the law is not good?
- There was no discussion about the interface between LTA and NLA - it is taken for granted that the LTA will prevail.

LTA

- It doesn't matter if the void instrument was acquired from a fictitious person. So *Gibbs v Messer* is overruled.

Section 44

- registration is conclusive evidence that the person named in it was entitled to the land. Only exception is fraud.

Section 51

- no action for possession or action for recovery should lie against the registered proprietor.

Section 6 + 51

- Fraud has to be actual dishonesty, or wilful blindness. Not mere notice or knowledge.

Evaluate the Torrens system

- It has given ordinary owners a secured title, kept system easy, cheap and efficient. It also helps economic growth. It also protects lenders because it allows for registration of memorandum of mortgage - gives them an indefeasible interest.
- But on the other hand, the protection of the registered proprietor is at the cost of the Māori land interests, particularly in the early years of colonisation as it rendered colonisers title indefeasible and made native land titles particularly vulnerable as they were unregistered interests - peter moore.

Indefeasibility: immediate or deferred?

The Two views

1. Deferred indefeasibility = *Gibbs v Messer*
    a. Indefeasibility is deferred to the next person who acquired the land after the person who registered under a voidable instrument.

    b. This approach is better for the person who originally owned the land and lost it.
2. Immediate indefeasibility = *Assets*
    a. Even if you registered under a voidable instrument, you will get good title.
    b. This approach is better for a person who is on the register.
    c. We would argue this approach because if the person on the register wasn't fraudulent, why should they not be entitled to full advantage of the system? Title owners should be absolutely protected from challenges to title.
3. No issue if there is fraud - it is clear under LTA that you get good title if you obtain title from a person who was fraudulent and did not know of the fraud.
    a. Sometimes both can be present but they are conceptually distinct.
    b. Issue will arise if you got title from fraudulent person, but that made the title void.

The courts have agreed that immediate indefeasibility is the best view.

Boyd

Facts

- Boyd was the former owner and registered proprietor of land in Wellington.
- Land was compulsory taken by Wellington city council in war conditions under the Public Works Act, making them the registered proprietor.
- They paid market value for the land so Boyd was entitled to compensation but for some reason application for compensation wasn't taken in time, so he challenged the legality of taking the land to get some compensation.
- He said that under s 15 of PWA, the council needs to get approval from the governor of council or consent of the owner to take the land if it has a dwelling house on it. This procedure was not complied with so the instrument that they registered under the LTA was void.
    - He argues that this procedural non-compliance is important because the PWA involves taking private property of people by the state, and that procedure was there to protect private property rights. Council has acted ultra vires. [But we could counter that it is just a formality like in *Assets,* the governor would have approved if presented with documents].

Issue

- Is indefeasibility immediate or deferred?
    - If it is deferred, then registration of a void instrument means that they do not get a valid title. If they had transferred the property or mortgaged it to a third party, that third party would have a valid title.
    - If it is immediate, then the council has good title, even though the instrument was void.

Held

- Majority: the council has good title.
    - If *Assets* applies, there is no necessity for the court to consider whether the instrument was void/procedure wasn't complied with. A transfer that is registered without fraud makes the title of registered proprietor conclusive/indefeasible.
    - *Gibbs v messer* - should be distinguished to only focus on a fictitious person.
        - Policy: statutory restrictions exist for a reason? By allowing the council to register and get away with it as a means to circumvent the requirements is not desirable.

    - Also similar idea here of conflicting statutes - the public works act and the LTA. LTA is superior like in other cases.
    - If council had on sold land, no doubt the title is indefeasible.
- Dissent: Salmond J
    - If the instrument is void before registration, it is still void after registration. Thus, it cannot create indefeasible title unless a third person in good faith and for value purchases the land.
    - While the purpose of the LTA is to abolish nemo dat, he stresses that the LTA was to abolish the rule in favour of the rule that he who purchases title has good title "unaffected by any effect of the title in the vendor". In this case, there is clearly a defect in the title of the previous owner.
    - There is a distinction between imperfect title (of vendor) and imperfect transaction (of purchaser).
        - Registration perfects the purchaser's title notwithstanding the defect in the vendor's registered title.
        - But it is different to say that registration also validates defects in the instrument registered. If vendor has a good title but the purchaser's conveyance is invalid (e.g. purchased under a forged document), registration will not perfect the purchaser's instrument.
    - Why should a properly registered proprietor be deprived land by someone whose own registration is actually void?
    - It is wrong to say the *Gibbs v Messer* is establishing a special rule for fictitious persons only.
    - He also argued *Assets* is about a bona fide purchaser, not about voidable instruments.

Because Salmond J's judgement was quite strong and the council only won by a margin, this left the state of the law ambiguous.

Frazer v Walker (PC)

Facts

- Mr and Mrs. Frazer owned a piece of land in Auckland. Mrs. F borrows a large sum of money against the land from the Radomski's. She signed it on behalf of herself and her husband and the solicitor witnessed both signatures (this was a lie/forgery).
- Mrs. Frazer never repays the money and Ramdomski's conduct a mortgagee sale. Walker buys the house. Somehow Mr. F didn't know this was happening.
- Mr. Walker now wants to take possession of the land as the registered proprietor, and Frazer says the mortgage is invalid so he still has the best interest.

Held

- COA: whether we apply the deferred or immediate indefeasibility theory, Walker has acquired a valid title and bought in good faith, so there is nothing than can impeach Walker's title.
- PC: Frazer could not have an action against Radomski or Walker because immediate indefeasibility applies.
- Five groups of legislative provisions
    1. Requirements on instrument
        a. Registration, once affected, must attract consequences which the act attaches to registration - that it is indefeasible whether the instrument is void or not.

2. Paramountcy and title indefeasible unless fraud
    a. Current s 51. We should adopt *Assets* definition of this.
3. Certificate conclusive of title
    a. Current s 44.
4. Court and registrar's powers
    a. Not an issue for us anymore because the new act restricts registrar's power and gives the court more discretion.
5. Bona fide third party rights
    a. Principle remains the same, they get good title.

- Approved majority in *Boyd* and say that *Gibbs v Messer* is narrowed to fictitious persons.
- Registration of void instruments is effective to vest and to divest title and to protect the registered proprietor against adverse claims. - Deferred indefeasibility isn't a thing.
- But this principle does not deny the plaintiff the right to bring an in personam claim against the registered proprietor, founded in law or equity, for such relief as a court may grant.
    - For example, in *Boyd* the court could have invoked an equitable jurisdiction since there was no third party and council got land through unjust enrichment.

LTA changes

- Makes the law not as determined on immediate or deferred indefeasibility as *Frazer* held.
- In certain circumstances, *Frazer* rule can be challenged. This responds to the discomfort that there is a hard and fast immediate indefeasibility rule.

1. Section 54 - application of court for order for alteration of register
    a. Has to be a situation of void or voidable instrument or where the instrument of an owner of land suffers loss or damage by registration under a void instrument
    b. Application has to be made no later than 6 months after person A becomes aware, or ought reasonably to have become aware of the acquisition of the estate or interest by person B, to the registrar and the registered owner of the estate etc.
2. Section 55 - court may make an order only in cases of manifest injustice
    a. Court can cancel registration if it would be manifestly unjust for person B to remain a registered owner.
    b. (2) Manifest injustice = not just forgery or dishonest conduct
    c. (3) If compensation can address the loss, this should be taken rather than cancelling the title.
    d. (4) Circumstances to consider:
        i. Circumstances of the acquisition by person B of interest
        ii. Failure by person B to comply with any statutory power or authority in acquiring the estate
        iii. If the estate is in Māori freehold land, failure by person to comply with TTWMA
            1. Is this provision really enough to address injustices of immediate indefeasibility for Māori? This is just one factor out of many to weigh up and not all cases would apply here.
        iv. The identity of the person in actual occupation of the land
        v. The nature of the estate e.g. fee simple or mortgage
            1. Fee simple would have a stronger connection with the land than a mortgagee who just wants to sell the land for money.
        vi. Length of time A or B have owned or occupied the land

1. Longer amount of time, greater connection with land.

vii. Nature of any improvements made by A or B to the land

viii. Use to which land has been put by A or B

ix. Any special characteristics of the land and their significance for either A or B

x. The conduct of A or B in relation to the acquisition of the estate

1. Who is more innocent in this situation? Did you bring the issue on yourself because of dumb behaviour or were you fraudulent?

xi. Any other circumstances the court thinks is relevant

e. Manifest injustice seems like a high threshold, but probably would apply in a lot of land cases.

3. Section 56 - court must not make an order if estate or interest transferred to a third person
   a. If there is a further transfer, you cannot argue for return of land or cancellation of title because their registered interest is not affected by the void instrument.
   b. Deferred indefeasibility will always be fine.
4. Section 57 - registration of order of the court

How would this change the outcome of the cases we have looked at?

Gibbs v Messer:

- Owner of fee simple land, suffered loss or damage because of registration under a void or voidable instrument.
- S 54(1)(b): void or voidable instruemnt = macIntyre's mortgage.
- S 56: have not conducted mortgagee sale yet, so the provision is not engaged, we can look at s 55.
- S 55(4): should court make an order
  - (a) McIntyres dealt with a dodgy lawyer in the case without checking the fictitious persons identity. Maybe didn't take care, but they were dealing with a lawyer who says they are representing a client so maybe not unreasonable, they didn't check the identity.
  - (d) messer was occupying the land, he left the country though but came back.
  - (e) messer's interest in the land was fee simple whereas McIntyres was a mortgage so Messer's is more substantial.
  - f) messer occupied the land for a while, palpably longer than mortgage.
  - (j) messer did give certificate of title and power of attorney to the lawyer, so maybe like Breskvar type situation, you are lamson inviting fraud on your title. But then is it unreasonable to leave this stuff to your lawyer.
  - Maybe manifest injustice?

Assets:

- Satisfy s 54 and 56.
- S 55(4):
  - For Māori owners (a)(b)(c)(h)(i) could apply - it would breach TWMA.
  - (d) Assets is on the land
  - Assets have fee simple, Māori owners have lesser interest.
  - Assets has been on the land for a while.
  - A lot for improvements to land by Assets.
  - (j) potentially conduct of assets as they did sort of acquiesce and didn't check, but it seems fair that they didn't in these circumstances.
  - Probably not manifest injustice.

Beale

- S 56 would apply because it had been transferred, so couldn't come under this jurisdiction.

Boyd

- Satisfy 54/56.
- S 55(4):
    - Circumstances - taken off him under the act. He also didn't get compensation because of procedural issues.
    - (B) they failed to comply with statutory authority
    - (d) he occupied the land
    - (e) he had fee simple
    - (f) he had occupied the land for a long time.
    - (h) land maybe was used for an important purpose in war time.
    - (j) conduct of the council was dodgy.
    - Probably would be manifest injustice here.

Westpac

- Satisfy 54, and 56
- S 55(6)
    - Pretty much all of them are in favour of the woman, NOT westpac.
    - Celar manifest injustice.

Frazer v Walker

- S 56 would apply, title has been transferred so cannot have this jurisdiction.

Breskvar v Wall (HCA)

Facts

- 1868 Breskvar borrowed $10,000 from Petrie, and Breskvar provided a copy of certificate of title and blank memorandum of transfer to Petrie as guarantee that if he defaulted, Petrie could register title on the land. This is odd because it is dangerous for B and is against the law. If someone tries to use this memorandum it will be void because it is illegal.
    - At this time, you would obtain security over land by transferring land and then transferee would transfer back property to borrower once debt was paid.
    - Now - you just register your mortgage as a charge.
- Then P committed fraud by registering his grandson on the title. P had power of attorney over his grandson, so sold the land on grandson's behalf to Alban Co.
- Alban Co did not know about the fraud and searched for title which showed grandson as legitimate owner of land. But Alban did not register their interest.
- B searched for his title and found he no longer owned the land, so he launched a caveat on the title.
    - S 140 - caveat = registrar can't do anything to the title e.g. register a new interest, title is frozen.
- B argues that
    - Wall registered the land through fraud, so his title is invalid.
    - Wall registered on void instrument so title is invalid for this reason too.
    - He does not have indefeasible title, so can't pass title to A.
    - If A was able to register he would have got good title because they would be a bona fide purchaser, but they didn't.

Issue

- Can B get his land back or can A register their interest?
- Was Wall's title valid? Was A's title valid? How do we deal with competition between two parties who both have unregistered interests?

Held

- Wall's title was affected by fraud because P was his agent, and it was void because it was illegal. If wall didn't sell the land to A, B would have gotten land back.
- However, they still have a legal interest in the land and B has an equitable interest, so Wall does not have no interest.
    - Nemo dat isn't relevant anymore, registration alone vest title, not by the instrument of transfer, so it is conclusive evidence of legal title.
    - Not registration by title, but title by registration. So even in the case of fraud, Wall had a legal title that is good against the world, but this can be defeated by the original owner.
- If deferred indefeasibility
    - Alban would not have good title because he registered under a void instrument (like in *Gibbs v Messer)*.
    - But under LTA, you get good legal title if you obtain title from a person who is fraudulent. So arguably he would also have the legal interest despite void interest. Why should there be a difference?
    - Also the court applies deferred indefeasibility they may be less prepared to say wall has title to pass on, as they are less absolute about gaining title by registration.
- Competing equitable interests between A and B
    - A's equitable interests do not depend on the transfer from void instrument but from the registered owner.
    - If Alban has to depend upon the blank instrument to maintain the rights it must fail - instrument cannot be a good source of equitable rights. But because Wall's rights were registered, and they did have some legal interest, A is taking a transfer from a registered proprietor so they can have an equitable interest.
    - Who has priority?
        - B's equitable interest lost priority because of his own fault in handing over a blank transfer instrument, may still owe money and didn't launch caveat sooner.
        - Normally because B's interest is earlier in time it would have priority, but because A was more innocent he lost priority.
- Fraud
    - The registration as proprietor was obtained by the proprietor's own fraud.
        - This either means the fraud is to obtain registration. P acted as Wall's agent so it is fraud.
        - But may have been different if Wall did not have grandson as agent or Wall transferred the property himself, as Wall may not be affected by the fraud.

This result does seem fair given that B is less innocent than Alban having been the creator of this mess.

Fraud v Void instrument

1. Fraud
    a. Dishonest conduct or forgery
        i. If it is the act of the registered proprietor - their title is defeasible

ii. If fraud is by someone else and person on title is not fraudulent - title is indefeasible.

2. Void instrument
    a. Could be caused by forgery or failing to meet procedural requirements under statute.
        i. Immediate indefeasibility - as soon as title is registered, it is indefeasible, even if registered on a void instrument.
        ii. Deferred indefeasibility - if title is registered on the void instrument then title is defeasible, but subsequent purchasers will have a bonafide interest.

Westpac v Clark (SC)

Facts

- [Note: There is a distinction between a mortgage agreement and a memorandum of mortgage that is registered on the register.]
- Imposter approached Westpac for loan, produced certificate of title and mortgage so prove she was Ms. Finich, and got a mortgage over the Remuera house.
- Mr. Clark thought he was dealing with real house owner. He was Finich and Westpac's lawyer.
- Mortgage agreement was created, imposter signed and bank advanced money. Clakr undertook to register the mortgage memorandum but forgot.
- Imposter left and Westpac realised it was a fraud. But when Clark went to register mortgage on title, the registrar had put a caveat on the title, so he couldn't = it is an unregistered mortgage.
- So bank sues Clark for negligence. He has to show there was a breach of duty of care and that there was loss.

Issue

- There was clearly a duty of care that was breached, but there is an issue with showing that there is causation between Clark's actions and the loss of westpac.
- Westpac argues that if the mortgage was registered it would have been indefeasible, thus they would have been able to enforce the mortgagee sale, so they have suffered loss because of Clark's actions.

Held

- Blanchard J: Even if the mortgage was registered, the valid mortgage would have secured nothing of Westpac's loan - this is Chris' part.
- Elias CJ: Just because the mortgage would be valid if it was registered does not mean that westpac would be entitled to register.
    - The premise of the claim is that it was entitled to have Mr. Clark register a forgery and they have been deprived of that benefit - they never had this right.
    - Registrar is not supposed to register void instruments. The failure to register by Mr. Clark did not cause the banks loss. Loss is because the mortgage is void.
    - The mortgage would not have effect as an equitable charge because the mortgage itself was void.
    - While in *Frazer* the void mortgage slipped through the system and was registered, so gave them good title, this does not mean that they were entitled to register their mortgage. Same applies here, you still have to comply with formal requirements for registration under the LTA.

    - **Registration of void instrument gives good title ≠ entitlement to register a void instrument.**
- Could we interpret this as a step towards deferred indefeasibility thinking? Maybe closer to what we saw in Salmond J's dissent in *Boyd* - idea of purchaser's bad instrument.
- Bring in policy considerations?

Difference between this case and Breskvar

- Distinction is between defective title and defective instrument.
- Westpac had a defective instrument = void mortgage. Cannot act like you have a right to register a void instrument.
- Breskvar = alban's instrument itself wasn't void, it was just that wall's instrument was void, so they would have been entitled to register it but for the caveat.
- Policy - judges didn't' want to encourage corporations to shift their liability to the public and in B they didn't want to reward him for breaking the law by giving a blank memorandum of transfer as security.

Draft legislation of LTA 2017

- Had a provision that creates an obligation on banks to scrutinise borrowers identities. E.g. bank should check the real identity of the mortgagor, they are powerful should do this.
- This would restrict immediate indefeasibility in certain cases
    - This clause was scraped at the last moment, but there are still discussions of bank responsibilities.
- LTA didn't distinguish between transferee and mortgagee.
    - But s 55 (4): talks about the nature of the estate - so the court does have some power to distinguish between the interests.

Green Growth v Queen E II National Trust (SC)

Facts

- Mr. Russell entered into an open space covenant with the national trust in 1997, under an Act. He granted this to a trust over a block of land and was noted on the register.
- Mr. Russell could make limited alterations to his own land only after the approval of the trust and if the alternation did not detrimentally affect the native plantation.
- Land was sold to green grove.
- Green grove wants to develop the land and approached the trust for approval. The trust refused.
- Green growth bought with knowledge of the covenant so they are bound by it - s 116 PLA.

Issues

- Covenant was defined by reference to an aerial photograph that wasn't attached to documentation. So it is unclear what land the covenant refers to.
    - Trust tried to argue that the defined area applies to the whole land.
    - Green grove argued that the covenant is ineffective/void as it was not executed as a deed, so notification should be removed.
- Should we treat notification like registration, so that it is indefeasible?
    - Green grove argue it is not the same as registration, thus the covenant is not indefeasible.
    - The purpose of notification is to give notice to purchaser of the covenant so they are bound by it - s 116 PLA.

Held

- William Young and O'Regan JJ:
- **Legislative Intent:** Denying the status of registered proprietors to a covenant notified under the PLA was not the primary purpose of the relevant provisions.
    - Where a document which is registered contains a provision which is contrary to law (e.g. unlawful restraint on trade of a lease) registration does not preclude the occasion that the provision is ineffective. Similar issues can arise with notified restrictive covenants.
        - Registration does not make an unlawful registration in an agreement become lawful.
    - The purpose of s 307(5) of the PLA is avoiding the possibility of an argument that notification of such a covenant would preclude scrutiny of the legal effectiveness of some of its terms.
    - It is unlikely the legislation contemplated permitting instruments recorded on the register to be impeached on the basis of technical arguments as to the mode of execution or certification.
- **Statutory interpretation of "register" "registered proprietor" "instrument" "dealing"**
    - A covenant is an instrument and a dealing for the purpose of s 33, by reason of s 34. The recording of a covenant is deemed to be registration. By reason of s 35, the trust is the entity named in the covenant as taking the interest as the registered proprietor of that interest.
    - Noted covenants are registered, so on that basis the covenant should be treated like a registered interest as indefeasible and trust is the registered proprietor of that covenant.
- **Thus, the principle of immediate indefeasibility applies as if notification of the open space covenant was registration, and coventee is registered proprietor.**
- Elias CJ:
    - the covenant is a statutory covenant because the queen Elizabeth 11 act. She places weigh on s 22(3) of this act, every open space covenant shall run with and bind the land and be an interest in the land for the purposes of the LTA. When it's registered = indefeasible.
    - So maybe it is specific to open space covenants, maybe it is broader?

Discussion

- Is this establishing a universal principle that all noted covenants are registered covenants and all noted covenanters are the registered proprietors, or is it specific to this case?
    - COA clearly has a different approach but the same conclusion. COA looks more specifically at the National Trust Act and that it confers protection of indefeasibility to an open space covenant under s 226 - this would be following Elias.
    - The 2017 act makes distinction between notification and registration so maybe that distinction exists for a reason. Maybe this makes it clear that parliament did not intend for a covenant to be indefeasible if they are noted.
    - S 7 PLA - covenants are interest in land but notation does not give covenant an operation under the act that it would normally have.
    - But you could also take William Young j's reasoning - in which case it is just an interpretation of LTA so notification isn't any different.
- Policy

- What is wrong with covenants being registered and indefeasible? Doesn't this comply with the purposes of torrens system to be a complete register, shouldn't we deal with all rights in land in the same way.
-

Overall

1. Torrens system
    a. Perfects title (remove nemo dat)
    b. Confers title - s 24.
2. Void instruments
    a. Immediate indefeasibility from case law
    b. But LTA 2017 S 54-57 allow for exception of manifest injustice.

Caveats

What is a caveat?

- It means "beware". It is a notice issued by an interested party that no action is to be taken until that party has been heard.
- Effect: s 140 LTA - as long as a caveat remains on the register, the registrar cannot register an instrument that would affect the estate or interest protected by the caveat.
    - Exception: S 141 LTA: when a mortgagee exercises mortgagee sale and there is a mortgage that happens after the registered mortgage, and then you mortgage to someone else, first mortgagee was entitled to mortgagee sale - right is not affected by second mortgagee, can't launch a caveat.
- Purpose: primarily to protect interests in the land, it does not improve existing rights or create new rights. However, not every interest can support a caveat.
- Caveatable interests: s s138(1) LTA
    - Have to claim a proprietary right in the land, a mere personal right cannot allow a caveat to be lodged.
    - Act makes it clear it doesn't matter whether the interest is registrable or not, can be a caveat.
    - An owner of the estate can put a caveat on their own title isn certain circumstances, but this has restrictions.
        - E.g. fear you lawyer will sell your land to someone else fraudulently ≠ can't place caveat on it.
        - But if you had an interest that was distinct as a registered owner you could.
- Responses to caveats
    - Provide notice - s 139
    - Removal - s 142
    - Lapse - s 143 [person is forced to go to court to defend caveat]
    - Onus of proof
        - On the caveator
        - Have to show you have a reasonably arguable case, that you are entitled to the protection of the caveat for caveat to stand.
- Registrar's caveat - s 149.

Philpott v Noble Investments Ltd

Facts

- Noble has a large piece of land that is divided up and sold. It hasn't received subdivision consent though. Philpott bought some pieces of land, Noble promises to provide roading and services to P's land under clause of agreement for sale. Lot 9 = where applicants land is. Subdivision duly received council consent but dispute broke out at P launched caveats to protect interest. Noble applies for caveat to lapse.

Issue

- Do the appellants have a caveatable interest in the land?
    - Appellants: Clause 15 to provide services of roading etc. = create easement
        - Alternative argument that they hold land on trust for P.
    - Noble: the agreement was to undertake work, not to convey an interest in land (contractual)

Held

- LAW
- The onus is on the applicants to demonstrate that they hold an interest in the land that is sufficient to support the caveat, but they need not establish that definitively.
- It is enough if the applicants put forward a reasonably arguable case to support the interest they claim
- The summary procedures involved in applications of this nature are not suited to the determination of disputed questions of fact. An order for the removal of a caveat will only be made if it is patently clear that the caveat cannot be maintained
    - either because there is no valid ground for lodging it in the first place or
    - because such a ground no longer exists.
- When an applicant has discharged the burden upon it, the Court retains discretion to remove the caveat which it exercises on a cautious basis. Before it does so the Court must be satisfied that the caveator's legitimate interest would not be prejudiced by removal.
- A caveatable interest is therefore an interest in land. Personal/contractual right is not enough unless it creates or carries with it an interest in the land. No closed list = just have to show there to be a legal or beneficial interest in the land.
- Uncertainty in law: are only those interests capable of registration caveatable, or whether the category of caveatable interests extends to non-registrable equitable interests which are nevertheless proprietary in nature? This is clarified by 2017 Act, it doesn't matter. Can be an equitable easement.
- IS THERE AN EQUITABLE EASEMENT? - reasonably arguable.
- Look at the document as a whole from the perspective of a reasonable person having all the background knowledge reasonably available to all the parties.
- The agreement itself does not expressly promise to grant an easement.
- Looking at the document as a whole, the owners have an interest in how they gain access to their property = easement situation.
- Noble argues → there will be a public road in the subdivision that everyone can access to the main road/council road so no easement is required to go over other land. But this is uncertain.
- Caveatable interests will extend to noble lands to whichever part it needs to go through.
- Clause 2D.15 - the purchaser's will release covenants and surrender easement for the purpose of subdivision, the wording may be reasonably required.
    - Current situation is not a reasonable requirement for appellant to give easement up.
- Second caveat = Apple field promises to work on the roading and services.

    - Noble argues agreement is about obligations owed from applefield to appellants, but they would have not contracted to do this work unless there was some other obligation between them.
- Each owner has an interest in how they gain access to their property. If you were to remove the caveat this would have a detrimental effect to the caveator: if yes, then maybe more likely there is an interest.
- RESULT - no agreement to have an easement but caveat must remain.
- Caveat cannot lapse, they established the low threshold. This is not saying an easement is created though - this is just a contract to provide services (built a road).
- HC imposed conditions that once roading in invested in city council, then Noble can apply for caveat to lapse.
- COA disagree. The operation of condition is uncertain because doesn't link to contractual language. Conditions were inconsistent with the requirement that caveators interest should not be prejudiced by the removal.

PVG v GP96

Facts

- Company called PVL, owned by Mr. H, has a number of associated companies, LVL and GP96.
- Most of Mr. H's companies are in receivership. LVL is registered proprietor of property in Christchurch, it was mortgaged to FM custodians and then to dominion (second mortgage)
- Dominion then transferred it's mortgage the rights to PVG.
- FM custodians has priority to PVG
- LVL leased the property to living space and living space assigned the lease to GP96. Lease is equitable.
- LVL is now in receivership and property could be sold.
- GP96 holder of unregistered lease, launches caveat.
- FM is first mortgagee who paid insurance payout, so don't worry about mortgagee sale.
- PVG sold property under mortgagee sale to Harris. FM is happy for that sale. Agreement with Harris to sell chattels and insurances claims and security system to Mrs. Harris.
- Mortgagee sale between PVG and Harris - subject to two conditions
    - Caveat must be removed
    - Subject to FM Custodians agreement with Mrs. Harris

Two proceedings

- GP96 and PVG about the caveat.
- GP96 and FM custodians about the sale of chattels and insurance claims because GP96 does not want sale to go ahead, condition of sale of property. They have lodged a claim for restraint.

Issue

- After the earthquake, the lease was terminated and GP96 has no lease interest at all. But focus is for their unregistered lease vs. PVG's registered mortgage. Who has priority?
    - PVG argues that the assignment of the lease was not consented to by the mortgagees, mortgagee was there first so would take priority over the lease. - s 141 (special status of mortgagees).
- Does GP96 have a caveatable interest in the property which binds the mortgagee?

Held

- LAW - priority

- Registration under the LTA confers on mortgagees an indefeasible title related to the interest of the registered proprietor in the fee simple which, subject to various exceptions, is immune from adverse claims not registered prior to the mortgage, such as claims from a later lessee where no consent to the lease was provided.
- LAW - caveatable interest
- Caveat will only be removed if there is no ground for lodging it in the first place, or the ground has ceased to exist.
- Residual discretion of court to remove caveat if the courts find that there is no practical advantage to maintaining a caveat and caveator will not be prejudiced.
- APPLICATION
- The lease from LVL to Living Space and assignment were all signed by Mr. H who owns all the companies, including G96. There is no apparent consideration, so doesn't seem like GP96 pays LVL anything for the assignment. Time of assignment was also just before receivership and receivers had no knowledge of assignment. FM knew about lease but didn't consent to assignment. PVG didn't consent either.
    - For these reasons, a caveatable interest must yield to PVG's registered mortgage, the registered mortgage is indefeasible. GP96 has no caveatable interest because a purchaser from a mortgagee sale takes the mortgage free from any other mortgage or interest that does not have priority of the mortgage or is not binding on the mortgage.
    - Transfer of property by PVG to Mrs. H, pursuant to a mortgagee sale in terms of s 103 of LTA, will vest title to the purchaser freed from the leasehold interest claimed, as it neither has priority over the mortgage nor is it binding on the mortgagee.
    - Assignment of the lease happened after the mortgagee sale. It wasn't binding anyway because mortgagee did not consent to assignment.
    - LTA 141: later unregistered mortgagees caveat cannot stand caveat against dealings was lodged after registration of registered mortgage
- The court's discretion
    - Even where caveater has made a reasonably arguable case to remove the caveat, court has discretion to still remove the caveat.
    - "No caveat" clause: usual to agree to not to lodge of caveat in these agreements.
        - Judge acknowledges that the no caveat clause in the lease does not prevent a caveatable interest from arising, but it is relevant to the courts residual discretion as to whether to sustain the caveat.
        - Court is reluctant to enforce this clause.
    - No benefit of lease: so no detriment to remove
        - Threshold for removal become low.
        - GB96 didn't make a case for it because GB96 hasn't been able to use the premise since the earthquake so they get no benefit from the lease.
        - There is no detrimental effect if the caveat is removed, so the result is GB96 failed on all grounds and caveat is removed.
- [Key issue for us is a priority issue, of unregistered lease that is later in time that is not consented to.]

Overall

- What kind of interest can support a caveat?
- What effect does it have? What is the purpose of it?
- What is the response to a caveat? What process?

- What is the onus of proof/standard of proof?
    - If someone has an unregistered interest and there is a sale to a new person, best approach is to launch a caveat on the title as the new owner will not be bound to uphold the unregistered interest. If the seller doesn't like this, she can apply for the caveat to be removed or lapse under s 142 and 143.
    - Mary can defend this, it is a low standard and then caveat will stand.

Statutory Exception - Ranking of two competing statutes when application of statutes would have different outcomes

General

- Registered title under LTA is paramount.
- LTA is ordinary legislation though, it does not prevail over other statutes
- S 51(3)(b) - indefeasible title is subject to any enactment other than this Act that overrides or limits the title.
- However, few statutes express limit the LTA
    - S 8 of PLA - PLA applies subject to the LTA.
    - S 4 of PRA - the PRA will override any other act unless the contrary is expressed.
        - E.g. PRA rules apply to split house 50/50, even if one party has indefeasible title under the LTA.

Miller v Minister of Mines

Facts

- General rule: house owner owns to heaven and core of earth, but crown may nationalize minerals of land.
- Crown granted land to Mason and grant did not reserve mineral rights to the crown as far as the certificate of title was concerned (although that was the K intention).
- Land was sold to David, who assigned the mineral rights to a mining company through K.
- Mining company gets mining permit from government under the mining act - license and mining company assigned mining rights to the crown and the mining permit.
- David then sells to Miller. He holds a certificate of title that did not contain any reference about mining rights. Miller wants to stop crown mining on his land.

Issue

- Are mining rights a registrable interest in the land? What is the legislative intent regarding mining privilege vs LTA?
    - Miller: he has indefeasible title as the registered owner of the land. Crown's interest was not noted on title so he is free from encumbrances including mining rights of crown (s 51(2))/
        - Overriding statue must be 'clear and explicit'
    - Crown: the mining interests are not registrable, but this should not mean they are defeated. The mining act is a seperate and complete code in itself that is special legislation so should override the general LTA statute.
        - It would be inconsistent with the nature of the legal interest that the mining interest should require subsequent registration to become fully effective.
        - Mining permit = creates a legal interest under statute. It is not like an equitable interest which you need to register for it to be legal. It is a statutory authority that is complete in itself.
        - But other than this, Miller can occupy the whole estate.

Held

- Legislative intent
    - The mining act provides its own separate and independent code for registration of a mining license.
    - If not registrable under the LTA and LTA overriding mining act = would mean all mining licensee lose their value except against the person who originally granted the mining rights (personal/contractual claim). This cannot be the legislative intent.
- Statutory exception by "proper implication" that one statute overrides the other
    - The mining act overrides the LTA, it does not matter that it is not express.
    - It is sufficient if this is a proper implication from the terms of the relevant statute, doing a holistic statutory interpretation of both statues in their context/purpose.
- Are the interests arising under the Mining Act registrable under the LTA register?
    - If they are not registrable, it is more likely that the parliament intended the competing legislation to override the LTAA.
        - Tipping J *Regal:* disagrees with this. It shouldn't matter whether interests are registrable or not.
    - S 51: the title of the registered owner is free from estates and interests in the land no matter whether they are not capable of being registered or noted on the register.

Housing Corporation v Māori Trustee

Facts

- The Māori trustee is the legal owner of Māori freehold land (statutory establishment to manage Māori affairs and hold land for Māori)
- The land was mortgaged to Nat West and Housing Co.
- Parties agreed that two mortgages would be ranked on the same footing.
- Both of mortgages were registered but housing corporations mortgage instrument was defective as it did not comply with the Māori Affairs Act requirement.
    - Before land is sold on mortgage MLC has to endorse the transaction.
    - It was never approved of by the court, but was registered because of an oversight.
- When Housing discovered that the mortgage was not endorse, it asked the MLC to endorse its own copy of the mortgage and asked the land registrar to deliver the land registrar's copy to the Māori Land Court for endorsement. Both court and land registrar refused.
- Housing corporation applied for judicial review of court registrar and land registrar so that it could validate it's mortgage which was registered.

Issue

- Should the MLC registrar and land registrar endorse the mortgage?
- Was the mortgage valid, despite failure to comply with MLA?
    - Underlying issue: which act should prevail? LTA or MLA?

Held

- According to immediate indefeasibility, registration of a void instrument gives good title.
    - Exceptions: fraud and s 51/52 - misdescription of the boundaries. Not issue.
    - No in personam exception or registrar's power.
- Ranking statutes?
    - Proper implication of legislative history:
    - Legislative history = MAA was passed in 1953 and amended in 1967. This was against the background of *Boyd* and *Frazer v Walker*.

        - That parliament chose not amend the MAA despite the outcomes of these cases = inference that parliament intended for immediate indefeasibility to apply.
        - POLICY: endorsement by MLC and recordings are purely administrative functions rather than of deep legal importance (s 233). Similar to *Assets*.
        - Case law:
        - *Breskvar* - statutory provision that register instruments void do not prevail against registration under torrens.
        - Conflict of law rules:
            - Specific statute will override general statute, and the one later in time will override earlier one. But these are just factors, not decisive.
- No legislative intent for MAA to override LTA, indefeasibility is settled in *Frazer v Walker,* so immediate indefeasibility prevails, mortgage is valid.

Warin v R-G of Land

Facts

- Warin bought Māori freehold land from Māori trustee.
- Breaches of MLA because Māori trustee had to get consent of the beneficial owners as they have the first right of refusal as the preferred class of alienees, and they had to get approval from MLC.
    - "No registration without prior confirmation" - s 126 TTWMA: the registrar general shall not register any instrument affecting Māori land, unless the instrument is confirmed by the court, or the registrar has issued a certificate of confirmation in respect of the instrument.
- Warin took possession and registered the land under the LTA.
- 18 years later, Warin wanted to sell the land and potential purchaser found that it was listed as Māori freehold land on MLC records. Owner is Māori trustee. However, the LTA register showed that it was Warin's land.
- Māori trustee agree that Warin's title is indefeasible, but an amicus curiae (specialist of the court giving advice on the matte) represents the preferred class of alienee and oppose the title. They are not a party to proceedings however.
- Warin asked MLC to amend it's record, they refused, so he appealed to the Māori appellate court, refused, so he went to HC.

Issue

- Is Warin's title indefeasible?

Held

- All council agrees that the transfer should not have been registered, but not our issue.
- Immediate indefeasibility - even if an instrument shouldn't have been registered, once it is registered it is indefeasible because mere registration confers title - *Frazer v Walker*.
- <u>Can MAA override LTA?</u>
- Principles for resolving conflicts of statutes:
    - Can we reconcile the conflict in some other way?
    - If not, the later law in time will override the new law.
    - A special law will override a general law.
- Proper construction of the acts? Factors…
    - *Miller* - Statutory intention can be express or implied
    - Purpose of TTWMA - to facilitate the retention of Māori land in the hands of Māori.
    - Legislative background:

        - *Housing corporation* - held that LTA overrides MAA because act is just administrative. That TTWMA was passed after housing corporation, but the new provision doesn't saying that if you don't comply, land will be defeasible = No intention for parliament to have TTWMA override LTA.
    - Legislative intentions:
        - Legislation contemplates Māori freehold land becoming freehold land because they provide procedures for it. So while purpose is a factor, retention is not absolute.
    - Legislative language:
        - Alienate under s 146 of TTWMA = no alienation of land otherwise in accordance with TTWMA. Land registrar's registration was disposal of land = alienation of land. Language therefore governs the registrar's action so should override LTA.
        - Court rejected this argument because in ordinary usage a person has to have a right or interest in a thing if they dispose/alienate that thing.
    - Policy:
        - If the TTWMA is to prevail it will mean that land cannot pass out of Māori hands without compliance. If Warrin sells the land, no one ever gets good title. People who buy Māori land unknowingly will be worse off than someone who buys from a fraudulent person. This can't be parliament's intention.
    - Practical points:
        - MLC record is messy and cumbersome, LTA record is a streamlined, effecient. In public interest to have indefeasible title recorded on LTA, rather than MLC.
    - Where without fraud a purchaser of Māori land becomes registered without complying with the act, legislation cannot have meant that the title would be defeasible.
        - Here, Māori owners did not object and Warrin had been in possession for a decade [probably would find manifest injustice for him today]

Overall

1. Express provision?
    a. RPA or Illegal contracts act
2. "Proper implication of legislative intent" (*Miller)*
    a. General rules
        i. A later act will prevail over an earlier one
        ii. A special act will prevail over a general one
    b. Legislative background
    c. Parliament's intention
        i. Has there been changes or no changes to conflicting legislation in light of common law decisions which suggest an intention for LTA to override?
    d. Precedent
    e. Wording of statute
    f. Policy
        i. Is the other legislation more of an administrative function or does it have more of a substantive impact?

ii. Will the impact on title be unfair to say it overrides LTA? E.g subsequent purchasers.
iii. Is the LTA register better than other statutes register/or way of recording things?

g. Practical points
h. And any other relevant considerations

3. Legislative response
    a. S 126 TTWMA - change about endorsement in response to *Housing Corporation?*
    b. S 55 (4) LTA - manifest injustice provisions for HC - incorporates a lots of ideas from *Warin*
4. Māori land
    a. Law Commission review - this issue is too big and complex. There needs to be a seperate review for the TTWMA.
    b. *Warin* - Judge wanted legislative intervention.
        i. We have s 55(4) but we could question how much this actually makes a difference. In *Warin,* Māori owners didn't have problem, so it wouldn't change the outcome, maybe would solidify Warin's claim. In *Housing Corporation,* it was about creditors so did not concern Māori owners.
        ii. Arguably this isn't a satisfactory resolution to the issue.

Statutory exception: Fraud

What is fraud?

- LTA s 52(1)(a): only the person who acquired the title through fraud will be affected. If an innocent purchaser purchases property for value from fraudulent person, they will get good tite.
- *Assets:* it is actual dishonesty, not constructive fraud. Must be brought home to RP or his agent. Omissions to inquire ≠ fraud, but if suspicions are aroused and you are wilfully blind it may be fraud.
- LTA s 6:
    - Forgery and dishonest conduct are both fraud.
    - Fraud has to be in obtaining registration (cannot be fraud if it is after you registered)

1. Type A: Fraud must be against the registered owner of the estate or interest in the land (mortgage, easement or lease) [*Messer, Frazer, Brezvar]*
2. Type B: Fraud must be against the owner of an unregistered interest, if the registered owner or their agent
    a. In acquiring the estate or interest had actual knowledge or was wilfully blind as to the existence of the unregistered interest AND
        i. Note: equitable doctrine of constructive notice does not apply - you can't say you should have known.
    b. Intended at the time of registration to defeat the unregistered interest (*Waimeha* - there must be a designed object to cheat)
        - Type B is hard to make out. How are you willfully blind if you intend registration to defeat an unregistered interest?
        - For our purposes we can say - if you are wilfully blind your conscience is already affected, so there must be some intention to defeat the unregistered interest.

- Maybe it is still possible that for type B = you need actual knowledge but can have objective intention to defeat registration?

Loke Yew

Facts

- Eusope holds 325 acres that is subdivided and leased. One lease it to Loke Yew. The leases were perpetual meaning he was in possession forever. He had all rights to the land except to receive rent. - basically sub-infeudation. The lease was unregistered.
- Eusope was approached by a rubber company PS Co to buy the land. Eusope purchased back all the leases except for Loke Yew's as he did not want to sell.
- Eusope made clear to PS Co that he had no right to sell Eusope's land, but trust deed said that he was selling all 325 acres.
- PS Co representative said that they will make their own arrangements for Loke Yew to sell his land, so Eusope signed.
- Once they got the land, PS says the Loke Yew has to leave the property because they own the land and as registered proprietor they have indefeasible title. His title is registered, so he doesn't have an interest.

Held

- <u>This is fraud.</u>
- The company director knew of Loke Yew's interest, new eusope would not sell if his interest would be affected, and produced infromation to induce eusope to sell on false promise that they would fairly engage with Loke Yew to gain his interest to get Eusope to sign.
- If not for this fraud, they would not have become the registered owner, Eusope never would have signed.
- Clearly TYPE B fraud
    - Fraud against loke yew with unregistered interest. Registered owner (PS) in acquiring the land had actual knowledge of unregistered interest of Loke yew's lease and intended before registration to defeat the interest through registration.
- [If they had then sold the land to a third party, then that third party would have indefeasible title].
- <u>There is a constructive trust</u>
- If A buys land knowing that b has an interest in it, A holds land on trust for b.
- Property interest was never passed to PS on registration, beneficial interest always remained with Loke Yew over that land.
    - But was there a promise undertaking or legislative background which suggests a trust was imputed?
- **Fraud where you make an undertaking with intention to defraud**

Harris v Fitzmaurice

Facts

- Harris was the RP. F was a tenant.
- F leased shop for 5 years with right of renewal, lease was unregistered
- Harris bought the land
    - he lived next door, new there as a shop and that he had a tenant.
    - Auctioneer told Harris that the shop had a weekly tenancy before the sale.
- F continued to lease the shop and paid cheap rent to Harris.
- Then, Harris found out F had a fixed term lease and was not happy. If it was a weekly tenancy he could raise the rent or give it to someone else for better price - fixed term - bad deal.

- He claimed that F's interest was not registered, and because of his indefeasible title as RP he wants to get rid of the burden of the lease.
- Issue: in purchase sale agreement of property there is a clause that says:
    - The property is sold subject to existing tenancies if any.
- H says he is not bound by this clause.
- F argues that Harris was fraudulent because he knew there was a tenancy and he has to recognise their rights because he bought the property subject to any tenancy no matter what it is, so if he does not recognise it = fraud.

Held

- No fraud at the time of registration. Plaintiff was told by auctioneer that it was a weekly tenancy, so on that evidence plaintiff intended to recognise the existence of the weekly tenancy and intended to recognise it.
- Essence at issue is that Harris learnt the truth of the arrangements, and so can we say he is fraudulent to try and render these arrangements ineffective.
- But it is impossible to say someone is fraudulent by doing this. He just had a mistaken belief, and simply does not want to be called on the recognise a tenancy of a different nature than he was aware of when he purchased the property. Thus, he should be able to rely on indefeasibility.
- **It is not fraud when you have made an undertaking in the mistaken belief of the situation on registration, and later find out the situation is different and wish to change it.**
- *Criticism:*
    - Could we argue he did have knowledge of the lease? He lived next door, he knew if had been there for some time. It isn't normal to run a shop of a weekly tenancy so that should have aroused his suspicions and he should have investigated.
    - But the new act tells us that constructive notice is not fraud - can't say he should have known.
- Can you be fraudulent after registration?
    - You used to be able to under supervening fraud. *Merrie v Mckay*
    - The judge distinguishes the case here.
    - But now under s 6 supervening fraud is abolished, has to be fraud before registration.
- If he was told there was a 5 year term lease, then he would have knowledge of the unregistered interest but still a matter of fact whether he intended to register to defeat the unregistered interest.
- If he was told there was some kind of lease, we could say he was wilfully blind as his suspicions were aroused. But against hard to show second limb.
    - Maybe bring in *Efstratiou* reasoning? It was impossible for someone not to know.

Efstratiou v Glantschnig

Facts

- Mr and Mrs G bought a house for 300k. Wife contributed half of the price from her pocket but her name was not on the register. This was pre-PRA.
- Relationship deteriorated and Mr. G left. Then he came back suddently and someone else was living in the house with his wife.
- Wife had to leave the house but got an unjunction against the husband to stop him entering the hosue.

- Mr. G went to real estate agent and asked him to sell the house. It was sold for a relatively low price, purchaser found very quickly.
- E became the new registered owner.
- The wife sued the husband, the agent and E. Wife wanted house restored to husbands name so she could say he held it on trust for her and she has a beneficial interest. She also wants damages.
- Husband got money, spent it and disappeared. Real estate agent is not really involved, so E is main defendant.

Issue

- Is E's title indefeasible?
    - Was E guilty of Type B Fraud?

Held

1. Husband was fraudulent? - Constructive trust
    a. There was clearly a constructive trust held by husband for benefit of wife. He breached trustee obligations by selling the house and depriving her of her equitable interest = fraud. She is entitled to house, so she is entitled to restoration of title and can have claims in equity.
    - [can do equitable tracing but property is now in ownership of E and he is RP, so cannot get house back unless E was fraudulent]
2. Real estate agent fraudulent? - irresistible inference
    a. He knew problem between couple, lent husband money when he came back to NZ, new the scene that occured between couple before husband sold the house, husband showed him the injunction the wife had granted to stop him entering the house, the knew wife had claim to the house, the knew value of house, he found the purchaser within 3 days.
    b. Definitely inference that he is party to fraud based on these circumstances. Agent chose not to give evidence so no rebuttal to inference.
3. Was E fraudulent?
    a. Fraud has to be brought home to E to effect his title.
    b. If he is a party to the fraud, their joint actions will make them liable jointly with the husband. What if E knew about the breach of trust and goes ahead with purchase anyway?
    c. Four factors for knowledge of breach:
        i. Price: it was worth $800,000 and he bought it for $500,000.
        ii. Timeline: it was less than a week from deciding to sell and selling the house.
        iii. He didn't go see the house
        iv. He allowed the husband to live in the house after sale (although this was subsequent to registration, so probably can't be factor)
    d. Courts are generally conservatitve when it comes to applications of the doctrine of fraud.
        i. *Assets:* omission to make a further inquiry is not fraud unless suspicions are aroused/wilfully blind.
        ii. *Waimiha* (Salmond J): Test is not knowledge of the adverse right, it is whether he knows enough to make further inquiries or to refrain from purchasing or purchase subject to the right as an honest man.

e. There was no direct evidence that his suspicions were aroused, but given the context as a whole being so extraordinary, the judge believed it was justified to say E was a party to the scheme. BUT they ARE NOT saying that there is constructive fraud, just given the circumstances he must have been wilfully blind to the fraud. It is hard to believe an honest person could buy a house in those circumstances.

4. Result
    a. E knew that by purchasing the property he would be depriving the wife of her equitable interest, so he is a party to the fraud.
    b. E could use husband in personam.
    c. Transfer was set aside, house returns to husband under registration, and wife gets her equitable claim to the house.

Issues with this case

- Is it really actual dishonesty here? Shouldn't court need more facts to say that it was an extraordinary situation?
- There could be other explanations why he might purchase that quickly or for that price other than having actual knowledge of fraud. Maybe agent said he needed money urgently or E is not a prudent person. Seems to be applying a reasonable person standard to E, because then it becomes constructive trust.
- Under the new act, more facts would be needed to decide on E's guilt.

Dollars and Sense Finance Ltd v Nathan

Facts

- Nathan borrowed a large sum of money from his parents company DS. He provided his parents house in Keri Keri as security for the mortgage.
- DS instructed a solicitor, Mr. Thomas, to secure the mortgage. Thomas then gave Rodney the mortgage documents to get him to get his parents to sign. Parents are separated, so Rodney only obtained father's signature and forged his mother's signature.
- Rodney could not pay off the loan, so D and S are seeking to sell the house.
- Father died early in the proceedings and his share of the house was passed to the mother because of survivorship under joint tenancy.
- Mum argues that the registered mortgage was not indefeasible because the mortgage instrument was forged = fraud.

Held

- There is type A fraud here. Rodney clearly committed fraud, but to defeat the registered mortgage, it must be shown that the registered mortgage was fraudulent. DS didn't do anything dishonest to secure the signature.
- BUT we can find DS liable for fraud if Rodney was acting as their agent, or their lawyer agent was wilfully blind on behalf of DS.

1. Is Rodney DS's agent?
    a. A person can be another person's agent through actual authority or apparent authority.
    b. Apparent authority = The principal and third party need to have contact so they could represent to the third party that person was their agent.
        i. There was no direct contact between DS and Nathan's so that they could have represented/held out Rodney to be their agent.
    c. Actual authority = Rodney was actually acting as agent of DS.
        i. There was no explicit contract asking Rodney to be DS agent

ii. Was Rodney acting as an agent in delivering the mortgage documents for signature or was he just a conduit for delivery of documents.
iii. TEST: Was the task undertaken a substantive one, so that they were actually acting as an agent?
1. Rodney was asked to get his parents signature, obtain his parents certificate of title and insurance policy document, to fulfill statutory duties of initial disclosure by DS and to give his parents a signed document called statement of covenanters to say they relinquish their rights to independent legal advice and take responsibility for their actions.
2. These are significant and important documents that affect the ability of the mortgage deed to be effective and significantly impact the parents rights, so he is not just a postman, obtaining filled out forms of these documents was a substantive task.

2. Was the forgery committed within the agency?
a. Neither DS nor Mr. Thomas knew of Rodney's fraud so didn't authorise fraud.
b. Courts don't think the Mr. Thomas was wilfully blind or that DS was wilfully blind either.
c. But this isn't decisive on whether they are liable for agents fraud.
d. Two step test
i. What act has the principal authorised?
1. DS didn't authorise forgery here.
ii. Is the agents act so connected with those authorised acts that it can be regarded as a mode of performing them? Is agents conduct within the scope of the task agent was engaged to perform?
1. Rodney was tasked to obtain his parents signature and he forged the signature, so it is closely related to the task he had to perform = within scope.
2. It does not matter that Rodney committed fraud for his own benefit.
e. Imputation of knowledge test instead?
i. If agent is fraudulent, we can impute knowledge to the principal as if they were fraudulent if they know of agents fraud.
ii. Cases cited: registered mortgagee's solicitor commits fraud in course dealing without principals knowledge = mortgage was indefeasible because mortgagee didn not know about agents fraud?
iii. SC reject this approach. They prefer two step test, fraud is not limited to imputation of knowledge.
f. Underlying principle: who is more innocent in this situation?
i. DS took risk that Rodney would obtain signature vs. Nathan who knew nothing.
ii. Reality is t
g. Policy
i. Principal should take responsibility for not checking agents conduct.
ii. Reality - agent will not tell the principal that they have committed fraud, so principle often won't have knowledge, but agent should not be able to use agent for benefit and not take risk or liability.

iii. Corporate lenders standard - if lenders follow standard of practice when lending there is little danger of an allegation of agency like the one madehere. If DS didn't depart from standard by giving rodney form to pass on, this issue never would have arisen.

- There is agency, so DS is fraudulent. Thus, registered mortgage is defeasible.
- Under the new act, fraud committed by an agent affects the registered proprietors title, so agency rules still apply.

Overall

1. Exception to indefeasibility, s 52
    a. But if there is a further transfer, nemo dat does not apply, innocent third party gets good title, but fraudster does not get good title.
2. S 6 - starting point
    a. Forgery or other dishonest conduct (*assets*, s 6)
    b. At: time of acquiring registration.
    c. By: RP or his agent (could be both *assets)*
    d. Against
        i. RP
        ii. Owner of an unregistered interest, where RP or their agent
            1. Had knowledge of interest or were wilfully blind AND
            2. Intention to defeat interest at the time of registration
    e. Constructive notice is not sufficient.
3. Must be actual fraud or dishonesty
    a. Loke Yew, Harris, E v G.
4. "Brought home to the registered proprietor or his agent" (*Assets)* = by RP or agent
    a. Dollars

Statutory exception - in personam exception

What is meaning of in personam?

- In rem = enforceable against the whole world. In personam = enforceable against a particular person - like K, torts, breach of trust.
- *Frazer v Walker:* indefeasibility does not deny the right of plaintiff to bring a claim in personam - s 51(6).
- Conceptually it isn't accurate to call it an exception. It isn't an exception to the rule, it just continues to exist despite the LTA. LTA does not override in personam remedies where the parties are the original parties to the transaction, only when there are third parties involved due to ongoing transaction does the remedy become limited to damages.
- What is does do is change the remedies that you can get for in personam claims
    - For example, you cannot use equitable tracing if you have an equitable proprietary right in property because if a third party has obtained property without notice for value, their title is indefeasible.
    - But if the issue is between A and B (wrongdoer) the court can compel B who owes an obligation to perform that obligation or pay account of profits or compensation.
- Example: Charlie promises to sell land to lucy. If he backs out of the promise
    - If Charlie stays as RP himself: Court can enforce promise and say that he has to perform K.

- But if Charlie sells the property to Linus instead of Lucy and linus is not aware of Lucy's interest and Linus becomes RP: Court can only award damages to Charlie in damages, can't get land back.

Taitapu Gold Estates v Prouse

Facts

- Plaintiff sold land to defendant. Contract specifically reserved minerals to plaintiffs. There should be two certificates of title for land and minerals, but this was not done. So prima facie, the new owner has everything.
- Plaintiff wants to enforce rights to minerals, defendant say they have indefeasible title, don't have to recognise defendant's interest.

Issue

- Is the plaintiff entitled to have register ratified?
- Allegation of fraud - they both agreed that P would have right to minerals, and then backed out.

Held

- Rejected argument of fraud - it was a mistaken belief, not fraud at time of registration. Similar to *Miller,* it was only after registration that they wanted to take advantage of the situation.
    - Maybe supervening fraud, but we no longer have this.
- But Plaintiff can still have an in personam claim against defendant because they had a prior relationship, other than their rival claims to the property e.g. K where they agreed to reserve mineral rights - *assets*
- *Sutton J* Prendergast J: I do not think that the effect of a certificate of title under the LTA is, as between immediate parties to a contract, to alter their rights and liabilities against each other. If plaintiff would have right to have deed cancelled if position of parties hadn't been altered, and in equity the defendant would hold the legale state as trustee for the plaintiffs, there is nothing in LTA which puts an end to the trust. The trust is not noticed in the register but trust is always enforceable in the court as rights against the trustee, despite trustees certificate of title.
    - Law of obligations is not affected by LTA.
- If D was benefit for something which they neither bought nor paid for which was included in the transfer by mistake = unjust enrichment.
- The court would not allow RP to use LTA as a shield to defeat the vendor's interest.
- Court imposed a constructive trust on the purchaser. The registered proprietor held mineral rights on trust for P - *Loke Yew*
    - However, if defendant onsold the land to someone else and they became new RP. the property would not be traceable, so we could not say that it was held on constructive trust. LTA subsists the in personam obligation, remedy would be confined to damages.

Bahr v Nicolay (No. 2)

Facts

- Bahr sold property to Nicolay. Sale was subject to a claim for release of a repurchase contract that Bahrs would be able to continue to occupy the property they sold on lease to which they pay rent. After 3 years, Bahr is entitled to repurchase their property back at $45,000. - Essentially a financing arrangement so Bahr's could get cash to develop the property, and N would benefit because they could receive rent and make a profit from the sale.

- The certificate of title didn't record any of the collateral K, it just said Nicolay was RP and it was this on LTA too.
- Nicolay sells the property to Thompsons, they become RP. Nothing in K to stop N onselling, so no breach of K. But in K of sale to Thompson's clause 4 acknowledges that agreement exists between B and N.
- After sale, Thomposn' wrote to Bahrs and lawyers to say they agreed to be bound and honour the agreement.
- Bahr's launched a caveat on the title and solicitor wrote back to confirm they would exercise their right to repurchase at the end of the 3 years.
- Just before 3 year period expired, they sent a notice of purchase and deposit to Thompsons. Thompson's returned deposit and said they did not intend to sell the property back or sell to someone else.

Issue

- Are the Bahr's entitled to re-purchase the property?

Held

1. Fraud?

- Test
    - Assets - actual dishonesty
    - Waimeha - fraud is a designed object to deprive someone's interest
        - [new act combines these two]
    - Fraud in the eyes of equity is not sufficient to defeat LTA title, take a narrow interpretation
- Mere notice of unregistered interest and refusing to recognise interest after registration is not fraud. Even having the actual knowledge of that registration would defeat interest is not fraud. So can't say that because they knew there was fraud.
- There was no designed object to cheat in transfer and no intention to deprive on transfer.
- But in *Bunt v Hallinan:*court found that there was fraud where house for sale with shed at the back that was leased to someone as an unregistered interest, vendor knew about interest but solicitor sent a letter saying they will take title free of interest so they bought property and became RP. So can be a fine line to draw.

2. In personam?

- <u>Nicolay</u>
- Judges first set out in personam rights are not inconsistent with indefeasibility, does not protect RP from their own conduct.
- N had a legal interest, B had equitable interest by reason of contractual provision (so more than just a contractual right). The agreement did not prevent N disposing of his legal interest but still required him to uphold Bahr's equitable interest.
    - If he reconveyed the property or if he sold the property he must ensure the new purchaser honoured the agreement. But he did this with clause 4, so no breach.
- <u>Bahr</u>
- Bahr had in personam rights against the Thompsons as a consequence of their conduct because it created a direct relationship between B and T.
    - T understood N would not sell unless they agreed to be bound,
    - the agreement itself may not be enough but they sent a letter undertaking to be bound,
    - subsequent to that letter T made two offers to B to buy back property which is an indication that T accepted the obligation to B,

    - the fact that they seek to extinguish their rights shows that they know they are bound.
- Thus, B has an in personam claim not because of notice but because they undertook to be bound by the obligation. In equity, we can impose a constructive trust so the T holds the property for the benefit of B.
    - It is important that the LTA does not mean a person can act unconscionably without consequence.
    - In personam is not an impeachment to indefeasibility, it is enforcing the undertaking
- **Both Loke Yew and Bahr emphasised that there was an undertaking either to honour the unregistered interest that was later not complied with.**
    - But there is a difference between these two cases, as the Thompson's seemed to want to honour the undertaking when they sent the letter, where as PS co did not.

3. Often fraud and in personam will overlap, fraud is a higher threshold so if fraud is made out there will definitely also be an in personam claim. Don't need to use it either.
4. Could we argue there is supervening fraud?
    a. The LTA explicitly excludes supervening fraud. This recognises that many judges disagreed over whether you could recognise supervening fraud, because often those situations will be covered by in personam.
    b. Blanchard J: says in this case supervening fraud will not apply. In personam exception will cover all supervening fraud exceptions.

Duncan v McDonald

Facts

- Nigerians told NZers that there were 30 million US dollars available for appropriation from the nigerian government, if they deposited $285,000 into an account - they would get 2 million.
- NZers did not have much money so borrowed money from Duncan who was a solicitor and trustee of two estates. They asked for a loan by the Simmonds estate. Duncan promised half a million reward if he does this. Duncan got a security over the Mcdonald's property to secure the loan (mortgage). This was a breach of his FD. Other trustee didn't know any of this.
- Money was lost because it was a scam, Simmonds tried to enforce mortgagee sale and Mcdonalds brought action to resist a sale.

Issue

- Was the mortgage valid?
    - Because the venture was illegal (intended to defraud nigerian government), the loan was an illegal contract under the common law and illegal contracts act.
    - S 6: an illegal contract has no effect and no one is entitled to any property that is disposed of pursuant to an illegal contract.
    - This suggests the mortgage is invalid as Duncan was part of the scheme.
- Other issue: Simmonds did not know about the conduct. Should Simmon's be affected by Duncan's conduct? They will lose $285,000 and interest when they did nothing?
    - Mcdonalds: illegal contract provision means they should resist mortgagee sale.
    - Simmonds could have personal action against Duncan, but we don't know how much that would be worth.
- Final issue: if there was a mortgagee sale, would Mcdonald be personally liable if the sale of the house would not satisfy the debt?

Held

- Conflict of statutes issue:

    - Which one prevails, illegal contracts act that says the contract is valid or the LTA that says the mortgage is registered so is valid unless fraud.
    - S 6 says that the illegal contract act is subject to any other enactment, so LTA expressly overrides the illegal contracts act.
    - We have to find fraud to say that the mortgage is not valid.
- Was there fraud?
    - There was no fraud between the parties - McDonald's and Duncan. Duncan didn't trick them into giving the mortgage, it was their idea, and Mcdonald's knew it was an illegal venture.
- Registration of a void instrument
    - Registration creates title, so does not matter that instrument was void. Immediate indefeasibility applies.
    -
- In personam
    - LAW
    - Prior relationship: parties need to have a prior relationship external to their claims for title to have an in personam claim (*Assets/Taitapu)*
    - In personam claims must be recognised causes of actions
        - Unconscionable conduct: there must be unconscionable conduct by the RP (*Bahr)* [Doesn't need to be actual dishonesty: lower threshold]
        - Unjust enrichment: might find in personam claim where this is present (*Taitapu*)
        - Although there are no precise limitations on what in personam claims can be made.
        - Question is: would it be plainly inconsistent with LTA to allow a claim where this right would be defeated? It is a question of fact and degree whether RP's behaviour will give rise to equity to support an in personam claim
            - It isn't enough to make an in personam claim if the RP would not have got good title under common law. This would be defeating the LTA and bringing back common law system.
            - Not enough if the RP registered with knowledge of the competing claim and new registration would defeat it.
    - APPLICATION
    - The estate is not innocent because while the beneficiaries themselves are innocent, under the LTA Duncan is the estate (he is legal owner, LTA doesn't recognise Simmonds beneficial interest or that Duncan was their agent, he is just principal). Therefore, it is unconscionable for the estate to enforce the mortgagee sale.
        - The court of equity will not permit complete transference of laws where prior conduct of mortgagee (Duncan) made it unconscionable to use the legal title to the mortgage with that result.
    - BUT If Duncan was acting as principal according to the LTA, his dishonesty should also not be imputed to his beneficiaries as if he was their agent (like normal). Thus, they should be entitled to some claim.
    - If the McDonald's lose out, they don't have any other recourse. Duncan doesn't owe them a fiduciary duty. But Duncan is just as guilty as the McDonalds so it unfair if he is left off the hook and the McDonald's bare the whole consequence.

- Beneficiaries were entitled to receive the whole loss in personam. Court apportioned the loss so that Duncan and McDonald. McDonald would share the responsibility to recover the certain amount and Duncan was to pay the rest.
- Then if Duncan and McDonalds can't pay, then beneficiaries can enact the mortgagee sale.

Principles of in personam claim

1. Need unconscionability [but not dishonesty].
    a. There has to be unconscionable conduct between two parties (if the result is unconscionable that is a different issue)
2. Recognise cause of Action
    a. The court of equity would take into account the relative culpability of the parties to the mortgage and prevent the enforcement in part.
3. Cannot use in personam to defeat LTA principles
    a. The court may provide relief against the consequence of an illegal contract.
        i. In *Duncan,* the mortgage was effective but the court has jurisdiction to grant relief to the McDonald's under s 7. If transfer of property is under an illegal K, it is invalid so you get nothing, but court can say you would get some compensation in specific circumstances.
            1. Although S 7 is for the effect of legal contracts not for the effect of registration under LTA. It gives the court the power to grant relief where the contract or transfer of property is invalid. But they use it anyway.

Nathan v Dollars & Sense

Facts

- Same as above.

Issue

- Is there an in personam claim for parents against D and S?

Held

- Majority found in personam claim.
- Lay out three principles from *Duncan*.

1. Is an in personam claim inconsistent with the objectives of LTA?
    a. William Young: the forged instrument was not sufficient for an in personam claim because in personam should be inconsistent with LTA. We can't use in personam to say that the instrument or transaction is invalid to defeat indefeasibility, goes against LTA.
    b. Majority: mere notice of an unregistered interests is not sufficient because it will violate the notice provision, defeat purposes of LTA.
2. Unconscionable conduct
    a. William Young: mere neglect is not unconscionability. Mr. Thomas as D and S's agent should not have given Rodney authority to secure the signature = neglect by lender. But there was no misrepresentation by D and S, no misuse of power, no improper attempt to rely on it's legal rights and no knowledge of wrongdoing by any party. Not unconscionable conduct?
        i. Imputed notice principle - *O'Brian v Wilkinson:* if assurity is subject to undue influence and circumstances call for creditors inquiry and they do nothing,

assurity is entitled to relief. But this principle doesn't automatically get priority over LTA if they conflict.

   b. Majority: They agree that something more than neglect is needed. But they think if a lender knew a borrower would/could exercise undue influence over another person to secure guarantee (because their operation would allow him to forge the signature) and the lender neglected to do anything about it and maintained this practice, this conduct is not just neglect it is unconscionable.
      i. Policy: courts want to enforce standards of conduct of financiers, especially when lending to borrowers in a non-commercial relationship/domestic assets.
      ii. Imputed notice principle - *O'Brian v Wilkinson* should be extended to financier's conduct. It is not just about notice it is about a code of conduct.

3. Recognised cause of action
   a. William Young: None. D didn't represent against the parents or exercise undue influence over them.
   b. Majority: Unjust enrichment.
      i. Although they didn't explain why because they provide real money, they weren't unjustly enriched, they were just out of pocket.
4. Policy
   a. William Young: there is no need for an in personam claim here because she was deprived of property by fraud, can get state compensation. Issue is not about protecting vulnerable asset owner but protecting public from corporate lender.
   b. Majority - parents could get state compensation if their claim was not successful, but the same idea that they want to enforce the code of conduct.

Application of exceptions to indefeasibility

1. What statutory exceptions can apply?
   a. In personam
   b. Fraud
   c. Conflicting statutes
   d. Void/Voidable instruments.
2. Has there been a further transfer?
3. Fraud
   a. Type A
      i. Has there been any dishonest conduct by the registered proprietor?
      ii. *Bahr*
   b. Type B
      i. Did they have knowledge of the unregistered interest or were wilfully blind?
      ii. Did they intend before or at the time of registration to defeat Saul's interest?
      iii. *Loke Yew, Harrison, Bahr, Efstratiou*
4. In personam
   a. Can't be inconsistent with the torrens system: can't get in personam claim if it on the basis that the instrument registered was void.
   b. Is there unconscionable conduct?
      i. Doesn't have to be dishonest, just contrary to good conscience. But needs to be more than just registering an interest with knowledge of a competing claim with another party - *Duncan*

ii. Could try to argue that there is an unconscionable outcome if illegal mortgage is enforced? - *Duncan*
    1. But this isn't a very strong argument to make because the limb focuses on the conduct, not the outcome.
iii. If you find there is fraud, this limb will be satisfied too.

c. What is the cause of action?
    i. Breaching of undertaking
    ii. Breach of contract
    iii. Statutory obligations not complied with
    iv. Unjust enrichment.