

INDEFEASIBILITY

BACKGROUND TO THE TORRENS SYSTEM

The Torrens system is a system of land registration and land transfer. Registration both perfects title (s 183 LTA 1952, removing the *nemo dat* rule) AND confers title.

Priority is according to the time of registration.

The system was introduced in Australia in 1858. The NZ system is closely modelled on this original system.

Three ways of recording title

1. **Record of title by private conveyance:** essentially just private contracts. Very difficult to trace and keep track of.
2. **Registration of deeds:** all private conveyance documents kept in a national register, eg. in NZ we still have the Crown Registry which contains records of Crown transfers
3. **Torrens system/LTA:** Copies of contracts are all stored in one place. This register records all transactions that affect a certain parcel of land, making easy to ascertain the current situation of that land. Registered title is indefeasible subject to some exceptions.

Advantages of the Torrens system

- Under the common law in England, land transfers were done through the deeds system. It was slow, costly, and difficult to check the title of certain land.
- But, at this time land transfers were very infrequent so the common law was sufficient.
- But Australia and NZ: both colonies, where settlers arrived and wanted land = way more transfer of land.
- The Torrens system served to get rid of the complexities of the English system, and cater to the needs of settlers.
- The Torrens system is also: cheaper, simpler, transparent, everything kept in one place, more secure, don't have to go behind the register to check title.
- It also removed the *nemo dat* rule: you cannot transfer better title than what you have, and past defects in title can never be cured. See ss 182 and 183 of the LTA 1952.

The Torrens system and equity

- The system is really only concerned with legal interests, not equitable interests
- Where land is held in a trust, the LTA considers that lander to be owned by the trustees

Three principles of the Torrens system

1. **Mirror:** the register is an accurate and complete reflection of the actual title
2. **Curtain:** the register is the sole source of information for potential purchasers.
3. **Compensation:** the state guarantees title, and compensates for loss.

SUMMARY OF KEY LTA PROVISIONS (2017 Act)

Section 6: meaning of “fraud”

Fraud = forgery or other dishonest conduct by the RP or the RP’s agent.

Supervening fraud is not fraud.

Fraud must be against the RP or the owner of an unregistered interest, if the RP or the RP’s agent:

- a. Had actual knowledge or, or was wilfully blind to, the existence of the unregistered interest; and
- b. Intended at the time of registration to defeat the unregistered interest

Section 24: effect of registration

An instrument has no effect on title until it is registered. Before registration it can only create an equitable interest in property

Section 35: priority of instruments

Instruments have priority according to the time they are lodged, not the time they are executed

Section 51: title by registration

Registration confers title. The RP will hold title as set out on the register, and subject to any conditions on the register. That title cannot be set aside. Unregistered interests are only equitable.

Section 52: exceptions and limitations

52(1)(a) = LTA does not protect title where it is acquired through the RP or RP’s agent’s fraud

Note: the fraud exception is s 63 of the LTA 1952

Section 182 LTA 1952:

Except in the case of fraud, a person who purchases land from the RP does not need to check how the RP acquired their title. Nor will such a person be affected by notice of any trust or unregistered interest in the land. Knowledge of such a trust or unregistered interest is not fraud in itself.

Section 183 LTA 1952:

Bona fide purchasers for valuable consideration will not be liable if the registered owner from whom he purchased the land registered the land through fraud or error, or under a void/voidable instrument.

Note: s 183 is the key provision which affects the nemo dat rule

Alteration of register: ONLY FOR VOID/VOIDABLE INSTRUMENTS

Section 54: application to court for order for alteration of register. Note: this power takes a step back from immediate indefeasibility, and is potentially very wide.

Section 55: court may make order only in cases of manifest injustice. Forgery and fraud will not always constitute manifest injustice.

Section 56: court must not make order if the estate/interest has been transferred to a third person, that third person acting in good faith

Section 57: registrar must make whatever alterations to the register the court has ordered

PRINCIPLES OF INDEFEASIBILITY

The **key issue** the courts grapple with in the following cases is the discrepancy between:

- Sections 62 and 63 LTA 1952, which states that an RP will get good title except in the case of **fraud**, and
- Section 183 LTA 1952, which states that a bona fide purchaser for value will have good title even if the vendor was registered through fraud, error, or under a **void/voidable instrument**.

The question is thus whether error and **void/voidable instruments** have the same status, and therefore the same effect, as **fraud**.

Deferred indefeasibility

Registration of a void or voidable instrument does not give indefeasible title immediately, it is only the root of indefeasible title. Indefeasible title only arises upon a further transaction (ie. the next purchaser will get indefeasible title: s 183).

Followed in *Gibbs* and by the *Boyd* minority.

Immediate indefeasibility

Once the instrument of transfer is registered, in the absence of fraud you get indefeasible title, even if the instrument is void or voidable.

Followed in *Assets* (by implication), *Boyd*, *Frazer* and *Breskvar* (which goes even further and finds that registration not only perfects existing title but confers/creates good title).

But note *Westpac v Clark*: just because registration can validate an otherwise void instrument, doesn't mean you are entitled to have a void instrument registered.

The LTA 2017 confirms immediate indefeasibility.

Sections 54-57 LTA 2017

These sections actually take a step back from immediate indefeasibility. They only apply in situations of void/voidable instruments.

The court has the power to grant relief to correct or cancel title in certain circumstances. This power is potentially very wide. What it means is that a person who is registered under a void instrument might not be 100% safe under immediate indefeasibility, because the court could exercise this power and change the register (and therefore the title).

Gibbs v Messer

PC, 1891

Facts

Husband gives power of attorney to Creswell. C commits fraud by transferring land to a fictitious person, Hugh Cameron. The land is registered under HC's name. C then sets up a mortgage, and the McIntyres obtain a charge over the land. The McIntyres and the wife, Mrs Messer, are competing for title over the land.

Principles

- The McIntyres were only registered under a forged and therefore void instrument. Registration of void instruments does not automatically grant good title. Thus, the McIntyres' mortgage was void and couldn't defeat the title of the true owner (Mrs Messer).
- Had HC been a real person and party to the fraud, the McIntyres would be protected as bona fide purchasers for value (s 183 LTA 1952).
- The McIntyres were registered under a forged/void instrument. It was their responsibility to check the the identity of the vendor/HC - it is they who have done something wrong.
- The McIntyres did try to argue that HC was just a nom-de-plume for C, (ie. C is fraudulent and s 183 applies), but the court rejected their argument.
- Overall: the PC follows a **deferred indefeasibility** approach. Registration of a void instrument doesn't give good title of itself, it is only the *root* of good title.

Assets

PC, 1905

Facts

Cooper facilitates the transfer of three blocks of Maori land to A. The Maori Land Act contained six requirements for extinguishing Maori customary title. The Maori respondents claimed that the land transfers were invalid because these requirements were not met, they also alleged that C and A were fraudulent, and that the NLC lacked jurisdiction rendering the transfer instruments void.

Principles

- Relevant legislation for this case = LTA 1885, which provides that registration is conclusive and confers indefeasible title in the absence of fraud.
- PC finds that the lack of compliance with the NLA requirements is only a formality issue. The registrar had no duty to go behind the register and check compliance.
- *Gibbs v Messer* confined to situations with fictitious persons
- Equity cannot be used to burden the title of the RP. Here, there was no evidence of a trust relationship arising independently of the LTA. The LTA doesn't interfere with the law of trusts. Thus, the PC was reluctant to superimpose a constructive trust over RPs.
- "Fraud" = actual fraud in the sense of dishonesty, not constructive/equitable fraud. The fraud must also be brought home to the RP or his/her agent.
- Omission to make further inquiry is not fraud by itself, however if you are suspicious and fail to make inquiries, that may constitute fraud.
- PC implicitly holds that the LTA prevails over the NLA
- Overall: Registration is conclusive of title in the absence of fraud. Here, there was no fraud on the part of A. Thus, A gets indefeasible title.
- The court does not expressly state that **immediate indefeasibility** is the correct approach, but it can be inferred from the judgment.

Beale

SC, 1905

Facts

The NLC makes orders dividing Maori land, improperly. A block of the land is sold and registered with Burt. Eventually the land is sold and registered with Beale. The Maori owners were in possession of the land the whole time. Beale seeks recovery of possession of the land.

Principles

- Burt was fraudulent, but B didn't know anything about the fraud.
- S 182 LTA 1952: an RP's title is not affected by notice of an unregistered interest, and notice as such is not fraud. However, there is a fine line between mere notice (not fraud) and wilful blindness (fraud).
- Here, there is evidence suggesting that B *knew* the Maori owners had been in possession the whole time. But overall, the court finds that B had purchased in good faith, and s 183 applied.
- S 183 LTA 1952: B is a bona fide purchaser for valuable consideration, not knowing of Burt's fraud. She therefore acquired indefeasible title under the LTA, despite Burt's fraud.
- Overall: B gets possession.

Boyd

CA, 1924

Facts

B was the RP of some land. The GG proclaimed that the land had been taken in order to build a tramway. The proclamation was void, but the land was registered with the defendant anyway. B claims a declaration that the proclamation was void as consent was not sought (the Public Works Act requires consent), and therefore the registration was obtained through D's fraud.

Principles

Majority

- *Assets* is confirmed and applied. D gets indefeasible title in the absence of fraud, and here there is no fraud.
- Court not entitled to inquire into whether the proclamation was void
- *Gibbs v Messer* confined to situation of fictional persons.
- Majority follow **immediate indefeasibility** approach.
- Overall: the defendant gets indefeasible title even though the instrument was void.

Minority

- *Gibbs* should be applied, not *Assets*.
- *Assets* was solely about bona fide purchasers for value. It said nothing about persons who acquire title through void instruments.
- There is little difference between a forged instrument and an otherwise void instrument.
- Salmond J: registration alone does not transfer title, the instrument of transfer must be valid. Fraud and void/voidable instruments both impact upon title. Deferred indefeasibility is more consistent with the principles of the Torrens system
- Overall: B should get the land back

Frazer v Walker

PC, 1967

Facts

A and F were the RPs of a block of land subject to a mortgage. F borrowed money from Radomski, forging A's signature on the mortgage instrument (rendering the instrument void). The mortgage was registered. F defaulted and Radomski sold the land to Walker. Walker brought proceedings against F seeking possession of the land.

Principles

- *Assets* still the leading case where registration is done through fraud. But, the main uncertainty was whether immediate indefeasibility or deferred indefeasibility was the correct approach.
- PC confirms that **immediate indefeasibility** is the correct approach.
- *Gibbs* is still limited to fictitious persons.
- Here, the mortgage was valid because it was registered.
- F cannot bring a claim against Radomski, because the court settles on immediate indefeasibility (ie. Radomski got good title too). But, F might be able to bring a claim in personam against Radomski.
- F cannot bring a claim against Walker, as under deferred indefeasibility he was a bona fide purchaser under s 183, and under immediate indefeasibility even Radomski got good title.
- Overall: Walker gets title

Breskvar

HCA, 1971

Facts

B are the RP of some land. They give P a blank memorandum of transfer as security for a loan. P fraudulently inserted W's name on the memorandum and registered it. B places a caveat on the title. A Pty Ltd purchased the land from P as a bona fide purchaser. The transfer was not yet registered.

Principles

- Here the court goes one step further in respect of **immediate indefeasibility**. It finds that even a person who registers through fraud (here, W) will get legal title that is good against the world. Thus registration not only *perfects* existing bad title, it can *create/confer* good title that didn't exist before.
- The only person that title *will* be defeasible against is the person who was defrauded (here, B). Because of the fraud, B managed to retain an equitable interest in the land. Had B acted at this point, they could have got the land back from W.
- But, the land was on-sold to A Pty Ltd, who were bona fide purchasers for value.
- A Pty Ltd had only an equitable interest at the time of hearing as they weren't registered yet.
- So who's equitable interest takes priority? The court finds that A Pty Ltd wins because it was completely innocent, whereas B is more blameworthy because they gave P the blank memorandum and they were in debt.

Westpac NZ v Clark

SC, 2010

Facts

An imposter got a loan from Westpac. W got security over a property owned by the true owner. The mortgage instrument was forged. W became suspicious. The instrument had not been registered yet because the solicitor in charge, C, had forgotten to do so - in breach of his contract with W. The imposter defaulted. W sues C under negligence, the question being whether W's loss flowed from C' failing to register the mortgage.

Principles

- W's loss arose not from the lack of registration, but from the fact the mortgage instrument was a forgery, and therefore void.
- W is claiming that it is entitled to have C register a forgery, and that it has been deprived of that benefit.
- This is incorrect. Just because W *could have* obtained indefeasible title through registration of a void instrument, doesn't mean they are *entitled* to obtain such indefeasible title. The voidness of the instrument still exists no matter what.
- Thus, it was the fact that the instrument was void that W suffered its loss, NOT C's failure to register the mortgage.

- Overall: **immediate indefeasibility** is correct. But just because registration can validate an otherwise void instrument, doesn't mean you are *entitled* to have a void instrument registered.

STATUTORY EXCEPTIONS

Approach

1. Is there any express statement of priority between the competing statutes? (eg. the PRA expressly states that it overrides the LTA).
2. If not, did Parliament "by proper implication" intend the LTA to be overridden by the other statute? (*Miller*). Considerations come from *Housing Corp* and *Warin*:
 - a. Legislative background: when was the statute introduced, what have cases said about it, was Parliament deliberately legislating contrary to case law.
 - b. Other cases on competing statutes
 - c. Wording of statute
 - d. Objective of statute
 - e. Public policy
 - f. Practical considerations

Conflict between LTA and TTWMA

This is important. It's not just about protecting Maori ownership, but also ensuring that economic activities can proceed smoothly: if you can use the TTWMA to defeat registered title, then Maori owners will have problems mortgaging their land. Maori land will be difficult to deal with where there is no security of title.

The issue is still unresolved, but section 55(4)(c) LTA 2017 attempts to alleviate the conflict:

Section 55(4)(c)

In deciding whether or not to make an order cancelling the registration of person B because of manifest injustice, one of the factors the court can consider is (where the estate/interest is in Maori freehold land) if a person has failed to comply with the TTWMA.

Overall this is probably not enough to alleviate the conflict between the two statutes:

- This is only one factor on the list and it is not mandatory.
- Section 55 can only be invoked where there is registration of a void instrument, and under s 56 it can't be invoked if there is a further transfer (ie. an s 183 situation).

- The court cannot make an order unless there is “manifest injustice”, which doesn’t just mean mere forgery or other dishonest conduct.

Miller

PC, 1963

Facts

Aitken is the RP of some land. In 1916 he agreed to assign the mineral rights of the land to a mining company. In 1916 the company obtained a mineral licence with A’s consent. In 1944 the company assigned all its rights to the Crown through a deed. The deed was registered. M is now the RP of the land. M claims for a declaration that the Crown was not entitled to mine the land.

Principles

- Issue = whether the 1916 mineral licence was a registrable interest under the LTA. If it is, because it wasn’t registered, M’s title will prevail. If it isn’t, then it may be a burden upon M’s title.
- PC finds the mineral licence is not registrable under the LTA, because the Mining Act is an entirely separate code.
- If the LTA overrides the Mining Act, then mining licences lose all value except against the person who originally granted the licence.
- Overall: mining interests are therefore statutory exceptions “by proper implication”. An explicit statement of exception is not necessary.

Housing Corporation

HC, 1988

Facts

HC has a mortgage over Maori freehold land. Under the Maori Affairs Act, the mortgage needed to be endorsed by the MLC before it could be registered. The mortgage was not endorsed but was registered. HC now tries to get the mortgage endorsed, but the MLC refuses. HC is competing with another creditor and wants to preserve its priority.

Principles

- LTA overrides the MAA as there was no legislative intent to the contrary = MAA is subject to LTA immediate indefeasibility.
- The requirement of endorsement is merely administrative.
- HC therefore acquired immediate indefeasibility upon the mortgage being registered
- The Maori Trustee of the land wants the registrar to cancel the mortgage. Since *Frazer* the registrar’s powers have broadened. Currently, the registrar has the discretionary power under s 81 LTA 1952 to cancel registration of the mortgage.
- Court finds that the registrar should not exercise this power to cancel. In reality the registrar’s powers are limited and the registrar cannot act of his own volition.
- Overall: until the s 81 power is exercised, the mortgage is indefeasible.

Warin

HC, 2008

Facts

A block of land was vested in the Maori Trustee under the MAA by order of the MLC. The land was subdivided. The plaintiff purchased one of the sections and the transfer was registered under the LTA. They were unaware the land was Maori land. Under the TTWMA the transfer needed to be confirmed by the MLC before registration. Later the plaintiffs sought to resell the land but could not confirm its status as general land rather than Maori land. They apply to the MLC for an order to change the status to that of general land.

Principles

- In order for the plaintiff's title to be defeasible, it must be shown that the LTA overrides the TTWMA. It isn't enough to say the transfer is automatically void because it does not comply with the TTWMA requirement of confirmation.
- The TTWMA replaced the MAA, and added the requirement that instruments affecting Maori land be confirmed by the MLC before registration. But, the court stops short of finding that instruments which have not been confirmed must be invalid - Parliament can't have intended this.
- Court finds Parliament can't have intended the TTWMA to override the LTA. If this was so, then instruments that fail to comply with the TTWMA would never be capable of conferring defeasible title. Bona fide purchasers who buy from someone who has bought from a Maori owner will be worse off than people who buy from someone who got on the register through fraud (s 183 LTA 1952). On a public policy basis, this is unfair.
- Overall: plaintiffs have indefeasible title

FRAUD EXCEPTION

Section 62 LTA 1952 / Section 52(1)(a) LTA 2017

These sections provide an exception to indefeasibility for two types of fraud.

Fraud is now defined in s 6 LTA 2017. Fraud must be brought home to the RP or his agent.

1. Fraud against the registered proprietor
 - = actual fraud in the sense of dishonesty. Constructive notice is not enough. Omission to make further inquiry is not fraud by itself, however if you are suspicious and fail to make inquiries, that may constitute fraud (*Assets*)
 - Uncertain what dishonesty entails:
 - *Bahr* required a "designed object" to cheat someone of their interest.
 - *Esfratiou* seemed to only require constructive notice of the interest.
 - *Salmond J in Assets*: would an honest person go ahead with the transaction, knowing what he knows?
2. Fraud against the holder of an unregistered interest
 - Harder to show.
 - ONLY if the RP or RP's agent had actual knowledge or was wilfully blind to the existence of the unregistered interest, AND intended to defeat that interest at the time of registration.
 - This excludes supervening fraud (the situation of repudiating an unregistered interest after registration)
 - Constructive notice (objective, where the reasonable person would have known) is not fraud.
 - But wilful blindness (subjective, where the person's suspicions are actually raised and they fail to make further inquiries) is fraud.
 - This kind of fraud often occurs when the purchaser makes an undertaking to recognise the unregistered interest and later repudiates (eg. *Loke Yew*).

Supervening fraud?

- = when you get on the register, you don't have any fraudulent intent and you don't intend to defeat anyone's interest- you register in good faith. But, after you get on the register, you try to deprive someone of their unregistered interest. (*Harris*)
- Note: Section 6(2)(b) LTA 2017 expressly excludes supervening fraud.

Loke Yew

PC, 1913

Facts

Eusope is the RP of some land. LY has possession of a section of that land, and had some unregistered instruments which showed he was the owner of that section as long as he paid rent to E. That interest is however unregistered. The respondents purchased the land from E. E however did not want to sell the whole the land because of E's interest. The respondents talked him into it by saying that they would purchase LY's interest in his section later on. The respondents then registered the transfer, and claimed that LY needed to give up possession of his section.

Principles

- The respondents made the undertaking to purchase LY's interest, but they were fraudulent: they never intended to purchase it.
- There was no further transaction and so s 183 LTA 1952, which would have removed the effect of the fraud, is not applicable.
- Overall: It is the duty of the court to rectify the register, so that LY's section is registered under his own name.
- Alternative argument: the respondents purchased the land knowing of LY's interest and registered the transfer anyway, they therefore held the section on constructive trust for LY.

Harris v Fitzmaurice

SC, 1956

Facts

Some land had a house and a shop on it. The land was sold to H on the condition that it was subject to existing tenancies. H was told there was an existing weekly tenancy for the shop. The land was registered under H. However, there was actually a longer lease on the shop (5 years + optional renewal of 5 years) which H was not aware of at the time of purchase. H brings a claim that the longer lease is not binding on him.

Principles

- Here H gave an undertaking to recognise interests in the land, but this was based on a mistaken belief that the only interest was the weekly tenancy. He didn't know about the longer lease.
- Supervening fraud = where, at the time on getting on the register you have no fraudulent intent and don't intend to defeat anyone's interest, but after getting on the register you try to defeat someone's unregistered interest.
- Court finds that this is not fraud.
- *Merrie v McKay*: for this to be supervening fraud, H would needed to have *known* about the longer lease at the time of/before registration. Rather, he was only told about the weekly lease.
- No evidence of dishonesty on the part of H. Court assumes that if H *did* know about the longer lease, he wouldn't have purchased the land.
- Overall: no fraud on the part of H. Note: supervening fraud no longer constitutes "fraud" under s 6 LTA 2017.

Esfratiou

CA, 1972

Facts

A husband and wife have a tumultuous relationship. They have a house for which the wife had provided 50% of the deposit. The husband goes overseas for a time, and when he returns he finds his wife in bed with another man. The wife leaves the house and takes the children with her. The wife obtained an II preventing the husband from returning to the house. The husband then organized with his agent for the house to be sold. It was sold and the transfer was registered. The wife brought proceedings to set aside the transfer.

Principles

- The wife had an equitable interest in the house because she contributed to the deposit.
- Was the husband fraudulent? In selling the house at a gross undervalue and dissipating the proceeds, he was guilty of a wilful breach of trust = fraud.
- What about the agent? Court finds the agent was party to the fraud
- What about the purchaser? This is an s 183 situation = high threshold to find fraud against the RP.
 - Court finds that the fraud had also been brought home to the purchaser: house sold at gross undervalue, transaction was very speedy, purchaser didn't inspect the house, purchaser let the wife move back in after the sale.
 - Overall the purchaser must have been suspicious = party to the fraud
- Overall: transfer should be set aside BUT no damages awarded (wife can't get the transfer set aside *and* damages as well)
- Critique: *Assets* found that mere omission to make inquiries is not fraud. S 6 of the LTA 2017 also provides that constructive notice is not fraud. This is a very arguable case.

Sutton v O'Kane

CA, 1973

Facts

Two neighbours had an understanding that there was a right of way over some land, but this right had not been executed or registered. The land was then sold, and the instrument of transfer had no mention of the right of way. The purchasers let the respondent use the right of way for a time, but eventually asked that they stop. The respondent claims that the purchasers purchased the land with knowledge of the unregistered right of way, and were now committing fraud by repudiating on their obligations.

Principles

- In order for the purchasers to be fraudulent, they must have intended to defeat the unregistered interest at the time of purchase. Here there was no such intention.
- Majority find the purchasers were honest in mistakenly believing that the right of way was a legal interest. They intended to honour the right of way, but once they found out that it was not a legal right of way (as it wasn't registered), they were justified in refusing to acknowledge it. It's not dishonest not to honour what doesn't exist.
- The purchasers also made no undertaking to honour the right of way at the time of purchase.
- Morally the purchasers may have been in the wrong, but legally they were not fraudulent.

Dollars and Sense

SC, 2008

Facts

DS lent Nathan money, secured by a mortgage over his parents' house. N obtained his father's signature for the mortgage documents, but forged his mother's signature. N defaulted. DS sought to exercise its power of sale over the house. N's parents claim that the mortgage was defeasible and should be removed from the register under the fraud exception.

Principles

- N's forgery = fraud (s 6 LTA 2017).

- N was DS's agent in being tasked with obtaining his parents' signatures.
- Fraud can be carried out by an agent in the course of his/her agency, even where it has not be authorised by the principal.
- "the fraud took place to achieve the very thing that N was asked to do as an agent by DS, that is to obtain a registrable mortgage". The fraud was so closely connected with the authorised task that it could be seen as part of the task itself.
- DS didn't need to have imputed knowledge of the fraud. As a principal, you are affected by your agent's fraud through vicarious liability.
- Policy argument = lenders should be encouraged to be careful when letting borrowers organize the signatures of their guarantors. Lenders should bear this responsibility rather than innocent parties.

Cassegrain

HCA, 2015

Facts

C acquired title to some land as a joint tenant with her husband, through her husband's fraud. She then acquired title as the sole RP after her husband transferred his interest to her for \$1. The company which originally owned the land sought to recover title.

Principles

- C's title as joint tenant was indefeasible. Her husband's fraud did not affect her as he was not her agent, and the fraud was not brought home to her.
- C's title as sole RP was defeasible. It was derived from or through a person registered as proprietor through fraud (her husband).
- C was not protected by s 183 because consideration was only \$1 (note that under the s 51(4) LTA 2017 you can acquire indefeasible title even without valuable consideration)
- Overall: company can sue C.
- NOTE: the NZ courts have departed from this case since it was decided.

IN PERSONAM EXCEPTION

Frazer v Walker confirmed that the LTA does not bar plaintiffs from bringing claims in personam

Conceptually it isn't an exception at all, because the LTA never purported to affect rights in personam. It does not affect the law of obligations between parties.

Often in personam claims come by way of a constructive trust (as in *Loke Yew, Prouse, Bahr*).

Requirements for an in personam claim: *Duncan* and *Nathan*

1. **Not inconsistent with the Torrens system**
 - Eg. registration under a void document, or notice of an unregistered interest, would *not* give rise to a claim in personam because the LTA makes it clear that you get indefeasible title in those situations.
2. **Unconscionable conduct on the part of the current RP**
 - Eg. breaching a code of practice (*Dollars & Sense*), giving an undertaking and later repudiating (*Bahr*), an unconscionable outcome (*Duncan*)
3. **Recognised cause of action**
 - This must be something independent of the LTA
 - Eg. unjust enrichment (*Nathan*), breach of an undertaking (*Bahr*), mistake (*Prouse*), another statute (*Duncan: Illegal Contracts Act*)

Tipping J in *Regal Castings*: An in personam claim against an RP looks to the state of the RP's conscience, and denies him the right to rely on his indefeasible title if he has conducted himself in a way that it would be unconscionable for him to rely on the register.

Such a claim is concerned with the **personal obligations** of the RP. A claim in personam concerns the personal obligations of the RP, it is not a challenge to the RP's title.

The in personam jurisdiction cannot impinge upon the fundamental purpose of the Torrens system. An RP who becomes registered without fraud takes it free of any interest which has not been noted on the register, including interests which are not capable of registration. But, an RP does not take the land free of interests which he has made an **undertaking** to recognise.

Taitapu v Prouse

HC, 1916

Facts

The plaintiffs agreed to sell some land to the defendants, reserving their right to the minerals in the land. The instrument of transfer and registration omitted this reservation, by mistake. When the plaintiffs found out about the omission they sought to rectify the register. The defendants denied there was any mistake.

Principles

- The defendants were not fraudulent, as in *Loke Yew*, as they had no knowledge of the reservation and so had no intention to defeat the plaintiffs' interest.
- Equity regards it as unconscionable to retain what has been given and received by mistake. Here the defendants mistakenly obtained legal title to the minerals, but beneficial title lay with the plaintiffs (the defendants held the minerals on constructive trust for the plaintiffs).
- So the mistake in the contract between the parties created an personam right independent of the LTA (there was an independent relationship).
- Overall: right to the minerals transferred back to the plaintiffs.

Bahr v Nicolay

HCA, 1988

Facts

The Bahrs (original owner) sold some land to a purchaser, who leased it back to them for three years. The contract provided that upon expiry of the lease, the Bahrs would repurchase the land. The land was then sold to Thompson, who acknowledged the existence of the repurchase provision in the earlier contract. T became RP, and agreed to sell the land back to the Bahrs. The Bahrs paid a deposit but the T refused to sell the land.

Principles

Fraud

- Majority take a narrow approach to fraud: the RP must have a designed object or intention to cheat the original owner of their existing right.
- Knowledge of an unregistered interest, and even knowledge that registration would defeat that unregistered interest, is not fraud.
- At the time of transfer the T had no designed object = no fraud.

Constructive trust

- The T bought the land subject to the Bahrs' interest, and made an undertaking to honour that interest (cf. *Sutton v O'Kane* where the purchasers didn't make an undertaking to protect the vendor's interest in the right of way).
- They therefore held the land on constructive trust for the Bahrs.
- They must now re-convey the land back to the Bahrs in order to avoid acting unconscionable. Re-conveyance is not impeaching the T's title, but rather enforcing the T's undertaking.
- Overall: court orders specific performance, T must transfer interest in the land back to the Bahrs.

Duncan v McDonald

CA, 1997

Facts

Some Nigerians tricked some Kiwis into paying money to them, in return for a \$2m reward. To raise the money, the appellant solicitor took out a mortgage over a property owned by the McDs. The money was paid but lost in Nigeria. The mortgagee sought to enforce their security and sell the property. The McDs brought an action resisting the sale, arguing that the mortgage was void and unenforceable as it was fraudulent. The appellant eventually conceded that he had full knowledge of the illegality of the scheme.

Principles

- The mortgage was illegal under the Illegal Contracts Act.
- The appellant had knowingly participated in an illegal scheme
- The McDs were not ignorant to this illegality = they too were dishonest.
- But, the LTA overrides the ICA. Registration has rendered the mortgage valid and protects the mortgagee's right of sale.
- However, court finds it would be unconscionable in the circumstances to allow the mortgagee to enforce this right. There has been unconscionable conduct which gives rise to a right in personam.
- The mortgagee can only apply for relief under s 7 of the ICA.

Nathan

CA, 2007

Facts

See *Dollars & Sense*, above

Principles

Three requirements for an in personam claim

1. It must not be inconsistent with the objectives of the Torrens system
2. It must involve unconscionable conduct on the part of the current RP: this must be more than mere notice, but need not amount to actual dishonesty.
3. It must be a recognised cause of action

Application to the facts

- Here, DS had failed to meet even the most basic codes of practice of financiers in loaning money = unconscionable conduct
- The recognised cause of action = unjust enrichment, although the court doesn't elaborate on this.

Regal Castings

SC, 2008

Facts

L owned a business, Capro. L was personally liable for Capro's debts owing to RC. RC let Capro enter into a debt restructuring agreement. L was to repay the debt in instalments. L and his wife transferred their home into a family trust, effectively for free. The transfer was registered. RC was not informed of the transfer. Capro goes into liquidation and still owes money to RC. RC sues L, but his only remaining asset is the home. RC sues to have the home made available to them. RC applies under s 60 of the PLA to set aside the transfer of the home into the family trust, on the basis that there was fraudulent intent.

Principles

- L intended to defraud creditors by transferring the house into the family trust.
- The trust was not a bona fide purchaser for value because it got the home pretty much for free.
- So, the transfer is voidable by RC under s 60
- A claim under s 60 is not precluded by LTA indefeasibility, because it is a claim in personam. S 60 effectively operates as an exception to indefeasibility.
- Court reaffirms the three elements of an in personam claim from *Nathan*. Here the recognised cause of action (first condition) was s 60.
- Tipping J notes that even volunteers who do not give valuable consideration can obtain indefeasible title through registration (now confirmed under s 51(4) LTA 2017).

- Overall: trustees ordered to transfer 50% of the house to the Official Assignee for the benefit of L/Capro's creditors.