INTERESTS IN LAND.

LEASES.

A lease confers a proprietary right to exclusive possession, reversion rests with owner. A lease carries dual character: the K, which confers personal right between the parties, and the lease itself, which confers property right between the parties.

Part 4 of the PLA sets out the requirements for a lease:

1. **Fixed or periodic term: certain commencement & end date.**

s 212: do not need to refer to a date per se, can be a future event so long as sufficiently defined. No time limit; can be 999 years.
s207: note the requirements for short term leases.

2. **Certain premises.**

Plan or reference to the title. Registered leases require a survey plan – most leases are not registered.

3. **Exclusive possession.**

FATAC v CIR –

(1) confirms the approach must be to look at the **effect** of an instrument in granting exclusive possession – i.e. what the deed confers – as opposed to the intention of parties.

Because tenancy/license distinction turns on those substantive rights granted to the occupier, it remains unaffected by the label which the parties choose to place on the transaction … intention can be misleading unless it is appreciated that the only intention that matters is intention as to substantive right, not to legal classification.

(2) the test for whether exclusive possession has been conferred.

Landlord's right of entry: can landlord come on anytime, or is subject to restrictions? Can anyone else come onto the land?

- Landlord had a general right to entry to come onto the land so long as did not interfere with quarry.
- Mt Wellington also had a quarry agreement with atlas – stockpile and remove materials.

Terminology of document/terms of agreement: don't need to be confined to labels, but can be useful in considering the effect of the document itself

- no duration considered: leases need a defined term. It is a "necessary incident".
- the use of "license" in agreement is not decisive / determinative – terminology only useful insofar as reveals intention to confer EP.

Restrictions on the use of land: but some restrictions do not negate a tenancy.

Proportionate share of land: if the agreement talks about an entire section of land and the tenant only has EP over one part of the land, then that is not EP. But if the agreement only talks about one proportion, and tenant has EP over that, then that is ok.

- not critical that it was only a proportion so long as clearly defined/ demarcated.
- Here, lacking definition of area.
- ***Waimiha:*** right to mill trees on piece of land, but no EP over that piece of land = license.
- ***Brooks:*** more about **control?** OTF, had key but no control over the electricity and front door = license.

Landlord's right to termination: is the landlord free to terminate at whim?
Rent? not essential, but a good manifestation / evidence of intent to be lease.

Puhunui has a property that included a quarry. P grants Atlas the right to operate the quarry for 12 years. P sells property to Mt Wellington (related to Fatac): the K of sale noted the arrangement w P (as a license).
If agreement was mere license = F has to pay GST.
If agreement lease = F does not have to pay.

Held license.

Cases where EP but no lease –
statute forbids granting of lease
landlord unqualified right of entry
other legal relationships (employee, office holder, mortgage in possession)
small portion of a bigger area (*Waimha, Brooks* – need control over small)

4. **Formalities**

s 24: in writing, signed. Note short-term; doctrine of past performance.

5. **Rent?**

not essential.

Types of leases?

Fixed term lease –

- time length certain; can be in reference to a future event (but s212: cannot exceed 10 years).

Tenancy at will –

- created by express or implied agreement. operates outside of s210.
- possession = indefinite. BUT can be terminated by either party at any time – no formal notice required.

Implied statutory tenancy –

- created by statute, not created by any agreement. Terminable at will by giving 20 day's notice.
- s210: arises in 2 situations –
  - where there has been a fixed term lease which has expired but no new lease has been agreed too, tenant remains in possession ("holding over")
  - where there is an implied period tenancy at CL by reason of the T having possession w L's consent.

Express period tenancy –

- usually residential tenancies – grant of tenancy for a "period" (week/month/year), which will continue to renew itself until either party quits. Exception to CL requirement that maximum duration needs to be certain. Right to terminate on notice inherent – notice period usually equivalent to period of lease. (except when year = period will be 6 months).

Perpetually renewal lease/Glasglow lease –

- Is for a fixed period – 14 or 21 years – then perpetually renewable for the same period. Usually in ground leases (where landlord leases land only and the T erects building on land).

ASSIGNMENT OF LEASES.

Dual character means when someone assigns a lease, they are not assigning both aspects.

Contractual element -

- created by K
- K imposes rights & obligations
- Privity of K dictates rights & obligations can only exist between parties - can only remain between the parties

Tenurial element –

- interest carved out of the freehold interest
- estate in land = rights & obligations (receive rent, right to the freedom).
- Privity of E exists between who-ever is lessee and lessor.

Sub-lease?

Under a sub-lease, there is no relationship – no privity of K or E – between the landlord and the sub-lessee. The lessee held privity of K, and privity of E with the sub-lease, as a sub-lease is carving a portion out of the original lease.

- under the CL, must end before the end of the head lease.
- Under PLA, can end at the same time.

EFFECT OF THE PLA ON ASSIGNMENT.

New lessor (transferee of the reversion; new landlord, owner etc).

PLA s 231 & 233 transfer covenants to the new lessee/lessor.

s 231: Burden of lessor's covenants run with the land. New owner of the land (new lessor) is bound by the covenants of the original lessor. Lessee and assignees can enforce these covenants.

s 233: Benefits of lessee's covenants run with the land. The new lessor can enforce the covenants.

These sections mean the transferee of the reversion (i.e. the new landlord/owner) has the benefits and burdens of the original lessor – inherits their rights and obligations.

- that is, if there were promises made in the K between A&B, A's transferral of the lease to C does not mean these are no longer enforceable by B.
- B cannot enforce them via the K, but through the PLA. **statutory relationship**

Original lessor.

Privity of K still applies. 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 the transfer of reversion.

This mean that if lease was frustrated/if there was an issue, the lessee (if original lessee) could sue either.

New lessee.

s 240(3) –

- must pay rent to the lessor
- must observe all covenants
- may enforce all covenants against lessor.

Original lessee.

s 241: transferor/assignee of the lease continues to be liable for the original covenants and for rent. This includes intermediate assignees.

but as per s 241(2), anything that is outside the original lease agreement the original lessee will not be liable for (***Fell; Herbet Duncan***) **unless the lease provided a mechanism for it.** This means that if the lease included a variation clause, the original lessee will be liable for any variation (such as a rent increase).

- If a right of a renewal is exercised, that constitutes a new grant. *Gibbons v Holding*: assignor no longer liable.
- If it is a mere extension, which was provided for in the original lease, then assignor remains liable as the lease was not a new grant.

THE COMMON LAW POSITION.

Must be included in the K, or contemplated by the K to enforce against the original lessee. Similar to PLA.

City of London v Fell

Does Fell's obligation (as original lessor/assignor) to pay the rent end at the expiration of the lease or does it extend into the statutory holding over period?

Held that Fell is bound by the K but not bound by the tenancy if it goes beyond the K. The tenancy post 1986 exists because of the statute creating a "holding over" period – **the period does not exist according to the terms of the K.** F only covenanted to pay during the contractual term, therefore it cannot be liable for rent post 1986 (as that was not provided for in any term of the K).

- F leased premises from City of London for 10 years. Lease included a rent review after 5 years.
- Fell moves in later, few years later assigns lease to Grovebell.
- After 5 years, rent increased as per the original K – G continued to pay.
- Lease expired; G continues in possession. As there were no negotiations made over extending the lease, statutory provisions hold that it is a mere holding over period, therefore rent is still payable.
- G does not pay rent for any of this period; insolvent.

QB decision distinguished between term & tenancy: K continued as contemplated term extending past tenancy.

- CA REJECT this –
    - term is an integral part of the tenancy. Cannot be bound by any obligations after the termination of the tenancy.

Herbert Duncan v Cluttons

Does Cluttons' obligation to pay the rent for the term of lease (wherein term was defined to include any statutory holding over period) extend to an increased rent (as imposed by the statute)?

Held Cluttons' can only be liable for the contractual rent. As the contractual rent was paid by the assignee, and it is the failure to pay the extra rent that is being pursued, C is not liable for any $.

- HD leased premises to C, lease run until 1990 (70k a year)
    - "term" was defined in the K to include any stat holding over period (c.f. *Fell*) – not just terminating on the expiration of the lease.
- C assigned lease to Warringtons
- W decided they wanted to stay on/apply for a new tenancy, lessor did not want that
- Nevertheless, W stay in possession, interim rent imposed by statute – 200,000k.
- W continue to pay old rent, leave after 3 months.

To be sure, landlord has right to enforce claim against HD (privity of E), HD are liable on the increased rent. However, that extended right extends only insofar for C as the K stipulates: C can only be liable for the K rent. The additional rent has nothing to do with C, additional rent must be outside the K. Statute (judge) increased the rent based on the tenurial relationship between W & HD – K did not increase the rent.

RIGHTS AND OBLIGATIONS IN A LEASE.

Covenant of quiet enjoyment, non-derogation from the grant, right to repair. *Kalmac v Delicious Foods; Nordern v Blueprint; Tram Lease v Coad; Mobil Oil v Auckland Council.*

COMMON LAW.

Contract usually stipulates the rights and obligations of parties. However, common law implied a number of rights & obligations.
Landlord covenants –

- tenants right to quiet enjoyment
- non-derogation from grant: landlord obliged to not do anything inconsistent with the with the use of the land

Tenant covenants –

- tenant to pay rent
- yield possession when lease expires
- tenants obligation not to commit waste (voluntary = create damage/permissive = omit to deal with detoriation)

POSITION UNDER THE PLA.

s 218(2): implied covenants are abolished. PLA schedule 3 now sets out the covenants.
s 279: parties can negative, vary, extend covenants – K takes priority.

Covenant of Quiet Enjoyment.

Kalmac – enjoy ≠ enjoy. **implied in every lease under the PLA.**
quiet = peaceful and free from interruption/interference; enjoy = exercise and use of the right/full benefit of the right.

1. **"substantial interference" with ability to use premises in an ordinary way.**
   ***Kalmac**:* demolition caused noise, vibration, access difficulty & business obstruction.
   ***Nordern**:* shit & urine, customers of brothel would preposition staff.
   Southwark v Tanner: can be noise
2. **lessor responsible for people under or through themselves. element of control – i.e. cannot control neighbours.**
   Nordern: traditional position that landlord is not responsible for the activities of another tenant. If lessee wants to limit the other tenant, needs to say so in lease. But OTF, interference was so substantial and N were "shutting their eyes in knowing that was using a brother".
3. **prospective – covenant cannot impose a positive obligation for landlord to do something.**
   Southwark v Tanner: the state housing was not soundproof. However, the covenant of quiet enjoyment did not apply in requiring the landlord to fix it, because it was **pre-existing condition**, the tenant accepted the premises as they were at the commencement of the lease.
4. **remedy? does not give automatic right of cancellation: damages – injunction – cancellation.**
   Nordern: must be a substantial breach of the covenant. CR: but substantial interference is the first limb, therefore would be rare to not grant cancellation.
   PLA cancellation code? For lessor's cancellation only, not helpful if you are a lessee who wants to cancel.

Non-derogation from the grant.

Nordern – grantor cannot derogate from the promise, that is a rule of common honesty.

1. **activity causing derogation is done on other land the lessor has**
2. **activity is done by the lessor, or permitted by the lessor. If not lessor must have control and choose not to intervene** (cf ***Nordern*****).**
3. **ascertain the purpose of the lease.**

This is needed because the claim is predicated that the acts of the lessor are so severe they prejudice the successful fulfilment of the lease. This can be implied in the lease – does not depend on a specific clause.
***Nordern**:* purpose = "general commercial purposes".

4. **have the alleged derogating actives rendered the lease "materially less fit" for achieving that purpose (*Norden)/* Has the activity frustrated the purpose for which the lessor knows the lessee is taking the premises or is likely to use the premises for?**

Substantial interference ≠ physical interference. Any consistent use that renders the premises unfit is sufficient.
***Nordern**:* purpose = interference here so severe that the premises has been rendered unfit. (shit, urine, prepositions).
BUT Substantial interference ≠ interference with amenities/inconvenience (e.g. privacy, tranquillity, insurance costs). it is a question of fact & degree. HOWEVER, interference does not need to be so substantial that it renders the purpose of the lease impossible.

Kalmac: implied covenant in the lease not to alter the building. This is because if the grant is on condition that the whole building will remain, then demolishing it derogates.

Coad: implied covenant that there will be a restriction on use of neighbouring land. This is because it is a necessary implication to avoid undermining the grant – the wall removal would cause the building to collapse.

5. **Remedy? Cancellation**

Covenant to repair.

PLA sch 3, s 13: keep the premises in the same condition that they were in.

Return the property to the condition it was in when the term of the lease began (except for reasonable wear & tear).

Can replace this with something more express – i.e. standard of repair.

- ***Proudfood v Hart***: well-established that you do not discharge this obligation by returning the property to the state it was when first occupied. The covenant can extend to improvement.
- **BUT – s l**Lessee not required to put premises in good condition if not in good condition at the beginning unless context requires otherwise.
- ***Mobil Oil***: cannot be transformative change.

Standard of repair is what reasonably minded tenant would do in circumstances/Obligation construed by reference to what the "reasonably minded tenant of the kind envisaged at the commencement of the lease"

Proudfood v Hart: such repair as having regard to the **age, character and locality** of the property that would make it for for occupation of the reasonably minded tenant of the class likely to it.

***Mobil Oil*:** reasonably minded = tenants of the particular kind within reasonable contemplation of the parties at the commencement of the lease.

did not need to fix soil condition: lessor, at time of signing lease, intended it to be industrial – therefore reasonably minded tenants of the kind envisioned would not need to need to transformative (sub-soil) change.

Kalmac v Delicious Foods Ltd 1994 (CA)

Whether the demolition of the building except for DF's part would amount to a derogation from the grant/breach of quiet enjoyment?

Held that inherent in the lease was that building would remain whole. The grant was on this condition, therefore derogation found. It follows from a finding of derogation that QE will be satisfied.

- C owns a small shop, shop joined to a 3-storey building
- C leased shop, eventually assigned to DF
- C sells property to K, knew of DF's possession – sale was subject to the lease.
- K tried to terminate lease, DF refused: K started to demolish the rest of the building.

While not explicit, it is clear from the lease that building would remain whole:

- Clause re; council rent stipulated that rents are calculated based on the proportion of the leased section compared to the entire building.
    - would not be able to calculate the rent if parts of the building were demolished.
- clause re: insurance referred to insurance for the whole building.

Non derogation: grant is on the condition that the whole building would remain, demolishing = derogation.

Quiet enjoyment: caused noise, vibration, access difficulties and obstructed DF's business.

Remedy (NB: lessee not seeking cancellation)

- balance out competing interests – HC determined injunction & CA did not feel they were in a position to disagree.

Nordern v Blueprint 1992 (HC).

Whether the fourth-floor tenant's operation of brothel constituted a derogation from the landlord, despite the fact there was no frustration of Blueprint's lease directly, landlord was not responsible for the activities of another tenant and, in the alternative, cancellation is nevertheless unjustified?

Held that while the normal position is that a landlord will not be responsible, the interference was so "substantial" and N had essentially "shut their eyes" to the actions of K – that is, they knew and refused to exercise their power as landlords.

- N owned & leased building – 4 floors. B/Panda was a personnel agency, leased third floor
- fourth floor leased to a couple, tenants assigned the lease to an escort company - K. N gave permission – turned out to be a brothel.
- B/P quit the lease, refused to pay rent – N arguing cancellation is a breach as unjustified, sued for rent in arreas.

NB: brothel-keeping illegal at time - not critical, Elias analysed more from a moral perspective.

Arguments by N –

1. **no frustration of P/B's lease.**

Elias REJECTS: substantial interference – shit & urine, positioning P/B staff. Does not need to be interference that renders the purpose of the lease *impossible*, merely frustrate.

2. **landlord not responsible for the activities of another tenant.**

Elias accepts the ordinary position is that if a lessee wants to limit the activities of another lessee, will have to explicitly include in the lease. Here, however, the interference was so substantial the ordinary position was undermined.

- Elias considered N were "shutting their eyes" to the actions of K – knew and refused to exercise power.

3. **even if in breach, not sufficient to warrant a cancellation?**

If lessor has derogated, it is implicit that cancellation is allowed as it is a finding that the purpose of the lease was frustrated.

Tram Lease v Croad 2003 (CA).

Whether the demolition of a supporting wall on a neighbouring property mounted to a derogation from the grant?

Held that implicit in the grant was an implied restriction on the use of the neighbouring land, due to the existence of a supporting wall and the nature of the two buildings.

- C assigned a glasglow lease over the 'shoe repair site'.
- Land used to all belong to one person, subdivided and now wall of the shoe repair site has a wall that sits on the neighbouring site, the KFC site.
- There used to be an easement, but this had expired and had not been renewed.
- TL then acquired the title to both sites, tried to buy lease from C but failed. TL acquired the lease from the KFC so had full fee simple over that site.
- TL tried to get judgment saying C's right to the wall had ended, C counter-claimed with derogation.

The purpose of the lease was to afford the lessee of the shoe-repair shop throughout the term of the lease exclusive and secure possession of that land, including the building that was pat of the land. If the wall were to be pulled down by the lessor, and the building collapsed as a result, then that purpose would be frustrated.

- There must be an implied restriction on the use of the neighbouring land. This is necessary to avoid the undermining of the grant

Does it matter that, at the time of the grant to C, C had no power to prevent the previous lessee of the KFC site to remove the wall? (as the easement had expired).

- No: Question is not whether such a restriction was agreed to by the parties at the time of the grant, but whether it should be implied because it is necessary to prevent the purpose of the grant being frustrated.

Here, removing the wall would –

- cause the building to collapse
- undermine security
- disrupt the business.

Mobil Oil NZ v Development Auckland 2016 (SC).

Whether DAC was entitled, under the express "clean and tidy" clause, or alternatively under the implied covenant to repair, to recover the cost from Mobil of remediating the sub-soil contamination?

Held that Mobil did not have to pay: the "clean and tidy" clause, if interpreted consistently with it's use in other leases could not extend to an obligation to remove sub-soil contamination, particularly when a another lessee involved.

- property reclaimed land used for oil storage for 100 years, before that it was a rubbish dump
    - Australian predecessors, eventually taken over by Mobil Oil NZ.
    - DAL successor of original lessor
- Mobil had signed an agreement w original lessor: *keep the premises in good order, clean and tidy.*
- When M handed back premises, subsoil was heavily contaminated – some as a result of Mobil, but also from their predecessors.

HC: "clean & tidy" does not extend to subsurface

CA: "clean & tidy" does extend – lease didn't authorise contamination and future tenants were not going to accept the condition of the land.

SC –

Context of the land: not contemplated as being used for residential/commercial purposes.

- land created from a rubbish dump. When the lease was signed/obligations imposed, it was industrial land, no one thought it would be used for residential. Original lessor had accepted contaminated land at the end of the original lease w Aus M.

Lease instrument: clause could require to do something more than return to original condition, but cannot clean up a rubbish dump/oil storage facility, that is transformative. K could never have required this.

- "keep" may obligated more than just maintenance of status quo – may require some kind of improvement.
- BUT it cannot require transformative change.
- "good order" & "clean and tidy" usually in the context of residential tenancies – do not require you to go beyond the surface in that context.

Proudfoot? Makes clear could include repair – e.g. a dilapidated roof to be replaced to prevent interior water damage to house.

- Necessary qualifications –
    - reasonably minded ≠ every single tenant. Need to satisfy the tenant of the particular class
    - Here, reasonable industrial user / reasonable oil company.
- Confined to contemplation at the time of the lease

In sum: Lessee may need to go beyond the original state of the property when lease entered into. But the standard of repair has to be construed by reference to the condition that would be required by a reasonably minded tenant at time of grant.

TERMINATION OF LEASES.

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.

Surrender: lesee gives leasehold back to the lessor before the term expires and lessor accepts this. There is a consensus to end lease before term.

Occurrence of determining event: event cannot be breach of covenant by either party – can end the lease if event doesn't happen.

Break clause: term that gives right to terminate early (long-term leases).

Notice to terminate: usually applies in periodic tenancies.

Merger: leasehold & reversion held by same person.

Cancellation: party entitled to cancel b/c of conduct of another.

- lessor's rights - governed by the PLA cancellation code
- lessee's right to cancel less clear – CCLA gives more rights to cancel.
- *Nordern:* lessee has right to cancel in cases of non-derogation.

Frustration: premature determination of the lease because of the happening of an unforeseen event that is so significant to the K so as to destroy it's whole basis.

- *Roman Catholic*: only possible if K makes **no** provision for the supervening event. That is, **the reasonable person would think the K is different in the circumstances and cannot be performed.**
    - high threshold.

Roman Catholic Bishop v RFD Investment

Whether a lease (of 999 years) of a building damaged by an earthquake, which the owner decided to not repair due to the offer of purchase, nevertheless subsisted, or whether it was terminated, or frustrated due to the terms of the lease agreement not being carried out?

Held that it was entirely reasonable that a lease of this nature would not terminate simply because one of it's contemplated purposes – worship - was negated. The designation of the site as a church, in light of the fact it was a lease for 999 years, was not necessarily a permanent state of affairs.

- RFD owned building, several units
- RCP occupies one of the units – RCP registered lessee. used to be fee simple owner on nearby piece of land but exchanged for 999 year lease – peppercorn rent. For all practical purposes, is like freehold. the strongest interest a lessee could have in land.
- leasehold is a unit title = stratum estate. This means fee simple in your unit and tenancy in common in an undivided share in the common areas.
- Earthquake damages – RFD decide not to repair because Govt offered to purchase for 9m.
- There is an insurance pay out of 1.5m, RCP given 200k.
- But RCP want portion of the 9m, arguing that the lease has never ended, therefore have to buy them out.

1. **Termination**: did the lease terminate based on the terms of the lease agreement? Lease cannot be terminated by default, nor implied – must be an explicit termination. Interpretation of the lease –

- cl 25: if unable to reinstate building, landlord to pay a just and equitable amount of insurance monies.
    - RCB: silent about subsistence, status quo continues.
    - RFD: absence of express wording that the lease is to subsist, it must terminate once insurance monies paid out.
- J: needs to be **explicit**. if it was accepted as implicit, that would advance termination as the default position.
    - The clause merely provided the method by which insurance money was to be allocated when indemnity cover was **all** that was available.

Nature of the lease –

- The lease here was highly valuable – perpetual lease of 999 years, RCB could do what they wanted on the land.
- also included a unit title – gets common area also. value is larger than just the interest in unit A.

Purpose of the lease –

- purpose of lease not confined to just the interest in unit A.
- purpose of the lease not confined to using the chapel as a place of worship.
    - RFD: parties would not have intended that the lease would subsist beyond the ability to use for that purpose.
- J: leasehold purpose can change. evidenced by cl 10.

2. **frustration:** was the lease frustrated?

Frustration is a K doctrine, where the obligations of the K become incapable of being performed. Only can operate if the K makes no provision for the circumstances that have arisen/supervening event. Hesitate to apply in the context of a lease, while can be applied due to the dual nature, estate in land should not be easily extinguished. **Purpose of the lease: whether the RP would think the purpose of the lease destroyed or frustrated?**

- *National Carriers:* have to ascertain the purpose – the narrower the purpose at the time of K, the greater prospect of frustration.
- Purpose not just worship – one of the purposes of many.
- Are the obligations altered?
    - crown offer to buy not certain – just a proposal. That cannot frustrate
    - Cannot say lease was frustrated pre-acquisition.
- Under the CERA 2011, owners included lessess. In light of the fact RCB's interest worth more than RFD, would be unjust enrichment to allow RFP to take all the $.

LEASES SUMMARY.

EASEMENTS.

An easement is a right annexed to land to utilise other land of different ownership in a particular matter, or to prevent the owner of the other land from utilising his land in a particular manner. **PLA subpart 3, ss 291–300.**
positive easement = entitles someone to do something on another's land - *Re Ellenborough's Park.*
negative easement = precents someone from using their land in a particular way (restrictive covenant).
servient tenement = land which is being used for the easement.
dominant tenement = whoever has the benefit of the easement.
easement in gross = services (no DT) – powerlines etc.

Re Ellenborough –
Estate included park & surrounding land plots. Rights granted to purchasers of each plot – promised to never build on park, maintain as playground. Estate went to new owners – easement or mere personal right?

Easement or mere personal right?

1. **Existence of a dominant/servient tenement.**
   except: s291 PLA: easements in gross.

2. **Easement must "accommodate" the DT.**
   - Benefit must attach to the land and not the person.
     language: legal right intended to be annexed to the land, or privilege personal to possession?
   - connected to the enjoyment of the property or merely connected to the land?
     Otherwise, mere K.
   - primarily a question of fact & degree.
     usually requires some aspect of physical connection between the DT and the right granted.

   Re Ellenborough: *rights sufficiently connected, increased value of DT's property. Different to using a local zoo or cricket ground.*

3. **DT & ST must be different people**
   except: LTA s 108(3).

4. **Easement must be capable of being a subject matter of a grant**
   - right too wide, or too vague?

   Re Ellenborough: well-defined, only owed certain.
   - whether the right inconsistent with the ownership/possession of the ST.

   Re Ellenborough: using park is fine.
   - mere right of recreation without utility on benefit.

   Re Ellenborough: being able to use the park is not a mere right to wander. Served some use.
   Regency Villas: swimming, golfing & playing tennis? exercise is essential, **right to use facilities not just recreational, although it is also recreation.**
   No prohibition against recreational easements, so long as provides some type utility to DT.

Scope of the easement? Court will interpret very narrowly as they do not want to increase/change the agreed to burden on ST. Court will endeavour to protect ST's property rights. **Exclusively determined by the language of the deed:**
Barry v Fenton: "vehicular access only" to be interpreted narrowly despite the 'greater right' argument. PF a greater right will encompass a lesser right, but this was negated by the use of the words in the deed.
Peacock v Custins*:* even if no practical consequence on ST burden, still will not find outside words of the deed.

- C, about twice a year, used his easement of red land access over P's land to access blue land (blue land was over the red).
- Court considered **key is the object of the DT:** if the objective is to use the easement to for the purpose of accessing other land, that cannot be allowed. However, if passing over other land is **incidental for some other purpose,** then that will be OK.
  - e.g. if VUW students had an easement to go over the ST's land for the purposes of going to the library, a student who used the easement to get a coffee and then return to the library would be ok. But a student who was merely getting coffee would not.

Harris v Flower: easement to enter the pink land. using easement to enter pink land is fine, but if **true purpose** is to use easement to enter white land, that will not be allowed. *Court will not allow the burden of the ST to be increased without consent beyond the grant.*

- Grant of an easement for one plot cannot extent to an easement for the enjoyment of both.

Jobson v Record: easement granted for agricultural purposes, DT was using for storing & transporting timber – not OK.

COURT JURISDICTION UNDER THE PLA. (LANDLOCKED LAND)
s 319: special order when carrying out specific work (e.g. painting house)
s 321: special order for wrongly placed structure
ss 326–33: landlocked land – *Kingfish Lodge; Squally Cove; Murray*

- 326: landlocked = no reasonable access; reasonable access = physical access that is reasonably necessary for the use & enjoyment of the land
- 327: landlocked owner can apply to Court
- 328: discretionary power to remedy – grant an easement; transfer title.

1. **Is the landlocked –** ***Squally Cove*** **9 factor test.** ***SQUALLY & MURRAY EMPHASISE FACT SPECIFIC.***
   Murray: **value judgement for the Court after taking into consideration all the evidence.**

Physical access in fact (as opposed to abstract legal access)

- *Squally*: if red & blue roads are not RA as they depend on the goodwill of the owners, probably need both physical & legal access.
    - Purple road insufficient as purple was not physically accessible.
    - but remind us it is very much a fact specific enquiry. For example, sea access was reasonable in *Kingfish*, but that is not the case on the *Squally* facts. *Murray* also emphasises the fact-based nature of the enquiry.
- *Kingfish* rejects requires access over land; rejects requires access without external assistance, inconvenience not enough
    - gives an example of a paper road
- *Kingfish,* for the purposes of the RMA consent process, accepted sea access was reasonable = own goal.
- *Murray*: access from two footpaths, above and below the home.

Question of present, not future fact

- *Squally*: existence of offer should not be considered in first enquiry (however, will be relevant in second).

Should not depend on whim of adjoining owner

- *Squally:* red & blue roads are not RA as they depend on the goodwill of the owners
- *Murray:* public, council owned footpaths

Existing use of the land in considering, not looking at potential uses owners could apply for under the RMA

- *Kingfish*: purposes of current consent under the RMA, not future consent

Reasonable access not necessarily the best access

- *Murray*: adequacy of existing access?

Value judgment based on evidence

- Locality: residential vs rural, contemporary living (density)
- Topography:
    - *Murray*: ngaio, hilly. Reasonable access in ngaio going to mean a different thing to reasonable access elsewhere

Circumstances as they exist at the time of purchase

- *Murray:* applicants knew at time of purchase. Indeed, there was evidence they considered the lack of VA to be a good thing (peace & quiet).
    - BUT fact knew about the access difficulties does not preclude a claim, just more difficult.

Reasonable access does not mean vehicular access

- *Kingfish; Murray*
- BUT *Squally Cove:* but there are likely to be few cases where VA is not RA.

2. Should the Court grant RA under 328 (go to s 329).

Nature & quality of access when applicant purchased the land

- *Murray; Kingfish*

Circumstances under which the land has been landlocked

- i.e. who made the mistake
- *Kingfish*: historical accident. HC - determinative, CA – relevant not determinative.

Conduct of the parties, including any attempts to negotiate?

- *Squally*: reasonable offer – 20k- for the yellow road – therefore reasonable access offered.

Hardship to either parties?

- *Kingfish*: neighbours' would have to put up with privacy, traffic, security, maintenance etc. (lodge development context)

3. If grant, on what condition?

Kingfish –
sea access only, K wants to develop lodge and extend accommodation.
NOT LANDLOCKED – physical access does not mean access over land, when K went to get his RC he told the EnvC that sea access was fine.
NO DISCRETION – while the fact there is no land access is a historical accident, HC put too much emphasis on this. It is relevant but nevertheless clear there would a substantial interference with the peace & quiet of D. The location was all about the peace & quiet.

Murray –
old people claim steep footpath access to their house no longer reasonable access = circumstances have changed since purchase?
NOT LANDLOCKED – RA does not necessarily VA (admits few), ngaio is very hilly – two footpaths, time of purchase.
NO DISCRETION – knew about at time of purchase, does not preclude but makes more difficult.

Squally Cove –
access on red & blue roads through goodwill, P owns last 650m, does not want them so offers the yellow road – will grant license for $. Also a purple road which some have easement for but that is not passable.
LANDLOCKED – no physical access over the purple, yellow not a relevant consideration here, access at whim
NO DISCRETION – this is because the claim would not actually fix the problem: grant over the red road will not be enough as need the blue road as well. furthermore, offer of yellow road reasonable

VARIATION, MODIFICATION, RECTIFICATION AND EXTINGUSHMENT.

Variation must comply with formalities requirements.

Rectification - can be rectified if the memo of transfer contains material defects in the intention of rights described. equitable remedy – agreement does not reflect the true agreement/intention between the parties.

- *Davey*: need evidence of **clear, shared intention** to show consensus.

Davey v Baker 2016 –

D reached an agreement with neighbour over an easement, surveyor incorrectly recorded boundary, D signed easement without reading it. P sold to B, B noticed easement different to what D was using.

1. rectification?

No common intention – not enough evidence to show that there was a consensus. Equitable remedy? D's fault he did not check. B is BFPFVWN. rectification intrude on indefeasibility.

Modification – **ss t. Court can consider in modify/extinguish -**

(a) nature and extent of the use being made of the benefitted or burdened land (or both);
(b) character of the neighbourhood
(c) any other circumstance relevant.

- only the ST can modify – DT cannot enlarge their rights

Harnden v Collins 2010 -

1. **modification on easement? or is it a creation of a new one.**
    - Wanted to change the direction of the easement, and remove part marked F.

Easement was a composite whole (subdivision context) – properties so interconnected any obstacle impacts access.

2. **is there jurisdiction to modify – i.e. is it the ST?**
    - applicants are DT and ST at the time same. One applicant is only an ST.

Ability to modify easement limited to the ST, the "person bound". Extinguish part F is fine (as ST&DT) but part H goes over C's land, he is the ST. None of the applicants can therefore apply to fix part H.

3. **scope of the power to modify**

Modification includes the **ability to enlarge the easement**. But we can question the reasoning of that (compensation purposes).

Davey v Baker –

2. modification?

D is **DT** – cannot apply. D tries to argue there is a –

- restrictive covenant? cannot go beyond the scope of the easement
- positive covenant? maintain right of way?
    - both rejected: purpose of jurisdictions is only to relieve burdens.

No precedence involved where DT is not also the ST. To be sure "easement" in PLA includes covenants in easement instruments. But key test is what you are **actually bound by**: D here is bound by covenants relating to maintenance, so could modify responsibilities in relation to that, but cannot modify the easement itself.

Extinguishment –

- surrender: DT may surrender complying
- merger: if owners are the same – PLA: need consent
- occurrence of event: instrument might specific
- abandonment: usually does not apply to easement.
    - this is because LTA makes easements indefeasible
    - however, if the easement becomes redundant, the LTA will extinguish

COVENANTS.

A positive covenant is the promise to do someone on coventor's land for the benefit of the covenantee's land.
e.g. building a common driveway; keeping road in good repair
A restrictive/negative covenant is the promise not to do something covenantor's land for the benefit of the covenantee's land.
e.g. not building on something.
benefit = being the covenantee, receiving the good
burden = being the covenantor, having to do/not do the good

At common law.

BENEFIT – common law allows the benefit of all covenants, whether positive or negative to run with the land of to run with the land of the covenantee. Requires –

1. intention that it will run with the land;
2. touch & concern the land of the covenantee;
3. covenantee must have a legal estate in the land;
4. new enforce had to have had the same estate.

BURDEN – common law does not allow the burden to pass. New owner not privy to the K so cannot have obligations imposed on them.

In equity.

BURDEN - **equitable enforcement – *Tulk v Moxhay.*** If the promise is negative in substance (I will not do X) – i.e. burden of a restrictive covenant, it will run with the servient land constituting an equitable interest which binds the covenantor's successor's title who have notice of it.

1. covenant to be negative – I will not do something
2. covenant must benefit the dominant land
   a. requires a DT
   b. must touch and concern the land
3. common intention to run.

This is a creation of equity, therefore is only an equitable interest in land. It is limited to a equitable remedies, and not enforceable against a BFPFVWN.

Tulk v Moxhay

Whether M bound to as covenantor to a promise to maintain the vacant lot, which he knew of at time of purchase?
Held at despite the common law purchase, there is no difference in principle between M knowing, and T being able to enforce against E, the original covenantor. To hold otherwise would be to render any promise pointless.

However, subsequent cases have restricted *Tulk* to restrictive covenants only. Sucessors in title must have notice and covenant must be restrictictive in nature.

AT PLA.

BENEFIT – s 301: enforceable (unless contrary intention).
BURDEN – s 302: enforceable (unless contrary intention). s 303 allows burden of positive covenants to run with the servient land – i.e. no distinction between positive or negative/restrictive covenants at law anymore.

1. Notice? s 307 PLA/s 12 LTA allows for covenants to be noted – equitable interest protected as on the register, whole world can be assumed to know. Notation is not registration – does not mean indefeasible. If the burden of a covenant accidentally omitted from the title, BFPFVWN would not be bound.

1. Can be positive or negative.
2. Covenant must benefit the dominant land?
   a. under the PLA, a DT is not required. PLA s 307 – covenants in gross.
   b. but touch and concern STILL required: degree of connection between the benefit and land
3. intention?
   Under CL/equity, needed intention that it would run with the land. Under the PLA, intention assumed unless contrary is proven.

Modification, variation dealt with under same section of PLA: ss 316–317.
Jansen v Manson 1994 **–** purpose of the covenant was to protect the view. While Herne Bay has seen considerable development over past 30 years, remains a residential neighbourhood – single unit dwellings OK. s 317(2)(b)(ii).

Interpreting covenants? purposive approach.
Big River Paradise v Longrieve 2008: covenant did not allow subdivision of BRP's property. purpose of the covenant was to limit development and preserve amenities of Longrieve. If leases were allowed to be granted, despite having an interest for less than 30 years (weird loophole BRP doing to get around covenant), this would have the same effect as subdivision. The nature of a lease is that lessee gets an interest within a defined area of property = subdivision.

Covenants in gross?

A covenant in gross is where there is no DT. It is a promise that concerns the land of the ST, but does not benefit the land of any DT.

Can they be enforced against the parties?
2 ways they can be enforceable against the parties –

1. Encumbrance - *ANZCO v AFFCO*: if registered in an encumbrance, enforceable against a successor in title but no one else. That is, could enforce against the owner, but could not enforce against an occupier.
2. Per se - **LTA 2017 s 242 inserted ss 307 a–f into the PLA:** covenants in gross are enforceable per se, and include mere occupiers. Equitable interest only.

Which is better?

1. Encumbrance can be registered, functions as mortgage – therefore includes the power of sale if breached. Covenants in gross per se are an equitable interest, therefore can only be noted not registered.
2. Covenants in gross can bind any occupier, whereas encumbrance can only bind the owner of the land.

ANZCO v AFFCO –

- AFFCO processes meat, closed the processing plant
- Sold the land to MF. The sale K included covenant not to use for meat processing for 20 years.
- AFFCO registered this as an encumbrance. This meant that if it was breached, AFFCO could order power of sale.
- MF lease to R, who use to freeze & store meat. AFFCO sue, settle in deed, R stops using
- MF sells to ANZCO for meat processing, conditional of AFFCO approval – AFFCO decline.
- ANZCO go ahead anyway – lease to I to manufacture & store processed meat products. = in breach of E.

Held that CIG could be recorded in an encumbrance, registered and enforceable against successor's in title. Thus, ANZCO liable for breach & liable for acts of I. BUT I & R are not directly liable as they were mere lesees. However, did not accept CIG are enforceable per se. Considered the PLA made clear that covenants must benefit the land to run with the land, no benefit in a CIG.

Mortgages.

Banks loan $$. They ask for security to the loan – usual way is through mortgage. Therefore a mortgage carries two agreements –

- **Loan agreement**: covenants to repay the loan, perform any obligations. These are personal covenants. This is a K.
- **Mortgage agreement**: this is an agreement for security. The security secures the performance of the covenant. Obligations in the mortgage agreement mean that the bank has a proprietary interest in the mortgaged property.

THERE IS A DISTINCTION BETWEEEN THE LOAN AGREEMENT AND THE MORTGAGE AGREEMENT (*Westpac/Duncan*).

usual operation of a mortgage –

- X borrows $100k from bank, secured against the house.
- X defaults
- Bank sells house, realises $80k
- Ban can sue X on personal covenants to recover the remaining $20k.

Common law? mortgages used to transfer title to mortgagee. Mortgagor retained an equitable title. Conveyance would have a term. Under LTA/PLA? mortgages now take effect as a charge over the land. Mortgagor retains legal title, mortgagee has a power of sale. Therefore a mortgage is **merely a charge over the land.**

DISTINCTION.

A registered but void mortgage is indefeasible under the LTA, therefore protects the charge over the land. However, the covenants in loan agreement are separate and mortgagor will not be liable for those.

- ***Duncan v MacDonald***: Mortgage, although illegal = void, was unregistered under the LTA, therefore became indefeasible. But the K was illegal, therefore the covenants in the K (the loan agreement) are null and void. So the bank can sell the property but cannot sue on the personal covenants left over (i.e. that 20k in the example above). **Mortgage is valid only to the extent of the charge on the land.**

Have to assess what is secured by the mortgage. If the loan agreement is referring to someone who is not the registered prop of the property, then technically, the mortgage does not secure anything.

- ***Westpac v Clark*:** all obligations mortgage and a separate loan agreement signed by fraudster. Mortgages are registered separately. Court held that even if the mortgage had been registered, would have secured nothing. This is because –
  - **'you'** in the home loan agreement referred to the fraudster: mortgage secures all of your [the imposter's debts]. Therefore the loan only referred to the fraudster, and the reference to a mortgage secured nothing.
  - **'you'** in the mortgage document was confined to the registered prop – which did not include a fraudster purporting to the be the RP. This is because the mortgage document referred to a memorandum that had been registered by W in respect to all of it's mortgages – cl 1.1: all money which you [the real Mrs F] may owe to W. *The fact it was all obligations is important*.
    - possible that if loan agreement had been incorporated into the mortgage doc, may have been enforceable.
    - possible that if had been fixed sum, then property could have been charged up to the value of the land. It was important that the mortgage document was all-obligations in the sense it referred to all of the RP's debts, and not just the debt on this particular loan.

EQUITY OF REDEMPTION.

Once the debtor/mortgagor has repaid the debt in full, lender is obliged to reconvey the property. Under the CL because the title was transferred to the lender, even if debtor was one day late, the debtor could not get the property back. So, equity stepped in – lender has to give property back once principal sum & interest paid, irrespective of if after the due date = equity of redemption. (Under the PLA s97: mortgagor entitled to redeem anytime before it is sold. Still have to pay the agreed amount of interest).

What will be a clog on the equity of redemption? A mortgage must be redeemable. If it is not, that will be a clog.

Illusory – looks like there is a right to redeem, but there isn't.

- *Fairclough*: mortgage only redeemable 6 weeks before the expiration of a lease (20 year lease). Such a clause hampered the ability of F to take part pat in other transactions.

Postponement – mortgages often made for a long time. **Sometimes the period is too long.**

- *Knightsbridge*: 40 years, 80 6 monthly instalments. Explicit in K was that could not repay earlier than the scheduled 40 years. Held not to be a clog.
  - This is because they had agreed to it in a commercial K.
  - Both parties had received legal advice, knew their business and negotiated at arms' length.
  - Equity will grant relief if unconscionable or oppressive, but this was not,.
  - Don't want to interfere with freedom of K: while mortgagee has asked for a term to be inserted enabling them to obtain the release from the security of such parts of the property – but they did not insist on this and were willing to accept an assurance from the mortgagees on the subject. They now cannot turn around and say the omission of such a term was unreasonable.
- PLA s 97 certainly allows for it to be repaid earlier, just whether parties have decided something different in the K.

Doctrine of restraint of trade – if places unreasonable constraint on future ability of borrower to conduct business, might be a clog.

- *Fairclough*: only allowed to purchase mortgagor's beer.
  - Equity of redemption allows ability to obtain new finance transaction without impinging on other transactions.

option to purchase? cannot obtain an option in the same transaction.

- ***Jones:*** a mortgagee, cannot as a term of the mortgage, enter into a K to purchase any part interest in the mortgaged premises. The foundation of this rule is because such an inclusion would be repugnant or inconsistent to the transaction of the mortgage which it forms part

collateral advantages? clog if collateral advantages extend beyond payment.

- ***Fairclough:*** Court will not allow any contemporaneous instrument with the mortgage deed, or by anything which could be regarded as simultaneous arrangement or part of the same transaction
- ***Jones v Morgan*:** mortgagee cannot enter into a K in same instrument as a mortgage. **What was the true character of the transaction? Did the appellants make a bargain such that the right to redeem was cut down, or did they simply stipulate for a collateral undertaking, outside and clear of the mortgage?**
    - Here, arrangement to give 50% of the shares inconsistent with redemption.
    - But the transference of the shares were in the 1997 contract, whereas the mortgage had been in the 1994 contract.
    - However, although two separate documents, the shares were integral part of an ongoing deal – the 1997 contract merely constituted a variation on the 1994 contract.
- ***Noakes v Rice:*** covenant to only sell mortgagee's beer in mortgagor's hotel, whether or not any money owing on the mortgage. this was a clog

Why? **it is the essence of a mortgage that in the eye of equity it should be a mere security for money, and that no bargain can be validly made which will prevent the mortgagor from redeeming on payment of what is due, including principal, interests and costs.**

You can have a collateral advantage so long as it is not a clog – part of the same transaction, or separate? IF applies after mortgage repaid, probably going to be a clog.

OPPRESSIVE MORTGAGES.

Under the Credit Contracts and Consumer Finance Act, the Court can reopen oppressive contracts.

s 118: oppressive means –

- harsh, unjustly burdensome, unconscionable or in breach of reasonable standard of commercial practice.
- reopen = rewriting the K to fix any oppressive element.

s 120 confers jurisdiction when –

- the mortgage is oppressive;
- party has exercised a right or power conferred by the K in an oppressive manner
- party is induced to enter the K in an oppressive manner.

GE Custodians v Bartle

- B purchased an apartment as part of a Blue Chip investment scheme
- Mortgage broker, TML, approved the loan application on behalf of GE Custodians as lender
- B had to provide a statutory declaration that they could afford to service the loans. They believed, incorrectly, that Blue Chip would service the loans
- GE took no steps to obtain details of B's declaration, were aware that B had received legal advice
- Investment scheme failed, B defaulted.

Oppression is a determination to be made in light of a variety of factors in each case – consideration of whether there had been "**reasonable standard of commercial practice"**

LAW -

- ***Greenbank*:** the Court determines what is reasonable practice for the industry. A party could be blameless following industry practice but that would still be in breach of what is reasonable.
- oppression remedy wider in scope than unconscionability – may occur even where an oppressive party is only following industry practice.

APPL -

Supreme Court considered that credit K should be seen as oppressive unless the lender has a basis for it. Here, GE were not aware that B was unable to repay.

- even when a lender has knowledge of circumstances that might otherwise cause it to suspect something improvident about the loan, it will ordinarily be excused from making an enquiry if it is also aware the borrower is being advised about the transaction by an independent lawyer. **the presence of a lawyer discharges the need to make an enquiry**
    - lender is entitled to assume lawyer giving good advice
    - it is not for the lender to question the competence or independence of the lawyer
    - of course, there may be exceptional cases, if the "outside observer, knowing only what the financier knows, would conclude that the solicitor's independence had been somehow compromised", or alternatively where the substance of a transaction is so disadvantageous that no solicitor could properly advise signature

This means here, whether GE knew about the B and their dealings with Blue Chip in connection with the apartment; and then whether in light of that knowledge, the K was oppressive?

What knowledge did GE have of B's situation?

- GE knew the B were of retirement age – but on their loan application, B described themselves as investors. GE had no way of knowing what other income they had.
- Loan was well within ordinary lending limits on a loan to valuation ration; borrowing for unspecified purposes; interest rate unexceptional
    - To be sure, term might have been seen long in light of B's age but could exercise early repayment.
- **Most importantly**, B were being advised by a lawyer (independence not being put in issue in the case)
    - accept that position might have been different if B had not been represented by an independent solicitor but this was not argued in the SC
- GE knew nothing of Blue Chip's involvement, did not know terms of agreement they were in BC
- At time of the later loans, GE knew a bit more about Bartles' asset/liability position, but seemed like they had assets of 930k to support loans totalling 630k.

Therefore GE did not know of any matter which would have made the advancing of the loans in breach of reasonable standards of commercial practice, or otherwise oppressive.

Why did the CA get it so wrong?

- Largely because two of the members treated the lawyer to have been found by the HC as not independent, whereas the HC had considered he was independent, just negligent
- CA confused role of GE with role of a solicitor

Power of sale.
s 176: mortgagees are under a duty of reasonable care when exercising the power of sale to mortgagor; guarantor; and any other mortgagees (when there are multiple mortgages on one property).
Cannot K out of this.

Applefield v Damesh

- AF had land, 2 mortgages – one to D, one to ANZ
- ANZ wanted AF to sell the land
- Hughes potential buyer
- Under company constitution, AF would have to seek permission of shareholders (publicly listed). However loophole if there was a mortgagee sale
- So, D conducted the sale, sold to H (D had a 50% share in H company)
- At same time, land was rezoned so increased in value

AF attempted to sue D, alleging it had a DoC to obtain the best price.

What is the duty of care?

- There is a duty of care to get the true market value of the property.
- DoC will be triggered once the decision to sell has been made. Not imposed while deciding if time is good to sell.
- No general rule that mortgagee must take advice or market the property over a particular period of time – but must take all reasonable steps.
- Burden of Proof? Mortgagee has to prove they got the best price against the market.

APPL -
Here, Damesh exercised reasonable care into entering the sale K.

- AF had wanted to sell at that time and on the same terms
- Negotiated price with Hughes themselves
- Sale secured against a big ANZ write-off – 5.25m against 13m = big benefit for AF, real worth of sale around 21m
- D had been truly independent in the price it had sought for the land

TORRENS SYSTEM & INDEFEASIBILITY OF TITLE.

The LTA is a system wherein one gets title **by** registration – the act of registration provides title. (s 24) This is distinct from a mere deed registration system wherein registration merely validates registration. As it is the act of registration that provides title, the title is immediately indefeasible, except as burdened by all registered (or, in the case of covenants, noted) interests (s 51/*Breskvar*). Correspondingly, registration perfects any defect in the title.

- K does not pass title, registration does
- nemo dat abolished: indefeasibility means a title does not pass with defects. Registration perfects. This means you can give a better title than what you had. Under the CL, if defective would remain defective forever.
- details the parcel of land, as opposed to previous transaction – unit of land basis of record (as opposed to the K).
- favours the BFPFVWN over the original owner

Previous mechanisms of transferring title –
Record of title by private conveyance: a buyer & seller would have copy of the K, third copy deposited with lawyer. This was an inefficient system – land records were scattered everywhere.
Registration of deeds: centralised system that registered the deeds of sale. All copies of private conveyance held, K were copied and stored.
Torrens system: the act of registration focusses on the parcel of land as opposed to previous transactions – land units detailed very carefully, situation ascertainable at a glance. Can acquire land quickly & easily.

The Torrens system & colonisation –
The Torrens system arose in colonial Australia. People wanted to be able to alienate land quickly, current system expensive and time consuming. SA Act: prevent complex & cumbrous land registration that is uncertainly and costly. While facilitative in simulating economic growth, this was often at the cost of native land interests. Native customary interests/land titles are unregistered (Māori customary land cannot be on the register) therefore they are particularly vulnerable under the TS. Forced in order to become registered (which was in and of itself an expensive and time consuming process). The TS necessarily requires legal & beneficial ownership to be separated.

The Land Transfer Act 2017.

3 core principles.

- **Mirror**: the record is a mirror that reflects accurately & completely the current facts material to the title
- **Curtain**: register is the source of the information. Purchasers do not need to go beyond the register and concern themselves with equity/trusts that may exist behind the curtain.
- **Compensation**: state guarantees title. If LTA causes you to lose land, then the state will compensate you.

What can be registered?

- General land
- Māori? Not customary land, Māori freehold registerable. Also register Māori freehold on NLA register.
- Not Crown land, if acquire under the PWA, title is destroyed. State housing exception.
- Interests? Legal interests only + covenants and caveats.

Changes to the 1952 Act?

- directly overruled *Gibbs v Messer* – does not matter if instrument made void by a fictitious third person
- defines fraud – s 6
- Narrows registrar's powers: can only correct clerical omissions
- Judicial discretion granted re ss 55–56 manifest injustice.

KEY SECTIONS –

Section 3 – purpose.

- provide security of ownership – state guaranteed title
- facilitate transfer & dealings with land
- compensate for loss resulting from the system
- provide register of land that describes and records ownership.

section 24 – title.

- title does not pass until registration of instrument

section 35 – priority.

- Priority to be based on registration rather on when the instrument was signed.
- Registered will always be unregistered – 2 unregistered? competing equities. (*Breskvar*)

section 44 – evidentiary effect of documents.

- image of title will can be conclusive

section 51 – indefeasibility.

- Registered titles cannot be set aside
- Registration perfects defects in the vendor's title
- RP gets whatever is noted on the title as absolute, free from everything not noted.
    - exceptions, ss 52–56: fraud, conflicting statutes, in personam.

DEFERRED/IMMEDIATE INDEFEASIBILITY DEBATE.

Under the common law, the registration of a void instrument would give a defected title. This is because it was the instrument that conferred title, and if the title contained defects, registration would not change that. The title would remain defected forever, due to operation of nemo dat. However, under the LTA, as is the emphasis is on the act of registration in providing title, the instrument being registered does not matter. If that instrument is void/voidable, registration, as an act, nevertheless perfects. Registration ensures indefeasibility. Nevertheless some felt that the Torrens System intended to override an instrument's nullity, arguing that the TS only intended to perfect a BFPFVWN's defective title, not to perfect all defects in instruments registered.

- **Deferred** defeasibility: first title – the title gained by registering the void instrument – is defeasible but can be the root to a good title. *Gibbs v q aweMesser,* Salmond's dissent in *Boyd v Mayor of Wellington*
- **Immediate** indefeasibility: purchaser's title is indefeasible. It is the act of registration that confers title, does not matter about the instrument.

DEFERRED?

Gibbs v Messer 1891 (AUS) **NB: s 51(4)(b): fictitious person exception overruled.**

Whether the MacIntyre's registered mortgage against the fictitious Hugh Cameron over what had been Messer's land was defeasible to the Messer's previous position as RP?

Held that because the mortgage document was void – it has been signed by someone who did not exist – registration had not perfected it. Protection of registration under the TS is only limited to those who actually derive rights from the RP.

- Under the [old] LTA, innocent BF purchaser's get good title even if the vendor's title was defective – if HC had been real, mortgage would be indefeasible.
- But there was a no statutory provision - drafting loophole between ss62/63 & 183 of 1952 and prior Acts – that perfected a defective instrument upon registration. Therefore as the Mac's were not transacting on the faith of the register itself, the mortgage was defeasible.
- The duty lies on the purchaser to ascertain the identity of an agent who purports to act for a principal.
- In A-B-C, Macintyre's are B – there was no further transaction. If Mac's had sold the mortgage to C, then C's title would be indefeasible.

Salmond's dissent in *Boyd v Mayor of Wellington*

- Registration cannot perfect a void instrument
- This is because there is a dual requirement of passing title: registration alone cannot pass title. Just like land cannot pass without valid instrument without regisration – NEED BOTH to pass title.
- There must be a distinction between **an imperfect title (vendor's defect – purchaser blameless) and an imperfect transaction (purchaser's defect – purchaser fucked up)**.
    - Under the 1952 Act, s 183 secured the objective for BFPFVWN to not have to investigate history of their title. Statutory interpretation makes clear there is a legislative gap. s 183 implies there is an exception: only that BFPFVWN can perfect a defect title – someone else can't.
- DI is more consistent with the objectives of TS than II.
    - To be sure, TS abolishes nemo dat.
    - But TS was designed to protect the BF purchaser who purchases a defective title – obtains an indefeasible title unaffected by the V's title.
    - perfecting a BFPFVWN's title notwithstanding defects in V's title is different question from perfecting all defects in the instruments registered.
- *Gibbs* is correct: case is not just about fictitious third person, but how registration of a VI does not give good title.
    - There is no difference in principle between a fraudulent signature and someone acting ultra vires.

Elias's approach in *Westpac v Clark*

- Accepts II: mortgage would be valid if it had been registered
- but this does not mean Westpac is **entitled** to have the mortgage registered. LTA directs the registrar not to register void instruments. So the reason why Westpac has suffered loss is not because it wasn't registered, but because it was void.
- whether or not registration confers II does not affect the status of an unregistered instrument. A person who might benefit should it obtain indefeasibility (as through mistake to its status) is not entitled to obtain registration – two distinct things before the act of registration.

Manifest injustice provisions in the LTA.

- While likely to require a very high threshold, the new jurisdiction conferred to the Court under ss 54–56 does somewhat go toward to DD: the Court, if title registered by a void instrument, can find defeasible.
- However, makes clear that Court discretion very limited, existence of forgery/dishonest conduct do not = MI and the MI must not be able to addressed by compensation or damages.
- s 56 makes clear that only applies to B, not C or anyone subsequent. Cannot make an order if transferred to a third person.

Circumstances of acquisition by B
Knowledge of Māori possession in *Beale.*
Failure by B to comply with statute - *Boyd*
If estate or interest is Māori free hold, failure to comply with TTWMA
Identity of person in occupation
Nature of estate in interest – mortgage/FS?
Length of time either party owned/occupied
nature of improvements made to the land
use of the land by A or B – *Boyd,* important war time purposes
special characteristic of the land & significance
c.f. Tangata whenua
conduct in acquisition
B been bad, OR who is more innocent

IMMEDIATE.

Frazer v Walker (PC) confirms II the approach in 1966.

***Assets v Mere Roihi 1905*:** once on the register, title is impeachable. No action can lie against the RP to recover the land, registration is an absolute bar (except for fraud).

- PC don't really consider the DD/II issue. MR argued that as instrument had been void, land never left their hands. No right had ever been secured (*Gibbs*).
- PC confine *Gibbs* to fictitious third person.

***Boyd v Mayor of Wellington 1924*:** applies *Assets*.

- "a transfer having been duly registered without fraud makes title of the registered owner conclusive"
- no need to even consider if the proclamation is void – but even if finding that it is, Council would have a good title as they registered without fraud.

***Frazer v Walker 1966*:** provisions of the LTA (1952) demonstrate RP's title indefeasible once registered, even if registered under a VI.

- registration **itself** vests & divests title (not the incidence of registration).
- anyone - absent fraud, statutory conflict – on register has good title.
- but in personam jurisdiction not impacted.

REGISTRATION AND INJUSTICE.

While registration/II can give rise to injustice, it reflects a conscious decision to choose the rights of a BFPFVWN over a previous RP/occupier. Injustices would arise either way, just had to pick one side. II is a clear line in the sand, the law values certainty. Remember compensation exists.

***Assets v Mere Roihi 1905*:** Cooper had been clearly fraudulent, manipulated NLC process. But the PC considered Assets was not fraudulent. Fraud requires actual dishonesty, constructive fraud is inadequate. Assumes LTA dominant over NLA – mere formality issues. Cannot argue trust.

- Māori lose land despite original alienation being fraudulent

***Beale v Tihema Te Hau 1905*:** Beale was a BFPFVWN. While clear evidence that Burt (original alienator from Māori) had been fraudulent, Simmons & Beale title is unaffected by the that. Fact of notice – Beale knew S had never been in possession & probably knew Māori were in possession - does not make Beale fraudulent. Beale had no knowledge of Burt's fraud.

- Māori lose land despite still being in occupation and original alienation being fraudulent

EQUITABLE INTERESTS AND REGISTRATION.

The nature of unregistered interests

Breskvar v Wall 1971: Although Wall acquired his title fraudulently and on a void instrument, registration – as the act that gives title – nevertheless confers a valid legal interest in the property. The difference is, is that it is defeasible against the original RP. The act of W's registration divested B of any legal interest, therefore B has an equitable interest only. W's legal interest he can pass on, which he does to A before B lodges the caveat. However, A only has an equitable interest because of the caveat.

Competing equities –

- usually time would mean B's interest would prevail.
- Here, different as was B's own fault in giving a blank instrument, which tempted P to commit fraud
- Also, B still owed money.

A's equity wins.

Reconciling *Breskvar* (A being allowed to register his unregistered) & *Westpac?* (W not being allowed to register)
policy?

- A was a BFPFVWN; Westpac is a big bank

Salmond's distinction in *Boyd*: defective title vs defective instrument.

- *Breskvar:* imperfect title, vendor's defect.
- *Westpac*: imperfect transaction, purchaser's defect.
- TS not designed to perfect purchaser's defects
- TS designed to perfect vendor's defects for a BFPFVWMMN

Westpac v Clark 2010: even if something would become indefeasible on registration – such as a void mortgage – does not mean entitled to register to it. There is a distinction between an instrument when it is unregistered, and it's ability to be registered and become indefeasible.

***Greengrowth No 2 v QE II Trust 2018*:** perfecting a noted covenant?
Whether notification of a covenant on the register perfects the covenant, or if it merely notifies thus remaining a defective covenant? Held that a covenant noted on the register cannot be impeached on such 'technical arguments'. Parliament intended for noting on register to be registration, and that immediate indefeasibility ought to apply to covenants, even if defective.

- QE trust established by legislation to encourage & promote open space for the benefit of New Zealanders
- Can enter into open space covenants to protect & maintain land – in 2012 GG purchased a parcel of land which had an open space covenant in favour of QE noted on the title
    - any alterations to the land would have to be agreed to by QE
- trust declined when GG wanted to develop.

GG: covenant, as noted on the register, is incomplete. Refers to a protected area defined by reference to a photograph, but no photograph was ever attached. Covenants can only be **noted** on the register. Unlike registration, notification, as a process, does not perfect the defect. Here, the title is perfected but the covenant remains defective, merely notifed.

- PLA s 307(4), (5): notification does not give the covenant any greater operation than it would have.

Williams J REJECTS following statutory interpretation of the LTA 1952, in which he concludes notification was intended to perfect.

Purpose of s 307: is not to deny the status of RP to a covenant notified.

- When a registered document contains an unlawful provision – e.g. unlawful restraint of trade in a lease – registration does not suddenly make that provision lawful, the Court can still find ineffective.
- s 307 explicitly making clear ("avoiding the possibility of an argument") that notification of such a covenant would "preclude scrutiny of the legal effectiveness of some of its terms".

Parliament would not have intended instruments recorded on the register to be impeached on the basis of such technical arguments.

- LTA 1952 s 33–35 = open space covenant is an encumbrance, therefore by reason of these sections' covenants are intended to be treated the same as a registerable instrument.

BUT: whole purpose of the scheme of the LTA makes clear that covenants are equitable interests only, and are intended to be treated as separate interests. The rationale of why covenants are on the register is to purchaser is aware, not change the nature of them.

- could be distinguished as being reasoning that is not universal – can say William's analysis confined to open space covenants due to them being an encumbrance

Elias CJ REJECTS following statutory interpretation of the QE Act (the legislation which vested in the trust the power to make these covenants). Considers it is **statutory interest** in land which limits the rights of the RP. Do not need to perfect.

- Reg does not confer validity on all terms of a registered instrument.
- But here, the interest GG obtained was always subject to the notified covenant – under the QE act, the trust is proprietor of an interest. Upon it's entry to the register it is not open to GG to challenge the validity.

CA approach had also been to rely on the QE Act, considering Parl had intended to confer indefeasibility onto those open space covenants

- s 22(6) of QE Act: emphatic that covenant shall run & bind with the land. Deemed to be an interest for these purposes.
- Policy: good purpose. Parliament would not have intended for it to be open to such technical arguments.

Elias & CA approaches are therefore distinguishable due to their reliance on the QE Act.

Protecting unregistered interests – caveats.

Caveats: a caveat placed on the title 'freezes' the title, prevents any further changes to the title until it is resolved. **It must be an interest in land in order to place.**

- s 183 of LTA: claims an estate or interest in land, whether capable of being registered; beneficial interest as a result of trust.

Contesting a caveat?

- s 139: notice must be given to the RP of estate/interest.
- s 142: they can then bring a removal claim.

These proceedings are subject to a low threshold: **if the caveat were to be removed, would it detrimentally affect the caveator** (the person who lodged the cav)? Substantive proceedings come later – this is only about removal before the substantive.

***Philpott v Noble*:** not an easement per se but meaning of the clauses within the context of a document as a whole would convey to a reasonable person having all the background knowledge reasonably available to the parties in the situation at the time of the K.

- cl 15: vendor undertakes to provide full width roading together with sewer, power, telephone, water & stormwater/
- **implicit intention to confer a right/ interest sufficient**
- owners have an interest in how to gain access to their property from the main road – legitimate concern that if it were removed would detrimentally affect the caveator.

Example of low threshold.

But this is still some standard: ***PVG v GP96.***

- PVL RP of land – building unoccupied due to earthquake
- GP96 (company associated with PVC) has an unregistered lease (had a no caveat clause)
- PVG has a registered mortgage (entered into **before** lease w GP – entered into an agreement to sell.
- GP lodge caveat

Held that the caveat cannot remain.

- PVG are not bound by the lease: it was entered into later in time than mortgage and no consent was sought from PVG
- nature of mortgage: confers an indefeasible title immune from adverse claims not registered prior to the mortgage
    - *Hinde*: even where a caveator may show an arguable case on a mortgagee sale where the **mortgage constitutes a prior interest, the caveat will usually be removed because the caveator's claim is against the mortgagor's estate, and that estate is subject to the mortgagee's power of sale**.
- no detriment to remove – premises had not been occupied for 8 years.
- Relevance of the no caveat clause? Does not prevent a caveatable interest from arising, nevertheless remains relevant in lowering the threshold
    - Ruiping questions this.

Lapse?

- s 143: application for caveat to lapse. Caveator must respond within 10 working days that it should not lapse.

EXCEPTIONS TO INDEFEASIBILITY.

Some Acts are express:
PLA s 8: the PLA is subject to the LTA
PRA s 4A: every other Act is subject to this Act. The PRA will override the LTA.

Statutory exceptions/conflict.

s 51(3)(b): title subject to any enactment other than this Act that overrides or limits the title.

When two acts conflict, Court needs to resolve them: policy choice; public interest.
The approach needs to be a holistic assessment of Parliament's intention (*Miller*). *Warin*: "need for exceptions to indefeasibility to be clearly expressed by the legislature" – implicit OK, but needs to be clear implicit?

PUT STATUTES SIDE BY SIDE – say that is ultimately a policy choice for Courts to decide.
Legislative intent (including history) – *constitutional dialogue.*

- *Housing Corp 1988*: MAA vs LTA. it was important that Parliament had amended the Māori affairs act in 1967, as this was after the decisions in *Boyd* and Walker. Therefore, Parliament had ample time to overrule the decisions if they had intended to do so.
- *Warin 2008*: TTWMA s 126 vs LTA. TTWMA had been enacted after *Housing Corp* and parliament would have been aware of the need to be explicit.
    - To be sure TTWMA purpose is to retain Māori land in Māori possession. But s 126 nevertheless contemplates that Māori freehold land can become general.

Policy factors –

- *Housing Corp*: sections of MAA are merely operational/facilitate admin. There is no purpose in them that changes substantive property rights.
- *Warin:* BFPFVWN would never be able to obtain good title if defeasible against MLC records – inconsistent with fraud exception.

Other factors –

- **precedent?**
    - *Housing Corp* considered *Breskvar* (Stamp Act) & finding that statutory breaches do not override the LTA
    - does not refer to *Assets* – but *Assets* did assume that LTA overrode NLA, did not analyse
- **practicality?**
    - ***Warin –***
        - emphasised how LTA register better than the NLC register. Better to have one dominant register – curtain principle
        - if Māori land was defeasible, may be hard for Māori to secure mortgage (Law Com)
        - Māori beneficial owners are not disputing. Defendant amicus curae.
- conflict of laws rules?
    - specific > general; later > earlier.
    - but *Housing Corp* emphasises that these are mere guiding tools.

Miller v Minister of Mines: PC considered that as the mining interest was not a registerable instrument, therefore the grant is independent of the LTA. Mining Act was intended to be its own separate code.

- **do not need an express provision to override – it can be by proper implication.**
- Reasoning in *Miller* not super relevant as LTA confirms it does not matter whether an interest is or is not registrable.

Housing Corp v Māori Trustee: 2 mortgages, HC mortgage defective – MLC did not endorse the mortgage, therefore the MMA was not complied with. But HC mortgage registered under the LTA. HC ask MLC to register mortgage, MLC decline. HC apply for JR.
Warin v R-G of Land 2008: W bought land from Māori trustees, there were breaches of the MLA (needed consent of all beneficial owners & first right of refusal to preferred class of alienee). 10 years later tried to sell, potential purchaser found out Māori land. LTA records inconsistent with MLC records.

- 126 of TTWMA states that no instrument can be registered unless instrument has been confirmed by the MLC.

does s 126 override the LTA?

- while s 126 directs the Registrar not to register an instrument if not confirmed by the MLC, **the section stops short of declaring that such a registration would be void.**
- Yes the purpose of the TTWMA was to retain Māori land in Māori possession but the existence of s 126 contemplates that Māori land will sometimes become general freehold land.
- LTA/TTWMA interface needs "legislative intervention"
- acknowledges Tangata whenua, land as taonga / injustices of *Beale* but considers they are not relevant. Māori beneficial owners do not content W's right to sell.

LTA AND EFFECT ON MAORI INTEREST?
Assets; Beale: Māori customary interest not able to be registered, subordinate to registered. Unjust.
Housing Corp (MMA); *Warin* (TTWMA): but even now, hard to argue due to Parliament's lack of express intent in overriding.
TTWMA reference in MI sections: requires a void/voidable instrument, but still biggest indicator so far. Unless there is a C.
Warin: need legislative intervention
Law Com: very big job
indefeasibility clear line in the sand at the moment. If allow an exception beyond that – could complicate.

Fraud.

s 52(1)(a): title of the estate or interest acquired through fraud on the part of a RP (or their agent).

Acquired through?

This means that there can be no supervening fraud – that is, fraud that occurred after the RP became the RP. Must be fraudulent at the time of transaction.

- *Harris v Fitzmaurice* (B): fact H found out it was a 5-year tenancy after the purchase, subsequently challenged, is insufficient. H, at time of purchase, despite thinking it was a weekly tenancy, nevertheless wanted to honour that.
    - Can question this: H lived next door, had known F had been there for awhile. Is it really reasonable to think F was on a weekly lease. However, **this argument would be at best constructive fraud (something you should have known).**
- Timing is the difference between *Harris* and *Loke Yew*: while both purchasers gave an undertaking to protect unregistered interest. But *LY* had an intention defeat before the registration. Whereas, *Harris* made the undertaking based on a mistake belief regarding the unregistered interest.

Fraud?

section 6 –

(1) forgery or other dishonest conduct

Assets: actual dishonesty – subjective. Constructive not enough. Not enough to say that might have found fraud if had been more vigilant / made more enquiries. However, failure to act on suspicion might be fraud if it can be shown his suspicions were aroused and he abstained from making enquiries because feared of learning the truth.

wilful blindness = suspicion has been aroused. RP must know of fraud or irregularities – or suspicious of such – by someone else.

BUT D&S CA 2007: "wilful blindness to the lack of proper attestation could amount to LTA fraud (even without any suspicion of forgery) – *talking about how the lawyer had been wilfully blind regarding the lack of proper witnessing.* (Obiter)

Beale: fact Beale knew Māori had an unregistered interest not enough – would need to know of Cooper's fraud.

Harris: adopts *Assets*. issue of fraud "a pure question of fact".

Gibbs: fictitious third person
Assets: Cooper manipulated NLC process.
Beale: Burt conspired with two registered Māori owners to manipulate NLC process.
Frazer: Mrs F forges Mr F signature
Breskvar: blank memorandum of transfer
Westpac: fake Mrs Fenech signature
Loke Yew: G lies to E so E signs
Harris: failed – fraudulent to have undertaken to protect lease
Efrstratiou: knew price undervalue, quick speed of sale, did not inspect, would allow Mr to continue living in it.
Dollars: Nathan forging parents signature
Bahr: failed – T despite undertaking to protect B's promise with N, refuse to do so
Duncan: failed – D not fraudulent in M executing the mortgage

PC Waimiha in ***Bahr:*** must have a "designed object to cheat". (HIGH THRESHOLD)

CA Waimiha in ***Estratiou:*** whether the purchaser knew enough to make it his duty as an honest man to stay on his land.

N

(2) against –

a. the (previously) RP of an estate or interest – Type A

b. owner of an unregistered interest IF RP - Type B

i. **knew (subjectively) or was wilfully blind to the existence of an unregistered interest;**

TYPE A – *Gibbs, Frazer, Breskvar*
TYPE B – *Loke Yew, Assets, Beale*

Assets: Not enough to say that might have found fraud if had been more vigilant / made more enquiries OF THE EXISTENCE OF AN UNREGISTERED INTEREST . However, failure to act on suspicion might be fraud if it can be shown his suspicions were aroused and he abstained from making enquiries because feared of learning the truth.

BUT D&S CA 2007: "wilful blindness to the lack of proper attestation could amount to LTA fraud (even without any suspicion of forgery) – *talking about how the lawyer had been wilfully blind regarding the lack of proper witnessing.* (Obiter)

Efratsiou**:** fact E knew the price was undervalue, the speed of the sale, E did not inspect and would allow jilted husband to continue living in it = wilfully blind.

= arguable if need to have suspicion of an unregistered interest in order to be wilfully blind.

ii. **intended for the registration to defeat the unregistered interest.**

Bahr.Waimiha*:* not enough to know that your registration would defeat the unregistered interest. must have an intention to cheat.

How can you have intention to defeat the unregistered interest if you do not even know of the existence of the unregistered interest (c.f. (i) including WB).

(3) does not include constructive fraud

Efratsiou? There was no conclusive evidence E knew Mr G or knew about Mrs G, or Mrs G unregistered interest. Are the four factors just going to constructive fraud – RP would not have purchased.

ME: is this because of the test they applied (CA *Waimiha*, not the PC *Waimiha*).

On the part of the RP or their agent?

BRINGING HOME THE FRAUD/WHEN NOT AGENCY –

Efratsiou: can you bring home the fraud to the RP? What did the RP know?

Mr G (husband) – clear fraud.

- G was a constructive trustee for his wife (knew $ owed to her)
- selling the land clearly intended to defeat's wife equitable interest
- spent the proceeds, deprived wife of the value of the property.

RE Agent – party to the fraud.

- knew the problem's between the couple; the fight (had paid for the husband's flight)
- knew of the wife's interest in the land
- knew the house's value and knew offering it undervalue

Mr E – the test applied did not require actual knowledge of Mrs G adverse right, but enough for Mr E (in his duty as an honest man) to know enough to enquire further, refrain from purchasing or purchase subject to the rights

- price: knew significantly undercalue
- speed of sale: 3 days – very fast
- inspection: E did not inspect the house
- continued living: E allowed Mr G to continue living there.

= E knew enough.

Application of this?
R: more facts are needed. *Harris* emphasised how fraud is a matter of fact and subjective. But this analysis looks like we are finding E fraudulent as a matter of circumstances (objectivity/RP in shoes of E).
ME: case emphasises the "extraordinary case" – novel facts. easy to confine to the specific facts. ALSO, LTA requires an intention to defeat. Would be very hard to satisfy this on these facts as no evidence E knew Mr G, or Mrs G, or the existence of Mrs G unregistered interest.

AGENCY – HAS D GIVEN FRAUDSTER SOMETHING TO DO ON THE FACTS?
Dollars & Sense -

1. did D&S make it R's task to obtain the execution? i.e. did they create the agency and prescribe the scope?

Yes: tasked with getting the signature, obtaining the certificate of title, insurance policy document, fulfilling statutory duties of initial disclosure, statement of covenantor. All solicitor's communications went via Rodney.

- There is a distinction between acting as an agent and being a mere conduit for delivering documents
- This is a finding of fact – what did the fraudster have to do on the facts?

2. was the act (forgery) committed within the agency?

Yes: while D&S did not know, nor did they authorise the forgery but this must be determined in a commercially realistic way. Here the act of forging parents signature **was so connected to the task Rodney had been given to perform**

- enquiry is into whether the scope of the task fall into what the agent was engaged to perform – **sufficiently close connection?**
  - look to the nature of the task to be performed
  - and how the use of an agent for that purpose created a risk for the third party
- there can still be scope even if just for the benefit of P, even more so if for the benefit of P and A (as it was here)

3. imputation of knowledge – does the P need to know?

This is not required as law: liability arises because P is **vicariously responsible**.

- imputation is therefore wrong for policy reasons: principals should be checking their agent's conduct
- practically most principals' won't know of the agent's fraud.

4. policy and corporate practices?

- lenders should be following good practice
- does not undermine TS – agency fraud has never been allowed
- should bear their own loss

In personam (for restoration of title/interest).

In personam is not an assertion that the title is defective, or is in anyway challenging the title. In personam challenges the individual – operates in a separate sphere but in this context is seeking the restoration of title/interest, therefore interacts with TS. It is not really an exception, just acknowledge they still exist in relation to getting an interest back.
LTA **does** change remedies available, in particular the order of specific performance. If B, cannot rest on your right as RP to defeat an SP claim. But if there is a C, cannot order SP – can only get damages from B.

1. claim cannot be inconsistent with the TS.

Cannot argue something settled or addressed by the LTA. An IP claim founded on nothing more than the invalidity of the instrument or underlying transaction would be inconsistent with the indefeasible nature of RP title.

- bare fact instrument is forged is not sufficient to establish an IP claim.
- Need something more than this to point too

***Nathan*:** unconscionable to give Rodney the authority? unconscionable to give Rodney the opportunity to forge.
Duncan: unconscionable for estate to enforce the mortgage.

- more required than the act of registering knowing there is an unregistered interest, more than knowing there is an irregularity in or relating to the instrument.

2. Unconscionable conduct by the RP.

Unconscionable conduct is a lot lower threshold than fraud: unconscionable is something that is contrary to your good conscience.
***Taitapu*:** equity would consider it unconscionable for one to hold onto something they got by mistake. On the facts, D mistakenly received P's right to the minerals. This creates a right in equity outside of the LTA – unconscionable to keep mineral rights.
***Bahr*:** B have an equitable interest based on the N-B K. Mere notice of the N-B K might not be enough. However, B also has rights against T, because T **had undertaken to be bound**.

- Unconscionability would not be established because of mere notice, but here because there was an undertaking, that was unconscionable.
- Therefore there is an obligation on N to compel T to transfer the land back to B

Duncan: Duncan acting unconscionably in making a fraudulent and illegal K. This is a K that therefore would be unconscionable for the estate to enforce against M.

- Equity will not permit transference of loss where the prior conduct of mortgagee made it unconscionable to use legal title in this way
- Question of FACT & DEGREE
    - Was D really unconscionable? M wanted the mortgage. CA focussing on the unconscionable result, as opposed to unconscionable conduct.

***Nathan (CA)*:** D&S acted unconscionably – if a lender knew a borrower *might* exercise undue influence to secure a guarantee & failed to do anything about it – unconscionable in the context of sureties law. Bank gave R the chance to forge.

- public policy: Court willing to enforce standards of conduct on financiers taking security for loan (loan sharks).
- financiers who do not need deal with sureties directly **therefore take the risk,** particularly when they know the surety is not receiving any legal advice.
    - Young dissent – Yes, should not have given R authority to obtain the signature. but that was mere neglect. Neglect cannot constitute unconscionable.

3. recognised cause of action.

Usually will be unjust enrichment.
***Assets*:** claim cannot be b/c they are rival claimaints.
***Taitapu*:** unjust enrichment for D to have the minerals – that is not what agreed to with P.
Bahr*/*Duncan: no clear claim of action established. (breach of trust?)
***Nathan (CA)*:** unjust enrichment for D&S to exercise the mortgagee sale.

- but its not unjust enrichment – D&S gave proper $ to R, they should be able to get that back?
    - Young dissent – no cause of action, no misrepresentation, no contact between D&S and N.
    - N can get state compensation; D&S would get nothing.
    - **Majority taking instrumental approach.**