LEASES.

Fixed term; tenancy at will (K); implied statutory tenancy (210 – holding over, implied period); express periodic (residential – maxium duration not certain, rolls over); perpetually renewable. **Pt 4:** fixed or periodic term (event, 212; short-term, 207);certain premises, exclusive possession, formalities (24); rent? ***Fatac:*** effect of the document, not the intention of the parties. lease/license turns on substantive right; not the label. **Landlord/others right to entry?** L general right of entry, stockpile agreement w A. **Terminology in agreement/terms of agreement.** 'License' not conclusive, only useful insofar as confers EP, **but no duration** in agreement. **Restrictions on use?** some restrictions = OK. **Proportionate share of land**? if agreement talks about entire piece of land, and only have EP over part (***Waimha,*** milling trees) = no EP. But if agreement only talks about that one part. Not critical that it was only one portion, but portion needed to be clearly defined. ***Brooks****:* key but no **control** over electricity/front door.

Assignment: dual nature. **New lessor: can enforce all covenants, inherit rights & obligations of the K -** s 231& 233 burden of lessor's covenants, benefit of lessee's covenants run with the land. **Original lessor:** PoK still applies. remains liable for covenants. **New lessee:** s 240(3); pay rent, enforce & observe all covenants. **Original lessee:** s 241: remains liable for rent; all covenants. variation will not be liable unless the lease provided a mechanism for it. right of renewal; 'new grant' (*Gibbons*) vs extension. ***Fell:*** statutory holding over period not included, not bound by the tenancy if it goes beyond the K. Only covenanted to pay for the statutory period. ***Cluttons*****:** stat period included in term, but only liable for K rent. Rent had been imposed based on the tenurial relationship between assignee – lessor, not to do w HD.

Rights and obligations: sch 3 sets out, 218 abolishes CL, 279 can vary.

Covenant of Quiet Enjoyment. (1) substantial interference with ability to use premises. ***Kalmac*****:** demolition caused noise; ***Nordern*****:** shit & urine; ***Southwark*****:** noise. **(2) control/lessor responsible.** ***Nordern*****:** interference so substantial ordinary position overridden. **(3) cannot be prospective.** ***Southwark:*** pre-existing condition. **(4) remedy?** no auto cancellation. substantial? damages or injunction. **Non-derogation from grant. (1) control/lessor responsible. (2) ascertain purpose. (3) alleged activities rendered "materially less fit" (*Nordern*)/activity frustrated purpose that lessor knew lessee was going/likely to use premises for?** Substantial interference ≠ physical interference, BUT Substantial interference ≠ interference with amenities/inconvenience. HOWEVER, interference does not need to be so substantial that it renders the purpose of the lease impossible. question of fact and degree. ***Kalmac*** lease intp that building would remain whole; ***Coad***: necessary implication of lease.

Covenant to repair/commit waste. s 13: return to condition was in. well-established this can include repair. **Standard of repair is what reasonably minded tenant would do in circumstances (*Proudfoot*). tenant of the particular class; at time of grant. 233:** no good condition unless context says otherwise. ***MO*****:** context of land: used to be rubbish dump, then oil. "keep" may oblige more than maintenance of status quo BUT no transformative change. "good order/clean & tidy" usually in the context of residential, could not incl subsoil.

Termination: expiry, surrender, occurrence of determining event, break clause, notice to terminate, merger, cancellation. Lessor? 244–264. Lessee? non-derog/QE CCLA.

RCB: cannot terminate on default, must be **explicit**. **interpretation:** cl 25 merely provided method by which insurance $ to be paid. **purpose:** not just confined to worship in unit A, purpose can change. **nature:** 999 years, unit title = very valuable.

Frustration? ***RCB***: 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.** Going to be a high threshold, *national carriers*, crown offer just offer.

EASEMENTS. ss 291–300.

Easement or mere personal right? **(1)** existence of DT/ST (291: EiG).

(2) easement must **accommodate** the DT: benefit must attach to the land: language of agreement. must beneficial to the land, not the person. not enough to show value has inc.

(3) DT & ST different people (except - LTA s 108(3))

(4) easement must be capable of being a grant. Are the rights wide/ambiguous; inconsistent with the ownership of the ST; mere right of recreation? ***Re Ellenborough***: being able to use park not a mere right to wander – connection with DT. ***RV:*** recreational incidental, health&wellbeing important. Recrational OK if provide utility to DT.

The SCOPE of the easement is very important. Court will interpret narrowly, do not want to increase burden on the ST. Exclusively determined by the language of the deed.

Barry: vehicular access only, greater right argument rejected due to deed.

Peacock: even if no practical consequences on ST burden, still will not find outside the deed.

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. ***Harris.***

Jobson: purpose of easement important, cannot use for another purpose.

Court jurisdiction under the PLA.

319, special order when carrying out work. 321, order when wrong place structure.

ss 326–33: landlocked land. 326: landlocked = NO RA; RA = PA that is reasonably necessary for the use & enjoyment of the land**. 327:** order. **328&329:** discretion & matters.

Landlocked land.

(1) is the land landlocked? value judgment for Court taking into consideration all the evidence/Fact specific.

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

Squally**:** red & blue roads depend on the goodwill of the owners, probably need both physical & legal access. Purple road insufficient as not PA. ***Kingfish*** rejects requires access over land; rejects requires access without external assistance, inconvenience not enough - gives an example of a paper road. 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 irrelevant here.

Should not depend on whim of adjoining owner

Squally: red & blue roads

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 – Location, 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

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 329).

Nature & quality of access when applicant purchased the land - ***Murray; Kingfish***

Circumstances under which the land has been landlocked

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 – is the offer reasonable?

Hardship to either parties?

Kingfish**:** neighbours' would have to put up with privacy, traffic, security, maintenance etc.

3. if grant, on what condition? split costs etc.

Verification, modification, rectification, extinguishment.

Rectification: need evidence of clear, shared intention to show consensus.

Davey**:** No CI, equitable remedy - D's fault he did not check. ST rights.

Modification - 316–317.

Harnden: **(1) modification or creation of new easement; (2) ST application; (3) scope of the power.** (1): modification – easement composite whole; (2) Extinguish part F is fine (as DT&ST), but not part H as C is the only ST; (3) can enlarge.

Davey: **not the ST.** restrictive covenant argument (cannot go beyond): rejected. "easement" in PLA includes covenants in easement agreements, but must look at **what actually bound by. D here is bound by cov's in regard to maintenance so could modify those, but not the actual scope.** purpose of jurisdiction is to relieve burden.

COVENANTS. covenantor: carries burden; covenantee: carries benefit.

AT CL**: BENEFIT** could run w land if (1) intention to run w the land; (2) touch & concern land of covenantee; (3) covenantee has legal estate; (4) new covenantee has same estate.

BURDEN could not run – orthodox K perspective.

AT EQ: **BURDEN** – ***Tulk*** **–** if promise is **negative in substance (restrictive covenant)**, will run with if covenantor has notice. (1) covenant to be negative; (2) cov must benefit the dominant land – requires a DT, touch and concern; (3) common intention to run w land.

AT PLA: 301–303 - no distinction between positive or negative/restrictive covenants at law anymore. BENEFIT & BURDEN of ALL covenants. LTA: can note, whole world knows. (1) can be positive or negative; (2) covenant must benefit the DT? 307: CiG. **but still need to touch & concern.** (3) intention assumed unless contrary intention.

Modification - 316–317: ***Jansen:*** Herne Bay; adding another storey. purpose = protect view

Interpreting – purposive approach. ***Big River Paradise*** purpose = prevent development, preserve amenities. Not about RMA definition but effect of what is trying to do.

Covenants in gross? when there is no DT: **promise not to use for meat processing.** promise to burdens land but person receiving the benefit is receiving it personally?

2 ways they can be enforced: **registered as an encumbrance** (ANZCO); **per se** under LTA 242 inserted into PLA ss 307 A–F. Encumbrance? can be registered, functions as a mortgage (power of sale) but only enforceable against occupiers. Per se? equitable only (remedies??) but enforceable against anyone. *ANZCO* rejected per se because there is no benefit **to the land** in a CiG. AFFCO liable for I breaches, but I is not liable themselves.

MORTGAGES.

A 'mortgage' carries two agreements – **loan agreement:** covenants to repay the loan, perform any obligations. Personal covenants/K. **mortgage agreement:** 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. THEY ARE DISTINCT.

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:*** Mortgage, although illegal = indefeasible. BUT the K was illegal, therefore the covenants in the Kare 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. Even if the mortgage had been registered, would have secured nothing: **'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. could be diff if loan agreement had been incorporated; or if had been fixed sum (prop could been charged up to the value).

Equity of redemption: A mortgage must be redeemable. If it is not, that will be a clog. s97: mortgagor entitled to redeem anytime before it is sold (incl agreed interest).

Illusory: looks like right to redeem, but there isn't. ***Fairclough:*** 6 weeks before end of lease.

Postponement: is the period too long. BUT ***Knightsbridge:*** security of commercial K.

Doctrine of RoT: should be able to enter into new transactions. ***FC:*** only buy L's beers.

Option to purchase: ***Jones:*** cannot obtain an option in the same transaction.

Collateral advantages: ***Jones:*** 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? 50% shares = clog. One ongoing transaction. **it is the essence of a mortgage 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.**

Oppressive mortgages: Court can rewrite mortgages under 118 of CCRA. jurisdiction is conferred under 120. harsh, unjust burden, unconscionable or breach of reasonable practice.

GE Custodians: court can determine what is reasonable standards of commercial conduct, wider than unconscionability.

What knowledge did GE have of B's situation? knew they were old but listed themselves as investors, loan was ordinary, signed and said they would be able to pay. subsequent loans still had more $ than loan (930 to 630). did not know about agreement with BC. **most importantly, knew they had a lawyer.**

lender is entitled to assume lawyer is giving good advice, the presence of a lawyer discharges the need to make an enquiry even if otherwise would be suspicious.

CA? incorrect application of HC finding of fact.

Power of sale: 176 mortgagees are under a duty of care when mortgagee sale. ***Applefields.***

What is the duty? get true market value. but only triggered once have made the decision to sell, not imposed while deciding whether want to sell. no general rule that M must take advice or market the property over a particular period of time, but must take all reasonable steps. Burden lies with mortgagee to prove.

Application in ***Applefields?*** 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 ; factual finding that D had been independent (AF alleged conflict with H).

MANIFEST INJUSTICE? 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 freehold, 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

LTA AND EFFECT ON MAORI INTEREST?

Assets, Beale. Housing Corp/Warin – still not fixed. Need leg intervention. MI provision? Law Com very big job. indef a nice clear certainty at the moment.

TS/INDEFEASIBILITY.

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 title. 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; nemo dat abolished; favours BFPFVWN; details land as opposed to K's. Previously? record of title by private conveyance; deed registration system.

THE LTA 2017: overrules *Gibbs;* defines fraud; narrow's registrar's powers; MI.

the three principles – Mirror (reflects accurately), curtain (reg source), compensation.
Key sections – 3, 24, 35, 44, 51, 52, 55–56.

Deferred?
Gibbs v Messer 1891 (AUS) **NB: s 51(4)(b): fictitious person exception overruled.**
Mortgage document void, registration could not perfect. If HC had been real, would be perfected. But there was a loophole in old statute - ss62/63 & 183 – which meant registration did not perfect a void instrument. Mac's not transacting on faith of the register.
Salmond's dissent in *Boyd v Mayor of Wellington*: registration does not perfect a void instrument, there is a dual requirement of passing title. distinction between **an imperfect title (vendor's defect – purchaser blameless) and an imperfect transaction (purchaser's defect – purchaser fucked up)**. However, this was a more plausible intp under the 1952 Act.
DI more consistent with TS? TS was designed to protect the BFPFVWN. perfecting a BFPFVWN's title notwithstanding defects in V's title is different question from perfecting all defects in the instruments registered.
Elias's approach in *Westpac v Clark*: 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: new jurisdiction but high threshold? TBC.
Immediate: confirmed by PC *Frazer* in 1966.
Assets 1905: once on the register, title is impeachable. 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 1924: applies *Assets*. 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: registration **itself** vests & divests title (not the incidence of registration). wife forges husband's signature, R's mortgagee, power of sale to W (BFPFVWN). did not matter if DI.
injustice? If a clear line in the sand, law values certainty.
Assets 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 1905: Beale was a BFPFVWN. While clear evidence that Burt = 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 Burt being fraudulent

Equitable interests and registration.
Nature of interest? Even if fraud, still have a legal title to pass on. Just not indef.
Breskvar: W gains LT through reg, B loses his LT, EI only. Would be able to get back LT but for A's interest. **Competing equities** – time ordinarily but here fault.
Westpac: even if something become indef on reg, does not mean entitled to indef. There is a distinction between an instrument when it is unregistered, and it's ability to be registered and become indefeasible.
Reconciling? B = vendor's defect; W = purchaser's defect. + policy.
Greengrowth No 2: **perfecting a noted covenant?** GG = covenant is defective, refers to a photo that is not attached. cov is not perfected by reg, merely noted. Held that a covenant noted on the register cannot be impeached on such 'technical arguments'. Parl intended for noting on register to be registration, and that II ought to apply to covenants, even if defective.
William J approach: stat intp of LTA 1952 s 33–35 = open space covenant is an encumbrance, covenants are intended to be treated the same as a RI. Gives example of reg not making an unlawful cl lawful, court can still find ineffective.
BUT: whole purpose of the scheme of the LTA makes clear that cov = EI only,intended to be treated as separate interests. Rationale = purchase aware, not change nature.
not universal –analysis confined to open space covenants due to them being an encumbrance.
Elias approach: stat intp of GE Act. **statutory interest in land**, don't need to perfect. 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:** s 22 implies cov will run w land. good purpose.
Approach specific to the covenant.
Protecting unregistered interest?
Caveats: a caveat placed on the title 'freezes' the title. must be an interest in land
s 183 LTA. Contesting: **s 139 & s 142.** 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 = prop interest. **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.
PVG v GP96: PVG are not bound by the lease: it was entered into later in time than mortgage and PVL (RP) did not seek consent from PVG. no detriment to remove – premises had not been occupied for 8 years. Relevance of the no caveat clause? J: relevant, R: questions this.

nature/power of mortgage of mortgage – estate subject to mortgagee's power of sale.
Lapse? s 143 -must respond within 10 working days that it should not lapse.
STATUTORY CONFLICT.
s 51(3)(b): holistic assessment of Parliament's intention (*Miller*). Put side by side, ultimately a policy choice. BUT *Warin* – clear expression of intent to override LTA.
Legislative intent (including history) – *constitutional dialogue.*
Housing Corp 1988: MAA vs LTA. amendment 1967 was after the decisions in *Boyd* and *Walker*.
Warin 2008: TTWMA s 126 vs LTA. TTWMA had been enacted after *Housing Corp* and parl = knows explicit. purpose to retain yes but s 126 contemplates transfer.
Policy factors –
***Housing Corp*:** sections of MAA are merely operational/facilitate admin.
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* – does not refer to *Assets*
practicality?
Warin – LTA register better than the NLC register. 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 *HC* that these are mere guiding tools.
*Miller:*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.**
s 126 TTWMA/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. purpose but contemplation.** needs "legislative intervention".
IN PERSONAM.
IP is not an assertion that the title is defective, challenges the individual – operates in a separate sphere but in this context is seeking the restoration of title/interest, therefore interacts with TS. 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. TEST FROM XX
(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.
Nathan: unconscionable to give Rodney the authority? *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: something contrary to your good conscience.
Taitapu: unconscionable to receive minerals.
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**.
Duncan: a fraudulent and illegal K unconscionable for the estate to enforce against M. (can q)
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. **policy/financiers take the risk.**
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.
Bahr/Duncan: no clear claim of action established. *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.
FRAUD.
s 52(1)(a): acquired through fraud on the part of a RP (or their agent).
(1) Acquired through? be no supervening fraud – must be fraudulent at the time of transaction.
Harris v Fitzmaurice (B): H, at time of purchase, despite thinking it was a weekly tenancy, nevertheless wanted to honour that. 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, **= constructive fraud.**
Timing is the difference between *Harris* and *LY:* 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.
(2) Fraud? s 6
Type B FIRST: (i) **knew or wilfully blind to the EXISTENCE of an unregistered interest.**
***Assets*:** not enough t say vigilant, must have had suspicion that you abstained from making enquiries on for fear of knowing the truth. But *D&S (CA) obiter* wilful blindness to the lack of proper attestation could amount to LTA fraud (even without an suspicion of forgery) &
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.
(ii) intended for the registration to defeat the interest.
Bahr.Waimiha: not enough to know that your registration would defeat the unregistered interest. must have an intention to cheat.
A/B: (1) forgery or other dishonest conduct
Assets: actual dishonesty – subjective. Constructive not enough. Wilful blindness? while *Assets* considered wilful blindness - failing to act on suspicion because you feared from learning the truth - as part of the fraud definition, the LTA refers to wilful blindness only in the context of fraud against an unregistered interest. However, what is being referred to in s 6(b)(i) is wilful blindness *as to the existence of the unregistered interest*. Therefore it could still be that being Y wilfully blind to the existence of X's dishonest conduct in securing Y's interest could be sufficient to bring home the fraud.
***Beale*:** fact B knew Māori had an unreg interest not enough – would need to know of C's fraud.
Harris: adopts *Assets*. issue of fraud "a pure question of fact".
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 and make further enquiries before purchasing.
A/B: (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).
(3) 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
RE Agent – party to the fraud: knew the problems, wife's interest, value of the house
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; speed of sale; inspection; continued living
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.
ME: 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?
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, etc. mere conduit distinctions = finding of fact. what did F have to do OTF?
was the act (forgery) committed within the agency? Yes: must be determined in a commercially realistic way. sufficiently close connection: nature of task, creation of risk. 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).
imputation of knowledge – does the P need to know? NO
liability arises because P is **vicariously responsible**. practically most principals' won't know.
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.
Gibbs: fictitious third person; *Assets*: Cooper NLC *Beale:* Burt NLC process; *Frazer*: Mrs F forges Mr F; *Breskvar*: blank mem 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; *D&S:* Rodney; Bahr: T undertaking; *Duncan*: scam but no fraud inter se.