

LEASES AND LICENCES

Lease = an interest in land – possessory property interest

Licence = not interest, permission to be on land/use land for specific purpose.

Dual character: have the contractual relationship – PoC

- Also have the tenorial/property relationship – PoE.

TEST FOR LEASE – *Fatac* [40]-[41] (needed licence for no tax)

Say nature of interest – who has PoE and PoC?

1. Fixed or periodic term

- This goes along w exclusive possession - *Fatac*

2. Certainty of premises

- Usually need to have exclusive possession over the whole property.

3. Exclusive possession – cannot be terminable at will of lessor

- Orthodox = EP but recently ppl have said look to parties' intention.

- Also need some intention to be legally bound

o Paying rent is relevant to intention but is not itself determinative

o Restrictions not themselves negate a tenancy relationship.

- Can't kick you out based on some other legal relationship – e.g if you are an employee and you being fired means you can be kicked out.

- **EP turns on the effect of the grant** – this is a matter of interpretation so intention can be brought in here ONLY.

o *Dominion Budget Rent A Car* – look at dominant purpose – is EP incidental to this? But this is problematic re commercial leases.

- *Fatac* a licence because:

o No EP – V small area – Didn't pay rent – LL had general access right

EFFECTS OF ASSIGNMENT

City of London Corp v Fell (QB) – company went bust w/o paying rent

- Nourse LJ: Contractual liability was coterminous w the term so could not be liable in this respect for any rent – statutory hold over period not contemplated in the instrument. No PoC bc contract over.

Cf Herbert Duncan: contract stipulated hold overs so liable.

o No PoE either.

o AT CL: Assignee is only bound by covenants that 'touch and concern the land' – this is NOT about personal obligations.

PLA AMENDMENTS TO THIS:

- S 231(1): new owner has benefits and burdens of original lessor

- S 233: Lessor's successor in title can enforce lessee covenants.

- **DO NOT NEED COVENANTS TO TOUCH/CONCERN LAND**

o S 240(3): assignee must pay rent/follow covenants

o S 241: assignor remains liable to lessor for payment/covenants

o **This only applies where assignment after 01/01/08 b PLA then.**

OBLIGATIONS + IMPLYING TERMS

BQE: Implied by tenant/landlord relo– implied by PLA sch 2

- Not absolute = landlord does want they can reasonably not to interfere.

1. Was there **substantial interference** w the tenant's possession?

- *Kalmar* (bakery): court looked to the **instrument to imply term** of not destroying the building at all.

o Partial demolition of building breached implied term

o Enjoy = exercise of rights and having full benefit

o Don't need physical interference

2. Was that by landlord or those claiming under him?

3. Is it attributable to the previous conditions of the premises (*Southwark*)

3. Remedy: damages, injunction, cancellation where justified.

Non-derogation from grant – implied by PLA sch 2

Tram Lease – [26]: implied grant from the **context/circs**.

1. Activity causing DOG occurs on the land that the lessor has

2. Activity done/permitted by lessor or in their control

3. Interference needs to be substantial

- Pulling down wall in *Tram Lease* – exposed to weather etc.

4. Activity needs to frustrate the purpose for which the lessor knows lessee is taking the premises or is likely to use them

- *Nordern*: Frustration is not impossibility = 'materially less fit'

o Where premises used for illegal/immoral way then there is irredeemable 'stigma'.

o What is in the grant is **both from the instrument and implied covenants**

o **Changes the CL: where LL authorises, consents or participates in activities that may be a substantial interference, they can be liable** – if they are aware of problem and idly stand by – 'wilful b'

- *Tram Lease*: if the wall was pulled down and building collapsed, purpose frustrated.

Mobil Oil: the oil contaminations – good + tenantable repair:

- To 'keep' a property does not necessary mean maintaining it – BUT TRANSFORMATIVE CHANGE.

- *Proudfoot*: such repair as, having regard to age, character and locality of the premises would make it rsnble fit for occupation of a rsnble tenant of the class likely to take it – more than mere maintenance

o Must because in rsnble contemplation of parties at the commencement of the lease.

- Requirements to imply a term – *BP Refinery*:

o Must be rsnble and equitable

o Must be necessary to give business efficacy to the contract

o Must be so obvious that it 'goes without saying'

o Must be capable of clear expression

o Must not contradict any term of the contract.

- But s 223: don't have to return it in better shape than u got it.

TERMINATION – *Bishop of the Diocese v RFD*

- Frustration only where lease is silent as to what to do in the circs + performance of cntrel obligs fundamentally dif to parties' idea.

o Narrower purpose = greater chance frustration

- Lease couldn't be impliedly ended here – perpetual lease 4 nominal term

- Using chapel not only purpose – so purpose not frustrated to cancel

- Leasehold in common property/land which would survive destruction.

EASEMENTS

"A right annexed to land to utilise other land of dif ownership in a particular manner... or to prevent the owner of the other land from utilising his land in a particular manner".

ELEMENTS – *Re Ellenborough Park*

1. Dominant and servient tenement – s 291 PLA – easements in gross

2. Easements must accommodate dominant tenement

- Benefit attached to ownership: not personal right

o Right of garden enjoyment attached to premises, not to purchaser

o Doesn't matter that others can use – they are only ones w legally enforceable right

- Cnrxn btwn benefit and the normal enjoyment of land

o Question of fact

o Look @ nature of alleged dominant tenement and right granted

o "Reasonably necessary for the better enjoyment of the tenement"

o Garden enhances normal use so valid

- *Regency Villas v Diamond Resorts*: right to use pools, tennis court

o 'essential to daily routines' – goes against recreational easements.

o Critique this pretty much anything can fall under this rationale.

3. Dom and serv owners must be different persons – s 108(3) LTA

4. Right capable of forming the subject matter of grant

- Can't be too wide or vague: commonly understood/well defined

- Not inconsistent w proprietorship/possession of servient owners

o Not at level of joint occupation – doesn't exclude actual owner

- Mere right of recreation w/o utility or benefit

o no jus spatiandi e.g *A-G v Antrobus*: Stonehenge parking lots.

INTERPRETING SCOPE OF EASEMENTS

Barry v Fenton (vehicular only): look 2 grant must give words actual meaning unless susceptible to other meanings then can include intention.

- Greater right does NOT include lesser right in NZ

Peacock v Custins [2002] EWCA (red land/blue land): Ancillary uses allowed – does not fall foul of rule in *Harris v Flower*.

- **Underlying rule: if use is not of the benefit of the additional land then can be considered ancillary under the original easement**

- Can't cultivate adjacent farmland – but could picnic.

- Doesn't matter that burden on servient land did not increase – still have legal issue because you have increased the land benefitted against esmt.

- Critique: something illegal just bc intention to use additnl land.

LANDLOCKED LAND: Structure from *Squally Cove*

- Apply under s 327(1)/328(1) for order granting easement over land.

1. Is it landlocked? – s 326 definition

- No rsnble access for use/enjoyment of purposes allowed under RMA–

o Physical emphasises access **in present fact**

o At whim of adjoining owner not enough e.g in *Squally Cove* re blue.

o Concerned w present uses of land

o Reasonable access ≠ best access

o **Value judgment – *Kingfish Lodge***

Characteristics of locality, topography, transport req.

o Circs @ time of acquisition may show understanding re rsnble.

o Not always vehicular

o Legislation is remedial no presumption of non-interference

o Crown marginal strip not an issue – *Kingfish Lodge*

- Court has residual discretion – need to look at all the circs - *Kingfish*

2. If yes, should reasonable access be granted? Under s 328.

- Offer of alternative uses comes in here – owner cannot unreasonably withhold consent.

- Regard s 329 factors:

o Nature and qual of access at time of acquisition

o How did land become landlocked?

o Conduct of parties

o Hardship suffered by parties if order made/not made.

3. If yes, what are the conditions?

VARIATION/MODIFICATION OF EASEMENTS

Harnden v Collins (subdivisions, needed to move easements):

RANDERSON J: 3 step approach to s 317

1. Scope of easement at issue: looking at the context of entire easement/easements as composite whole – look at whole circs

2. Does scope to modify incl enlargement?:

- Legis hist = pointing towards being more broad, remedial legislation

o Limiting to lessening renders power redundant.

o Inclusion of compensation shows can modify even if detrimental

- Whether change beyond modification and is radical transformation is q of **fact and degree**: can't compare physical dimensions, look at circs

3. Who can apply?: s 316 only burdened owner

- Directed at relieving burden on applicant's land where the circs have changed since easement created – the change can't case **subst. injury**

- Granted at court's discretion

INTERPRETING EASEMENTS – *Shmuck v Opuu Coastal (2019) SC*

- CA had issue bc too broad, DC didn't retain effective control, personal right not proprietary right.

- Re easement A4: validation principle – *Regency villas*: once ascertain that parties intended to confer property right, court should validate.
 - o Use benefitted dominant tenement bc business on that land.
- Re easement A6: allow repair partially on boatyard/XYZ land so clearly serves dominant tenement.
 - o **Ouster principle**: rights can be so extensive so leave servient owner w/o rsnl use of their land whether essentially joint ownership
 - Lord Scott in *Moncrieff*: bad, test is whether servient owner retains possession and control of land – use is always affected.
 - o Not too broad – small area, time limit, doesn't deprive DC of use.
 - o **Exhaustively stating limits not req of valid easement.**
 - o Extrinsic evidence ONLY where rsnl person would refer to it e.g resource consents referred to in easements here.

COVENANTS

Enforcement – STILL NEED NOTICE UNDER PLA

- At CL benefit runs – needed to touch and concern – *need intention for run w the land to be shown*.
 - o Equity will enforce against BF purchaser w notice bound – needed touch and concern
 - Now covered by statute: but still need benefitted land if no CIG.
 - o S 301: unless contrary intention, benefit enforceable
 - o S 302: unless contrary intention, burden enforceable
 - o S 307A-F allows registration of covenants in gross + enforcement
- Tulk v Moxhay**: equity enforces covenant against purchaser w notice.

MODIFICATION OF COVENANTS – s 317

Synlait Milk Ltd v NZ Industrial Park Ltd [2020] NZSC (dairy factory)
O'REGAN J: 2 stage approach – balancing of policy (*Pollard*)

1. Is s 317 ground met?
 - No substantial injury owner of benefitted land – s 317(1)(a)
 - o Substantial = 'real, considerable, significant'
 - o Can be physical, economic or intangible
 - o None here – unlikely they would get resource consent anyway
 - Change in character of neighbourhood – s 317(1)(a)(ii)
 - o Now it is an industrial zone + heavily subdivided – reasonable uses extended beyond what was foreseen when covenant entered into (s 317(1)(b)).
2. Should discretion to extinguish/modify covenant be recognised?
 - Shouldn't just do it bc more convenient for servient owner – *ANZCO*
 - *Re University of Westminster*: one or more of grounds PF should grant

INTERPRETATION OF COVENANTS

Big River Ltd v Congreve [2008] NZCA (52 leaseholds, 30 yr lease)

- Need to at least look at properties affected by it.
- Where a court takes 'static' or 'mobile meaning' – 'mobile' cannot change scope of underlying contract.
 - o Mobile = looking at 'subdivision' in reference to intention.
- Shouldn't have contract susceptible to legislative process – but also normal ppl would look at the RMA.
- Purpose of grant to stop overdevelopment – rsnl person says subdiv.

COVENANTS IN GROSS RUNNING W LAND – *ANZCO v AFFCO*

- Obv normal +ve and -ve covenants run w the land – but here the encumbrance did not register any dominant tenement.
 - o So it was restrictive covenant in gross.
 - o **MOE registrable as mortgage, covenant not unless in MOE.**
- *Staples*: held that RCG ran w land – this court says no:
 - o English authority since been overturned – Aus followed.
 - o **We have a statutory mechanism of enforcement now**

- **Have to look at instrument when determining scope of encumbrance**: encumbrancer included successor and assigned so ANZCO liable for Itoham NOT Riverland (assign of previous empy)
- **Encumbrance not modifiable under s 126G PLA** (now s 317)
 - o Needs to have a dominant land – don't have that here
 - o Court cannot modify bc not truly restrictive – cannot have a restriction running w land if no dominant land.
- CIG enforceable under s 307A-307F of the PLA **where expressed in instrument after 2018 before this apply ANZCO re modification.**
 - o S 318D can extinguish/modify covenants in gross.
 - o S 307B don't need contract I link like MOE – anyone claiming thru title can be enforced against.

MORTGAGES

- Contract to repay money or fulfil certain oblig. W security for performance of the terms.
- Can be fixed sum (secured = what is owing – all in registered doc) OR
 - o All-obligations (identifies mtgd property + secures money but terms of loan in separate referenced loan agreement).

Westpac NZ Ltd v Clark (fraudster and lawyer who didn't register)

- **Difference btwn what is secured at what is owing.**
 - o *Duncan*: registration makes valid but only re secured property – no personal obligations to pay where there is shortfall bc invalid loan.
 - o This was all-obligations – need to determine whether loan agreement referenced property in referenced loan agreement.
- 'You' in mortgage instrument = RP, 'you' in loan = fraudster
- Mortgage secured invalid loan doc – not enforceable against RP bc she never signed – have to ask, would they be contractually committed?
 - o Mortgage secured money owed by true owner – again didn't sign.
 - o Nothing secure so lawyer's negligence caused no loss.

CLOG ON EQUITY OF REDEMPTION – ss 97 and 98 at PLA

- Able to repay OR equity will enforce contractual right to repay.
- *Fairclough v Swan Brewery* (20yr lease, repay 6 wks b4 end): Lord McNaghten: Equity will not allow impediment to redemption
- No real diff btwn preventing redemption + right as pretence.
- Here, practically loan irredeemable and this was term of loan itself.
- *Knightsbridge Estates v Byrne (1939) Ch* (40 yr redemption)

SIR WILFRED GREENE MR:

- Court can look at extraneous circs re reasonableness of the term
- Collateral advantages beyond date of redemption only prevented by equity where:
 - o Unfair and unconscionable; OR
 - o In the nature of a penalty clogging equity of redemption
- 40 yrs not unconscionable bc commercial lease, parties well aware
- Cf *Fairclough*: there leasehold so would get nothing when repaid
- *Jones v Morgan (2001) EWCA* (50% stake in property)
CHADWICK LJ: Amounts to a clog – transaction stipulated interest
- *New Patagonia Meat*: collateral advantage points to clog but need one of three situations above.
- Case stands for principle on collateral advantage: keeping an interest/option to purchase is a clog and void.

- Here – falls into third category – repugnant to contract + equity right
- Rule that mortgagee cannot **as a term of the mortgage** stipulate for a remaining interest in land
 - o Property must be returned to mortgagor in form conveyed.
 - o *Patagonia*: Q whether contracts 'in substance and in fact' independent of original bargain.

PILL LJ: Not unconscionable or clog bc distinct contract

Noakes v Rice: collateral advantages must end when mortgage ends
REOPENING OPPRESSIVE MORTGAGES – s 120 CCCFA03
3 ways of oppressive: bad conditions, induced, opp exercise of power TEST:

1. Were the conditions themselves oppressive?
 - Must be oppressive re s 118: oppressive, harsh, unjustly burdensome, unconscionable or in breach of rsnl standards of commercial practice
 - o Wider than unconscionable – **objective standard**
 - o Look at standards of commercial practice – court decides these
 - o Look @ knowledge of mortgagee
2. Were the surrounding circs desperate?
3. More in depth re circs.
 - *GE Custodians v Bartle*: independent legal advice?: SC said not oppressive pretty much exclusively on this point.
 - *Italia Holdings*: prop developers got shit deal but no oppressive bc they were in property and were advised.
 - Knowledge of the mortgagee – should they have been put on alert?

MORTGAGEE POWER OF SALE – s 176 PLA

- DOC on m-gee to obtain best price rsnlly obtainable at time of sale
Apple Fields Ltd v Damesh Holdings Ltd [2001] NZCA
FACTS: Damesh assignment = Parshelf bought AF debt and then ANZ sold debt to Parshelf, wrote off other debt. Subject to shareholders.

- Damesh Contract = Damesh exercised power of sale to Parshelf.
 - o In case couldn't do assignment.
- Exercised contract bc no shareholder approval. P held for partnership where one company owned by D's principal shareholder.

McGRATH J: Onus on D to show DOC discharged.

- S 103PLA52 gave recognition to CL DOC: incl. acting in good faith
 - o Intended to protect the mortgagor against absence of incentive for mortgagee to obtain purchase price higher than cost of mortgage.
 - o You can sell to yourself as mortgagee but just have higher DOC.
- DOC = best price that can be obtained **at the time of sale.**
 - o Mortgagor decides when to sell – *Countrywide Banking*
 - o **Duty begins when decision to sell made**
- What is rsnl depends on the facts of the case.
- Four factors that this was rsnl:
 - o AF wanted to sell, on same terms
 - o If sold quickly, ANZ would write off debt – real value 21 mil.
 - o Price struck independent of Damesh – Mr Smith not involved
 - o Didn't act in bad faith.
- Remedy if breached; set aside sale, equity of redemption reinstated.

INDEFEASIBILITY

CHANGES TO CL BC OF TORRENS

1. Priority of interests – s 35:

- First registered interest – CL used to be first instrument executed.
- **LTA reintro indef. Issue:** you get indef title but lots exceptions.

2. *Nemo dat* rule extinguished:

- Under ND, defective title remained defective open to claims from original owner.
- Removed it – BF purchaser gets valid title: emphasis on purchaser
 - o Deliberate choice – don't have to go through loads of transactions
 - o Encouraging purchases and secure transactions in land

3. Compensation under s 3 – provides original owner w compensation where wrongfully deprived of title and then passed on to BFP4V.

PRINCIPLES OF TORRENS: Mirror, curtain, compensation.

WHAT IS ON THE REGISTER?

1. ALL General land incl. general land owned by Māori.
 2. Māori freehold land land never left Māori hands
 - Also subject to MLC jurisdiction: they have their own register
 3. Crown land NOT registered ungranted land by definition
 4. Māori customary land NOT registered
 5. Equitable interests not registrable EXCEPT covenants under s 307.
- S 153 – can't enter trusts:

KEY SECTIONS

S 51 – Title by registration: held only subject to what is on register.

- S 51(4)(a): consideration amount doesn't matter
- 51(4)(b): doesn't matter if from fake person – overrules *Gibbs*

S 52 – Exceptions to indefeasibility

- (1)(a): fraud exception
- (1)(b): other interests on register
- (1)(c)-(e): admin mistakes.

S 54 – **Court's fix title where loss bc of void or voidable instrument.**

CAVEATS

KEY LEGISLATION

S 140: Effect is to freeze the register

S 138(1): caveatable interests

- (1)(a): does NOT have to be registrable
- (1)(b): incl equitable interests
- **Contractual/personal right not enough**
- **Potential interest not enough**

s 142: can apply to have caveat removed.

S 143: if caveat not defended, lapses in 10 days.

TEST:

1. Is there a caveatable interest? – s 138

Philpott (subdivision w undertakings easements, roading) –

WINKELMANN J: Onus on applicant to show caveatable interest

- “Caveatable interest is an interest in land”
- Personal/contractual not enough unless carried interest in land.
- Does not create/amend existing rights – can't decide disputed facts.
- Class of caveatable interests not closed.
- Non-registrable equitable interests capable of supporting.

GP96 (unconsented lease, untenantable):

GENDALL J: Lease not binding on PVG so yield to mortgage

- s 103 LTA: transfer of mortgaged land - purchaser free of any other interest binding on the mortgagee

- o S 105: exception is consent to that interest - no consent here
- o *Cashmere Ltd v Carroll*: consent means knowledge of the terms of the lease and conduct affirming knowledge of being bound. Passively standing by not enough.

2. Is there a reasonably arguable case to sustain it?

Philpott: must have at least a reasonably arguable case

- Only removed if 'patently clear' can't stand – *Botany Downs*

Development v Auckland City Council

- *Vector Gas*: court must be aware of context – here subdivision where undertook to provided services.

- **Promise to grant roading w/o explicit promise of easement enough to meet reasonably arguable case threshold.**

3. Court's residual discretion

Philpott: court must satisfied removal won't prejudice caveator's interest

GP96: discretion to remove in face of 'no caveat' clause not high

- Bc property damaged/untenantable, **balance of convenience** = remove.

EXCEPTIONS – address all in – COMPETING EQUITIES?

OUTLINE INITIAL INDEFEASIBILITY– All re void/voidable

Assets v Mere Roihi (PC): Māori landowners, bad NLA procedure

- **Registration title is FINAL – u have the interest.**

- Issues w procedure j formalities – LTA prevails over NLA
- Title can only be impeached for fraud.
- Registrar does not have duty to go behind title once registered
- Distinguished/limited *Gibbs* to its facts.
- Tried IP claim on trusts but didn't work.

Beale v Tihema Te Hau (1905) PC: 150 Māori, fraud, beale down line

- Upon registration Mrs Beale got indefeasible title – BFP4FV

- **Notice of unregistered Māori interest not enough to support fraud**

o Need knowledge that u defeat interest or wilfully blind (*Assets*)

Boyd v Mayor of Wellington: registration = immediate indefeasibility despite being registered on void/voidable instrument.

Frazer v Walker (1966): wife forged husband signature for mortgage

- Registration conferred immediate title – immune to adverse claims
- Registration **does not deny IP claim**
- Fraud = actual fraud by RP or agent (affirms *Assets*).

Breskvar v Wall (1971) HCA: (memo left blank):

BARWICK CJ: Immediate indefeasibility – conclusiveness of title re RP

- Registration of void instrument effective

- B's interest equitable – could've defeated W's interest if no on sell
 - o But Alban has competing interest
 - o Time of competing equities relevant, but so is fault.
 - o B's had equity postponed bc they were more at fault.

MENZIES J: Registration gave W legal title to deal with A.

- Under LTA, W's interest would've been defeated by fraud except.

Westpac v Clark [2010] NZSC:

ELIAS CJ: Can't get benefits of registered mortgaged for unreg loan doc.

- Reg. mortgage indef. But doesn't secure anything if the debt it charges comes from forged/unreg document.

- Reg. confers immediate indef. But void loan doc remains void.

- Bc instrument secured nothing, lawyer did not cause loss.

- Salmond j in *Boyd*- diff btwn bad title and bad instrument

- o Bad title = get from someone w shit title bc fraud or whatever
- o Bad instrument = instrument u register is void e.g here.
- o Both valid once reg. but bad instru. = no entitlement to register

- Policy issues here:

- o Compensation: public pay, Bank can't pass on liabilities to taxpayers.
- o They have to check who is coming to them.
- o Might have had recourse to manifest injustice.

MANIFEST INJUSTICE – ss 54, 55(1) and 55(4) factors.

- **55(1):** Cancel reg. of owner where manifestly unjust to keep on title.

- **55(4) factors:**

- a)circs of the acquisition by new owner
- b)failure by new owner to comply with any statutory power or authority in acquiring the estate or interest
- c) if Māori freehold land, failure to comply with TTWMA
- d) the identity of the person in actual occupation of the land
- e)the nature of the estate or interest e.g fee simple or a mortgage
- f) the length of time person A and person B have owned/occupied
- g) nature of improvements made by either person A or person B
- h) the use to which the land has been put by person A or person B
- i) any special characteristics of the land and significance to ppl
- j) the conduct of the parties in acquisition
- k)any other circumstances that the court thinks relevant.

- **S 56: COURT CANNOT MAKE ORDER WHERE SUBSEQUENT TRANSFER TO BFP4FV**

STATUTORY EXCEPTION

PROPER IMPLICATION TEST: Q is whether legislature intended to override LTA by proper implication – *Warin* (Māori freehold land)

Miller v Minister of Mines (1963) (Mining interests): Mining Act > LTA

- **Not necessary that there is direct/explicit overriding – cf Housing**

- If mining interest defeated by reg, have no value - Can't be intended.

- **Holistic statutory interpretation exercise**

Housing Corp [1988] NZHC: (Housing mtge not reg, MLC no amend)

McGECHAN J: **No very clear intention by parl.** for MLA to override

- Parl know sometimes things get on register w/o following procedure.

o Duty of the registrar purely administrative.

- **Breskvar:** statutory provisions rendering instruments void no prevail over LTA subject to *Traviens* that non-essential term that is illegal does not become validated (**and can't get SP for it**).

- General leg overridden by special.

- Earlier generally overridden by later.

Warin (2008) NZHC: (Māori freehold land, MLC no amend register)

- ALLAN J: If they wanted to override LTA, would have amended it.
- [59]: **Guidance from leg. Purpose** – here to keep land w Māori.
 - Overriding can be **expressly or necessarily by implications**.
 - Said u shouldn't register bad procedure docs but didn't go so far as to say what happens if you do register them.
 - [98]: Considerations from *Grey v County Council* (guidelines only)
 - o There must be inconsistency
 - o Must try construe to give effect to both where possible
 - o Only if one 'so inconsistent or repugnant' to the other have to choose
 - o Earlier special not repealed by later general
 - o Later special overrides earlier general

FRAUD EXCEPTION

FRAUD TEST – s 6: Forgery or other dishonest conduct by RP or their agent in acquiring interest to land or registration.

1. Type A or Type B?

- **A (6)(2)(a):** against the reg owner e.g in *Breskvar, Gibbs, Frazer*
- **B (6)(2)(b):** against unregistered interest e.g *Loke Yew, Assets, Beale*

2. Fraud criteria:

Type A:

- **“Actual fraud, dishonesty of some sort” (Assets):**

- o *North Shore Aero:* Higher than equitable fraud (unconscionable conduct) but lower than CL fraud (i.e no need misrep or deceit).
If mixed w caveat issue need to show fraud (not just rsnby arg) Q of if interest survived the transfer, needed fraud.
Lombard finance: line btwn taking knowing of unreg interest and dishonestly taking to prejudice of unreg interest is a **matter of degree**.
- o *Loke Yew:* so long as rights of third parties aren't implicated [s 56] you cannot shelter behind registered title can't endorse rights you only got because of fraud
Looked at actual intention – imposed const. trust.
- o *Harris* (shop w weekly rent): Q of fraud pure fact Q – HIGH THRESHOLD but can change mind after if no intention @ time
Not fraudulent to not enforce interest different to what u thought
- o *Bunt:* Cannot assume fraud from knowledge of unreg. Interest
Lawyer advised them there was no interest – cannot be fraudulent if you didn't think there was an interest to defeat.
Stuart v Kingston: need personal dishonesty/moral turpitude
Eichelbaum J minority: always intended to settle, just hedging his bets that they wouldn't do anything ab it.
 - Advice one factor – need to look at **totality of knowledge**.
- o *Bahr v Nicolay:* need something more than knowledge of equitable interest

- o *Nathan v D&S:* can find fraud through agency/wilful blindness
- **By RP or their agent:** knowledge fraud must be brought home (*Assets*)
 - o *Duncan:* need fraud inter se.
- **At the time of acquisition:** no supervening fraud (*Bunt v Hallinan*).
- Type B:** all above AND
- 6(2)(b)(i): knowledge of the interest/wilful blindness
 - o No requirement to make enquiries BUT
 - o *Waimaha Sawmilling Co:* Q of whether knew enough to make it his duty to stay his hand and make further enquiries
This would be wilful blindness
 - o *Assets:* abstaining from further enquiries for fear of learning the truth
 - o *Nathan v D&S:* from *Assets* – wilful blindness
Where D's suspected forgery/fraud
Refrained from making inquiries for fear of learning truth
Not wilfully blind re forgery but re false attestation
- 6(2)(b)(ii): intention to defraud/defeat unreg. interest.
- 3. Remedy:** getting back on the title hahahaha.
- 4. Critiques:** Dummy high standard but can change ur mind if u play cards right? Makes no sense.

IN PERSONAM EXCEPTION

- Duncan:** RP req. to hold land to give effect to oblig which they burdened themselves w at law or equity provided not inconsistent w Torrens
- S 51(5):** Nothing in this section affects the IP jurisdiction.
- TEST – Duncan v McDonald** (Nigerian govt).
- 1. Not Inconsistent W Objectives Of Torrens**
- *Taitapu* (minerals not registered, contract said it would)/*Frazer: IP claims are not inconsistent w indefeasibility on the register*
 - *Nathan:* being able to defeat on knowledge of competing interest/IP claim would be inconsistent w Torrens – need more.
 - *Bahr:* must arise independently of an ownership claim.
- 2. Recognised COA – legal or equitable**
- *Bahr v Nicolay* (lease out w promise to buy back): the IP claim must bring with it an interest in land.
 - o **Unlike fraud** IP claims can arise from conduct BEFORE AND AFTER registration
 - o Wilson + Toohey: T's subject to const. trust bc of undertaking/contractual stip in S&P agreement to sell land back.
 - o Brennan J: bound bc of knowledge + undertaking
Indefeasibility ab protecting transferee from bad title, not shielding from consequences of their own actions.
 - *Assets:* trust relo not based on anything apart from fact that they were competing for the title – exist out of the LTA system.
 - **Taitapu Gold Estates:**
 - o *Paoro Torotoro:* effect of cert of title not to alter rights and liabilities

- o Diff from *Assets* const. trust imposed bc of contractual promises.
- o Can't claim to hold something they didn't buy.
- **Duncan v McDonald:**
 - o Attributing conduct to trust: Mr D as trustee acting as principal
BUT ACTIONS NOT RELEVANT RE RELIEF.
 - o Illegal contracts act subject to LTA.
- **Nathan v Dollars & Sense [2007] NZCA** (forged mum signature):
 - o W YOUNG P (dis): can't impute conduct for fraud + no IP claim
Can attribute conduct where:
 - Agent – express, implied, apparent.
 - Using imputed notice under *O'Brien/Wilkinson*
 - Reckons you can't use imputed notice for forgery.
 - *Schultz, Cricklewood:* where agent does fraud exception to principle that they communicate w principal.
 - Issues w IP claim – no COA:
 - No-one actually dealt w Mrs Nathan
 - Not bound by mortgage anyway – didn't sign it
- o GLAZEBROOK (Maj): COA as unjust enrichment
Ex P Batham – D's agent procured assignment of notice thru fraud: based on wider principle that agent's fraudulent actions attributed to innocent principal when acting in scope of actual authority
 - Here, fraud happened when getting docs, authorised to do.
 - There was benefit to principal anyway (*Loyd Grace*)
 - Against justice to allow principals to always escape on this
- Not following *Shultz, Cricklewood:*
 - Inconsistent w assets, no authority, rejected in *Batham*.
- Something more than neglect required for IP claim.**
O'Brien/Wilkinson not ab imputed conduct impose standards on financiers, should extend to forgery cases.
 - **Strong case for allowing IP when this code breached**
 - Wilfully blind to possibility of UI
- 3. Unconscionable conduct ('something extra' – Nathan)**
- **Duncan: Q of fact and degree whether RP's behaviour strong enough to give rise to an equity** need more than knowledge of bad instrument
 - o But lower than actual dishonesty.
- *Nathan:* breaching some kind of code/expected behaviour?
 - o Is it a **known situation of risk** where we would expect heightened diligence?
- 4. Remedy** – equitable – specific performance or damages where on sold.
- **Duncan:** court won't let one person take all loss where both parties down bad.