

# THE NATURE OF TORRENS INDEFEASIBILITY: UNDERSTANDING THE LIMITS OF PERSONAL EQUITIES

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*[Torrens registration has revolutionised land law, in particular the law of conveyancing. However, the precise scope of Torrens indefeasibility — which lies at the heart of the system — remains poorly understood, especially in respect of its relationship to the so-called ‘personal equities’ exception. The key to disentangling this web of confusion lies in accepting that personal equities, properly understood, do not actually form an exception to indefeasibility at all. The two concepts operate on completely different planes. In practical terms, this means that three crucial points must be understood. First, the Torrens system is intended to prevent adverse claims on the basis of prior title and no more. Where a claim arises out of circumstances independent of prior title, Torrens indefeasibility does not preclude such a claim, irrespective of whether it is premised upon notice. Secondly, both the common law and equity have developed complex means by which legal and equitable property are protected. Not only is the vindicatio employed, property rights are also protected obliquely through the law of wrongs and possibly even the law of unjust enrichment. Such claims are premised upon prior title, even where liability is established by means other than notice or strict liability. Accordingly, these claims do not survive Torrens registration. Finally, so long as the basis of the claim is not some form of prior title, the claim itself may take on proprietary attributes, usually but not always of an equitable flavour.]*

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## I INTRODUCTION

‘[T]he principle of indefeasibility of title’, it has been said, ‘is the foundation of the Torrens system of title.’<sup>1</sup> The defining feature of the Torrens system of registration, as compared to previous models of land registration practised by common law systems, is that it ‘is not a system of registration of title but a system of title by registration.’<sup>2</sup> The objective of this system, pioneered in South

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<sup>1</sup> *Bahr v Nicolay [No 2]* (1988) 164 CLR 604, 613 (Mason CJ and Dawson J).

<sup>2</sup> *Breskvar v Wall* (1971) 126 CLR 376, 385 (Barwick CJ).

Australia in 1858 by Sir Robert Torrens,<sup>3</sup> 'is to save persons dealing with registered proprietors from the trouble and expense of going behind the register, in order to investigate the history of their author's title, and to satisfy themselves of its validity.'<sup>4</sup>

Prior to the implementation of the Torrens system of registration, conveyancing in South Australia, as in other colonies, was mired in the complexities inherent in the English system of conveyancing. This was most obvious in relation to proof of title to land, which 'necessitated tracing title back through an unbroken chain of events and documents, perhaps as far as the Crown grant.'<sup>5</sup> The previous land registration system, based on the registration of deeds, did little to overcome the difficulties and uncertainties in proof of title because it was the deed, rather than the title, that was registered. Registration therefore provided no assurance of validity, merely providing priority *if valid*. The need to investigate title every time land was conveyed or otherwise dealt with meant that parties had to incur expense in both time and money every time a transaction was entered into. Due to the complexities of such investigation, purchasers also had to abide a certain degree of risk that defects in the vendor's title would not be fully discovered in the investigation. The system of independent titles proposed by Torrens obviated the costs involved in the investigation of title. By overturning the common law rule of *nemo dat quod non habet*,<sup>6</sup> it also significantly reduced the risk to a purchaser of any conveyance which was duly registered under such a system, since the purchaser's title upon registration would be 'indefeasible' and free from defects affecting the vendor's title.

It has been suggested that Torrens' objectives were achieved by 'the elevation of the Register above all else.'<sup>7</sup> However, it is notable that 'indefeasibility' is not an absolute concept, with a list of exceptions to indefeasibility invariably found in all Torrens statutes.<sup>8</sup> One exception, however, stands out amongst all others, as it is not expressly listed as an exception in any of the Torrens statutes. Yet, as pronounced by the Privy Council in the leading case of *Frazer v Walker*,<sup>9</sup> it is generally accepted that the principle of indefeasibility 'in no way denies the right of a plaintiff to bring against a registered proprietor a claim in personam, founded in law or in equity, for such relief as a court acting in personam may

<sup>3</sup> For background as to how the Torrens system was conceived, developed and eventually born, see P Moerlin Fox, 'The Story behind the Torrens System' (1950) 23 *Australian Law Journal* 489. Cf S Robinson, *Transfer of Land in Victoria* (1979) ch 1.

<sup>4</sup> *Gibbs v Messer* [1891] AC 248, 254 (Lord Watson for the Lord Chancellor, Lords Watson, Hobhouse, Herschell, Macnaghten, Morris and Shand). See also *Black v Garnock* (2007) 230 CLR 438, 461, where Callinan J observed that:

The purposes and objects of the Torrens system of title were to simplify conveyancing, to introduce a greater assurance, indeed certainty, of title and in consequence to reduce the expense of establishing and protecting title under the old land titles system.

<sup>5</sup> Peter Butt, *Land Law* (5<sup>th</sup> ed, 2006) 717. As to what proof of title means and entails, see JT Farrand, *Contract and Conveyance* (4<sup>th</sup> ed, 1983) ch VI.

<sup>6</sup> That is, 'one cannot give what one does not have'.

<sup>7</sup> *Black v Garnock* (2007) 230 CLR 438, 463 (Callinan J).

<sup>8</sup> See below nn 37–40 and accompanying text.

<sup>9</sup> [1967] 1 AC 569.

grant.<sup>10</sup> This unwritten exception to the principle of indefeasibility is sometimes referred to as the ‘in personam’ exception,<sup>11</sup> but it is also labelled the ‘personal equities’ exception.<sup>12</sup> The scope of this unwritten exception is notoriously uncertain. It seems to be generally accepted that the exception, by whichever name, only encompasses known legal or equitable causes of action.<sup>13</sup> It has been suggested that this limitation ensures that the exception does not ‘supply a blank canvas on which a plaintiff can paint any picture.’<sup>14</sup> However, given that both the common law and equity are capable of spawning new causes of action, it has been questioned whether this is an adequate limitation to the exception.<sup>15</sup> In another leading case, *Oh Hiam v Tham Kong*, the Privy Council observed that indefeasibility does not prevent the court from ‘exercising its jurisdiction in personam to insist upon proper conduct in accordance with the conscience which all men should obey.’<sup>16</sup> Whilst such statements are not uncommon,<sup>17</sup> a reference to conscience as a limiting requirement is also not universally accepted. Thus, references to unconscionability have been criticised as either of limited assistance<sup>18</sup> or downright misleading.<sup>19</sup> In *Presbyterian Church (NSW) Property Trust v Scots Church Development Ltd*, Young CJ in Eq commented that to ask the question, ‘[w]hat ... is the alleged unconscionability ... may well be [to ask] the wrong question because, although the accustomed shorthand is to speak in terms of personal equities, the Privy Council [in *Frazer v Walker*] did not so confine the principle.’<sup>20</sup> All of this, however, does not leave future courts and commentators with much guidance.

<sup>10</sup> Ibid 585 (Lord Wilberforce for Viscount Dilhorne, Lords Denning, Hodson, Wilberforce and Sir Garfield Barwick).

<sup>11</sup> Ibid.

<sup>12</sup> *Breskvar v Wall* (1971) 126 CLR 376, 385 (Barwick CJ).

<sup>13</sup> See *Garofano v Reliance Finance Corporation Ltd* (1992) 5 BPR 11 941, 11 945 (Meagher JA); *Grgic v Australian & New Zealand Banking Group Ltd* (1994) 33 NSWLR 202, 222–3 (Powell JA); *Pianta v National Australia Bank Ltd* (1994) 17 Fam LR 34, 39 (Handley JA); *Macquarie Bank Ltd v Sixty-Fourth Throne Pty Ltd* [1998] 3 VR 133, 146–7 (Tadgell JA) (*‘Macquarie Bank’*); *Horvath v Commonwealth Bank of Australia* [1999] 1 VR 643, 650–1 (Tadgell JA).

<sup>14</sup> *LHK Nominees Pty Ltd v Kenworthy* (2002) 26 WAR 517, 556 (Anderson and Steytler JJ).

<sup>15</sup> Barry C Crown, ‘Indefeasibility of Title: Developments in Singapore’ (2007) 15 *Australian Property Law Journal* 91, 101. An excellent example of how this limitation is an inadequate one is the case of *Mercantile Mutual Life Insurance Co Ltd v Gosper* (1991) 25 NSWLR 32. The case is generally regarded as wrongly decided by most commentators: see, eg, Peter Butt, ‘Indefeasibility and Sleights of Hand’ (1992) 66 *Australian Law Journal* 596, 596; Barry C Crown, ‘A Hard Look at *Bahr v Nicolay*’ in Dora Neo, Tang Hang Wu and Michael Hor (eds), *Lives in the Law* (2007) 191, 202–4; Tang Hang Wu, ‘Beyond the Torrens Mirror: A Framework of the In Personam Exception to Indefeasibility’ (2008) 32 *Melbourne University Law Review* 672, 682.

<sup>16</sup> (1980) 2 BPR 9451, 9454 (Lord Russell for Lords Wilberforce, Diplock, Russell, Keith and Lane).

<sup>17</sup> See *Barry v Heider* (1914) 19 CLR 197, 213 (Isaacs J); *Vassos v State Bank of South Australia* [1993] 2 VR 316, 333 (Hayne J); *Story v Advance Bank Australia Ltd* (1993) 31 NSWLR 722, 737 (Gleeson CJ), 739–40 (Mahoney JA); *Macquarie Bank* [1998] 3 VR 133, 162 (Ashley AJA); *LHK Nominees Pty Ltd v Kenworthy* (2002) 26 WAR 517, 552 (Murray J); cf at 558–9 (Anderson and Steytler JJ).

<sup>18</sup> Lyria Bennett Moses, ‘Recipient Liability and Torrens Title’ (2006) 1 *Journal of Equity* 135, 139.

<sup>19</sup> Tang, ‘Beyond the Torrens Mirror’, above n 15, 682.

<sup>20</sup> (2007) 64 ACSR 31, 44.

It is notable that both the *in personam* and personal equity labels have come to be criticised as inappropriate. The former is potentially misleading insofar as it suggests that claims falling within the exception necessarily have no proprietary effect. In truth, the ‘personal’ aspect of the right that arises does not describe its exigibility as much as it does the fact that it arises out of the interaction between the plaintiff and the registered proprietor. It is personal to that *interaction*. Thus, when the Privy Council in *Frazer v Walker* spoke of claims being brought in *personam*,<sup>21</sup> they were not referring to the persons against whom the claims could be brought, an issue which never arose, but rather that the action arises as against the person of the registered proprietor, because of his or her identity, and not because of a property right that binds the world at large.

The personal equity label is doubly misleading. It suggests not only that the right is personal, but that only claims originating in equity fall within its embrace — when in fact the exception recognises claims both at law and in equity. It may well be this misdescription that gave rise to the idea that the exception is tied to notions of unconscionability, since unconscionability is regarded as underpinning the jurisdiction of the Chancery.<sup>22</sup> Yet, once it is acknowledged that legal causes of actions are equally within the exception, it becomes difficult to understand why unconscionability should play any role in the delimitation of this exception. The ‘equitable’ aspect of the exception has led to a great deal of confusion over the nature of unregistered interests. It has resulted in decisions, such as *McGrath v Campbell*,<sup>23</sup> where the court considered that an implied *Wheeldon v Burrows*<sup>24</sup> easement, although legal in respect of unregistered land, could only take effect as an equitable easement under the Torrens system.<sup>25</sup> Perhaps the most accurate label is that the exception operates in respect of claims arising between the claimant and the registered proprietor ‘*inter se*’.<sup>26</sup> Although this soubriquet has yet to catch on, this article will adopt this term to refer to the concept at issue.

Indeed, whereas the inappropriateness of the *in personam* and personal equities labels has been frequently commented upon<sup>27</sup> — perhaps unfairly in respect of the former (as commentators fail to grasp the meaning of *in personam* in the relevant context) — the most inappropriate label of all, that it is a true exception to the principle of indefeasibility, has been relatively safe from criticism.<sup>28</sup>

<sup>21</sup> [1967] 1 AC 569, 585 (Lord Wilberforce for Viscount Dilhorne, Lords Denning, Hodson, Wilberforce and Sir Garfield Barwick).

<sup>22</sup> See generally *Presbyterian Church (NSW) Property Trust v Scots Church Development Ltd* (2007) 64 ACSR 31, 40–4 (Young CJ in Eq).

<sup>23</sup> (2006) 68 NSWLR 229, 245 (Tobias JA).

<sup>24</sup> (1879) 12 Ch D 31.

<sup>25</sup> See below nn 178–81 and accompanying text.

<sup>26</sup> Bruce Ziff, *Principles of Property Law* (4<sup>th</sup> ed, 2006) 453.

<sup>27</sup> See, eg, Butt, *Land Law*, above n 5, 787–8. In relation to the personal equity title, see Crown, ‘A Hard Look at *Bahr v Nicolay*’, above n 15, 201; Tang, ‘Beyond the Torrens Mirror’, above n 15, 679–84.

<sup>28</sup> Robert Chambers is one of the few commentators to contest the ‘exception’ label, but even then, Chambers accepts that the label is ‘not untrue’, merely ‘unhelpful’: Robert Chambers, ‘Indefeasible Title as a Bar to a Claim for Restitution’ [1998] *Restitution Law Review* 126, 128.

Indeed, so entrenched is the idea that it is an exception, that numerous Torrens jurisdictions have statutorily enshrined its status as such.<sup>29</sup> According to the *Oxford English Dictionary*, an ‘exception’ is

[s]omething that is excepted; a particular case which comes within the terms of a rule, but to which the rule is not applicable; a person or thing that does not conform to the general rule affecting other individuals of the same class.<sup>30</sup>

One of the predominant reasons why the principle of indefeasibility and its counterpart, the inter se exception, are so poorly understood is the remarkable failure on the part of courts and commentators to refer to the precise language of the various Torrens statutes. There has been no attempt to attribute a precise meaning to the concept of indefeasibility and its largely unwritten exception, as the labels themselves lack precise content. ‘Indefeasibility’, although part of Sir Robert Torrens’ vocabulary, is noticeably absent from most Torrens statutes.<sup>31</sup> Indeed, neither does the phrase ‘in personam exception’ nor ‘personal equity’ appear in many statutes.<sup>32</sup>

In truth, the inter se exception cannot fall within the definition of an exception because it does not actually come ‘within the terms of the rule’ — namely, the principle of indefeasibility. As the Privy Council opined in *Frazer v Walker*, indefeasibility ‘in no way denies’ such claims against registered proprietors. Indeed, their Lordships were keen to caution that ‘[t]he principle must always remain paramount that those actions which fall within the prohibition of [indefeasibility] may not be maintained.’<sup>33</sup> Therefore, the courts never historically saw the inter se claims as a true exception to indefeasibility, but rather as claims that simply fell outside the rule.<sup>34</sup> Indeed, if they fell within the terms of the rule, their existence would be difficult, if not impossible, to justify. At the very least, greater effort than presently exerted would be needed to explain how a non-statutory exception that clearly transgresses a statutory rule came to exist and flourish. However, although the inter se rule is often confusingly considered an exception to the principle of indefeasibility, no such effort is seen. Instead, much effort has been wasted in trying to reconcile the exception of inter se

<sup>29</sup> See, eg, *Land Title Act 2008* (NT) s 189(1)(a); *Land Title Act 1994* (Qld) s 185(1)(a). Insofar as such personal equity ‘exceptions’ have been grafted onto earlier Torrens legislation that contained no such references, this cannot as a matter of principle expand the scope of the principle of indefeasibility as statutorily enshrined, unless the specific indefeasibility provisions of the legislation are themselves amended and expanded. They should therefore be regarded generally as merely clarifying that such claims coexist with the principle of indefeasibility rather than construed as first expanding the principle of indefeasibility and then cutting it back again by way of a true exception. An interesting Torrens jurisdiction where *some* ‘personal equity’ exceptions were included in the original legislation is the *Land Titles Ordinance 1956* (Singapore) ss 28(2)(b)–(e); see Kelvin Low, ‘The Story of “Personal Equities” in Singapore: Thus Far and Beyond’ [2009] *Singapore Journal of Legal Studies* (forthcoming).

<sup>30</sup> J A Simpson and E S C Weiner (eds), *The Oxford English Dictionary* (2<sup>nd</sup> ed, 1989) vol V, 498.

<sup>31</sup> Butt, *Land Law*, above n 5, 725. But see *Land Title Act 1994* (Qld) ss 37–8; *Real Property Act 1886* (SA) s 69; *Land Titles Act 1980* (Tas) s 40.

<sup>32</sup> Butt, *Land Law*, above n 5, 725.

<sup>33</sup> [1967] 1 AC 569, 585 (Lord Wilberforce for Viscount Dilhorne, Lords Denning, Hodson, Wilberforce and Sir Garfield Barwick).

<sup>34</sup> See *ibid.*

claims with the rule of indefeasibility. It is the thesis of this article that the only plausible reconciliation of the two is to accept, as appears to be suggested by the Privy Council in *Frazer v Walker*, that the two rules operate on different planes and that the inter se rule is *not* a true exception to the principle of indefeasibility.

From this understanding, three practical consequences follow. First, indefeasibility operates on a different plane to that of the inter se rule. This is because the former is intended to prevent adverse claims on the basis of prior title and no more, whereas the latter only allows claims that are independent of prior title. As such, the two do not contradict each other but are independent and complementary rules. Secondly, because elaboration of the inter se rule may allow claims that are independent of prior title against the registered proprietor, courts may find it necessary to undertake a closer investigation of recognised causes of action, particularly those arising in equity. This is because common law systems have developed complex methods by which legal and equitable property are protected. There are at least two, possibly three, means through which common law systems protect property rights. The most commonly employed form of protection is through the law of torts, such as the tort of trespass. Such protection is oblique in that the action does not assert the property right per se, but rather alleges interference with such a right. In other words, the property right is protected by asserting that the defendant has committed a wrong. Though less common, some property rights are also protected directly. This occurs in equity where a beneficiary simply asserts his or her interest in the trust property as against a third party, without simultaneously asserting any wrongdoing. Such claims are direct and are sometimes referred to as claims in *vindicatio*, as distinct from wrongs. Despite the difference in form, both types of claims are substantially concerned with the law's protection of existing property rights. More controversially, it has even been suggested that property rights are also protected obliquely by the law of unjust enrichment.<sup>35</sup> It must be kept in mind that, regardless of their form, any claims premised upon protection of prior title cannot survive Torrens registration. The difficulty in this respect lies in the ambiguous nature of certain causes of action. Whereas some are clearly recognisable as protective of prior title, the object and purpose of other causes of action are less obvious and greater scrutiny may have to be brought to bear upon them. Finally, as long as a claim falls within the ambit of the inter se rule, it is not the case that the only permissible remedy is necessarily personal. Provided its proprietary flavour does not arise out of prior title, such proprietary remedies are permissible under the Torrens system.

## II THE CASE FOR CONSISTENCY

The view that the inter se rule does not conflict with the principle of indefeasibility is not a new one. It rests upon the solid foundations of *Frazer v Walker*, the bedrock of modern in personam claims. Such a view has recently been described

<sup>35</sup> Peter Birks, *Unjust Enrichment* (2<sup>nd</sup> ed, 2005) 66.

by one commentator as the ‘wide view of the in personam exception’.<sup>36</sup> However described, it is an undoubtedly correct proposition, which may be proved by a close study of the statutory language of Torrens legislation. Typical of many Torrens statutes is the *Transfer of Land Act 1958* (Vic), where ‘indefeasibility’ does not feature in the so-called ‘paramountcy provision’. Section 42(1) thus provides:

Notwithstanding the existence in any other person of *any estate or interest* (whether derived by grant from Her Majesty or otherwise) which but for this Act might be held to be paramount or to have priority, the registered proprietor of land shall, except in the case of fraud, hold such land subject to such encumbrances as are recorded on the relevant folio of the Register but *absolutely free from all other encumbrances whatsoever* ...<sup>37</sup>

It seems clear that the indefeasibility intended to be conferred by s 42(1) is only indefeasibility from prior estates and proprietary interests. It is not intended to immunise the registered proprietor from all claims whatsoever, whether or not they may otherwise affect the land. In the words of Lord Wilberforce in *Frazer v Walker*, indefeasibility ‘does not involve that the registered proprietor is protected against any claim whatsoever’.<sup>38</sup>

It is less common to encounter Torrens statutes that refer explicitly to indefeasibility. One such rare statute is the *Real Property Act 1886* (SA). However, like the Victorian Act, indefeasibility is intended to be limited. The two relevant paramountcy provisions are ss 69 and 70, with s 69 providing:

The title of every registered proprietor of land shall, *subject to such encumbrances, liens, estates, or interests* as may be notified on the original certificate of such land, be absolute and indefeasible, subject only to the following qualifications ...<sup>39</sup>

The reference to ‘encumbrances, liens, estates, or interests’ suggests that the indefeasibility conferred by s 69 is intended only to protect the registered proprietor from claims based on prior title. Even if s 69 is considered insufficiently clear, the same view is spelt out even more clearly in s 70, which provides:

In all other cases the title of the registered proprietor of land shall prevail, notwithstanding the existence in Her Majesty, Her heirs, or successors, or in any person of *any estate or interest* whatever whether derived by grant from the Crown or otherwise, which but for this Act might be held paramount or to have priority; and notwithstanding any want of notice, or insufficient notice of any application, or any error, omission or informality in any application or proceedings.<sup>40</sup>

<sup>36</sup> Tang, ‘Beyond the Torrens Mirror’, above n 15, 675.

<sup>37</sup> *Transfer of Land Act 1958* (Vic) s 42(1) (emphasis added).

<sup>38</sup> [1967] 1 AC 569, 580 (Lord Wilberforce for Viscount Dilhorne, Lords Denning, Hodson, Wilberforce and Sir Garfield Barwick).

<sup>39</sup> *Real Property Act 1886* (SA) s 69 (emphasis added).

<sup>40</sup> *Real Property Act 1886* (SA) s 70 (emphasis added).

A careful reading of *Frazer v Walker* shows how their Lordships' judgment accords with these statutory expressions of indefeasibility. Their Lordships were careful in that case to stress that the registered proprietor is not protected in respect of all claims, only adverse claims.<sup>41</sup> If adverse claims are read to mean any claim against the registered proprietor, then the Privy Council will be guilty of illogicality. However, since they were referring to adverse claims in the context of defining the registered proprietor's indefeasible title, it seems tolerably clear that, by adverse claims, the Privy Council meant claims adverse to the registered proprietor's title. Unfortunately, *Frazer v Walker* has been poorly understood. Thus, as becomes clear in the following analysis, there are flaws in the arguments even amongst modern proponents of the consistency theory.

In *CN & NA Davies Ltd v Laughton*, it was suggested that the inter se exception 'sits comfortably with the concept of indefeasibility [because it] is essentially non-proprietary in nature.'<sup>42</sup> Thomas J further stated that '[t]he key element is the involvement in or knowledge of the registered proprietor in the unconscionable or illegal act or omission in issue.'<sup>43</sup> However, neither proposition is sustainable.

As to the former, the most uncontroversial inter se claim is that by a purchaser against a registered proprietor who agrees to sell registered land to him or her; thus the claim is clearly proprietary.<sup>44</sup> It is trite law that the remedy of specific performance is available against the registered proprietor. Furthermore, the Torrens system does not inhibit the operation of the doctrine in *Walsh v Lonsdale*,<sup>45</sup> which has the effect of transferring equitable title to the purchaser in the above claim pending the completion of transfer.<sup>46</sup> Indeed, the operation of the maxim 'equity regards as done that which ought to be done' is essential to support the system of caveats in Torrens systems. Although the objects of the caveat system are open to debate,<sup>47</sup> the system as first introduced presupposes the existence of property interests apart from registered interests. This is because, initially, only proprietary interests could be protected by caveat. If the only proprietary interests recognised by the Torrens statutes are registered ones, then entire sections of statutes purporting to deal with caveats would have been enacted in vain. We thereby see the potential dangers of referring to the rule as the in personam rule, as the Privy Council did in *Frazer v Walker*.<sup>48</sup> Although it is true that the claim operates in personam in the sense that it arises as against the

<sup>41</sup> *Frazer v Walker* [1967] 1 AC 569, 585 (Lord Wilberforce for Viscount Dilhorne, Lords Denning, Hodson, Wilberforce and Sir Garfield Barwick).

<sup>42</sup> [1997] 3 NZLR 705, 712 (Thomas J).

<sup>43</sup> *Ibid.*

<sup>44</sup> *Oh Hiam v Tham Kong* (1980) 2 BPR 9451, 9454 (Lord Russell for Lords Wilberforce, Diplock, Russell, Keith and Lane).

<sup>45</sup> (1882) 21 Ch D 9.

<sup>46</sup> *Bunny Industries Ltd v FSW Enterprises Pty Ltd* [1982] Qd R 712, 715 (Connolly J), although the case of *Walsh v Lonsdale* itself was not considered.

<sup>47</sup> See *Black v Garnock* (2007) 230 CLR 438, 463–70 (Callinan J). *Contra J & H Just (Holdings) Pty Ltd v Bank of New South Wales* (1971) 125 CLR 546, 552–4 (Barwick CJ).

<sup>48</sup> [1967] 1 AC 569, 585 (Lord Wilberforce for Viscount Dilhorne, Lords Denning, Hodson, Wilberforce and Sir Garfield Barwick).

registered proprietor, the idea is sometimes subverted to mean that the claim results in a personal remedy. This could not be what the Privy Council meant by in personam, as it was completely unnecessary to address the exigibility of the claim that arose in that case.

As to the latter statement, the suggestion that the inter se rule is somehow concerned with the involvement or knowledge of the registered proprietor, much less that such involvement or knowledge is a 'key element' of the rule, cannot be correct. In actuality, the elements of a cause of action vary from one claim to another. While consent is a key element in a claim in contract, in tort the standard of liability can range from deceit to negligence to knowledge to intention to strict liability. The in personam label is particularly inapt to describe liability in unjust (or unconscientious)<sup>49</sup> enrichment, since the basis for liability is contentious. On one theory it is strict, while on the other liability is based on unconscionability ex post, which arguably means the same thing. To try to capture the various elements of every possible cause of action that would fall within the inter se rule in a pithy statement is surely futile.

A more sound approach to defining indefeasibility would employ the methodology of exclusion rather than inclusion. On this approach, the 'primary objective of the Torrens system [would be] the avoidance of the expense, difficulty, and delay of investigating and proving the validity of a vendor's title.'<sup>50</sup> Accordingly, any claims that do not conflict with this objective ought to be permissible. Two potential sources of confusion can be quickly eliminated. First, sometimes a new unregistered interest in land can be mistaken for a pre-existing interest in land.<sup>51</sup> Secondly, it is a common mistake to assume that the inter se rule can only operate where there is some conduct on the part of the registered proprietor.<sup>52</sup> Although the vast majority of cases where the inter se rule operates will involve conduct on the part of the registered proprietor (for instance a promise in a claim contract), a small minority will not (such as mere receipt of a mistaken transfer). Despite holding promise, there remain a number of significant flaws in the current literature purporting to demarcate the scope of the inter se rule by means of an exclusionary rather than an inclusionary rule.

Much of the difficulty in establishing a clear rule stems from the controversial subject of restitution for unjust (or unconscientious) enrichment. It has been suggested that some restitutionary claims that fall within the inter se rule are

<sup>49</sup> See, eg, *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516, particularly at 543–4 (Gummow J); G J Virgo and J Beatson, 'Contract, Unjust Enrichment and Unconscionability' (2002) 118 *Law Quarterly Review* 352. See also Paul Finn, 'Equitable Doctrine and Discretion in Remedies' in W R Cornish et al (eds), *Restitution: Past, Present and Future — Essays in Honour of Gareth Jones* (1998) 251, 252. Cf Michael Bryan, 'Unjust Enrichment and Unconscionability in Australia: A False Dichotomy?' in Jason W Neyers, Mitchell McInnes and Stephen G A Pitel (eds), *Understanding Unjust Enrichment* (2004) 47.

<sup>50</sup> Chambers, 'Indefeasible Title as a Bar to a Claim for Restitution', above n 28, 134.

<sup>51</sup> Cf *ibid* 129. Chambers' reference to restitutionary proprietary interests here is generalised. Further, although Chambers refers to potential confusion between a new unregistered interest in land with a pre-existing *unregistered* interest, in truth the potential for confusion extends to pre-existing *registered* interests in land. Hence, the present text refers to pre-existing interests in land rather than pre-existing unregistered interests in land.

<sup>52</sup> *Ibid* 130–1.

consistent with indefeasibility whereas others detract from it.<sup>53</sup> Amongst those that detract from the concept of indefeasibility are those claims where ‘the reason for restitution is a defect in the decision to transfer the registered property right’ — in other words, where the transfer was vitiated by ‘mistake, duress, undue influence, or the exploitation of weakness’.<sup>54</sup> It is acknowledged that, where such cases give rise to an equitable property right to the registered land, this right is ‘not an older right, which survives registration, but a new right created by the unjust [or unconscientious] enrichment caused by that registration’.<sup>55</sup> However, it is widely conceded that such rights ‘directly interfere with indefeasibility of title’ because they ‘have the effect of undoing registrations.’<sup>56</sup> This concession is misleading because it is irrelevant that a claim, which falls within the inter se rule, has the effect of ‘undoing’ a registration. Suppose that, after a purchaser is registered as proprietor, he or she contracts to resell the land to the vendor. No-one would suggest that the new contract detracts from indefeasibility because it has the effect of undoing the registration.

In short, indefeasibility is concerned solely with protecting the registered proprietor from claims based on prior title, and not from any other claims, including the possibility that the registration may be reversed for reasons unrelated to prior title. Closely examined, indefeasibility protects the registered proprietor from any adverse property rights, making it important to distinguish between prior property rights and fresh property rights. Prior property rights clearly do not bind the registered proprietor. So far as fresh rights created against the registered proprietor are concerned, these rights may either be personal or proprietary. Where fresh rights are proprietary, it may still be said that such property rights are adverse to the registered proprietor’s title. Strictly speaking, this is true, but such rights bind the registered proprietor *not* because they are property rights but because they were created as a result of the registered proprietor’s personal conduct. As such, it is irrelevant whether the rights are personal or proprietary as against the registered proprietor. Suppose a registered proprietor declares a trust over his or her land. There is no doubt that, outside the Torrens system, a beneficiary of the trust will have a property right adverse to that of the trustee. It may be argued that, within the Torrens system, the beneficiary cannot rely on that adverse property right. However, as against the trustee, the beneficiary need not rely on the proprietary nature of the right. The beneficiary may simply rely on the trustee’s consent to act as trustee to enforce the right against him or her.<sup>57</sup> The exigibility of the proprietary right is irrelevant as against the trustee. Does this mean that there is no property right? The short answer is ‘no’. Indefeasibility is accorded only to the registered proprietor and no-one else. This means that even if a newly created right were to fail against the

<sup>53</sup> Robert Chambers, *An Introduction to Property Law in Australia* (2<sup>nd</sup> ed, 2008) 468–70.

<sup>54</sup> *Ibid* 468.

<sup>55</sup> *Ibid* 469.

<sup>56</sup> *Ibid*.

<sup>57</sup> Including the right to reduce the trust property into his or her possession by application of the rule in *Saunders v Vautier* (1841) 4 Beav 115; 49 ER 282.

registered proprietor as a property right (an irrelevant question since the exigibility of such a right is only important as against third parties) it would remain efficacious against any other third party. Therefore it is probably more accurate to state that indefeasibility confers protection against any adverse property claim. The need to further explain that a right that may be a property right may not bind the registered proprietor *as a property right* — but that the right nonetheless remains proprietary *except as against the registered proprietor* — means that it is probably more convenient to simply state that indefeasibility prohibits claims based on prior title.

Secondly, it has been commented that there is an apparent inconsistency in the operation of the inter se rule in the cases where it detracts from indefeasibility and cases where registration was procured by a forged instrument, albeit not where forgery is effected by the registered proprietor.<sup>58</sup> This is because mere notice of the forgery would not affect the registered proprietor's indefeasible title whereas notice of the defect in the transfer would trigger the inter se rule, and thereby affect their indefeasible title.

This analysis is problematic. First, the case of the forged instrument falls squarely within the exclusionary rule prohibiting claims based on prior title. Apart from the statutory exception for fraud, a prior owner would need to assert a claim against the registered proprietor on the basis of their prior title in order to get their land back. Hence, such a claim falls within the category of claims prohibited by the principle of indefeasibility rather than the category of claims permitted by the inter se rule. Although the Torrens system is primarily motivated by the need to reduce costs, difficulty, and delay involved in investigating title, the protection of indefeasibility was extended beyond cases where there was a defect in the vendor's title. It was extended to cases where, although the vendor's title was unimpeachable, the transfer itself was defective because the instrument was a forgery or otherwise void.<sup>59</sup> In so extending the principle of indefeasibility, the protection from prior title became complete. Not only is the registered proprietor protected from prior title which afflicted the vendor's title, he or she is likewise protected from the defrauded vendor's own (prior) title.

It is thus not strictly correct to state that

[t]here is a great deal of difference between an investigation into the quality of the vendor's title, which the Torrens system is designed to obviate, and an investigation into the validity of the transaction through which title will be obtained.<sup>60</sup>

Insofar as the validity of the transaction is impugned, on the basis of fraud or forgery, the principle of indefeasibility extends to protect the registered proprietor from the effects of nullity. Thus, there can be no doubt that the case of

<sup>58</sup> Chambers, *An Introduction to Property Law in Australia*, above n 53, 470.

<sup>59</sup> For examples of transfers void otherwise than for forgery that are nevertheless given effect by the Torrens system, see *City of Canada Bay Council v F & D Bonaccorso Pty Ltd* (2007) 71 NSWLR 424; *Koopahtoo Local Aboriginal Land Council v KLALC Property Investment Pty Ltd* [2008] NSWCA 6 (Unreported, Giles, Tobias JJA and Young CJ in Eq, 18 February 2008).

<sup>60</sup> Chambers, 'Indefeasible Title as a Bar to a Claim for Restitution', above n 28, 134.

*Pyramid Building Society (in liq) v Scorpion Hotels Pty Ltd*<sup>61</sup> was correctly decided. One of five members of a company, Scorpion Hotels, caused a guest-house owned by the company to be mortgaged to the Pyramid Building Society. The member used the \$310 000 advanced on that mortgage to discharge an existing mortgage on that property as well as for his own purposes.<sup>62</sup> The mortgage was executed by a rogue director and his wife, who were not authorised to execute the mortgage on behalf of Scorpion Hotels.<sup>63</sup> On these facts, the Victorian Court of Appeal upheld the mortgage on the basis that, upon registration, it was protected by the principle of indefeasibility.<sup>64</sup>

*Pyramid Building Society (in liq) v Scorpion Hotels Pty Ltd* has been criticised for failing to consider a claim in restitution for unjust enrichment,<sup>65</sup> which may have been run in the following (somewhat simplified) way. Under the common law, a forged conveyance was completely invalid, and the defendant would be subject to claims brought by the plaintiff on the basis of his or her pre-existing title. Such claims are prohibited by the Torrens system, as the act of registration would validate the forged transfer. However, the plaintiff's lack of intention to part with the property is nevertheless sufficient to give rise to a right to restitution of the land so transferred.<sup>66</sup> In the first place, such claims in restitution, on the basis of ignorance, powerlessness or absence of intent, are highly controversial.<sup>67</sup> Secondly, recognising such a claim would effectively abrogate the Torrens rule that enables a forged instrument to effect a transfer of title. Perhaps most

<sup>61</sup> [1998] 1 VR 188.

<sup>62</sup> *Ibid* 189 (Hayne JA).

<sup>63</sup> *Ibid*.

<sup>64</sup> *Ibid* 196.

<sup>65</sup> Chambers, 'Indefeasible Title as a Bar to a Claim for Restitution', above n 28.

<sup>66</sup> A distinction is drawn between so-called 'two-party cases' and so-called 'three-party cases': *ibid* 129–30. It is suggested by Chambers that where a plaintiff seeks to recover property which has passed directly from himself to the defendant, such a claim falls within the *inter se* rule. However, where a plaintiff seeks to recover property from a defendant who received it, not directly from the plaintiff, but from someone who acquired it from the plaintiff and then transferred it in a separate transaction, it does not. If this distinction is sound, almost all cases of forged transfers would fall within Chambers' two-party rule, which would seriously undermine the principle of indefeasibility. In the context, the suggested distinction between notice of fraud or forgery and notice of the plaintiff's original property interest may well be one that is too nice. Purchasers, for example, would have notice of their vendors' original property interests but that will not allow their vendors to establish any claim in unjust enrichment against them. Nor, where the transaction is unauthorised, as in cases of forgeries, does notice of a plaintiff's property interest feature. Notice of a party's property interest has never given rise to any claim in cases of forgery. Such claims were permitted outside of the Torrens system simply because, being unauthorised, they were completely ineffectual. Nor is the analogy with the concept of notice in *Barclays Bank plc v O'Brien* [1994] 1 AC 180 obviously correct. That doctrine extends unjust enrichment liability for the misrepresentation or undue influence of another. It remains controversial whether persons who deprive others of their property are liable in unjust enrichment. To assume therefore that they are and that the same extension ought to apply is unsatisfactory. Furthermore, it is generally conceded that such 'unjust enrichment' liability serves to obliquely protect property rights: see, eg, Birks, *Unjust Enrichment*, n 35, 66. If so, labelling the claim one of 'unjust enrichment' ought not to permit it to succeed.

<sup>67</sup> See, eg, *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, 158–9 (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ) ('*Farah Constructions*'). See also Elise Bant, "'Ignorance" as a Ground of Restitution — Can It Survive?' [1998] *Lloyd's Maritime and Commercial Law Quarterly* 18; Peter Watts, 'Book Review: *Unjust Enrichment* by Peter Birks' (2005) 121 *Law Quarterly Review* 163, 166.

significantly, such claims — if they exist — exist to protect prior title, albeit obliquely. They do so even though the claim itself may be mediated through unjust (or unconscientious) enrichment. Accordingly, such claims may not be permitted by the inter se rule. Previous attempts to demonstrate that the inter se rule does not conflict with indefeasibility are insufficiently nuanced, in that there seems to be an assumption that only a direct assertion of prior title — a *vindicatio* — is prohibited by the Torrens system. In truth, any claim based on prior title, whether asserted directly or indirectly, is prohibited by the principle of indefeasibility.

### III REFINEMENT AND INTERNMENT: KEEPING THE INTER SE RULE WITHIN BOUNDS

The most significant difficulty with existing modern theories about the coexistence of the inter se rule and the indefeasibility principle is an overly broad definition of the claims that fall within the former. There seems to be an assumption, albeit unspoken, that only claims asserting title directly fall within the scope of claims prohibited by indefeasibility. This underestimates the possible claims that may serve to protect title, which a legal system may enlist. Theoretically at least, there are three such claims and they may overlap.

The first is a *vindicatio*, in which the plaintiff simply asserts that the land registered in the defendant's name belongs to them without asserting any wrongdoing. It is commonly supposed that only equity permits a *vindicatio*<sup>68</sup> — where the beneficiary of a trust asserts his or her pre-existing equitable interest against a third party by seeking a declaration that the third party holds the trust property subject to the beneficiary's equitable interest. Such a claim involves a direct assertion of ownership<sup>69</sup> and, being premised upon prior title, is clearly and undoubtedly prohibited by the Torrens system.

The second possible claim lies in the category of wrongs whereby the plaintiff seeks to protect their prior property right by claiming that the defendant has committed a wrong. This is the most common means by which property rights, both real and personal, are protected at common law. In the context of land law, this is manifested in the tort of trespass to land (or trespass *quare clausum fregit*).<sup>70</sup> Unlike a *vindicatio*, which involves a bare assertion by the plaintiff of his or her property right, an action in trespass alleges wrongful interference with that right. It is thus distinct from a *vindicatio* in form, although in substance they both serve to protect the plaintiff's property right. While the tort of trespass does

<sup>68</sup> See, eg, Birks, *Unjust Enrichment*, above n 35, 64–6. *Contra* David Fox, 'Legal Title as a Ground of Restitutionary Liability' [2000] *Restitution Law Review* 465.

<sup>69</sup> Birks, *Unjust Enrichment*, above n 35, 64.

<sup>70</sup> Francis Trindade, Peter Cane and Mark Lunney, *The Law of Torts in Australia* (4<sup>th</sup> ed, 2007) 129.

not require the defendant to exclude the plaintiff from their land,<sup>71</sup> such exclusion from the land would nonetheless be a trespass.<sup>72</sup>

The final possible claim arises from unjust enrichment, though the existence of such claims remains controversial. All three categories of claims serve to protect property rights, but while *vindicatio* does so directly, claims in wrongs and unjust enrichment do so obliquely.<sup>73</sup> The idea that property rights are protected through the law of wrongs is not particularly new to lawyers, since for many centuries interests in land have been protected primarily through the tort of trespass as well as the action of ejectment (which is itself derived from trespass). While such common law claims that serve to protect prior title to land are tolerably obvious, the same cannot be said of equitable causes of action, not to mention potential claims in unjust enrichment that may lie at law or in equity.

The need to differentiate between the multifarious legal and equitable causes of action that serve to protect prior title and those that do not is amply demonstrated in the case of *Pyramid Building Society (in liq) v Scorpion Hotels Pty Ltd*. The cause of action that the Victorian Court of Appeal allegedly failed to consider is said to lie in unjust enrichment and it was argued that, as a result, it did not infringe the principle of indefeasibility.<sup>74</sup> However, assuming such a cause of action exists, it serves to protect a different form of unjust enrichment than cases of mistake, duress, undue influence and the like.<sup>75</sup> It does not serve to protect the transferor's autonomy, but rather to protect the transferor's title.<sup>76</sup> As such, it must infringe the indefeasibility principle even though it may don the cloak of unjust enrichment. The case, therefore, is correctly decided. It did not fail to consider an unjust enrichment claim falling within the inter se rule because there was no such claim. The only plausible unjust enrichment claim that could be raised contradicted the principle of indefeasibility and thus could not possibly succeed.

A host of controversial claims that have either been allowed or disallowed may be similarly examined. The following discussion will, *ex necessitate*, be an incomplete examination of the scope of the inter se rule. Only the most controversial causes of action will be examined but it is hoped that the process will clarify the present thesis and allow it to be readily applied to novel claims. It also attempts to demonstrate that, beyond *Frazer v Walker*, a great many of the leading cases are consistent with the present thesis.

<sup>71</sup> Mere entry upon the land without the plaintiff's permission suffices: see, eg, *Schumann v Abbott* [1961] SASR 149; *Greig v Greig* [1966] VR 376; *Coles-Smith v Smith* [1965] Qd R 494. In this respect, an action in trespass is distinct from an action of ejectment.

<sup>72</sup> See, eg, *Waters v Maynard* (1924) 24 SR (NSW) 618, 620–1 (Campbell J).

<sup>73</sup> Birks, *Unjust Enrichment*, above n 35, 66. In the context of conversion of goods, for example, Lord Mansfield, in *Hambly v Trott* (1776) 1 Cowp 371, 374; 98 ER 1136, 1137, has suggested: 'An action of trover is not now an action *ex maleficio*, though it is so in form; but it is founded in property.'

<sup>74</sup> Chambers, 'Indefeasible Title as a Bar to a Claim for Restitution', above n 28, 134.

<sup>75</sup> Kelvin F K Low, 'Recipient Liability in Equity: Resisting the Siren's Lure' [2008] *Restitution Law Review* 96, 103.

<sup>76</sup> Birks, *Unjust Enrichment*, above n 35, 66.

*A De Novo Constructive Trusts*

One issue that has bedevilled the courts, ever since Torrens registration was first established in South Australia, is the availability of the constructive trust against a registered proprietor as part of the inter se rule. Before considering this, there are two senses in which the words ‘constructive trust’ may be used that must first be excluded. First, the concern here is the availability of a *proprietary* constructive trust and not liability to account as a constructive trustee, the latter being liability of a *personal* nature.<sup>77</sup> Secondly, the right of a beneficiary under an express trust, which subsists as against a transferee because the latter is not equity’s darling, is likewise excluded. It is debatable whether the label ‘constructive trust’ is appropriate in this second instance.<sup>78</sup> It may be that a more appropriate label here is that the transferee is a ‘constructive trustee of an express trust interest’.<sup>79</sup> Whatever the case, it is clear that such trusts are excluded by the indefeasibility principle because they serve to protect prior title.

The controversy therefore surrounds the availability of either de novo proprietary constructive trusts or new — as opposed to persisting — equitable proprietary interests, such as those arising out of an undertaking by a transferee made to a transferor to recognise the rights of another. It is here necessary to dispel a number of misconceptions. It has been said that indefeasibility is ‘not [intended to] provide the registered proprietor with any immunity from personal claims. It is a defence only against proprietary claims or *proprietary remedies* with respect to the land in question.’<sup>80</sup> On this basis, it has been concluded that ‘[t]o the extent that the remedy [sought] ... is a monetary or other personal order and does not lie against the land itself, indefeasibility of title offers no defence to the registered proprietor.’<sup>81</sup> The latter proposition is clearly wrong. If a plaintiff brought an action against a registered proprietor on the basis of their prior title (by, for example, alleging that the transfer was effected on a forged instrument and so was a nullity), it matters not whether the plaintiff was seeking ejectment or simply a personal remedy. The claim would fail because it is prohibited by the indefeasibility principle. In short, indefeasibility is concerned not with the remedial prospects of the claim but with the basis of the claim.

The clearest example of the permissibility of supposedly proprietary remedies, referred to earlier,<sup>82</sup> is the case of a registered proprietor who contracts to sell the registered land. The remedy in such a case takes on a proprietary flavour through the operation of the maxim ‘equity regards as done that which ought to be done’, even though strictly speaking the proprietary aspect of the claim is irrelevant to the dispute between the purchaser and the registered proprietor. Hence, in the context of a contract of sale, even if the maxim did *not* operate, so that there was

<sup>77</sup> Lionel Smith, ‘Constructive Trusts and Constructive Trustees’ (1999) 58 *Cambridge Law Journal* 294.

<sup>78</sup> Lionel Smith, ‘Transfers’ in Peter Birks and Arianna Pretto (eds), *Breach of Trust* (2002) 111.

<sup>79</sup> J E Penner, *The Law of Trusts* (5<sup>th</sup> ed, 2006) 113.

<sup>80</sup> Crown, ‘Indefeasibility of Title: Developments in Singapore’, above n 15, 103 (emphasis added).

<sup>81</sup> *Ibid* 103–4.

<sup>82</sup> See above nn 44–8 and accompanying text.

no transfer of title in equity, the same result would follow in a dispute between the two parties arising from the availability of specific performance. The proprietary nature of the remedy is irrelevant as between the contracting parties. It is sometimes easy to confuse specific performance with an identification of property rights, but the two are clearly distinguishable.<sup>83</sup> Even if it were correct that indefeasibility prohibits the courts' employment of proprietary remedies — which it does not — it is difficult to see how it can justifiably lead to a prohibition on the courts' use of specific performance orders against registered proprietors.

The most telling sign that this view of Torrens indefeasibility is mistaken lies in the caveat system. The caveat system is premised upon the existence of unregistered proprietary interests. If the indefeasibility principle prohibited such interests from ever arising, it is difficult to see what function the caveat system could serve. It has been suggested that constructive trusts must be considered in two categories: those that undermine the principle of indefeasibility and those that do not.<sup>84</sup> The difficulty, of course, lies in distinguishing them. On one reading, this theory is entirely consistent with the one being presented in this article. Where the constructive trust arises out of conduct on the part of the registered proprietor, which is something more than mere registration with notice of a *prior unregistered interest*, it would not undermine the principle of indefeasibility. The problem with this proposition is that, in many instances, it confuses notice of an unregistered (or even registered) proprietary interest with notice of wrongdoing or other facts that may give rise to legal liability.<sup>85</sup> Notice of a prior interest in land cannot be used to defeat a registered proprietor's title on the basis of priority, but there is no reason why the registered proprietor's title should be immune from challenge because of notice of something other than prior title. There is no reason why a common law or equitable cause of action built upon notice of something other than prior title should be prohibited under the Torrens system.

Once it is accepted that *de novo* constructive trusts are permissible under the Torrens system, the solution to the difficult case of *Bahr v Nicolay [No 2]* ('*Bahr v Nicholay*')<sup>86</sup> becomes obvious. The facts in *Bahr v Nicolay* follow a recurring pattern commonly encountered, both inside and outside the Torrens system. A, a registered proprietor, confers certain rights over land to B. A then sells the land to C, who agrees with A to be bound by B's rights. C then denies

<sup>83</sup> See Ben McFarlane, 'Identifying Property Rights: A Reply to Mr Watt' [2003] *Conveyancer and Property Lawyer* 473, 474–6. *Contra* Graeme Watt, 'The Proprietary Effect of a Chattel Lease' [2003] *Conveyancer and Property Lawyer* 61, 64–71.

<sup>84</sup> Tang, 'Beyond the Torrens Mirror', above n 15, 684–7.

<sup>85</sup> See, eg, *ibid* 693–5, where Tang argues that liability on the part of the registered proprietor that arises out of fact patterns seen in such cases as *Barclays Bank plc v O'Brien* [1994] 1 AC 180, *Royal Bank of Scotland plc v Etridge [No 2]* [2002] 2 AC 773, *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447 and *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395 affects the principle of indefeasibility '*in practice*': at 694 (emphasis added). In such cases, although reference is sometimes made to 'notice', such 'notice', actual or constructive, is *not* notice of a prior proprietary interest and hence irrelevant to the principle of indefeasibility. See below nn 114–15 and accompanying text.

<sup>86</sup> (1988) 164 CLR 604.

that he or she is bound by B's rights.<sup>87</sup> Outside the Torrens system, this denial is usually upon the basis that B's rights were merely personal and operated only against A, therefore not binding C. Where it is registered land, C has an additional string to his or her bow — drawing on additional support from the principle of indefeasibility. In *Bahr v Nicolay*, two strategies were adopted to uphold liability on the part of C. According to the majority, the imposition of a constructive trust on C that falls within the scope of the inter se rule suffices to preserve C's liability.<sup>88</sup> Alternatively, the minority found liability could be upheld through a finding of fraud.<sup>89</sup> It is arguable whether the constructive trust is the best vehicle for imposing liability upon C, but that is a question of the appropriateness of the remedy, rather than whether allowing such claims would detract from indefeasibility.<sup>90</sup> Such claims are *not* premised upon prior title as, outside the Torrens system, B resorts to them precisely because the agreement with A conferred upon B no proprietary rights.<sup>91</sup> There is greater scope for the application of such claims in Torrens systems because prior proprietary rights are weaker in a Torrens system than under the general law. Therefore, what could previously be recovered by a simple assertion of the priority of title cannot be achieved so readily where C has registered their title. Instead, as the majority in *Bahr v Nicolay* asserted, something more is required.<sup>92</sup>

The use of the fraud exception by the minority is unconvincing because it unnecessarily stretches and distorts the meaning of fraud. Fraud does not extend to a situation where C promises to do something, with an honest intention to perform, but then later changes his or her mind. If the elements of a valid contractual promise are present, C may be liable for breach of contract, but even where the contract is intentionally breached, we do not describe it as fraudulent. It seems odd therefore to classify an intentional breach of a promise, *where the elements of a valid contractual promise are not present*, as fraudulent. It is, of course, a different matter if C made the promise with no intention of keeping it. Presently, the fraud exception is fraught with confusion. A leading case confines fraud to cases of 'actual fraud, [that is], dishonesty of some sort, not what is called constructive or equitable fraud'.<sup>93</sup> However, a later case claims that some species of equitable fraud are caught by the fraud exception.<sup>94</sup> The recurring case of a promisor who changes his or her mind in relation to a promise, which does

<sup>87</sup> Ibid 623–7 (Wilson and Toohey JJ).

<sup>88</sup> Ibid 638–9 (Wilson and Toohey JJ), 654–60 (Brennan J).

<sup>89</sup> Ibid 618–9 (Mason CJ and Dawson J).

<sup>90</sup> For a discussion of whether the constructive trust is an appropriate method of protecting property rights, see generally Susan Bright, 'The Third Party's Conscience in Land Law' [2000] *Conveyancer and Property Lawyer* 398; Ben McFarlane, 'Constructive Trusts Arising on a Receipt of Property *Sub Conditione*' (2004) 120 *Law Quarterly Review* 667.

<sup>91</sup> See, eg, *Binions v Evans* [1972] Ch 359.

<sup>92</sup> Cf *Presbyterian Church (NSW) Property Trust v Scots Church Development Ltd* (2007) 64 ACSR 31, 40–4 (Young CJ in Eq), albeit in the context of a discussion of the fraud exception.

<sup>93</sup> *Assets Co Ltd v Mere Roihi* [1905] AC 176, 210 (Lord Lindley for Lords Macnaghten, Davey, Robertson, Lindley and Sir Arthur Wilson).

<sup>94</sup> *Latec Investments Ltd v Hotel Terrigal Pty Ltd (in liq)* (1965) 113 CLR 265, 273–4 (Kitto J); see also at 280 (Taylor J), 287–8 (Menzies J).

not yet have contractual force, has come to be described as ‘supervening fraud’.<sup>95</sup> However, this categorisation of such behaviour is not sufficient. If the fraud exception extended to equitable fraud, there would at least be the benefit of some certainty, in that cases of equitable fraud would be well-recognised. But to extend the fraud exception beyond ‘actual fraud’ to *some* cases of ‘equitable fraud’ with a further extension to ‘supervening fraud’ places an intolerable stress on the stability of the concept of fraud. If it is accepted that the inter se rule permits any claim that arises apart from claims with the object of protecting prior title, much of the confusion with respect to the fraud exception can be dispensed with.<sup>96</sup> Courts may return to the simple position of limiting fraud to ‘actual fraud’ and nothing else, and trust that other meritorious claims will be addressed by the inter se rule.

On this basis, constructive trusts — as well as other remedies, including personal remedies — may be asserted against a registered proprietor for a variety of claims that are not dependent on prior title but nonetheless proprietary. These include the claim in *Bahr v Nicolay*, proprietary estoppel, a *Pallant v Morgan* equity,<sup>97</sup> and claims to recover bribes received by fiduciaries where the proceeds have been invested in land.<sup>98</sup>

#### B Misrepresentation, Duress, Undue Influence and Unconscionability

The vitiating factors of duress, undue influence and unconscionability pose little difficulty in the context of Torrens statutes in two-party cases where the registered proprietor is personally responsible for the particular vitiating factor.<sup>99</sup> However, where the registered proprietor has not personally contributed to the vitiating factor, it has been suggested that there is an irreconcilable clash of objectives between allowing rescission and preserving indefeasibility.<sup>100</sup> Assuming this view is correct, it is somewhat surprising that the courts have not yet detected this clash, as claims for rescission have not failed because of indefeasibility.<sup>101</sup> Whether the relevant Torrens jurisdiction employs the system of

<sup>95</sup> See, eg, Elizabeth Toomey, ‘Why Revisit *Sutton v O’Kane*? The Tricky Trio: Supervening Fraud, the In Personam Claim and Landlocked Land’ (2007) 13 *Canterbury Law Review* 263; Law Commission (NZ), *Review of the Land Transfer Act 1952* (Issue Paper No 10, October 2008) 46–7.

<sup>96</sup> See Douglas J Whalan, ‘The Meaning of Fraud under the Torrens System’ (1975) 6 *New Zealand Universities Law Review* 207; Peter Butt, ‘Notice and Fraud in the Torrens System: A Comparative Analysis’ (1977–78) 13 *University of Western Australia Law Review* 354; Sir Anthony Mason, ‘Indefeasibility: Logic or Legend?’ in David Grinlinton (ed), *Torrens in the Twenty-First Century* (2003) 3.

<sup>97</sup> [1953] 1 Ch 43. See generally Nicholas Hopkins, ‘The *Pallant v Morgan* “Equity”?’ [2002] *Conveyancer and Property Lawyer* 35.

<sup>98</sup> See, eg, *A-G (HK) v Reid* [1994] 1 AC 324.

<sup>99</sup> Adrian J Bradbrook, Susan V MacCallum and Anthony P Moore, *Australian Real Property Law* (4<sup>th</sup> ed, 2007) 171.

<sup>100</sup> Lynden Griggs, ‘In Personam, *Garcia v NAB* and the Torrens System — Are They Reconcilable?’ (2001) 1 *Queensland University of Technology Law and Justice Journal* 76; Tang, ‘Beyond the Torrens Mirror’, above n 15, 683.

<sup>101</sup> See, eg, *Burke v State Bank of New South Wales* (1994) 37 NSWLR 53, 74–9 (Santow J).

constructive notice pioneered in *Barclays Bank plc v O'Brien*<sup>102</sup> and recently refined by the House of Lords in *Royal Bank of Scotland plc v Etridge [No 2]*,<sup>103</sup> or Australian principles of unconscionability and the so-called 'special equity' for wives,<sup>104</sup> how such claims of third-party unconscionability ought to be treated under the Torrens system are questions of critical importance.<sup>105</sup> Some commentators have suggested that allowing such claims would 'in fact undermine the principle of indefeasibility of title',<sup>106</sup> even going so far as to suggest that such claims can only be 'justified as an anomalous exception to the critical imperatives of the Torrens system.'<sup>107</sup> Yet neither school of thought proposes to exclude such claims in the Torrens system. It has been suggested that it may be acceptable if the circumstances of the case can be 'explained as a modification or qualification to the fundamental tenet of indefeasibility.'<sup>108</sup> Tang, a like-minded critic, goes even further, suggesting that 'the *Garcia* doctrine should [be allowed in the context of Torrens land] because the social utility of the doctrine — in the protection of vulnerable people in a familial situation — far outweighs the principle of indefeasibility of title.'<sup>109</sup>

With respect, it is difficult to see how courts can manipulate the statutory concept of 'indefeasibility' as if it were judge-made law. In applying Torrens legislation, the courts do not have the same leeway to develop the law as they would if the rule were laid down by precedent. Judges cannot interpret a validly enacted statute as disallowing a particular claim and then decide to allow the claim simply because they consider a different, judge-made rule of greater import. Such manipulation would be contrary to the doctrine of parliamentary sovereignty.<sup>110</sup>

In truth, these third-party unconscionability claims are perfectly compatible with the principle of indefeasibility because they fall within the scope of the inter se rule. In suggesting that such claims detract from indefeasibility or are otherwise incompatible, commentators have fallen into a common error — they have assumed that, insofar as the various claims employ the doctrine of notice, the relevant notice is notice of prior title and therefore within the scope of the principle of indefeasibility. This mistake was identified more than a decade ago when John Mee pointed out that Lord Browne-Wilkinson's use of the doctrine of notice was decidedly unorthodox. The doctrine, ordinarily used to reconcile

<sup>102</sup> [1994] 1 AC 180.

<sup>103</sup> [2002] 2 AC 773.

<sup>104</sup> See *Yerkey v Jones* (1939) 63 CLR 649, 683 (Dixon J); cf at 690 (McTiernan J), 666 (Rich J); *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447, 462 (Mason J); *Garcia v National Bank of Australia Ltd* (1998) 194 CLR 395, 403–9 (Gaudron, McHugh, Gummow and Hayne JJ), 441 (Callinan J).

<sup>105</sup> The various different doctrines arguably serve the same objective: see Andrew Phang and Hans Tjio, 'From Mythical Equities to Substantive Doctrines: *Yerkey* in the Shadow of Notice and Unconscionability' (1999) 14 *Journal of Contract Law* 72.

<sup>106</sup> Tang, 'Beyond the Torrens Mirror', above n 15, 679.

<sup>107</sup> Griggs, 'In Personam, *Garcia v NAB* and the Torrens System', above n 100, 87.

<sup>108</sup> *Ibid.*

<sup>109</sup> Tang, 'Beyond the Torrens Mirror', above n 15, 694.

<sup>110</sup> See generally *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399.

rights arising from two transactions, was applied in a situation with ‘only one transaction, that which is being attacked on the grounds of undue influence or misrepresentation’ — this is because, at the time the guarantee is concluded, ‘the surety’s equity to set aside that transaction has not yet come into being.’<sup>111</sup> It is therefore a mistake to talk about notice, actual or constructive, of earlier rights. This view has been recently vindicated in the House of Lords, where it was said that ‘this is not a conventional use of the equitable concept of constructive notice.’<sup>112</sup>

In the context of the Torrens system, it has been said:

There is an important distinction between notice of a pre-existing equitable interest and notice of the vitiation of the other party’s intention to enter the transaction. This distinction is crucial for the application of the principle of indefeasibility. The protection from the effect of notice provided by a Torrens system applies to notice of pre-existing unregistered interests and cannot be used to prevent the creation of new equitable interests.<sup>113</sup>

Thus, assuming the doctrine of constructive notice were being conventionally used,<sup>114</sup> it would in this context be a reference to constructive notice of undue influence or other wrongdoing, *not* constructive notice of a prior right. Notice of facts that give rise to a *de novo* right is not the same as notice of a prior right. Torrens legislation protects the registered proprietor from the latter but not the former. The right to rescind a mortgage against the bank cannot be a prior right because it arises simultaneously with the creation of the mortgage. Nor can the bank be regarded as having taken subject to the victim’s right to rescind as against the wrongdoer, since the contract with the bank is independent of any contract the victim may have with the wrongdoer.

Perhaps even more significantly, the constructive notice employed by the courts is an entirely different concept altogether from notice of prior title. As Lord Nicholls observed:

There is a further respect in which *O’Brien* departed from conventional concepts. Traditionally, a person is *deemed* to have notice (that is, he has ‘constructive’ notice) of a prior right when he does not actually know of it but would have learned of it had he made the requisite inquiries. A purchaser will be treated as having constructive notice of all that a reasonably prudent purchaser would have discovered. In the present type of case, the steps a bank is required to take, lest it have constructive notice that the wife’s concurrence was procured improperly by her husband, do not consist of making inquiries. Rather, *O’Brien* envisages that the steps taken by the bank will reduce, or even eliminate, the risk of the wife entering into the transaction under any misapprehension or as a result of undue influence by her husband. The steps are not concerned to dis-

<sup>111</sup> John Mee, ‘Undue Influence, Misrepresentation and the Doctrine of Notice’ (1995) 54 *Cambridge Law Journal* 536, 541–2.

<sup>112</sup> *Royal Bank of Scotland plc v Etridge [No 2]* [2002] 2 AC 773, 802 (Lord Nicholls).

<sup>113</sup> Chambers, ‘Indefeasible Title as a Bar to a Claim for Restitution’, above n 28, 130.

<sup>114</sup> As appears to have been the case in *Macquarie Bank* [1998] VR 133.

cover whether the wife has been wronged by her husband in this way. The steps are concerned to minimise the risk that such a wrong may be committed.<sup>115</sup>

Since constructive notice in this context is not really constructive notice as such but simply a label by which the courts impose a duty to minimise transactional wrongdoing, it is entirely compatible with the principle of indefeasibility. Even if applied in a conventional sense, such constructive notice would not involve notice of prior title and would still remain outside the mischief that the indefeasibility principle is intended to prevent; instead, these claims fall quite neatly within the inter se rule. It is therefore unsurprising to find the courts untroubled by the principle of indefeasibility when considering claims of constructive notice, as these claims operate on a different plane to that of Torrens indefeasibility.

### C Mistake

The availability of remedies for mistaken transfers is a matter of some controversy. Whereas some commentators believe that relief should be available to the mistaken transferor against the registered proprietor/transferee,<sup>116</sup> other commentators paint a more complex picture.<sup>117</sup> According to the latter view, the cases are inconsistent and contradictory, with relief being offered in some cases<sup>118</sup> but denied in others.<sup>119</sup> In truth, the cases are remarkably consistent in that where the mistaken transferor seeks relief against the registered proprietor/transferee, relief is almost invariably given.<sup>120</sup>

That relief was denied in *Medical Benefits Fund of Australia Ltd v Fisher*<sup>121</sup> may be explained quite simply as being unrelated to cases of mistake within the rubric of unjust enrichment. In that case, Fisher (the defendant) had purchased land which had previously been held by three tenants in common, each holding

<sup>115</sup> *Royal Bank of Scotland plc v Etridge [No 2]* [2002] 2 AC 773, 802 (emphasis added).

<sup>116</sup> See, eg. Tang, 'Beyond the Torrens Mirror', above n 15, 696. Tang's suggestion that the remedy is based on the contract is a somewhat simplified view of matters. At least in respect of transfers of land, the common law recognises the principle of abstraction: see William Swadling, 'Rescission, Property, and the Common Law' (2005) 121 *Law Quarterly Review* 123, 139–40, citing *Cundy v Lindsay* (1878) 3 App Cas 459, 466 (Lord Cairns LC). It is thus not necessarily true that if the contract may be rescinded for mistake then the transfer would likewise be rescindable. It is more likely than not that the transfer would be affected by the same mistake, such that it will also be rescindable. The distinction is, however, important because there may be no contract at all (a mistaken gift) or the contract may not be afflicted by a mistake but the transfer may be. The principle of abstraction is more controversial in respect of transfers of goods: see Birke Häcker, 'Rescission of Contract and Revesting of Title: A Reply to Mr Swadling' [2006] *Restitution Law Review* 106, 109. See generally Dominic O'Sullivan, Steven Elliott and Rafal Zakrzewski, *The Law of Rescission* (2008) ch 20.

<sup>117</sup> See, eg. Lynden Griggs, 'Indefeasibility and Mistake — The Utilitarianism of Torrens' (2003) 10 *Australian Property Law Journal* 108.

<sup>118</sup> See, eg. *Lukacs v Wood* (1978) 19 SASR 520; *Tutt v Doyle* (1997) 42 NSWLR 10.

<sup>119</sup> See, eg. *Medical Benefits Fund of Australia Ltd v Fisher* [1984] 1 Qd R 606; *State Bank of New South Wales v Berowra Waters Holdings Pty Ltd* (1986) 4 NSWLR 398; *Tanzone Pty Ltd v Westpac Banking Corporation* (1999) 9 BPR 17 287.

<sup>120</sup> *Lukacs v Wood* (1978) 19 SASR 520; *Tutt v Doyle* (1997) 42 NSWLR 10. Cf *State Bank of New South Wales v Berowra Waters Holdings Pty Ltd* (1986) 4 NSWLR 398.

<sup>121</sup> [1984] 1 Qd R 606, 612 (McPherson J).

an original certificate of title. When a new certificate of title was issued to the defendant, it failed to mention, as the original three certificates of title had done, the plaintiff's lease agreement.<sup>122</sup> This lease agreement was for an initial period of three years, followed by an option to renew for three further consecutive terms of three years each.<sup>123</sup> Although the defendant did not object when the plaintiff renewed the lease for the first time, it pleaded indefeasibility when the plaintiff sought to renew the lease for the second time.<sup>124</sup> Here, the mistake was that of the Deputy Registrar of Titles, not the plaintiff. There was no recognised cause of action that existed at common law or in equity for such a mistake.<sup>125</sup> This meant that any relief had to be located within the terms of the relevant Torrens legislation, but here no statutory relief was available.<sup>126</sup> The claim thus failed because it could not satisfy the trite rule that before one can resort to the inter se rule, one must first establish a cause of action either at common law or in equity.<sup>127</sup>

The case of *Tanzone Pty Ltd v Westpac Banking Corporation*<sup>128</sup> is likewise explicable. Here a lease agreement contained a rent review clause which erroneously would result in a dramatic escalation of rent over the duration of the lease.<sup>129</sup> The landlord then sold the land to a purchaser who registered his title.<sup>130</sup> Consistently with the present thesis, the Court observed that, as against the original landlord, a claim for rectification would have succeeded.<sup>131</sup> However, as against the registered proprietor, the claim for rectification failed. The result is clearly correct. Windeyer J begins by first noting that the right to rectify in equity would bind a purchaser with notice.<sup>132</sup> However, because Torrens registration provided indefeasibility of title, such a right did not survive registration.<sup>133</sup> Although the right only amounted to a mere equity as opposed to a full equitable interest, it would be 'illogical and inimical to the whole theory of Torrens if there were protection against interests in land of which there was notice but no protection against lesser mere equities of which there was notice.'<sup>134</sup> This must be considered to be correct. It is debatable whether or not mere equities are property rights but Windeyer J must have been correct in

<sup>122</sup> Ibid 606–7.

<sup>123</sup> Ibid 606.

<sup>124</sup> Ibid 606–7.

<sup>125</sup> Ibid 610.

<sup>126</sup> Ibid.

<sup>127</sup> See *Garofano v Reliance Finance Corporation Pty Ltd* (1992) 5 BPR 11 941, 11 945 (Meagher JA); *Grgic v Australian & New Zealand Banking Group Ltd* (1994) 33 NSWLR 202, 222–3 (Powell JA); *Pianta v National Australia Bank Ltd* (1994) 17 Fam LR 34, 39 (Handley JA); *Macquarie Bank* [1998] 3 VR 133, 146–7 (Tadgell JA); *Horvath v Commonwealth Bank of Australia* [1999] 1 VR 643, 650–1 (Tadgell JA).

<sup>128</sup> (1999) 9 BPR 17 287.

<sup>129</sup> Ibid 17 292 (Windeyer J).

<sup>130</sup> Ibid 17 289.

<sup>131</sup> Ibid 17 294.

<sup>132</sup> Ibid 17 295.

<sup>133</sup> Ibid 17 296–8.

<sup>134</sup> Ibid 17 297.

treating them as at least akin to such rights.<sup>135</sup> Whether or not it is properly regarded as a form of property right, its ability to affect a subsequent registered proprietor must be regarded as being essentially proprietary for the purposes of the Torrens system, and hence prohibited by the principle of indefeasibility. The learned judge also considered that an in personam claim was not available because any claim based upon notice could not prevail against the principle of indefeasibility.<sup>136</sup> There is a risk that the decision may be misunderstood if attention were to be focused solely on the dismissal of the claim on the basis of its requirement of notice. However, contextually, it seems obvious that the learned judge was referring to notice of a prior property right and not merely notice *simpliciter*.

The sole oddity in this series of cases is arguably *State Bank of New South Wales v Berowra Waters Holdings Pty Ltd*.<sup>137</sup> Here, as a result of a mistaken belief on the part of the registered mortgagees that the debt had been fully paid, a discharge of the mortgage was registered.<sup>138</sup> An action by the mortgagees against the mortgagors failed on the grounds that the discharge was indefeasible.<sup>139</sup> The mortgagees had alleged that the discharge was void as a result of the mistake and this appeared to create a direct conflict between their claim and the principle of indefeasibility. As Needham J observed, 'since the decision in *Frazer v Walker* ... a void instrument, upon registration, creates an interest indefeasible as against the whole world with the exception of persons who can bring themselves within the exceptions to indefeasibility.'<sup>140</sup> Assuming that the correct relief was sought by the mortgagees, there is a significant distinction between an instrument allegedly void because it is a forgery and an instrument that is rendered void at law by mistake. In the former case, as epitomised by *Frazer v Walker*, such forged instruments are generally ineffectual at law because of the *nemo dat* rule. The rule is intended to protect the prior title of the victim of the forgery and, as a result, it is obvious that a claim of nullity because of forgery cannot be sustained. In the latter case, however, the avoidance (even *ab initio*), of the transaction by the law is *not* intended to protect prior title but rather to relieve the transferor of the effects of their mistake. Such a claim does *not* fall within the scope of the principle of indefeasibility but is instead permissible through the *inter se* rule.

There was, however, clearly some confusion as to the basis of the mortgagee's claim. The mortgagee, rather than arguing on the basis of mistake, instead argued that a personal equity had arisen because the mortgage could not be discharged

<sup>135</sup> In this respect, the decision of *Mijo Developments Pty Ltd v Royal Agnes Waters Pty Ltd* [2007] NSWSC 199 (Unreported, Hammerschlag J, 9 March 2007) is interesting as Hammerschlag J decided that 'mere equities' are caveatable, though not because they are a proprietary interest: at [32]–[34], [43]–[50].

<sup>136</sup> *Tanzone Pty Ltd v Westpac Banking Corporation* (1999) 9 BPR 17 287, 17 299 (Windeyer J).

<sup>137</sup> (1986) 4 NSWLR 398.

<sup>138</sup> *Ibid* 403 (Needham J).

<sup>139</sup> *Ibid* 402–3.

<sup>140</sup> *Ibid* 402.

without full payment of the debt.<sup>141</sup> Voidness, where occasioned by mistake rather than forgery, does not infringe the principle of indefeasibility. Otherwise, an absurd result is reached, whereby the availability of relief for mistakes is dependent upon nice distinctions as to whether the effect of the mistake is to render the transfer void or voidable.<sup>142</sup>

#### D Recipient Liability in Equity

Of all the claims that have been alleged to fall within the inter se rule, there is perhaps none as controversial as knowing receipt, also known as recipient liability and the claim under the first limb of *Barnes v Addy*.<sup>143</sup> This article does not intend to revisit the controversies surrounding the substantive elements of the claim or its underlying nature;<sup>144</sup> instead the focus is on its compatibility with the principle of indefeasibility.

Prior to the decision of the High Court of Australia in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* ('*Farah Constructions*'),<sup>145</sup> the Australian courts were divided over whether such claims were permitted under the inter se rule. A majority of the Victorian Court of Appeal in *Macquarie Bank Ltd v Sixty-Fourth Throne Pty Ltd* ('*Macquarie Bank*')<sup>146</sup> as well as a majority of the Full Court of the Supreme Court of Western Australia in *LHK Nominees Pty Ltd v Ken-*

<sup>141</sup> Ibid 403.

<sup>142</sup> Consider the controversial case of *Shogun Finance Ltd v Hudson* [2004] 1 AC 919, which has drawn a host of criticisms: see, eg, Christopher Hare, 'Identity Mistakes: A Missed Opportunity?' (2004) 67 *Modern Law Review* 993; Karen Scott, 'Mistaken Identity, Contract Formation and Cutting the Gordian Knot: *Shogun Finance v Hudson*' [2004] *Lloyd's Maritime and Commercial Law Quarterly* 292; Catherine Elliott, 'No Justice for Innocent Purchasers of Dishonestly Obtained Goods: *Shogun Finance v Hudson*' [2004] *Journal of Business Law* 381; Andrew Phang, Pey-Woan Lee and Pearl Koh, 'Mistaken Identity in the House of Lords' (2004) 63 *Cambridge Law Journal* 24; D W McLauchlan, 'Parol Evidence and Contract Formation' (2005) 121 *Law Quarterly Review* 9; D W McLauchlan, 'Mistake of Identity and Contract Formation' (2005) 21 *Journal of Contract Law* 1; Robert Stevens, 'Objectivity, Mistake and the Parol Evidence Rule' in Andrew Burrows and Edwin Peel (eds), *Contract Terms* (2007) 101.

<sup>143</sup> (1874) LR 9 Ch App 244, 251–2 (Lord Selborne LC).

<sup>144</sup> See *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378, 382, 386 (Lord Nicholls for Lords Goff, Ackner, Nicholls, Steyn and Sir John May); *Bank of Credit & Commerce International (Overseas) Ltd v Akindele* [2001] Ch 437; *Grupo Torras SA v Al-Sabah* [2001] Lloyd's Rep 36, 62 (Robert Walker, Tuckey LJ and Sir Murray Stuart-Smith); *Twinspectra v Yardley* [2002] 2 AC 164, 194 (Lord Millett); *Dubai Aluminium Co Ltd v Salaam* [2003] 2 AC 366, 391 (Lord Millett); *Citadel General Assurance Co v Lloyds Bank Canada* (1997) 152 DLR (4th) 411; *Farah Constructions* (2007) 230 CLR 89. The controversy likewise rages outside the courts: see, eg, Peter Birks, 'Misdirected Funds: Restitution from the Recipient' [1989] *Lloyd's Maritime and Commercial Law Quarterly* 296; P J Millett, 'Tracing the Proceeds of Fraud' (1991) 107 *Law Quarterly Review* 71; Lord Nicholls, 'Knowing Receipt: The Need for a New Landmark' in W R Cornish et al (eds), *Restitution: Past, Present and Future — Essays in Honour of Gareth Jones* (1998) 231; Lionel Smith, 'Unjust Enrichment, Property, and the Structure of Trusts' (2000) 116 *Law Quarterly Review* 412; Peter Birks, 'Receipt' in Peter Birks and Arianna Pretto (eds), *Breach of Trust* (2002) 213; Robert Walker, 'Address: Dishonesty and Unconscionable Conduct in Commercial Life — Some Reflections on Accessory Liability and Knowing Receipt' (2005) 27 *Sydney Law Review* 187; Sarah Worthington, *Equity* (2<sup>nd</sup> ed, 2006) 179–89; Low, 'Recipient Liability in Equity', above n 75.

<sup>145</sup> (2007) 230 CLR 89.

<sup>146</sup> [1998] 3 VR 133, 156–7, 175 (Tadgell JA); see also at 136 (Winneke P).

worthy<sup>147</sup> felt that such claims infringed the principle of indefeasibility. In contrast, a majority of the Queensland Court of Appeal in *Tara Shire Council v Garner* considered that such claims fell within the inter se rule and were thus permitted.<sup>148</sup> That such claims were even permitted under the Torrens system was conceded before the Victorian Supreme Court in the earlier decision of *Koorootang Nominees Pty Ltd v Australia & New Zealand Banking Group Ltd*,<sup>149</sup> as well as a unanimous New South Wales Court of Appeal in *Say-Dee Pty Ltd v Farah Constructions Pty Ltd*.<sup>150</sup> The High Court has since indicated its preference for the views of the majority in *Macquarie Bank*,<sup>151</sup> but its dicta in *Farah Constructions* on the compatibility of receipt claims with the Torrens system<sup>152</sup> has been lamented as both ‘surprisingly brief’ and ‘arguably uncertain’.<sup>153</sup>

One obstacle to receipt claims before the courts appears to be the perceived difficulty of establishing the element of receipt. Thus, the High Court in *Farah Constructions* quoted with approval<sup>154</sup> Tadgell JA’s opinion in *Macquarie Bank* that ‘it is not possible to escape the circumstance that, if there was a “knowing receipt” by the appellant, it was a receipt by virtue of registration under the *Transfer of Land Act*.’<sup>155</sup> This is because the registered proprietor derives his proprietary interest in the land ‘from the fact of registration and not from an event antecedent thereto’.<sup>156</sup> While some commentators appear to consider this to be the sole basis of Tadgell JA’s decision,<sup>157</sup> in truth there was always another string to Tadgell JA’s bow. It seems clear that Tadgell JA considered that even in cases where the element of receipt can be made out, such a claim was incompatible with the principle of indefeasibility. Thus, he observed that

to recognise a claim in personam against the holder of a mortgage registered under the *Transfer of Land Act*, dubbing the holder a constructive trustee by application of a doctrine akin to ‘knowing receipt’ when registration of the mortgage was honestly achieved, would introduce by the back door a means of un-

<sup>147</sup> (2002) 26 WAR 517, 549 (Murray J), 555 (Anderson and Steytler JJ), 568–72 (Pullin J). The Full Court consisted of five justices.

<sup>148</sup> [2003] 1 Qd R 556, 574 (Atkinson J); see also at 562 (McMurdo P).

<sup>149</sup> [1998] 3 VR 16, 75 (Hansen J).

<sup>150</sup> [2005] NSWCA 309 (Unreported, Mason P, Giles and Tobias JJA, 15 September 2005) [208] (Tobias JA). Mason P and Giles JA were in agreement with Tobias JA.

<sup>151</sup> For the High Court majority’s discussion of *Macquarie Bank*, see *Farah Constructions* (2007) 230 CLR 89, 171–2 (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ).

<sup>152</sup> (2007) 230 CLR 89, 167–72 (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ).

<sup>153</sup> Hugh Atkin, “‘Knowing Receipt’” Following *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 29 *Sydney Law Review* 713, 720.

<sup>154</sup> (2007) 230 CLR 89, 169 (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ).

<sup>155</sup> [1998] 3 VR 133, 156. The facts of *Farah Constructions* are further complicated because it was not alleged that the defendants received land as a result of a breach of fiduciary duty, but rather that they received information, which they used in breach of fiduciary duty to acquire land: see Rob Chambers, ‘Knowing Receipt: Frozen in Australia’ (2007) 2 *Journal of Equity* 40, 46.

<sup>156</sup> *Mayer v Coe* [1968] 2 NSW 747, 754 (Street J), cited in *Macquarie Bank* [1998] 3 VR 133, 157 (Tadgell JA). Cf *Black v Garnock* (2007) 230 CLR 438, 451, where Gummow and Hayne JJ opined that ‘the title obtained by registration under the [*Real Property*] Act was not historical or derivative, but was a title which registration itself created in the proprietor.’

<sup>157</sup> See, eg, Atkin, above n 153, 721.

dermining the doctrine of indefeasibility which the Torrens system establishes.<sup>158</sup>

Unfortunately, Tadgell JA did not elaborate further as to why there was such an inconsistency. Was there an inconsistency with the view that indefeasibility is subject only to fraud defined as actual dishonesty? Or did the inconsistency arise because the remedy of such a claim involved the divestment of the registered proprietor's title? Or did the inconsistency arise because a knowing receipt claim protected prior property rights?

It is convenient to address the first objection, that the element of receipt in a recipient liability claim cannot be established where the subject of the claim is Torrens land. This objection has been criticised as 'unduly technical'.<sup>159</sup> It is argued that, instead of suggesting that the element of receipt is independent of the antecedent actions of the errant trustees, it is more accurate to describe the transfer as being facilitated by the defaulting trustees. Alternatively, it is suggested that the plaintiff may resort to the tracing process to establish receipt. In fact, the receipt objection is arguably based on an overextension of Street J's comments in *Mayer v Coe*, where his Honour commented that the registered proprietor derives his proprietary interest in the land 'from the fact of registration and not from an event antecedent thereto'.<sup>160</sup> This overextension is perhaps influenced by the popular view that under the Torrens system, every transfer involves a surrender of land to the Crown followed by a re-grant of the same to the purchaser.<sup>161</sup> In truth, although it may serve as vivid imagery, no Torrens legislation expressly provides that a transfer involves the surrender and re-grant of land.<sup>162</sup> It is also notable that *Mayer v Coe* was a case involving a forged instrument.<sup>163</sup> In the context of a forged instrument, the transfer obviously cannot derive from an event antecedent to registration since any such event is, outside the Torrens system, merely a nullity and of no effect whatsoever. However where a claim of knowing receipt is asserted, the defaulting trustee's actions in transferring the land *do contribute* to the efficacy of the transfer. It may be true that without registration legal title cannot be transferred by the trustee, but it is equally true that registration would not have been effected had the trustee not executed the transfer in breach of trust. As a result, dismissing a

<sup>158</sup> *Macquarie Bank* [1998] 3 VR 133, 157.

<sup>159</sup> Tang, 'Beyond the Torrens Mirror', above n 15, 689.

<sup>160</sup> *Mayer v Coe* [1968] 2 NSW 747, 754.

<sup>161</sup> Robert R Torrens, *The South Australian System of Conveyancing by Registration of Title* (1859) 9, 34. See also *City of Canada Bay Council v F & D Bonaccorso Pty Ltd* (2007) 71 NSWLR 424, 438 (Mason P, Tobias JA and Young CJ in Eq); *Koompahtoo Local Aboriginal Land Council v KLALC Property Investment Pty Ltd* [2008] NSWCA 6 (Unreported, Giles, Tobias JJA and Young CJ in Eq, 18 February 2008) [130] (Young CJ in Eq).

<sup>162</sup> Although it must be conceded that the same illustration is used by Sir Robert Torrens in his second reading speech introducing the South Australian Real Property Bill 1857: South Australia, *Parliamentary Debates*, Legislative Council, 4 June 1857, 203–4 (Sir Robert Torrens, Treasurer).

<sup>163</sup> The same may indeed be said of the comments made in *City of Canada Bay Council v F & D Bonaccorso Pty Ltd* (2007) 71 NSWLR 424, 438 (Mason P, Tobias JA and Young CJ in Eq) and *Koompahtoo Local Aboriginal Land Council v KLALC Property & Investment Pty Ltd* [2008] NSWCA 6 (Unreported, Giles, Tobias JJA and Young CJ in Eq, 18 February 2008) [130] (Young CJ in Eq).

recipient liability claim simply on the basis of lack of receipt may not be completely satisfactory.

This leaves the objection based on incompatibility with indefeasibility. It has been forcefully argued that knowing receipt claims do *not* have to give rise to proprietary remedies.<sup>164</sup> If a proprietary remedy is not sought, so the argument goes, the claim cannot be answered by a plea of indefeasibility.<sup>165</sup> Matthew Harding argues that if a personal remedy may be obtained and subsequently enforced against the judgment debtor who may as a result be forced to sell their interest in the land, then there is no reason why the proprietary remedy may not be granted in a claim for knowing receipt since such claims are not based on an assertion of prior title.<sup>166</sup> On the other hand, Tang Hang Wu employs this argument for the opposite proposition, arguing that if indefeasibility precludes a knowing receipt claim to the land itself, then it should also preclude a remedial response in the form of a monetary award.<sup>167</sup> This is because 'it is a hollow victory for the registered proprietor to retain the land if they have to pay a sum equivalent to the value of the land in terms of equitable compensation to the defendant.'<sup>168</sup> In one sense, both views are correct. They contradict a view of the inter se rule holding that indefeasibility 'is a defence only against proprietary claims or proprietary remedies with respect to the land in question' and does not 'prevent claims being brought against the registered proprietor for personal remedies.'<sup>169</sup> An approach to indefeasibility that focuses on the remedy misses the point entirely. It is demonstrably wrong because the *locus classicus* of a claim falling within the inter se rule, one against the registered proprietor upon a contract to sell land, does sound in a proprietary remedy.

However, these opposing views on the viability of a knowing receipt claim nevertheless approach the issue from the wrong perspective. The view that a proprietary remedy is permissible because a personal remedy is unobjectionable assumes without justification that personal remedies are never precluded by a plea of indefeasibility. This is both contrary to authority<sup>170</sup> and demonstrably false. Suppose that a rogue forges the signature of the plaintiff and effects a transfer of title to the defendant who then registers their title. The plaintiff cannot bring an action of ejectment against the defendant because such an action would be contrary to the principle of indefeasibility. By the same token, the plaintiff is prevented from bringing an action to recover damages for being excluded from the land. Where a claim is premised on protecting prior title, it is prohibited by the principle of indefeasibility whether it results in recovery of the land or merely a monetary award. The key question is not the nature of the remedy but the nature of the claim. There is often an assumption that the principle of

<sup>164</sup> Matthew Harding, 'Barnes v Addy Claims and the Indefeasibility of Torrens Title' (2007) 31 *Melbourne University Law Review* 343, 350–1.

<sup>165</sup> *Ibid* 353–4.

<sup>166</sup> *Ibid* 355–6.

<sup>167</sup> Tang, 'Beyond the Torrens Mirror', above n 15, 691.

<sup>168</sup> *Ibid*.

<sup>169</sup> Crown, 'A Hard Look at *Bahr v Nicolay*', above n 15, 207.

<sup>170</sup> *Registrar of Titles (WA) v Franzone* (1975) 132 CLR 611.

indefeasibility only prevents a direct assertion of prior title. This cannot be correct. Where a claim is substantially concerned with protecting prior title, it should be met by the indefeasibility principle whether or not the claim involves a direct assertion of the prior title (a *vindicatio*) or merely protects prior title obliquely (via the law of wrongs or unjust enrichment).

The view that a claim based on knowing receipt is prohibited because it is premised upon notice or knowledge of a prior unregistered interest is more promising but ultimately requires closer examination. This is because protection of prior property rights and notice often, but not always, go hand in hand. Prior title is not always protected by the doctrine of notice. This is most clearly demonstrated by the common law rule *nemo dat quod non habet*.<sup>171</sup> Even in equity, a volunteer without notice is bound by prior title.<sup>172</sup> Likewise, a purchaser of an equitable interest is bound by an earlier equitable interest even if they had no notice of the earlier interest.<sup>173</sup> Conversely, the law employs the concept of notice in other instances that have nothing whatsoever to do with protection of prior title.<sup>174</sup> To equate the doctrine of notice with the protection of property rights is therefore at best a convenient, if not completely correct, shorthand. It provides us with a good starting point for our analysis but we cannot afford to forego closer examination.

It becomes necessary, therefore, to classify the claim in knowing receipt to determine its viability in the Torrens system. If it is intended to protect prior title, even obliquely, then it should be prohibited by the principle of indefeasibility. If not, then the claim should be allowed, even to the point of permitting the award of a proprietary remedy. On this measure, the claim in knowing receipt fares badly. Whether it responds to unjust enrichment or is a wrong in itself, a claim in knowing receipt appears to serve the function of protecting prior title.

#### IV PROPRIETARY REMEDIES

Although the case for the availability of proprietary remedies against the registered proprietor has already been made,<sup>175</sup> it is perhaps still necessary to explain somewhat the nature of such unregistered proprietary remedies in the context of a Torrens system. In truth, where a claim falls within the inter se rule, whether the remedy is proprietary or personal in nature has little direct effect on the registered proprietor. Take the example of the registered proprietor contracting to sell their land. Even if the rule in *Walsh v Lonsdale* were to be abolished so that no constructive trust would arise,<sup>176</sup> a registered proprietor would still be

<sup>171</sup> William Swadling, 'Property: General Principles' in Andrew Burrows (ed), *English Private Law* (2<sup>nd</sup> ed, 2007) 219, 221.

<sup>172</sup> Kevin Gray and Susan Francis Gray, *Elements of Land Law* (4<sup>th</sup> ed, 2005) 1324.

<sup>173</sup> *Ibid* 1191, 1323.

<sup>174</sup> See above nn 110–13 and accompanying text.

<sup>175</sup> See above nn 44–8 and accompanying text.

<sup>176</sup> As proposed by William Swadling, 'The Vendor–Purchaser Constructive Trust' in Simone Degeling and James Edelman (eds), *Equity in Commercial Law* (2005) 463. *Contra* Robert Chambers, 'The Importance of Specific Performance' in Simone Degeling and James Edelman (eds), *Equity in Commercial Law* (2005) 431.

subject to an order of specific performance that they convey the land as promised. In truth, whether or not the remedy is proprietary or not affects only third parties. Its effect on the registered proprietor is mostly indirect in that it allows the plaintiff to lodge a caveat to prohibit dealings contrary to their rights. Even as far as third parties are concerned, these proprietary rights are more limited than outside the Torrens system. Most obviously, these rights, although proprietary, do not bind subsequent registered proprietors. Nor is it true that any proprietary rights that may arise will necessarily be equitable if unregistered. The principle of indefeasibility does not relegate unregistered property rights to equitable status simply from lack of registration, contrary to what is sometimes assumed.<sup>177</sup> In respect of property rights arising out of *some* circumstances, this will be the result of a related provision in the legislation, which provides that *instruments* are ineffectual to pass any estate or interest in land until registered.<sup>178</sup> Thus technically, as a matter of statutory construction, unregistered *legal* property rights arising otherwise than by instrument (such as easements arising by implication under the rule in *Wheeldon v Burrows*) are permissible under most Torrens systems, albeit that a subsequent registered proprietor may not be affected by such *legal* property rights because the principle of indefeasibility ousts the operation of the *nemo dat* rule. Such subsequent registered proprietors, if they register in circumstances giving rise to a fresh cause of action falling within the inter se rule, may themselves be bound by those fresh rights that the circumstances may give rise to. But they are not bound by earlier unregistered proprietary rights because of the principle of indefeasibility. It is a mistake to assume that the inability of such property rights to affect subsequent registered proprietors automatically renders them equitable. Likewise, some Torrens statutes provide rules on priority where such unregistered proprietary rights are the subject of caveats.<sup>179</sup> As the High Court of Australia in *Halloran v Minister Administering National Parks and Wildlife Act 1974* recently observed of land registered under the Torrens system:

The assimilation of the registered title to a legal title may be convenient so long as it is appreciated what is involved. It is likewise with respect to the use of the term 'equitable' to describe interests recognised in accordance with the principles of equity but not found on the Register.<sup>180</sup>

## V CONCLUSION

The personal equities exception to indefeasibility is today poorly understood because the concept of indefeasibility is itself poorly understood. This was not always the case. In the halcyon days of *Frazer v Walker*, the courts understood that indefeasibility had its limits and that in personam claims were simply claims

<sup>177</sup> See, eg, *McGrath v Campbell* (2006) 68 NSWLR 229, 245 (Tobias JA).

<sup>178</sup> See, eg, *Real Property Act 1900* (NSW) s 41(1); *Land Title Act 1994* (Qld) s 181; *Real Property Act 1886* (SA) s 67; *Land Titles Act 1980* (Tas) s 49(1); *Transfer of Land Act 1958* (Vic) s 40(1).

<sup>179</sup> See, eg, *Land Titles Act 1993* (Singapore) cap 157, s 49 (2004 rev ed).

<sup>180</sup> (2006) 229 CLR 545, 560 (Gleeson CJ, Gummow, Kirby and Hayne JJ) (citations omitted).

falling outside the scope of indefeasibility. Indefeasibility is intended to protect a registered proprietor from claims based on prior title. While such claims may be directly asserted, prior title may also be indirectly protected through the law of wrongs or unjust enrichment. Where the claim is based on prior title, it falls foul of the principle of indefeasibility and cannot be brought against the registered proprietor. This is the case whether the remedy sought is personal or proprietary. Indeed, as against the registered proprietor, it will be irrelevant whether it is personal or proprietary. If a claim is not based on prior title, then it falls outside the indefeasibility principle and within the scope of the inter se rule. Such claims may be brought against the registered proprietor, even if they seek a divestment of title. In determining whether claims fall within the inter se rule or the indefeasibility principle, courts must be careful to avoid the pitfall of confusing the doctrine of notice with prior title. The concept of notice has been employed in many different situations. In some cases, they undoubtedly concern prior title, whereas in others, they clearly do not. There will inevitably be grey areas where it is not clear if prior title is involved in a claim but that does not in any way detract from the present thesis, which provides a clear path to enable the courts to cut through the chaff of confusion surrounding indefeasibility and so-called 'personal equities'.