

**A COMPARATIVE ANALYSIS:
THE CONSEQUENCES OF FRAUD IN THE ENGLISH
AND NEW ZEALAND LAND TITLE
REGISTRATION SYSTEMS**

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Introduction

There is a striking contrast, between the New Zealand and English¹ land registration systems, to the approach taken and often the outcome to fraudulent transactions. To illustrate this, take the situation in the well known New Zealand case, *Frazer v Walker*.² The Privy Council held that a bona fide mortgagee and then subsequent purchaser, whom had acquired title to the farm property by virtue of a previous fraudulent transaction, were both to be protected by the indefeasibility provisions in the Land Transfer Act (LTA) 1952. Mr Frazer, the defrauded previous registered proprietor, was entitled to compensation for his loss. Conversely, the application of this factual situation to the English Land Registration Act (LRA) 2002 is likely to result in a different outcome. As Mr Frazer was still in actual occupation of the farm, an English Court would probably find for him by rectifying the land title. The subsequent purchaser who had been deprived of their interest would be entitled to compensation.

The legal justification to these divergent consequences and further comparisons between the two title registration systems will be expanded on in this paper. More specifically three fundamental questions will be analysed: firstly, does a registered proprietor who makes a fraudulent³ transfer remain protected as the registered proprietor over the property? Secondly, is a bona fide purchaser for value protected where there is a previous fraudulent transfer? And

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¹ Although this paper refers solely to England, the term encompasses England and Wales.

² *Frazer v Walker* [1967] 1 AC 569.

³ Fraudulent transfers are absolutely void (forgery is included).

thirdly, in what circumstances is a registered proprietor of property required to recognise an unregistered interest which exists over that property? These questions involve the subsequent transfer of registered property. The effect of first registration in England will not be evaluated.⁴ Due to the complexity, especially in England, in answering these three primary questions it was not possible, to also consider whether these outcomes would differ if the fraudulent transfer was to a volunteer transferee.

A. Registration of Title

Security of land ownership is essential. As Hammond J stated, 'if there is any area of the law in which the absolute security is required, without equivocation, it must be in the area of security of title to real property.'⁵ The tool for providing this security in England is no longer, as may be perceived by many, predominantly prescribed by a common law 'deeds system.' Legislation⁶ has dramatically changed the nature and consequences of conveyancing to *compulsory registration of title*. New Zealand is no stranger to this concept with the 'Torrens system'⁷ of title registration being at the forefront of our land law.⁸ It is therefore not necessary to look at the principles specific to deeds conveyancing in this paper, as these will play only a limited role in the future of both jurisdictions.

Legislation is absolutely paramount, especially when considering land title registration principles. Advocates of title registration in England began laying claim to the concept in 1862, shortly after it was implemented in South Australia. However, the 1862 Act proved to be a

⁴ Land Registration Act 2002, s 3 - 22 and schedule 1.

⁵ *Register-General of Land v Marshall* [1995] 2 NZLR 189 at 198-199.

⁶ Currently compulsory title registration is governed by the LRA 2002; previously LRA 1925.

⁷ Named after the founder, Sir Robert Torrens, who sought to improve security and cure the defects common with unregistered deeds title transactions.

⁸ Although the 'deeds system' is still in existence (Deeds Registration Act 1908) it is of virtually no application today due to title registration proclaimed by the Land Transfer Acts: Land Transfer Act 1870; Land Transfer Act 1885; Land Transfer (Compulsory Registration of Titles) Act 1924; and currently the Land Transfer Act 1952. This current Act has undergone many amendments, including the notable Land Transfer (Computer Registers and Electronic Lodgement) Amendment Act 2002.

failure.⁹ The later statutes were not much better in declaring that indefeasibility was impossible.¹⁰ The LRA 1925¹¹ was the breakthrough influence in creating sweeping changes to the law of title registration in England. This statute remained virtually unaltered for the rest of the century slowly extending compulsory title registration over England and Wales. Complete coverage was achieved in 1990.¹² The recently enacted LRA 2002 has been heralded as a ‘conveyancing revolution,’¹³ most significantly introducing electronic computer registration. Whilst the LRA 2002 is revolutionary, it depends on the LRA 1925 for much of its conceptual foundation. The LRA 2002 is to bring about not a system of registration of title, but a system of title by registration.¹⁴ This has signified a momentous shift of ideology in England from the concept of possession to that of qualified title ownership.

In order to understand the legal justification of the three fundamental questions posed in this paper, the legislative concepts at the foundation of registration in each jurisdiction need to be explained. This is essential in determining the conclusiveness that registration confers on transferees for consideration. The statutory approaches in providing security of title are conceptually very different. England has not followed in the footsteps of New Zealand and other Commonwealth nations by implementing a Torrens registration system. Instead England opted for its own unique scheme. While the general aim of all title registration schemes is that the register should reflect, to a degree,

⁹ Title registration was not compulsory and there was no indemnity fund for errors and fraud in the title. The system was also extremely expensive due to obtaining detailed enquiries as to boundaries. E Cooke, ‘E-Conveyancing in England: Enthusiasms and Reluctance,’ in D Grinlinton (ed), *Torrens in the 21st Century* (2003) at 278.

¹⁰ Land Transfer Act 1875; Land Transfer Act 1897 introduced limited compulsion and an indemnity fund. However the status of the indemnity fund was of virtually no use following the decision in: *Attorney-General v Odell* [1906] 2 Ch 47.

¹¹ Amendments to the LRA 1925 were made in 1936, 1986, 1988 and 1997.

¹² C Harpum, *Megarry & Wade - The Law of Real Property* (6th ed, 2000). On December 1st 1990 the whole of England and Wales was subject to compulsory registration. In March 2003 around 90% of titles were registered.

¹³ L Chamberlain, ‘The Land Registration Act 2002: A Conveyancing Revolution’— Pt 1 [2002] 152 NLJ 1093.

¹⁴ Per Barwick CJ, *Breskvar v Wall* (1971) 125 CLR 376 at 385 in Law Commission and HM Land Registry, *Land Registration for the Twenty-first Century: a Conveyancing Revolution*, No. 271 (London, 2001).

three fundamental principles:¹⁵ a mirror,¹⁶ insurance,¹⁷ and the curtain,¹⁸ these are not absolute and in England¹⁹ especially there has been some deviation from aspects of these.

1. Land Registration in New Zealand: Land Transfer Act 1952

The foundation of New Zealand's LTA is that a registered proprietor is deemed to have a conclusive indefeasible title to land on registration.²⁰ As Lord Wilberforce stated, 'indefeasibility of title is a convenient description of the immunity from attack by an adverse claim to the land or interest in respect of which he is registered.'²¹ The paramount statutory provisions from which this concept is derived are sections 62,²² 63,²³ 182,²⁴ and 183²⁵ LTA 1952. However, as these sections

¹⁵ T Ruoff, *An Englishman looks at the Torrens System* (1957).

¹⁶ The register should be an accurate and conclusive reflection of the relevant interests affecting the land. As Lord Oliver in *Abby National Building Society v Cann* [1991] 1 AC 56 at 78C stated, the governing principle of land registration is that land should be regulated by and ascertainable from the register alone.

¹⁷ The accuracy of the register should be guaranteed if the register is found to be inaccurate. There should be state compensation available.

¹⁸ A purchaser of land is not concerned with interests which lie behind the register.

¹⁹ See generally: A Pottage, 'The Originality of Registration' (1995) 15 OJLS 371.

²⁰ *Bahr v Nicolay* (No. 2) (1988) 164 CLR 604 at 613. This protection does not pass until registration: LTA 1952, s 41. As illustrated in *Sutton v O'Kane* [1973] 2 NZLR 304 and *NZ Meat Nominees v Sim* (1990) 1 NZ ConvC 190.

²¹ *Frazer v Walker* [1967] NZLR 1069 at 1075-1076.

²² LTA 1952, s 62: This essence of this section is that a registered proprietor of land shall, except in the case of fraud, hold the land subject to that notified on the register of title but absolutely free from all other interests whatsoever. There are three exceptions to this in s 62.

²³ LTA 1952, s 63: The essence of this section is that no action for the recovery of land can be brought against a registered proprietor: ... (c) except where the registration was obtained by the fraud of the registered proprietor. There are also 4 other statutory exceptions.

²⁴ LTA 1952, s 182: The essence of this section is that 'a person who without fraud, deals with the registered proprietor is not obliged to inquire into the circumstances in which registration was obtained and is not affected by notice of any trust or unregistered interest. Knowledge of the existence of a trust or unregistered interest is not of itself to be imputed as fraud.

²⁵ LTA 1952, s 183: No action for recovery of land, or for damages, can be brought against a person who became registered, bona fide, and for value on the ground that his or her predecessor became registered through fraud or error of any kind or under any void or voidable instrument.

proclaim, the concept of indefeasibility is not absolute. There are numerous exceptions, with the most notable of these being fraud.

2. Land Registration in England: Land Registration Act 2002

In England the conclusiveness of registration is determined by section 58 LRA 2002.²⁶ Although, section 29²⁷ is equally significant and could broadly be translated as the English equivalent to New Zealand's indefeasibility sections. This states verbatim:

- (1) If a registrable disposition of a registered estate is made for valuable consideration, completion of the disposition by registration has the effect of postponing to the interest under the disposition any interest affecting the estate immediately before the disposition whose priority is not protected at the time of registration.
- (2) For the purposes of subsection (1) the priority of an *interest is protected* –
 - (a) in any case if the interest –
 - (i) is a registered charge or subject of a notice in the register,
 - (ii) falls within any of the paragraphs of Schedule 3, or
 - (iii) appears from the register to be excepted from the effect of registration.

This section, at first glance, appears to indicate that land title is conclusive to a purchaser, even when there is forgery. This would support the New Zealand approach of immediate indefeasibility.²⁸ However on closer examination it is clear that this section substantially differs.

(a) Overriding Interests

Elaborating on section 29(2)(a)(ii), the paragraphs listed in schedule 3²⁹

²⁶ LRA 2002, s 58 (1): If, on the entry of a person in the register as the proprietor of the legal estate, the legal estate would not otherwise be vested in him, it shall be deemed to be vested in him as a result of the registration. (2) Subsection (1) does not apply... in which some other registration requirement remains to be met (these requirements are specified in schedule 2, it is not necessary to examine these at all in this paper).

²⁷ Previously LRA 1925, s 20. LRA 2002, s 30 is identical to the provisions in s 29 and relates to charges (mortgages).

²⁸ Immediate indefeasibility will be explained below.

²⁹ LRA 2002, schedule 3, these overriding interests include: (1) leasehold estates in land

are unregistered interests which override registered dispositions. The special protection given to these is the most controversial and fundamental difference that emerges between the paramount statutory provisions of New Zealand and England. Gray and Gray describe overriding interests as, 'a crack in the mirror from which the Land Register is meant to reflect'³⁰ as this is a total exception to the normal registration principles. The effect of overriding interests is that they are binding and enforceable against the registered proprietor or a subsequent registered proprietor,³¹ regardless of whether they are registered on the title, and even if there is no knowledge of their existence. This means that purchasers may be in for a 'nasty shock' if they fail to inspect the property and make appropriate enquiries.³²

Two conditions must be established before any overriding interests are to take effect. First, the interest must subsist 'immediately before the disposition' and affect the estate subject to the disposition.³³ Secondly, priority must be protected at the time of registration as an unregistered interest falling within one of the categories in schedule 3. The most significant of the overriding interests in schedule 3, which can directly impact on how priorities are determined when there is a fraudulent transfer or when recognising an unregistered third party's interest, is the protection given to a person in actual occupation of property. The other overriding interests are of less significance to this paper so will not be examined in detail.

not exceeding seven years; (2) interests of persons in actual occupation; (3) easements and profits a prendre; (4) customary and (5) public rights; (6) local land charges; (7)-(9) mines and mineral interests; (10)-(14) five miscellaneous provisions (franchise, manorial right, right to rent which was reserved to the Crown, non-statutory right in respect of an embankment or sea or river wall and a right to payment in lieu of tithe). Guidance on the operation of overriding principles in the LRA 2002 can be derived from case law relating to the LRA 1925.

³⁰ K Gray & S F Gray, *Elements of Land Law* (4th ed, 2005).

³¹ LRA 2002, schedule 3(2). Previously, LRA 1925 s 70(1)(g); Law Commission and HM Land Registry, *Land Registration for the Twenty-first Century: a Conveyancing Revolution*, No. 271 (London, 2001) para 8.55.

³² S Cretney & G Dworkin, 'Rectification and Indemnity: Illusion and Reality' [1968] 84 LQR 528.

³³ LRA 2002, schedule 3.

(b) A Proprietor in ‘Actual Occupation’

An essential preliminary question to consider is in what circumstances can a proprietor in England claim the protection of being in actual occupation of property? It is worth examining this issue separately as this will significantly impact on the three fundamental questions which will be subsequently discussed. To be in ‘actual occupation’ two elements must be established: that the claimant has an interest in the land; and that they are in actual occupation at the date of the disposition.³⁴ A useful ‘mathematical’ formula is provided by Gray and Gray:³⁵

$$\begin{aligned} & \text{‘Interest’ + ‘Actual Occupation’ – ‘Inquiry’} \\ & = \text{‘Interest which overrides’} \end{aligned}$$

An ‘interest’ is restricted to a normal *proprietary* interest in the land (not personal rights). These are rights capable of enduring through different ownerships, according to nominal conceptions of title to real property.³⁶ The specific interests that are capable of binding a registered proprietor will be listed below, mainly when considering the third question.

It is important to note though, that it is the *rights* of the occupier that are protected by the status of being an overriding disposition, not the occupation itself.³⁷ Occupation without an interest does not create an overriding interest.³⁸ Occupancy has thus been described as a ‘trigger’ which activates the statutory protection of the occupier’s rights.³⁹ A successful claim does not automatically mean the claimant is entitled to a right of occupation in the property either. In some situations there may be this right while in others, the interest which overrides is completely unrelated to actual occupation.

³⁴ LRA 2002, schedule 3(2). The issue of priority is decided at the time of the completion of the purchase, not registration.

³⁵ K Gray & S F Gray, *Elements of Land Law* (4th ed, 2005).

³⁶ *National Provincial Bank Ltd v Hastings Car Mart Ltd* [1964] Ch 655 at 696 per Russell LJ.

³⁷ *National Provincial Bank Ltd v Ainsworth* [1965] AC 1175.

³⁸ *City of London BS v Flegg* [1988] AC 54 at 74 per Lord Oliver.

³⁹ K Gray & S F Gray, *Elements of Land Law* (4th ed, 2005).

The second element to establish is whether a person is in *actual occupation* of the land. This is defined in the statute: 'if he, or his agent or employee, is physically present there.'⁴⁰ While this definition seems to be self-explanatory much litigation has occurred to determine where the line of 'physical presence' should be drawn. As this is a question of fact⁴¹ the courts have been unwilling to lay down a code or catalogue of situations when occupation is established.⁴² A consideration which will be taken into account though, is not only the length of time one may be absent from a property, but also the reason for it.⁴³ As Lord Oliver stated,⁴⁴ there must be 'some degree of performance and continuity which would rule out a mere fleeting presence.' Actual occupation has been held to include such situations as: the presence of the owner's builders on partly derelict property;⁴⁵ a separated wife who visited the property everyday to look after the children;⁴⁶ and where an occupier had gone elsewhere to give birth to her child but while away her husband had transferred the house, for consideration, to a friend who changed the locks and prevented her from returning.⁴⁷ However in *Strand Securities Ltd v Caswell*⁴⁸ the Court of Appeal held that leaving one's furniture in a flat, having a key to the flat or making occasional use of it⁴⁹ was not enough to constitute actual occupation.

Occupation of premises rather than houses has not been considered as frequently. In *Malory Enterprises Ltd v Cheshire Homes (UK) Ltd*⁵⁰ fencing a derelict property and other typical ownership activities such as storing items was held to represent actual occupation. However in *Epps v Esso*

⁴⁰ LRA 2002, schedule 3(2)(2).

⁴¹ *William & Glyn's Bank Ltd v Boland* [1981] A.C. 487, applying the LRA 1925, s 71(g).

⁴² *Hodgson v Marks* [1971] Ch. 892 at 932 per Russell LJ.

⁴³ *Stockholm Finance Ltd v Garden Holdings Inc* [1995] NPC 162. A lady who had not set foot in her London home for over a year was held to no longer be in actual occupation of it.

⁴⁴ *Abbey National Building Society v Cann* [1991] 1 AC 56 at 93.

⁴⁵ *Lloyds Bank Plc v Rosset* [1965] Ch 958.

⁴⁶ *Kingsnorth Finance Co Ltd v Tizard* [1986] 1 WLR 783.

⁴⁷ *Chbokar v Chbokar* [1984] FLR 313, note - this issue did not arise in the Court of Appeal.

⁴⁸ *Strand Securities Ltd v Caswell* [1965] Ch 958 at 981.

⁴⁹ Affirmed in *Epps v Esso Petroleum Ltd* [1973] 1 WLR 1071.

⁵⁰ *Malory Enterprises Ltd v Cheshire Homes (UK) Ltd* [2002] EMCA Civ 151.

*Petroleum Co Ltd*⁵¹ Templeton J held that parking cars on vacant land would not suffice, as occupation was not obvious. Conversely though, parking a car in a garage did amount to actual occupation.⁵²

These cases demonstrate that in reality, physical presence is not always easy to determine. English land law has opted to grapple with this factual issue instead of having confidence in the conclusiveness of the register as is preferred in New Zealand.

A sub-issue which has also arisen is whether it is necessary to occupy the entirety of the premise over which the overriding interest is claimed. In *Asburn Anstalt v Arnold*⁵³ Fox LJ commented that ‘the overriding interest will relate to the land occupied but *not* anything further.’ Conversely the Court of Appeal, in the recent case, *Ferrisburst Ltd v Wallcite Ltd*⁵⁴ declined to follow the earlier precedent which has placed a far more onerous burden on the purchaser.⁵⁵ The Court of Appeal held that a purchaser was bound by an option to purchase agreement regarding the whole title, not just that which was occupied. This extension is an additional step in the wrong direction from the conclusiveness of a title and even further annunciates the difference between the New Zealand and English land title registration systems. If this case was decided in England presently, a different outcome would probably eventuate due to the statutory provision that ‘the overriding interest must relate to land for which there is actual occupation.’⁵⁶ This does not rule out the possibility of a person being held to have actual occupation if they do not have physical occupation of every little part of it though. The question to be asked is whether the conduct of the occupier suffices as actual occupation of the entire area claimed.⁵⁷ This interpretation would be consistent with the statute.

⁵¹ *Epps v Esso Petroleum Co Ltd* [1973] 1 WLR 1071.

⁵² *Kling v Ketson Properties Ltd* (1984) P & CR 212.

⁵³ *Asburn Anstalt v Arnold* [1989] Ch 1 28, applying the LRA 1925, s 71(g).

⁵⁴ *Ferrisburst Ltd v Wallcite Ltd* [1999] Ch 355, applying the LRA 1925, s 71(g).

⁵⁵ Law Commission and HM Land Registry, *Land Registration for the Twenty-first Century: a Conveyancing Revolution*, No. 271 (London, 2001) para 8.57.

⁵⁶ LRA 2002, schedule 3(2)(1).

⁵⁷ R Smith, *Property Law* (4th ed, 2004) at 153.

(c) Limitations to a Proprietor in Actual Occupation

However, the LRA 2002 contains two main statutory limitations where a purchaser may take free of an overriding interest where there is an unregistered proprietor who is in actual occupation.⁵⁸ The first of which is if an inquiry was made before the disposition and this had not been disclosed when it could have reasonably been expected.⁵⁹ The burden of enquiry is on the purchaser who must therefore discover those in actual occupation and ask what their interest in the property is. Asking the seller is not sufficient.⁶⁰ The second limitation is if there is an interest belonging to a person whose occupation would not have been obvious on a reasonably careful inspection of the land at the time of the disposition *and* which the person to whom the disposition is made had no actual knowledge at the time.⁶¹ It is not the interest which has to be apparent, but the occupation of the person having the interest.⁶² The test of occupation, as stated, is whether it was *obvious* on a reasonably careful inspection of the land. This test is suggested to be less demanding than constructive notice.⁶³ The purpose of this section is to protect a purchaser where occupation is neither known nor readily ascertainable.⁶⁴ The onus therefore rests on the occupier.

3. Comparison

Contrasted with New Zealand's land transfer system, the status accorded to a proprietor in actual occupation of land is an alien

⁵⁸ LRA 2002, schedule 3(2)(1). There are two other statutory limitations: (a) which relate to the Settlement Land Act 1925; (d) future leases, postponed for 3 months. A non-statutory limitation is that a spouses statutory possession rights are not capable of being overriding interests - Family Law Act 1996, s 31(10). Otherwise purchasers would need to make enquires in a large number of cases.

⁵⁹ LRA 2002, schedule 3(2)(1)(b), this is a reformulation of LRA 1925, s 70(1)(g).

⁶⁰ *Hodgson v Marks* [1971] Ch 892.

⁶¹ LRA 2002, schedule 3(2)(1)(c).

⁶² Law Commission and HM Land Registry, *Land Registration for the Twenty-first Century: a Conveyancing Revolution*, No. 271 (London, 2001) para 8.62.

⁶³ C Harpum, *Megarry & Wade - Law of Real Property* (6th ed, 2000) at 12-068. This limitation to actual occupation could be argued if this factual situation was to occur now in cases such as: *Abbey National Building Society v Cann* [1991] 1 AC 56 and *Lloyds Bank Plc v Rosset* [1996] Ch 958.

⁶⁴ Law Commission and HM Land Registry, *Land Registration for the Twenty-first Century: a Conveyancing Revolution*, No. 271 (London, 2001) para 8.62.

concept, out of kilter with the purpose of title registration envisaged by Sir Robert Torrens. Therefore, it could be held that Torrens registration protects static (rights of parties as registered on the title) rather than dynamic security (purchasers taking free of any overriding interests which are not registered on the title).⁶⁵ In that respect an overriding interest is the 'stumbling block' on registration of title.⁶⁶

As the legislative foundations of registration and conclusiveness of title in England and New Zealand have been explained, it is now appropriate to investigate and compare the consequences of fraudulent transactions. There has been very little mention in England of fraud.⁶⁷ The main reason suggested for this, is that where a void (forged) transaction has been registered, the English land registration statutes have used the concepts of actual occupation and of mistake (relating to rectification)⁶⁸ as a mode of inquiry.

B. The First Fundamental Question

The first fundamental question to be addressed is whether a registered proprietor who previously made a fraudulent (void) transfer of property to himself remains protected as the registered proprietor? This is an undemanding issue. The void transfer has to be of no effect. The fraudulent registered proprietor obviously must lose possession and title to the property in question as it would be unthinkable to allow otherwise. In New Zealand the LTA 1952 specifically states fraud as an exception to indefeasibility.⁶⁹ Section 85 also enables the High Court to cancel or correct the computer register against the fraudulent registered proprietor.⁷⁰ The position in England, while not as visibly clear in the statute, is the same. While registration vests legal title in a fraudulent

⁶⁵ E Cooke and P O'Connor, 'Purchaser Liability to Third Parties in the English Land Registration System: A Comparative Perspective' (2004) 120 LQR 640.

⁶⁶ Sir John Stewart-Wallace, 'Principles of Land Registration', at 32 in R Smith, *Property Law*, (4th ed, 2004).

⁶⁷ R Smith, *Property Law*, (4th ed, 2004).

⁶⁸ LRA 1925; LRA 2002 states that the register may be rectified where there is a mistake. This is intended, according to the Law Commission's Report (No. 271, para 8.15), to include fraud.

⁶⁹ LTA 1952, s 62 and s 63.

⁷⁰ LTA 1952, s 85 was applied in *Ejfastratiou v Glantsching* [1972] NZLR. 594. The registrar also has the power to correct the register, applying LTA 1952, s 81.

proprietor, like New Zealand, the defrauded true proprietor can undertake proceedings in court to establish that the title is void and seek rectification of the register. Rectification will reverse the transaction on the grounds that registration was a mistake even if this prejudices the fraudulent proprietor in possession of the land.⁷¹ Obviously no indemnity will be payable as the transfer was wholly a result of their own fraud.⁷²

C. The Second Fundamental Question

This question is more difficult. Should a bona fide purchaser for value be protected where there is a fraudulent transfer? Therefore fraud is against a previous registered proprietor. An example of this scenario is where: land was initially fraudulently transferred from (P) to (A), who obtained registration and then on-sold the land for valuable consideration to a bona fide purchaser, (B). The issue is whether (P) can claim the registered title to the property from (B). This is a complex issue, which poses a problem for any land registration system. There are two innocent parties and one must lose. Should an innocent bona fide purchaser for value be deprived of their interest in the property or should the innocent transferor who has been defrauded of their interest lose the claim to recover the property? The approach and conceptual basis taken, when analysing the conflicting interests in this scenario, illustrates an essential difference between the two title registration systems. The answer in New Zealand is rather more simplistic than the myriad of possible outcomes under the English LRA 2002.

1. New Zealand's Answer

In New Zealand this question has experienced considerable litigation and academic discussion. The degree of legitimacy the court assigns to the principle of registration, by a bona fide purchaser under a void transfer, is central in determining which innocent party has priority. There was originally uncertainty as to whether the doctrine of deferred indefeasibility⁷³ or immediate indefeasibility⁷⁴ would prevail.⁷⁵ The Privy

⁷¹ LRA 2002, schedule 4(3)(2)(a).

⁷² LRA 2002, schedule 8(5)(1)(a).

⁷³ T Bennion & D Brown & R Thomas & E Toomey, *New Zealand Land Law* (2005). A title obtained fraudulently can be defeated only if it is 'perfected' by a subsequent bona

Council in the landmark decision, *Frazer v Walker*,⁷⁶ held in favour of the doctrine of immediate indefeasibly, conferred by sections 62, 63 and 183 LTA 1952. Thus, registration of title by a bona fide purchaser for value was conclusive even via a previously fraudulent transfer. However this decision is likely to cause harsh results in some situations.⁷⁷ It is possible that a person still in occupation of property would be ejected. Nevertheless, this position is preferred and has subsequently been affirmed on numerous occasions both in New Zealand⁷⁸ and Australia.⁷⁹ Applying the scenario above, if the registered proprietor (B) is a bona fide purchaser for value⁸⁰ they will be protected by the immediate indefeasibility provisions in the LTA 1952. This will also clearly apply to a subsequent bona fide purchaser. The defrauded transferor (P) would be entitled to receive compensation from the state.⁸¹ If for instance, (B) is a registered bona fide mortgagee under a forged transfer, then similarly no claim will be successful as (B) is protected by immediate indefeasibility.⁸² (P) would be restored as the registered proprietor but subject to (B)'s mortgage⁸³ and (P) could then claim compensation to remove the interest.

fide purchaser for value.

⁷⁴ A bona fide purchaser for value, in the absence of fraud, will obtain an indefeasible title to the property on registration.

⁷⁵ This question was left open in *Gibbs v Messer* [1891] AC 248 (transfer to a fictitious person). In *Assets Co Ltd v Mere Roihi* [1905] AC 176 (three consolidated appeals) it was considered that registration of a void instrument does not confer an indefeasible title; *Boyd v Mayor of Wellington* [1924] NZLR 1174 held that registration of a void instrument under the LTA, conferred an immediately indefeasible title.

⁷⁶ *Frazer v Walker* [1967] 1 AC 569.

⁷⁷ NZ Property Law and Equity Reform Committee, 'The decision in *Frazer v Walker*,' June 1977, 9.

⁷⁸ Most notably in *Housing Corp of NZ v Maori Trustee* [1988] 2 NZLR 662; *Morrison v BNZ* [1991] 3 NZLR 291.

⁷⁹ Applying similar 'Torrens legislation' to New Zealand's: *Mayer v Cole* [1968] 2 NSWLR 747 (Aus); *Breskvar v Wall* (1971) 126 CLR 376 (Aus).

⁸⁰ The position of volunteers has not yet been determined in New Zealand.

⁸¹ LTA 1952, s 172(b). Compensation will probably not be available for a forged transfer to a fictitious person as was held in *Gibbs v Messer*.

⁸² LTA 1952, s 183.

⁸³ The analogous Australian case to this example is *Heron v Broadbent* (1919) 20 SR (NSW) 101.

2. England's Answer

The concept of 'indefeasibility' is foreign to English land registration statutes, cases, Law Commission Reports and textbooks. It has provoked very little litigation at all as there is a completely different ideology to registration. While registration in England similarly applies a 'statutory magic'⁸⁴ that confers immediate legal title⁸⁵ on the newly registered proprietor, this is subject to the possibility that the register is 'altered.'⁸⁶ Both an overriding interest and grounds for rectification can result in derogation of title from a registered proprietor.

New terminology under the LRA 2002 refers to alteration, with rectification being a subset of this.⁸⁷ Alteration is where any change is made to a register of title. It does not affect rights. It has the effect of ensuring the register accurately reflects the legal position of the title.⁸⁸ Alternatively, rectification is correcting a *mistake*⁸⁹ where a registered proprietor of the property is prejudiced.⁹⁰ This affects rights. While there is no guarantee of title itself in England, an indemnity provided by schedule 8(1) LRA is available where any person suffers loss by reason of *rectification* of the register. This indemnity provision can therefore be viewed as similar in nature to that offered in New Zealand to a defrauded party. Rectification and an indemnity are complementary remedies. Rectification will first be determined and then compensation will be available to the party who loses their claim. An alteration however is deemed to cause no loss under the Act and therefore no indemnity is available.

While the outcome when applying the English approach to land title

⁸⁴ *Argyle Building Society v Hammond* (1984) 49 P & CR 148 per Slade LJ at 153. Under s 29(1) LRA 2002 as long as the registered proprietor is unaware of the forgery and provides valuable consideration they will obtain good title on becoming registered.

⁸⁵ LRA 2002, s 58 and Law Commission and HM Land Registry, *Land Registration for the Twenty-first Century: a Conveyancing Revolution* (London, 2001) para 1.10.

⁸⁶ Slade LJ used the word 'rectified.' The terminology is substantially different under the LRA 2002. The correct word to now use is 'altered.' This is explained below.

⁸⁷ LRA 2002, s 65 and schedule 4.

⁸⁸ N P Gravells, *Land Law* (3rd ed, 2004).

⁸⁹ Correcting a mistake includes a registered forged transfer, though neither the LRA 2002 nor the Law Commission's Report (No. 271) expressly state this.

⁹⁰ LRA 2002, schedule 4(1).

registration will occasionally render the same result as would be seen in New Zealand, the theoretical basis for doing so is entirely different. For simplicity, analysis of a fraudulent transfer against a previous registered proprietor in England has been divided into three situations. Firstly, where there is an overriding interest by a defrauded proprietor still in actual occupation of the property. Secondly, (in the absence of an overriding interest) where title is transferred into the name of the fraudulent party and then transferred on for consideration to a bona fide purchaser or a mortgagee. And thirdly, (in the absence of any overriding interest) where a title is forged and transferred directly to an innocent bona fide purchaser for value.

(a) A Defrauded Proprietor who is in Actual Occupation of the Property

The first factual situation involves the determination of whether a defrauded registered proprietor is entitled to have title to the property returned to them by virtue of being in actual occupation and thus having an overriding interest. A claim to an equitable remedy, such as alteration of the register, is considered a proprietary *interest* and can bind innocent transferees.⁹¹ However as explained above, it is critical that the person claiming alteration is deemed to be in actual occupation of the property (is physically present there).⁹² If a defrauded proprietor (P) is in actual occupation of land then the register would be altered to reflect this. Normally as the new registered proprietor (B) is already bound by the interest prior to the alteration, no compensation is available, for there is considered to be no loss.⁹³ However a special exemption to this principle appears to exist under schedule 8(1)(2)(b) LRA 2002 where there has been a forgery.⁹⁴ A victim, (B), deprived of title to property by a person in actual occupation, (P), may be deemed

⁹¹ LRA 2002, s 116. Cases which illustrated this under the LRA 1925 are: *Chonwood Ltd v Lyall* (No. 2) [1930] 2 Ch. 156; *Blacklocks v JB Developments (Goldaming) Ltd* [1982] Ch 183; *DB Ramsden & Co Ltd v Nurdin & Peacock plc* [1999] 1 EGLR; *Collins v Lee* [2001] 2 All ER 332 at p 338 (where doubts were raised as to fraudulent misrepresentation); *Holaw (470) Ltd v Stockton Estates Ltd* (2001) 81 P & CR 404 at 69; *Malory Enterprises Ltd v Cheshire Homes (UK) Ltd* [2002] EMCA Civ 151 at 81.

⁹² This is subject to the provisions, as explained, in the LRA 2002, schedule 3(2)(1)(b).

⁹³ The loss is caused by the overriding interest not alteration of the register.

⁹⁴ D J Hayton, *Registered Land* (3rd ed, 1981); R J Smith, *Property Law* (4th ed, 2003). This point has not been argued in court and will only rarely occur.

to have suffered loss and therefore be entitled to an indemnity on the register being altered. This should be the correct interpretation to take in England for compliance with the 'insurance principle.' If for instance (B) happened to be a registered bona fide mortgagee⁹⁵ or (B) was a bona fide purchaser and (C) was a bona fide mortgagee, then similarly alteration would occur and the mortgagee would be entitled to an indemnity.⁹⁶ As was already explained, actual occupation by a proprietor in New Zealand (LTA) is irrelevant and plays no part in determining priority to land.

(b) Title is Transferred to the Fraudulent Party and then onto a Bona Fide Purchaser (or Mortgagee) for Value

The second factual situation concerns if, or in what situations, rectification of land title will be ordered (in the absence of an overriding interest) to deprive a registered proprietor of their legal title. There is no immediate indefeasibility provision(s) in the LRA 2002. Rather than the registered title of a bona fide purchaser for value under a void transfer being absolutely paramount,⁹⁷ the purchaser will *usually*⁹⁸ be protected provided they are in possession of the property.⁹⁹ This is if land is 'physically in their possession.'¹⁰⁰ In *Kingsalton v Thames Water Developments*¹⁰¹ the Court elaborated on this concept to state that 'a proprietor will normally be in possession, unless dispossessed.' As already seen, the Act also uses the expression 'actual occupation' when referring to an overriding interest. It is suggested that this is a narrower

⁹⁵ Protected under LRA 2002, s 30.

⁹⁶ *Collins v Lee* [2001] 2 All ER 332, applying LRA 1925. The Court of Appeal allowed rectification against both the registered proprietor and the mortgagee. If the LRA 2002 was applied alteration would similarly be ordered to cancel both the transfer and interest with an indemnity available.

⁹⁷ See *Frazer v Walker* [1967] 1 AC 569.

⁹⁸ LRA 2002, schedule 4 (3)(2) and 6(2).

⁹⁹ *Re Haigh's Case* [Eng] – unreported.

¹⁰⁰ LRA 2002, s 131(1) & (2) defines certain relationships which give rise to possession without physical occupation. Occupation can be transferred to another and can include: a landlord is protected if a tenant is in occupation (*Freer v Unwins* [1976] Ch 288), a mortgagor is protected if a mortgagee is in occupation, licensor is protected if a licensee is in occupation and trustee is protected if a beneficiary is in occupation.⁷

¹⁰¹ *Kingsalton v Thames Water Developments* [2002] 1 P & CR 184 at 21, applying the LRA 1925.

concept than the term ‘possession.’¹⁰² Although there is often an overlap where both terms will be satisfied, possession is of separate application than actual occupation. The focus here is on the present registered proprietor, not the previous one.

There are two presumptions in the LRA 2002. While in light of *Nouri v Marvi*,¹⁰³ these presumptions *may* be seen as only fettering the ‘discretion of the registrar to rectify,’ they will nevertheless still be *highly persuasive* for a court when exercising its discretion.¹⁰⁴ The first presumption is if a registered proprietor is deemed not in possession of the land, the existence of grounds for rectification must lead to the rectification unless there are exceptional circumstances which justify a refusal to rectify.¹⁰⁵ If rectification succeeds here the registered proprietor will be compensated by the indemnity fund.¹⁰⁶ Depriving a registered proprietor in possession of property from losing their interest is still one of the central aims of the LRA 2002. This is the second presumption. At the point when rectification of the register is demanded if the registered proprietor is in possession, then rectification will not take place without their consent and an indemnity will be paid to the claimant with the defrauded interest.

However this is not without exception. There are two situations when the protection of a proprietor in possession can be overturned and rectification allowed: where the registered proprietor has caused or contributed to the mistake by fraud or carelessness,¹⁰⁷ or unless it

¹⁰² *Strand Securities Limited v Caswell* [1965] 1 All E.R. 820 at 826 & 829-830. While leaving furniture in a flat will not satisfy as being in actual occupation, this may be sufficient to establish possession. However the ambit of how much wider possession is than actual occupation is not clear.

¹⁰³ *Nouri v Marvi* [2006] 1 EGLR 71 per Judge Rich QC – interpreting Peter Gibson LJ’s judgment in *Kingsalton v Thames Water Developments* [2002] 1 P & CR 184 was of the opinion (*obiter dicta*) that the courts discretion to rectify was ‘unfettered.’

¹⁰⁴ *Ibid* – the court will look at the ‘policy of the statute.’

¹⁰⁵ LRA 2002, schedule 4(3)(3) and 6(3); Law Commission and HM Land Registry, *Land Registration for the Twenty-first Century: a Conveyancing Revolution*, No. 271 (London, 2001) para 10.18 and 10.22.

¹⁰⁶ LRA 2002, schedule 8(1)(2)(b) relates to schedule 8(1)(1)(a). These provisions also existed under the LRA 1925.

¹⁰⁷ LRA 2002, schedule 4(3)(2)(a). An issue which has not been determined yet is what behavior would amount to carelessness. Examples under the LRA 1925, s 82(3)(1), are found in: *Re 139 High Street Deptford* [1951] Ch 884 at 890-892 and *Claridge v Tingey* [1967]

would be unjust for the alteration not to be made.¹⁰⁸ The use of the double negative 'unjust' and 'not to be made' seems to indicate that the person seeking rectification must have a strong case.¹⁰⁹ Factors that the court may take into account include the length of undisturbed possession, the need for the land, expenditure on it, and the indemnity position.¹¹⁰ The burden here is reversed onto the claimant.

Rectification therefore allows for an element of discretion. There is also discretion under the indemnity provision of the Act. It is unlikely in this situation that an indemnity would be paid. Schedule 8(5)(1) and (2) LRA 2002 states that an indemnity will not be payable where the claimant's loss is suffered wholly or partly as a result of their own fraud, or may be reduced where the loss that is suffered is partly as a result of their own lack of care.¹¹¹ Applying the hypothetical example above: if (A) fraudulently transfers (P)'s title to themselves, becomes registered, and later sells the land to (B), so as long as (B) is deemed to be in possession and is unaware of the forgery it is likely that (B)'s title will not be rectified. B will have 'good title' under sections 29(1) and 58 LRA 2002, with (P) entitled to receive an indemnity.¹¹²

A variation on this factual situation is instead of the void transfer being to a bona fide purchaser for value, the transfer is to a bona fide mortgagee. If (A) fraudulently transfers (P)'s property (who is not in actual occupation) to themselves and then obtains a registered mortgage over the property from (B), the title would initially be rectified in (P)'s favour.¹¹³ However the issue remains what should happen to (B)'s (the mortgagee's) registered interest, created before the rectification? Should the interest remain protected on the title or should there be a secondary rectification? The case, *Norwich and Peterborough BS*

1 WLR 134 at 140-141.

¹⁰⁸ LRA 2002, schedule 4(3)(2)(b) and 6(2)(b).

¹⁰⁹ R Smith, *Property Law* (4th ed, 2003).

¹¹⁰ Examples under the LRA 1925 [s 82(3)(c)]: *Johnson v Shaw* [2004] 1 P & CR 123, rectification was ordered; *Horrill v Cooper* (1998) 78 P & CR 336 at 345-347, rectification was ordered; *Epps v Esso Petroleum Co Ltd* [1973] 1 WLR 1071 at 1080-1083 grounds for rectification were not satisfied.

¹¹¹ See *Dean v Dean* 80 P & CR 457.

¹¹² LRA 2002, schedule 8(1)(1)(b).

¹¹³ LRA 2002, schedule 4(3)(2)(a).

*v Steed*¹¹⁴ established that rectification against a subsequent mortgagee requires independent grounds. Therefore it is logical in England, that where there is fraud, the title will be rectified on these independent grounds to remove the mortgagee's interest. The basis for doing so is that the mortgagee can not claim that they are in 'possession' of the property; it is the fraudulent mortgagors who are in possession.¹¹⁵ The rectified title will thus reflect its true position before the fraudulent transfers occurred.¹¹⁶ All is not lost for the mortgagee though. Due to the nature of title registration they will be entitled to an indemnity from the state.¹¹⁷ In comparison with the New Zealand LTA the register will remain unaltered. However the registered proprietor will receive compensation to pay the mortgage off.

(c) Title is Fraudulently Transferred Directly to a Bona Fide Purchaser for Value

The third factual situation is subtly different than the previous and although it would not be thought that the consequences would be any different, the English courts have managed to distinguish it. This is where (A) forges (P)'s signature (who is not in actual occupation) and directly transfers the title to a new bona fide registered purchaser for value (X). The issue is whether (X)'s title is protected. Applying section 58 LRA 2002 it would *prima facie* seem that (X) is protected. Even a person who is registered as proprietor (transferee) of a legal estate, on the strength of a forged transfer, should nonetheless obtain the legal estate.¹¹⁸ Thus the statutory processes as described above should be applied. However application of the corresponding previous statutory

¹¹⁴ *Normich & Peterborough BS v Steed* [1993] Ch 116.

¹¹⁵ LRA 2002, schedule 4(3)(3) and 4(8), the court has the power to change the priority of interests. The title was not rectified in *Re Leighton's Conveyance* [1936] 1 All ER 667 applying LRA 1925 (however this case was based on undue influence and not fraud).

¹¹⁶ See cases applying the LRA 1925, s 82: *Argyle Building Society v Hammond* (1984) 49 P & CR 148 and subsequently: *Normich & Peterborough BS v Steed* [1993] Ch 116. Secondary rectification was precluded against the charge of the innocent mortgagee as the transaction was voidable not void (this was a question of construction applying LRA 1925). If there was a forgery though (thus a void transfer, LRA 1925 s 82(g)) rectification would have been permitted and an indemnity to the mortgagee available.

¹¹⁷ LRA 2002, schedule 8(1)(2)(b).

¹¹⁸ Law Commission and HM Land Registry, *Land Registration for the Twenty-first Century: a Conveyancing Revolution*, No. 271 (London, 2001) para 9.4.

provision¹¹⁹ suggested otherwise, even if the registered proprietor is in possession. It therefore seems that section 58 does not protect a claim by (P).

The initial case, *Attorney-General v Odell*¹²⁰ involved a forged transfer by the chargee's solicitor to Odell who was wholly innocent. The Court rectified against Odell on grounds that he never had 'good title' and was therefore not even entitled to an indemnity. This position remained, applying the LRA 1925, on different grounds. In *Malory Enterprises Ltd v Cheshire Homes (UK) Ltd*¹²¹ the Court of Appeal held that there was no disposition¹²² giving absolute title on the strength of a forged transfer. The new registered proprietor (legal owner) was subject to the rights of the defrauded party as the beneficial ("true") owner holding the property on trust for them. Therefore, surprisingly, the purchaser will *not* receive good title.

The issue of compensation under the LRA depends on whether 'good title' is obtained by a transferee. Presently the answer to this question is not clear. If the transferee does not obtain good title, there cannot be any mistake under the legislation, and therefore rectification is not available. The indemnity cannot be claimed as this is dependent on rectification.¹²³ The favourable view is that legal, 'good title,' should be found under a directly forged transfer. A contrary conclusion seems to be bizarre, unjust and lacks logic. It is unwise to have a further distinction to these principles of land registration solely on the premise that the fraudster imitated the registered proprietor and transferred the property to an unaware bona fide purchaser. These precedents should be overruled on the grounds that there was a misunderstanding as to the effect of registration (in light of sections 58 and 29 LRA 2002). The decision in *Malory* undermines the conclusiveness of the register and is

¹¹⁹ LRA 1925, s 69.

¹²⁰ *Attorney-General v Odell* [1906] 2 Ch 47 applying the LTA 1875; R J Smith, 'Forgeries and Land Registration' (1985) 101 LQR 79, this is effectively supporting a deferred indefeasibility doctrine.

¹²¹ *Malory Enterprises Ltd v Cheshire Homes (UK) Ltd* [2002] EMCA Civ 151 applying the LRA 1925. The reasoning is equally applicable to the LRA 2002.

¹²² A *disposition* is essential under s 29 LRA 2002. If there is no disposition then this section cannot apply.

¹²³ LRA 2002, schedule 8 (1)(2)(b).

also inconsistent with the earlier precedent of *Argyle BS v Hammond*.¹²⁴ For the sake of simplicity and confidence in the register it is hard to see the precedent in *Malory* progressing any further.

3. Comparison

The three situations that have been described illustrate the complexity, lack of conclusiveness in the register and the completely different conceptual basis for land title registration in England. Having the status of being in possession and/or an overriding interest is pivotal. New Zealand, sensibly, does not recognise any such concept. It must be commended though that the statutory priority system in England is destined to be acceptable *most* of the time as the proprietor in possession or in actual occupation usually wishes to keep the property and not receive compensation. There is generally far greater reluctance in New Zealand to alter the position of the register. Immediate indefeasibility dictates that the bona fide purchaser for valuable consideration or mortgagee would receive title to the property, and the defrauded previous registered proprietor would be compensated. The advantage of this approach is its simplicity which may in turn bolster public confidence.¹²⁵

D. The Third Fundamental Question

The third fundamental question to be analysed is one of the most difficult issues faced by any registration scheme:¹²⁶ if or in what circumstances is a registered proprietor of property required to recognise an unregistered interest which exists over the property? The purchaser's wrongdoing here affects not the vendor's interest, but unregistered third parties. For instance if (X) holds an unregistered interest in the land, of which (Z) has become the registered proprietor, the issue is whether (X) is able to have their interest recognised.

1. New Zealand's Answer

The approach adopted in New Zealand is to determine whether the

¹²⁴ *Argyle BS v Hammond* (1984) 49 P & CR 148.

¹²⁵ R J Smith, 'Forgeries and Land Registration' [1985] 101 LQR 79 at 88.

¹²⁶ R J Smith, *Property Law* (4th ed, 2003).

registered proprietor's conduct amounts to fraud. If so, then the registered proprietor takes title subject to the unregistered interest claimed, as the indefeasibility protection under the LTA 1952 is no longer available. Section 182 LTA states that a registered proprietor is not affected by notice of any trust or unregistered interest and that knowledge of any trust or interest shall not be imputed as fraud.¹²⁷ The LTA does not define fraud though; this is left to judicial interpretation. Therefore something more than mere knowledge is required. The courts, in a series of early cases, used *obiter dicta* to assist in drawing a perimeter around the sphere of behaviour that would be considered fraudulent. This is still applied in cases today.

In *Assets Co Ltd v Mere Roibi*¹²⁸ the Privy Council held that fraud is confined to 'actual'¹²⁹ personal 'dishonesty' of some kind, not what is called 'constructive' or 'equitable' fraud.¹³⁰ Then in *Waimiba Sawmilling Co Ltd v Waione Timber Co Ltd*¹³¹ Salmond J elaborated on the concept of 'dishonesty'¹³² to adopt a 'duty of an honest man' test.¹³³ The Privy Council in *Waimiba*¹³⁴ also expressed that it is fraudulent 'if the designed object of a transfer is to 'cheat a man of a known existing right.' While this *obiter dictum* is of some help, it is essentially a question of fact, at the date of registration, in determining whether conduct is considered fraudulent. This can often be a thin line, as the cases have suggested.¹³⁵

¹²⁷ Pre LTA 1952, in *Locher v Howlett* (1894) 13 NZLR 584 at 595-596, Richmond J held that notice of a trust or unregistered interest is not fraud.

¹²⁸ *Assets Co Ltd v Mere Roibi* [1905] AC 176 at 210 (PC).

¹²⁹ This is a conscious, subjective knowledge which may also include wilful blindness.

¹³⁰ TBF Ruoff, 'Protection of the Purchaser of Land (1969) 32 MLJ 121. A person may not benefit from avoiding information which he or she would have discovered had the enquiries usually made by a prudent purchaser been made.

¹³¹ *Waimiba Sawmilling Co Ltd v Waione Timber Co Ltd* [1923] NZLR 1137 at 1175 (CA).

¹³² *Ibid* at 1173. Dishonesty is a wilful and honest disregard and violation of the rights of other persons.

¹³³ *Ibid*. This is whether the purchaser knew enough to make it his duty as an honest man, to hold his hand, and either make further inquiries, abstain from the purchase, or purchase subject to the rights.

¹³⁴ *Waimiba Sawmilling Co Ltd v Waione Timber Co Ltd* [1926] AC 101 at 106 per Lord Buckmaster.

¹³⁵ Cases where a registered proprietors conduct was considered fraudulent: *Loke Yew v Port Swettenham Rubber Co Ltd* [1913] AC 491; *Efstration v Glantschnig* [1972] NZLR 594; *New Zealand Meat Nominees v Sim* (1990) 1 NZ ConvC 190, 498; *Jessett Properties Ltd v UDC Finance Ltd* [1992] 1 NZLR 138; *Swann v Secureland Mortgagee Investments Nominees Ltd* (in

If it is a proprietor's purpose on registration to defeat an unregistered interest, then obviously this conduct would not attract the protection of indefeasibility.

2. England's Answer

(a) Overriding Interest

The approach taken in England is not surprisingly, entirely different. The protection conferred to an unregistered third party is not based on any issue of fraud but whether the unregistered party has an *overriding interest*.¹³⁶ If so, then regardless of notice the purchaser will be bound to honour that interest. The most common situations where there is an overriding interest is if the claimant has an unregistered leasehold estate in land not exceeding seven years,¹³⁷ or the interest holder is in actual occupation of the premises. An unregistered lease in the property is relatively straightforward according to the statutory provisions in the LRA 2002.¹³⁸ However the protection of a proprietor in actual occupation of property is less so. Although the LRA 2002 now requires most interests capable of being classified as overriding to be noted in the register,¹³⁹ there are several that will still be protected so long as the holder of the interest is in actual occupation of the property. These include: a legal¹⁴⁰ or equitable lease or tenancy;¹⁴¹ beneficial interest

licq) [1992] 2 NZLR 144; *Ward v Keane* 21/8/92, CA 11/91; *Hopman v Peka* 4/11/98 CP132/94; *Tuscany v Gill* (2001) 4 NZ Conv 193 at 446.

Cases where a registered proprietor's conduct was not considered fraudulent: *Waimiha Sawmilling Co Ltd v Waione Timber Co Ltd* [1926] AC 101; *Harris v Fitzmaurice* [1956] NZLR 975; *Bunt v Hallinan* [1985] 1 NZLR 450; NZ *Guardian Trust Co Ltd v Ashby* 16/7/86 CP 727/86; *Tafyanichich v Index Developments Ltd* 28/3/91 CP 1330/90; *Crinklewood Holdings Ltd v C V Quigley & Sons Nominees Ltd* [1992] 1 NZLR 463; *Laing v Lanron Sbelv Co No 56 Ltd* [1994] 1 NZLR 562; *Auckland CC v Man O'War Station Ltd* 19/8/97 CP 1355/83; CN & NA *Davies Ltd v Laughton* [1997] 3 NZLR 705; *Duncan v McDonald* [1997] 3 NZLRE 669; *Town & Country Marketing Ltd v McCallum* (1998) 3 NZ ConvC 192 at 698.

¹³⁶ LRA 2002, schedule 3, above n 29.

¹³⁷ Leases of 7 years or more are registrable dispositions and thus have no effect in law until registered.

¹³⁸ LRA 2002, schedule 3(1).

¹³⁹ R J Smith, *Property Law* (4th ed, 2003).

¹⁴⁰ *Asbburn Anstalt v Arnold* [1989] Ch 1 at 27D.

¹⁴¹ *Greaves Organisation Ltd v Stanhope Gate Property Co Ltd* (1973) 228 EG 725 at 729.

under an implied (bare) trust¹⁴² or some other trust of land;¹⁴³ estate contract;¹⁴⁴ unpaid vendors lien;¹⁴⁵ protected or statutory tenant;¹⁴⁶ and a tenants right to recoup repair costs from the future rent owed to the landlord.¹⁴⁷ One overriding interest of particular importance was determined by the House of Lords in *William & Glyn's Bank Ltd v Boland*.¹⁴⁸ It was held that interests of beneficiaries (a wife) of trusts for sale¹⁴⁹ was an interest in the land and thus protected as 'overriding.'¹⁵⁰ This decision represented a large expansion to the negative of registration.¹⁵¹ If an overriding interest exists then alteration of the title will occur. However as the registered proprietor takes subject to any overriding interests prior to alteration, no indemnity can be claimed as they have suffered no loss. This decision merely reflects the existing entitlement. If such a provision, giving priority to certain overriding interests of proprietors in actual occupation existed in New Zealand, then in several situations a registered proprietor would be bound by the interest prior to registration. Obvious examples in New Zealand where the courts have held the registered proprietor to be innocent of fraud and thus take free of the interest, when they are likely to be bound by the interest in England, include the factual situations found in *Harris v Fitzmaurice*¹⁵² and *Bunt v Hallinan*.¹⁵³

¹⁴² *Collins v Lee* [2001] 2 All ER 332 at 336.

¹⁴³ *William & Glyn's Bank Ltd v Boland* [1981] AC 487; *City of London BS v Flegg* [1988] AC 54; *Lyns v Prowsa Developments Ltd* [1982] 2 All ER 953; *Popey v Helfield Properties Limited* [2005] EWHC 368 – where the claimant sought to establish a constructive and resulting trust.

¹⁴⁴ For example an option to purchase: *Webb v Pollmount Ltd* [1966] Ch 548 at 603 & a right of pre-emption (s 155 LRA 2002): *Homsy v Murphy* (1997) 73 P & CR 26 at 35.

¹⁴⁵ This is a right which one person has to either retain the property of another or have a right over it until a claim against the other is satisfied (P Spiller, *Butterworths NZ Law Dictionary* (6th ed, 2005)) – *Ferristhurst Ltd v Wallcote* [1999] Ch 355 at 367.

¹⁴⁶ *Barclays Bank plc v Zarovabli* [1997] Ch 321 at 328.

¹⁴⁷ *Lee-Parker v Izgett* [1971] 1 WLR 1688 at 1693.

¹⁴⁸ *William & Glyn's Bank Ltd v Boland* [1981] AC 487 applying the LRA 1925, s 71(g).

¹⁴⁹ Trusts of Land and Appointment of Trustees Act 1996 - the term a 'trust for sale' is now known as a trust of land.

¹⁵⁰ Applying LRA 1925, s 70(g).

¹⁵¹ E Cooke, 'E-Conveyancing in England: Enthusiasms and Reluctance,' in D Grinlinton (ed), *Torrens in the 21st Century*: (2003) at 280.

¹⁵² *Harris v Fitzmaurice* [1956] NZLR 975.

¹⁵³ *Bunt v Hallinan* [1985] 1 NZLR 450.

(b) No Overriding Interest

There will be some situations in England where an unregistered proprietor will not have an overriding interest in the land. But does that mean that a registered proprietor, who for instance has actual knowledge of the interest and purchases the property with the object of defeating that interest (akin to fraud in New Zealand), can take free of it? There is very little authority on this question in the English land registration system. The LRA 1925 and 2002 seem extremely reluctant to get tangled in this debate. Cross J¹⁵⁴ emphatically stated, ‘notice of something which is not on the register of the title in question shall not affect a transferee unless it is an overriding interest.’ Does this indicate that this question is completely closed then? There was a glimmer of hope cast by Graham J in *Peffer v Rigg*.¹⁵⁵ It is this decision, which did not concern any issue of an overriding interest that has been branded as the ‘root of the English systems unease’ with Torrens fraud.¹⁵⁶ Graham J held that a registered proprietor was bound by an unregistered interest on three grounds,¹⁵⁷ the most notable of these being a lack of good faith (equivalent to Torrens fraud). Section 20¹⁵⁸ of the LRA 1925 seemed to state that a registered proprietor for valuable consideration would take free of the claimant’s unregistered interest, regardless of whether there was good faith or notice. Graham J recognised that while the legislation’s intention was to simplify matters of title as much as possible, this particular section cannot be interpreted as broadly as this.¹⁵⁹ So he read in tandem with section 20 the definition of a purchaser: ‘in good faith for valuable consideration.’¹⁶⁰ This view would not enable a purchaser with knowledge of an interest to take advantage of the Act and secure to himself a flawless title which he ought not to

¹⁵⁴ *Strand Securities v Caswell* [1964] 2 All ER 956, there was no actual occupation.

¹⁵⁵ *Peffer v Rigg* [1977] 1 WLR 285.

¹⁵⁶ E Cooke and P O’Connor, ‘Purchaser Liability to Third Parties in the English Land Registration System: A Comparative Perspective’ (2004) 120 LQR 640.

¹⁵⁷ There was only nominal (not sufficient) consideration under s 20(4) LRA 1925; and a constructive trust was held to exist.

¹⁵⁸ Equivalent to LRA 2002, s 29.

¹⁵⁹ *Peffer v Rigg* [1977] 1 WLR 285 at 294.

¹⁶⁰ LRA 1925, s 3 (xxi).

obtain.¹⁶¹ Good faith was essential to the transaction.

Strong criticism¹⁶² has been directed at Graham J's judgment, that in consideration of the issue he ignored section 74 LRA 1925 which states, 'notice of a trust does not affect the register nor any person dealing with the land.' While the analysis may have been wrong, the result must be correct. There was clear knowledge of the trust and a dishonest intention to defeat it on purchasing the property. *Peffer*, factually, closely resembles the New Zealand case of *Ejfastration v Glantschnig*.¹⁶³ The New Zealand Court of Appeal found in similar fashion, but in a far more direct manner due to the LTA provisions, that suspect behaviour between the husband and a purchaser did amount to fraud in depriving his wife of her interest (being a breach of a constructive trust). The speed of the transaction (with no inspection of the property), and the nature of it (the property was transferred for cash at 60% below its market value) had the deliberate purpose to defeat the unprotected rights of the transferor's wife. Applying *Peffer* to the law in NZ the registered proprietor's behaviour would result in fraud. It is unfortunate to note that there is no judicial comment in England of any Commonwealth registration principles relating to fraud which may have been of assistance. The decision in *Peffer* has never been directly overruled. However, persuasive authority to do so was reached by the House of Lords in *Midland Bank Trust Co Ltd v Green*.¹⁶⁴ This case does not represent title registration though and can be distinguished on this point.¹⁶⁵ However its facts and reasoning are persuasive and could well be applied to registered land. Lord Wilberforce stressed that the Court will have no regard for the motive of transactions which would be necessary for determining whether one had good faith: 'to make the validity of the transaction dependant on a

¹⁶¹ *Peffer v Rigg* [1977] 1 WLR 285 at 295.

¹⁶² M P Thompson, 'Registration, Fraud and Notice' [1985] CLJ 280. Graham ignored the deliberate decision that notice should be irrelevant to registered land (Report of the Acquisition and Valuation of Land Committee (1919) Cmd 424, para 32) and also cases which emphasised the irrelevance of notice: *Strand Securities v Caswell* [1964] 2 All E.R. 956; *Parkash v Irani Finance Ltd* [1970] Ch 101, Plowman J stated that 'one of the essential features of registration of title is to substitute a system of registration of rights for the doctrine of notice.'

¹⁶³ *Ejfastration v Glantschnig* [1972] NZLR 594.

¹⁶⁴ *Midland Bank Trust Co Ltd v Green* [1981] AC 513.

¹⁶⁵ Created under the Land Charges Act 1925.

person's mind, seems to make distinctions equally difficult to analyse in law as to establish in fact.¹⁶⁶ It is submitted that this reasoning should not be adopted with relation to registered land. It is necessary and possible to look at the conduct and intention of the purchaser, as is done when determining fraud in a Torrens system. Assessing 'actual dishonesty'¹⁶⁷ precisely requires categorising the purchaser's motive which Lord Wilberforce does not support.

The issue of whether good faith is required now is not expressly addressed by the LRA 2002. As land registration is a statutory concept¹⁶⁸ there needs to be some 'door' in the legislation to enable importation of this requirement. However there is no definition of a 'purchaser' in the LRA 2002 and thus the words of section 29 are to be interpreted without any assistance. If the courts interpret the list referred to in section 29 as exhaustive, then arguments for the importation of notice will be futile. The Law Commission was far clearer than the LRA 2002 though. It emphasised that knowledge (actual notice) of an unprotected interest or bad faith would not have any affect upon the statutory protection of the purchaser.¹⁶⁹ No sympathy is shown for those in England who do not protect their interests.

3. Comparison

The absence of good faith in the LRA 2002, strong criticism and misapplication of the statutory requirements in *Peffer*, and the general reluctance for the English courts to adopt any common law principles of notice leaves the jurisdiction with a clearly different approach for dealing with unregistered third party interests over registered land. The focus in England is likely to be directed solely at whether an unregistered third party has an overriding interest. It seems clear, in the absence of an overriding interest, that an unprotected interest is defeated by a registered disposition regardless of if the registered

¹⁶⁶ *Midland Bank Trust Co Ltd v Green* [1981] AC 513 at 531.

¹⁶⁷ *Waimiba Sawmilling Co v Waione Timber Co* [1926] AC 101.

¹⁶⁸ E Cooke and P O'Connor, 'Purchaser Liability to Third Parties in the English Land Registration System: A Comparative Perspective' (2004) 120 LQR 640.

¹⁶⁹ Law Commission and HM Land Registry, *Land Registration for the Twenty-first Century: a Conveyancing Revolution*, No. 271 (London, 2001) para 5.16.

proprietor acted wholly fraudulent. The only option available to the claimant is to establish a personal claim (akin to that of an *in personam* claim in New Zealand).¹⁷⁰ E Cooke¹⁷¹ suggests that as the avenue for any requirement of good faith is no longer available, the *in personam* claim will develop far further than anticipated. This comment seems correct as the courts surely would not permit the 'statute to be used as an instrument of fraud.'

While the status accorded to a person who has an overriding interest weakens the concept of title registration, it should at least be mentioned that surprisingly, systems like New Zealand's that do not accord paramount status to unregistered interests, are destined to face more litigation under the fraud exception to indefeasibility. However as so few cases arise, this is a valuable trade off.

Conclusion

This paper has focused on comparing the consequences of fraudulent land transactions between England and New Zealand by directing attention to these three fundamental questions. As submitted, there are few similarities between the land title registration systems. The English LRA is founded upon and deals with the fraudulent transfer of property on a wholly different conceptual basis and in a far more complicated manner. This subsequently makes the task of directly comparing cases between each jurisdiction a challenge as the judgments are naturally focused on the relevant legislation. As the LRA 2002 has only recently been enacted, one can only wait with interest for future judgments so that additional comparisons between the jurisdictions can be drawn.

¹⁷⁰ An *in personam* claim arises out of a proprietors own conduct.

¹⁷¹ E Cooke and P O'Connor in 'Purchaser Liability to Third Parties in the English Land Registration System: A Comparative Perspective' (2004) 120 LQR 640.