

## THE TORRENS SYSTEM AND THE IN PERSONAM CLAIM

REBECCA ARDAGH\*

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### Introduction

“Life, liberty, and property do not exist because men have made laws. On the contrary, it was the fact that life, liberty, and property existed beforehand that caused men to make laws in the first place.”<sup>1</sup>

This quote from Frederic Bastiat identifies a concept that is not often addressed when commenting on the application of property law; the idea that to have property is an inherent, natural right, in the same league as liberty and life itself. The ability of individuals to own separate property, and to be able to identify this property, is essential for the cohesion of society as a whole, over and above the intrinsic importance of property ownership to the everyday lives of individuals. The importance of this notion arguably is reflected in the significance of ‘security’ of title demonstrated in land statutes, case law and commentary. Giving a title holder security allows them to confidently exercise their right to enjoy the land they own without interference. However, in giving the legal owner of property too much security one runs the risk of allowing them to hide behind this, while depriving someone else of their own legitimate interests. Finding this balance between superiority of title and potential competing interests has become a controversial issue in land law, the limits of which are still undefined.

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\* Rebecca Ardagh, University of Canterbury.

<sup>1</sup> Frederic Bastiat, *The Law*, (The Foundation for Economic Education: Irvington, New York, 1987) at 6.

With the introduction to New Zealand law, of the initially strict Torrens system of registration, the registered title became absolutely paramount and competing interests could not affect this. However, through time, this concept has become more flexible and avenues around this security of title ("indefeasibility"), other than those outlined in Torrens statutes, are being debated in both courts and commentary. One such avenue, known as claims in personam, is still being defined through continuing cases. In assessing the place of such a claim in a Torrens system this paper will discuss the Torrens system itself and the concept of indefeasibility as it is incorporated into this system. The in personam claim will also be examined, along with the way it is applied alongside Torrens principles to determine whether it effectively works with them or undermines them in its current form. In addition, there are suggestions for reform or improvement that will be addressed in order to gain an understanding of the future of this claim in the New Zealand Torrens system.

### A. New Zealand's Torrens System

Previously, New Zealand's system of registration operated as a Deeds system. However, this system was fraught with problems as to the acquisition of the title, the validity of previous titles and the lack of security.<sup>2</sup> In South Australia, Sir Robert Torrens introduced a new system of title and registration into the Real Property Act of 1858.<sup>3</sup> New Zealand then followed suit by implementing the system in the Land Transfer Act 1870. After four consolidations of this Act, New Zealand has the same system under a new Act; the Land Transfer Act 1952. Torrens' aim in developing this system was to introduce a "cheap, simple, expeditious and accurate system of transfer of land", restoring "to its intrinsic value a large amount of property depreciated or unmarketable through defective evidence or technical imperfection

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<sup>2</sup> Bennion, Brown, Thomas, and Toomey, *New Zealand Land Law*, (2<sup>nd</sup> ed, Wellington, 2009) at 38.

<sup>3</sup> Ibid.

in title”.<sup>4</sup> This has often been cited as the aim of many Torrens statutes.<sup>5</sup> In a review of the New Zealand Land Transfer Act made by the Law Commission in 2008 the aims of New Zealand’s Torrens statutes were to “create a register of land titles reflecting the estates in land throughout New Zealand and their encumbrances; an “indefeasible title” in the absence of fraud, with specific exceptions; as well as a public record of land transfers; a simpler, less costly system of conveyancing than the deeds system, and a means whereby compensation for loss of title due to the system could be granted by the state.”<sup>6</sup> It can be concluded that many of the aims of these statutes are practical; to create efficiency and reliability in an area where the system has previously been inadequate to cope with demand.

In order to meet these aims there are some cardinal principles of the Act that must be upheld to allow the system to be as efficient as possible. These principles have come to be characterised as the ‘curtain and the mirror’ principles of land registration.<sup>7</sup> More specifically; the ‘mirror’ principle, ensuring that the register reflects the complete state of the title - in other words, ‘what you see is what you get’; the ‘curtain principle’, that the register creates a curtain between the title and other interests lying behind the register, and any purchaser is not required to investigate any interests behind that curtain; and finally the ‘insurance principle’, where as mentioned, if the register does not accurately reflect the title to the detriment of a person then compensation can be

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<sup>4</sup> Robert Torrens, *A Handy Book on the Real Property Act of South Australia* (1862) 11 cited by Lynden Griggs, “In Personam, *Garvia v NAB* and the Torrens System – Are they Reconcilable?”, (2001) 1:1 QUT *Law & Justice Journal* 76 at 77.

<sup>5</sup> For example, opening statement in the Report of the Real Property Law Commission in November 1861 (SA): Parl Paper No 192 (1861).

<sup>6</sup> Review of the Land Transfer Act 1952, Law Commission October 2008, Wellington, NZ, Issues Paper 10 at 19.

<sup>7</sup> Griggs, above n 4; Tang Hang Wu, “Beyond the Torrens Mirror: A Framework of The In Personam Exception to Indefeasibility”, (2008) 32 MULR 672 at 673.

made by a State assurance fund.<sup>8</sup> Despite these being the principles behind the working of the system, it is commonly expressed that the fundamental principle of any Torrens system is indefeasibility of title<sup>9</sup> as this contributes to the operation of these three mentioned overarching principles.

## B. Indefeasibility of Title

In *Frazer v Walker*<sup>10</sup> Lord Wilberforce describes indefeasibility as “a convenient description of immunity from attack by adverse claim to the land or interest in respect of which he is registered, which a registered proprietor enjoys. This conception is central in the system of registration”. The importance of this concept is also highlighted in the well cited dictum of Edwards J;<sup>11</sup> “The cardinal principle of the statute is that the register is everything, and that, except in cases of actual fraud on the part of the person dealing with the registered proprietor, such person, upon registration of the title under which he takes from the registered proprietor, has an indefeasible title against all the world”.<sup>12</sup> While only mentioned in two sections of the statute,<sup>13</sup> despite statements in *Frazer v Walker* that it does not appear at all,<sup>14</sup> this concept has a firm grounding in case law to do with registration. The indefeasibility focussed sections of the Act are ss 62, 63, 64, 182 and 183. In order to understand the potential exceptions to immediate indefeasibility it is necessary to examine these sections.

Section 62 states that the registered title will be paramount unless one of the four described situations exists; the title is obtained by fraud, an

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<sup>8</sup> Bennion, Brown, Thomas, and Toomey, above n 2 at 39

<sup>9</sup> Wu, above n 7 at 672.

<sup>10</sup> *Frazer v Walker* [1967] AC 569, at 580.

<sup>11</sup> *Fels v Knowles* (1906) 26 NZLR 604, at 620.

<sup>12</sup> *Ibid.*

<sup>13</sup> The Land Transfer Act 1952 ss 54 and 199.

<sup>14</sup> *Frazer v Walker*, above n 10.

earlier title exists<sup>15</sup>, there is an omission of an easement on the title,<sup>16</sup> or there is a misdescription of boundaries.<sup>17</sup> The most controversial of these exceptions is the fraud exception as the interpretation of this is varied between cases. However, it is accepted, since the case of *Assets Co Ltd v Mere Roibi*, that to constitute fraud under the statute then there must have been actual fraud,<sup>18</sup> leaving equitable fraud available as a basis for a claim in personam, as will be discussed later. Section 63 protects the registered proprietor from ejectment unless, as before, there is fraud,<sup>19</sup> misdescription of boundaries,<sup>20</sup> or a prior title. However, there are additional exceptions to indefeasibility in this section including the right to a legitimate mortgagee sale of the property,<sup>21</sup> or the registered proprietor is a tenant under a lease and the landlord has legitimate reason to eject him,<sup>22</sup> where the registered proprietor will not be protected from ejectment. Section 64 guarantees to uphold the title of the registered proprietor, preventing any right that may be held over the same title to be used in a way that undermines the registered proprietor's title.<sup>23</sup> Section 182 is effectively the 'curtain' section, alleviating the new registered proprietor of any responsibility, unless in the case of fraud, to inquire as to previous registrations of title for that property, how the purchase money was used. It also guarantees that any notice of interests such as trusts or unregistered mortgages will not affect his title.<sup>24</sup> Section 183 protects a bona fide purchaser or mortgagee for value from any adverse claims arising from the fact that they derived their title from a person who was "registered as proprietor through fraud or error, or under any void

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<sup>15</sup> The Land Transfer Act 1952 s 62(a).

<sup>16</sup> Ibid, s 62(b).

<sup>17</sup> Ibid, s 62(c).

<sup>18</sup> *Assets Co Ltd v Mere Roibi* [1905] AC 176, 210 (PC).

<sup>19</sup> The Land Transfer Act 1952 s 63(1)(c).

<sup>20</sup> Ibid, s 63(1)(d).

<sup>21</sup> Ibid, s 63(1)(a).

<sup>22</sup> The Land Transfer Act 1952, s 63(1)(b).

<sup>23</sup> Ibid, s 64.

<sup>24</sup> Ibid, s 182.

or voidable instrument”<sup>25</sup>.

These sections combine to give a registered proprietor the security of title more commonly referred to as ‘indefeasibility’, however, interpreting them together has been difficult. As described by Salmond J the legislation was “so badly drafted... that it is difficult so to harmonize these sections”<sup>26</sup>. Although the exceptions to indefeasibility that were originally anticipated were named in the statutes, no other direction was given in addition to this. Because of this vague nature there is difficulty in knowing whether these exceptions should be widely or narrowly interpreted and applied. The centrality of the concept of indefeasibility to the Torrens system has been used to suggest that a strict interpretation and application is what must have been intended. J. E. Hogg made the statement that “indefeasible title means a complete answer to all adverse claims on mere production of the register”<sup>27</sup>. However, an argument that indefeasibility is a principle is that easy to apply, that it is a direct and ready-made answer to any adverse claim is, in this author’s opinion, hard to believe. In fact, it is arguable that indefeasibility was never meant to be absolute,<sup>28</sup> even in drafting Torrens legislation exceptions to the principle are outlined. These exceptions have been interpreted very strictly by the courts. The exception of ‘fraud’ contained in these sections has been interpreted to include only actual fraud, and no other (arguably more easily proved) accepted definition.<sup>29</sup> This strict interpretation of statutory exceptions to indefeasibility is just another example of the judicial respect for the

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<sup>25</sup> Ibid, s 183.

<sup>26</sup> *Boyd v Mayor of Wellington*[1924] NZLR 1174, 1211; Rt Hon Justice Peter Blanchard, “Indefeasibility under the Torrens System in New Zealand” in Grinlinton (ed) *Torrens in the Twenty-first Century*, (LexisNexis, Wellington:2003), at 31.

<sup>27</sup> J.E. Hogg, *Registration of Title to Land Throughout the Empire*, (1920) at 94 cited by L. L. Stevens, “The In personam Exceptions to the Principle of Indefeasibility,” (1969) 1 (2) *Auckland University Law Review* 29 at 29.

<sup>28</sup> Lynden Griggs, *The Tectonic Plate of Equity – establishing a fault line in our Torrens Landscape*, (2003) 10 APLJ 21 at 21.

<sup>29</sup> *Assets Co Ltd v Mere Roibi*, above n 18.

principal and their unwillingness to undermine it. However, the courts do have an inherent jurisdiction in equity and have not endorsed any attempt of indefeasibility to limit that jurisdiction;<sup>30</sup> “that this principle 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 grant”.<sup>31</sup> The tension that can be seen to exist between these two principles leads to the crux of this paper; how can indefeasibility and the courts equitable jurisdiction, namely when acting in personam, co-exist within a Torrens system?

### C. Claims In Personam

#### 1. What is the in personam claim?

According to Snell there are many different uses of the term “equity” depending on its context.<sup>32</sup> An equitable interest in property is a form of ownership that equity would endorse but that is not endorsed by other legal means; statute or at common law.<sup>33</sup> However, these equitable interests do have to arise out of some sort of obligation in order to be recognised; most commonly this is in the form of a contractual relationship, such as the equitable interest of the unregistered mortgagee.<sup>34</sup> When acting in personam someone has the right to go to the court, acting in equity, for a remedy or relief.<sup>35</sup>

Robert Torrens never anticipated the role that equity could play in his system and so any guidance or direction for applying such a claim is

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<sup>30</sup> Stevens, above n 27 at 30.

<sup>31</sup> *Frazer v Walker*, above n 10. at 585 per Lord Wilberforce.

<sup>32</sup> Edmund Henry Turner Snell, *Principles of Equity*, (London: Sweet and Maxwell, 1990), at 23.

<sup>33</sup> Diane Skapinker, “Equitable interests, mere equities, “personal” equities and “personal equities” – distinctions with a difference”, (1994) 68 Australian Law Journal 593 at 593.

<sup>34</sup> Ibid.

<sup>35</sup> Ibid; Meagher, Gummow and Lehane, *Equity: Doctrines & Remedies* (Butterworths: Adelaide, 1992) at 118-120, [428].

inherently lacking in original statutes. Some cases can attract compensation under s172 of the Land Transfer Act 1952, upholding the original aim mentioned; that the state would be responsible for loss suffered under the system. With named exceptions to the concept of indefeasibility, and compensation for situations that are not one of these named exceptions, it was not seen that equity could be needed. Therefore, in interpreting the application of a claim, the courts focus on maintaining the aim of the statutes and therefore indefeasibility, the debate centres on the extent to which this should be upheld against all other interests. The in personam claim itself has been described as “inherently vague”<sup>36</sup> and that because of this its application based on a right to property would undermine indefeasibility and so the Torrens system in general.<sup>37</sup> However, equity plays a large role in modern society and in addition to this there are a lot of interrelated interests that can be attributed to properties, which makes the system a lot more complicated than it originally was or foreseen to be. Because of this the Torrens system has had to be flexible to react and change with society.<sup>38</sup>

## 2. How has the application of the in personam claim evolved?

There are, generally speaking, two schools of thought on how far this ‘flexibility’ should be able to extend concerning the potential application of claims in personam; that it should be interpreted narrowly to avoid posing a threat to the Torrens system, or that it should be interpreted more widely.<sup>39</sup> There is concern that a narrow approach to equitable claims can constrain the development of the law.<sup>40</sup> Of course law according to property operates around rights so central to society that changes in social values will readily affect the

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<sup>36</sup> Barry C Crown, “Equity Trumps the Torrens System: *Ho Kon Kim v Lim Gek Kim Betsy*” [2002] *Singapore Journal of Legal Studies* 409 at 415.

<sup>37</sup> Ibid; Wu, above n 7 at 674.

<sup>38</sup> Griggs, above n7 at 78; *Barry v Heider* (1914) 19 CLR 197.

<sup>39</sup> Wu, above n 7 at 673.

<sup>40</sup> Ibid, at 676.



public's expectations from the law in this area. This does create an expectation that the law be able to change and develop with society. Although the statute states that a registered proprietor's title cannot be affected by notice of another interest,<sup>41</sup> Robert Chambers thinks that this should not be the case. "A defendant who acquires a registered interest in Torrens land from the plaintiff, with notice of the facts giving rise to the plaintiff's claim for restitution of that interest (i.e. notice that the interest is an unjust enrichment at the plaintiff's expense), should not be protected from that claim by the principle of indefeasibility".<sup>42</sup> Respectfully, it is this author's opinion that although the in personam claim should be interpreted widely in order to recognise the various interests that can be vested in a common title, seeking a remedy of restitution is taking the application of this claim too far. It is necessary to find a balance between indefeasibility of title and the right to bring equitable claims against the registered proprietor. As indefeasibility is qualified by provisions within Torrens statutes themselves it seems logical that some encroachment by equitable claims is also not only viable, but in some ways to be expected. However, it is the author's opinion that the most important aspect of a claim in personam, arguably what makes it acceptable in a Torrens system at all, is that a claim in personam is not a claim against the title, but a claim against the registered proprietor him or herself, arising out of conduct.<sup>43</sup> In a remedy of specific performance or constructive trust the courts are merely ensuring that the registered proprietor's conduct is corrected. Sometimes this can have an effect on the title, but is still granted to remedy the conduct of the registered proprietor. A remedy of restitution, however, is a remedy focussed solely on the title itself, as opposed to the behaviour leading to the claim. Because if this, it is

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<sup>41</sup> Land Transfer Act 1952, s 182.

<sup>42</sup> Robert Chambers, 'Indefeasible Title as a Bar to a Claim for Restitution', *Restitution Law Review* 6 (1998) 126 at 134.

<sup>43</sup> Right Honourable Justice Andrew Tipping, 'Commentary on Sir Anthony Mason's Address' in Grinlinton (ed) *Torrens in the Twenty-first Century*, (LexiNexis, Wellington:2003), 23; S Robinson, *Claims in Personam in the Torrens System: Some General Principles*, (1993) 67 Australian Law Journal 355 at 355.

harder to see the application of this equitable remedy being able to coexist with the Torrens system without posing too large of a threat to indefeasibility of title and the system itself.

As mentioned previously, *Frazer v Walker*<sup>44</sup> is authority for the accepted notion that claims in personam are acceptable. However, there is still much debate as to whether these claims are an exception to indefeasibility or not. In *CN & NA Davies v Laughton*,<sup>45</sup> Thomas J noted that in personam “sits comfortably with the concept of indefeasibility... It is essentially non-proprietary in nature. The key element is the involvement in or knowledge of the registered proprietor in the unconscionable or illegal act or omission in issue”.<sup>46</sup> Chambers also argues that calling the in personam claim an exception to indefeasibility is a misnomer as it does not prevent indefeasibility operating legitimately.<sup>47</sup> It is still commonly referred to as an ‘exception’ to indefeasibility, whether it technically is one or not. If it is an exception to the principle, it is still regarded as a necessary one in order to ensure that the Torrens system is fair and maintains justice, though it must always be applied in a way that limits any threat to the system.<sup>48</sup>

Therefore, it is seen as necessary that the registered proprietor is not given such an elevated priority over every other interest that the registered title becomes a shield from any unconscionable conduct or illegal act they may have done in acquiring the title. Protecting the registered proprietor to this extent was never Torrens’ aim.<sup>49</sup> However, whilst attempting to uphold this justice the courts must also act so as not to undermine the principle of indefeasibility itself. This concept of

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<sup>44</sup> *Frazer v Walker*, above n 10 at 585.

<sup>45</sup> [1997] 3 NZLR 705, 712.

<sup>46</sup> *Ibid.*

<sup>47</sup> Chambers, above n 42 at 128.

<sup>48</sup> Sir Anthony Mason, ‘Indefeasibility – Logic or Legend?’ in Grinlinton (ed) *Torrens in the Twenty-first Century*, (LexisNexis: Wellington, 2003) at 16.

<sup>49</sup> Mason, above n 48.

balance between the priority of competing rights is extremely fragile and due to lack of guidance in statute many different ways of approaching different types of claims have been explored, in particular reference to claims for restitution. Chambers argues that this has led to inconsistencies between cases and a remaining question of how to approach these claims in a satisfactory manner.<sup>50</sup> It is widely recognised by the courts that these claims are limited, though these limits are largely undefined.<sup>51</sup>

Originally its application was more strictly confined to situations where a contractual relationship existed or a trust. One reason for this, in terms of contract, is that it provides a tangible basis from which the plaintiffs can prove their rights.<sup>52</sup> It was also mentioned in dictum by Prendergast CJ in *Paoro Torotoro v Sutton*<sup>53</sup> that “there is nothing in the Land Transfer Act which, as between the trustee and the cestui que trust, puts an end to the trust. The trust is not noticed in the Register; but the cestui que trust may always in this Court enforce his rights against the trustee, although the trustee may have acquired a certificate of title”.<sup>54</sup>

A constructive trust was created by the Courts in *Taitapu Gold Estates Ltd v Prouse*<sup>55</sup> where the plaintiffs and defendants had a contractual relationship for the transfer of property. The rights to minerals under the land being transferred was contained in the contract but not included in the transfer, due to a simple mistake. The court held that from the moment of the transfer the defendants held the minerals on constructive trust for the plaintiffs. The plaintiffs had a contractual

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<sup>50</sup> Chambers, above n 42 at 126.

<sup>51</sup> *Boyd v Mayor of Wellington* (1913) 32 NZLR 1149; *Tataurangi Tairuakena v Mua Carr* [1927] NZLR 688.

<sup>52</sup> *Paoro Torotoro v Sutton* 1 NZ Jur (NS) SC 57; *Jonas v Jones* (1882) NZLR 2 SC 15.

<sup>53</sup> *Ibid.*

<sup>54</sup> *Sutton*, above n 52 at 65.

<sup>55</sup> [1916] NZLR 825.

right to the property which created an equitable interest in the minerals; however, the equitable right to the minerals was not turned into a legal right through registration. The reasoning of the judge in this case, seems to align itself with the argument, that an equitable interest in the property created through contract is made into a legal title through registration, the part of that interest that was not recognised through registration still exists in equity with the intention that it transfer into a legal title eventually. This is similar to Tipping J's interpretation of the act of registration. He stated that registration is "a system of creating legal title through the process of registration. Prior to registration an equitable title may exist, but only the act of registration can create a paramount legal title".<sup>56</sup> When granting the remedy of a constructive trust in this case, Hosking J mentioned that it was not conflicting with the Land Transfer Act and that the courts often enforce obligations under contract and in concern of trust.<sup>57</sup> This principle has been followed in a succession of cases.<sup>58</sup> However, when these cases were analysed by Stevens, he also noted that these principles, though accepted in the case would not be applied where the plaintiffs themselves did not follow equitable maxims. Therefore, the equitable maxim that one must 'do equity' to receive equity still applies in cases concerning equitable interests in land and the in personam claim.

However, one noticeable development of this area of claim was when it was extended to claims by third parties to the contract. One example of this, also given by Stevens, was the case of *Shepherds v Graham*, where the claimant was a subsequent transferee. Whilst there was no privity of contract between the two parties, the original registered proprietor had still not performed their obligations as they were outlined in the

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<sup>56</sup> Right Honourable Justice Andrew Tipping, 'Commentary on Sir Anthony Mason's Address' in Grinlinton (ed) *Torrens in the Twenty-first Century*, (LexiNexis, Wellington:2003) at 21.

<sup>57</sup> Mason, above n 48 at 833; Hogg, above n 27 at 34.

<sup>58</sup> Stevens, above n 27 at 34 gives the examples of: *Mereana Perepe v Anderson* [1936] NZLR 47; *Shepherd v Graham* [1947] NZLR 654.

original contract. A property was to be transferred to the original transferee, agreed upon by both parties. However, due to a genuine mistake a portion of the property was left off the register, though this went unnoticed by both parties. The new registered proprietor inhabited the property completely, as if it had been transferred in the stipulated manner. It was the subsequent transferee who noticed the mistake in the register and sought to get it rectified. However, the title of the original registered proprietor was in control of the executor of her estate. The court held that because the executor had inherited the property he did not fall into the 'bona fide purchaser for value' category of the Act. Because of this a decision to allow the claim would not be contrary to the Act. Although there was no privity of contract between the two parties this would not disallow rectification of the mistake. It was held, once again, that at the time of transfer the equitable interest that still remained after the legal title had been established was held as part of a constructive trust for the claimant by the executor of the original registered proprietor's estate. In the author's opinion this also highlights the idea that claims in personam are granted with the interest of remedying behaviour of the registered proprietor. The obligations that the registered proprietor committed to are more important than the evidence of a relationship between the two parties.

In trustee cases a trust can be implied from a relationship, such as in *Congregational Church of Samoa Henderson Trust board v Broadlands Finance Ltd*<sup>59</sup> and *Tataurangi Tairakena v Mua Carr*<sup>60</sup>. In the first case it was held that there must be something from which the court could form a constructive trust; either an express trust or a contractual relationship between parties, or an implied fiduciary relationship. In the case of *Tataurangi* a member of a committee gained a lease with the approval of the committee. The lease was to land the committee held as tenants in common. This lease was held not to gain indefeasibility as the

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<sup>59</sup> [1984] 2 NZLR 704.

<sup>60</sup> [1927] NZLR 688.

member held the lease in a “fiduciary capacity as a member of the committee”.<sup>61</sup> From this it can be concluded that originally the in personam claim was applied in cases where it could be proved that the defendant had obligations that had not been fulfilled, and could be remedied through specific performance of these obligations. However, the claims need a basis from which the equitable interest or rights of the plaintiff to the land in question can be proved, hence a contractual relationship being the usual starting point for this type of claim, though privity of contract between the plaintiff and defendant is not expressly required. A claim can also originate from a trust. These can be implied through the relationship between plaintiff and the defendant, or awarded for an express trust, as in the case of *Kissick v Black*.<sup>62</sup> One common ground between these two claims is that both a contract and fiduciary or trustee relationships imply a sense of obligation. However, while there were these principles there were no direct rules as to how the in personam claim was to be approached.<sup>63</sup> This led to the claim being applied in a broad spectrum of cases, without much consensus on guidelines for its application<sup>64</sup> and increased tension between the ‘narrow’ and ‘wide’ approaches to application of claims in personam.

In *Ob Hiam v Tham Kong*<sup>65</sup> Lord Russel of Killowen stated that courts can exercise their equitable jurisdiction in this area on grounds of conscience, and that they have the ability to exercise “its jurisdiction in personam to insist upon proper conduct in accordance with the conscience in which all men should obey”.<sup>66</sup> This seems to invoke a sense of ‘fairness’ as being a determinant in both when and how the in personam claim should be applied. In this sense it is almost as if directions that are too strict are counter-productive when it comes to

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<sup>61</sup> Hogg, above n 27 at 37.

<sup>62</sup> (1892) 10 NZLR 519.

<sup>63</sup> Bennion, Brown, Thomas, and Toomey, above n 2 at 99.

<sup>64</sup> Chambers, above n 42 at 126.

<sup>65</sup> (1980) 2 BPR 9451 (PC).

<sup>66</sup> *Mua Carr*, above n 60 at 9453 and 9454.

the operation of a court acting in personam. More specifically, that the application of this claim should be on a case by case basis, in a way that relies more on a sense of justice than a strict adherence to rules that are determined for the sole purpose of aiding compliance with the principle of indefeasibility. Lyn Stevens and Kerry O'Donnell believe that flexibility is necessary in a system of indefeasibility, as without it the principle of indefeasibility itself would allow injustices to occur.<sup>67</sup> This supports the view that the in personam claim should at least be capable of being applied widely, but specifies that the reason for this is to prevent indefeasibility being used as a tool of injustice. This is much less broad than having jurisdiction to accept the claim in any case where conscience would allow it, as seemingly suggested by Killowen. Therefore, there are even arguments about jurisdiction within the generalised theories themselves. To the other extreme it has been stated that these remedies have “extended beyond old boundaries into new territory where no Lord Chancellor’s foot has previously left its imprint”.<sup>68</sup>

### 3. Current Guidelines for the Application of Claims in personam

In the recent case of *Regal Castings Ltd v Lightbody*<sup>69</sup> some guidelines were established for the application of the in personam claim in an attempt to regain the balance between legal and equitable rights. The first thing that was deemed necessary by the Supreme Court was that the plaintiff show that they had a cause of action, the basis of which

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<sup>67</sup> Lyn Stevens QC, Kerry O'Donnell, 'Indefeasibility in decline: the in personam remedies', in Grinlinton (ed) *Torrens in the Twenty-first Century*, (LexiNexis, Wellington:2003) at 152.

<sup>68</sup> Mary-Anne Hughson, Marcia Neave and Pamela O'Connor, 'Reflections on the Mirror of Title: Resolving the Conflict Between Purchasers and Prior Interest Holders', (1997) 21 *Melbourne University Law Review* 460 at 462 citing Sir Anthony Mason, 'The Place of Equity and Equitable Remedies in the Contemporary Common Law World' (1994) 110 *Law Quarterly Review* 238 at 238.

<sup>69</sup> [2008] NZSC 87.

was either legal or equitable.<sup>70</sup> Tipping J then goes on to the second criteria for a successful in personam claim; that it must be unconscionable for the defendant to rely on indefeasibility gained from their title to defeat the plaintiff's interest.<sup>71</sup> It is important to note that here he does define 'unconscionable' as 'being against good conscience'. Unconscionability has often been a controversial point, especially for those who do not support a wide application of the in personam claim. Though the vague notion of using conscience as a deciding factor in when the claim should be applied can very possibly lead to a wide application, it is important to remember that this claim itself is an operation of equity. Its basis is focussed on the conduct of a registered proprietor and unlike statutory limitations on conduct, its operation is to prevent exploitation of privileges granted by these statutes and using them in an improper manner. Jonathan P Moore made the comment that "a vague and amorphous concept such as unconscionability would, if sufficient on its own to defeat a registered interest in land, drive a horse and buggy through the Torrens system."<sup>72</sup> However, he also noted that this is why it is so important that unconscionability isn't sufficient on its own. As implemented by Tipping J in *Regal Castings Ltd v Lightbody*, it is qualified by two other criteria and importantly the first criteria is one of law, as mentioned. The third criteria that limits the possible exploitation of the term 'unconscionable' is that allowing the claim must not be contrary to or undermine the Torrens system.<sup>73</sup> It is easy to see how these three guidelines draw on principles of previous cases, especially when it comes to the traditional contract/trust basis for a claim, the focus on the causes of action themselves and the responsibility of a registered proprietor to act responsibly in respect to the rights of and obligations they undertake in relation to others.

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<sup>70</sup> *Regal Castings Ltd v Lightbody* [2008] NZSC 87; [2009] NZLR 433, [157].

<sup>71</sup> *Ibid*, at [158].

<sup>72</sup> Jonathan P Moore, 'Equity, Restitution and In Personam Claims under the Torrens System' (Pt 1) (1998) 72 *Australian Law Journal* 258 at 260.

<sup>73</sup> *Regal Castings Ltd v Lightbody*, above n 70 at [160].



The surprising thing is that the evolution of the application of this claim can be generalised as having gone from a more 'strict' application; needing either a direct involvement in trust, or a contract where the parties gained privity of contract for a claim to be based, to a slightly wider application through the employment of the rationale outlined in *Regal Castings*. Since this development the law seems to have turned back to attempting to constrain the application of the claim in New Zealand. The matter of jurisdiction of courts to grant claims in personam was contested in *Ludgater Holdings Ltd v Gerling Australia Insurance Company Pty Ltd*.<sup>74</sup> The Supreme Court and Court of Appeal both agreed that the High Court did have jurisdiction to hear these claims, however the subject matter must be one for which they have jurisdiction. However, in terms of the application one criteria or measure of unconscionability has recently returned to employment in New Zealand courts. *Cashmere Capital Ltd v Crossdale Properties Ltd*<sup>75</sup> was a Court of Appeal case that recently limited the in personam claim to "positive affirmative act such as written or oral acceptance or ... an implied acceptance by conduct" that "truly engages the conscience of the party whose registered priority is challenged".<sup>76</sup> This means that rather than the defendant's reliance on the register, it is their previous behaviour that is drawn into question and rather than simply being found to be against good conscience, they must have participated in some positive action. This was a rule first established in *Bell v Alfred Franks & Bartlett Co Ltd* [1980],<sup>77</sup> accepted by *Regional Securities Ltd v Christensen Potato Co Ltd* (1991)<sup>78</sup> and *NZ Fisheries Ltd v Napier City Council*.<sup>79</sup> The latter of these cases was applied in *Harman & co Solicitor Nominee Company v Secureland Mortgage Investments Nominees Ltd*,<sup>80</sup> which was also in the Court of Appeal. A recent application of this rule in the

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<sup>74</sup> [2010] NZSC 49.

<sup>75</sup> [2009] NZCA 185.

<sup>76</sup> *Cashmere Capital Ltd*, above n 75 at 18.

<sup>77</sup> 1 All ER 356.

<sup>78</sup> ANZ ConvR 57.

<sup>79</sup> CA 173/88 24 November 1989.

<sup>80</sup> [1992] 2 NZLR 416.

High Court was *Bobs Cove Developments Limited v Strategic Nominees Limited*,<sup>81</sup> in April 2010. A Mortgagee tried to exercise its power of sale over property. However, another party had a caveat on that title arising out of an Agreement for Sale and Purchase for a portion of that property and tried to stop it from lapsing in light of the mortgagee sale. The mortgagee did have notice of this prior interest and acknowledged this before they were registered. A point this author finds worth considering in this case is that the mortgagee admits that the portion of land that is contained in the Agreement is not actually listed under the security for the mortgage. Their argument is that as part of the company's title their registered interest still extends to it, despite their knowledge of the agreement for sale and purchase, this portion of the land is not officially excluded. The judge accepted this argument. A similar case, *Centillion Investments Ltd v Hillpine Investments Ltd*<sup>82</sup> was decided on the basis of supervening fraud according to the knowledge of the interest. However, the judge in *Bobs Cove* preferred to decide on the grounds of the in personam claim, which he stated had overtaken this area of law.<sup>83</sup> It was held that the in personam claim could not be relied on as they did not reasonably argue that the interest was enough to undo the mortgagee's registered interest. According to the high threshold put forward in the *Cashmere*, SNL just stood by and therefore was not guilty of any affirmative conduct. Although it is arguable that accepting the existence of a previous interest in land before becoming registered and then using the register to deny the other party of that interest to the land would fall under the 'unconscionable' limb in *Regal Castings* this was not enough in *Bobs Cove*. Although the rationale behind employing the aforementioned rule was discussed in the Court of Appeal case of *Cashmere* this case was in fact appealed to the Supreme Court. The court did not go into any in depth discussion of the principles of the case it did mention its

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<sup>81</sup> CIV-2010-485-61, 26 April 2010.

<sup>82</sup> HC Auckland CIV-2006-404-695, 6 December 2006.

<sup>83</sup> Also suggested in Elizabeth Toomey, *Why Revisit Sutton v O'Kane? The Tricky Trio: Supervening Fraud; the in personam claim and Landlocked Land*, (2007) 13 CLR 263 at 276.

support for all aspects of the decision and the reasoning therein. Because of this, *Bobs Cove* applied the principle contained in the Court of Appeal case but referred to it as a Supreme Court authority.<sup>84</sup> However, it is respectfully the opinion of this author that the application of this rule in *Cashmere* is inherently flawed. In this case Cashmere Capital loaned money to property managers Crossdale for residential units. These were being used for the purpose of a retirement home and the residents had leases for life that were consented to by Cashmere when giving the loan. However, when the director of Crossdale became bankrupt they sought to reclaim their investment through a mortgagee sale of the units. On page 10 of the judgment the court recognises that Cashmere has consented to the leases however, the level of knowledge they had as to the terms of the leases was not recorded. The court concluded that because of this it was 'reasonable' for Cashmere to infer that the leases were short term. Therefore there was no action positive enough to warrant an application of the in personam claim. In spite of this it seems given these particular circumstances this is not a well reasoned conclusion to draw. It would seem that one would naturally assume that leases to residences in a retirement home would not be short term. In looking back to *Regal Castings* and the concept of unconscionability it would seem that these are the exact circumstances that equitable claims such as those in personam exist to remedy. When one has knowledge of and consents to upholding agreements between parties and then uses their position on the register to renege on these agreements, then that is unconscionable action. In addition to this, when one has knowledge of existing leases, especially when that knowledge is constructed around the basis of a mortgage agreement, it seems that the reasonable thing to infer is not limited knowledge, but considerable knowledge. Things like the value of agreed payments, the frequency of these and any limits to the term the payment would be received for must arguably all be things that a finance company could be assumed to take into consideration when guaranteeing the security of their investment.

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<sup>84</sup> CIV-2010-485-61, 26 April 2010, at [35].

There is no mention of the *Regal Castings* case as a guide for application of the claim, simply as authority for allowing the claim to be heard. This means that the rationale that *Regal Castings* gave was neither accepted nor overruled. The *Regal Castings* three criteria were intended to be more of a guiding rationale than a strict test, and maintain the room for flexibility within judicial reasoning of the law. On the other hand *Cashmere* seems to create a criteria or measurable standard when it comes to assessing the behaviour of the registered proprietor and *Bobs Cove* is a recent case addressing the in personam claim in New Zealand courts, suggesting that the judiciary is leaning towards the limited application of the claim itself. An interesting point to note is that before *Bobs Cove* this rule had only been applied in cases addressing the actions of mortgagees. However, *Bobs Cove* discusses the principle as being a rule for applying the in personam claim in general, in this case surrounding agreements for sale and purchase.<sup>85</sup> These two lines of thought can be seen as co-existing; the new criteria simply building upon the initial level of unconscionability. However, this author would argue that by setting a measureable standard the flexibility intended by the court in *Regal Castings* becomes more rigid. Which method of assessment will be more commonly used, and whether strict criteria for this inhibits or aids the development of this area of law in the future remains to be seen.

#### 4. Other Possible Solutions

The courts will always be bound to interpretation of the Land Transfer Act 1952 as it exists, and as mentioned the vague nature of the drafting of these sections can lead to many different interpretations. Therefore, the ability of the courts to create their own system of guidance will always be limited to adherence to notions 'indefeasibility' that are mentioned, but not adequately defined in the Act.<sup>86</sup> There are various

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<sup>85</sup> CIV-2010-485-61, 26 April 2010, at [33] and [35].

<sup>86</sup> Review of the Land Transfer Act 1952, Law Commission October 2008, Wellington, NZ, Issues Paper 10 at 21.

options for reform suggested in the 2008 review of the Act. One of these is to attempt to define indefeasibility within the Act,<sup>87</sup> as done in s 40 of the Land Titles Act 1980 (Tasmania, Australia). This seems very logical. Often concerned about the boundaries of the in personam claim one forgets to acknowledge that boundaries by definition are between two things. Potentially, a way to figure out where the in personam claim stops is by ascertaining where indefeasibility begins. By determining the boundaries of indefeasibility it can help bring definition to the current shadow boundaries of the in personam claim.

In Singapore the Torrens system was introduced almost 100 years later than in New Zealand and Australia.<sup>88</sup> This gave the drafter of their Torrens statute, Baalman, the advantage of knowing the potential of equity to arise in the Torrens system, and the problems this was creating overseas. In reaction to this he attempted to remain as close to having complete indefeasibility of title as possible in his Torrens system by including an exhaustive list of strictly defined exceptions in the statute.<sup>89</sup> This seems to be close to what would need to happen if one were to attempt to define the operation of indefeasibility within a statute - provide an exhaustive list of when it were not to apply. However, it was soon seen in this system that even an exhaustive list of exceptions was not enough to intrude on the court's jurisdiction to operate in equity within a Torrens system. This was shown in the case of *Ho Kon Kim v Lim Gek Kim Betsy*,<sup>90</sup> where the Singapore Court of Appeal adopted personal equities as applied in other Torrens jurisdictions as a general exception to indefeasibility outside of those specific exceptions named in the statute. Where a Torrens system, or any system, is seen to be too harsh or strict in its recognition of competing rights, equity has often been seen to step in and soften the

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<sup>87</sup> This was suggested again in Law Commission, *A New Land Transfer Act*, (NZLC R 116, June 2010) 19 at 19.

<sup>88</sup> Barry C Crown, 'Indefeasibility of Title: Developments in Singapore', (2007) 15 *Australian Property Law Journal* 91 at 92.

<sup>89</sup> *Ibid*, at 94-95.

<sup>90</sup> [2001] 4 SLR 340.

application in order to provide a sense of justice under the law.<sup>91</sup>

Another option for reform given in the 2008 review of the Land Transfer Act 2008 was the introduction of a conclusive register.<sup>92</sup> This would mean that the title would include a list of all interests, equitable and legal, when it was registered so that all had equal ability to be recognised and protected by indefeasibility. It could be argued that the caveat system allows persons with an equitable interest in land to do this now. However, it is a necessary component of the caveat system that the equitable interest be capable of eventual registration to be able to be noted on the title. This would provide protection in most cases but still leave some interests without protection. In order for a conclusive register to operate properly, the types of interests that are capable of registration in the reviewed system would need to be specified to prevent potential abuse by those with equitable interests. The review of the Act itself mentions that although this would be an ideal solution, like indefeasibility itself it could never be absolute.<sup>93</sup> It could also be seen as diminishing the effect of indefeasibility by allowing too many other interest holders to have affect over the title of the registered proprietor. Once again this is an issue of careful balance between interests and also between abilities of those being advantaged to use their benefit given under the system in a way that detracts the rights of another. In addition to this, there is an issue of practicality in defining the types of interests that can be registered and establishing an effective system to allow this to take place.

Although it seems easy to say that consolidation of the system should be attempted through legislative means, it is actually very difficult to ascertain a way in which this could be done without requiring very strict definitions of statutory terms or an exhaustive list of named

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<sup>91</sup> Margaret White, 'Equity: a general principle of law recognised by civilised nations?' 4 2004 (1) *QUTLJ* 103 at 105.

<sup>92</sup> *Cashmere Capital Ltd*, above n 75 at 20.

<sup>93</sup> *Cashmere Capital Ltd*, above n 75 at 21.

exceptions to the indefeasibility principles. These present problems both of conclusiveness and adherence. It is hard to both define terms within the Act and create a list of exceptions that is complete. There will still always be a need for the court to interpret terms in their own way and also exceptions to the principle not foreseen in the drafting of the legislation. This author shares the opinion that to create an exhaustive list of exceptions to indefeasibility would likely lessen the exceptions to indefeasibility that currently operate but also create a strict application of the law in an area that is so deeply enrooted in the livelihood of individuals. In operating around something as important as land and the ownership of property it is necessary that the system is flexible so as to allow individuals to feel satisfactorily protected by the law and have confidence in the ability of the law to recognise their rights. Because of this, the author believes that the best option for consolidation of the in personam claim as it operates in a Torrens system is through the courts.<sup>94</sup>

### Conclusion

It can be concluded that the aim of a Torrens system in any jurisdiction is to provide accuracy, affordability and simplicity in a transfer system but also to provide the registered proprietor with security of title, giving them priority over any adverse claims. However, due to the strict nature of drafting, equitable claims, claims in personam in particular, had to be included in the system to soften this and also provide security to other types of rights that might not be registered. However, with this came competing thoughts as to whether such claims had a place within a Torrens system or not, as it potentially undermined the central principle. Through examination of the subsequent cases and commentary on the issue it is this author's opinion that the in personam claim has not only an acceptable, but a necessary place in any Torrens system. However, it is essential that

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<sup>94</sup> Also an argument put forward in Law Commission, *A New Land Transfer Act*, (NZLC R 116, June 2010), at 23-24.

competing rights are balanced; the registered proprietor attracts indefeasibility, but it should not be to the extreme that he or she is able to use this principle to undermine the legitimate rights of others. One must still be able to feel secure in their title so in applying the in personam claim in a Torrens system the courts established guidelines to ensure a balance was obtained. Although the in personam claim has a place in a modern Torrens system it is not without doubt and attack from commentators and even courts. However, with guidelines and consistency in its application there is no argument against it enough to show that it is not worth applying in such a system. When *Regal Castings* was first decided it seemed that there was an identifiable rationale that was to be employed that would give consistency between cases whilst still allowing judicial flexibility in the application of the claim. However, since *Bobs Cove* it seems that the courts are favouring more a definitive test or measure for the application of this claim. With both avenues coexisting currently it is important to watch the future cases in this area to see which line of thought is favoured judicially. However, one thing that can be concluded from this analysis is that this is an area that is most definitely for the courts to develop, as opposed to requiring legislative reform.