CHAPTER 5

Statutory Regulation of Interests in Land: the Deeds Registration and Torrens Systems

THE BACKGROUND

5.1 The problem of how to facilitate or regulate the conveyance or transfer of interests in land in the best interests of the community has perplexed lawyers for centuries and is still, in many ways, a live issue. In a society where social interests are seen as best served by keeping land in the hands of the same families for generations, the law may appropriately provide for formalities which make the transfer of land more difficult or at least create substantial delay. However, in the twentieth century, land has not only continued to serve its traditional role in the production of wealth and in the provision of shelter, but has increasingly become an independent commercial commodity to be bought and sold in the same manner as many other investments. All these uses require that the system regulating the creation and transfer of interests in the land should be reliable and efficient: Ruoff, p 16. If the purchase of land, domestic or commercial, becomes complex and exposes parties to significant risks beyond their control then the interests of society may be subverted.

5.2 The materials analysed in the earlier chapters show clearly enough that the common law principles relating to interests in land were hardly conducive to the emergence of a reliable and efficient conveyancing system. This can be illustrated by the typical case in which a vendor contracts to sell the fee simple estate in 'Blackacre' to a purchaser for an agreed price. The purchaser is concerned, at the minimum, with two matters: first, to ensure that on completion of the transaction the fee simple estate in Blackacre is transferred, free of any interest in a third party. After paying the purchase price to the vendor and receiving a conveyance in return, the purchaser does not want possession of Blackacre disturbed by a third party claiming an easement over the land or, worse still, claiming to be its 'true owner'. Since land is permanent and since interests in land may be asserted after long periods of time have elapsed, the purchaser has cause for concern. Second, the purchaser does not want the task of verifying the vendor's title to be unduly complex and costly. If it is, the delay and expense required to complete the transaction may be intolerable.

5.3 At common law the purchaser could verify the vendor's title in only one way. This was to trace the history of dealings in Blackacre by examining all documents relating to the land. These documents representing transactions with the land were collectively known as the 'title deeds' or the 'chain of title'. Each document in the chain would have effected some dealing such as a

conveyance or a mortgage. If the documents did not evidence a continuous chain (that is, if the chain was defective) then the owner would not be able to show good title to a purchaser. The practice of English conveyancers, before legislative intervention, was to require the production of documents dating back at least 60 years prior to the proposed conveyance. In Australia, subject to any time limits restricting the scope of the search, the purchaser would commence the search by inspecting the Crown grant and would then investigate the succeeding dealings with the land, by examining all conveyances, mortgages, wills and other instruments relevant to title. The object of the search was to ensure that the vendor's title was not subject to interests other than those specified in the contract of sale. The vendor was obliged to produce all relevant title documents to enable the purchaser to make the appropriate inquiries.

5.4 Even an exhaustive search of the chain of title would not give the purchaser complete security, largely because of the principle *nemo dat quod non habet* ('no one gives who does not possess') and the ever-present possibility of undetected (and undetectable) outstanding interests. Cases in which defects of title would not be revealed by a search included the following:

- If the vendor or some other person deliberately removed a document from the chain of title, such as an instrument creating an easement of way over the land, the purchaser would be bound by any legal interest created by the document, even if unaware of its existence at the time of the conveyance.
- If the vendor conveyed the fee simple estate in Blackacre to P1, but retained the title deeds and fraudulently purported to convey the fee simple estate to P2, the latter would generally receive only the title retained by the vendor — in short, nothing. It will be recalled that something of this kind happened in *Pilcher v Rawlins* (1872) 7 Ch App 259; **4.164C**. In some circumstances Pi's title might have been postponed to that of P2, on the principles discussed in *Northern Countries of England Fire Insurance Co v Whipp* (1884) 26 Ch D 482; **4.158C**, but the starting point was the *nemo dat* principle.
- If the vendor relied upon a document in the chain of title which for some reason did not operate according to its terms, the vendor might have acquired no interest in the land to convey to the purchaser. This would have been so, for example, if the conveyance to the vendor was void because it was a forgery or because it was executed in circumstances giving rise to the application of the doctrine of *non est factum*.
- Defects may have appeared on the face of documents comprising the chain of title, yet have been very difficult to detect and thus have been inadvertently overlooked by the purchaser's solicitors. For example, an early document in the chain of title may have contained incorrect words of limitation and therefore failed to pass the interest it purported to convey. This may have caused subsequent documents to be ineffective to operate according to their terms.
- A search of the chain of title did not reveal proprietary interests in the land acquired other than by means of a document. For example, the vendor's title may have been barred by a squatter's adverse possession, or a neighbouring landowner may have acquired an easement over the land by long user. It was sometimes impossible for the purchaser to discover such defects of title by inspection of the land, or, indeed, any other means.

Apart from the threat to the purchaser's title posed by these cases, the search of a chain of title was (and for that matter still is) time consuming and expensive. It was not a simple procedure and required the services of persons who understood the intricacies of the common law rules governing interests in land.

5.5 The common law position has been changed in minor respects by legislation designed to minimise the searches that should be undertaken by a prospective purchaser. Thus, in some states, a limitation has been placed on the period of commencement of title a purchaser may require, subject to any express contractual stipulation to the contrary. Usually the period of commencement of title specified by statute is 30 years, reduced from the period of 60 years adopted by English conveyancers: NSW, s 53(1); Qld, s 237(1); Tas, s 35(1) (20 years); Vic, s 44(1); Sale of Land Act 1970 (WA) s 22.[1] In South Australia the common law obligation to investigate title for 60 years presumably remains, while in England the period of commencement of title has been altered to 15 years: Law of Property Act 1969 s 23. The 30-year provision relates to the obligation of the vendor to prove a good title. The effect of the provision is that the vendor must prove title for a period of 30 years preceding the date of the contract, commencing with what is known as a 'good root of title'. A good root of title has been defined to mean:

> [An] instrument of disposition dealing with or proving on the face of it (without the aid of extrinsic evidence) the ownership of the whole legal or equitable estate in the property sold, containing a description by which the land can be identified, and showing nothing to cast any doubt on the title of the disposing parties [*Re Lemon and Davies' Contract* [1919] VLR 481 at 483, quoting from Williams, *Vendor and Purchaser*, 2nd ed, p 106].

The instrument most clearly constituting a good root of title is a conveyance of the fee simple estate; a legal mortgage, since it operates as a conveyance of the legal fee simple, serves equally well. However, a specific devise of land contained in a will does not of itself constitute a good root of title, since it is not the will but the subsequent acknowledgment by the executor of the testator that operates as the instrument of disposition to the devisee: *Gateway Developments Pty Ltd v Grech* (1970) 71 SR (NSW) 161. The 30-year provision is supplemented by a section which, subject to any contrary intention in the contract, prevents the purchaser from requiring the production of any deed, will or other document made before the time stipulated for the commencement of title: NSW, s 54(1); Qld, s 238; Tas, s 3(2); Vic, s 45(1).

5.6 Another approach is to discourage purchasers from searching the vendor's title over-assiduously by promising them certain immunities. For example, four states provide that a purchaser shall not be deemed to have any notice of matters prior to the statutory period for the commencement of title unless the purchaser actually makes investigations or inquiries into matters prior to that period: NSW, s 53(3); Qld, s 237(6); Tas, s 35(5); Vic, s 44(6). Although no provision of this kind is made in South Australia, the same effect may be achieved in that state by the general notice section: see **4.168E**. If a period of commencement of title is fixed by statute or the common law, it is presumably reasonable for the purchaser to limit any inquiries to this period of time and, consequently, notice of any interest that could be discovered by a search going beyond the period of commencement of title will not be presumed unless the purchaser actually makes that search. These provisions, at first glance, appear to be very significant in reducing the purchaser's burden in searching title and therefore in eliminating many of the

1. In this chapter (except in the section dealing with the deeds registration system and the section dealing with the Torrens system), the following Acts are referred to by the abbreviation of the state enacting them: Conveyancing Act 1951 (ACT); Conveyancing Act 1919 (NSW); Property Law Act 1974 (Qld); Law of Property Act 1936 (SA); Conveyancing and Law of Property Act 1884 (Tas); Property Law Act 1958 (Vic); Property Law Act 1969 (WA). The legislation relevant to the section dealing with the deeds registration sysem is specified in **fn 2** below and that relevant to the section dealing with the Torrens system is specified in **fn 6** below.

problems associated with general law conveyancing. A little reflection will show, however, that if the provisions are designed to prevent purchasers being concerned with transactions occurring before the period of commencement of title, they do not necessarily achieve their objective. The restrictions on the purchaser's right to require the production of documents do not relate to the question of whether interests created by documents executed before the period of commencement of title will bind the purchaser if he or she takes a conveyance of the fee simple estate. Thus, legal interests created before the period of commencement of title will bind the purchaser. The immunity against notice does not protect the purchaser against legal interests, since the enforceability of such interests does not depend on notice: see also *Darbyshire v Darbyshire* (1905) 2 CLR 787; 11 ALR 417; cf Tas, s 35(6). Nor do these restrictions necessarily prevent a purchaser relying on defects in the vendor's title, in order to avoid the contract of sale: NSW, s 54(10); cf Qld, s 238(12); Vic, s 45(11). See generally Stonham, pp 365–83.

THE DEEDS REGISTRATION SYSTEM — 'GENERAL LAW' OR 'OLD SYSTEM' LAND

5.7 In 1825, New South Wales adopted the Irish system whereby recording or registration of a deed affecting land was not essential to the validity of the deed, but a deed that was recorded took priority over one which was either not recorded or recorded subsequently: Registration of Deeds Act 1825 (NSW). Tasmania, South Australia and Western Australia followed suit: Registration Act 1827 (Tas); Registration of Deeds, Wills, Judgments, Conveyances and Other Instruments Act 1841 (SA); Registration of Deeds, Wills, Judgments and Conveyances Affecting Real Property Ordinance 1832 (WA). When Victoria and Queensland separated from New South Wales in 1851 and 1859 respectively, they took over all laws that had previously applied to them by virtue of their status as part of the colony of New South Wales, including the laws relating to deeds registration. Thus, the deeds registration system, in the form of the Registration of Deeds Act 1843 (NSW), applied in Victoria and Queensland from the beginning of their existence as separate colonies. Although the original enactments have been amended in all states, the deeds registration system continues to apply to land not under the operation of the Torrens system.[2] In Victoria, the deeds registry is closed to registration of dealings since 1 January 1989, and instruments can be registered only under the Transfer of Land Act 1958. In the Australian Capital Territory the Registration of Deeds Act 1957 (ACT) establishes a deeds registration system, but does not confer priority on registered over unregistered instruments.

5.8 The Torrens system, originally introduced in South Australia by the Real Property Act 1858, was subsequently adopted elsewhere in the country: see legislation cited in fn 2 below. The legislation introducing the Torrens system provided that all land alienated by the Crown after a certain date would automatically come under the system: see, for example, Real Property Act 1862 (NSW) s 13 (1 January 1863). Land alienated by the Crown before that date and not

2. The legislation currently in force is as follows: Conveyancing Act 1919 (NSW) Pt XXIII; Property Law Act 1974 (Qld) ss 241–249; Registration of Deeds Act 1935 (SA); Registration of Deeds Act 1935 (Tas); Property Law Act 1958 (Vic) Pt I; Registration of Deeds Act 1856 (WA). In this part of the chapter, these Acts are referred to by the abbreviation of the state or territory enacting them.

brought within the Torrens system retains its character as general law or old system land and is therefore subject to the deeds registration system. The states have enacted legislation designed to encourage the conversion of general law land to Torrens system and in some cases have required conversion to take place: see 5.22–5.44. These policies have met with varying degrees of success, although there is still some land outside the Torrens system, particularly in the areas of New South Wales, Tasmania and Victoria which were first settled. Consequently, in most parts of Australia the two systems, general law and Torrens, exist side by side, although the day may not be too distant when the process of conversion to Torrens title is completed.

The deeds registration system

5.9 The system of registration of instruments affecting general law land is not compulsory, except in special cases such as statutory discharge or mortgage where registration is made a condition precedent to the operation of the instrument. The Queensland legislation, for example, allows the registration, inter alia, of any agreement in writing, deed, conveyance or other instrument (except a lease for less than three years), will or devise affecting any estate in land: s 241. The incentive to register instruments affecting land is that registered instruments (except wills) if made and executed bona fide and for valuable consideration shall have priority over all other instruments registered later or remaining unregistered: Qld, s 246. Similar provision is made in three other states, although the legislation differs in minor respects as to the instruments which may be registered: NSW, s 184G; Qld, s 246; Tas, s 9. For a discussion of the instruments which may be registered, see Sykes and Walker, pp 408–15. The effect of registration is not to cure all defects in the instrument registered, nor *necessarily* to give the person registering the instrument a title free from all anterior defects. For example, registration of a forged conveyance will confer neither validity on the otherwise invalid document, nor priority for it over a subsequently registered instrument properly executed by the holder of the fee simple estate: *Re Cooper* (1881) 20 Ch D 611. The effect of registration is to give the instrument registered 'priority' over all instruments that are either unregistered or not registered until later. This may allow a person who would have had a defective title at common law (for example, because the vendor had previously parted with the fee simple estate) to take a good title under the deeds registration system by virtue of the timely registration of the relevant instrument: see *Boyce v Beckman* (1890) 11 LR (NSW) (L) 139.

5.10 In South Australia and Western Australia the position is more complex. South Australia does not have a priority provision as such, but provides that an unregistered instrument is 'fraudulent and void' against subsequent purchasers unless it has been registered prior to the registration of the subsequent purchaser: SA, s 10(2). This provision applies even if the subsequent purchaser had actual notice of the prior unregistered instrument at the time of the transaction. Thus, if A sells a fee simple interest in land to B, and then fraudulently resells to C who registers, C's interest will prevail over that of B. The South Australian Act does not specifically advert to the situation where C is fraudulent, although probably C's interest would not prevail in that case: Sykes and Walker, pp 413–14. Because the South Australian Act does not contain a priority clause, difficulties may arise in the case of a competition between a prior equitable interest which is registered, and a later legal interest which is also registered: see Sykes and Walker, p 414. In Western Australia, the Act contains both a priority clause similar to that of the four eastern states, and an avoidance clause similar to that appearing in South Australia: WA, s 3. The priority clause is not limited by any requirement of bona fides

or valuable consideration. Thus, it appears that a registered instrument will take priority over a later registered instrument, or an instrument which is not registered, even in the case of fraud. However, the avoidance clause only invalidates an unregistered instrument against a subsequent bona fide purchaser or mortgagee of the land for valuable consideration. In the case of the avoidance clause no reference is made to registration of the later instrument, although of course the holder of the later instrument might in turn find it avoided against a subsequent purchaser who fails to register that instrument.

Registrable instruments and the effect of registration

5.11 The priority principle comes into play where there is an inconsistency between a registered interest and an unregistered interest, or between two registered interests. There may be considerable difficulty in determining whether there is an inconsistency between two documents: see *Boyce v Beckman* (1890) 11 LR (NSW) (L) 139; *Andrews v Taylor* (1869) 6 WW & A'B (L) 223; Stonham, pp 446–50.

THE TORRENS SYSTEM

5.12 It has been said that Sir Robert Torrens set out to establish a system of registration of title 'that would be reliable, simple, cheap, speedy and suited to the social needs of the community': Ruoff, p 16. Compare the goals of the 'perfect conveyancing system' stated by Sir Charles Brickdale to be 'security, simplicity, accuracy, cheapness, expedition and suitability to circumstances': Brickdale, *Methods of Land Transfer*, 1914, pp 1–11, cited in Kerr, *The Principles of the Australian Lands Title (Torrens) System*, 1927, p 6. The materials earlier in this chapter show that the common law, even as supplemented by the deeds registration system, did not achieve these goals and that an entirely different scheme was required to do so. The preamble to the original Torrens statute, the Real Property Act 1858 (SA), stated that it was 'expedient to amend' the law because 'the inhabitants of the Province of South Australia are subjected to losses, heavy costs, and much perplexity, by reason that the laws relating to the transfer and encumbrance of freehold and other interests in land are complex, cumbrous, and unsuited to the requirements of the said inhabitants ...'. The Torrens system, in the form in which it eventually emerged in South Australia (the 1858 legislation was substantially amended in 1861), fundamentally changed the nature of real property law in the colony. The principles embodied in the South Australian legislation still serve as the basis of the Torrens system in Australia. For a brief history of this development, see Stein and Stone, pp 1–32; Gray, 3rd ed, pp 282–4 TBC.

5.13 There is considerable controversy concerning the historical origins of the Torrens system in South Australia. The title registration scheme formulated by Torrens, on his own admission, was not completely new. He acknowledged adapting his proposals from earlier systems of transfer and registration, particularly that embodied in the Imperial Merchant Shipping Acts which dealt with the registration of title to ships. The first four chapters of the remarkably thorough work by Hogg, *Australian Torrens System with Statutes*, 1905, examine the antecedents of the Torrens system and dispel the oversimplified notion, often expressed, that Torrens invented a radically new scheme albeit with a little help from the Merchant Shipping Acts. It has always been shown that, despite Torrens' own denials, he derived ideas from many sources, including the 1857 report of the English Royal Commissioners investigating

registration of title, and that he received considerable assistance from a number of persons within South Australia: Whalan, 'The Origins of the Torrens System and its Introduction into New Zealand' in *Centennial Essays*, pp 3–12; Robinson, pp 1–25.

5.14 While commentators agree that Torrens was far from unaided in the formulation and presentation of his proposals there has been disagreement from the beginning as to the extent of the assistance he received. Torrens himself was accused by his contemporaries of plagiarism and by later critics of not being the true author of the system that bears his name: Kerr, *The Principles of the Australian Lands Title (Torrens) System*, 1927, pp xii–xiii, and authorities there cited. Torrens' views are set out in his book, *The South Australian System of Conveyance by Registration of Title*, 1859; for a brief biography of Torrens and a portrait of some of the personalities he encountered in his struggle to secure enactment of the legislation, see Fox, 'The Story Behind the Torrens System' (1950) 23 *ALJ* 489. Robinson has argued that the most important single contribution to the legislation was made by Dr Ulrich Hübbe, a German lawyer living in South Australia in the 1850s. Robinson acknowledges the political role played by Torrens, but argues that the legislation reflected the approach of the Hanseatic system of title registration with which Hübbe would have been familiar: Ch 1, esp pp 11–25; Robinson, pp 480–4. Raff and Esposito argue that the Torrens System was adapted from the Hamburg land title registration system and that Torrens has been given too much credit for its development at the expense of other key players.[3] Taylor refutes these accounts, arguing while Torrens benefited from the input of others, he deserves the credit that he has traditionally been given for conceiving the principles on which the system is based and using the Merchant Shipping Act as the legislative model.[4] Whatever the truth as to the contributions to the drafting of the legislation, Torrens' political activities were substantially, although not entirely, responsible for securing acceptance of the new system in South Australia and, eventually, in the other Australian colonies.[5]

Bringing land under the Torrens system

5.15 The Torrens legislation has always contemplated a limited form of compulsion in relation to the conversion of old system land (also known as 'general law land') to the Torrens system. The earliest legislation provided that land alienated or granted by the Crown after the date of commencement was automatically to be under the Torrens system: Real Property Act 1925 (ACT) (21 May 1925); Real Property Act 1862 (NSW) (provision commenced 1 January 1863); Real Property Act 1861 (Qld) (1 January 1862); Real Property Act 1858

3. M Raff, 'Torrens, Hubbe, Stewardship and the Globalisation of Property Law Systems' (2009) 30 *Adelaide Law Review* 245; Esposito, 'A New Look at Anthony Forster's Contribution to the Development of the Torrens System' (2006–07) 33 *UWALR* 251. See also Lucke, 'Ulrich Hobbe and the Torrens system: Hubbe's German Background, His Life in Australia and His Contribution to the Creation of the Torrens System' (2009) 30(2) *Adelaide Law Review* 213.
4. Taylor, 'Is the Torrens System German?' (2008) 29 *Jo Leg Hist* 253; Taylor, 'The Torrens System: Definitely Not German' (2009) 30 *Adel Law Rev* 195.
5. Pike, 'Introduction of the Real Property Act in Australia' (1961) 1 *Adel LR* 169; Whalan, 'Immediate Success of Registration of Title to Land in Australasia and Early Failures in England' (1967) 2 *NZULR* 416; Stein and Stone, pp 1–32; Croucher, '"Delenda Est Carthago!" Sir Robert Torrens and His Attack on the Evils of Conveyancing and Dependant Land Titles: A Reflection on the Sesquicentenary of the Introduction of His Great Law Reforming Initiative' (2009) 11 *FLJR* 197.

(SA) (1 July 1858); Real Property Act 1862 (Tas) (30 June 1862); Real Property Act 1862 (Vic) (2 October 1862); Transfer of Land Act 1874 (WA) (1 July 1875); but see Seat of Government Acceptance Act 1909 (Cth) ss 6(2), 7. This provision has been continued in the current legislation.[6] It follows that only land alienated by the Crown before the introduction of the Torrens system can retain its status as old system land. In the case of this land, the Torrens legislation establishes a procedure whereby the holder of the fee simple estate, or other specified persons, may apply to bring the land under the legislation.

5.16 Since the introduction of the Torrens system to Australia over a century ago, the conversion of land to that system has proceeded at varying rates. No unregistered alienated land remains in Queensland, the Australian Capital Territory and the Northern Territory: Bradbrook, McCallum, Moore and Grattan, 5th ed, p 192; MacDonald, McCrimmon, Wallace and Weir, *Real Property Law In Queensland*, 3rd ed, Lawbook Co, 2010, p 270. Very little remains in Tasmania and South Australia and less than one per cent of freehold land in Western Australia is unregistered. The process of conversion is least advanced in the older and more settled areas of New South Wales and Victoria, but even in these areas the percentage of land unconverted is quite small. In Victoria, 35,000 parcels of land remained unregistered in 1998, on the eve of the introduction of a new conversion regime: Victorian Law Reform Commission, *Review of the Property Law Act 1958*, Report 20, 2010, p 10. In New South Wales only about 2.75 per cent of parcels are yet to be converted and the percentage in area would be very much smaller.

5.17 Certain persons, including the owner of the fee simple estate at law or in equity, the person having the power to appoint or dispose of the fee simple estate (for example, under the Settled Land Act 1958 (Vic)) and trustees for sale of the land are empowered to apply to bring old system land onto the Torrens register: Vic, s 10; NSW, s 14(2), (3); SA, s 27; Tas, s 11; WA, s 20. A mortgagor (that is, the holder of the equity of redemption under the general law) cannot apply without the consent of the mortgagee. In general, the Registrar has administrative responsibility for processing the application to register land and is entrusted with discretion to decide whether or not to issue a certificate of title to the applicant. An unsuccessful applicant may, however, call on the Registrar to state the grounds on which the application has been rejected and may require that these grounds be substantiated before the court: NSW, s 121; SA, s 221; Tas, s 144; Vic, s 116; WA, s 203; *Riley v Nelson* (1965) 119 CLR 131; [1966] ALR 663. The procedures followed vary from state to state but the Victorian provisions are reasonably representative.

5.18 The legislation appears to give the Registrar a broad discretion to determine the standards the applicant's title must meet in order to be accepted under the Act: Vic, s 26S; cf NSW, ss 17(2), 23(2); SA, ss 32–34, 36; Tas, ss 12(1), (2); WA, ss 21–23, 25. The discretion of the Registrar in states other than New South Wales, Victoria and Tasmania tends to be more circumscribed, varying according to the class into which the application falls. Even where the discretion appears to be broad, the applicant may appeal against the Registrar's rejection of the application or, alternatively, seek an order for mandamus to compel the Registrar to register

6. The current legislation is: Land Titles Act 1925 (ACT) s 17; Land Title Act (NT) s 48; Land Title Act 1994 (Qld) s 47; Real Property Act 1886 (SA) s 26; Land Titles Act 1980 (Tas) s 9; Transfer of Land Act 1958 (Vic) s 8(1); Transfer of Land Act 1893 (WA) s 18; but compare Real Property Act 1900 (NSW) Pt 3. In this part these Acts are referred to by the abbreviation of the state or territory enacting them.

a 'good, safe, holding and marketable title': see generally Robinson, pp 430–1; Stein and Stone, pp 39–44. Before assessing the applicant's title, the Registry undertakes an investigation of that title, using the powers conferred by the Act. Where the application for registration is made on behalf of the applicant by a solicitor (as it usually is) the Registrar sometimes regards himself or herself as relieved from the obligation of verifying the matters that might otherwise require independent official investigation.

5.19 In the Victorian Act there is an express provision empowering the Registrar to grant an application where the evidence of title is incomplete or a document cannot be produced or there is some other imperfection, conditioned upon a contribution to the assurance fund of such sum as the Registrar considers to be a sufficient indemnity: Vic, s 108(3). Land may be brought under the provisions of the Act by a variety of conversion schemes, including upon lodgment of a legal practitioner's certificate as to title: see Vic, s 12; Pt II, Div 2. The Registrar has a discretion to issue an ordinary folio or a provisional folio: s 18. A provisional folio is a transitional folio for bringing land under the operation of the Act without full investigation. It is is issued with a warning as to subsisting interests, or as to a qualification in a legal practitioner's certificate. After 15 years the warning is removed and the folio ceases to be subject to the subsisting interests or qualification. A folio may also be provisional as to title dimensions where the dimensions of the lot are not based on survey information which has been investigated by the Registrar.

In New South Wales and Tasmania, a qualified certificate of title may be issued in a doubtful case: NSW, s 28B; Tas, s 21. A qualified title does not prevail over subsisting interests and a caution is recorded on the title to indicate this. In New South Wales the procedure enables the Registrar-General to create a qualified title based upon initiative and without a detailed search of the existing old system chain of title: NSW, ss 28B–28E. When the title is first issued all interests of which the Registrar-General is aware are recorded and additional interests may be recorded at any time before the caution lapses: see Stein and Stone, p 42. In Tasmania, if the applicant's claim is doubtful, or the applicant fails to produce all the necessary documents, or make all proofs to the recorder's satisfaction, the recorder may issue the applicant with a qualified certificate of title which may contain a general or specific caution about defects in title: Tas, s 21(2). The caution lapses after 20 years in Tasmania and after 12 years in New South Wales: Tas, s 25; NSW, s 28M(3). In addition, in New South Wales the caution also lapses six years from the date of issue of the qualified folio in relation to any estate or interest in respect of which a bona fide purchaser becomes registered: NSW, s 28M(2). The effect of the lapsing of a caution is to free the land from any interests that affected the land when it was brought under the Torrens system, other than those recorded on the title or otherwise protected by the Act. While a caution is extant, the title of the vendor of land under qualified title should be investigated as if the land were still under the general law even though the transfer is effected by the same procedures as for the transfer of any land under the Torrens system.

5.20 The fact that the New South Wales provisions for the issue of qualified title empower the Registrar-General to take the initiative in bringing land under the system provides a framework for the conversion of much remaining old system land in the state. The Registrar-General has power, for example, to require any person to supply particulars relating to land, produce instruments evidencing title and support any claim to an interest in the land. The potential effect of this legislation has been limited both by the resources available to the Registrar-General and the fact that, as originally drafted, the powers were limited to

land which had been surveyed adequately and the boundaries of which could be defined. In 1976, Pt 4B was added to the Real Property Act 1900 (NSW). This Part authorises the Registrar-General to create a limited folio of the register where the boundaries are not sufficiently defined for an ordinary title. The Registrar-General must make a notation on the limited title indicating that the description of the land has not been verified: NSW, s 28T(4). Once a plan of survey has been lodged in which the boundaries are adequately described, the Registrar-General may remove the limitation: NSW, s 28V. The effect of a limitation is that where any land is incorrectly included in a limited folio because of a wrong description of boundaries, the title of the registered proprietor is defeasible to the extent of the error: NSW, s 28U. A title may be both limited and qualified.

Compulsory extension of the Torrens system

5.21 The slow rate of voluntary conversion of Torrens system land prompted state legislatures, acting on the recommendation of the administrators of the schemes, to pass legislation requiring the conversion of old system land to Torrens title. Several different approaches have been taken.

5.22 As was noted above, land which is to be used for a strata titles scheme must be brought under the Torrens system. This limited form of compulsion has also been adopted in relation to subdivisions of land. Thus, in New South Wales the Registrar-General is empowered to refuse to register a plan of subdivision that includes old system land unless the last document in the subdivider's chain of title is lodged, together with any registered deed creating a legal mortgage. The Registrar-General may bring the subdivided land under the Torrens system by issuing a qualified folio, the effect of which has been noted in **5.21**, or, if considered appropriate, an ordinary folio: NSW, ss 28D, 28EA. Compare Local Government (Building and Miscellaneous Provisions) Act 1993 (Tas) s 113, which requires the Registrar, on receiving a plan of subdivision comprising old system land, to bring it under the Real Property Act by proceeding as if a primary application had been made: see also Tas, s 18.

5.23 More sweeping approaches to the problem of conversion to Torrens title have been attempted in Australia with varying degrees of success: cf Moore, 'Compulsory Conversion to Torrens Title — An Admission of Failure?' (1966) 40 *ALJ* 190. In Victoria and South Australia, for example, legislation directs the Registrar with 'all convenient speed' to bring old system land under the Torrens system: Vic, s 9; or 'with all reasonable speed': Real Property (Registration of Titles) Act 1945 (SA) s 3. Under Victoria's 1998 conversion reforms, once a parcel of old system land is identified, the Registrar must create an 'identified folio' for it, unless a provisional or ordinary folio is created: Vic ss 26E, 26W; and see **5.20**. Interests may be recorded on an identified folio, but no person is registered as owner, no certificate of title issues, and subsisting interests are enforceable under the rules of the old system. Instruments relating to old system land can be registered only under the Transfer of Land Act 1958. If a conveyance, mortgage, or assignment of a possessory title is lodged, the Registrar may create a provisional folio or an ordinary folio for the land: Vic ss 4(1), 22–24; see **5.20**.

5.24 The Real Property (Registration of Titles) Act 1945 (SA) requires the Registrar to proceed, with such modifications as are necessary, as if an application has been made to bring land under the Torrens system. The Registrar is to issue an ordinary certificate of title if he or she is satisfied that such a certificate would have been issued had an application been made

by a qualified applicant and that there is no person in adverse possession of the land. In other cases a 'limited' certificate of title is to issue. The limitation may be as to description of the land or to title or both. Where the title is limited as to description it can be replaced by an ordinary certificate only when the Registrar is satisfied as to the proper measurements. Where the certificate is limited as to title it will be replaced by an ordinary certificate when the Registrar is satisfied that the defect no longer exists; in any event it will be replaced automatically by an ordinary certificate after the expiration of 12 years. No contribution to the assurance fund is payable in respect of land brought under the Torrens system by direction.

In Queensland, conversion of land to the Torrens system had been virtually completed by 1973 when the Queensland Law Reform Commission issued its *Report on Property Law Reform*. In order to ensure that the last few thousand acres of old system land in the state were brought under the Torrens system, the commission recommended legislation designed to compel the registration of such land: see Property Law Act 1974 (Qld) ss 250–254. The Queensland approach was very effective and the Land Title Act 1994 now contains no provision for conversion. In this respect see also Tas, ss 17, 19–20, establishing a procedure for bringing land under the Act where a conveyance or mortgage is lodged for registration under the Registration of Deeds Act 1935.

What constitutes the register?

5.25C **Bursill Enterprises Pty Ltd v Berger Bros Trading Co Pty Ltd**
(1971) 124 CLR 73; ALR 551
High Court of Australia

[Under s 42(1)(b) of the Real Property Act 1900 (NSW), the registered proprietor's title was subject to an interest 'notified' on the certificate of title. The certificate of title to land acquired by Bursill in the city of Sydney included a notification of an encumbrance in the following terms: 'Right of Way created by and more fully set out in … Transfer No 7922 affecting parcels (X) and (Y)'. The certificate of title to the neighbouring land, of which Berger was the registered proprietor, stated that the right of way created by Transfer No 7922 was appurtenant to that land.

Transfer No 7922 was executed in 1872. In that transfer Guy, who was Bursill's predecessor in title, granted to Long, Berger's predecessor in title, an extension of an existing right of way:

> … together with all buildings at present erected on the said road or gateway and the right to pull down such buildings and to rebuild others at the height of not less than 12 feet from the ground over such road …

In the Supreme Court of New South Wales, **McLelland CJ** in Eq held that Transfer No 7922 created an easement over Bursill's land, which although misdescribed on Bursill's certificate of title, was protected by s 42(1)(b) of the Real Property Act 1900. Bursill appealed to the High Court and Berger cross-appealed against the refusal to make the third declaration sought.]

Windeyer J: As I read the instrument of transfer, what Guy purported to convey to Long was a building occupying a horizontal stratum of part of the land of which he, Guy, was the

registered proprietor. It seems that before the Conveyancing (Strata Titles) Act 1961, it was not possible in New South Wales to have a separate certificate of title under the Torrens system for a stratum of land above the surface of the earth. The provisions of the Real Property Act relating to subdivisions were, it seems, not thought to be applicable to such a case. But certificates of title for an estate in fee simple are always expressed to be subject to such incumbrances, liens, and interests as are notified thereon. The existence of a stratum interest could be effectively notified; for it is well established that such an interest is known to the law.

The critical question, as I see the matter, is then whether the interest in respect of buildings that Guy conveyed to Long can be said to have been 'notified on the folium of the register book constituted by … the certificate of title' within the meaning of s 42 of the Act. If it was, then Bursill holds its land subject to it; and that involves no inroad upon an indefeasible title.

The argument that the interest in the buildings is not notified on the certificate of title proceeded on the assumption that Bursill, when purchasing the land, could safely neglect to search Transfer No 7922, which was expressly referred to on the certificate of title. It is contended that this reference to the memorandum of transfer did not amount to constructive notice of its full operation, because it was described as creating an 'Extension of the Right of Way'. Doubtless this description would have been better if it had read 'extension of the right of way and rights in building above the way'. But it seems to me that what is 'notified' to a prospective purchaser by his vendor's certificate of title is everything that would have come to his knowledge if he had made such searches as ought reasonably to have been made by him as a result of what there appears. I here use the words of s 164 of the Conveyancing Act 1919 (NSW). We are not concerned in this case with s 43, which gives a protection against unregistered instruments, for Transfer No 7922 was registered, and is noted on the certificate of title.

It seems to me that, at any time from 1872 till today, a prudent conveyancer acting for a purchaser of the land that is now Bursill's would have ascertained what it was that Transfer 7922 referred to on the vendor's certificate of title in law effected. True he might have been surprised to discover all that his search revealed. But surely no prudent person, seeing the reference to a right of way, would neglect to ascertain what exactly was the nature of the right of way, the land subject to it, the persons who could avail themselves of it, for what purposes in what matter and at what times. The need to make such a search seems the more obvious if, by an inspection or survey of the land, the intending purchaser had become aware that there was a building over part of the land which was in the occupation of his neighbour. And it seems unlikely that a purchaser of this land in a built-up area of the city of Sydney would not be aware of the existence of the passage way and of the building above it. Whether he was so or not the reference on the certificate of title to Transfer 7922 was I think constructive notice of what it provided, that is the land was subject not only to a right of way but also to an interest of the adjoining landowner in the building above the way. I think that the registered proprietor of the land that is now Bursill's held his title subject to that interest. Therefore I consider that the owner of the land that is now Berger's has, and has had, in law a right to the exclusive use and occupation of this building. This Berger's predecessors in title have enjoyed for nearly a century. But no question of a right from adverse possession arises. The owners of Berger's land have held the building as of right by documentary title.

It follows from what I have said that, although I take a very different path from that which the learned Chief Judge in Equity took, and that I am unable to accept his reasons, I would uphold in substance the declarations that he made.

I would therefore dismiss the appeal, but make some alterations in the form of the decretal order.

Menzies J (dissenting): [His Honour agreed with the conclusion that Transfer No 7922 did not merely create an easement, but also granted rights in respect of the building above the right of way.] … It remains for consideration, however, whether the transfer of the building effected by transfer 7922 was itself notified upon the folium of the register book for the purposes of s 42 simply by reason of the notification of the rights of way created by the two instruments mentioned, including Transfer 7922 by which the transfer was also made. If so, the estate of the registered proprietor is subject to the interest claimed by Berger; otherwise it is not. The question, of course, is not whether a careful purchaser might be expected to inspect the instruments referred to and by so doing discover that, should it have been intended to notify the transfer of the interest in the land as well as the creation of the right of way, the notification actually made was incomplete. The question is rather whether the transfer of the property interest was itself notified by the reference to an instrument which, it was quite accurately said, created a right of way. It seems to me that the only interests notified were the rights of way and that that description cannot be regarded as covering the transfer of the interest in land constituted by the transfer of the building. I do not think that it would be conducive to the purpose of the Act to establish indefeasibility of titles to regard what is clearly the accurate notification of the creation of rights of way as going further and notifying an unmentioned transfer of land by reason of the reference to the instrument by which the rights of way were said to have been created but which also effected the transfer. In my opinion the transfer of land was not notified upon the folium of the register book constituted by Bursill's certificate of title and by reason of s 42 the registered proprietor holds the land free from the estate now claimed by Berger by virtue of Transfer 7922.

My conclusions require the allowing of the appeal without consideration of the question whether or not, if there had been the omission of any right of way or other easement, s 42(1) (b) would have applied to a right of way or other easement created after the land had been brought under the Real Property Act. They also dispose of the cross appeal. It cannot succeed.

Accordingly, I am of the opinion that the appeal should be allowed and the cross appeal dismissed.

[**Barwick CJ** delivered a judgment in which he expressed agreement with the reasons of **Windeyer J** and gave his own reasons for reaching the same conclusion as **Windeyer J**.]

Decretal order of the Supreme Court of New South Wales varied.

Otherwise appeal and cross appeal dismissed.

5.26 Questions

The cause of the misleading notification in this case was the lack of statutory authority at the relevant time for the issue of separate certificates of title for subdivided lots in airspace. The deficiency has been remedied by legislation in all jurisdictions. The more enduring problem is that a purchaser cannot rely on a notification on the certificate of title as to the legal effect of an instrument, but must assess the instrument itself. An instrument notified on the certificate forms part of the register, and it is the instrument which determines the legal effect: see also Ex *Parte Property Unit Nominees (No 2) Pty Ltd* [1981] Qd R 178 at 181; NSW, s 40(1B) (inserted after *Bursill v Berger*). Are the obligations imposed on searchers by *Bursill v Berger* unduly burdensome? Is the reference to constructive notice by Windeyer J appropriate in this context?

5.27 There would seem to be no reason why the approach in *Bursill v Berger* would not apply in jurisdictions other than New South Wales, notwithstanding variations in the wording of the legislation: ACT, ss 47, 49: NT, s 47; Qld, s 46; SA, ss 50, 51, 57; Tas, ss 33(1), (4), 40(1); Vic, ss 27, 33; WA, ss 48, 52. The form of s 42 has changed considerably since *Bursill v Berger,* but the reasoning in that case remains applicable in New South Wales: see now NSW, ss 3, 31B, 42.

The principle of indefeasibility

5.28 Whatever assistance Torrens may have received in developing his insights, he saw clearly that the inadequacies of the deeds registration system flowed from the dependent nature of old system titles: that is, from the principle that one weak link in the chain of title, unless cured by a sufficient period of adverse possession, was sufficient to destroy or impair the title of the last person in the chain. Accordingly, he concluded that a new scheme was required to achieve security and simplicity in matters of title to land. The scheme he proposed was based on the idea that the state should authoritatively establish title by setting up a register and guaranteeing that the person named as proprietor had a perfect title subject only to encumbrances specifically notified on the register. Interests in land were to be created or transferred not by the execution of documents, as was the case (in general) with old system land, but by the registration of dealings on the register. Thus, a dealing was not to be completed until registration although, as the authorities have developed in Australia, an unregistered dealing is by no means without effect. Since the state was to guarantee the title of the person registered as proprietor of an estate or interest in land, there would be no need for a purchaser to investigate the history of the vendor's title, nor to determine whether it was defective when registered. In short, Torrens attempted to make titles to land 'independent' by making the register conclusive and by barring 'retrospective investigation of title': Harrison, 'The Transformation of Torrens' System into the Torrens System' (1962) 4 *UQLJ* 125 at 129. Ideally, this principle requires the register to reflect all facts bearing on the title of the proprietor, thereby relieving anyone searching title from the need to go behind the register. The conclusiveness of the register is, in general, what is meant by the principle of indefeasibility. In *Frazer v Walker* [1967] 1 AC 569 at 580; 1 All ER 649 at 652, the Privy Council stated that the expression 'indefeasibility of title' 'is a convenient description of the immunity from attack by adverse claim to the land or interest in respect of which he is registered, which a registered proprietor enjoys'. At the time of the decision in *Frazer v Walker* the term 'indefeasibility' was not used in the Torrens legislation itself, but was adopted by the courts along with such other terms as 'unimpeachable', 'conclusive' and 'unexaminable'. Presently the term is used in the NT, s 39; Qld, ss 37–41; SA, s 69; and Tas, s 40.

5.29 The objects of the Torrens system have traditionally been equated with its methods, as, for example, in the following passage:

> The first [object] is to provide a register from which persons who propose to deal with land can discover all the facts relative to the title … The second object is to ensure that a person dealing with land which is subject to the system is not adversely affected by any infirmities in his vendor's title which do not appear on the register, thus saving the difficulty and expense of going behind the register to investigate the title. Thirdly, the Torrens system aims to provide a guarantee by the State that the picture presented by the register book is true and complete. If this turns out not to be the case, compensation is to be paid to any person who suffers loss either through the land being made subject to the system or else through the

register not disclosing all the facts relevant to the title [Hinde, 'The Future of the Torrens System in New Zealand' in Northey (ed), *The A G Davis Essays in Law*, 1965, p 78].

The Torrens system is a variant of the system known internationally as a system of registration of title. The objects of such systems are generally understood to be security of title and security of transaction — 'static' and 'dynamic' security in Demogue's terms: see further 5.33. A register that provides publicity for interests in land, the state guarantee of title (comprising the statutory vesting of title and compensation for losses caused by the system) and wider enforceability for registered interests are the methods employed by the Torrens system to achieve the objects. For an analysis of how the methods align with and serve the objects of title registration, see further, Arrieta-Sevilla, 'A Comparative Approach to the Torrens Title System' (2012) 20 *APLJ* 203; O'Connor, 'Registration of Title in England and Australia: A Theoretical and Comparative Analysis' in Cooke (ed), *Modern Studies in Property Law Vol 2*, Hart, Oxford, 2003, p 81 at pp 84–9.

The indefeasibility provisions

5.30 Several sections in each of the state Acts are relevant to the principle of indefeasibility. The structure and language of these sections are similar, but there are significant differences. In the outline below, the Victorian provisions are taken as a model, but the more important legislative variations in the other states are noted. See further Whalan, pp 293–6.

5.31 Section 41 of the Victorian Act asserts that 'every Crown grant or certificate of title registered under this Act … shall be conclusive evidence that the person named in such grant or certificate as the proprietor of or having any estate or interest in … the land therein described is seised or possessed of such estate and interest': cf ACT, s 52; NSW, s 40; NT, s 47; Qld, s 46; SA, s 80; Tas, s 39; WA, s 63. This is primarily an evidentiary provision and must be read subject to the key indefeasibility section (Vic, s 42), which determines the effect of registration of a person as proprietor of an estate or interest in land. A good example of the subordination of the apparently absolute terms of s 41 to the qualifications introduced by s 42 is *National Trustees, Executors and Agency Co v Hassett* [1907] VLR 404, where the certificate of title which erroneously included certain land was not conclusive despite the terms of s 41, because s 42(1) (b) denied conclusiveness to a certificate of title covering land included by a wrong description. The New South Wales legislation (NSW, s 40) most clearly emphasises that the conclusive evidence provision is not a major source of indefeasibility, but is designed to assist in relation to the proof of title. The legislation was amended in 1979 to state the evidentiary value of a 'computer folio certificate': NSW, ss 40(1A), (1B), 96D.

5.32 The key indefeasibility provision (the 'paramountcy provision') provides as follows:

1) Notwithstanding the existence in any other person of any estate or interest … which but for this Act might be held to be paramount or to have priority, the registered proprietor of land shall, except in the case of fraud, hold such land subject to such incumbrances as are notified on the Crown grant or certificate of title but absolutely free from all other incumbrances whatsoever, except —

a) [interests under a prior registered Crown grant or certificate of title];

b) [land included in the Crown grant or certificate of title by wrong description].

2) Notwithstanding anything in the foregoing the land which is included in any Crown grant certificate of title or registered instrument shall be subject to [a number of matters to be considered] notwithstanding the same respectively are not specially notified as incumbrances on such grant certificate or instrument [Vic, s 42; cf ACT, s 58; NSW, s 42; NT, s 188; Qld, s 184; SA, s 69; Tas, s 40; WA, s 68].

This provision has a threefold operation. First, it states that fraud will vitiate a registered title. Second, that the estate or interest of the registered proprietor is subject only to those encumbrances actually noted on the register, with two exceptions; and third, that nevertheless there are certain unregistered interests which are enforceable against the registered proprietor (these vary from state to state).

5.33 The paramountcy provision is accompanied by the so-called 'notice provision', which states that:

> … except in the case of fraud no person … dealing with … the registered proprietor … shall be required … to … ascertain the circumstances under … which such proprietor or any previous proprietor … was registered … or shall be affected by notice actual or constructive of any trust or unregistered interest, any rule of law or equity to the contrary notwithstanding; and the knowledge that any such trust or unregistered interest is in existence shall not of itself be imputed as fraud. [Vic, s 43; cf NSW, s 43 (see also s 43A); SA, ss 72, 186, 187; Tas, s 41; WA, s 134. Compare Qld, s 184(2)(a); NT, s 188(2)(a), which provide that 'a registered proprietor is not affected by actual or constructive notice of an unregistered interest affecting the lot'.]

The main purpose of the notice provision is to prevent certain equitable principles applying to registered land and to narrow accordingly the definition of 'fraud', a term otherwise undefined in the legislation: *Templeton v Leviathan* (1921) 30 CLR 34 at 69–70. The first of these objectives is achieved by protecting a person dealing with the registered proprietor from the effect of notice of any trust or unregistered interest. Thus, a purchaser taking a transfer from the registered proprietor takes free of any outstanding unregistered interest once the transfer is registered in the purchaser's name, notwithstanding that the purchaser has notice of the unregistered interest, unless the unregistered interest is protected by a specific statutory exception to indefeasibility. The second objective is achieved by the direction in s 43 that 'the knowledge that any such trust or unregistered interest is in existence shall not of itself be imputed as fraud' to the person purchasing from the registered proprietor.

5.34 A further provision, known as the protection of purchasers provision, extends the protection accorded to a purchaser bona fide by providing that nothing in the Act is to be interpreted so as to leave a bona fide purchaser for valuable consideration open to an action for recovery of damages or to an action of ejectment or to deprivation of his or her estate or interest, on the ground that the vendor may have been registered through fraud or error, or that he or she may have derived title from or through a person registered as proprietor through fraud or error: Vic, s 44(2); cf ACT, ss 152, 159; NSW, ss 45; Qld, s 184(2)(b); NT, s 188(2)(c); SA, s 207; Tas, s 42; WA, s 199, 202.

Deferred vs immediate indefeasibility

5.35 Perhaps the most fundamental decision confronting courts interpreting the Torrens legislation has been the necessity to choose between the competing theories of deferred and

immediate indefeasibility. Both theories relate to a case where a purchaser or mortgagee, acting without fraud, registers an instrument (such as a transfer or mortgage), to which the signature of the registered proprietor has been forged by a rogue. A common scenario is that the rogue (F) is a family member or trusted agent of the registered owner (O). F forges O's signature on a mortgage or transfer, pockets the loan advance or proceeds of sale, and absconds with the money. The purchaser or mortgagee (P1) registers the forged instrument, ignorant of the forgery. Both O and P1 are therefore innocent parties. O wants to set aside the registration of the forged instrument, and P1 wants to retain the title conferred by registration, but the law cannot meet the expectations of both. The Australian authorities show two approaches to resolving this conflict.

Under the doctrine of deferred indefeasibility, the title of a purchaser (P1) who registers a forged instrument is 'defeasible', which means that it can be set aside by a court at the suit of O. However if, before P1's title is set aside, P1 passes an instrument to a subsequent purchaser (P2), who registers in good faith, P2's title is indefeasible. Indefeasibility is 'deferred' until the subsequent purchaser, P2, registers without fraud. The opposing doctrine of immediate indefeasibility confers a good title on P1 'immediately' on registration of the forged instrument. Thus, P1's registered title cannot be set aside, even though it was procured by registration of a forged instrument, provided of course that P1 has acted without fraud.

5.36 The debate over immediate and deferred indefeasibility is about how the law should allocate the loss when two innocent parties to a transaction are affected by a fraud perpetrated by a third party. The law's dilemma is explained in the following passage:

> The choice of an adjudication rule to resolve disputes arising from unauthorised registration is perhaps the most vexed legal problem in land title registration systems. It presents a stark choice between two antithetical conceptions of security of title that Demogue called static and dynamic security. Demogue applied the term 'static security' to rules that protect the interests of existing owners in a third party property dispute with purchasers. Static security is based on the idea that owners should not be deprived of their property by the act of another without their consent. This type of security is static in the sense that it preserves the existing allocation of property. The opposing principle, dynamic security, is so called because it provides an incentive to acquire assets for productive purposes. It protects the reasonable expectations of purchasers that they will acquire a title free of unknown prior claims and defects.
>
> Land title registration is established to promote both forms of security. It has long been said that the objects of the system are twofold: 'security of title' and 'ease of transaction'. The first object refers to making existing property rights secure, and is identical to static security. The second object is often expressed as being to facilitate the transfer of property rights, or to make conveyancing quicker, cheaper and easier, but these are merely the consequences of enhancing security of transfer and acquisition. If purchasers are unsure that they are dealing with the true owner and that nobody else can enforce a prior claim against them in respect of the land, they will expend time and resources on title investigations in an attempt to remove the insecurity. If the insecurity can be relieved by other means, the transaction costs of conveyancing will diminish. The second object of land title registration can therefore be reformulated as follows: to reduce transaction costs, and thereby to make conveyancing quicker, cheaper and easier, by providing dynamic security. Accordingly, the two objects of land title registration systems are in fact to provide static security and dynamic security.
>
> Both objects are essential to the enterprise of land title registration. For land assets to be used productively, existing owners must be sure that they will not be deprived of their

property without their consent. Without static security, there would be little incentive to invest in improving land or bringing it into production. Purchasers need to be sure that the law will uphold their reasonable expectations that they are acquiring a sound title free of hidden claims. If they are to invest in the productive use of land, they need to be sure that no challenger will step forward in the future to assert a prior claim. Long after acquisition, purchasers and owners continue to require dynamic security.

The dilemma for the law is that it is sometimes impossible to provide both forms of security when the rights of a prior owner conflict with those of a good faith purchaser. Land title registration systems use a combination of risk management strategies to reduce the incidence of such conflicts. The strategies include: generating publicity for interests so that conflicts of property rights are less likely to arise, establishing new priority rules that provide an incentive to register, transferring some risks to the State, and spreading risk through an indemnity scheme.

These measures do not entirely eliminate the possibility for a collision of rights to occur. Where a purchaser in good faith registers an unauthorised disposition, the law must still provide an adjudication rule to determine who gets the land. A rule that awards the land to O promotes static security. It assures existing owners that they cannot be deprived of their land through a non-consensual disposition. But this rule *ipso facto* diminishes dynamic security, for purchasers can no longer be sure that they will get a clear title if they take an instrument for value and register it in good faith.

Alternatively, the law might adopt a rule that awards the land to P1. This promotes dynamic security, by upholding the reasonable expectations of purchasers that they will gain an indefeasible title if they register an instrument in good faith. Owners of land are now at risk of losing their title to land as a result of an invalid instrument. P1 will be happy that the rule enables him to acquire his title more securely, but must then live with the risk that he could lose his title through a non-consensual disposition occurring after his registration.

The law's dilemma is that we need both dynamic and static security, but the law must sometimes choose between them. The dilemma lies at the heart of land title registration, which incorporates both forms of security in its object [O'Connor, 'Registration of Invalid Dispositions: Who Gets the Property?' in E Cooke (ed), *Modern Studies in Property Law Vol* 3, Hart Publishing, Oxford, 2005, p 45 at pp 47–49 (footnotes omitted)].

5.37 Immediate indefeasibility is a rule of dynamic security, while deferred indefeasibility is a compromise which provides static security so long as P1, the person who registered the forged instrument, retains the land. Once a registered title has passed to P2 without fraud, dynamic security prevails, and P2's title cannot be set aside.

5.38 Before the Privy Council decided *Frazer v Walker* [1967] 1 AC 569; 1 All ER 649 (5.40C), there was a substantial body of conflicting authority as to which theory of indefeasibility was consistent with the Torrens indefeasibility provisions. (For a general survey of the judicial approach to indefeasibility before *Frazer v Walker*, see Hinde, 'The Future of the Torrens System in New Zealand' in Northey (ed), *The A G Davis Essays in Law*, 1965, pp 98–118.) One of the principal authorities was *Gibbs v Messer* [1891] AC 248, decided by the Privy Council on appeal from the Supreme Court of Victoria. In that case Mrs Messer, the registered proprietor of certain land, travelled to Scotland, leaving the certificate of title with her solicitor for safekeeping, together with a power of attorney in favour of her husband. The solicitor, Cresswell, forged the signature of the husband (as attorney) to a transfer of Mrs Messer's land to 'Hugh Cameron, grazier', a fictitious person. Cresswell, purporting to act as Cameron's agent, secured the latter's registration as proprietor of the land. Subsequently,

Cresswell executed a mortgage in favour of the McIntyres, in return for a loan by them (the proceeds of which Cresswell misappropriated). The mortgage was executed in Cameron's name as mortgagor and purported to be signed by him. The McIntyres, who acted in good faith, duly registered the mortgage. On returning to the colony and discovering the fraud, Mrs Messer commenced proceedings seeking cancellation of the certificate of title in Cameron's name and of the mortgage registered in the McIntyres' name.

Mrs Messer ultimately succeeded in her claim before the Privy Council. Lord Watson observed (at 255):

> … [the] protection which the statute gives to persons transacting on the faith of the register is, by its terms, limited to those who actually deal with and derive right from a proprietor whose name is upon the register. Those who deal, not with the registered proprietor, but with a forger who uses his name, do not transact on the faith of the register; and they cannot by registration of a forged deed acquire a valid title in their own person, although the fact of their being registered will enable them to pass a valid right to third parties who purchase from them in good faith and for onerous consideration.

5.39 There are a number of possible interpretations of the judgment in *Gibbs v Messer*. One is that the *ratio decidendi* is confined to the case where a forged instrument is registered. According to this interpretation, the Privy Council's holding was based on the contention that a purchaser cannot obtain an indefeasible title unless he or she has 'dealt with' the registered proprietor, as required by the notice provisions of the legislation. In the case of forgery, the purchaser fails to gain protection because he or she deals not with the registered proprietor, but a forger using the proprietor's name. A second and much broader interpretation is that the case denies indefeasibility of title to a person registering any void instrument, regardless of whether the invalidity is caused by forgery or some other matter, such as the transferor's lack of capacity. On this view even a purchaser dealing with the registered proprietor is not protected, if registration is obtained with a void instrument.

5.40 The third and narrowest interpretation of *Gibbs v Messer* has been adopted enthusiastically by courts anxious to overrule the case in effect, without appearing to do so. This approach contends that the decision 'turned on the non-existence of any real person to accept a transfer and get registered himself': *Assets Co Ltd v Mere Roihi* [1905] AC 176 at 211. The fictitious person interpretation is quite untenable, if it is intended to suggest that the result of the case would have been different had Hugh Cameron been a real person, or that the *ratio* can be confined to the situation where the signature forged is that of a fictitious proprietor. The suggestion that the result would have been different had Cameron been a real person is specifically rejected by Lord Watson: [1891] AC 248 at 257. The point of the references to the fictitious nature of 'Cameron' in *Gibbs v Messer* was to point out that if Cresswell had forged a transfer to himself and subsequently, after registration of the transfer, executed a mortgage in his own name as mortgagor, the McIntyres would have been able to succeed even under a rule of deferred indefeasibility. In such a case the mortgage would have been regularly executed by the mortgagor with whom the McIntyres could be said to have dealt. In emphasising the fictitious character of Hugh Cameron, Lord Watson was responding to an argument that 'Cameron' was merely Cresswell's alias and therefore the mortgage to the McIntyres was validly executed by the registered proprietor (Cresswell, alias Cameron) himself. In the result, Lord Watson concluded that Cameron was not a mere alias for Cresswell, as the whole point of his fraudulent scheme was to represent Cameron to be a real person who had no connection with Cresswell himself.

5.41 The first major attempt to confine *Gibbs v Messer* to its facts was made by the Privy Council in *Assets Co Ltd v Mere Roihi* [1905] AC 176. The fact situation in that case was very complex and involved, in part, the effect of initial registration of land under the Torrens system. Nevertheless, the judgment of Lord Lindley contained several statements indicating acceptance of the principle of immediate indefeasibility. See also *Creelman v Hudson's Bay Insurance Co Ltd* [1920] AC 194. This approach was carried further in the New Zealand case of *Boyd v Mayor of Wellington* [1924] NZLR 1124. A proclamation vested a portion of the land of which the plaintiff was registered as proprietor in the Wellington Corporation for public purposes. A copy of the proclamation, together with a plan of the land, was deposited in the Land Registry Office and registered against the plaintiff's title. The plaintiff argued that the proclamation was void as being *ultra vires* the corporation and asked for rectification of the register in his favour. A majority held that, even assuming the proclamation was void, registration of it conferred an indefeasible title to the land in the Wellington Corporation. Salmond J (at 1201) dissented on the ground that:

> … an instrument which is null and void before registration remains equally null and void *inter partes* not withstanding such registration, and creates no indefeasible title until and unless the rights of some third person purchasing in good faith and for value on the faith of the registered instrument have supervened. Until then it is the right and duty of the District Land registrar to rectify the register by cancelling a registration which was wrongly procured …

In *Garofano v Reliance Finance Corp Pty Ltd* (1992) 5 BPR 11,941; NSW ConvR ¶55-640, the New South Wales Court of Appeal rejected an attempt to give *Gibbs v Messer* an expanded meaning. Meagher JA (with whom Mahoney and Priestly JJA both agreed) commented (at 11,944) that the case, 'insofar as it is still good law, only applies when the forgery is in the name of a fictitious person … If anything the tendency has been to restrict the operation of *Gibbs v Messer*, not to expand it'. The court held that 'fraud' within the meaning of the Act required actual fraud or moral turpitude. The court held that the term 'mortgagee' in s 124 could include a person whose forged mortgage is recognised or valid under ss 42 and 43 of the New South Wales Act. See also *ANZ Banking Group Ltd v Barns* (1994) 13 ACSR 592 (registered proprietor's title not indefeasible because it had dealt with a non-existent person: that is, a company which had been dissolved). The case is discussed in Butt, 'Fictitious Proprietors' (1994) 68 *ALJ* 751. The possible application of a *Gibbs v Messer* exception in New South Wales seems to be precluded since 2000 by an amendment to the definition of 'fraud' to include 'fraud involving a fictitious person': NSW, s 3.

5.42 In *Clements v Ellis* (1934) 51 CLR 217; 23 ALR 62, the High Court was called upon to decide whether a registered proprietor, acting without fraud, obtained an indefeasible title on registration of a forged instrument. As the court was equally divided, the decision of the court below was affirmed. The case was regarded for over three decades as establishing that registration pursuant to a void instrument did not carry the protection of the indefeasibility provisions of the Act. See, for example, *Coras v Webb* [1942] QSR 66 (mortgage executed by infant); *Davies v Ryan* [1951] VLR 283 (forgery); *Caldwell v Rural Bank of New South Wales* (1951) 53 SR (NSW) 415 (invalid notice of resumption). But compare *Percy v Youngman* [1941] VLR 275 (infancy). However, a new orthodoxy emerged following the advice of the Privy Council in *Frazer v Walker*.

The adoption of immediate indefeasibility

5.43C

Frazer v Walker

[1967] 1 AC 569; 1 All ER 649
Privy Council

Lord Wilberforce: The appellant, Alan Frederick Frazer, and his wife, Flora Agnes Frazer, were in 1961 the registered proprietors under the Land Transfer Act 1952 of a farm property in a suburb of Auckland, subject to a mortgage to one Bailey on which £1732 was owing.

In 1961, Mrs Frazer, professing to act on behalf of herself and the appellant, arranged to borrow £3000 from the second respondents, which sum was to be secured on a mortgage over the property. A form of mortgage was prepared by the second respondents' solicitors, from whom it was collected by Mrs Frazer. She took it to solicitors acting for her and in their office a clerk witnessed her genuine signature to the mortgage and also a signature purporting to be that of the appellant which she had previously inserted. The mortgage document and the certificate of title were forwarded by the solicitors to the solicitors of the second respondents: they paid the £3000 partly to Mrs Frazer's solicitors and partly on her behalf in discharge of the existing mortgage, and in due course registered at the land registry office, Auckland, on 21 July 1961, the memorandum of mortgage together with a discharge of the previous mortgage.

As no payment of principal or interest was made, the second respondents exercised their power of sale, and on 26 October 1962 the property was sold by auction to the first respondent for £5000. The second respondents as mortgagees executed a memorandum of transfer to the first respondent which was registered on 29 November 1962. It is conceded that the second respondents and the first respondent acted throughout in good faith and without any knowledge of the irregularity on the part of Mrs Frazer.

On 16 March 1964, the first respondent commenced proceedings in the magistrates court at Auckland against the appellant for possession of the property, relying on his title as registered proprietor. These proceedings were removed into the Supreme Court. The appellant delivered a defence to this claim and also filed a counter claim against the first respondent, to which he joined the second respondents as defendants, asserting that what purported to be his signature on the mortgage was a forgery and that the mortgage, the advance by the second respondents, and the sale by the mortgagees had occurred without his knowledge. He claimed a declaration that his interest in the land was not affected by the purported mortgage or by the sale to the first respondent, a declaration that the mortgage was a nullity and an order directing the district land registrar to cancel the entries or memorials in the register whereby the second respondents were registered as mortgagees and the first respondent was registered as proprietor and to restore the name of the appellant and Mrs Frazer as joint owners of the land.

At the trial, Richmond J held that the appellant had given no authority to Mrs Frazer to mortgage his interest in the land. But nevertheless he gave judgment in favour of the first respondent and dismissed the appellant's counter claim, holding that the second respondents had obtained by registration an indefeasible title and that in any event the subsequent transfer gave the first respondent an indefeasible title. On appeal to the Court of Appeal, the appellant's appeal was dismissed on the ground that the first respondent, as a bona fide purchaser, had obtained an indefeasible title. The court gave no decision as to the position of the second respondents, although certain observations as to this appeared in the judgments. Before their Lordships, both the first respondent and the second respondents appeared and addressed arguments.

Their Lordships will deal first with the appellant's claim against the second respondents. This raises the question whether it was open to the appellant to bring proceedings attacking the validity of the mortgage against the second respondents, whose interest as mortgagees was entered in the register, and claiming cancellation of this entry. This question must be considered by reference to the provisions of the Land Transfer Act 1952. The relevant sections may be considered under five main headings:

Those sections which deal with the procuring of registration … Section 42 contains a prohibition against registration of any instrument except in the manner provided in the Act and unless the instrument is in accordance with the provisions of the Act … Even if non-compliance with the Act's requirements as to registration may involve the possibility of cancellation or correction of the entry … registration once effected must attract the consequences which the Act attaches to registration whether that was regular or otherwise… It is in fact the registration and not its antecedents which vests and divests title.

Those sections which provide protection to the registered proprietor against claims and proceedings. These are ss 62 and 63. Without attempting any comprehensive or exhaustive description of what these sections achieve, it may be said that while s 62 secures that a registered proprietor, and consequently anyone who deals with him, shall hold his estate or interest absolutely free from incumbrances, with three specified exceptions, s 63 protects him against any action for possession or recovery of land, with five specified exceptions.

It is these sections which, together with those next referred to, confer upon the registered proprietor what has come to be called 'indefeasibility of title'. The expression, not used in the Act itself, is a convenient description of the 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. It does not involve that the registered proprietor is protected against any claim whatsoever; as will be seen later, there are provisions by which the entry on which he relies may be cancelled or corrected, or he may be exposed to claims *in personam*. These are matters not to be overlooked when a total description of his rights is required. But as registered proprietor and while he remains such, no adverse claim (except as specifically admitted) may be brought against him.

Those sections which state the effect of the certificate of title. The principal section on this subject is s 75. The certificate, unless the register shows otherwise, is to be conclusive evidence that the person named in it is seised of or as taking estate or interest [sic] in the land therein described as seised or possessed of that land for the estate or interest therein specified and that the property comprised in the certificate has been duly brought under the Act. This section is of a similar character to those last discussed; it creates another — a probative — aspect of 'indefeasibility', nonetheless effective, though, as later provisions show, there are means by which the certificate may be cancelled or its owner compelled to hold it upon trust or to deliver it up through an action *in personam*.

Those sections which deal with correction or calling in of the certificate …

Those sections which relate to the position of third parties dealing with a registered proprietor. These are, in effect, ss 182 and 183. Section 182 deals with notice. In all systems of registration of land it is usual and necessary to modify and indeed largely to negative the normal rules as to notice, constructive notice, or inquiry as to matters possibly affecting the title of the owner of the land. Section 182 is of no direct relevance in the present case, which does not involve any question of notice.

Section 183 is in the following terms:

> (1) Nothing in this Act shall be so interpreted as to render subject to action for recovery damages, or for possession, or to deprivation of the estate or interest in respect of which he is registered as proprietor, any purchaser or mortgagee bona fide for valuable consideration of land under the provisions of this Act on the ground that his vendor or mortgagor may have been registered as proprietor through fraud or error, or under any void or voidable instrument, or may have derived from or through a person registered as proprietor through fraud or error, or under any void or voidable instrument, and this whether the fraud or error consists in wrong description of the boundaries or of the parcels of any land, or otherwise howsoever.

Their Lordships will revert to it when they deal with the appellant's claim against the first respondent.

The effect of these provisions upon the claim of the appellant against the second respondents must now be considered. It does not in their Lordships' view admit of any doubt. Although a mortgage of a fee simple does not take effect as a transfer of the fee simple (see s 100) it does create a charge on the land which the Act treats as an estate or interest in the land (see s 2, definitions of 'estate or interest' and 'proprietor'). It is therefore apparent that the appellant's counter claim against the second respondents, in so far as it sought a declaration that the appellant's interest in land was not affected by the purported mortgage and a declaration that the mortgage was a nullity, was an action for recovery of land within the terms of s 63. In so far as it sought cancellation by the court of the entry of the mortgage on the register, it could only be based on s 85. The proceeding does not fall within either the exception of fraud or within any of the other exceptions allowed by s 63. The power of cancellation by the court is also excluded by the express terms of s 85, because the proceeding (for recovery of land) is itself barred. No question of the invocation of the registrar's powers under ss 80 and 81 arises in the case. The conclusion must follow that the appellant's claim against the second respondents was correctly dismissed by Richmond J, and their Lordships find that his judgment on this point is supported by the authorities.

The leading case as to the rights of a person whose name has been entered upon the register without fraud in respect of an estate or interest is the decision of this Board in *Assets Co Ltd v Mere Rohi*. The Board there was concerned with three consolidated appeals from the Court of Appeal in New Zealand, which had decided in each case in favour of certain Aboriginal natives as against the registered proprietors. In each appeal their Lordships decided that registration was conclusive to confer upon the appellants a title unimpeachable by the respondents. The facts involved in each of the appeals were complicated and not identical one with another, a circumstance which has given rise to some difference of opinion as to the precise *ratio decidendi* — the main relevant difference being whether the decision established the indefeasibility of title of a registered proprietor who acquired his interest under a void instrument, or whether it is only a bona fide purchaser from such a proprietor whose title is indefeasible. In *Boyd v Mayor, etc, of Wellington* [1924] NZLR 1174, the majority of the Court of Appeal in New Zealand held in favour of the former view, and treated the *Assets Co* case as a decision to that effect. The decision in *Boyd v Mayor, etc, of Wellington* related to a very special situation, namely, that of a registered proprietor who acquired his title under a void proclamation, but with certain reservations as to the case of forgery it has been generally accepted and followed in New Zealand as establishing, with the supporting authority of the

Assets Co case, the indefeasibility of the title of registered proprietors derived from void instruments generally.

Their Lordships are of opinion that this conclusion is in accordance with the interpretation to be placed on those sections of the Land Transfer Act 1952, which they have examined. They consider that *Boyd's* case was rightly decided and that the *ratio* of the decision applies as regards titles derived from registration of void instruments generally. As regards all such instruments it established that registration is effective to vest and to divest title and to protect the registered proprietor against adverse claims.

The appellant relied on the earlier decision of the Board in *Gibbs v Messer* [1891] AC 248, as supporting a contrary view, but their Lordships do not find anything in the case which can be of assistance to him. Without restating the unusual facts, which are sufficiently well known, it is sufficient to say that no question there arose as to the effect of such sections as corresponded (under the very similar Victorian Act) with ss 62 and 63 of the Act now under consideration. The Board was then concerned with the position of a bona fide 'purchaser' for value from a fictitious person and the decision is founded on a distinction drawn between such a case and that of a bona fide purchaser from a real registered proprietor. The decision has in their Lordship's opinion no application as regards adverse claims made against a registered proprietor, such as came before the courts in *Assets Co Ltd v Mere Roihi,* in *Boyd v Mayor, etc, of Wellington* and in the present case.

Before leaving this part of the present appeal their Lordships think it desirable, in relation to the concept of 'indefeasibility of title' as their Lordships have applied it to the facts before them, to make two further observations.

First, in following and approving in this respect the two decisions in *Assets Co Ltd v Mere Roihi* and *Boyd v Mayor, etc, of Wellington,* their Lordships have accepted the general principle that registration under the Land Transfer Act 1952 confers upon a registered proprietor a title to the interest in respect of which he is registered which is (under ss 62 and 63) immune from adverse claims, other than those specifically excepted. In doing so they wish to make clear 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. That this is so has frequently, and rightly been recognised in the courts of New Zealand and of Australia: see, for example, *Boyd v Mayor, etc, of Wellington* and *Tataurangi Tairuakena v Mua Carr* [1927] NZLR 688 at 702.

Their Lordships refer to these cases by way of illustration only without intending to limit or define the various situations in which actions of a personal character against registered proprietors may be admitted. The principle must always remain paramount that those actions which fall within the prohibition of ss 62 and 63 may not be maintained.

The second observation relates to the power of the registrar to correct entries under ss 80 and 81. It has already been pointed out (as was made clear in *Assets Co* case [1905] AC 176 at 194–5) by this Board that this power is quite distinct from the power of the court to order cancellation of entries under s 85, and, moreover, while the latter is invoked here, the former is not. The powers of the registrar under s 81 are significant and extensive. They are not coincident with the cases excepted in ss 62 and 63. As well as in the case of fraud, where any grant, certificate, instrument, entry or endorsement has been wrongfully obtained or is wrongfully retained the registrar has power of cancellation and correction. From the argument before their Lordship it appears that there is room for some difference of opinion as to what precisely may be comprehended in the word 'wrongfully'. It is clear, in any evident, that s 81 must be read with and subject to s 183 with the consequence that the exercise of the

registrar's powers must be limited to the period before a bona fide purchaser, or mortgagee, acquires a title under the latter section.

As the appellant did not in this case seek relief under s 81, and as, if he had, his claim would have been barred by s 183 (as explained in the next paragraph), any pronouncement on the meaning to be given to the word 'wrongfully' would be *obiter* and their Lordships must leave the interpretation to be placed on that word in this section to be decided in a case in which the question directly arises.

The failure of the appeal against the second respondents entails (and it was not contended otherwise) that it must equally fail against the first respondent. But their Lordships would add that the action against that respondent was an action for the recovery of land within the meaning of s 63 and that it would be directly barred by that section, quite apart from the fact that it could not be maintained against the other respondents. The appellant could not bring his case against the first respondent within any of the exceptions to that section. Also their Lordships would add that, if it had been necessary for the first respondent to rely upon s 183 of the Act, he would by it have had a complete answer to the claim. The appellant argued that the second respondents were not 'vendors' within the meaning of the section — the suggestion being that he is only a vendor who sells the precise estate or interest of which he is the registered proprietor, so that a mortgagee does not fall within the description. It was further contended that the second respondents were not 'proprietors' because they did not own the estate or interest (ie the fee simple) which they purported to transfer. Their Lordships are in agreement with the Court of Appeal in holding that the section should not be so narrowly read and that it extends to the case of a mortgagee who is 'proprietor' of the mortgage and who has power of sale over the fee simple. Their Lordships need not elaborate on this part of the case since they concur with the conclusions agreed on by all three members of the Court of Appeal. Their Lordships will humbly advise Her Majesty that the appeal should be dismissed. The appellant must pay the respondent's costs.

Appeal dismissed.

5.44 Questions

1. In *Frazer v Walker* it was not necessary for the Privy Council to decide the case on the ground of immediate indefeasibility as the transfer to the purchasers from the mortgagee had been registered. Thus, the purchasers were protected whichever view of indefeasibility the Privy Council adopted. Is the reasoning of the Privy Council consistent with the approach of the High Court in *Clements v Ellis* (1934) 51 CLR 217; 23 ALR 62 (5.XX)? Why did Their Lordships not refer to *Clements v Ellis*?
2. Is it proper for a court deciding a case as significant as *Frazer v Walker* to make no reference to the policy arguments for and against immediate indefeasibility?
3. What are the consequences of the decision in *Frazer v Walker* for a defrauded registered owner in Mr Frazer's position?

5.45 The decision in *Frazer v Walker* received a mixed response in New Zealand. Some hailed it as providing better security of transaction. One legal practitioner said that the protection for purchasers provided by immediate indefeasibility had come at a high price to security of title for owners:

> Little does [the] proprietor realise that by the very act of making [his] title indefeasible (through *Frazer v Walker*) a new and even more dangerous weakness has been introduced … He makes it susceptible to loss by theft and forgery for the whole period of his ownership. No system can give absolute security to all parties: if excessive protection is given to a purchaser (usually a careless purchaser) under a forged transfer, it is at the expense of the security of all existing owners.[7]

Taylor recognised that the choice between immediate and deferred indefeasibility involved a trade-off between dynamic and static security (although he did not use those terms): see **5.33**. Although immediate indefeasibility is often equated with 'certainty', the continuous risk to static security that it entails for registered owners should be borne in mind when considering the cases below.

5.46 Following the Privy Council's decision in *Frazer v Walker*, a law reform committee in New Zealand recommended that the law be reformed to provide a presumption of immediate indefeasibility with a judicial discretion to set aside a registered instrument in cases where it would be unjust not to do so: Property and Equity Law Reform Committee, *Report on the Decision in Frazer v Walker*, 1977, para 23. This recommendation has been confirmed by a recent review undertaken by the New Zealand Law Commission and Land Information New Zealand: *A New Land Transfer Act*, Report 116, 2010, paras 2.11–2.16. See also Low and Griggs, 'Immediate Indefeasibility: Is It Under Threat?' (2011) 19 *APLJ* 222.

5.47 The New South Wales Parliament gave legislative recognition to the decision in *Frazer v Walker* by amendment to NSW, s 135. That section read:

> Nothing in this Act contained shall be so interpreted as to leave subject to action for recovery of damages or to … proceedings or action for the recovery of land, or to deprivation of the estate or interest in respect to which he is registered as proprietor, any purchaser or mortgagee bona fide for valuable consideration of land under the provisions of this Act on the plea that his vendor or mortgagor may have been registered as proprietor, or procured the registration of the transfer to such purchaser or mortgagee through fraud or error, *or under any void or voidable instrument,* or may have derived from or through a person registered as proprietor through fraud or error, *or under any void or voidable instrument* [now see s 45] …

The italicised words were added by the Real Property (Amendment) Act 1970 s 17(f), and made s 135 identical to s 183(1) of the Land Transfer Act 1952 (NZ), considered in *Frazer v Walker*. The purpose of the amendments was to endorse the policy approved by the Privy Council 'by completely removing any ambiguity [then] latent in the section' (per the Minister of Justice, Mr J C Maddison, New South Wales *Parliamentary Debates*, 26 February 1970, Legislative Assembly 3662–3): cf ACT, s 159; Qld, ss 184, 187; SA, s 207; Tas, s 42; Vic, s 44(2); WA, s 202. The relevant New South Wales provision is now s 45.

7. Taylor, 'Scotching *Frazer v Walker*' (1970) 44 *ALJ* 248 at 253.

The Law Reform Commission of Victoria reviewed the Victorian provisions and concluded that a presumptive rule of deferred indefeasibility was preferable in forgery cases: LRCV, Rep No 12, *The Torrens Register Book,* 1987, para 18. For a review of the views of law reform bodies in other jurisdictions, see New Zealand Law Commission and Land Information New Zealand, *Review of the Land Transfer Act 1952:* Issues Paper 10, 2008, pp 29–40.

The policy debate over deferred and immediate indefeasibility

5.48 The choice between deferred and immediate indefeasibility represents a fundamental policy dilemma for registered title systems. Australia, New Zealand, Papua New Guinea, Singapore, and the Canadian province of Saskatchewan are among the minority of registered title systems which use the rule of immediate indefeasibility: O'Connor, 'Registration of Invalid Dispositions: Who Gets the Property?' in Cooke (ed), *Modern Studies in Property Law Vol 3*, Hart Publishing, 2005, p 45 at pp 52–60. British Columbia's Land Title Act, RSBC 1996 c 250, ss 25.1, 26(1) confers immediately indefeasible title upon registered owners of estates in land if they acquired in good faith and for valuable consideration, but denies indefeasibility to mortgagees and their assignees: *Gill v Bucholtz* (2009) 90 BCLR (4th) 276; [2009] BCCA 137. Immediate indefeasibility was briefly adopted as an interpretation of Ontario's Land Titles Act, RSO 1990, c L-5 by the Ontario Court of Appeal in *Household Realty Corp Ltd v Liu* (2005) 261 DLR (4th) 679. The decision received a hostile reception and was overturned, first by legislative amendments in 2006 operating prospectively, and in 2007 by the Ontario Court of Appeal in *Lawrence v Maple Trust Co and Wright*; 5.XX. The Federal Court of Malaysia in *Adorna Properties Sdn Bhd v Boonsom Boonyanit @ Sun Yok Eng* [2001] 1 MLJ 241; 2 CLJ 133, interpreted s 340 of National Land Code as creating a rule of immediate indefeasibility, upsetting what was believed to be a settled interpretation. The decision was widely condemned as unjust and a 'forger's charter', and was reversed by the Federal Court in *Tan Ying Hong v Tan Sian San* [2010] 2 CLJ 269. See Teo, 'All Because of a Proviso — A Nine Year Wait to Right the Wrong' in P Carruthers, S Mascher and N Skead (eds), *Property and Sustainability: Selected Essays*, Lawbook Co, 2011, p 161; Loh and Tang, '"A Law Which Favours Forgers"?: Land Fraud in Two Torrens Jurisdictions' (2011) 19 *APLJ* 130.

5.49 Questions

Why has the choice between deferred and immediate indefeasibility been so controversial (and often so unstable) in a number of jurisdictions? And why has it usually been left to the judiciary to determine which rule applies? Is it simply a question of inadequate legislative drafting? See O'Connor, 'Deferred and Immediate Indefeasibility: Bijural Ambiguity in Registered Land Title Systems' (2009) 13 *Edinburgh Law Review* 194; Harding and Hickey, 'Bijural Ambiguity and Values in Land Registration Systems' in S Bright (ed), *Modern Studies in Property Law Vol 6*, Hart, 2011, p 285; Harding and Bryan, 'Responding to Fraud in Title Registration Systems: A Comparative Study' in Dixon (ed), *Modern Studies in Property Law Vol 5*, 2009, p 3; L Griggs, 'Resolving the Debate Surrounding Indefeasibility Through the Eyes of a Consumer' (2009) 17(2) *APLJ* 259.

5.50C

Breskvar v Wall

(1971) 126 CLR 376; (1972) ALR 205
High Court of Australia

[Mr and Mrs Breskvar (the appellants) were the registered proprietors of certain land in Queensland. On 5 March 1968 they executed a memorandum of transfer for an expressed consideration of $1,200, the name of the transferee being omitted from the instrument at the time of execution. Section 53(5) of the Stamp Act 1894 (Qld) provided that no transfer was to 'be valid either at law or in equity unless the name of the … transferee (was) written therein in ink' at the time of execution. The section further declared a blank transfer to be 'absolutely void and inoperative'. The trial judge found that the transfer was executed to afford security for a loan of $1,200 provided by Petrie (the second respondent), who took possession of the transfer and duplicate certificate of title from the Breskvars. In September 1968 Petrie inserted the name of his grandson, Wall (the first respondent), as transferee and shortly thereafter procured registration of the transfer. On 31 October 1968, Wall contracted to sell the land to Alban Pty Ltd (the third respondent). On 7 November 1968 Wall executed a transfer to Alban Pty Ltd, which acted in good faith without notice of the earlier transaction. The trial judge found that Petrie and Wall were acting fraudulently (Wall being affected by the fraud of his agent Petrie), in an attempt to cheat the Breskvars out of their land.

In December 1968 the Breskvars discovered that Wall had become registered as proprietor and accordingly lodged a caveat against further dealings with the land. On 9 January 1969 Alban Pty Ltd lodged its transfer for registration, but registration could not take place by reason of the Breskvars' caveat. The Breskvars (the appellants) sought a declaration that the transfer was void by reason of s 53(5) of the Stamp Act, an order that the entry of Wall's transfer in the register be cancelled, and damages.]

Barwick CJ: … The first named respondent is the now registered proprietor of the said land for an estate in fee simple free of incumbrances. [His Honour summarised Queensland's indefeasibility provisions (5.XX) and continued:]

These sections are to my mind central to the Torrens system of title by registration: they make the certificate conclusive evidence of its particulars and protect the registered proprietor against actions to recover the land, except in the specifically described cases. Section 44 complements these provisions by providing that the registered proprietor holds the land absolutely free from all unregistered interests except (a) 'in the case of fraud' which means except in the case that the registration as proprietor was obtained by the proprietor's own fraud – see *Assets Co Ltd v Mere Roihi* [1905] AC 176 (b) in the case of a proprietor claiming the same land under a prior certificate of title or under a certificate of title issued under Pt III of the amendment of the Act in 1952, ie, a certificate based on a possessory title or under a prior registered grant (c) in the case of right of way or other easement omitted from or misdescribed in the certificate of title and (d) in the case of the wrong description of the land or of its boundaries. The substantial correspondence of these exceptions to s 123 is readily observed, though the correspondence clearly enough is not complete …

Proceedings may of course be brought against the registered proprietor by the persons and for the causes described in the quoted sections of the Act or by persons setting up matters depending upon the acts of the registered proprietor himself. These may have as their terminal point orders binding the registered proprietor to divest himself wholly or partly of the estate or interest vested in him by registration and endorsement of the certificate of title: or in default of his compliance with such an order on his part, perhaps vesting orders may be made to effect

the proper interest of the claimants in the land. Also s 124 gives the Supreme Court power to cancel an entry in the register book and to substitute another entry in the event of the recovery of any land by ejectment from a fraudulent proprietor or from any of the persons against whom an action of ejectment is not expressly barred by the Act. This is the only power of the Supreme Court to amend the register. See *Assets Co Ltd v Mere Roihi* [1905] AC 176 at 195; *Frazer v Walker* [1967] 1 AC 569 at 581. Section 85 of the Land Transfer Act 1952 of New Zealand with which the last-mentioned case was concerned gives the power of amendment upon the recovery of any land estate or interest by any proceedings whereas s 124 of the Act deals only with the recovery of land by action of ejectment. The suit for declarations and orders for amendment of the register brought by the appellant in *Frazer v Walker* was held by the Privy Council in that case to be an action for the recovery of land. The appellants' suit in this case was not an action of ejectment but it was, in my opinion, an action for the recovery of land and, in any case, so far as it concerned the first respondent was within the exceptions contained in s 123. Such a suit not within those exceptions would be effectively barred by s 123.

Thus, except in and for the purpose of such excepted proceedings, the conclusiveness of the certificate of title is definitive of the title of the registered proprietor.

That is to say, in the jargon which has had currency, there is immediate indefeasibility of title by the registration of the proprietor named in the register. The stated exceptions to the prohibition on actions for recovery of land against a registered proprietor do not mean that that 'indefeasibility' is not effective. It is really no impairment of the conclusiveness of the register that the proprietor remains liable to one of the excepted actions any more than his liability for 'personal equities' derogates from that conclusiveness. So long as the certificate is unamended it is conclusive and of course when amended it is conclusive of the new particulars it contains.

The Torrens system of registered title of which the Act is a form is not a system of registration of title but a system of title by registration. That which the certificate of title describes is not the title which the registered proprietor formerly had, or which but for registration would have had. The title it certifies is not historical or derivative. It is the title which registration itself has vested in the proprietor. Consequently, a registration which results from a void instrument is effective according to the terms of the registration. It matters not what the cause or reason for which the instrument is void. The affirmation by the Privy Council in *Frazer v Walker* of the decision of the Supreme Court of New Zealand in *Boyd v Mayor of Wellington* [1924] NZLR 1174 at 1223, now places that conclusion beyond question. Thus the effect of the *Stamp Act* upon the memorandum of transfer in this case is irrelevant to the question whether the certificate of title is conclusive of its particulars.

[Having found that the registration of Wall was defeasible for his own fraud, his Honour proceeded to consider the position of Alban Pty Ltd, the purchaser from Wall, which had obtained an unregistered transfer:]

The situation therefore immediately after the registration of the memorandum of transfer of 5 March 1968, by the endorsement of a memorial on the certificate of title was that the fee simple in the land was vested in the first respondent. It follows that it was not and still is not vested in the appellants. But according to the findings of the trial judge that registration was procured by the first respondent by his own actual fraud. Consequently, although the registered proprietor in whom the fee simple was vested, the first respondent did hold his estate subject to the rights of the appellants. He did not hold it on trust for the appellants but as between themselves and the first respondent they had a right to sue to recover the land and to have the register rectified, their ability to make such a claim being within s 124(d). But, as

the trial judge correctly points out, such a claim is an equitable claim enforceable by reason of the principles of the Court of Chancery. The appellants require the assistance of a court having equitable jurisdiction.

If there had been no transaction by the first respondent with the third respondent, the appellants would have been entitled to succeed against the first respondent. Whether or not the Supreme Court could have amended the register need not be decided. Clearly an order for the execution by the first respondent of a memorandum of transfer to the appellants and for delivery to them of the duplicate certificate of title could have been ordered: and that order appropriately enforced.

But the purchase by the third respondent bona fide for value and without notice intervened before that equitable right of the appellants was fulfilled. The third respondent thus acquired an equitable interest in the land. The ability to create and the validity of an equitable estate in land the title to which is under the Torrens system were fully established in *Barry v Heider* (1914) 19 CLR 197. See also *Great West Permanent Loan Investment Co v Friesen* [1925] AC 208. The interest of the third respondent in the land was competitive with that of the appellants as persons deprived of their land by fraud. Their claim to the assistance of a court of equity whether regarded as a mere equity or an equitable interest in the land was not in its nature paramount or superior to that of the third respondent: nor in my opinion was that of the third respondent over that of the appellants which I think was an equitable interest in the land … There is thus a competition between the respective interests of the appellants and of the third respondent to be resolved on equitable principles.

Those principles are well established. See *Rice v Rice* (1854) 2 Drew 73; 61 ER 646; *Shropshire Union Railways & Canal Co v R* (1875) LR 7 HL 496; *Lapin v Abigail* (1930) 44 CLR 166; *Abigail v Lapin* (1934) 51 CLR 58; [1934] AC 491. The creation of the appellants' interest is prior in point of time. It arose at the time the first respondent became the registered proprietor. The circumstance that the memorandum of transfer by virtue of which the registration was obtained was executed in breach of the Stamp Act and void did not, in my opinion, prevent the appellants' right to sue the respondent arising. The priority of the creation of that right will only be lost by some conduct on the part of the appellants which must have contributed to the assumption, false as the event proved, upon which the holder of the competing equity acted when that equity was created. Here the appellants armed the second respondent with the means of placing himself or his nominee on the register. They executed a memorandum of transfer, without inserting therein the name of a purchaser; they handed over the relevant duplicate certificate of title and they authorised the second defendant, if occasion arose for the exercise of his powers as a mortgagee, to complete and register the memorandum of transfer. It seems to me that the actual decision of their Lordships in *Lapin v Abigail* governs this case. Here, as there, it can properly be said that 'the case becomes one of an agent exceeding the limits of his authority but acting within its apparent indicia'. The appellants therefore lose the priority to which the prior creation of their interest in the land would otherwise have entitled them.

The third respondent also sought to postpone the equity of the appellants by reason of their failure to lodge a caveat to protect their interest in the land as mortgagors. But having regard to what I have already said there is no need for the third respondent to place any reliance on that circumstance. However, I have recently expressed myself in relation to the effect of the failure of a person to lodge a protective caveat and find no need to repeat or amplify what I have written in *J & H Just (Holdtngs) Pty Ltd v Bank of New South Wales* (1971) 125 CLR 546.

I agree with the conclusion of the trial judge that the right of the appellants to recover their land from the first respondent should be postponed to the equitable interest therein of the third respondent as a purchaser bona fide for value and without notice. Consequently the order of the Supreme Court was correct.

In my opinion, the appeal should be dismissed.

Menzies J: … It is apparent, therefore, that there are two objections to whatever title Wall has. The first is that it was obtained illegally by the use of an invalid instrument made in breach of s 53(5) of the Stamp Acts; the second is that it was obtained by his own fraud. The appellants can, I have no doubt, displace Wall's title. To succeed, however, at the expense of Alban Pty Ltd, they must go further than they have to go against Wall. They must show either that Wall had no title at all, or, that their claim is to be preferred to that of Alban Pty Ltd.

The claim of Alban Pty Ltd is that it holds a transfer from Wall to carry out a purchase of the land, made for valuable consideration by Alban Pty Ltd from Wall, and made, so far as Alban Pty Ltd was concerned, in good faith, without notice of any rights of the appellants. Their rights came to the notice of Alban Pty Ltd only when a caveat to prevent the registration of the transfer to it by Wall had been lodged. The learned trial judge found that Alban Pty Ltd was a purchaser in good faith and for valuable consideration without notice of the appellants' rights.

In support of their claim that Wall is not the registered proprietor, the appellants call in aid certain passages from the judgment of Dixon J in *Clements v Ellis*… *Clements v Ellis* was a case decided under the Transfer of Land Act (Vic) but the provisions of the Real Property Act (Qld) are, with one exception to which I will refer later, substantially the same. What Dixon J said has been followed in New South Wales and in Victoria: *Caldwell v Rural Bank of New South Wales* (1951) 53 SR (NSW) 415, and *Davies v Ryan* [1951] VLR 283.

Since these decisions, however, the Privy Council has decided *Frazer v Walker.* In their opinion in this case their Lordships made no reference to *Clements v Ellis,* although it had been cited, but they did apply the decision of the majority in *Boyd's* case, preferring the judgment of the majority to the dissenting judgments of Springer and Salmond JJ. Their Lordships [1967] 1 AC 569 at 584 said:

> They consider that *Boyd's* case was rightly decided and that the *ratio* of the decision applies as regards titles derived from registration of void instruments generally. As regards all such instruments it established that registration is effective to vest and to divest title and to protect the registered proprietor against adverse claims.

It is important, however, to observe what their Lordships meant by the words 'all such instruments' in the passage which I have just cited. They meant void instruments whereby the name of the person had been registered without fraud in respect of an estate or interest. This appears clearly from the reference to *Assets Co Ltd v Mere Roihi,* on the preceding page, and from the statement that the main relevant difference between the majority and the minority in *Boyd's* case was whether the *Mere Roihi* case established 'the indefeasibility of title of a registered proprietor who acquired his interest under a void instrument, or whether it is only a bona fide purchase from such a proprietor whose title is indefeasible'.

Frazer v Walker was not a case of conflict between unregistered interests. In that case mortgagees, who had registered a mortgage from registered proprietors to which one signature was a forgery, sold the land under their power of sale to a purchaser who was duly registered as proprietor. The only fraud in the case was that of one of the registered proprietors who forged the name of her husband, a co-proprietor with her. Her fraud afforded no statutory basis for impeaching the title of the mortgagees when they were registered, or, of the registered

proprietor from them. Both the mortgagees and the registered proprietor acted in good faith and without knowledge of the forgery. The decision in *Frazer v Walker* cannot, therefore, govern this case. Indeed, one may perhaps be excused from wondering how the former registered proprietor, who suffered from his wife's forgery, could ever have hoped to succeed against the newly registered proprietor who took a transfer from registered mortgagees. The problem of competition for registration never arose in that case. Indeed, it is a case which would have fallen fairly and squarely within the statement of Dixon J in *Clements v Ellis* …

Nevertheless, *Frazer v Walker* is important here in establishing that, if and to the extent that earlier decisions were to the effect that an indefeasible title cannot be acquired by the registration of a void instrument, they have lost their authority. It must now be recognised that, in the absence of fraud on the part of a transferee, or some other statutory ground of exception, an indefeasible title can be acquired by virtue of a void transfer. It seems to me to follow that, where there is fraud or one of the other statutory exceptions to indefeasibility, a transferee does, by registration of a void transfer, obtain a defeasible title.

In this case, as I have already indicated, Wall, although he became registered proprietor, clearly enough did not obtain an indefeasible title. He obtained registration by the fraudulent use of an invalid instrument. It is the significance of his becoming registered in those circumstances that matters here.

The first critical question which I pose is, therefore, whether, when Wall became registered as proprietor of the land, the appellants ceased to be the registered proprietors. With the guidance of *Frazer v Walker* about the effect of the registration of void instruments, I have reached the conclusion that they did, and I think so regardless of whether the transfer was invalid by virtue of s 53(5) of the Stamp Acts, or, that, by reason of fraud, the title acquired was defeasible. The registration was of an instrument executed by the appellants as registered proprietors, albeit in breach of law, and, upon its registration, they ceased to be registered proprietors …

This is not a case where it is possible to apply *Gibbs v Messer* [1891] AC 248, where, as the Privy Council has explained, there was no real registered proprietor at all but only a fictitious person. After the registration of Wall as registered proprietor the appellants' rights were no longer those of registered proprietors but were simply to impeach the defeasible title which Wall had obtained by that registration. Furthermore, as I read s 53(5) of the Stamp Acts, the breach of law seems to lie in the execution of the instrument and not in its use. I therefore reserve any question arising out of the illegal use of an instrument to obtain registration in the name of the law breaker. *Frazer v Walker* was not concerned with illegality on the part of those becoming registered.

[His Honour proceeded to hold that as the appellants had executed a blank transfer in breach of the Stamp Act which enabled Wall to become registered, they should be postponed to the later interest of Alban Pty Ltd.]

The learned trial judge decided that the claim of the appellants must be postponed to that of Alban Pty Ltd and I would, for the reasons which I have given, dismiss this appeal from his judgment.

Walsh J: In my opinion, the principles laid down in *Frazer v Walker* as to the indefeasibility of a registered title, where the instrument by means of which registration is obtained is void, are applicable in the present case notwithstanding that it has been found here that there was fraud by which the transferee Wall was affected. The effect of the fraud upon the rights of the parties must, of course, be considered. But it is a different question from that which is raised by the non-compliance with the provisions of the Stamp Acts. In so far as the appellants, in addition to their reliance upon fraud, base their claim upon the contention that the transfer

was rendered void by s 53(5) of the Stamp Acts, I am of opinion that the principles stated in *Frazer v Walker* preclude them from succeeding. I am of opinion that those principles require the conclusion that when the transfer was registered then, as the learned trial judge said, 'the registration of Wall as the registered proprietor was effective to vest the title in him and to divest the title of the plaintiffs'. Wall was not a person who had nothing and, therefore, could grant nothing to a person with whom he dealt. Although what he had may have been vulnerable because of fraud to a claim by the appellants to have restored to them their former rights, it cannot be said that nothing had passed from the appellants to Wall.

I must consider now the effect of the fraud which was found to have been practised upon the appellants …

In my opinion, the appellants would be entitled, as between themselves and Wall, to have the registered title restored to them because of the fraud by which he was found to have been affected. He could not defeat their claims by reliance upon his registered title … But in the circumstances of this case, the appellants were not entitled in my opinion to take proceedings on the footing that they remained entitled to the legal estate. They could not assert an unconditional right to recover both possession of the land and the registered title to it. The right that they had was in my opinion of the nature of an equitable right. It was a right to ask a court to compel Wall as the holder of the registered title to deal with it in such a way that he would obtain no benefit from the fraud that had been practised on the appellants. In so far as they sought to have the legal title transferred back to them, that relief (if no right of any third party had to be considered) could no doubt have been granted but, I should think, only upon terms that they repaid the loan, which they asserted in their amended statement of claim they were willing and had offered to do. The rights which the appellants had by reason of the fraud were rights enforceable primarily against Wall as a party (through his agent) to the transaction with them and as the holder of the registered title acquired by means of the transfer. But it is important to examine the nature of their rights, not in order to determine what relief could be obtained against Wall, but to ascertain whether any relief can be obtained against Alban. In this respect what I have so far said may be summed up by stating that the provisions of the Stamp Acts did not prevent the registration of the transfer from divesting the legal estate from the appellants and vesting it in Wall and that the right of the appellants against Wall to have the legal estate restored to them was, in my opinion, an equitable and not a legal right. It is not necessary in this case, in my opinion, to enter into the question whether the appellants should be regarded as having an equitable estate in the land or as having 'an equity unaccompanied by an equitable interest' or, in other words, 'a mere equity as distinguished from an equitable estate': see *Latec Investments Ltd v Hotel Terrigal Pty Ltd (In Liq)* (1965) 113 CLR 265 at 277, 285. I am of opinion that, if it be assumed that the appellants had an equitable estate or interest in the land after their transfer had been registered, that interest is not entitled to priority over the interest which Alban acquired in the land. If the latter interest is to be considered as an equitable interest, arising out of the contract for the purchase of the land made by it with the registered owner of the land without notice of any defect in his title and completed by payment of purchase money and the obtaining of a transfer, Alban is entitled, in my opinion, to priority over the interest of the appellants. In my opinion, the principles enunciated in *Butler v Fairclough* and in *Abigail v Lapin,* require the conclusion upon the facts of this case that the interest of the appellants, although prior in time, is postponed to the interest of Alban …

[**Windeyer** and **Owen JJ** concurred with Barwick CJ. **Gibbs** and **McTiernan JJ** delivered judgments reaching the same conclusions.]

Appeal dismissed.

5.51 Questions

1. Would a decision in favour of the Breskvars in this case necessarily have been inconsistent with the decision in *Frazer v Walker* [1967] 1 AC 569; 1 All ER 649, given that the title of the registered proprietor, Wall, was defeasible for fraud? Was the endorsement of the principle of immediate indefeasibility part of the *ratio decidendi*? Do the judgments differ in any way in their treatment of the effect of registration of a void instrument? See Note (1972) 46 *ALJ* 357. What interest did the Breskvars retain in the land after the registration of Wall as proprietor? Why did that interest not prevail against the unregistered interest of Alban Pty Ltd? On this aspect of the case, see Sackville, 'Competing Equitable Interests in Land Under the Torrens System — A Postscript' (1972) 46 *ALJ* 344 at 346–8.
2. While the shift from deferred to immediate indefeasibility is the most significant turning point in the operation of the Torrens system, the policy issues and the consequences of the rule change were not discussed in the leading cases of *Frazer v Walker* and *Breskvar v Wall*, where the question was treated as one of statutory interpretation. In earlier authorities, deferred indefeasibility had been supported by arguments from policy as well as statutory interpretation. See, for example, Dixon J in *Clements v Ellis* (1934) 51 CLR 217 at 237; Salmond J in *Boyd v Mayor of Wellington* [1924] NZLR 1174 at 1205. It has been left to commentators to advance policy justifications for immediate indefeasibility. See, for example, the following observations by Sackville:

> It cannot be emphasised too greatly that the case for immediate indefeasibility is not based on irrefutable logic, but must depend on value judgments concerning the weight of conflicting policies. For example, in the forgery situation there is no denying that 'the court's protection of the rare forgery victim has been secured at the very heavy price of disturbing other basic securities and functions of the registration system': Taylor, 'Scotching *Frazer v Walker*' (1970) 44 *ALJ* 248, p 251. Security of title is undoubtedly a basic aim of the Torrens system and a registered proprietor is insecure to the extent that his or her signature can be forged to a registrable instrument and the certificate of title can be obtained by the forger. Yet deferred indefeasibility potentially threatens the security of all titles, since an innocent purchaser always runs the risk of having title impeached on the ground that registration of that title was based on a void instrument. Ultimately the most convincing rationale for immediate indefeasibility lies in the proposition that no purchaser of Torrens system land should be required to investigate the history of the vendor's title or to make inquiries that are burdensome or difficult. Any other view increases the cost and complexity of all conveyancing transactions, as well as detracting from the goal of security of title. If a purchaser taking a registrable transfer is required to ascertain at his or her peril the true identity of the person signing the transfer, an unduly onerous burden is placed on the purchaser. It is not a complete answer to point to the assurance fund, since monetary compensation is not always a satisfactory substitute for title to land and gaining access to the fund is often a protracted and worrying process.

Moreover, unless an instrument void for reasons other than forgery is capable of supporting an indefeasible title, a purchaser may well be required to make a variety of detailed inquiries to protect against possible adverse claims arising after registration. To a lesser extent the courts probably have been influenced by a belief that it is rather easier for a registered proprietor to protect himself against forgery than for a purchaser to do so and, furthermore, that a person defrauded by his own solicitor or relatives should suffer to a greater extent than the other innocent party.

3. Would purchasers need to investigate the history of the vendor's title if deferred indefeasibility were the rule? In a transaction, there may a defect in the vendor's root of title (for example, the vendor's registered title was procured by a forged instrument), or a defect in the current transaction (for example, the instrument given to the purchaser is forged). Under both immediate and deferred indefeasibility, purchasers are protected against a defect in their vendors' root of title. If for example, V registers a forged transfer from O, and then executes a transfer to P who registers it, P gets an indefeasible title under both rules. P can safely deal with V as registered owner, so does not need to investigate the history of V's title. The choice of rule matters only if the defect is in the current transaction (for example, a forged transfer from V to P). By registering the transfer without fraud, P gets an indefeasible title under the rule of immediate indefeasibility. But if deferred indefeasibility applies, P's title would be defeasible. Indefeasibilty is 'deferred' until P grants an interest to another registered proprietor in a later transaction. Should purchasers be expected to take steps to ensure that the instrument which they present for registration is duly executed by the registered owner and valid in all respects? Would such a rule require purchasers to make inquiries that are 'unduly burdensome or difficult'?
4. Do you agree that it is easier for a registered proprietor to take steps to prevent fraudulent dealings than it is for the purchaser (or more usually, the mortgagee) who registers a forged instrument? A five-member bench of the Ontario Court of Appeal in *Lawrence v Maple Trust Co and Wright* (2007) 51 RPR (4th) 1, 84 OR (3d) 94, 220 OAC 19 reached the opposite conclusion. The court adopted an interpretation of ss 78(4) and 155 of the Land Titles Act (Ont) that is consistent with deferred indefeasibility, for reasons of statutory interpretation, consistency with the authorities and policy. Gillese JA (with whom all members of the court agreed) said at [57]–[58]:

> Further and most importantly, in my view, deferred indefeasibility is also preferable for policy reasons. Under the theory of immediate indefeasibility, the innocent homeowner has no defence to a mortgagee's action for possession. The homeowner is exposed to the loss of her home through eviction with the only available remedy being to make a claim for loss of value of the property from the Fund. The idea that a person who buys a specific parcel of land with a specific house on it should be compensated in damages runs contrary to the notion that real property, in such circumstances, is not fungible. To see a lender compensated in damages does not offend that same notion.
>
> Moreover, unlike the intermediate owner, the homeowner has no opportunity to avoid the fraud. Ms Lawrence had no ability to discover

that her home was being fraudulently sold and mortgaged. By contrast, Maple Trust made the decision to advance money and had the opportunity to avoid the fraud. By interpreting the Act in accordance with the theory of deferred indefeasibility, the law encourages lenders to be vigilant when making mortgages and places the burden of the fraud on the party that has the opportunity to avoid it, rather than the innocent homeowner who played no role in the perpetration of the fraud.

The Ontario Court of Appeal evaluated deferred and immediate indefeasibility as different approaches to the allocation of losses arising from title frauds. Does immediate indefeasibility reduce the incentive for mortgagees to ensure that they are dealing with the registered proprietor? See O'Connor, 'Immediate Indefeasibility for Mortgagees: A Moral Hazard?' (2009) 21 *Bond LR* 133; Griggs, 'Resolving the Debate Surrounding Indefeasibility Through the Eyes of a Consumer' (2009) *APLJ* 260; Carruthers, 'Indefeasibility, Compensation and Anshun Estoppel in the Torrens System: The Solak Series of Cases' (2012) 20 *APLJ* 71; Peterson, 'Are all Torrens Transactions Equal? A Focus on the Efficiency of the Indefeasibility Accorded to Torrens Mortgages' (2011) 19 *APLJ* 280. Queensland and New South Wales have amended their legislation to deny indefeasibility to mortgagees who fail to take reasonable steps to check the identity of the person purporting to deal as mortgagor: see **5.78**. The New Zealand Law Commission has recommended that mortgagee's registered titles should be defeasible in these circumstances: Review of the Land Transfer Act (2010), paras 2.19–2.24 and recommendation R4.

5.52 Doubts about the policy soundness of immediate indefeasibility continue to be aired, prompted by high rates of identity fraud, and the losses suffered by owners evicted from their homes and deprived of their land because someone has forged a transfer or, more commonly, a mortgage. See, Toomey, 'Fraud and Forgery in the 1990s: Can Our Adherence to *Frazer v Walker* Survive the Strain?' (1995) 4 *Canterbury Law Rev* 424; Mason, 'Indefeasibility: Logic or Legend?' in Grinlinton, pp 17–19; Greenwood and Jones, 'Automation of the Register: Issues Impacting on the Integrity of Title' in Grinlinton, p 323. Australian courts have maintained the view that immediate indefeasibility facilitates land transactions by providing certainty, and is fundamental to the Torrens system as a system of title by registration: see, for example, *Conlan v Registrar of Titles* at [158], [163], [196]; *Black v Garnock* [2007] HCA 31 at [72]; *Solak v Registrar of Titles* [2011] VSCA 279 at [39]; *Perpetual Ltd v Barghachoun* [2010] NSWSC 108 at [25]; see further, Low and Griggs, 'Immediate Indefeasibility: Is It Under Threat?' (2011) 19 *APLJ* 222. For an illuminating analysis of the competing values in the policy debate over deferred and immediate indefeasibility, see Harding and Hickey, 'Bijural Ambiguity and Values in Land Registration Systems' in S Bright (ed), *Modern Studies in Property Law Vol 6*, Hart, 2011, p 285.

Immediate indefeasibility in the states and territories

5.53 In *Breskvar v Wall* (1971) 126 CLR 376, the High Court relied on arguments of statutory interpretation in support of its adoption of immediate indefeasibility in the context of the Queensland provisions. This raised questions as to whether the differently worded

provisions of other Torrens statutes should be interpreted as having the same effect. In South Australia the application of the principle of immediate indefeasibility is more doubtful by reason of SA, s 69(b). Section 69 provides that the title of the registered proprietor shall be absolute and indefeasible subject to, inter alia:

> (b) In the case of a certificate or other instrument of title obtained by forgery or by means of an insufficient power of attorney or from a person under some legal disability, in which case the certificate or other instrument of title shall be void: Provided that the title of a registered proprietor who has taken bona fide for valuable consideration shall not be affected by reason that a certificate or other instrument of title was obtained by any person through whom he claims title from a person under disability, or by any of the means aforesaid …

The subsection was considered by O'Loughlin J in *Wicklow Enterprises Pty Ltd v Doysal Pty Ltd* (1986) 45 SASR 247. His Honour read the subsection as preserving the concept of deferred indefeasibility in the case of a disposition from a person under a legal disability. However, in respect of the title of a registered proprietor who has taken bona fide for a valuable consideration by any of the other means referred to in the subsection, his Honour held that the title so acquired is immediately indefeasible.

This approach was rejected in *Rogers v Resi-Statewide Corp Ltd* (1991) 101 ALR 377 as being unnecessary for the earlier decision and as inconsistent with the history of the section and the mischief which it was introduced to remedy. Von Doussa J (at 382) held that deferred indefeasibility would 'best promote the purpose or object for which the provision was enacted': see Moore, 'Interpretation of the Real Property Act' (1988) 11 *Adel LR* 405. However, the Full Bench of the South Australian Supreme Court has rejected these arguments and confirmed the approach of O'Loughlin J: *Whittem v Acardi* (1992) 59 SASR 57. An application to the High Court was refused: (1993) 67 ALJR 514. The High Court held that an appeal would involve the construction of a Torrens Act with no equivalent except in the Northern Territory and that the issue turned 'to a significant extent upon punctuation and syntax and, in our view, involves no real question of principle': per Deane J at 514, delivering the judgment of the court. However, Deane J went on to state the court's preference for the construction adopted by the South Australian Full Court. It would seem, therefore, that immediate indefeasibility is restored as the basic position in South Australia: see Wikrama-Nayake, 'Immediate and Deferred Indefeasibility' (1993) 67 *Law Inst J* 393. The Full Court's decision was followed in *Tsirikolias v Oakes* (1993) 169 LSJS 249 and *Public Trustee v Paradiso* (1995) 64 SASR 367. In *Lansen v The Honourable Justice Olney (acting as Aboriginal Land Commissioner)* (1999) 169 ALR 49, Sackville J commented (at 75):

> Subject to one exception, this line of authority brings South Australia … into line with the construction of the Torrens legislation in other States and Territories, notwithstanding that none has any equivalent to s 69II … That is to say, a registered proprietor who obtains registration in good faith and for value on the basis of an instrument that is void will ordinarily be entitled to an absolute and indefeasible title notwithstanding the invalidity of the instrument or dealing by which he or she obtains registration … The exception in South Australia, to which I have referred, is that where a registered proprietor has obtained registration from a 'person under disability', s 69II [now s 69(b)] appears to deny the proprietor the benefits of immediate indefeasibility … In addition, it may be that a volunteer cannot claim the protection of the indefeasibility provisions of Torrens legislation.

5.54 Controversy about indefeasibility has not confined itself to South Australia. In *Chasfild Pty Ltd v Taranto* [1991] 1 VR 225, Gray J took the view that the cases establishing immediate indefeasibility were of limited significance for Victoria because of material differences between the Victorian legislation and that of Queensland and New South Wales. Section s 44(1), a provision unique to Victoria, provides:

> Any folio of the Register or amendment to the Register procured or made by fraud shall be void as against any person defrauded or sought to be defrauded thereby and no party or privy to the fraud shall take any benefit therefrom.

Gray J held that the subsection makes it clear that 'fraud' is not confined to the fraud of the registered proprietor or his or her agent, and that accordingly, a registered title procured by use of a forged instrument is defeasible. That interpretation was rejected in the subsequent decisions of Hayne J in *Vassos v State Bank of South Australia* [1993] 2 VR 316 and Smith J in *Eade v Vagiozopoulos* [1993] V ConvR 54-458, and by the Victorian Court of Appeal in *Pyramid Building Society v Scorpion Hotels Pty Ltd* [1988] 1 VR 188. The decisions in both Victoria and South Australia, which promote a consistent national adoption of immediate indefeasibility, were welcomed by commentators: Teh, 'Deferred Indefeasibility of Title in Victoria?' (1991) 17 *Mon LR* 77; MacCallum, 'Return to Immediate Indefeasibility of Title' (1992) 66 *Law Inst J* 970; Schultz, 'Judicial Acceptance of Immediate Indefeasibility in Victoria' (1993) *Mon LR* 327.

Instruments void for defects other than forgery

5.55 The effect of registration in rendering void instruments indefeasible is not confined to forgeries: *Story v Advance Australia Bank Ltd* (1993) 31 NSWLR 722 at 736. Other examples of void or voidable instruments leading to indefeasible title on registration are *Morton v Black* (1986) 4 BPR 9164 (where an unauthorised alteration by the mortgagor's solicitor did not affect the rights of the mortgagee); *Broadlands International Finance v Sly* (1987) 4 BPR 9420 (which concerned the registration of a document purporting to be executed under a power of attorney which was actually created after the execution of the relevant document); *Spina v Conran Associates Pty Ltd* [2008] NSWSC 326; NSW ConvR ¶56-218 (registration of mortgage executed by attorney acting beyond the powers conferred by a power of attorney); *Consolidated Development Pty Ltd v Holt* (1986) 6 NSWLR 607 (registration of an instrument invalid at common law under the rule against perpetuities). In *Horvath v Commonwealth Bank of Australia* [1999] VR 643, a mortgage given by a minor intended to secure moneys owing under a loan contract that was void by force of statute was held to be indefeasible; see **5.116C**. See also *Co-operative Property Developments of Australia Limited (in liq) v Commonwealth Bank of Australia* [1992] 1 Tas R 308, where the registration of an invalidly executed mortgage was held to give the mortgagee an indefeasible title in the absence of fraud.

5.56 At common law, a deed was rendered void if altered in a material way after execution. This was known as the rule in *Pigot's Case* ((1614) 11 Co 26b; 77 ER 1177). Registration cures an instrument invalidated by the rule by reason of a material alteration: *Karacominakis v Big Country Developments Pty Ltd* (2000) 10 BPR 18,235: *Barton v Upton* [2000] TASSC 20; *Paradise Constructors & Co Pty Ltd v Poyser* (2007) 20 VR 294. Note that in New South Wales, the rule in *Pigot's Case* has been abrogated by statute: Conveyancing Act 1919 (NSW) s 184. In *Boyd v Mayor of Wellington* [1924] NZLR 1174, a void proclamation purporting to acquire land under statutory power conferred a valid title on registration. The result has been criticised as

having the effect of preventing the setting aside of unlawful action taken in purported exercise of statutory authority: Whalan, *Centennial Essays*, p 277. On the question of whether action can be brought against the public authority as registered proprietor by the deprived former registered owner, see 5.101–5.102.

Indefeasibility of the terms in a registered instrument

5.57C **Mercantile Credits Ltd v Shell Co of Australia Ltd**
(1976) 136 CLR 326; 9 ALR 39
High Court of Australia

Gibbs J: The respondent is the lessee of land at Adelaide, now owned by Celtic Agencies Pty Ltd, on which is erected a service station and garage. The appellant is the mortgagee of that land. The lease to the respondent was registered under the Real Property Act 1886, as amended (SA) (the Act) on 2 February 1969. It contained two covenants under which the lessee was entitled upon notice to renew the term for three successive periods each of five years. That right of renewal was exercised, with the result that the term of the lease was extended so that it would expire on 1 March 1974 and that extension was registered on 30 August 1969. The mortgage in favour of the appellant was registered on 3 August 1973. Subsequently, on 15 February 1974, the respondent gave notice to Celtic Agencies Pty Ltd that it exercised its right to renew the term of the lease for a further five years, and on 23 April 1974 Celtic Agencies Pty Ltd executed an extension of the lease in registrable form. This extension has not been registered. Celtic Agencies Pty Ltd defaulted in its obligations under the mortgage and on 31 May 1974 the appellant gave notice of its intention to sell the land.

[The proceedings were commenced after the respondent, in July 1974, lodged a caveat claiming to be entitled to the registration of an extension of lease until 1 March 1979, and forbidding the registration of any dealing with the estate and interest of Celtic Agencies Pty Ltd unless such dealing was expressed to be subject to the respondent's claims. The appellant took out an originating summons seeking a declaration that the extension of lease was not binding on it as mortgagee and that it was entitled to exercise its power of sale free from any leasehold estate in the respondent. **Sangster J** dismissed the summons and held that the respondent was entitled to registration of the extension of lease.]

The appellant now claims to be entitled to exercise its power of sale under the mortgage free from any leasehold interest in the respondent. The respondent on the other hand claims to be entitled to have the extension registered. The question is which prevails — the title of the respondent arising from the exercise of the right of renewal or the title of the appellant under the mortgage.

It is not in doubt that the lease is entitled to priority over the mortgage since the former was registered before the latter (see s 56 of the Act). The appellant, however, contends that the right of renewal was not an integral part of the lease, and was not registrable, and that priority is given by s 56 only to the term of the lease and not to the right of renewal or to any extended term resulting from the exercise of that right … The registration of an instrument does not in all cases give priority or the quality of indefeasibility to every right which the instrument creates.

Speaking generally, the Act would not appear to be intended to render indefeasible a personal right created by a covenant which, although contained in a registered instrument, in no way affects the estate or interest in land with which the instrument deals …

It then becomes necessary to consider the nature of a covenant for renewal. It is well settled that such a covenant runs both with the land and the reversion … [T]he right of renewal is an incident of the lease and directly affects the nature of the term itself. However, it is clear that when the right is exercised 'a new lease, a new demise' comes into being.

The question whether the right of renewal gained priority over the mortgage by reason of the prior registration of the lease is, in my opinion, by no means an easy one. On the one hand it may be said that the right of renewal is an integral part of the estate vested in the lessee, and upon registration, obtains the same protection as the term itself. This was the view taken in *Pearson v Aotea District Maori Land Board* [1945] NZLR 542, by Finlay J. He said (at 550): 'A right of renewal is something which affects and is, in a sense, definitive of the term of a lease'. He went on:

> The right of renewal is adjectival in relation to the term granted. It constitutes a material qualification of the term, and is therefore something more than a mere ancillary right. It is in other words an integral part of the estate shown by the Register as vested in the lessee.

On the other hand, it might be said that what the lessee seeks in substance is to have priority according to the new lease which came into existence as a result of the exercise of the right of renewal, and that the new lease is not itself registered and gains no priority because it has its origin in a right conferred by a registered instrument.

It does not appear ever to have been found necessary in Australia to decide whether *Roberts v District Land Registrar of Gisborne* (1909) 28 NZLR 616, and *Pearson v Aotea District Maori Land Board* should be followed and that question was left open by members of this court in *Travinto Nominees Pty Ltd v Vlattas* (1973) 129 CLR 1; [1972–73] ALR 1153. The present case, unlike those two New Zealand cases, is not one in which the grant of the right of renewal was illegal or void and we are concerned not with a question of indefeasibility but with one of priority; although the two questions appear to depend on the same considerations, it is unnecessary to consider what the position would have been if the covenant had been void before the registration of the lease. In my opinion the judgment of Finlay J in *Pearson v Aotea District Maori Land Board*, so far as it is relevant to the present case, was correct. The right of renewal is so intimately connected with the term granted to the lessee, which it qualifies and defines, that it should be regarded as part of the estate or interest which the lessee obtains under the lease, and on registration is entitled to the same priority as the term itself. I am assisted to this conclusion by two further considerations. First, it would be unjust and inconvenient if a right to renew contained in a registered lease could be defeated by the subsequent registration of a mortgage, and it is difficult to attribute to the legislature the intention that rights of renewal, which of course are a common incident of leases and are often of considerable value, should be liable to be defeated in this way. If the provisions of the Act are ambiguous, they should be construed in a way that will avoid inconvenience and injustice. Secondly, the provisions of s 119 of the Act appear to me strongly to support the view that it was intended that rights of renewal contained in a lease should be protected by the registration of the lease.

… Under this section, a right to renewal contained in a lease for a term not exceeding one year to a tenant in actual possession is valid as against (*inter alios*) a subsequent mortgagee

if the lease is registered or protected by caveat and it would be an extraordinary anomaly if a similar right contained in a registered lease for a greater term received no protection.

On behalf of the appellant, reliance was placed on the express provision in s 117 of the Act that a right to purchase contained in a lease shall be binding, and it was submitted that this implies that it was intended that a right to renew should not be binding. However, a covenant giving a right to purchase is essentially different in character from a covenant for renewal. It is 'not a covenant concerning the tenancy or its terms'; it 'does not directly affect or concern the land' and it is 'not a provision for the continuance of the term, like a covenant to renew': *Woodall v Clifton* [1905] 2 Ch 257 at 279; [1904–7] All ER Rep 268 at 272 … Since such a covenant is collateral, and does not affect the estate or interest in land granted by the lease, the registration of the lease, in the absence of a provision such as that contained in s 117, would not (or at least might not) confer any priority or indefeasibility upon the covenant or the right which it creates. The provisions of s 117 were necessary to make it clear that the protection of the Act extends to a right for or covenant to purchase the land described in a lease but the same reason did not exist to make specific provision for the protection of covenants for renewal …

For these reasons I consider that the respondent's right of renewal prevails over the appellant's mortgage. The appellant's rights as mortgagee can only be exercised subject to the respondent's right of renewal and any extension resulting from its valid exercise.

I would dismiss the appeal.

Stephen J: … To confer indefeasibility upon rights of renewal contained in registered leases does violence neither to the general scheme of the Act nor to the objects which it seeks to attain. The existence of such rights of renewal will be apparent upon any inspection of the register and those who deal in the land may thus learn of the extent to which the reversion is thereby contingently affected. What will be registered, and protected by that registration, is a right conferred by covenant which touches and concerns the land and runs with the land; it is an incident of the lease creating an interest in the land and forming a part of the lessee's interest in that land. To accord it the protection afforded by registration is thus in no way inconsistent with the tenor of the legislation and gives rise to no anomalies.

Barwick CJ:

… In *Travinto Nominees Pty Ltd v Vlattas,* the court decided that a covenant which was illegal when made, obtained no validity or protection from the registration of the instrument in which it was found because its illegality denied the possibility of its specific performance. The position of covenants for renewal of the term of the lease which are not illegal was left as an open question. It now falls for decision.

It is now settled that an estate or interest purportedly created by an instrument, void under the general law, derives validity and indefeasibility from the registration of the instrument purporting to create that estate or interest: see *Frazer v Walker* [1967] 1 AC 569; [1967] 1 All ER 649, and the New Zealand decisions of which their Lordships there approved. But the specific enforceability of the covenant for renewal, assuming its validity either under the general law or because of its presence in the registered instrument, will be decided under the general law. The interest in the land derived from the covenant will be coextensive with the extent to which the covenant could be ordered to be specifically performed. We are not troubled in this case with a question which on occasions can arise, namely, whether, upon its proper construction, the covenant is merely personal to the covenantee or runs with the land. Here, clearly, the right of renewal is not personal and does run with the land. Further, the lease

had not been transferred: the lessee was at all times the registered proprietor of the interest in the land created by the memorandum of lease.

In my opinion, because of the specific enforceability of the right to renew, if exercised, the registration of the memorandum of lease containing the covenant for renewal created an interest in the land commensurate with the extent of the covenant. The memorandum of lease in its entirety so far as it affected any estate or interest in the land obtained the priority given by s 56, and the title of the registered proprietor of the lease, including that interest in the land derived from the covenant for renewal, became absolute and indefeasible by virtue of s 69.

[**Barwick CJ** agreed that the appeal should be dismissed.]

Appeal dismissed.

5.58 Questions

1. To what extent is a registered lease indefeasible? Does indefeasibility attach to all the terms of the lease or only to some? If the latter, how is the dividing line to be drawn? What kinds of covenants might be invalid or unenforceable notwithstanding registration of the lease containing them? In *Mercantile Credits*, Gibbs J says that indefeasibility does not extend to an option to purchase in a registered lease because it is not a covenant concerning the tenancy or its terms, or a provision for the continuance of the term: (1976) 136 CLR 326 at 346. It is different if the Act contains a provision such as SA, s 117 which specifically provides for an option to purchase to be included in a registered lease. If the option is exercised, the lessor is bound to execute a transfer to the lessee, and to that extent, the option is indefeasible. New South Wales and the Australian Capital Territory have similar provisions: NSW, s 53(3); ACT, s 83; SA, s 117.

   Does an option to renew, under the general law, create a legal or equitable interest in the lessee? If the latter, how can an equitable interest attract the benefits of indefeasibility? If the right to renew a lease is expressed to be dependent on the tenant observing the terms and conditions of the lease (as is usually the case), does registration of the lease relieve the lessee or his or her assignee of the obligation to perform those terms and conditions before being entitled to exercise the option? See Robinson, p 265.

2. Barwick CJ said registration of the lease would confer indefeasibility on the covenant for renewal only if it was specifically enforceable under the general law. Rossiter comments:

   Section 42 of the Real Property Act 1900 only renders title to an estate indefeasible upon registration. The section is not a panacea to cure all the ills in the estate itself, and even to begin to argue about the indefeasibility of a covenant is to misconceive the scope of the section. It is equally irrelevant to make the specific enforceability of an option to renew an issue as the Real Property Act is not concerned with the registration of equitable interests and, indeed, it is almost a contradiction in terms to refer to the registration

> of an equitable interest … Thus, registration of a lease ought to have no effect at all upon an option to renew; the enforceability of covenants should depend entirely upon the general law and the fact that an option to renew is also an equitable interest in land ought not to be allowed to cloud the issue [Rossiter, 'Options to Acquire Interests in Land — Freehold and Leasehold' (1982) 56 *ALJ* 576 at 626].

3. In *Karacominakis v Big Country Pty Ltd* (2000) 10 BPR 18,235; [2001] NSWCA 2, the lessee argued that the covenant to pay rent was rendered unenforceable by the rule in *Pigot's Case* notwithstanding registration of the lease: see **5.51** above. Giles JA (with whose judgment Handley and Stein JJA agreed) said the following about the effect of registration of a lease on the enforceability of the lessor's covenant to pay rent (at 18,247):

> Payment of the agreed rent is an essential part of the transaction between the lessor and lessee. The lessor gives the lessee an estate or interest in land in return for the lessee giving the lessor rent, rent being 'a sum issuing out of the land demised payable by the lessee to the lessor for the right to occupy that land and all that went with it': *Jungheun v Wood* [1958] SR (NSW) 327 at 330 per Owen J. The covenant to pay rent, to adopt the words of Blanchard J in *Duncan v McDonald*, is a condition upon which the leasehold interest is held and intimately related to the lessee's title created upon registration; taking up concepts found in *Travinto Nominees Pty Ltd v Vlattas* and in *Mercantile Credits Pty Ltd v Shell Co of Australia Ltd,* because of its connection with the continuance of the lessee's interest in the land, it delimits or defines that interest.

4. What if state legislation provided that an option to renew contained in a lease of service station premises was to be void unless the lease were approved by the Industrial Commission? Would the option to renew be enforceable against (a) the lessor; and (b) a later mortgagee in these circumstances? If not, why not? In *Travinto Nominees Pty Ltd v Vlattas* (1973) 129 CLR 1; [1972–73] ALR 1153, the High Court held that where there was statutory illegality, registration could not validate the option; compare *Pearson v Aotea District Maori Land Board* [1945] NZLR 542. Would it make any difference if the legislation did not declare the option to renew void, but merely imposed a penalty on parties entering into a lease containing such an option? In either case does it matter whether the party seeking to exercise the option to renew is the original lessee or the assignee of the lease whose assignment has been registered?

5. In the *Mercantile Credits* case Barwick CJ stated that the specific enforceability of a covenant for renewal contained in a registered lease was to be decided under the general law. Does this principle apply to other indefeasible interests? What if the option to renew in a registered lease had been granted by the lessor, a trustee, in breach of trust? Could the option to renew be enforced against a later mortgagee? How would such a case differ from the *Mercantile Credits* case? How would it differ from *Travinto Nominees v Vlattas*? Compare *Fels v Knowles* (1906) 26 NZLR 604; Davis, 'Options in Leases — A Further Exegesis' (1977) 9 *Well LR* 77; see also Whalan, *The Torrens System in Australia*, 1982, pp 114–19.

6. If an option to renew contained in a registered lease is indefeasible, what is the status of the lease that results from the exercise of the option prior to registration? What is the status of any options contained in such an unregistered lease? In *Re Eastdoro Pty Ltd (No 2)* [1990] 1 Qd R 424, the Supreme Court of Queensland held that the second of a series of options to renew contained in a registered lease was enforceable against a proprietor of the land who obtained registration after registration of the lease. This was despite the original lease having expired by effluxion of time and the lease created by the exercise of the first option not having been registered. The High Court refused leave to appeal the decision in *Re Eastdoro*: see also *Tenstat Pty Ltd v Permanent Trustee Aust* (1992) 28 NSWLR 625; *Re Maisons Pty Ltd* [1991] 2 Qd R 61. The decision imposes on purchasers the need to investigate registered leases for which the original term has expired, to discover if the options to renew have been exercised.

What is indefeasible in a void mortgage?

5.59 The indefeasibiltity of a forged mortgage on registration does not extend to a personal right created by a mortgage covenant, such as the mortgagor's obligations under a deed of guarantee: *Mercantile Credits Ltd v Shell Co of Australia Ltd* (1976) 136 CLR 326 at 343 (X.XX); *PT Ltd v Maradona Pty Ltd* (1992) 25 NSWLR 643. Does registration of a forged mortgage entitle the mortgagee to enforce the mortgagor's covenant to pay? The charge created on registration (the property right) is conceptually distinct from the covenant to pay, even where they are contained in the same instrument: *French v Queensland Premier Mines Pty Ltd* [2006] VSCA 287 at [13] per Maxwell P, cited with approval by Kiefel J on appeal: *Queensland Premier Mines Pty Ltd v French* [2007] HCA 53 at [35]. The mortgage in that case purported in effect to secure all moneys owing by the mortgagor to the mortgagee. The High Court interpreted Qld, s 62 to mean that when the mortgage was transferred, the transferee was entitled to the amounts specified in the mortgage but did not get the benefit of amounts owing under collateral loan agreements. Those debts would need to be separately assigned.

There are three different lines of authority on the question of whether the mortgagor's covenant to pay is made enforceable on registration of a void mortgage. Harding calls them the 'full indefeasibility' approach, the 'no indefeasility' approach and the 'limited indefeasibility' approach: B Harding, 'Under the Indefeasibility Umbrella: The Covenant to Pay and the 'All Moneys' Mortgage' (2011) 19 *APLJ* 231 at 243–5.

The 'full indefeasibility' approach was adopted in In *Pyramid Building Society v Scorpion Hotels* [1998] 1 VR 188 at 196, Hayne JA (with whom Tadgell and Brooking JJA concurred) held that the indefeasibility of a registered mortgage 'plainly' extends to the mortgagor's covenant to pay. In *PT Ltd v Maradona Pty Ltd* (1992) 25 NSWLR 643 at 681 Giles J said that the mortgagee's ability to recover the debt by suing on the personal covenant to pay was so connected with the mortagee's property interest that it would attract the benefit of indefeasibility. See also *Conlan v Registrar of Titles* (2001) 24 WAR 299 at 311–13; *Parker v Mortgage Advance Securities* [2003] QCA 275 at [6]; *Hilton v Gray* [2007] QSC 401 at [55]; *Clairview Developments Pty Ltd v Law Mortgages Gold Coast Pty Ltd* [2007] QCA 141 at [40]; *Small v Gray* [2004] NSWSC 97 at [75]–[80]; *Public Trustee v Paradiso* (1995) 64 SASR 387 at 388. On this view, the mortgagee would be able to hold the registered owner personally

liable for the debt that exceeds the amount recovered by the mortgagee on sale. Stoljar argues that such a result is inconsistent with the indefeasibility provisions which protect estates and interests in land, not contractual covenants: See also J Stoljar, 'Mortgages, Indefeasibility and Personal Covenants to Pay' (2008) 82 *ALJ* 28 at 37.

The 'no indefeasibility' approach holds that while the mortgagee's security interest is indefeasible, the covenant to pay is not. In *Grgic v Australian and New Zealand Banking Group Ltd* (1994) 33 NSWLR 202 at 224, Powell JA (Meagher and Handley JJA agreeing) declared that, notwithstanding that the registered proprietor's land was charged with the moneys secured by the bank's mortgage, he was not liable to the mortgagee on the personal covenant to pay in the forged mortgage. See also *Chandra v Perpetual Trustees Victoria Ltd (No 1)* (2007) 13 BPR 24,675; ANZ Conv R 481; [2007] NSWSC 694 at [29]; *Provident Capital Ltd v Printy* (2008) 13 BPR 25,199; [2008] NSWCA 131 at [32]; *Yazgi v Permanent Custodians Ltd* [2007] NSWCA 240 at [13]; *Perpetual Trustees Victoria Ltd v English* [2010] NSWCA 32 at [68]; *Van Den Heuvel v Perpetual Trustees Victoria Ltd* (X.XX) at [140]. Harding notes that it is implicit in this approach that when a forged mortgage is registered, the indefeasibility provisions generate a debt, along with the charge that secures it. Therefore the enforceability of a registered mortgage does not depend upon the existence of an enforceable covenant to pay: M Harding, 'Property, Contract and the Forged Registered Mortgage' (2010) 24 *NZULR* 21 at 30–3. Grattan suggests that the view that the covenant to pay does not attract indefeasibility is indirectly supported by the High Court's holding in *Gumland Property Holdings Pty Ltd v Duffy Bros Fruit Market (Campbelltown) Pty Ltd* (2008) 234 CLR 237; 244 ALR 1 at [104], that the mortgagor's covenant to pay does not touch and concern the land. Such a covenant, being merely personal, is unlikely to attract the benefit of indefeasibility: Grattan, 'Recent Developments Regarding Forged Mortgages: The Interrelationship Between Indefeasibility and the Personal Covenant to Pay' (2009) 21 *Bond LR* 43 at 52–4.

The 'limited indefeasibility' approach holds that the personal covenant to pay is made enforceable by registration only to the extent necessary to make the mortgagee's security interest effective. The New Zealand Court of Appeal in *Duncan v McDonald* (1997) 3 NZLR 669 held that the covenant to pay in a forged mortgage made indefeasible on registration is enforceable only to the extent necessary to make out the mortgagee's charge on the land. At 682–3, Blanchard J said:

> What registration of an otherwise void mortgage gives the innocent mortgagee in these circumstances is the right of recourse to the security for such value as the land may have. The charged property is rendered liable for the debt by the registration. The covenants to pay and supporting covenants given by the registered proprietor then become operative to such extent only as is necessary to enable realisation of the security and recovery of the advance or part thereof by that means.

Blanchard J further declared that the mortgagor could not hold the mortgagor personally liable for the debt in reliance on the covenant to pay in a forged mortgage: at 682–3. See also *Dollars & Sense Finance Ltd v Nathan* [2007] NZCA 177 at [20]. Brett Harding argues that the limited indefeasibility approach is preferable, as the mortgage interest conferred on registration must encompass the covenants which provide the basis for quantifying the debt it secures and make the security effective. While *Duncan v McDonald* has not been endorsed by Australian courts, some of the judicial statements which emphasise the dual nature of the covenant to pay could be interpreted as consistent with the 'limited indefeasibility' approach: Peterson, 'Are All Torrens Transactions Equal? A Focus on the Efficiency of the Indefeasibility Accorded to

Torrens Mortgages' (2011) 19 *APLJ* 280 at 314; Carruthers, 'Indefeasibility, Compensation and Anshun Estoppel in the Torrens System: The Solak Series of Cases' (2012) 20 *APLJ* 71. For example, In *Perpetual Trustees Victoria Ltd v Tsai* [2004] NSWSC 745 at [17], Young CJ in Eq said:

> [T]he reason why the personal covenant is considered to be part of the package of rights protected by the indefeasibility principle is that it maps out or may map out the extent of the quantum of the interest of the mortgagee in the land and in that sense is closely related to title requiring it to be considered as to limiting the rights. That seems to be what Giles J is saying in *Maradona* (above) at 681. See also what Bryson J said in *Challenger Managed Investments Ltd v Direct Money Corp Pty Ltd* [2003] NSWSC 1072 at [52]–[53].

5.60 The distinction between the mortgage as an interest in land and the covenant to pay as a contractual obligation has other consequences. A registered mortgage can subsist as a charge on land after the debt has been fully repaid, until the mortgagor exercises his or her right to call for a discharge of the mortgage. A mortgage can also be discharged without discharging the covenant to pay. The effect of the mortgage on the covenant to pay depends upon the wording of the instrument of discharge. In *Grundy v Ley* [1984] 2 NSWLR 467, a discharge in the Registrar-General's approved form was held to be effective only to release the land from the charge, while leaving the mortgagor's personal liability intact. In *Groongal Pastoral Co Ltd v Falkiner* (1924) 35 CLR 157, the discharge of mortgage was couched in terms that indicated a full and complete discharge of all personal obligations: see Scott, 'Indefeasibility and the Forged Mortgage' [1998] *NZLR* 531.

Indefeasibility and the all moneys mortgage

5.61 In *Frazer v Walker* [1967] 1 AC 569 (5.40C), the Privy Council determined that a registered mortgagee was a 'registered proprietor' within the scope of the paramountcy provision of the New Zealand Torrens statute, and accordingly enjoyed an indefeasible title on registration of a forged mortgage (assuming that the fraud was not brought home to the mortgagee). The traditional instrument of mortgage included a statement of the principal sum lent and an acknowledgment by the mortgagor that the loan moneys had been advanced by the mortgagee. This type of mortgage is effective on registration to create a charge for the secured sum: see, for example, *Royalene Pty Ltd v Registrar of Titles* [2008] Q ConvR 54-689; QSC 64; In recent years, the 'facility' mortgage has become the most common form. It may secure moneys advanced under an existing loan agreement, or it may be expressed to secure all moneys owing or payable from time to time by the mortgagor under any present or future loan agreement. The loan agreement is held separately from the Torrens register. If the loan agreement is a forgery, and no moneys have actually been advanced to the person shown as mortgagor, is there any debt that is secured by the mortgage? In *Perpetual Trustee Victoria Ltd v Tsai* (2004)?12 BPR 22,281; [2004] NSWSC 745, Young CJ in Eq expressed the view that the indefeasibility provisions do not entitle a mortgagee to enforce a mortgage where the debt arises under a separate loan agreement which is void for forgery and no funds were received by the person named as mortgagor. See also *Provident Capital Ltd v Printy* (2007) 13 BPR 24,603; NSW ConvR ¶56-810; [2008] NSWCA 131; *Chandra v Perpetual Trustees Victoria Ltd* (2007) 13 BPR 24,675; [2008] NSWSC 173.

5.62 It is clear that a registered mortgage comprises not just the covenants in the registered instrument but others which are incorporated into it. Statutory provisions in some jurisdictions

allow a party to lodge with the Registrar a memorandum of common provisions which can then be incorporated by reference into instruments which are subsequently lodged for registration: see, for example, Vic, ss 91A, 91B; NSW, s 80A. In cases after *Perpetual Trustee Victoria Ltd v Tsai*, the enforcement of a forged facility mortgage usually turned on whether the registered instrument of mortgage effectively incorporated the separate loan agreement. See, for example, *Yazgi v Permanent Custodians* (2007) 13 BPR 24,567; ANZ ConvR 566; NSW ConvR ¶56-195; [2007] NSWCA 240; *Vella v Permanent Mortgages Pty Ltd* (2008) 13 BPR 25,343; NSW ConvR ¶56-221; [2008] NSWSC 505. The question of what amounts to incorporation is discussed in J Stoljar, 'Mortgages, Indefeasibility and Personal Covenants to Pay' (2008) 82 *ALJ* 28; Grattan, 'Recent Developments Regarding Forged Mortgages: The Interrelationship Between Indefeasibility and the Personal Covenant to Pay' (2009) 21 *Bond LR* 43.

5.63 In *Perpetual Trustees Victoria Ltd v English* (2010)?14 BPR 27,339; [2010] NSWCA 32, a husband and wife had been separated for 13 years but contined to be jointly registered as owners of land. At the husband's request, the mortgagee made a loan offer to the husband and the wife. To accept the loan, the terms of the loan offer stated that 'you, and if there is more than one person all of you, must sign'. The terms of the offer defined 'you' to mean 'the person or persons to whom the offer is made'. The husband forged the wife's signature on the acceptance document and on the mortgage, which became registered. The mortgage was expressed to secure moneys payable under a 'secured agreement', being agreement 'between me or us, or any one of us, and you'. The Court of Appeal held that the loan offer was capable of acceptance only by the signature of both of the parties to which it was made. Therefore, no agreement ever came into existence between the couple and the mortgagee, or between the husband and the mortgagee. Accordingly, there was no 'secured agreement', and no debt secured by the mortgage. When reading the following case decided by the Court of Appeal shortly after *English*, consider the reasons for the difference in outcome.

5.64C **Van Den Heuvel v Permanent Trustees Victoria Ltd**
Supreme Court of New South Wales (Court of Appeal)
[2010] NSWCA 171

[A husband and wife were jointly registered as proprietors of land in New South Wales. Without the wife's knowledge, the husband forged her signature to an 'all moneys' mortgage and loan contract, both bearing the same date. The mortgage was registered and was not defeasible for fraud. The wife received no money from the loan advance. Upon default, the mortgagee sought an order for possession and judgment for the debt against both the husband and the wife. The husband did not defend the proceedings. The wife appealed from the trial judge's order granting the mortgagee possession. The Registrar-General appealed against being found liable to compensate the wife, partly on the ground that the wife should not have been held liable under the mortgage. The two appeals were consolidated. One of the questions was whether the mortgage secured a debt. As in previous cases, the court treated this question as a matter of construction of the documents.]

Young JA: … It is now necessary to consider the terms of the relevant mortgage in some detail. The mortgage itself was fairly innocuous. However, to understand it, one needs to look not only to the mortgage, but also to the memorandum filed by Perpetual's solicitors under s 80A of the

Real Property Act 1900 (setting out standard clauses deemed to be included in the mortgage) and the underlying Loan Agreement.

This is because, instead of adopting the traditional format of a simple mortgage document dealing with a security given to secure a definite sum lent plus interest, Perpetual elected to use the contemporary computer friendly format of the mortgage referring to monies due under the underlying Loan Agreement.

An additional complication is that a so-called 'plain English' document was employed. This endeavoured to deal with the situation of a loan to two persons by defining the word 'I' as embracing 'us' but forgetting to define 'we' and sometimes using 'we' instead of 'I'. If 'plain English' is to be employed in a document, great care must be taken to see that precision is not lost as it was in the case of the present mortgage.

One more comment must be made before turning to the text of the document. After the primary judge's decision, this court decided *Perpetual Trustees Victoria Ltd v English* [2010] NSWCA 32; (2010) 14 BPR 27,339. That case was a forged mortgage case on documents very close, but not identical, to those used in the present case. The *English* case must be considered binding on us (indeed no-one argued to the contrary), and enables answers to be given on some of the questions posed in the present appeal.

The mortgage is dated 11 November 2004. It includes the provisions of Memorandum 3161863.

Clause 2.2 of the memorandum include[s] the charging clause, viz: 'The Mortgage is security for payment to you of the Secured Money …'. It also contains the covenant to repay, viz: 'I agree to pay the Secured Money as and when the Secured Money becomes due and payable in accordance with the provisions of each Secured Agreement or the Mortgage'.

The mortgage form describes both the wife and her husband as 'Mortgagor'. The mortgage form states that the 'Mortgagor':

> mortgages to the mortgagee all the mortgagor's estate and interest in the land specified above …

One then needs to turn to the definitions in cl 1.1 of the Memorandum.

'I' is there defined as having the meaning 'the person or persons named and described as the Mortgagor in the Mortgage Form and "me" and "my" and, if there is more than one of us, "us" has a corresponding meaning.'

'You' is defined to mean 'the person or persons named and described as the Mortgagee in the Mortgage Form and "your" has a corresponding meaning.'

'Mortgage Form' means 'the form of Mortgage which I have executed which refers to and incorporates this document.'

'Secured Agreement' means 'any present or future agreement between me or us, or any one of us, and You'.

'Secured Money' means:

- all amounts which are payable at any time or are contingently owing or payable to you under a Secured Agreement; and
- Enforcement Expenses.

Clause 1.2 includes as the penultimate bullet point:

> a reference to any thing (including without limitation, to the Secured Money or to the Property) is a reference to the whole or any part of it and a reference to a group of things or persons is a reference to any one or more of them.

I will refer to this as 'the Group Clause'.
Clause 11.7 of the Memorandum is headed 'Joint and Several liability' and provides: 'If I am [sic] comprised of more than one person, each person will be liable individually, and every two or more persons are liable jointly, for all promises and obligations under the Mortgage.' [Presumably the drafter meant to write 'I is' rather than 'I am' as the word 'I' does not mean a person, but an expression, a trap for the 'plain English' user].
It is also vitally necessary to look into the precise terms of the underlying Loan Agreement. This also bears date 16 November 2004. It is said to supersede the preliminary loan approval of 19 October 2004, a document not in evidence.
Clause 1 of the Loan Agreement is as follows:

> **LOAN**
>
> We hereby agree to lend money to you which you agree to borrow and repay. The terms of the Loan are as set forth in this agreement (including the Schedule) and the Terms and Conditions Booklet (Non-Consumer Credit Code) ('Terms and Conditions').

The terms 'Borrower' and 'You' appear next to the names of 'Peter Harry Van Den Heuvel' and 'Elizabeth Van Den Heuvel'.
The schedule to the Loan Agreement provides for the interest rates to be charged and beside the words 'New Security' is the following:

> Registered First Mortgage by Peter Harry Van Den Heuvel and Elizabeth Van Den Heuvel over 18 McIntosh Street QUEANBEYAN NSW 2620 being the land more particularly described in Certificate of Title 24/12658.

The Loan Agreement incorporates a booklet of Terms and Conditions. Clause 1.1 of these Terms and Conditions defines 'You' to mean 'the Borrower or Borrowers', and 'your' has a corresponding meaning.

Clause 1.2 includes the Group Clause.

Clause 3 of the Terms and Conditions includes:

> Before a drawdown of your facility can be made:
>
> You must sign and return the Loan Agreement to our solicitors or settlement agent …

Clause 22.3 of the Terms and Conditions is as follows:

> **Joint and several liability**
>
> If the Loan is being made to more than one person, then each person will be liable individually, and every 2 or more persons are liable jointly, for all amounts due under the Loan. All of your obligations attach to your successors and permitted assigns.

[His Honour referred to *Perpetual Trustees Victoria Ltd v English* [2010] NSWCA 32 and continued:]

… Sackville AJA helpfully set out the basic principles that govern this type of case as follows:

1. Registration of a mortgage does not transfer the fee simple estate, but the mortgage takes effect as a security over the land: RP Act, s 57(1). Upon registration, the land

becomes liable as security in manner and subject to the covenants set forth in the mortgage: RP Act, s 41(1); *Provident Capital Ltd v Printy* per Basten JA (with whom Tobias and McColl JJA agreed) [2008] NSWCA 131; 13 BPR 25,199.[25].

2. Registration of a forged mortgage confers an indefeasible title on the mortgagee, provided that the mortgagee has not been party or privy to the fraud and no other exception to indefeasibility applies: *Breskvar v Wall* [1971] HCA 70; 126 CLR 376; *Yazgi v Permanent Custodians* [2007] NSWCA 240; 13 BPR 24,567 at [14], per Beazley JA (with whom Ipp and Tobias JJA agreed); *Pyramid Building Society (In Liq) v Scorpion Hotels Pty Ltd* [1998] 1 VR 188, at 191, per Hayne JA (with whom Brooking and Tadgell JJA agreed).
3. Registration of the mortgage does not necessarily ensure the validity of every term of the mortgage, irrespective of the relationship between the term and the estate or interest created by the mortgage itself: *Travinto Nominees Pty Ltd v Vlattas* [1973] HCA 14; 129 CLR 1, at 17, per Barwick CJ (with whom McTiernan and Stephen JJ agreed). Hence a personal right created by a covenant in a mortgage, such as a guarantee, is not rendered indefeasible by registration of the mortgage: *Mercantile Credits Ltd v Shell Co of Australia Ltd* [1976] HCA 9; 136 CLR 326, at 343, per Gibbs J; *PT Ltd v Maradona* (1992) 27 NSWLR 643.
4. In New South Wales, the view has been taken that a personal covenant in a registered but forged mortgage to pay the amount of the mortgage debt, where the debt exceeds the value of the property, is not protected by the indefeasibility provisions of the RP Act: *Grgic v Australia and New Zealand Banking Group Ltd* (1994) 33 NSWLR 202, at 224, per Powell JA (with whom Meagher and Handley JJA agreed); cf *Pyramid Building Society v Scorpion Hotels*, at 196, where a different view may have been taken.
5. The registration of a forged mortgage validates those terms of the mortgage which delimit or qualify the estate or interest of the mortgagee or are otherwise necessary to assure that estate or interest to the registered proprietor: *PT v Maradona*, at 679; *Yazgi v Permanent Custodians*, at [19]–[20].
6. It is necessary to construe the terms of a mortgage to determine the scope of the estate or interest in respect of which indefeasibility is conferred by registration of the mortgage: *Yazgi v Permanent Custodians*, at [22]. Thus whether registration of a forged mortgage allows the mortgagee to enforce its security interest in the land in relation to a debt or obligation arising under an agreement separate from the mortgage is a question of construction of the mortgage: *Westpac New Zealand Ltd v Clark* [2009] NZSC 73, at [43], per Blanchard, Tipping and Wilson JJ.
7. Generally speaking, if the mortgagee specifies a sum of money (plus interest) as the amount secured by the mortgage, the charge created by the mortgage will secure the amount so specified even if the document creating the indebtedness is void under general law principles: *Small v Tomasetti*.
8. However, if as a matter of construction, the mortgage does not take effect as a security over the land in relation to a claimed debt or obligation, registration of the mortgage will not entitle the mortgagee to exercise remedies, such as the power of sale, to enforce any such claimed debt or obligation: *Provident Capital v Printy*, at [50]–[52]; *Yazgi v Permanent Custodians*, at [25]ff. The question of construction may be particularly difficult where the registered mortgage refers to antecedent documentation which is not incorporated in the Torrens register and which may be invalid on general law principles.

… It is vital as between the wife and the Registrar General, and, to a lesser extent between the wife and Perpetual, as to whether the mortgage secured the money lent to the husband.

If it did, then, by operation of the indefeasibility principle, the wife's interest in the land can be realized by Perpetual; to recover the money it lent. If it did not, then the wife's interest is protected and she has little or no claim against the Registrar General.

As far as the husband is concerned, there is little difference. He either is bound by the mortgage or, if he is not, then, in equity, he will be considered under the same obligations as if he had signed the mortgage. This latter proposition is, in my view, the more technically correct way of stating the proposition that is sometimes put in a shorthand way by saying there is an implied agreement for a mortgage by conduct: *Mestaer v Gillespie* (1805) 11 Ves 231; 32 ER 1230; *Katsaitis v Commonwealth Bank of Australia* (1987) 5 BPR 12,049 at 12,052, *English* at [100].

Again, it must be noted that it is always open to a joint tenant to mortgage his or her aliquot share in the land if he or she can find a person willing to lend on that security. Under the Torrens System, such a mortgage, being a mere hypothecation, does not sever the joint tenancy. The security is over the mortgagor's interest alone. If the mortgagor predeceases the other joint tenants, the security ceases to exist over the land: *Lyons v Lyons* [1967] VR 169.

…

The decision in the *English* case … cannot simply be applied to the present case.

However, the *English* case does decide that the Group Clause means that the argument that 'I' means only the jointure of wife and husband should not succeed …

Thus I come back to the question as what was secured by the indefeasible mortgage.

This leads to the definition of 'Secured Money' set out earlier which means monies owing under a 'Secured Agreement.' 'Secured Agreement' is defined as 'any present or future agreement between me or us, or any one of us, and You'.

The only possible 'Secured Agreement' is the Loan Agreement. It was not signed by the wife, nor is it binding on her. However, the vital matter is whether, it being binding on the husband, the wife has (by virtue of indefeasibility) mortgaged her interest in the land because 'one of us' as named in the mortgage, that is the husband, by the Loan Agreement owes money to Perpetual.

It has been argued that because the Loan Agreement is drafted for both husband and wife to sign and only the husband signed it, it never came into effect. This argument is reinforced by reference to the condition in cl 3 of the terms and conditions noted above which required a return of the signed Loan Agreement before the loan was payable.

The cases cited to support this proposition are principally those decided in the area of guarantees, where, as a general rule, if a guarantee is to be given by four people and only three sign the documentation, the usual result is that the court will hold that the three signed on condition that the guarantee would, only operate after all had signed; see eg *Marston v Charles H Griffith & Co Pty Ltd* [1982] 3 NSWLR 294.

However, as I said in *Katsaitis* at 12,051, in each case the court must look at the intention of the parties. If the conclusion is that a person did not intend to take on an obligation unless others were also bound, then the document will not operate until all intended to be bound, have signed. However, this does not always follow.

The primary judge held [71] that it was not contemplated that the Loan Agreement was not binding until both Mr and Mrs Van den Heuvel had signed it. He said that there existed between Perpetual and the husband all of the essentials of a binding contract and the monies were advanced to him in accordance with its terms.

That finding was within the primary judge's mandate.

Moreover, as Mr Leopold submits in the instant case, Perpetual in paying over the money would know from past experience that wives' signatures are sometimes forged and that it

would at least have the husband bound by the documentation. On the husband's side, he knew he had forged his wife's signature to the documents and wanted the documents to be operative so as to receive the money he wanted.

With respect to Basten JA, I cannot draw the contrary inferences that he considers should be drawn.

In my view it follows that the conclusion must be that the parties (Perpetual and the husband) intended the documents to be operative even without the wife's signature. The balance of probabilities is that in the light of past history in the industry, the possibility that the wife's signature was forged or that the loan was unenforceable against the wife would have occurred to Perpetual. It would more likely than not accept that in that situation, so long as the husband was bound, it was commercially appropriate to lend out the money.

Thus, the monies were owing under a Secured Agreement and the mortgage catches up the wife's interest as part of the land charged.

Thus, the primary judge's view on this part of the case must be affirmed.

[**Hodgson JA** agreed with **Young JA** that the appeals should be dismissed. His Honour held that there was an implied agrement between Perpetual and the husband arising from the execution of a written document by the husband and the advancing of loan funds by Perpetual, and that the implied agreement fell within the definition of 'secured agreement' in the mortgage document. His Honour said that in *Perpetual Trustees Victoria Ltd v English*, an implied agreement would not have been secured by the mortgage because the mortgage in that case secured money owing under an agreement 'which I acknowledge in writing to be an agreement secured by the Mortgage': at [4]–[13]].

Bastan JA (dissenting) … Senior counsel for Perpetual invited the court to conclude that the loan and mortgage were intended to be binding agreements, whether or not they were signed by each of the borrowers and mortgagors respectively. In my view, that inference should not be drawn, the preferable inference being that Perpetual would not have advanced the money pursuant to the proposed facility unless both borrowers signed each document …

[His Honour reviewed the facts which, in his opinion, supported this inference:]

… Accordingly, it is probable that Perpetual intended that the financial arrangement only go ahead if both mortgagors were also identified as borrowers under the loan agreement.

… I would conclude that the loan agreement was not a binding agreement under the general law.

Indefeasibility

The second question is whether the loan agreement, despite its invalidity under the general law, obtained the benefit of indefeasibility, because it was secured by a registered mortgage which enjoys that benefit.

In *English*, Sackville AJA (with whom Allsop P and Campbell JA agreed) set out principles, said not to be in dispute, as to the effect of registration of a mortgage over land: at [68]. However, the mortgage in question in *English* included an element in the definition of 'Secured Agreement', not found in the present case, namely a reference to any present or future agreement 'which I acknowledge in writing to be an agreement secured by the Mortgage': at [76]. The court held that there was no such acknowledgment in writing and hence the default under the loan agreement was not secured by the mortgage …

Finally, it is necessary to consider whether the mortgage secured an 'implied' agreement between Mr van den Heuvel and Perpetual, manifested, as explained by Hodgson JA, 'by

the conduct of Perpetual and the husband in signing the loan agreement document … and advancing and accepting money conformably with the terms of that agreement' …

… [t]he mortgage expressly picks up an agreement between Perpetual and both, or either of, the mortgagors. That language is apt to catch an 'agreement' with Mr van den Heuvel alone. The question is whether the implied agreement between Mr van den Heuvel and Perpetual is an 'agreement' for the purposes of the definition of 'Secured Agreement' in the mortgage …

…

I would not allow Perpetual to rely upon this basis of liability. If it were permitted to rely upon an 'implied agreement', I would not consider such a legal construct to fall within the concept of 'agreement' in the mortgage. It is not a mortgage which secures all monies outstanding on any account or basis as between the mortgagors or either of them and Perpetual: it is limited to monies owing under an agreement. Like the court in English, I would construe that concept as applying to contractual arrangements entered into by the parties and not to agreements constructed by the law in the circumstances where the contractual arrangement has been held not to exist. For these reasons, there was no debt owing under the mortgage and Perpetual was not entitled to the relief it sought on the basis pleaded by it.

[The wife's appeal was dismissed. The appeal relating to compensation was allowed in part, to allow evidence as to the quantum of the wife's beneficial interest in the land.]

5.65 Questions

1. In *Van Den Heuvel*, as *English*, the husband forged the signature of the wife to a mortgage of their jointly owned land without her knowledge. What were the drafting differences that led to the mortgage being held enforceable against the wife in *Van Den Heuvel* but not in *English?*
2. What risk does the decision in *Van Den Heuvel* highlight for a person who holds land as a joint proprietor with another? Does the decision create a new form of 'sexually transmitted debt', in which a person may become liable for a co-owner's debts without having agreed to or signed anything at all? The Australian Law Reform Commission finds that case law suggests that women are more at risk of injustice than men from sexually transmitted debt: ALRC, *Equality before the Law: Women's Equality*, Report 69, Pt II, 1994, Ch 13. Would it have made any difference to the outcome in *Van Den Heuvel* if the joint owners had been a mother and son, or business partners?
3. Would the danger to the joint owner be greater if (as Hodgson JA accepts) an *implied* loan agreement can be secured by the mortgage?

5.66 In *Solak v Bank of Western Australia Ltd* [2009] VSC 82, the question of incorporation turned on the person to whom the documentation was addressed. An imposter pretending to be Tarik Solak, who had possession of his certificate of title and identity documents, procured a loan from the bank on the security of a registered mortgage over Solak's land. Clause 12 of the registered mortgage purported to secure to the mortgagee, 'the payment of the amount owing by you'. 'You' was defined in the mortgage as Tarik Solak. Clause 2.1 of the mortgage said that

'[y]ou, the mortgagor, agree that the terms and conditions are set out in a memorandum of common provisions and that the mortgage includes that document'. That memorandum said 'you' (the person named in the mortgage as the mortgagor) will pay to the Bank 'all money which you owe to the bank for any reason' under a bank document (defined to include any agreement or arrangement under which 'you' incur or owe obligations to the bank). The home loan contract identified the borrower as Tarik Solak and defined him as 'you'. Solak argued that the person described as 'you' in the mortgage was himself, the registered proprietor, while the 'you' in the loan agreement referred to the imposter who assumed the obligation to repay the loan. In rejecting Solak's arguments, Pagone J reasoned as follows at paras [14]–[17]:

> The Bank West Home Loan Contract identifies the borrower as Mr Tarik Solak … and, for the purposes of the contract, defines him as 'you'. It is that person who assumed the obligation to pay money albeit that he signed it on 16 March 2006 pretending to be the real Mr Solak. The force of Mr Solak's claim would seem, therefore, to depend upon whether there is, as a matter of construction, a mismatch between the 'you' referred to in the memorandum of common provisions and the Bank West home loan contract. The argument was that the latter is a contract entered into between Bank West and a person purporting to be Mr Solak but not Mr Solak whilst the memorandum of common provisions imposes upon the real Mr Solak, through registration of the mortgage, only those obligations actually assumed by him.
>
> I do not accept this to be the correct construction of the documents. The Bank West home loan contract is intended to come within the definition of 'Bank Document' in the memorandum of common provisions and, therefore, to be incorporated into the mortgage … 'You' in the definition of 'Bank Document' in the memorandum of common provisions is properly to be seen as a drafting device connecting the person named in the mortgage with the person named in another bank document as a means of identifying the document. In this case the person named in the mortgage is, of course, the registered proprietor but the person signing the mortgage as such is in fact the same as the person who signed the Bank West home loan contract as the real Mr Solak. It seems to me that the 'you' in the memorandum of common provisions which links the obligation to pay in the home loan contract with the security in the mortgage is the same both as a matter of drafting and as a matter of fact: the 'you' was the forger purporting to be Mr Solak in each document. The position is the same as if the memorandum of common provision had described Mr Solak by name.
>
> It is inherent in any forgery that the victim of the forgery has not assumed contractual obligations upon which he or she can be sued personally. It is, therefore, not an answer to the consequences of indefeasibility that there may be no personal obligations assumed by the true owner of the land where the covenant to pay is identified by the mortgage. In *Pyramid Building Society (In liquidation) v Scorpion Hotels Pty Ltd* Hayne J sitting in the Court of Appeal (with whom Brooking and Tadgell JJA agreed) observed:
>
> It has not been contended that the indefeasibility of the mortgage does not extend to the covenant for payment and it is plain that it does so extend.
>
> In this case, I consider the proper construction of the mortgage to be that the covenant to pay is found in the mortgage, incorporating, as it does, the memorandum of common provisions and, through it, the Bank West home loan contract. Accordingly, the mortgage, albeit forged, is effective as security. This conclusion is, in my view, consistent with the authorities relied upon for Mr Solak. The contrary outcomes in each of *Printy, Chandra* and *Tsai* depended upon the collateral agreement not having been incorporated into the mortgages. The contrary outcome in *Yazgi* depended upon the instrument of mortgage providing a narrower and overriding definition of 'mortgage debt' than that in the collateral

> document. In the case before me the mortgage document refers to, incorporates, and intends to incorporate, the obligations in the collateral document upon the stated assumption expressed in all three agreements that the person assuming the obligation and mortgaging the property is the same.
>
> Counsel for Mr Solak did not submit that I should adopt the broad view of the dicta from *Vella*; that is, it was not contended (in my view correctly) in this case that a covenant to pay obtained by forgery could not be enforced upon registration. The system of title by registration gives effect to the public policy in favour of the title standing in the register over other competing claims. The important public policy in the Torrens system of land titles was recently expressed to be that 'the land title register should be sufficient of itself to inform those concerned about the nature and extent of any outstanding interest in relation to the land'. The forger harmed both Mr Solak and the mortgagee but, upon registration of the mortgage, the mortgagee's title was secured and must have effect notwithstanding the impact against the interests of another innocent party [footnotes omitted].

If all the documentation referred to the same person, the real Tarik Solak, how did Solak incur any liability under the forged loan contract, which was a nullity at general law? See B Harding, 'Under the Indefeasibility Umbrella: the Covenant to Pay and the "All Monies" Mortgage' (2011) 19 *APLJ* 231 at 252–52. The reasoning in Solak has been criticised by commentators: M Harding, 'Property, Contract and the Forged Registered Mortgage' (2010) *NZULR* 21; Lane, 'Indefeasibility For What? Interpretive Choices in the Torrens System' in Moses, Edgeworth and Sherry, *Property and Security: Selected Essays*, Lawbook Co, 2009, p 149 at pp 161–3; Aitken, 'Indefeasibility and the Forged Mortgage' (2009) 32 *Aust Bar Rev* 253; Schroeder and Lewis, 'Indefeasibility of Title and Invalid All-Moneys Mortgages: Determining Whether Invalid Personal Covenants to Pay Are Protected Under the Indefeasibility Umbrella' (2010) 18 *APLJ* 185; Carruthers, 'Indefeasibility, Compensation and Anshun Estoppel in the Torrens System: The Solak Series of Cases' (2012) 20 *APLJ* 71.

5.67 The reasoning in *Solak* was found 'unpersuasive' by the New Zealand Supreme Court in *Westpac Banking Corporation v Clark* [2009] NZSC 73, a case which involved similar facts and materially similar loan documentation. The court said (at [49]):

> It is erroneous to interpret the loan contract as addressing the imposter and then to work backwards by transferring that interpretation to the registered documents merely because the language is common to all. The fact that 'you' in the loan contract is the imposter cannot possibly affect what 'you' means in the registered documents … The registration of a forged mortgage and the consequent indefeasibility of the charge cannot extend the scope of the intended linkage when the 'you' in the mortgage is the registered proprietor. The covenant to pay in the loan contract was not secured under the mortgage … its indefeasible charge secured nothing.

Their Honours said at [43]–[44] that the question had to be determined whether a particular unregistered document is one to which the mortgage document refers. A covenant in an unregistered loan agreement 'should be treated as incorporated only if the mortgage and the memorandum, read together as one registered document, must be interpreted as so requiring'.

Harding argues that there was no justification to support the finding in *Solak* that the parties to the mortgage intended to incorporate the terms of a loan agreement. He finds that Pagone J approached the question of incorporation as a property question, when cases such as *Westpac v Clark* and *Queensland Premier Mines Pty Ltd v French* (2007) 235 CLR 81 indicate that it

is a contract question, which requires the court to construe the mortgage to determine the intention of the parties: M Harding, 'Property, Contract and the Forged Registered Mortgage' (2010) *NZULR* 21 at 39–41.

Relief for the 'statutory mortgagor' under the Consumer Credit Code

5.68 The National Credit Code, which applies to regulated credit contracts made on or after 1 July 2010, is part of a national package which succeeds the uniform Consumer Credit Codes in state legislation; **X.XX**. Section 76 of the National Consumer Code empowers a court to re-open a contract, mortgage or guarantee if the court is satisfied that, in the circumstances at the time it was entered into or changed, it was unjust. If it reopens a transaction, the court's powers include making an order to discharge a mortgage: s 77(d). A predecessor provision of the New South Wales Consumer Credit Code, ss 70, was considered in *Van Den Heuvel v Perpetual Trustees Victoria Ltd* [2010] NSWCA 171; **X.XX**. The wife applied under s 70 to have a forged mortgage and loan agreement set aside on the grounds that as she did not enter into them, they were 'unjust credit contracts' within the meaning of the Consumer Credit Code (NSW) s 70. Young and Hodgson JJA found that the Code did not apply to the credit contract because the husband had declared for the purpose of s 11 that the credit was to be applied wholly or predominantly for business and investment purposes. Young JA expressed the view that an applicant who did not enter into a mortgage (because it was forged) is not entitled to apply under s 70. Hodgson JA thought it was arguable that a mortgage is entered into for the purposes of the Code when it is registered, but left the question open. Both judges expressed that even if such an application could be made, the contract or mortgage was not 'unjust' in the relevant sense, as the injustice of which the wife claimed arose from the consequences of registration rather than from the transaction. Basten CJ, in his dissenting reasons, observed that 'mortgagor' is not defined in the Code, and saw no reason to limit the scope of s 70 to exclude an applicant who is liable as a mortgagor and at risk of losing her land. The circumstance that the wife did not enter into the mortgage and had no opportunity to negotiate its terms was a relevant consideration in determining whether the transaction was unjust.

5.69 The approach of the majority to s 70 of the Code is consistent with authorities on the scope of relief from unjust contracts under Pt 2 of the Contracts Review Act 1980 (NSW), which is also dependent on the existence of a contract entered into by the applicant for relief. A mortgage based on a contract that is void for forgery is not subject to review under the Act: *Permanent Trustee Co Ltd v Frazis* [1999] NSWSC 319; *Perpetual Trustees Victoria Ltd v Cipri* [2008] NSWSC 1128; *Ford v Perpetual Trustees Victoria Ltd* [2009] NSWCA 186; *Permanent Custodians Ltd v Yazgi* [2007] NSWSC 279 (appeal allowed without submissions on this point in *Yazgi v Permanent Custodians Ltd* [2007] NSWCA 240); *Credit Connect Pty Ltd v Carney; Credit Connect Pty Ltd v Smit* [2010] NSWSC 910; *Perpetual Trustees Victoria Ltd v Van Den Heuvel* [2009] NSWSC 57. (The ruling of Price J on the Contracts Review Act argument was not appealed in *Van Den Heuvel v Perpetual Trustees Victoria Ltd* [2010] NSWCA 171.)

5.70 Section 38 of the uniform Consumer Credit Code provides that a mortgage must be in the form of a written mortgage document that is signed by the mortgagor and is not enforceable unless it complies with this requirement. Does the section render unenforceable a mortgage that was signed by a forger, and has been registered? See *Solak v Registrar of Titles* [2011] VSCA 279; **X.XX**.

Volunteers

5.71 For present purposes, a volunteer is one who does not give valuable consideration for his or her title, such as a donee under a gift or a devisee under a will. Under the general law a person who acquired a legal estate as a volunteer was subject to the equities which affected the donor or predecessor in title whether or not the donee had notice of those equities: *Re Nisbet and Potts' Contract* [1905] 1 Ch 391 (4.165); *Wilkes v Spooner* [1911] 2 KB 473; 4.166. By contrast, the bona fide purchaser for value of the legal estate without notice had 'an absolute, unqualified, unanswerable defence' against the claims of a prior equitable interest holder: *Pilcher v Rawlins* (1872) 7 Ch App 259 at 269; 4.164C. There was no issue of conscience in such a case and equity declined to interfere with the rights of the bona fide purchaser.

The position of a registered proprietor of Torrens title land which has been acquired as a volunteer has been the subject of some controversy in recent years. The Queensland and Northern Territory statutes expressly provide that a volunteer on registration obtains an indefeasible title: Qld, s 180; NT, s 183. In other jurisdictions, the matter has been decided as a question of statutory interpretation. The New South Wales Supreme Court has taken a different view to that of the Victorian and South Australian courts. Before the New South Wales Supreme Court's decision in *Bogdanovic v Kotef* (5.65C), it was generally accepted that the indefeasibility provisions did not protect a volunteer: see *Crow v Campbell* (1884) 10 VLR (Eq) 86; *Chomley v Firebrace* (1879) 5 VLR (Eq) 57; *Re the Land Tax Act; Ex parte Finlay* (1884) 10 VLR (E) 68; *Biggs v McEllister* (1880) 14 SALR 86; on appeal, 8 AC 314; Hogg, *Australian Torrens System*, p 823; *King v Smail* [1958] VR 273; *IAC (Finance) Pty Ltd v Courtenay* (1963) 110 CLR 550 at 572 per Kitto J.

The effect of denying indefeasibility to a volunteer is that the volunteer obtains a registered title that is as good as, but no *better* than that of the transferor. If the transferor's title was subject to equities enforceable against the transferor *in personam*, for example, an interest arising under a resulting or constructive trust, the equity would survive the registration of the transfer and be enforceable against the volunteer. If the transferor's registered title was defeasible for fraud, the volunteer would take only a defeasible title, with the result that a previous registered owner who had been deprived of land through the transferor's fraud would still be able to set aside the transfers and recover the land. The infirmities in the volunteer's registered title would not affect a subsequent purchaser for value, who would obtain an indefeasible registered title free of any equities that bound the volunteer.

Do the objects of Torrens system require extending the protection of indefeasibility to volunteers? A major object of the system is to facilitate market transactions by reducing the need for purchasers to make searches and inquiries to establish the quality of the title offered. To that end, the paramountcy and notice provisions provide that the registered owner takes free of prior equities. It is doubtful that volunteers rely on the register as a purchaser does, before accepting a gift. Baalman argued that the Torrens system is 'predominantly a purchaser's system' and that there is no need to protect volunteers who do not bear the risks of financial loss faced by purchasers: Baalman, *The Singapore Torrens System*, Singapore, 1961, p 86. Baalman's Singapore Torrens Act specifically denies the protection of indefeasibility for volunteers: Land Titles Ordinance 1956 s 28(30). Bradbrook, McCallum, Moore and Grattan, 5th ed, [4.320] find no compelling reason for granting indefeasibility to volunteers. Tooher and Dwyer argue (p 116) that registered volunteers need security of title if they are to invest in improvements to their land. For an overview of the arguments for and against indefeasibility attaching to volunteers, see Croucher, 'Inspired Law Reform or Quick Fix or "Well, Mr Torrens, What

Do You Reckon Now?": A Reflection on Voluntary Transactions and Forgeries in the Torrens System' (2009) 30 *Adel L R* 291; Histed, 'Fraud and the Volunteer: Harmonisation of Principle in Australia' (2007) 11 *J South Pacific L* 116; Atherton, 'Donees, Devisees and Torrens Title: The Problem of the Volunteer Under the Real Property Acts' (1998) 4 *Aust J Leg Hist* 121; Radan, 'Volunteers and Indefeasibility' (1999) 7 *APLJ* 197.

5.72C

Bogdanovic v Koteff

(1988) 12 NSWLR 472
Court of Appeal of New South Wales

Priestley JA: Young J dismissed a claim by Mrs Bogdanovic that she had a life interest in a house at 58 Annandale Street, Annandale. She has appealed to this Court against his decision.

The appellant and her late husband were friendly with Mr S Koteff. When he lived in Leichhardt, they paid rent to him for living in part of his house there. When he bought a house at 58 Annandale Street, Annandale, they moved with him and continued to pay him rent for the part of the house they used. The appellant's husband died in 1977. The appellant continued to live in Mr Koteff's house, as did he. Mr Koteff died in 1982. By his will he made Mr G Cklamovski his executor and his son Mr N Koteff his sole beneficiary. The house at 58 Annandale Street was subject to the provisions of the Real Property Act 1900. After probate of the will was granted to Mr Cklamovski a transmission application was duly registered pursuant to that Act, by which Mr N Koteff became the registered proprietor of the land. In May 1983, Mr N Koteff began proceedings by which he sought possession of the land from the appellant. She defended the proceedings, claiming that the property was held on trust for her on terms that she was entitled to reside there for the rest of her life, alternatively that she and Mr N Koteff were each beneficially entitled as tenants in common in the property in proportions to be determined by the court and alternatively again that she had a licence at law or in equity to remain living in the property until she died …

For the respondent Mr N Koteff it was argued that if the Court found that the appellant had equitable rights in the land against Mr S Koteff, and if they were likewise enforceable against Mr S Koteff's executor, nevertheless, upon the respondent's becoming the registered proprietor of the land, without notice of those rights, then the Real Property Act 1900 operated so that the land was in his hands free of any such rights …

The argument for the appellant recognised that on the face of s 42 and s 43 the respondent would hold his registered interest in fee simple free of any equitable rights of the appellant. It was submitted however that it appeared from other sections in the Act, and from various decisions, that s 42 and s 43 cannot be given the absolute force that in their isolation they appear to have. For this proposition *Frazer v Walker* [1967] AC 569 and *King v Smail* [1958] VR 273 were particularly relied on. It was then submitted that it had for many years been accepted by text writers of authority that although s 42 (and its equivalents in other jurisdictions which have Torrens System statutes) makes no express distinction between the measure of indefeasibility afforded to a volunteer and to a purchaser for value, the section was not intended (this being arrived at as a matter of construction) to give indefeasibility to the volunteer. A number of text writers, including Baalman in his *Commentary on the Torrens System in New South Wales* (1951) at 149–50, have expressed that view, which is retained in the current descendant of Baalman, *The Torrens System in New South Wales* by

Woodman & Nettle (1985) (looseleaf) at 347–8. Woodman & Nettle also retains (at those pages) Baalman's comment (at 150):

> … The general result is that, on registration of a voluntary transfer, the transferee (as is the case of a volunteer under the general law) occupies no better position than did his transferor. But once registered, he occupies a position quite as good; his title is indefeasible against all claims except such as would have prevailed against his immediate predecessor.

There are certainly authorities to support the appellant's assertion. *King* decided in terms that the Victorian Torrens System Act, the Transfer of Land Act 1954, did not confer upon a registered proprietor, being a mere volunteer, a title free from prior equities. *Frazer* also supports the appellant's submission that there is some limitation upon the absoluteness of s 42 and s 43, but only in the sense that a person having rights in equity against a registered proprietor may procure orders against that registered proprietor which will bring about the result that the proprietor's registered interest may be altered, as a result of equity, in acting upon his conscience, forcing him to submit to what in practical terms amounts to a correction of the register in favour of the person having the rights in equity against him.

If, however, *King* represented the law in New South Wales at the times relevant to the present case, the appellant would be entitled to succeed. The reasoning in *King,* in summary, was that when the Victorian counterparts of ss 42, 43, 96, 124 and 135 were read together, the references in them to a purchaser for value (taking the New South Wales sections as examples, in ss 42(1)(c), 124(d), 124(e) and 135) showed a general intention not to confer the benefit of indefeasibility upon volunteers. *King* is the latest of the cases cited by Woodman & Nettle (at 347–8) in support of the view stated in the text. *Frazer* however, took the more limited view that the sections from which the general proposition was derived by those who said volunteers were not within the meaning of s 42, did not support such a general proposition, but created only such exceptions to the general operative part of s 42 as were specifically stated in the sections themselves. Speaking for the Privy Council, Lord Wilberforce said (at 580–1) that the indefeasibility of title concept:

> … is central in the system of registration. It does not involve that the registered proprietor is protected against any claim whatsoever; … there are provisions by which the entry on which he relies may be cancelled or corrected, or he may be exposed to claims in personam. These are matters not to be overlooked when a total description of his rights is required. But as registered proprietor, and while he remains such, no adverse claim (except as specifically admitted) may be brought against him.

In New South Wales, at least two decisions at first instance have held the reasoning in *Frazer* applicable to the Real Property Act: see *Mayer v Coe* (1968) 88 WN (Pt 1) (NSW) 549; [1968] 2 NSWR 747 and *Ratcliffe v Watters* (1969) 89 WN (Pt 1) (NSW) 497; [1969] 2 NSWR 146.

In *Breskvar v Wall* (1971) 126 CLR 376 the High Court accepted *Frazer* as applicable to the Queensland Torrens System statute, the Real Property Act of 1877. Further, Barwick CJ, with whom Windeyer and Owen JJ both agreed, said that both *Mayer* and *Ratcliffe* correctly applied *Frazer.* None of the other four judges expressly mentioned the two New South Wales decisions, but it seems implicit in their discussion of the authorities that they were proceeding on the footing that the principles in *Frazer* would be likewise applicable to Torrens System statutes in other Australian States unless a particular statute happened to contain some

special provision requiring a different conclusion. So far as I have been able to see there is no such significantly distinguishing provision in the Real Property Act. Thus, it seems to me, the central ideas of *Frazer* are required by the High Court's decision in *Breskvar* to be applied by this Court in dealing with the present case. The broad proposition arrived at by Adam J in *King,* that a registered proprietor, being a mere volunteer does not obtain a title free from prior equities, must, following *Breskvar,* be replaced by a formulation based on what the High Court said in that case. There is such a formulation in Windeyer J's reasons. After referring to what Torrens himself said in his 1862 handbook on the Real Property Act of South Australia to the effect that his system left each freeholder in the same position as a grantee direct from the Crown, Windeyer J went on (at 400):

> … This is an assertion that the title of each registered proprietor comes from the fact of registration, that it is made the source of the title, rather than a retrospective approbation of it as a derivative right.
>
> I say that only to emphasise that the doctrine of an indefeasible title arising by registration was seen as the very essence of the Torrens system from its beginning. In the present case, the decision of the Privy Council in *Frazer v Walker* [1967] 1 AC 569 recognises that the registered proprietor has the legal property in the land, subject only to equities and such interests as the Act expressly preserves.

Similar statements were made by other members of the court, see Barwick CJ (at 385), Menzies J (at 397), Walsh J (at 405) and Gibbs J (indirectly) (at 413).

In the present appeal the appellant has not been able to point to anything in the New South Wales Act preserving the rights she had in regard to the land against the registered proprietor. She could have enforced those rights against Mr S Koteff and, I would assume, against his executor. But if knowledge of the appellant's interest by Mr N Koteff before he became registered proprietor would enable her to assert her rights against him (a matter upon which it is unnecessary in this case to express any opinion) the materials earlier referred to show there is no basis for holding Mr N Koteff knew anything which would put him on notice of those rights. Thus there was no material upon which the appellant could attempt to found an argument of any personal right against Mr N Koteff, nor was there any provision in the Real Property Act on which she could rely to prevent s 42 so operating that Mr N Koteff held his interest in the land as registered proprietor of an estate in fee simple 'absolutely free' from any estate or interest in her.

It seems to me that the provisions of the Real Property Act and the interpretations put on equivalent legislation by decisions which this Court should follow, lead to the result that the appellant's appeal must be dismissed with costs.

[**Hope** and **Samuels JJA** concurred in the judgment of **Priestley JA**.]

Appeal dismissed.

5.73 In *Bogdanovic v Koteff*, the New South Wales Court of Appeal declined to follow *King v Smail* [1958] VR 273, in which the Supreme Court of Victoria held that an interest acquired as a volunteer by the registered proprietor was subject to the equities which affected the transferor. Adam J rested his reasoning partly on the paramount effect of s 43 and on the *rationes* in *Gibbs v Messer* [1891] AC 248 and *Clements v Ellis* (1934) 51 CLR 217; 23 ALR 62. The Court of Appeal concluded that following the High Court's acceptance of immediate

indefeasibility, the line of reasoning used by Adam J can no longer be supported as a basis for the decision: see 5.32ff. The issue was further considered in *Rasmussen v Rasmussen* [1995] 1 VR 613 (extracted below) in which the Victorian Supreme Court, in its turn, rejected the New South Wales approach in favour of a broader contextual and purposive interpretation.

5.74C

Rasmussen v Rasmussen
(1995) 1 VR 613
Supreme Court of Victoria

[The plaintiff, Ernest John Rasmussen, claimed a constructive trust in his favour over four blocks of farming land which were registered as belonging to his son, Harold Edgar Rasmussen, the defendant. The plaintiff claimed that the constructive trust arose out of the circumstances of a farming partnership involving members of the Rasmussen family and, in particular, the affairs of Paul Rasmussen, the plaintiff's father who, upon his death, bequeathed the disputed blocks of farming land to his widow for life and then to Harold Rasmussen. Much of the judgment was concerned with whether there was a constructive trust. After detailed consideration of the evidence, **Coldrey J** held that there was a constructive trust in favour of Ernest Rasmussen over one of the four blocks and then considered the claim that even if a constructive trust existed it could not be enforced against Harold because of the indefeasibility provisions of the Transfer of Land Act 1958. It was accepted that there was no fraud within the meaning of the fraud exception to indefeasibility.]

Coldrey J: ... In *King v Smail* [1958] VR 273 Adam J had occasion to consider these provisions in relation to the indefeasibility of title accorded to a volunteer as distinct from a purchaser for value.

In that case the registered proprietor made a gift of his interest in certain land to his wife prior to entering into an agreement in favour of the respondent as trustee for his creditors. The respondent lodged a caveat claiming an equitable estate in fee simple under the deed of arrangement in the land in question. The caveat having been lodged subsequently to the instrument of transfer did not prevent the registration of the wife applicant as transferee of the husband's interest in the land and she became the registered proprietor of the entirety. The applicant applied to have the caveat removed.

His Honour observed at 276:

> Although s 42 of the Transfer of Land Act 1954 in itself affords no ground for distinguishing between the volunteer and the purchaser for value and would appear to give paramount effect to registered title in either case, other sections in the Act draw a distinction between the volunteer and the purchaser for value and appear to justify the conclusion that upon the registration of dealings subsequent to initial registration under the Act, it is purchasers for value only who were intended to have the benefit of s 42.

Reference is made to s 44(2), s 52(4) and s 110(3).
In discussing the operation of s 43 Adam J stated at 277–8:

> In the case of registration of title subsequent to initial registration ... it is only registered proprietors who obtain protection from s 43 who gain indefeasible title under s 42 ... If the position be that mere volunteers, though registered, gain no protection from

> s 43, by parity of reasoning they should be held to fall outside the indefeasibility provision of s 42. Are these mere volunteers then within the protection of s 43? In my opinion — clearly no. The protection given by s 43 to a registered proprietor, ie a legal owner of land, against the consequences of notice actual or constructive of trusts of equities affecting his transferor has point where the legal owner is a purchaser for value. A purchaser of a value has by virtue of this section immunity from prior equities of a bona fide purchaser of the legal estate without notice under the general law. On the other hand, to confer on a mere volunteer immunity from the consequences of notice would be illusory, for as already stated the volunteer was, on well-settled rules of equity, subject to equities which affected his predecessor in title whether with or without notice of such equities.
>
> Had it been intended by s 43 to relieve a mere volunteer from equities which affected his transferor, the section would have been differently worded as, for example, by providing the persons dealing etc with registered proprietors would not be affected by any trust or unregistered interest any rule of law or equity to the contrary notwithstanding.

The decision of Adam J has attracted the approval of text writers ... However in *Bogdanovic v Koteff* (1988) 12 NSWLR 472, the New South Wales Court of Appeal declined to follow *King's* case. The court held at 480 that following the decision of the High Court in *Breskvar v Wall* (1971) 126 CLR 376 (in which the decision of the Privy Council in *Frazer v Walker* [1967] AC 569 was cited with approval):

> The broad proposition arrived at by Adam in *King*, that a registered proprietor being a mere volunteer does not obtain a title free from prior equities ...

was no longer good law.

It is to be noted however that *Breskvar* and *Frazer* were each concerned not with the situation of a mere volunteer but with that of a purchaser for value. In neither case was the judgment of Adam J considered by the court. Moreover in the High Court decision of *Bahr v Nicolay*, which is not cited in *Bogdanovic*, there are passages in various of the judgments that appear to confine the protective operation of the relevant Transfer of Land Act sections to purchasers for value. (Again there is no reference to *King v Smail*.)

[In *Bahr v Nicolay*] At 613 Mason CJ and Dawson J commented upon ss 68 and 134. After quoting portion of the observations of the Privy Council in *Gibbs v Messer* [1891] AC 248 at 254, their Honours continued:

> Neither the two sections nor the principle of indefeasibility precludes a claim to an estate or interest in land against a registered proprietor arising out of the acts of the registered proprietor himself: *Breskvar v Wall*. Thus, an equity against a registered proprietor arising out of the transaction taking place after he became registered as proprietor may be influenced against him: [citation]. So also with an equity arising from conduct of the registered proprietor before registration [citation], so long as the recognition and enforcement of that equity involves no conflict with ss 68 and 134. Provided that this qualification is observed, the recognition and enforcement of such an equity is consistent with the principle of indefeasibility and the protection which it gives to those *who deal with* the registered proprietor on the faith of the register. [Emphasis added].

Wilson and Toohey JJ stated at 637:

> It is nearly a century since, in *Gibbs v Messer*, the Privy Council described the Torrens system in these terms:
>
> > The object is to save persons *dealing* with registered proprietors from the trouble and expense of going behind the register, in order to investigate the history of their author's title, and to satisfy themselves of its validity. That end is accomplished by providing that *every one who purchases, in bona fide and for value, from a registered proprietor*, and enters his deed of transfer or mortgage on the register, shall thereby acquire an indefeasible right, notwithstanding the infirmity of the author's title.

That statement still stands as an exposition of the nature and purpose of the Torrens system, though 'bona fide' must be equated with 'in the absence of fraud' and 'indefeasibility' is a word that does not appear in all the Torrens statutes of this country.

> Nevertheless, in accepting the general principle of indefeasibility of title, the Privy Council in *Frazer v Walker* made it clear 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'. [Emphasis added]

Brennan J at 652–3 remarked (after quoting the classic statement of the Privy Council in *Gibbs v Messer* to which reference has already been made):

> The consequence is that, whereas equity would subject the interest of a purchaser of land to an antecedent unregistered interest of which the purchaser has notice, the purchaser who takes with notice of an antecedent interest but who becomes registered under the Act without fraud takes free of that interest [cases cited]. Registration of the transfer is not fraudulent merely because the transferee knows that an antecedent interest of which he has notice will be defeated thereby …
>
> However, the title of a purchaser who not only has notice of an antecedent unregistered interest but who purchases on terms that he will be bound by the unregistered interest is subject to that interest. Equity will compel him to perform his obligation.

In my view the reasoning in the High Court decisions does not destroy the principles enunciated in *King's* case. That case is a carefully reasoned judgment and, with respect, I prefer it to that of the New South Wales Full Court in *Bogdanovic*. It is to be noted that *Bogdanovic* contains no discussion of the rationale for distinguishing between the indefeasibility of title of a purchase for value as distinct from a mere volunteer.

5.75 In a Queensland case, it was held by a trial judge that a caveator's rights would be unaffected by a transfer of the land to a volunteer. An appeal was allowed on another point, and the Court of Appeal made no comment on the volunteer issue: *Washington Constructions Co Pty Ltd v Ashcroft* [1982] Qd R 776. When the Queensland Real Torrens legislation was consolidated and re-enacted in 1994, it included a new provision, s 180, which provides that the benefits of indefeasibility apply to an instrument whether or not valuable consideration was given. The reasons for the amendment, as recommended by the Queensland Law Reform

Commission, were to minimise the number of exceptions to indefeasibility, and to avoid the question of whether a transferee was a volunteer in cases of sales at an undervalue: QLRC, *A Working Paper of the Law Reform Commission on a Bill in Respect of an Act to Reform and Consolidate the Real Property Act of Queensland*, WP 32, 1988, p 72.

5.76 The question whether volunteers do or should obtain the benefits of immediate indefeasibility upon registration continues to admit of no uniform answer. The divergence between the states is partly due to differences in the wording of the statutes. Section 69 of the South Australian Act (the paramountcy provision) refers to 'a registered proprietor who has taken bona fide for valuable consideration'. In *Adelaide Congregation Jehovah's Witnesses Inc v Pegasus Leasing Ltd* (SC (SA), Olsson J, 1996, No SCGRG of 1993, unreported), Olsson J affirmed earlier authorities that held that indefeasibility is not conferred on a mere volunteer. In *Valoutin v Furst* (1998) 154 ALR 119, Finkelstein J preferred the reasoning and the result in *King v Smail* and *Rasmussen v Rasmussen*. See also *Official Receiver v Klau; Ex parte Stephenson Nominees Pty Ltd* (1987) 74 ALR 67 at 74; *Peck v Peck* [2010] SASC 258.

In *Conlan (as Liquidator of Oakleigh Acquisitions Pty Ltd) v Registrar of Titles* [2001] WASC 201, Owen J rejected this approach and was persuaded by the reasoning in *Bogdanovic v Koteff*. See also *Regal Castings Ltd v GM and GN Lightbody* [2009] 2 NZLR 433. A recent review in New Zealand recommended legislation to make it clear the registered title of a volunteer should be indefeasible to the same extent as a purchaser for value: New Zealand Law Commission and Land Information New Zealand, *A New Land Transfer Act*, Report 116, 2010, p 16. The report suggests that the fraud exception to indefeasibility (which is of wider scope in New Zealand (5.87)) provides a safeguard against the transfer of land to a volunteer for the purpose of defeating an unregistered interest of which the volunteer is aware.

In *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 236 ALR 209 at [198], the High Court heard argument on the status of the registered volunteer under the indefeasibility provisions. In a unanimous joint judgment, the court stated said that the registered proprietors would prevail over the appellants even if they were volunteers. No reasons for this conclusion were given, and no authorities were cited. The statement was clearly *obiter*, as the registered proprietors were found to be purchasers for value. Tooher and Dwyer (at 116) suggest that the court's remark was more likely directed to a different question, namely, the operation of the first limb of the rule in *Barnes v Addy* (1874) LR 9 Ch App Cas 224.

Exceptions to indefeasibility

5.77 There are important exceptions to the general principle that the registered proprietor has an indefeasible title to land, subject only to the encumbrances notified on the register. Hinde identifies five main categories of exceptions to the indefeasible title of the registered proprietor: Hinde, 'Indefeasibility of Title since *Frazer v Walker*' in *Centennial Essays*, pp 38–40:

- express exceptions created by the Torrens legislation itself;
- the Registrar's power to correct the register in certain circumstances: see 5.108;
- specific exceptions imposed by other statutes such as those authorising the compulsory acquisition of land by public authorities and those dealing with encroachment of buildings;
- overriding statutes, which on general principles of statutory interpretation affect the Torrens legislation by subjecting the registered proprietor to interests not noted on the register: see 5.117; and

- exceptions permitted by the courts, such as 'the rights 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': *Frazer v Walker* [1967] 1 AC 569 at 585; 1 All ER 649 at 655.

5.78 Limitations inherent in the title of a registered proprietor may be regarded as exceptions to indefeasibility or merely as defining the scope or ambit of indefeasibility. Consider, for instance, the status of covenants in a registered lease: see 5.52Cff. Similarly, the status of a volunteer in Victoria and South Australia could be seen as indicative of an exception to indefeasibility or of its ambit.

5.79 The most obvious exception to indefeasibility applies where the registered proprietor has been guilty of fraud. The indefeasibility and notice provisions are so worded that the title of the registered proprietor cannot prevail against the interest of the person defrauded. Consistently with the spirit of the Torrens system and, in particular, the notice provision, equitable doctrines of constructive fraud have, at least until recently, had little impact on the judicial interpretation of the fraud exception to indefeasibility. In general, there must be something in the nature of 'personal dishonesty or moral turpitude': *Butler v Fairclough* (1917) 23 CLR 80 at 90 per Griffith CJ. However, the development of the modern constructive trust and the equitable concept of unconscionability have expanded the *in personam* exception to indefeasibility mentioned in *Frazer v Walker* [1967] 1 AC 569; 1 All ER 649. This development has the potential to blur the distinction between it and the fraud exception: *Bahr v Nicolay* (1988) 164 CLR 604; 5.89C. For this reason the *in personam* exception is discussed in 5.83ff immediately following the discussion of the fraud exception and before discussion of other express statutory exceptions.

The fraud exception

5.80C **Loke Yew v Port Swettenham Rubber Co Ltd**
(1913) AC 491
Privy Council

[In 1894 the Sultan of Selangor, acting under the Selangor Land Code 1891, granted about 322 acres of land to Eusope. Subject to an annual rent in favour of the Sultan, Eusope became the registered proprietor of the land under the provisions of the Registration of Titles Regulations 1891, which established a Torrens system of land registration in Selangor.

After a series of transactions Loke Yew became the owner of 58 of those 322 acres subject to the payment of an annual rent to Eusope. None of the Malay documents by which he acquired his interest was registered.

In 1910 the respondents, who knew of these earlier transactions, negotiated with Eusope for the purchase of the whole 322 acres comprised in the original grant. In June 1910 the respondents agreed to purchase from Eusope the whole 322 acres except Loke Yew's 58 acres. Eusope refused to sign unless the respondents undertook not to disturb Loke Yew's possession. The respondents' agent, Mr Glass, gave a verbal assurance to this effect and also signed a document stating that he would have to make his own arrangements as to Loke Yew's land. The Privy Council found that this was a statement of present intention falsely and fraudulently made for the purpose of inducing Eusope to execute a transfer of

the whole 322 acres. Eusope, upon receipt of the document, signed the transfer of the whole 322 acres and ultimately the respondents became registered as proprietors of the land.

On 22 June 1910, the respondents offered Loke Yew a sum substantially less than the value of his land in return for his surrender of all rights to the land. The offer was declined. In August 1910, the respondents instituted this action, claiming possession of the land as registered proprietors of the whole 322 acres. Loke Yew claimed he was entitled to occupy the 58 acres by virtue of rights acquired under the Malay documents. He pleaded that the respondents had taken their transfer with full knowledge of his rights and, further, that their conduct amounted to fraud so that, under the Registration of Titles Regulations 1891 s 7 (fraud being an exception to indefeasibility) the certificate of title was not conclusive in their favour. Loke Yew claimed that the respondents' registered title should be rectified and the land transferred to him by a properly executed transfer.

The Judicial Commissioner found in Loke Yew's favour and ordered the respondents to execute a transfer of the 58 acres to Loke Yew. On appeal, the Court of Appeal of Selangor made an order for possession in favour of the respondents. The court held that the respondents had an indefeasible certificate of title and the Malay documents were nullities which could confer no rights on Loke Yew. Loke Yew appealed to the Privy Council.

The judgment of their Lordships was delivered by **Lord Moulton**:]

Lord Moulton: … Their Lordships have no doubt that the true conclusion to be drawn from the evidence is that the above statement of Mr Glass to Haji Mohamed Eusope was intended to be and was a statement as to present intention as well as an undertaking with regard to the future, and that that statement was false and fraudulently made for the purpose of inducing Haji Mohamed Eusope to execute a conveyance which in form comprised the whole of the original grant, and that but for such fraudulent statement that conveyance would not have been executed. At that time it is evident that Mr Glass intended to eject Loke Yew if he did not accept whatever sum he chose to offer, and that therefore he did not intend to purchase Loke Yew's rights. It is also clear that it was understood, and intended by Mr Glass that it should be understood, that the document above set out was written (to use the words of one of the witnesses) 'for the security of the vendor to show that he was not selling Loke Yew's land', and their Lordships are of opinion that the document carries out that intention.

[The judgment then discussed the purchase price stated in the transfer. Their Lordships felt that it was clear from the amount actually paid that Loke Yew's lands were not included in the sale.]

Having thus possessed himself of a formal transfer of the original grant to himself as trustee for the Port Swettenham Rubber Co Ltd, Mr Glass procured its registration, and thereupon the solicitors for the plaintiff wrote to Loke Yew the following letter:

> Kuala Lumpur,
> Selangor, Federated
> Malay States, 22 June
> 1910. Dear Sir,
>
> On behalf of the Port Swettenham Rubber Co Ltd, we are instructed to inform you that our clients have bought the land comprised in Grant 675, and we are further instructed to ask you to give directions to your coolies to cease from entering on this land and tapping the trees thereon. We are informed that you have an agreement of some nature with the former owner of this land, and that though our clients do not admit, and in fact deny, that you have the right

against any person whatsoever under this agreement, yet to prevent any unpleasantness our clients are willing to pay you the sum of $20,000 if you will surrender to them any rights you claim under the said agreement. Yours faithfully Hewgill and Day Towkay Loke Yew.

and on the defendants' refusing to vacate the land the plaintiffs brought the present action for ejectment.

Their Lordships therefore find that the formal transfer of all the rights under the original grant was obtained by the deliberate fraud of Mr Glass. He was aware that he could not obtain the execution of a transfer in that form otherwise than by fraudulently representing that there was no intention to use it until the plaintiff company was able to do so honestly by having acquired Loke Yew's sub-grants by purchase, and he therefore fraudulently made such representation, and thereby obtained the execution of the transfer. It is an important fact to be borne in mind that although this fraud was clearly charged in the defence, Mr Glass was not called at the trial, nor was his absence accounted for. The inference to be drawn from this is obvious and is entitled to great weight.

The case of the plaintiffs as argued before their Lordships rested mainly on the effect of registration. At the date of the writ the transfer to the plaintiffs was registered while the sub-grants of Haji Mohamed Eusope held by Loke Yew were not. Counsel for the plaintiffs therefore argued that under the provisions of the Registration of Titles Regulation the plaintiffs possessed an indefeasible title to the land, and that under the provisions of s 4 all the sub- grants were 'null and void and of none effect'. A memorial of the transfer had been made upon the duplicate grant under the provisions of s 28, and they contended that that was equivalent to a certificate of title under s 6 and that by virtue of s 7 this was 'conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof'.

The conclusion to which their Lordships have come as to the transfer having been obtained by fraud brings the case within the exception of s 7 and is therefore a sufficient answer to these arguments. But their Lordships are of opinion that for other reasons they are irrelevant and beside the mark. They take no account of the power and duty of a court to direct rectification of the register. So long as the rights of third parties are not implicated a wrong-doer cannot shelter himself under the registration as against a man who has suffered the wrong. Indeed the duty of the court to rectify the register in proper cases is all the more imperative because of the absoluteness of the effect of the registration if the register be not rectified. Take, for example, the simple case of an agent who has purchased land on behalf of his principal but has taken the conveyance in his own name and in virtue thereof claims to be the owner of the land whereas in truth he is a bare trustee for his principal. The court can order him to do his duty just as much in a country where registration is compulsory as in any other country, and if that duty includes fresh entries in the register or the correction of existing entries it can order the necessary acts to be done accordingly. It may be laid down as a principle of general application that where the rights of third parties do not intervene no person can better his position by doing that which it is not honest to do, and in as much as the registration of this absolute transfer of the whole of the original grants was not an honest act under the circumstances it cannot better the position of the plaintiffs as against the defendant and they cannot rely on it as against him when seeking to enforce rights which formally belong to them only by reason of their own fraud. It must be remembered that in the present case the defendant immediately on the bringing of the action applied to rectify the register and that such rectification only awaits the event of this suit. His right to it is set up in the defence, so that he has taken all the necessary steps to obtain the full relief to which he is entitled …

5.81 The Privy Council in this case reinstated the order of the Judicial Commissioner at first instance, the order being that the company should execute a transfer of the 58 acres to Loke Yew, the relief he had asked for in his pleadings. In other words, the order was not one for the direct rectification of the register but rather was directed against the company itself — an *in personam* order in the manner of those issued by courts of equity. Harrison, pp 613–14, suggests that this order was made because the company's fraud gave Loke Yew what would be, on general principles, an equity of rectification entitling him to an order against the company. If the fraud by which the registered proprietor became registered was one which made 'the dealing void *ab initio*' (as with a forgery) the appropriate order would have been one for direct rectification of the register since the registrant acquires 'no interest'. Harrison argues that since the Act does not stipulate the precise consequences of fraud by the registered proprietor, it is necessary to look to general law principles for the answer. Was there any substantial objection in this case to an order for direct rectification of the register? See ACT, s 162; NSW, s 138; NT, s 191; Qld, s 187; SA, ss 220(4), 221 (not a precise equivalent); Tas, s 141; Vic, s 103; WA, s 200.

5.82 In *Assets Co Ltd v Mere Roihi* [1905] AC 176 at 210, Lord Lindley, delivering the advice of the Privy Council, made some observations on the meaning of fraud for the purposes of the Torrens legislation:

> [T]he fraud which must be proved in order to invalidate the title of a registered purchaser for value … must be brought home to the person whose registered title is impeached or to his agents. Fraud by persons from whom he claims does not affect him unless knowledge of it is brought home to him or his agents. The mere fact that he might have found out fraud if he had been more vigilant, and had made further inquiries which he omitted to make, does not of itself prove fraud on his part. But if it be shewn that his suspicions were aroused, and that he abstained from making inquiries for fear of learning the truth, the case is very different, and fraud may be properly ascribed to him. A person who presents for registration a document which is forged or has been fraudulently or improperly obtained is not guilty of fraud if he honestly believes it to be a genuine document which can be properly acted upon.

What is meant by knowledge 'brought home' to the registered proprietor or his or her agents? What if the solicitor for the registered proprietor, at the time the land was being purchased, became aware of a fraudulent scheme perpetrated by the vendor on a third party who claimed an interest in the land? If the solicitor fails to advise his or her client (the registered proprietor) of the fraudulent scheme, should that be enough to deprive the registered proprietor of the benefit of the indefeasibility provisions?

5.83 A bank officer forged the signature of an applicant for a mortgage on an internal bank document which was used by a regional office of the bank in considering whether to approve the loan. The High Court dismissed the claim that the mortgage could be set aside for fraud by the bank accepting that the document 'was not prepared for, and was not used for the purpose of, and did not have the effect of, harming, cheating or otherwise being dishonest' to the mortgagor: *Bank of South Australia v Ferguson* (1998) 151 ALR 729. The fraud must be 'operative' in the sense that it operated on the mind of the person said to be defrauded and to have induced detrimental action by that person. In the course of their joint judgment, Brennan CJ, Gaudron, McHugh, Gummow and Kirby JJ made the following observations about the nature of the fraud exception (at 732):

Not all species of fraud which attract equitable remedies will amount to fraud in the statutory sense. The distinction may be illustrated as follows. In some circumstances, equity subjects the interest of a purchaser of unregistered land to an antecedent interest of which the purchaser has notice. However, in respect of land to which the Act applies, registration of a transfer is not fraudulent in the statutory sense required to qualify the operation of the doctrine of indefeasibility, merely because the transferee knows that registration will defeat an antecedent unregistered interest of which the transferee has notice.

The points of significance for the present litigation are that (i) statutory fraud embraces less, not more than the species of fraud which, at general law, founds the rescission of a conveyance; and (ii) statutory fraud is not itself directly generative of legal rights and obligations, its role being to qualify the operation of the doctrine of indefeasibility upon what would have been the rights and remedies of the complainant if the land in question were held under unregistered title.

Fraud distinguished from carelessness

5.84 In *Pyramid Building Society (in liq) v Scorpion Hotels Pty Ltd* [1998] 1 VR 188, a mortgage was fraudulently executed by an improper affixation of the company seal by a person who was not a director of the company. The mortgagee had no knowledge of the irregularity and the mortgage was registered. It was held by the Court of Appeal of the Supreme Court of Victoria that the mortgagee was not guilty of fraud. The mortgagor had submitted that the mortgagee's solicitor had acted with reckless indifference to the irregularity and further inquiries would have revealed the fraudulent activity. Hayne JA (with whose judgment Brooking and Tadgell JJA agreed) ruled that 'reckless indifference' and 'wilful blindness', although convenient shorthand expressions to describe some cases of fraud, did not extend to embrace cases of negligence or want of due care in making inquiries.

Consider the conduct of the mortgagees and their agents in *Grgic v Australian and New Zealand Banking Group Ltd* (1994) 33 NSWLR 202; *Pyramid Building Society (in liq) v Scorpion Hotels Pty Ltd* [1998] 1 VR 188; and *Russo v Bendigo Bank Ltd*; 5.83C. In each case, the mortgagee's agents or employees might have detected the fraud and prevented the loss if they had taken reasonable steps to check the identity of the person purporting to deal as registered proprietor and that the mortgage was properly executed and attested. Due to immediate indefeasibility and the narrow scope of the fraud exception, the loss resulting from the fraud fell on the registered proprietors rather than on the mortgagees. Do you think the mortgagees and their agents might have taken more care to prevent the fraud if the transaction had been at the mortgagee's risk, rather than at the risk of the registered owner? Given the competitive pressures on mortgage lenders to cut their mortgage processing costs, is it realistic to expect them to adopt standards of inquiry that are apt to prevent identify fraud in mortgage transactions?

In *Young v Hoger* [2001] QCA 453, the Queensland Court of Appeal overturned a finding of wilful blindness amounting to fraud on the part of the mortgagee's solicitor, stating that 'an unacceptable explanation that he was naïve is at least as consistent with a desire to explain away his lack of care or competence as with his being dishonestly involved in the fraud on the first respondent': at [25]. For other cases in which the conduct of those for whom the mortgagee was responsible were characterised as carelessness, incompetence, disorganisation or stupidity not amounting to fraud, see *Hilton v Gray* [2007] QSC 401 at [47]; *Vella v Permanent Mortgages Pty Ltd* [2008] NSWSC 505 at [383]; *Royalene Pty Ltd v Registrar of Titles* [2008] QSC 64.

5.85 The registered proprietor who suffers loss through the registration of a forged transfer or mortgage may be entitled to monetary compensation from the state; see 5.125. Where a forged mortgage has been registered, the compensation may not be paid in time to enable the registered owner to discharge the mortgage and avert a mortgagee's sale. In *Hilton v Gray* [2007] QSC 401, the Registrar was willing to indemnify the registered proprietor if a forged mortgage was found to be indefeasible. The court gave the mortgagee an order for recovery of possession and judgment for the sum due under the mortgage, but stayed the orders to allow the registered owner a reasonable time to pay the sum. In *Royalene Pty Ltd v Registrar of Titles* [2008] QSC 64, the court made orders by which the compensation payable by the state would allow the registered proprietor to redeem the mortgage.

Statutory provisions to impose a duty on mortgagees

5.86 In 2005, Queensland amended its legislation to address concerns about lax identity-checking practices on the part of some mortgage lenders, that were contributing to the incidence of losses through fraud. Section 185(1A) denies indefeasibility to mortgagees who, in relation to a mortgage, transfer or mortgage or amendment, fail to take reasonable steps to check the identity of the person purporting to sign as mortgagor: Qld, s 185(1A). A mortgagee is deemed to take reasonable steps if it complies with the practices in the Land Title Practices Manual: Qld, s 11A(1)–(3). Similar requirements apply on transfer of a mortgage: s 11B(1)– (3). A mortgagee seeking the protection of indefeasibility bears the onus of proving that it complied with the provisions: Qld, s 185(5). A mortgagee who fails to comply and suffers loss or deprivation due to a forgery is not entitled to compensation from the State: s 189(1)(ab). See Weir, 'Indefeasibility — Queensland Style' (2007) 15 *APLJ* 79; Backstrom and Christensen, 'Qualified Indefeasibility and the Careless Mortgagee' (2011) 19 *APLJ* 19.

5.87 Similar provisions were enacted in New South Wales in 2009. From 1 November 2011, a mortgagee must before lodging a mortgage for registration take reasonable steps to ensure that the person who, or on whose behalf, the mortgage was executed is or will become the registered proprietor: NSW, s 56C(1). A mortgagee is considered to have taken reasonable steps if the mortgagee has taken the steps prescribed by the regulations: NSW, s 56C(2). The Registrar-General is empowered to cancel the recording of the mortgage in the register if the Registrar-General is of the opinion that the execution of the mortgage involved fraud against the registered proprietor and that the mortgagee has either failed to comply with s 56C(1), or had actual or constructive notice that the mortgagor was not the registered owner of the land: s 56C(6). A similar provision applies to the transferee of a mortgage: NSW, s 56C(8). The compensation provisions have been amended to provide that compensation is not payable in relation to any loss or damage suffered by a mortgagee or transferee of a mortgage arising from its failure to comply with s 56C or from the cancellation of a recording by the Registrar-General under s 56C(8): NSW, s 129(2)(j).

Fraud and agency

5.88 In *Assets v Mere Roihi* [1905] AC 176 at 210, Lord Lindley, giving the judgment of the Privy Council, stated that the fraud that will impeach the registered title must 'be brought home to the person whose registered title is impeached or to his agents'. In *Schultz v Corwill Properties Pty Ltd* [1969] 2 NSWR 576; (1969) 90 WN (NSW) (Pt 1) 529, in a case dealing

with the registration of a forged mortgage and a forged discharge of mortgage, Street J discussed the scope of the agency principle (at 537–9):

> The essential question which must be determined in respect of the grant of the mortgage and its discharge respectively is whether the fraud associated therewith '… can be brought home to the person whose registered title is impeached or to his agents. Fraud by persons from whom he claims does not affect him unless knowledge of it can be brought home to him and his agents'. In this extract from their judgment their Lordships encompass two alternative situations. The first is one in which the fraud is actually committed by ('brought home to') the person whose title is impeached or his agent. And the second is one in which he or his agents have knowledge that a fraud has been committed whereby the previous registered proprietor is being deprived of some or all of his interests. Each of these two concepts is capable of being applied in accordance with settled principles of law. The first, namely fraud on the part of the person whose registered title is impeached or his agents, involves the application of the ordinary principles governing the responsibility of a principal for the fraud of his agent. If the fraud in question is the immediate act of the person whose title is impeached, then the position is not open to doubt. If, however, the fraud is that of an agent for the person whose title is impeached, the principle of respondeat superior, with all its limitations and qualifications, is applicable. The matter is to be tested by investigating whether or not the principal is, in the particular circumstances under consideration, liable to the person who has been defrauded for the acts of the agent. On this topic one need not delve more deeply than the general statement in *Bowstead on Agency*, 13th ed, p 242: 'An act of an agent within the scope of his actual or apparent authority does not cease to bind his principal merely because the agent was acting fraudulently and in furtherance of his own interests. This principle is general, applicable to cases of actual and apparent authority; in tort, in the disposition of property; a similar result even appears in criminal cases. But the mere fact that the principal, by appointing an agent, gives that agent the opportunity to steal or otherwise to behave fraudulently, does not, without more make him liable; the agent must normally be acting within the scope of his actual or apparent authority for the principal to be responsible'.
>
> The second situation contemplated by the Privy Council in connection with the invalidating effect of fraud is one which involves the person whose title is impeached or his agents having *knowledge* of a fraud in the transaction under investigation. In this instance considerations of respondeat superior do not arise; it is knowledge that a fraud has been committed by someone for whom he is not responsible that exposes the title of the registered proprietor to challenge. Such knowledge in the registered proprietor, if existing in him prior to the consummation of the transaction under investigation, is squarely within the exception for fraud in s 42 to which their Lordships referred. The Privy Council have, however, also left open, as a basis for going behind the register, knowledgeon the part of the agents of the registered proprietor that fraud has tainted the transaction from which the registered title is about to derive. But (and here I acknowledge I am putting a gloss on the words used by the Privy Council), the mere fact that the existence of a fraud is known to an individual who is, in the transaction under consideration, the agent for some purposes of the person whose title is impeached will not of itself affect the indefeasibility of the title when registered. It is not enough simply to have a principal, a man who is acting as his agent, and knowledge in that man of the presence of a fraud. There must be the additional circumstance that the agent's knowledge of the fraud is to be imputed to the principal. This approach is necessary in order to give full recognition to (a) the requirement that there must be a real, as distinct from a hypothetical or constructive, involvement in the fraud by the person whose title is

impeached and (b) the extension allowed by the Privy Council that that the exception of fraud in s 42 can be made out if 'knowledge of it is brought home to him *or his agents*'.

This line of reasoning takes one into the well-known field of vendor and purchaser law dealing with the effect on a purchaser of defects in his vendor's title. Considerations of constructive notice are to be placed aside as not meeting the requirement of *knowledge* of fraud. If one finds knowledge in the person whose title is impeached, then that meets the requirements of the passage I have quoted from the judgment of the Privy Council. And if one finds, not express knowledge in the principal, but express knowledge in his agent, such that, within settled principles, that express knowledge is to be imputed to the principal, that is to say, the person whose title is impeached, then that also will fall within the exception enunciated by the Privy Council. Although the Privy Council has advisedly, as it seems to me, used the word 'knowledge' and not the word 'notice', the ordinary principles of vendor and purchaser law relating to the *imputation of notice* to the purchaser will equally cover the *imputation of knowledge* for presently relevant purposes. The principle of imputed notice is stated in *Williams on Vendor and Purchaser*, 4th ed, p 306, in the following terms: 'The rule that a purchaser is affected by notice to his counsel, solicitor or other agent, seems to rest on this ground: When a man employs such agents to transact his business he holds them out to the world as standing in his own place and representing himself; in fact, as being identical for the purpose of the business which he has authorised them to transact, with his own person. He must therefore accept this representation of himself by another, which is the consequence of his own act in employing an agent, as complete for all the purposes of such business and cannot justly be permitted to sever the identity of person created by him as to repudiate notice or knowledge given to or acquired by the agent, but not in fact communicated to the principal. It is therefore said that, where the relation of principal and agent and the duty of the agent to communicate any matter to the principal have been established, an irrebuttable presumption arises that the agent communicated the matter to the principal; hence evidence is not admissible to prove that the agent did not in fact communicate his knowledge to the principal'. To this rule there is an important exception that has particular relevance to the present case. The exception is stated by *Williams* immediately following the passage I have just quoted, namely: 'The rule is, however, subject to the exception that if the matter, of which it is sought to affect the principal with notice, is the agent's own fraud or fraudulent dealing or some equity arising thereout, or if the agent during his time of employment as such, and when he acquired the information in question, was a party to a scheme of fraud, then the principal is permitted to give evidence to rebut the above presumption and prove his ignorance of the matter; for the supposition that the agent communicated his fraud to the principal is too improbable to be entertained even by a court of equity'.

5.89 The reasoning in *Schultz v Corwill Properties Pty Ltd* was questioned by a five-member bench of the New Zealand Supreme Courrt in *Dollars & Sense Finance Ltd v Nathan* [2008] NZSC 20. A finance company agreed with Nathan to lend him a sum of money on the security of a mortgage over his parents' home, and gave him the instruments to arrange execution by them. Nathan forged his mother's signature on the instrument of mortgage, which the finance company registered without knowledge of the forgery. The court held that the finance company constituted Nathan as its agent for the purpose of obtaining the mortgagors' signatures.

The question was whether Nathan's forgery of his mother's signature was an act done within the scope of agency. Blanchard J, giving the judgment of the Supreme Court, said that the question was not whether the agent's conduct was authorised, but whether it 'fell within the scope of the task that the agent was asked to perform': at [39]. A fraudulent act may still be within the scope of agency whether done by the agent entirely for his or her own benefit, or

for the benefit of both the agent and the principal. The test for agency is whether the agent's acts were so connected to the tasks he or she was asked to do that they could be regarded as a mode of performing them. The forgery was done to achieve the task that Rodney had been asked to undertake, namely, to obtain a registrable mortgage, and the mortgagee was therefore defeasible for his fraud. Blanchard J said that it was not relevant to ask whether the knowledge by Rodney of his own fraud should be imputed to the mortgagee: at [43].

5.90 Institutional mortgagees are corporate entities which act through servants, agents and contractors. The restrictive approach to the scope of agency in *Schultz v Corwill* makes it more difficult to 'bring home' to mortgagees the fraud of their agents. Moreover, changed mortgage processing practices have further insulated mortgagees from imputation of fraud. Lenders often rely on intermediaries such as introducers and mortgage brokers to pre-assess applicants for loans and arrange execution of documents. Courts have held that such intermediaries are not, without more, agents of the lender, even if the lender pays them a commission: *Octapon Pty Ltd v Esanda Finance Corp Ltd* (SC (NSW), 3 February 1989, Cole J, unreported); *Permanent Custodians v Yazgi* [2007] NSWSC 279 at [86]–[95]; *Steel-Smith v Liberty Financial Pty Ltd* [2005] NSWSC 398; *Perpetual Trustees Victoria Ltd v Ford* [2008] NSWSC 29 at [98]–[101]. Where mortgagees retain other persons or corporations to perform functions for them in the origination of loans and mortgages, they will be fixed with knowledge of what their contractor knows: *Perpetual Trustee Company Ltd v Khoshaba* [2006] NSWCA 41; *Permanent Custodians v Yazgi* [2007] NSWSC 279.

False attestation of instruments

5.91 An issue that has arisen in a number of cases is whether it is fraud for an employee or agent of the mortgagee to falsely attest the signature of the transferor on a transfer or mortgage and, if it is, whether the fraud is committed within the scope of the agent's actual or apparent authority. In *Grgic v ANZ Banking Group* (1994) 33 NSWLR 202, the agent's attestation of a forged signature was held not to be fraudulent. A bank officer witnessed the signature to a mortgage and certified to personal knowledge of the identity of a person who later was discovered to be impersonating the owner of the relevant land. It was held that the conduct of the officer did not amount to fraud within the meaning of NSW, s 42. The impersonator had the certificate of title and other documents relating to the land and had been introduced to the bank officer in the name of the registered proprietor by an established customer to whom the registered proprietor was known. The fact that the bank officer clearly believed that the impersonator was the person he purported to be meant that, in attesting the signature, the officer did not act with conscious knowledge of the falsity of what he had done nor with reckless indifference to the truth or falsity of what he had signed.

Compare *Westpac Banking Corporation v Sansom* (1995) NSW ConvR ¶55-733. A wife mortgaged the marital home by forging her husband's signature. An officer of the bank falsely attested that the husband had signed the mortgage in his presence and the bank registered the mortgage. It was held that the bank officer's false attestation constituted fraud within the meaning of s 42 of the Real Property Act 1900 (NSW). See also *Australian Guarantee Corp Ltd v De Jager* [1984] VR 483; *National Commercial Banking Corp of Australia Ltd v Hedley* (1984) 3 BPR 9477; *Beatty v ANZ Banking Group Ltd* (1995) V ConvR 54-517; [1995] 2 VR 301; ANZ ConvR 478; *State Bank of New South Wales v Yee* (1994) 33 NSWLR 618; *Baker v Australia and New Zealand Banking Group* (SC (NSW), Cohen J, 5 May 1995, unreported).

5.92C

Russo v Bendigo Bank Ltd

(1993) 3 VR 376
Court of Appeal of Victoria

[Mrs Russo's son, Mr Halaseh, forged her signature on a mortgage on her home to secure a loan to a company controlled by him and his wife. A law clerk, Rita Gerada, working for the mortgagee's solicitor Mr Reichman, falsely attested Mrs Russo's signature on the mortgage. Ms Gerada had not seen Mrs Russo sign the mortgage, and had been instructed by Mr Reichman never to attest a person's signature unless she saw the person sign. She was unaware of the forgery. Mr Reichman lodged the mortgage for registration without knowledge of the forgery or the false attestation. The bank obtained an order for possession of the property and Mrs Russo appealed, arguing that the bank's registered mortgage was defeasible for fraud.]

Ormiston JA: [F]rom early times it was both assumed and held that the concept of fraud referred to in the legislation derived from the Torrens Act was what was called 'actual fraud', from which I understand the courts were excluding equitable fraud of the kind which has come to be called 'constructive fraud'. Such a limited view of the notion of fraud was no doubt consistent, in the broadest sense, with the purposes intended to be served by the new legislative scheme for registered title. Nevertheless in recent years it might appear that some qualification has been placed upon the original interpretation, in particular by observations of Mason CJ and Dawson J in *Bahr v Nicolay (No 2)* (1988) 164 CLR 604. (After reviewing the authorities his Honour continued.) Consequently, having regard to the manner in which the interpretation of the concept of fraud has changed over the years both in New Zealand and in Australia, I would respectfully suggest that the most satisfactory definition of the concept of fraud was given in 1923 by Salmond J in the *Waimiha Sawmilling* case when heard by the New Zealand Court of Appeal: [1923] NZLR 1137 at 1173:

> The term 'fraud' is not here used in its most restricted sense as including merely deceit, nor in its widest sense as including the constructive or equitable fraud of the Court of Chancery. It means dishonesty — a wilful and conscious disregard and violation of the rights of other persons.

I should add that I do not believe that anything stated above runs counter to any observation of this court expressed in recent decisions such as *Pyramid Building Society v Scorpion Hotels Pty Ltd* [1998] 1 VR 188 at 191, 193, *Macquarie Bank v Sixty-Fourth Throne* at 142–6 and *F & F Holdings Pty Ltd v Ridge Lane Pty Ltd* [1998] VSCA 72 at [40].

(c) Whether Miss Gerada was guilty of 'fraud'

The weakness in the appellant's case is twofold: first, there was no direct evidence of dishonesty or moral turpitude on the part of Miss Gerada, unless one were able to rely solely on the untruth told by her in the attestation clause; secondly, there is not a scintilla of evidence to show that she was involved in Mr Halaseh's dishonesty or that she would have any reason to do so. To support the first proposition (the second not being denied) it was said on behalf of the respondents that there was no evidence: (i) that Miss Gerada knowingly put the mortgage forward on the path to registration; (ii) that she did not believe that the mortgage was executed in her presence by Mrs Russo and (iii) that she appreciated that the lodging of the mortgage would convey a representation to the contrary. I cannot accept contention (ii) for, according

to the learned judge's findings, she had no belief that it was executed by the appellant in her presence, despite her later protestations to the contrary … It was found, indeed it was not disputed, that she was not present and Miss Gerada must have been aware of that fact when she added her signature as an attesting witness. Of course this conclusion says nothing to deny that she believed Mrs Russo had signed. The other two matters are far less easily answered and they go, in a significant way, to the issue of how Miss Gerada's behaviour should be characterised.

As to the question whether Miss Gerada knew that she was putting the mortgage 'forward 'on the path to registration', there is surprisingly no evidence. One might think that that is a matter which could be inferred. If one was dealing with a person of professional training or long experience as a law clerk, the inference might well be irresistible. But there was no evidence as to Miss Gerada's understanding of conveyancing procedures, nor any attempt to cross-examine her to show what her understanding was. The strongest point against her is her concession that Mr Reichman was adamant that signatures must be attested in the presence of the signatory, from which many would infer that something untoward might occur if that instruction were not followed … There was, of course, no evidence that she knew about the significance of attestation clauses so far as the registration of title was concerned … Other than that she would be aware that the document might be registered and enforced against the signatory, I do not believe that there is sufficient evidence to show that she was aware of the significance of her attestation in the process of putting forward the mortgage 'on the path to registration'.

Likewise, as to her appreciation that the lodging of the mortgage would convey a representation to the contrary to the Titles Office, I see no basis for concluding that it had been proved that she was aware and appreciated the significance of her role. Certainly she would be aware that what she had said in the attesting clause was not strictly accurate but, bearing in mind that she had no knowledge at the time of the forgery by Mr Halaseh, she could well have been totally unaware of the difference her attestation made in the process leading to registration. It was not shown that she had any reason to doubt the signature and thus putting the mortgage forward might, for all the evidence shows, have been seen by her as no more than a formal step in the requisite legal chain of procedures. That, I believe, is the reason why the learned judge held that in the circumstances she had believed it merely to be a 'formality'. Here she was mistaken but she was not shown to be a person of the training or sophistication to appreciate the legal consequences of a failure to comply with what may have seemed to her a legal technicality. Certainly, I would not on appeal infer that at the age of 19 or 20, with training effectively only as a clerk over some three years, she had the necessary appreciation of the consequences or significance of her false statement.

In short, I believe that Miss Gerada knew that what she had said was false but I do not believe that she has been shown to be dishonest … She had nothing to gain from her false statement, except possibly some saving of time or trouble. She was not involved in Mr Halaseh's dishonest schemes. She had no knowledge that Mrs Russo did not sign and no knowledge that she did not wish to sign the mortgage. In my view it would be a curious consequence that her behaviour should be characterised for this purpose as fraud, for the very essence of that concept is to relieve people from the consequences of indefeasibility only where their behaviour, or the behaviour of those for whom they are responsible, has that element of dishonesty, of conscious moral turpitude or wickedness such as would justify the intervention of a court to set aside the mortgage or other registered estate.

Consequently I would reject the appellant's argument that the learned judge was wrong in holding that Miss Gerada was not guilty of 'fraud' within the meaning of the Act.

(d) Whether the respondent bank was otherwise guilty of 'fraud'

[The appellant contended that] even if Miss Gerada was not personally guilty of fraud, then the respondent bank was guilty of it by reason of its own knowledge and in particular the knowledge and understanding of Mr Reichman for whom it was said that the bank was here responsible. As to the bank itself it was conceded that no specific act carried out by its officers was relevant to the consideration of this question. It was not aware of the forgery and it was not party to any scheme to obtain a mortgage from the appellant contrary to her wishes. If it were to be held responsible for the circumstances under which the appellant lost her interest in the land, then it could only be because the bank itself put the mortgage on the path to registration (a matter for which it could not otherwise be criticised) and because its solicitor, Mr Reichman, both by reason of Miss Gerada's acts and by reason of his own acts, knowledge and understanding should be treated as guilty of fraud for which the bank should be held responsible.

It would seem that the only factor additional to those which had been found against Miss Gerada was that Mr Reichman had the knowledge and understanding of conveyancing law and procedures which could have resulted in his knowing that the consequences of allowing the improperly attested document to go forward were so serious as to amount to fraud. So it was said that, if he had known that the document had not been properly attested, then it would have been wrong of him to allow the signed mortgage to go to the bank in the expectation that it would be registered upon the faith of the attestation clause. Mr Reichman, a solicitor (and thus the bank), could not hide behind the misdeeds of his clerk if that clerk knew the statement in the attestation clause to be false. So it was said that the aggregation of these facts were sufficient to justify a finding of fraud against the solicitor (and thus the bank) even though the individual behaviour of each was not such as could be characterised as fraudulent.

Again it must be said that, in this context and for these purposes, knowing or known falsity is not the same as fraud, for what the court is required to ascertain is whether there was actual fraud in the sense I have attempted to describe earlier. For the present it may be assumed that some accumulation or aggregation of matters or factors may be permitted for this purpose. Such an aggregation produced, in effect, the outcome in *AGC v De Jager*, although most of the matters there relied upon arose out of the acts or understandings of the employees of AGC itself.

[**Ormiston JA** observed that in the *AGC* case, AGC's employees admitted that they forwarded the documents for registration knowing that they were falsely attested. His Honour continued:]

The present case is very different. Apart from the fact that the acts here relied upon were not acts of employees but only of persons engaged as solicitors and agents for the purpose, to which I shall briefly return, there was no combination of acts in the present case which could properly be held to amount to actual fraud. Despite attacks made on Mr Reichman in the course of the case, the judge rejected all allegations of impropriety, so that it was held that he was not party to any scheme to defraud the appellant and that he had no knowledge of either the forgery or the falsity of the attestation clause … Thus, even taking into account the acts of both Mr Reichman and Miss Gerada, there was no conscious dishonesty or moral turpitude or wickedness which would give a characteristic to the transaction which it did not otherwise have. False statement there may have been, fraudulent it was not.

It is therefore strictly unnecessary to deal with the further argument that even if Miss Gerada or Mr Reichman in combination with Miss Gerada had been guilty of 'fraud' the

bank could not be held responsible for that in the circumstances … To the extent that Mr Reichman's acts were improper, such as would otherwise be characterised as amounting to fraud, then it was said that that of itself took his acts outside the course of his authority … If he had consciously gone forward and obtained registration of the mortgage in the knowledge of, or wilfully blind to, the fact only that it was not properly attested, then I doubt that would have involved him doing something outside the scope of his authority. The same reasoning would apply if Miss Gerada were to be held (contrary to my opinion) to have been guilty of fraud on the same limited basis.

It is not, however, necessary to reach any final conclusion on this aspect of the appeal. The answer to the case is that there was no such impropriety of a kind which should be characterised as fraud for the purpose of the Act for which the solicitor was either himself responsible or responsible indirectly by reason of the activities of his employee … In turn, the bank could not be held responsible for any of the acts alleged against it. For these reasons I would also reject the argument that the bank had been guilty of 'fraud' within the meaning of the Act. I would therefore dismiss the appeal.

[**Winneke P** agreed with **Ormiston JA. Batt JA** agreed with **Ormiston JA** that the false attestation did not constitute fraud within the meaning of s 42(1). His Honour said that while he did not think it was honest to falsely attest a signature, more is required to establish statutory fraud: '(T)here must be an intention to affect adversely the rights of another person or at least recklessness as regards the affection of such rights'.]

Order: Appeal dismissed.

5.93 Questions

1. Do you agree with the distinction drawn by the court between making a false statement and acting dishonestly? If the law clerk's false attestation of Mrs Russo's signature, contrary to her employer's instruction was not sufficient, what more would be required to amount to fraud under s 42(1)?
2. What specific knowledge by the law clerk as to the consequences of her actions would need to be shown, to prove a case of fraud? If, while possessing the requisite knowledge, she had breached her employer's instruction by attesting Mrs Russo's signature, would that act be 'brought home' to the mortgagee bank on the basis of agency? If the solicitor had known of the false attestation, but not the forgery, when he lodged the transfer, would this have amounted to a fraud 'brought home' to the mortgagee as principal?

5.94 Note the statement of Ormiston JA endorsing Salmond J's formulation of the test for fraud in *Waimiha Sawmilling*: 'It means dishonesty — a wilful and conscious disregard and violation of the rights of other persons'. Is this formulation consistent with cases such as *Australian Guarantee Corp Ltd v De Jager* [1984] VR 483, where the knowing lodgment of a falsely attested mortgage by the mortgagee's employees was characterised as a fraud on the Registrar? For comment on the judgments in *Russo*, see Rodrick, 'Forgeries, False Attestation and Imposters: Torrens System Mortgages and the Fraud Exception to Indefeasibility' [2002] *Deakin Law Review* 5.

5.95 In *Davis v Williams* (2003) 11 BPR 21,313; [2003] NSWCA 371, the New South Wales Court of Appeal considered whether a false representation to the Registrar could amount to fraud, where it was not done to deprive anyone of an interest in land. In order to save a small amount of stamp duty, a registration clerk made an unauthorised alteration to an executed transfer before lodging it for registration. The transfer as executed provided for transfer to a husband and wife 'as joint tenants'. The clerk amended it by substituting 'as tenants in common'. The effect of the amendment was that on the death of the husband, survivorship did not operate in favour of the wife. Hodgson JA and Young CJ in Eq (Gzell J dissenting) found that the clerk's conduct lacked the element of actual dishonesty or moral turpitude required for fraud. Their Honours inferred that the clerk knew that the Registrar-General would be misled into thinking that the altered transfer was in the same form as the transfer executed by the parties. However, they found that she did not understand that the misrepresentation was material rather than a mere formality, and did not intend to induce the Registrar-General to act in a materially different way. Nor did she intend to deprive anyone of an interest in land. As to what mental element would be required to establish fraud on the part of the registration clerk, see Hodgson JA at [26]:

> If the registration clerk made a representation to the Registrar-General, knowing it to be false in a material respect, and intending that the Registrar-General be induced by the representation to act in a way materially different from what otherwise would have been done, then I think that would be sufficient dishonesty or moral turpitude, irrespective of whether she had any intention that anyone be disadvantaged by this. If a lie is material in respects such as these and understood to be so, I do not think that lack of intent to harm can justify treating it as a 'white lie' and as excluding dishonesty or moral turpitude.

5.96 Even a knowing misrepresentation to the Registrar by a registered proprietor's solicitor may not render the proprietor's title defeasible for fraud. In *J Wright Enterprises Ltd (in liq) v Port Ballidu Pty Ltd* (2010) QSC 213, the registered mortgagee's solicitor knowingly altered the mortgage documents after they were executed, so as to make it appear to the Registrar that the documents had been executed in accordance with statutory requirements. The court said it would have been a simple matter to have them re-executed, and the solicitor 'did not act in violation of any person's rights'. While the acts of the solicitor amounted to fraud, it could not be brought home to the registered mortgagee because 'the authorities do not support such exacting standards upon agents of mortgagees with respect to registration': at [92]. Is the decision in this case consistent with *Davis v Williams* and *Russo v Bendigo Bank Ltd*?

Fraud against the holder of a prior unregistered interest

5.97 Fraud may be either against the holder of an unregistered interest (as in *Loke Yew v Port Swettenham Rubber Co Ltd* [1913] AC 491; **5.77C**) or against a previous registered proprietor: see, for example, *Breskvar v Wall* (1971) 126 CLR 376; **5.45C**. Fraud against the holder of an unregistered interest raises an issue as to the effect of the notice section; see **5.30**. It is not fraud for a registered proprietor to merely acquire title with notice of an existing unregistered interest or to take a transfer knowing that its registration will defeat such an interest: *Bahr v Nicolay (No 2)* [1988] HCA 16; (1988) 164 CLR 604 at 613, 653; *Leros Pty Ltd v Terara Pty Ltd* (1992) 174 CLR 40. See, for example, *R M Hosking Properties Pty Ltd v Barnes* [1971] SASR 100. In that case K, the registered proprietor of shop premises, sold to the plaintiff a shop that was subject to an unregistered lease, which contained an option to renew. At the time of the sale, the

plaintiff was aware that the premises were let, and before registration, it learned the full terms of the lease. After the plaintiff became registered owner, the tenant continued to pay rent, and in due course purported to exercise the option to renew. The plaintiff brought proceedings to recover possession of the premises. In this case the defendants could not rely on the exception to indefeasibility protecting a tenant in possession (SA, s 69(h)), since that was restricted to leases for a term not exceeding one year. Walters J held that the plaintiff, despite its knowledge of the unregistered lease, was not guilty of fraud. There was no evidence of actual dishonesty and to hold that 'mere notice' of an unregistered interest amounted to fraud would stultify the notice provision: SA, ss 72, 186, 187. A purchaser who knew of an unregistered lease was nevertheless entitled to complete his or her contract by registering a transfer. It followed that upon registration of its transfer, the plaintiff's title prevailed over the defendants' unregistered lease. Walters J followed the Queensland case of *Friedman v Barrett; Ex parte Friedman* [1962] Qd R 498. Is *Barnes'* case consistent with *Loke Yew's* case? See also *Munro v Stuart* (1924) 41 SR (NSW) 203 (n); *Achatz v De Reuver* [1971] SASR 240.

5.98 Do cases like *R M Hosking Properties Pty Ltd v Barnes* [1971] SASR 100 suggest that a purchaser, on registration, receives too much protection against unregistered interests? Why should a purchaser take free of interests of which he or she has full knowledge? See generally McMorland, 'Notice, Knowledge and Fraud' in Grinlinton, p 67; Blanchard, 'Indefeasibility under the Torrens System in New Zealand' in Grinlinton, p 29; Thomas, 'Land Transfer Fraud and Unregistered Interests' [1994] *NZ Recent Law Review* 218; Whalan, 'The Meaning of Fraud under the Torrens System' (1975) 6 *NZULR* 207; Butt, 'Notice and Fraud in the Torrens System; A Comparative Analysis' (1977) 13 *UWALR* 355; Whalan, pp 313–17; Cooke and O'Connor, 'Purchaser Liability to Third Parties' (2004) 120 *LQR* 640; Hepburn, 'Concepts of Equity and Indefeasibility in the Torrens System of Land Registration' (1995) 3 *APLJ* 41. Each of these articles compares the different approaches of the Australian and New Zealand courts to the definition of fraud, the Australian courts consistently taking a narrower view of fraud (that is, an interpretation more protective of the registered title). While mere knowledge of the existence of an unregistered interest is not fraud, such knowledge in conjunction with other circumstances may amount to fraud.

5.99 There has long been a difference between Australian and New Zealand authorities on the question of where to draw the line between fraud and mere notice. In Australia, it is not fraud for a purchaser to register with knowledge that a prior interest will be defeated by the registration: *Mills v Stokman* (1967) 116 CLR 61 at 78; *Wicks v Bennett* (1921) 30 CLR 80 at 91. New Zealand authorities apply the test stated by Salmond J in *Waimiha Sawmilling Co Ltd (in liq) v Waione Timber Co Ltd* [1923] NZLR 1137 (New Zealand Court of Appeal, not considered by the Privy Council on appeal). Salmond J said that while a purchaser is not affected by the mere knowledge of the existence of a trust or prior unregistered interest, knowledge that the registered owner is acting in breach of trust or is wrongfully destroying a prior interest does amount to fraud. Fraud will be established if the purchaser had actual and certain knowledge of the breach of trust or wrongful deprivation, or if 'he knew enough to make it his duty as an honest man' to make further inquiries before proceeding with the transaction: at 1173, 1177. This duty of inquiry has not been accepted in Australia: Mason, 'Indefeasibility: Logic or Legend' in Grinlinton, p 3 at p 10. Australian courts maintain that the fraud exception requires personal dishonesty or moral turpitude: see, for example, *Russo v Bendigo Bank Ltd* [1999] VR 376; *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230

CLR 89; 81 ALJR 110 at [192]; *Latec Investments Ltd v Hotel Terrigal Pty Ltd* (1965) 113 CLR 265 at 273–4.

It is fraud for a purchaser to collude in transfer designed to cheat a person out of a known existing right, or to engage in a deliberate and dishonest trick to cause the person not to register the interest: *Waimiha Sawmilling Co v Waione Timber Co* [1926] AC 101 at 106 (Privy Council). For example, in *Efstratiou v Glantschnig* [1972] NZLR 594, a husband transferred his matrimonial home to a purchaser who did not inspect the house, bought the house at a considerable undervalue, and paid the purchase price within one day. The husband held the property on a resulting trust for his wife as to a one-half share. It was found that the husband had been guilty of a wilful breach of trust and the purchaser had been a party to a scheme designed to cheat the wife out of her half-share. Although the New Zealand Court of Appeal referred to Salmond J's test in *Waimiha Sawmilling*, it is likely that fraud would also be found by an Australian court in these circumstances: Blanchard, 'Indefeasibility under the Torrens System in New Zealand' in Grinlinton, p 29 at pp 36, 43.

Supervening fraud

5.100 Is it fraud for a purchaser, having agreed to honour the rights of a prior interest holder, to undergo a change of mind after registration, and resile from the promise? (Note that these facts are different from *Loke Yew* where the purchaser's promise to respect the prior unregistered rights was found to be falsely and fraudulently made.) The fraud which activates the exception to indefeasibility has generally been understood as temporally limited to the period leading up to registration. In *Bahr v Nicolay (No 2)* (1988) 164 CLR 604, the High Court was equally divided on the question of whether it was fraud for a registered owner dishonestly to repudiate a prior interest that the person had agreed to honour for the purposes of obtaining title: see extract below at 5.89. Mason CJ and Dawson J answered the question in the affirmative, while Wilson and Toohey JJ answered in the negative. Brennan J did not address the question, as he (along with all members of the court) held that the prior interest was enforceable agains the registered owner *in personam*. The authorities in both Australia and New Zealand are unsettled: see Bradbrook, McCallum, Moore and Grattan, 5th ed, p 223; Hinde, Campbell and Twist, *Principles of Real Property Law*, 2007, pp 327–35; Tooher, 'Muddying the Torrens Waters with the Chancellor's Foot? *Bahr v Nicolay*' (1993) 1 *APLJ* 1.

Rights *in personam* (the 'personal equities exception')

5.101 In *Frazer v Walker* [1967] 1 AC 569 (5.40C) Lord Wilberforce stated that the principle of indefeasibility 'in no way denies the right of a plaintiff to bring against a registered proprietor a claim *in personam*, founded in law or in equity, for such relief as a court acting *in personam* may grant. Courts and commentators call this the '*in personam* exception to indefeasibiity' or 'the personal equities exception', but Low cautions that these terms can mislead: Low, 'The Nature of Torrens Indefeasibility: Understanding the Limits of Personal Equities' (2009) 33 *Melb Uni LR* 205 at 679–81. The principle to which Lord Wilberforce referred is not an exception created by the statutes, like the fraud exception, but arises outside the statutory scheme. Claims *in personam* arise from a dealing or relationship between the plaintiff and the registered proprietor, as distinct from a claim *in rem*, which is a property right that the plaintiff can assert against all the world. Low argues that the term 'personal equities' is misleading because it suggests that the claims are personal rights enforceable in equity. Lord Wilberforce's

words 'a claim *in personam*, founded in law or in equity', indicates that claims may arise from legal as well as equitable causes of action. See also *Grgic v ANZ Banking Group* (1994) 33 NSWLR 202 at 223–4.

5.102C

Bahr v Nicolay (No 2)
(1988) 164 CLR 604
High Court of Australia

[The appellants, Mr and Mrs Bahr, were unable to raise funds to develop their land. They therefore decided to finance the development by selling the land to the first respondent, Nicolay, on terms that they might lease it for a number of years and then repurchase it for an amount specified in cl 6 of the contract of sale. Nicolay sold the land to Thompson, the second respondent. The contract of sale with Thompson included in cl 4 an acknowledgment of the agreement between Nicolay and Mr and Mrs Bahr. Thompson subsequently told Mr and Mrs Bahr that he 'recognised' cl 6 of their contract with Nicolay and would agree to sell the land for the agreed amount. When the Bahrs attempted to repurchase the land and paid the deposit, Thompson, now the registered proprietor, refused to sell. The Bahrs commenced an action in the Supreme Court of Western Australia against Nicolay and Thompson claiming an order that the land had vested in them on payment of the purchase price agreed with Nicolay. The action was dismissed by the trial judge and this decision was upheld by the Full Court.]

Mason CJ and Dawson J: … By cl 4 of the agreement between the first respondent and the second respondents, the second respondents 'acknowledge [sic] that an agreement exists' between the appellants and the first respondent, that agreement being the undated 1980 agreement. The clause does not purport to create in favour of the appellants new rights over and above those previously existing. In terms it acknowledges the existence of the earlier agreement. Although the precise effect of the clause must be left for later consideration, it necessarily involves an acknowledgment of such rights as the appellants may have had under the earlier agreement.

This characterisation of cl 4 lies at the heart of the second respondents' case: namely that mere notice of a prior unregistered interest does not amount to fraud within the meaning of s 68. That section provides that, except in the case of fraud, the registered proprietor holds the land subject only to incumbrances notified on the certificate of title, save for exceptions not material to this case. Section 134 provides that, except in the case of fraud, no person taking a transfer of the land shall be affected by actual or constructive notice of any trust or unregistered interest and that knowledge of any trust or unregistered interest 'shall not of itself be imputed as fraud'.

Sections 68 and 134 give expression to, and at the same time qualify, the principle of indefeasibility of title which is the foundation of the Torrens system of title. As the Judicial Committee observed in *Gibbs v Messer* [1891] AC 248 at 254: 'The object is to save persons dealing with registered proprietor from the trouble and expense of going behind the register, in order to investigate the history of their author's title, and to satisfy themselves of its validity'.

Neither the two sections nor the principle of indefeasibility preclude a claim to an estate or interest in land against a registered proprietor arising out of the acts of the registered proprietor himself: *Breskvar v Wall* (1971) 126 CLR 376 at 384–5. Thus, an equity against a registered proprietor arising out of a transaction taking place after he became registered as proprietor may be enforced against him: *Barry v Heider* (1914) 19 CLR 197. So also with an equity arising from the conduct of the registered proprietor before registration (*Logue*

v Shoalhaven Shire Council [1979] 1 NSWLR 537 at 563), so long as the recognition and enforcement of that equity involves no conflict with ss 68 and 134. Provided that this qualification is observed, the recognition and enforcement of such an equity is consistent with the principle of indefeasibility and the protection which it gives to those who deal with the registered proprietor on the faith of the register.

There is no fraud on the part of a registered proprietor in merely acquiring a title with notice of an existing unregistered interest or in taking a transfer with knowledge that its registration will defeat such an interest: *Mills v Stokman* (1967) 116 CLR 61 at 78; *Waimiha Sawmilling Co (in liq) v Waione Timber Co* [1926] AC 101. The decision in *Waimiha Sawmilling* merely gives effect to s 134 by excluding from the statutory concept of fraud an acquisition of title with notice of any trust or unregistered interest. However, Lord Buckmaster in expressing the reasons for the decision went rather further when he reproduced (at 106) the following passage of the remarks of Lord Lindley in the earlier decision (*Assets Co Ltd v Mere Roihi* [1905] AC 176 at 210): 'fraud … means actual fraud, dishonesty of some sort, not what is called constructive or equitable fraud …'.

Lord Buckmaster went on (at 106–7) to instance, as examples of fraud, the transfer whose object is to cheat a man of a known existing right and a deliberate and dishonest trick causing an interest not to be registered.

These comments do not mean all species of equitable fraud stand outside the statutory concept of fraud. Far from it. In *Latec Investments Ltd v Hotel Terrigal Pty Ltd (in liq)* (1965) 113 CLR 265 at 273–4, Kitto J held that a collusive and colourable sale by a mortgagee company to its subsidiary was a plain case of fraud. According to his Honour, '[t]here was pretense and collusion in the conscious misuse of a power', this being a 'dishonest course'; at 274. Likewise, in *Loke Yew v Port Swettenham Rubber Co Ltd* [1913] AC 491 at 504, Lord Moulton instanced the case of an agent who has purchased land on behalf of his principal but has taken the conveyance in his own name, and in virtue thereof claims to be the owner of the land, though he is in law a trustee for his principal. It seems that his Lordship did not intend to make this illustration as an example of the statutory concept of fraud. His Lordship had earlier dealt with the issue of fraud and indefeasibility and was, when instancing the acquisition of title by an agent, propounding another answer based on the power and duty of the court to rectify the register … Despite this, the example given by Lord Moulton is in our view an instance of fraud within the meaning of s 68.

According to the decisions of this court actual fraud, personal dishonesty or moral turpitude lie at the heart of the two sections and their counterparts: see *Butler v Fairclough* (1917) 23 CLR 78 at 90, 97; *Stuart v Kingston* (1923) 32 CLR 309 at 329, 356. However, from the appellants' point of view the examples may not travel quite far enough because the dishonesty which they exhibit is dishonesty on the part of the registered proprietor in securing his registration as proprietor …

For our part we do not see the illustrations given and the statements made in the cases as amounting to definitive pronouncements that fraud is confined to fraud in the obtaining of a transfer or in securing registration. The statements, viewed in their context, merely express the reasons why particular circumstances fall within the statutory exception. Nor do we see anything in the language or purpose of s 68 which warrants such a restrictive interpretation. Indeed, we agree with Higgins J in *Stuart v Kingston* when his Honour said (at 345) that there was much to be said for the view, expressed by Stawell CJ on the equivalent Victorian provision, that the section should be 'construed strictly' and the exception 'liberally'. The section restricts, in the interests of indefeasibility of title, rights which would exist otherwise at law or in equity. And granted that an exception is to be made for fraud why should the

exception not embrace fraudulent conduct arising from the dishonest repudiation of a prior interest which the registered proprietor has acknowledged or has agreed to recognise as a basis for obtaining title, as well as fraudulent conduct which enables him to obtain title or registration? In the context of s 68 there is no difference between the false undertaking which induced the execution of a transfer in *Loke Yew* and an undertaking honestly given which induces the execution of a transfer and is subsequently repudiated for the purpose of defeating the prior interest. The repudiation is fraudulent because it has as its object the destruction of the unregistered interest notwithstanding that the preservation of the unregistered interest was the foundation or assumption underlying the execution of the transfer. For the same reason the subsequent repudiation by a transferee of property of a limited beneficial interest in that property is fraudulent, when the transferee took the property on terms that the limited beneficial interest would be retained by the transferor. It is immaterial that the transferee 'may have been innocent of any fraudulent intent in taking the conveyance in absolute form': *Bannister v Bannister* [1948] 2 All ER 113 at 136.

What then was the purpose and effect of cl 4 of the agreement between the first and second respondents? The matrix of circumstances in which the agreement was made throws up three significant factors. First, the making of an agreement between the first and second respondents which would result in the destruction of the appellants' existing rights, or allow the destruction of those rights, by registration of a transfer in favour of the second respondents in circumstances whereby the rights became unenforceable would expose the first respondent to liability for breach of contract … Secondly, as we have seen, upon registration of such a transfer, the combined effect of ss 68 and 134 would, in the absence of fraud, bring about the destruction of the appellants' rights. Thirdly, at least until registration of such a transfer, the appellants' equitable interest under the 1980 agreement, being first in time, had priority over the interest of the second respondents as purchasers under their agreement with the first respondent.

Viewed in this setting, cl 4 of the later agreement was designed to do more than merely evidence the fact that the second respondents had notice of the appellants' rights. If that were the only purpose to be served by the acknowledgment it would achieve nothing. It would enable the second respondents to destroy the appellants' interest and would leave the first respondent exposed to potential liability for breach of contract at the suit of the appellants. In the circumstances outlined, it is evident that the purpose of cl 4 was to provide that the transfer of title to Lot 340 was to be subject to the appellants' rights under cl 6 of the 1980 agreement in the sense that those rights were to be enforceable against the second respondents.

At first glance it might seem that the words of cl 4 are inadequate to achieve this purpose. But an acknowledgment of an antecedent agreement in an appropriate context may amount to an agreement or undertaking to recognise rights arising under that antecedent agreement. And here the inferences to be drawn from the matrix of circumstances are so strong that they necessarily influence the interpretation of cl 4. These inferences provide a secure foundation for imputing an intention to the parties and reading cl 4 as a reflection of that intention …

Granted that the purpose of cl 4 is as we have explained it, what is its legal effect? It is simply an undertaking to perform the 1980 agreement if called upon to do so by the appellants? Contract scarcely seems to give sufficient effect to what the parties had in mind. A trust relationship is a much more accurate and appropriate reflection of the parties' intention.

The appellants submitted that cl 6 creates a trust in favour of them as third parties, in accordance with the principles enunciated in cases such as *Re Shebsman; Official Receiver v Cargo Superintendents (London) Ltd* [1944] Ch 83, and *Green v Russell; McCarthy (Third Party)* [1959] 2 QB 226. However, in the absence of the manifestation of a clear intention to create a trust, the courts have been reluctant to hold that a trust exists … This reluctance

to accept that the parties have created an express trust has induced the English courts to impose what has been described as a constructive trust in order to protect a prior interest from destruction on the registration of a later interest: see *Bannister* [1948] 2 All ER 133; *Binions v Evans* [1972] Ch 359; *Lyus v Prowsa Ltd* [1982] 1 WLR 1044; 2 All ER 953. *Bannister* itself was not a third party trust. It was simply a case in which a transferee, who took the transfer as a trustee, repudiated his trust and asserted a beneficial title in himself.

… If the inference to be drawn is that the parties intended to create or protect an interest in a third party and the trust relationship is the appropriate means of creating or protecting that interest or of giving effect to the intention, then there is no reason in a given case an intention to create a trust should not be inferred. The present is just such a case. The trust is an express, not a constructive, trust. The effect of the trust is that the second respondents hold Lot 340 subject to such rights as were created in favour of the appellants by the 1980 agreement.

Even if we had not reached this conclusion, we would not have regarded the registration of the transfer in favour of the second respondents as destroying the appellants' rights. Having regard to the intention of the parties expressed in cl 4 of the later agreement, the subsequent repudiation of cl 6 of the 1980 agreement constituted fraud. The case therefore fell within the statutory exception with a result that the appellants' prior equitable interest prevails over the second respondents' title, the second respondents taking with notice of the interest.

Wilson and Toohey JJ: … the real question is — having registered their interest under the provisions of the Act, did the second respondents acquire a title which was indefeasible in the sense that it was no longer open to attack by the appellants? The question may be further refined by asking — having regard to ss 68 and 134 of the Act, was there in any relevant sense fraud on the part of the second respondents? Unless there was such fraud, the second respondents hold their title free of any interest the appellants have by reason of cl 6, subject to any claim in personam that may lie against the second respondents.

… Can it be said, using the language of *Waimiha Sawmilling Co Ltd v Waione Timber Co Ltd* [1926] AC 101 at 106, that the designed object of the transfer to the second respondents was to cheat the appellants of a known existing right? Notwithstanding the various matters to which we have referred, we think the evidence falls short of establishing that case. The respondents agreed to buy Lot 340 in the hope, even the expectation, that the appellants would not be able to buy back Lot 340. But the evidence does not justify a finding that it was their intention to ensure that the appellants did not do so. However, it does establish that the second respondents took a transfer of Lot 340, knowing of cl 6, accepting an obligation to resell to the appellants and communicating that acceptance to Mr Callard, but banking on the appellants' inability to find the $45,000 necessary to implement the clause. What are the consequences of that finding?

[Their Honours then discussed the right of a plaintiff to bring an action for *in personam* relief as considered in *Gibbs v Messer*, *Frazer v Walker* and *Breskvar v Wall* and continued:]

This vulnerability on the part of the registered proprietor is not inconsistent with the concept of indefeasibility. The certificate of title is conclusive. If amended by order of a court it is, as Barwick CJ pointed out, 'conclusive of the new particulars it contains': *Breskvar v Wall* (1971) 126 CLR 376 at 385. Returning to *Frazer v Walker* the Privy Council said (at 585) of claims *in personam*: 'The principle must always remain paramount that those actions which fall within the prohibition of ss 62 and 63 may not be maintained'.

The reference to ss 62 and 63 is a reference to the Land Transfer Act 1952 (NZ), roughly corresponding with ss 68 and 199 of the Act. The point being made by the Privy Council is that the indefeasibility provisions of the Act may not be circumvented. But, equally, they do

not protect a registered proprietor from the consequences of his own actions where those actions give rise to a personal equity in another. Such an equity may arise from conduct of the registered proprietor after registration: *Barry v Heider* (1914) 19 CLR 197. And we agree with Mahoney JA in *Logue v Shoalhaven Shire Council* [1979] 1 NSWLR 537 at 563, that it may arise from conduct of the registered proprietor before registration.

The evidence leads irresistibly to the following conclusions. The second respondents understood through their agent Mr Callard that the first respondent would not sell Lot 340 unless they agreed to be bound by the obligation in cl 6 which required the first respondent to resell to the appellants. The second respondents bought Lot 340 on the understanding common to vendor and purchasers that they were so bound and cl 4 was included to give effect to that understanding. Clause 4 may have been, of itself, insufficient for that purpose but the second respondents' letter of 6 January 1982 and their two offers of 8 January 1982 put beyond doubt their acknowledgment of their obligation to the appellants.

By taking a transfer of Lot 340 on that basis, and the appellants' interest under clause 6 constituting an equitable interest in the land, the second respondents became subject to a constructive trust in favour of the appellants: *Lyus v Prowsa Developments Ltd* [1982] 1 WLR 1044; 2 All ER 953; *Binions v Evans* [1972] Ch 359 at 368. If it be the position that the appellants' interest under cl 6 fell short of an equitable estate, they none the less had a personal equity enforceable against the second respondents. In either case ss 68 and 134 of the Act would not preclude the enforcement of the estate or equity because both arise, not by virtue of notice of them by the second respondents, but because of their acceptance of a transfer on terms that they would be bound by the interest the appellants had in the land by reason of their contract with the first respondent.

Brennan J: … a purchaser who takes with notice of an antecedent interest but who becomes registered under the Act without fraud takes free of that interest: *Oertel v Hordern* (1902) 2 SR (NSW) (Eq) 37; *Munro v Stuart*; *Friedman v Barrett*; *Ex parte Friedman* [1962] Qd R 498. Registration of the transfer is not fraudulent merely because the transferee knows that an antecedent interest of which he has notice will be defeated thereby. As Kitto J said in *Mills v Stokman* (1967) 116 CLR 61 at 78, 'merely to take a transfer with notice or even actual knowledge that its registration will defeat an existing unregistered interest is not fraud'.

However, the title of a purchaser who not only has notice of an antecedent unregistered interest but who purchases on terms that he will be bound by the unregistered interest is subject to that interest. Equity will compel him to perform his obligation … Orders of that kind do not infringe the indefeasibility provisions of the Act. Those provisions are designed to protect a transferee from defects in the title of a transferor, not to free him from interests with which he has burdened his own title.

… A registered proprietor who has undertaken that his transfer should be subject to an unregistered interest and who repudiates the unregistered interest when his transfer is registered is, in equity's eye, acting fraudulently and he may be compelled to honour the unregistered interest. A means by which equity prevents the fraud is by imposing a constructive trust on the purchaser when he repudiates the unregistered interest. That is not to say that the registration of the transfer to such a proprietor is affected by such fraud as may defeat the registered title: the fraud which attracts the intervention of equity consists in the unconscionable attempt by the registered proprietor to deny the unregistered interest to which he has undertaken to subject his registered title.

Appeal allowed.

5.103 Questions

1. Personal equities are often pleaded as an alternative to the fraud exception in cases where a person has been deprived of their interest by the registration of a forged or invalid mortgage or transfer. In *Bahr v Nicolay (No 2)* (5.89C) all judges found that the conduct of Nicolay gave rise to a personal equity enforceable by the Bahrs, although only two judges (Mason CJ and Deane J) found that the same conduct amounted to fraud within the meaning of s 42. The personal equity exception is not confined to conduct on the part of the registered proprietor after having become registered but extends to equities arising as a result of conduct on the part of the registered proprietor or to which he or she was privy prior to registration: *Logue v Shoalhaven Shire Council* [1978] 1 NSWLR 710 per Powell J and per Mahoney JA [1979] 1 NSWLR 537 at 563. As noted above (5.XX) the authorities are unsettled on the question of whether conduct after registration can activate the fraud exception.

   The distinction may be very fine between a purchaser who takes an interest knowing that there is an unregistered interest affecting the land which will be defeated on registration of the purchaser as proprietor, and a purchaser who has undertaken to be bound by the unregistered interest. Can keeping silent be taken to signal assent to a condition, rendering the condition enforceable against the registered owner under the principle in *Bahr v Nicolay (No 2)*? See *Bourseguin v Stannard Bros Holdings Pty Ltd* [1994] 1 Qd R 231.

2. In *Hinds v Uellendahl (No 2)* (1992) 112 FLR 222 it was held that mere knowledge of the existence of a prior contract of sale was not knowledge of some dishonest or fraudulent design. This question most commonly arises in relation to unregistered leases. Does an acknowledgment that the purchaser knows that there is a tenant in the premises amount to an undertaking to be bound by the lease? Or does it merely mean that, as between vendor and purchaser, the purchaser will not insist on vacant possession? Compare *R M Hosking Properties Pty Ltd v Barnes* [1971] SASR 100 and *Oertel v Hordern* (1902) 2 SR (NSW) 37; see also *Snowlong Pty Ltd v Choe* (1991) 23 NSWLR 198.

5.104 In South Australia, the Act specifically provides for the enforcement of contracts and trusts against the registered proprietor. Thus, s 71 states that nothing in the indefeasibility section shall affect:

(d) the rights of a person with whom the registered proprietor shall have made a contract for sale of land or for any other dealing therewith; and

(e) the right of a *cestui que trust* where the registered proprietor is a trustee, whether the trust shall be express, implied or constructive.

Section 249(1) provides that the Act shall not affect:

> … the jurisdiction of the Courts of law and equity in cases of actual fraud or over contracts or agreements for the sale or other disposition of land or over equities generally.

For interpretation, see *R M Hosking Properties Ltd v Barnes* [1971] SASR 100 at 106–7; *Friedman v Barrett; Ex parte Friedman* [1962] Qd R 498 at 511–12. Does the South Australian legislation add anything to the *in personam* exception to indefeasibility? The judicially recognised exception has also been given legislative sanction in Queensland where s 185(1)(a) provides a specific exception to indefeasibility for 'an equity arising from the act of a registered proprietor'; see also NT, s 189(1)(a). The Act does not give any guidance as to what constitutes an equity and this is left for the courts to determine: see *White v Tomasel* [2004] 2 Qd R 438; **5.99**.

5.105 *Bahr v Nicolay (No 2)* was followed in *Gunns Ltd v Balani Pty Ltd* [2011] FCA 431, in which it was held that a registered mortgage was subject to a purchaser's unregistered interest under a prior contract with the mortgagor. The mortgagee had expressly agreed in writing to give effect to the contract. In *Valbirn Pty Ltd v Powprop Pty Ltd* [1991] 1 Qd R 295, a purchaser gave a contractual undertaking to be bound by the terms of an existing unregistered lease, which included an option to renew. After the transfer was registered, the purchaser claimed that it was entitled to rely on indefeasibility to defeat the option to renew. It was held that the purchaser was bound by a personal equity See also *Executive Seminars Pty Ltd v Peck* [2001] WASC 229.

5.106 In *Mercantile Mutual Life Insurance Co Ltd v Gosper* (1991) 25 NSWLR 32, a registered owner successfully asserted a personal equity to deprive a mortgagee of its interest acquired by the registration of a forged mortgage. The respondent's husband forged her signature on a variation of mortgage instrument relating to her property. Acting without fraud, the appellant bank registered the variation, using the respondent's certificate of title which it already held as mortgagee under the previously registered mortgage. The appellant was not in fact authorised by the respondent to use the certificate for the purpose of registering the variation. Mahoney JA (with whom Kirby P agreed) said that the respondent had a personal equity against the appellant bank requiring it to grant a discharge upon the payment of the moneys owing under the original, valid mortgage. In the view of Mahoney JA (at 48–9), the personal equity arose from the mortgagee's breach of its obligations to the respondent as custodian of her certificate of title. His Honour said that it is clear from the authorities that no personal equity arises from the bare fact that the instrument was forged: at 52.

The decision in *Gosper* has been distinguished in later cases. In *Ginelle Finance Pty Ltd v Diakakis* [2002] NSWSC 1032, Studdert J distinguished *Gosper* on the ground that in the case before him, the first and second mortgages were registered one immediately after the other and there was no pre-existing relationship between the plaintiff, the defendant and the solicitors. In *Gosper*, by contrast, the mortgagee held the certificate of title for several years under a genuine mortgage but later produced it to enable registration of the forged variation of mortgage. In *Vella v Permanent Mortgages Pty Ltd* [2008] NSWSC 505 at [380], Young CJ in Eq quoted with approval Butt's view that the personal equity in *Gosper* arose because of the mortgagee's unauthorised use of the certificate of title: see Butt, 'Indefeasibility and Sleights of Hand' (1992) 66 *ALJ* 596. In *Paradise Constructors & Co Pty Ltd* (2007) 20 VR 294 at [39], Neave JA expressed doubt that *Gosper* would be followed in Victoria. Wu argues that the decision is wrong because the appellant's claim against the mortgagee amounted to no known cause of action: Wu, 'Beyond the Torrens Mirror: A Framework of the *In Personam* Exception to Indefeasibility' (2008) 32 *MULR* 672.

The types of causes of action that can be asserted against a registered proprietor

5.107 In *Grgic v ANZ Banking Group* (1994) 33 NSWLR 202, Powell JA, in a much-cited passage, made the point that the *in personam* exception to indefeasibility embraced only known causes of action at law or in equity. At pp 223–4 his Honour said:

> I am of the view that the expressions 'personal equity' and 'right in personam' encompass only known legal causes of action or equitable causes of action, albeit that the relevant conduct which may be relied upon to establish 'a personal equity' or 'right in personam' extends to include conduct not only of the registered proprietor but also of those for whose conduct he is responsible, which conduct might antedate or postdate the registration of the dealing which it is sought to have removed from the Register.

The requirement that the plaintiff show a recognised legal or equitable cause of action has been followed in many other cases: see, for example, *Conlan v Registrar of Titles* (2001) 24 WAR 299; *Garafano v Reliance Finance Corp Pty Ltd* (1992) NSW ConvR ¶55-640; *Macquarie Bank Ltd v Sixty-Fourth Throne Pty Ltd* [1998] 3 VR 133.

5.108 In *Breskvar v Wal* (5.45C) Barwick CJ said that, apart from certain forms of action expressly barred by the Act, proceedings may be brought against a registered owner *in personam* that 'may have as their terminal point orders binding the registered proprietor to divest himself wholly or partly of the estate or interest vested in him by registration and endorsement of the certificate of title'. In a case where a mortgagee has acted negligently but not fraudulently in acquiring its interest, does the registered proprietor have an action in negligence against the mortgagee that gives an equity to set aside the registered mortgage? In *Pyramid Building Society (in liq) v Scorpion Hotels Pty Ltd* [1998] 1 VR 188, Pyramid sought to enforce its rights as registered mortgagee against the registered proprietor, Scorpion Hotels. Having failed to establish fraud by reason of 'wilful blindness' or 'reckless indifference' on the part of the mortgagee's agents (see 5.81), Scorpion argued that it had a personal equity against the mortgagee arising from negligence, based on the following acts and omissions. Pyramid's solicitor had failed to read a company search that he had obtained before settlement, and failed to notice that one of the persons who attested the affixing of Scorpion's common seal on the mortgage was not a director, as required by its articles of association. The solicitor had also failed to ask for a copy of the minutes of the meeting of Scorpion authorising the execution of the mortgage. (No such minute existed.) Hayne JA (with whom Tadgell and Brooking JJA concurred) disposed of Scorpion's personal equity argument as follows (at 195–6):

> On the hearing of the appeal, counsel for Scorpion submitted that Scorpion had a claim against Pyramid for negligence and that this gave it a personal equity to set the mortgage aside. No such case was pleaded or advanced at trial and, in my view, Scorpion may not seek to establish such a case now. In any event, the case which it sought to raise for the first time on appeal is a case in which there are several difficulties — difficulties which I consider to be insurmountable. The essence of the argument was that Pyramid's solicitor owed a duty to Scorpion to take care to ensure that it (Scorpion) had properly given authority for the transaction of loan and mortgage. I very much doubt that the solicitor for Pyramid owed Scorpion any such duty when Scorpion had a solicitor acting for it in relation to the transaction — a transaction that would see the obligation of Scorpion to the National Australia Bank discharged and replaced with an obligation to Pyramid. That is, I very much doubt that a solicitor confronted with another solicitor who claims to be acting for a

borrower owes the borrower a duty to take care that the solicitor is right in the assertion that he or she has been properly retained by the borrower. What is the solicitor for the lender to do? Is the solicitor for the lender to meet the assertion that the borrower has retained a solicitor with the statement 'prove it' or is the solicitor for the lender to go behind the solicitor for the borrower and make his or her own enquiries about the retainer? Nor is there anything in the facts of this case which would suggest that in this case the solicitor for the lender should have taken any such step. But these are not the only difficulties in the argument. If contrary to my view, the solicitor for Pyramid did owe the borrower a duty to take care and if the solicitor breached that duty, that may give rise to a claim for damages but it was not explained how it gave a right to have the mortgage set aside.

His Honour then cited the comments from Powell JA in *Grgic* (see above) and continued:

I do not accept that the conduct of Pyramid or its solicitor in relation to procuring the execution and registration of the mortgage was such as to give rise to a personal equity in Scorpion sufficient to set the mortgage aside. Scorpion established no legal or equitable cause of action against Pyramid. As I say, the highest that the evidence went was to show that had Pyramid (or its solicitors) made further enquiries the defects which it is now said existed in Scorpion's execution of the mortgage would have been revealed.

The requirement of an element of unconscionability

5.109C **Vassos v State Bank of South Australia**
(1993) 2 VR 316
Supreme Court of Victoria

[The plaintiffs were the registered proprietors as tenants in common of land that was subject to a registered mortgage to Sandhurst Trustees to secure the sum of $130,000. The third co-owner was authorised to refinance the mortgage at cheaper rates. The plaintiffs subsequently discovered that their signatures had been forged to a registered mortgage in favour of the defendant bank, as well as to a guarantee and an indemnity to secure the sum of $500,000 advanced to an investment company, FHI Group. The defendant bank was not a party to the fraud and was unaware of it. The plaintiffs sought a declaration, inter alia, that they had an *in personam* right against the defendant bank.]

Hayne J: I consider it of the first importance to recall that the bank's title as mortgagee here is not defeated by the fact of forgery. The bank acquired that title innocent of any fraud or knowledge of fraud. Its title is as mortgagee to secure all amounts owed by any of the mortgagors including amounts owed by any of the mortgagors as guarantors of FHI Group. Of course two of the three mortgagors never assented to become surety for FHI Group or to give the bank a mortgage as security for any such indebtedness but in no case where the signature of a mortgagor has been forged will that mortgagor have assented to pay the debt secured by the mortgage. If, as the plaintiffs contended, the fact of lack of assent of the mortgagor gives an in personam right to a discharge, then every mortgagor whose signature was forged would be entitled to compel the mortgagee to discharge the mortgage on the basis that the mortgagee was not entitled to demand any more than had been agreed to be paid and the 'mortgagor' had never agreed to pay anything. That flies in the face of indefeasibility of title

for without any fault of any kind on the part of the mortgagee he could always be compelled to discharge his security and his title obtained by registration could always be set aside at the suit of the defrauded party. Such a conclusion again appears to hark back to the views expressed by Dixon J in *Clements v Ellis* — views which, as I have said, have been rejected by the High Court in *Breskvar v Wall* and later cases.

The bare fact that a party has not assented to the transaction recorded in an instrument registered under Torrens system legislation does not, in my opinion, give that person a right enforceable by in personam action to have the transaction reversed. For my part I consider it is clear that more than the bare fact of forgery (and thus an absence of assent) must be shown to found any in personam action of the kind spoken of in *Frazer v Walker* and subsequent cases.

As Mahoney JA points out in *Gosper's* case there has been no comprehensive definition of 'personal' equity for these purposes: at 45. Again as his Honour points out it may be possible to discern in the authorities two suggestions about the content of the expression 'personal equity' in this context: that the interest must not be inconsistent with the terms or policy of the legislation and that 'personal' equities arise only from acts of the new owner: at 45; *Breskvar v Wall,* at 384 to 385. However whatever the limits may be on such 'personal' equities the very language used to describe the right and the reference to the remedies being 'in personam remedies' is a clear reference to the remedies being available in circumstances where equity would act, ie, in cases which equity would classify as unconscionable or unconscientious. In the present case, for reasons to which I will refer later, it may well be that the bank did not act without neglect but there is in my view no material which would show that the bank acted unconscionably. There was no misrepresentation by it, no misuse of power, no improper attempt to rely upon its legal rights, no knowledge of wrongdoing by any other party. It obtained a mortgage, apparently regular on its face but which was in fact forged. Even if by making reasonable enquiries the bank could have discovered the fact of the forgery I do not consider that that fact alone renders its conduct unconscionable. I do not consider that the plaintiffs have any in personam right against the bank; all that they have shown is the mere fact of forgery of the instrument.

[**Hayne J** held that the defendant bank should have judgment against the plaintiffs for possession of the land and was entitled to sell the land and to realise it in satisfaction of the amount owing under the mortgage. The indemnity and guarantee was held to be unenforceable against the plaintiffs and the defendant was restrained from seeking to enforce it against them. The plaintiffs were given judgment against the Registrar of Titles for indemnity under s 110(3) of the Transfer of Land Act 1958 (Vic), being the assessed value of their interest in the land.]

Orders accordingly.

5.110 Questions

Hayne J's view in *Vassos*, that a registered proprietor is not susceptible to an *in personam* action unless he or she is acting unconscionably or unconscientiously, has been endorsed by appellate courts in *Grgic v Australian and New Zealand Banking Group Ltd* (1994) 33 NSWLR 202; *Story v Advance Bank Australia Ltd* (1993) 31 NSWLR 722; *Macquarie Bank Ltd v Sixty-Fourth Throne Pty Ltd* [1998] 3 VR 133; *Pyramid Building*

Society (in liq) v Scorpion Hotels Pty Ltd [1998] 1 VR 188; *McGrath v Campbell* [2006] NSWCA 180 at [98]–[101]; *LHK Nominees Pty Ltd v Kenworthy* (2002) 26 WAR 517; *Dollars & Sense Finance Ltd v Nathan* [2007] NZCA 177. What is the source of this restriction on the scope of the personal equities exception? Hayne J treats it as implicit in the concept of *in personam* remedies. Are all equitable remedies that are granted against an owner *in personam* premised on the restraint of unconscionable conduct? Consider, for example, the requirements for enforcement against a registered proprietor of rights arising under a resulting trust (see, for example, *Calverley v Green* (1984) 155 CLR 242; **4.98**), or under a constructive trust arising at the point of entry into a specifically enforceable contract of sale (for example, *Barry v Heider* (1914) 19 CLR 197; **5.149C**). Does Hayne J's view leave room for *in personam* claims based on legal causes of action, such as contract?

5.111 The Queensland Court of Appeal has recognised a personal equity against registered owners who had not acted unconscionably in acquiring their interest. In *White v Tomasel* [2004] 2 Qd R 438, the appellants had obtained registration of a transfer pursuant to orders of the District Court that the Court of Appeal considered to have been wrongly made. The respondents argued that they had an indefeasible title and could not be ordered to retransfer the land to the appellant, as they had simply acted in reliance on the court order and had done nothing unconscionable. The Court of Appeal held by a majority that the court could order the respondents to retransfer the land as part of the restitution in consequence of the orders being set aside. McMurdo J (Williams JA agreeing) held that the appellant's right to restitution was an equity that fell within the scope of the *in personam* exception to indefeasibility in Qld, s 185(1)(a).

McMurdo J said (at 456) that unconscionability should not be a universal requirement for enforcing a personal equity against the registered owner, as 'otherwise, for example, the rights of a purchaser under an uncompleted contract for the sale of a registered interest would not be enforceable'. Williams JA, who agreed with McMurdo J, said (at [59]) that in invoking the assistance of the court at first instance to obtain the order against the appellant, the respondents impliedly accepted that their title was subject to an order of the court, which included any reversal of the order on appeal. The obligation to which the respondents had submitted themselves was one enforceable against them *in personam*, and was not inconsistent with indefeasibility. Davies JA, in dissent, held that no equity can be enforced against the registered proprietor unless his acts make it unconscionable for him to retain title, and the circumstances did not give rise to such an equity. Christensen and Duncan argue that the view of the majority represents an unwarranted extension of the *in personam* exception: Christensen and Duncan, 'Is Indefeasibility a Bar to Restitution after Reversal of Judgment on Appeal?' (2005) 11 *APLJ* 81. See also Young, 'Torrens Title: Indefeasibility Affected by "Equities" — What is an Equity? — Case Note: *White v Tomasel*' (2005) 79(1) *ALJ* 30; Papamatheos, 'What are the Juridical Bases of Reversal of Judgment Restitution?' (2004) 25 *ABR* 268.

There is a division of opinion in subsequent authorities. In *Battenberg v Union Club* (2005) 215 ALR 696; [2005] NSWSC 242 at [53], Campbell J said that the view of the majority in *White v Tomaset* 'goes too far' and expressed a preference for the minority view of Davies JA. In *Harris v Smith* [2008] NSWSC 545 at [55], Brereton J approved the broader view of the majority in *White v Tomasel*, that a plaintiff should not in every case be required to prove

unconscionability. His Honour said: '[I]n my view a plaintiff invoking a personal equity for these purposes does not have to establish a superadded element of unconscionability'. Wu argues that the requirement of unconscionability for the *in personam* exception should be abandoned: Wu, 'Beyond the Torrens Mirror: A Framework of the *In Personam* Exception to Indefeasibility' (2008) 32 *MULR* 672 at 679–82.

The ability of the court to order retransfer after registration may affect the court's assessment of the 'balance of convenience' in an application for removal of a caveat that prevents registration, or in proceedings for an interlocutory injunction; X.XX. In *Ardrey v Bartlett* [2004] WASCA 256 at [25]–[36], Murray ACJ approved the reasoning of Williams JA in *White v Tomasel*, in considering the possible consequences of ordering removal of a caveat. Templeman and Steytler JJ did not find it necessary to consider the matter.

Special equity cases

5.112 A personal equity exception which does incorporate the requisite element of unconscionability is the equity which a wife has to set aside a surety given to a third party to secure the debts of her husband. In *Yerkey v Jones* (1940) 63 CLR 649, the High Court accepted that it might in some circumstances be appropriate to give special protection to a wife who gives a surety. There has been a great deal of controversy about the status of the principle in *Yerkey v Jones*, the argument being that wives in this position are better protected by more general principles of equity. The special equity in favour of married women was confirmed as part of the law when the High Court of Australia decided *Garcia v National Australia Bank Ltd* [1998] HCA 48. *Yerkey v Jones* was affirmed. The issue has been the subject of much academic comment.[8] The High Court left open the possibility that the principle extended to 'long term and publicly declared relationships short of marriage between members of the same or of opposite sex': at [22]. Some authorities have observed that the High Court did not intend to confine the benefit of the *Garcia* principle to married women, and that it may extend to other relationships in which the lender can reasonably be taken to have understood that the guarantor may repose a requisite degree of trust and confidence in the debtor in business affairs: *Kranz v National Australia Bank Ltd* (2003) 8 VR 310 at [24], [31]; *Alierzai v ANZ* [2004] QCA 6; Q ConvR 54,60 at [39], [82]. McCallum J suggested that such an expectation might arise with respect to a relationship between an elderly parent and an adult child: *Australian Regional Credit v Mula* [2009] NSWSC 325 at [138]–[139]. In *Permanent Mortgages Pty Ltd v Vandenberg* [2010] WASC 10, Murphy J declined to extend the *Garcia* principle to a relationship of aged parent and child: at [191]–[197]. See Brown, 'Undue Confusion over Garcia' (2009) 3 *J Eq* 72.

5.113 The promotion of the special equity in favour of married women applied in *Garcia v National Bank of Australia Ltd* and the equity favouring those suffering from a special vulnerability or disability noted in cases such as *Commercial Bank of Australia v Amadio*

8. Cockburn, 'Some More Nails in the Coffin of *Yerkey v Jones*' (1997) 11 *APLB*61; Duggan, 'Till Debt Us Do Part: A Note on *National Australia Bank Ltd v Garcia*' (1997) 19 *Syd LR* 220; Scott, '*Yerkey v Jones* Upheld or Just Explained Away?' (1998) 6 *APLJ* 275; Riley, 'Special Equity of Wives' (1999) 73 *ALJ* 170; Stone, 'Infants, Lunatics and Married Women: Equitable Protection; *Garcia v NAB*' (1999) 62 *MLR* 604; Kiefel, 'Guarantees by Family Members and Spouses: *Garcia* and a German Perspective' (2000) 74 *ALJ* 692; Griggs, 'In Personam, *Garcia v NAB* and the Torrens System — Are They Reconcilable?' (2001) 1 *QUTLJJ* 76; Stone, 'The Distinctness of Garcia' (2006) 22 *JCL* 170; Wilson, 'Unconscionability and Fairness in Australian Equitable Jurisprudence' (2004) 11 *APLJ* 1.

(1983) 151 CLR 447; *Spina v Conran Associates Pty Ltd* [2008] NSWSC 326; NSW ConvR ¶56-218 are illustrative of an expanding scope of equitable remedies based on unconscionability. Unconscionability is not just a traditional concern of equity but now has a statutory basis in enactments such as the Contracts Review Act 1980 (NSW); **11.52, 11.57**. However, the concern of equity to relieve against unconscionable behaviour and sharp practice may not sit easily with the advancement of the notion of indefeasibility of title. If the person becoming registered is guilty of unconscionable conduct as the primary actor, the *in personam* exception to indefeasibility will answer to repel reliance by such a person upon a registered title. The position is more difficult when the person accused of unconscionability has a more passive role. This is most likely to arise where the registered proprietor is accused of unconscionable behaviour arising from having received notice of the unconscionable conduct of a third party. A not untypical situation in this context is where a credit provider who has a registered security has constructive notice of undue influence or unconscionable behaviour on the part of a third party against the borrower or notice of the possibility of the existence of a *Yerkey v Jones* equity in favour of the borrower. Is a personal equity based on concepts of notice reconcilable with the 'notice' provisions in the Torrens statutes, which provide that a registered owner is not affected by notice of a prior unregistered interest or trust and that mere notice is not of itself to be imputed as fraud? The issues raised by the conflict of two important cornerstones of the modern law of property, a vigilant and expanding equity and the preservation of the notion of indefeasibility of title, are difficult and complex and not easily resolved. Some of these issues are explored by Griggs, '*In Personam, Garcia v NAB* and the Torrens System — Are They Reconcilable?' (2001) 1(1) *QUTLJJ* 76; Butt, 'Equity, Restitution and *In Personam* Claims under the Torrens System' (1998) 72 *ALJ* 258.

Personal equity and breach of trust

5.114 A registered proprietor who obtains registration of a transfer in breach of fiduciary duty to the transferor cannot set up his or her registered title to escape liability: *Tataurangi Tairuakena v Mua Carr* [1927] NZLR 688. The same applies where the registered proprietor acquired title under circumstances that give rise to a constructive trust: *Bahr v Nicolay (No 2)* (1988) 164 CLR 604; **5.890**. Breaches of trust or fiduciary obligations involve the element of unconscionability or equitable fraud required to bring an action against the registered owner *in personam*. In recent years, parties have sought to bring proceedings against registered owners under the rule in *Barnes v Addy* to land under the Torrens system. *Barnes v Addy* (1874) LR 9 Ch App 244 concerns the liability of a stranger who deals with assets as trustee or fiduciary in breach of trust. Under the 'first limb' of *Barnes v Addy*, a stranger who knowingly receives trust property in breach of trust holds the property subject to the trust. This is known as 'recipient liability'. The 'second limb' arises where a stranger, although not receiving trust property, assists with knowledge in a fraudulent or dishonest design on the part of a trustee or fiduciary, and therefore takes the property as a constructive trustee. This limb is known as 'accessory liability'.

The scope of both limbs of *Barnes v Addy*, and their application to Torrens system land, was considered by the High Court in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 81 ALJR 110. In a joint judgment (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ), the court held that the breach of trust or fiduciary duty required under the second limb must be dishonest and fraudulent. In relation to the requirement to prove that the registered owner had knowledge of the breach, the court referred to the five categories of knowledge laid out by

Peter Gibson J in *Baden Delvaux & Lecuit v Societe Generale pour Favoriser le Development du Commerce* [1992] 4 All ER 161:

(i) actual knowledge;
(ii) wilfully shutting one's eyes to the obvious;
(iii) wilfully and recklessly failing to make such inquiries as an honest and reasonable person would make;
(iv) knowledge of circumstances which would indicate the facts to an honest and reasonable person;
(v) knowledge of circumstances which would put an honest and reasonable person on inquiry.

The court said (at [170]–[178]) that categories (i)–(iv) would suffice to establish knowledge under the second limb, but category (v) would not. The court's ruling on this confirms the views of the majority justices in *LHK Nominees Pty Ltd v Kenworthy* [2002] WASCA 291, and the majority view in *Macquarie Bank Ltd v Sixty-Fourth Throne Pty Ltd* [1998] 3 VR 133, that dishonesty in the second limb of *Barnes v Addy* coincides with the concept of fraud as an exception to indefeasibility under the Torrens statutes.[9] The cited cases were expressly approved by the High Court: at [196].

The first limb of *Barnes v Addy*, which imposes a constructive trust on a person who acquires trust property with actual or constructive knowledge of the existence of a trust, is harder to reconcile with the indefeasibility provisions, particularly the 'notice' provisions, of the Torrens statutes; see **5.30**. In *Tara Shire Council v Garner* [2002] QCA 232, a majority of the Queensland Court of Appeal held that a registered owner who took property knowing that it was held on trust for an earlier purchaser (the council) was subject to a personal equity which bound him to hold the property on trust for the council. The High Court in *Farah Constructions* preferred the view of the majority of the Victorian Court of Appeal in *Macquarie Bank Ltd v Sixty-Fourth Throne Pty Ltd* [1998] 3 VR 133 that a claim under *Barnes v Addy* was not a personal equity which could be asserted as an exception to indefeasibility.[10] The High Court (at [193]) approved the following remarks of Tadgell JA ([1998] 3 VR 133 at 156):

> [T]o recognise a claim *in personam* against the holder of a mortgage registered under the Transfer of Land Act, dubbing the holder a constructive trustee by application of a doctrine akin to 'knowing receipt' when registration of the mortgage was honestly achieved, would introduce by the back door a means of undermining the doctrine of indefeasibility which the Torrens system establishes. It is to be distinctly understood that, until a forged instrument of mortgage is registered, the mortgagee receives nothing: before registration the instrument is a nullity. As Street J pointed out in *Mayer v Coe* … the proprietary rights of a registered mortgagee of Torrens title land derive 'from the fact of registration and not from an event antecedent thereto'. In truth, I think it is not possible, consistently with the received principle of indefeasibility as it has been understood since *Frazer v Walker* and *Breskvar v Wall*,

9. See Butt, 'Knowing Receipt of Trust Property as an Exception to Indefeasibility' (2007) 81 *ALJ* 713.
10. For comment on the case, see Bryan, 'Recipient Liability Under the Torrens System: Some Category Errors' (2007) 26 *UQLJ* 83; Harding, '*Barnes v Addy* Claims and the Indefeasibility of Torrens Title' (2007) 31 *MULR* 343; Low, 'The Nature of Torrens Indefeasibility: Understanding the Limits of Personal Equities' (2009) 31 *MULR* 205; Wu, 'Beyond the Torrens Mirror: A Framework of the *In Personam* Exception to Indefeasibility' (2008) 32 *MULR* 672; Atkin, '"Knowing Receipt" Following *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 29 *Syd LR* 713.

> to treat the holder of a registered mortgage over property that is subject to a trust, registration having been honestly obtained, as having received trust property. The argument that the appellant is liable as a constructive trustee because it had 'knowingly received' trust property should in my opinion fail [footnotes omitted].

One consequence of the ruling in *Farah Constructions* is that a purchaser who has been 'gazumped' by the registration of a transfer to another purchaser cannot compel the latter to transfer the land to him, even if the second purchaser took with knowledge that the vendor had already sold the land. What further circumstances might be required to give rise to a constructive trust? See *Bahr v Nicolay (No 2)* (1988) 164 CLR 604; 5.89C.

Personal equities and mistake

5.115 In the absence of fraud, common mistake does not make a registered title defeasible: *Merrell Associates Ltd v HL (Qld) Nominees Pty Ltd* [2010] SASC 155 at [39]–[42]. In some circumstances a personal equity may arise against a registered owner who has acted unconscionably in taking advantage of the transferor's unilateral mistake or a mutual mistake. See, for example, *Majestic Homes Pty Ltd v Wise* [1978] Qd R 225, where a lessee registered a lease knowing that it contained an option to renew which should not have been included. The lessor's solicitor had inserted the option by mistake and the lessor did not realise the error when he executed the lease. It was held that registration of the lease did not prevent the lessor's assignee taking proceedings to rectify the lease by deleting the option clause on the ground of either unilateral or mutual mistake. The court characterised the lessee's conduct as amounting to 'sharp practice'. See also *Tutt v Doyle* (1997) 42 NSWLR 10, where the vendor, to the knowledge of the purchaser, transferred more land than contracted for, and was granted an order for retransfer as it would be unconscionable for the purchaser to retain it. In a case where more land has been transferred than was bargained for, relief under the personal equities exception will be available where the transferee either knew, or had reason to know, that the transferor was, or might well be, mistaken: *Minister for Education and Training v Canham* [2004] NSWSC 274.

A personal equity can also arise where a transferee unconscionably retains land transferred under a mutual mistake. In *Lukacs v Wood* (1978) 19 SASR 520, the defendant received a more valuable lot with a dwelling upon it instead of the vacant lot he had contracted for. His refusal to retransfer was held to be unconscionable. Jacobs J said, at 531, that there was an 'equity in the present case to preclude the defendant from retaining the windfall benefit, by reason of [common] mistake, of a highly advantageous bargain which he did not intend to make and for which he has paid a wholly inadequate consideration'. See also *Pacer v Westpac Banking Corporation* (SC (NSW), No 3615 of 1995, Santow J, unreported); *Harris v Smith* [2008] NSWSC 545. In some cases, courts have refused to find a personal equity: *Medical Benefits Fund of Aust Ltd v Fisher* [1984] 1 Qd R 606; *Tanzone Pty Ltd v Westpac* (1999) 9 BPR 17,287; NSW ConvR ¶55-908; [1999] NSWSC 478. In *State Bank of New South Wales v Berowra Waters Holdings Pty Ltd* (1986) 4 NSWLR 398; NSW ConvR ¶55-281, a mortgage was discharged by mutual mistake before the debt had been paid. Needham J held that this gave rise to no personal equity, or if it did, the plaintiff's claim fell within the class of actions prohibited by NSW, ss 42 and 124. Griggs finds no clear and consistent explanation for the variable outcomes in this series of cases: Griggs, 'Indefeasibility and Mistake — the Utilitarianism of Torrens' (2003) 10 *APLJ* 108.

Personal equity and unlawful action by public authorities

5.116 In *Logue v Shoalhaven Shire Council* [1979] 1 NSWLR 537, a council failed to observe strictly the statutory requirements in selling land for overdue rates. The council itself purchased the land which, apart from the irregularities, it was entitled to do. The executor of the previous proprietor argued that the irregularities gave him an equity which prevailed against the council notwithstanding its registration as proprietor. A majority of the Court of Appeal held that the irregularities did not invalidate the sale and, even if they did, the invalidity did not create a personal equity of a kind that could prevail against the registered proprietor. Mahoney JA dissented, contending that the council's breach of its statutory duty gave rise to a personal equity in favour of the previous proprietor. He distinguished *Boyd v Mayor of Wellington* [1924] NZLR 1174 on the ground that the invalidity of the resumption in that case did not result from the acts of the defendants.

5.117 The South Australian Full Court refused to apply the *in personam* exception to the facts that arose in *Palais Parking Station Pty Ltd v Shea* (1980) 24 SASR 425. Land was resumed (compulsorily acquired) in good faith by the Director-General of Medical Services. However, the resumption was unauthorised as the Director-General was not a competent authority. His title was nonetheless held to be indefeasible and the court refused to recognise a personal equity in the former owner to have the land retransferred. The mere fact that the Director-General was registered for an interest to which he was not entitled under the Act did not give rise to a personal equity enforceable against him. King CJ (Williams J agreeing) said (at 430) that to allow a personal equity against him would render indefeasibility 'virtually meaningless'. The refusal of relief in cases involving the illegal and wrongful expropriation of property purportedly under statutory power has been the subject of critical comment.[11]

Personal equity and easements

5.118 In *Golding v Tanner* (1991) 56 SASR 482, the Full Court of the Supreme Court of South Australia found that a prescriptive easement was enforceable against the registered proprietor who held title during the period of long user and was not inconsistent with the notion of indefeasibility of title. The easement was held to be enforceable against the registered proprietor under the rights *in personam* exception to indefeasibility, but would not have been enforceable against a successor in title to the servient tenement. In *Williams v State Transit Authority of New South Wales* (2004) 60 NSWLR 286, the New South Wales Court of Appeal distinguished *Golding v Tanner* on the basis that s 88 of the Real Property Act 1886 (SA) admitted the possibility of easements by prescription, while s 42 of the Real Property Act 1900 (NSW) did not. See further **10.119–10.121C.**

11. Hughson, Neave and O'Connor, 'Reflections on the Mirror of Title: Resolving the Conflict Between Purchasers and Prior Interest Holders' (1997) 21 *MULR* 460 at 492–4; G Hinde, 'Indefeasibility of Title *Since Frazer v Walker*' in *Centennial Essays*, 1971, p 33 at p 75; Whalan, 'The Torrens System in New Zealand — Present Problems and Future Possibilities' in *Centennial Essays*, 1971, p 258 at p 277; Langford, 'The *In Personam* Exception to Indefeasibility' in R Langford and J Dodds Streeton, 'Aspects of Real Property and Insolvency Law', Research Paper No 6, *Adelaide Law Review*, 1994, pp 91 at pp 147–54; Bradbrook, McCallum, Moore and Grattan, 4th ed, p 362.

Conclusions on the scope of the personal equities exception

5.119 In conclusion, the scope of the *in personam* exception has been significantly narrowed in recent years. Although the High Court in *Bahr v Nicolay (No 2)* envisaged personal equities as broader in scope than the fraud exception, persons deprived of their land through forgery of a transfer or mortgage now have little chance of successfully asserting a personal equity against a careless transferee or mortgagee in circumstances that do not engage the fraud exception: see, in particular, *Pyramid Building Society (in liq) v Scorpion Hotels Pty Ltd* [1998] 1 VR 188 (5.94); *Vassos v State Bank of South Australia* (5.98C); and *Farah Constructions v Say-Dee* (5.102) (but see the limited and much criticised exception in *Mercantile Mutual Life Insurance Co Ltd v Gosper* (1991) 25 NSWLR 32 (5.95)). The *in personam* exception to indefeasibility has been discussed in a number of articles.[12]

Registrar's powers of correction

5.120 All jurisdictions have conferred discretionary powers on the Registrar to correct entries in the register and supply omitted entries, but the Registrar must not erase the original entry. An error in this sense occurs when information recorded in the register does not accord with the instrument on which the entry was based: *Registrar of Titles v Franzon* (1975) 132 CLR 611 at [13]; *Equitiloan Securities Pty Ltd v Registrar of Titles* [1997] 2 Qd R 597; *Quach v Marrickville Municipal Council [No 2]* (1990) 22 NSWLR 65 at 71. In *State Bank of New South Wales v Berowra Waters Holdings* (1986) 4 NSWLR 398, when a registered mortgagee mistakenly discharged the mortgage, the resulting entry was held not to be an 'error' for purposes of NSW, s 12(1)(d). The correction has the same effect as if the error or entry had not occurred, but without prejudicing any right that arose from any entry prior to the correction: NSW, s 12(1)(d), (3); Qld, s 15; SA, s 220(f); Tas, s 139; Vic, s 103(2), (3); WA, s 188(ii); ACT, ss 14(1)(e), 160. The Privy Council in *Frazer v Walker* took the view that this type of provision is a mere 'slip' provision of no substantive importance; see 5.40C. Courts have interpreted such provisions narrowly. For analysis of the provisions in all jurisdictions, see Skead and Carruthers, 'The Registrar's Power of Correction: "Alive and Well", Though Perhaps "Unwelcome"?: Part I: The Slip Provision' (2010) 18 *APLJ* 32.

5.121 South Australia, Tasmania, New South Wales and Western Australia have another 'substantive' provision which empowers the Registrar to cancel an entry or document on the basis of fraud or error: NSW, ss 136, 137; SA, ss 60–63; WA, ss 76–77; Tas, ss 163, 164.

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12. See generally Stevens, 'Indefeasibility in Decline: The *In Personam* Remedies' in Grinlinton, pp 141; Langford, 'The *In Personam* Exception to Indefeasibility of Title', *Adel Law Review*, Research Paper No 6, 1994, pp 146–7; Griggs, 'In Personam, *Garcia v NAB* and the Torrens System — Are They Reconcilable?' (2001) 1(1) *QUTLJJ* 76; Stevens, 'The *In Personam* Exceptions to the Principle of Indefeasibility' (1969) 1 *AULR* 29; Gyles, 'Indefeasibility and Actions *In Personam*' (1972) 46 *ALJ* 644; Land, 'Fraud and Personal Equities Under the Torrens System' (1988) 62 *ALJ* 1036; Moore, 'Equity Restitution and In Personam Claims under the Torrens System' (1998) 72 *ALJ* 258; and 'Equity, Restitution, and In Personam Claims under the Torrens system: Part Two' (1999) 73 *ALJ* 712; Hughson, Neave and O'Connor, 'Reflections on the Mirror of Title: Resolving the Conflict Between Purchasers and Prior Interest Holders' (1997) 21 *MULR* 460; Gray, 2nd ed, pp 308–21.

12. Edgeworth, 'Planning Law versus Property Law: Overriding Statutes After *Hillpalm v Heaven's Door* and *Kogarah v Golden Paradise*', forthcoming in (2007) *EPLJ*; see also, Edgeworth, 'Overriding Statutes and the Torrens System (Again)' (2007) 81 *ALJ* 713.

In *Frazer v Walker* the Privy Council said that a similar provision in the New Zealand legislation conferred powers that were 'significant and extensive'. Lord Wilberforce said that the power 'must be read with and subject to s 183 [the paramountcy provision] with the consequence that the exercise of the registrar's powers must be limited to the period before a bona fide purchaser, or mortgagee, acquires a title under the latter section'; see 5.40C. The South Australian position may be affected by the special provision relating to forgery or disability in s 69(b); 5.50. For a discussion of the powers, see Skead and Carruthers, 'The Registrar's Power of Correction: "Alive and Well", Though Perhaps "Unwelcome"? Part II: The Substantive Provision' (2010) 18 *APLJ* 132; Hinde, 'Indefeasibility of Title Since *Frazer v Walker*' in *Centennial Essays*, pp 55–67; Grinlinton, 'The Registrar's Powers of Correction' in Grinlinton, p 217; Scott, 'Indefeasibility of Title and the Registrar's "Unwelcome" s 81 Powers' (1999) 7 *Canterbury Law Journal* 246. As Registrars have exercised their powers of correction cautiously, direct authorities on the scope of the powers are sparse. A judge of the Supreme Court of Queensland, in taking a narrow construction of the correction power, has commented that the 'extent of the registrar's power to correct errors in the register is a largely unexplored area of the Torrens system. To recognise an unqualified power in that regard would have potentially destructive consequences … a discretionary power to detract from indefeasibility of a registered title ought to be construed with the utmost strictness': *Medical Benefits Fund of Australia Ltd v Fisher* [1984] 1 Qd R 606 at 611 per McPherson J.

5.122 The Queensland and Northern Territory Registrars also have a substantive power of correction, although in different terms. The Registrar is empowered to correct the register if satisfied that the register is incorrect and that the correction will not prejudice the rights of the holder of a recorded interest: Qld, s 15(1)(b); NT, s 17(1)(b). A person holding an interest in the register will not be prejudiced 'if the holder acquired or has dealt with the interest with actual or constructive knowledge that the register was incorrect and how it was incorrect': Qld, s 15(8); NT, s 17(5). The Queensland Registrar can also correct the register to show an omitted or misdescribed easement within the exception to indefeasibility in s 185(1)(c), even if the correction will prejudice the rights of a current interest holder: s 15(3)(a); 5.XXX. The Queensland Registrar can correct the register if the register is incorrect because the Registrar has incorrectly recorded an interest, or the Registrar has held an inquiry under Div 4 and has concluded that the register is incorrect, including, for example, because there has been a fraud affecting the register: s 15(1), (2). If the Registrar is unwilling to exercise this power in case of fraud, application may be made to the Supreme Court for an order under s 187. See Weir, 'Registrar's Power of Correction — Queensland Reforms' (1998) 6 *APLJ* 101. The Northern Territory Registrar is also empowered to hold an inquiry into matters including whether a person has fraudulently or wrongfully procured an entry in the register, and may correct the register following the inquiry: NT, ss 20–26.

Other exceptions to indefeasibility

5.123 All states create exceptions to indefeasibility in cases where an interest is asserted by a proprietor claiming under a prior certificate of title or where the land has been included in the register by wrong description of parcels or boundaries: see 5.29. When concurrent titles are issued covering the same land and neither has been cancelled, the holder of the prior certificate prevails: *Medical Benefits Fund of Australia Ltd v Fisher* [1984] 1 Qd R 606. The exception does not give priority to a bona fide purchaser for value who takes under a later certificate. In New

South Wales, Tasmania, Western Australia and the Australian Capital Territory, the protection of purchasers section does not protect the registered proprietor against an action for ejectment or recovery of land by the holder of the prior certificate: see 5.31.

5.124 A registered proprietor's title is not indefeasible in respect of a portion of land which the original parties did not intend to be included in the certificate of title, and which was included due to a misdescription of the physical parcel, its boundaries or area. The misdescription usually results from a surveying error when the land was first registered, but can arise on a subsequent transfer of part of the land: *Michael v Onisiforou* (1977) 1 BPR 9356. Except in Queensland, the Northern Territory and Tasmania, the legislation is framed so that a bona fide purchaser of land is not subject to the exception: ACT, s 58(1)(c); NSW, ss 42(1)(c), 124(e); SA, s 69(c); Vic, s 42(1)(b); WA, s 68. The bona fide purchaser may receive further protection from the protection of purchasers section: see 5.31.

5.125 The exceptions for prior certificate of title and wrong description can arise on the same set of facts, such as where a portion of land included in a certificate due to wrong description of boundaries is also included in an earlier certificate. As to which exception applies in cases of overlap, see Carruthers and Skead, 'The Prior Certificate of Title and Wrong Description of Land Exceptions to Indefeasibility: Resolving the Overlap' (2009) 17 *APLJ* 240. While the exceptions for fraud, prior certificates of title and misdescription are couched in uniform language, the form of the remaining express exceptions to indefeasibility varies considerably from state to state. The Victorian section generally goes further in protecting unregistered interests than the legislation of the other states. Vic, s 42(2) provides that land which is included in any Crown grant, certificate of title or registered instrument shall be subject to:

a) the reservations exceptions conditions and powers (if any) contained in the Crown grant of the land;
b) any rights subsisting under any adverse possession of the land;
c) any public rights of way;
d) any easements howsoever acquired subsisting over or upon or affecting the land;
e) the interest (but excluding any option to purchase) of a tenant in possession of the land;
f) any unpaid land tax and also any unpaid rates and other charges that can be discovered from a certificate [issued pursuant to certain named Acts] notwithstanding the same respectively are not specially notified as incumbrances on such grant certificate or instrument.

The following brief analysis takes the Victorian legislation as the starting point and makes some comparisons with the legislation elsewhere. The table at 5.127 shows the extent to which the state Acts have made express inroads into the principle of indefeasibility.

Reservations and exceptions in Crown grant

5.126 In states where there is no express statutory exception for reservations in the Crown grant, the same result has been reached by administrative action. In New South Wales, for example, certificates of title have long been endorsed to the effect that they are issued subject to the reservations and conditions, if any, contained in the Crown grant. The terms of the Crown grant are not mentioned on certificates of title subsequently issued in respect of the land. A searcher therefore cannot ascertain from the register book (the original certificate of title) what reservations or exceptions were contained in the Crown grant. In practice, no serious

problem is caused, since the most common reservations or exceptions in the Crown grant relate to the Crown's right of resumption (now governed by legislation) and the Crown's retention of the right to minerals. It has always been known that the Crown's practice was to reserve mineral rights. Furthermore, the reservations in Crown grants have now been superseded by a series of statutes providing that property in a variety of minerals shall remain in the Crown.

Short-term tenancies

5.127 All jurisdictions in Australia accept the propriety of subjecting a registered proprietor to the unregistered interest of a short-term tenant in possession of the land. The justification for this approach is that the expense and inconvenience of requiring the registration of short-term leases as the price of their enforceability against third parties outweigh the advantages. Moreover, the purchaser can be expected to discover the tenant's occupation and ascertain the existence of the lease before completing the purchase. (In the usual case the purchaser is fully aware before settlement of the purchase of all outstanding interests in the land. Problems arise, in general, only where the purchaser discovers after settlement an interest of which he or she was unaware, or at least the extent of which was not appreciated.)

5.128 The duration of unregistered leases protected in jurisdictions other than Victoria varies from one to five years: ACT, s 58(1)(d) (not exceeding three years) and see ss 58(1)(e), 85; NSW, s 42(1)(d) (protection confined to leases not exceeding three years); Qld, ss 4 and 185(1) (b), (2) (from year to year or a term not exceeding three years); SA, s 69(h) (one year); WA, s 68(1A) (not exceeding five years). In South Australia and Western Australia the provision relates only to tenancies where the tenant is in actual possession (or in New South Wales entitled to immediate possession) at the time of registration. The Western Australian provision specifically excludes options to purchase and options to renew unless protected by caveat: WA, s 68(1). Unless protected by caveat, an option to renew will be destroyed by the registration of a subsequent transfer to a purchaser, even if the purchaser took with notice: *Leros Pty Ltd v Terara Pty Ltd* (1992) 174 CLR 407. Tas, s 40(1)(d) excepts from the indefeasibility provisions the interest of a tenant under a periodic tenancy; a lease taking effect in possession for a term not exceeding three years (whether or not the lessee has power to extend); an equitable lease but not as against a bona fide purchaser without notice who has lodged a transfer for registration; and a residential tenancy agreement to which the Residential Tenancy Act 1997 applies.

5.129 Victoria uniquely has an exception to indefeasibility for the interest of a tenant in possession without any limitation as to the duration of the tenancy: Vic, s 42(2)(e). The phrase 'interest of a tenant in possession' is widely construed and includes the interest of a purchaser given possession before settlement: *Robertson v Keith* (1870) 1 VLR (E) 11. See also *Burke v Dawes* (1938) 59 CLR 1 at 17–18; *McMahon v Swan* [1924] VLR 397; Bradbrook, 'The Scope of Protection for Leases Under the Victorian Transfer of Land Act' (1988) 16 *MULR* 837. In *Downie v Lockwood* [1965] VR 257 (8.201C) it was held that a tenant's equity of rectification of the original lease constituted part of the tenant's interest in the land.

The legal effect of the exception in s 42(2)(e) was considered by the Full Court of the Federal Court in *Perpetual Trustees Co Ltd v Smith* (2010) 186 FCR 566; [2010] V ConvR 54-779. The court ruled that the provision does not operate positively to give the tenant's interest automatic priority over a subsequently registered interest. It operates negatively to deny the registered proprietor the ability to rely on the registered title to defeat the interest of a tenant in possession. The question of priority between the two interests is determined

according to general law priority rules, as in a competition between unregistered interests. In a contest between a tenant in possession and a registered mortgagee, the relevant time for assessing priority is the time of the creation of the mortgage in equity, not its registration: see also *Balanced Securities Ltd v Bianco* [2010] VSC 201 at [101]–[117].

Easements

5.130 There are two kinds of exceptions in the Torrens statutes for unregistered easements: general and partial. General exceptions are found in Victoria and Tasmania. The Victorian provision, s 42(2)(d), excepts easements 'howsoever acquired'. It is matched in scope by WA, s 68(1A) which excepts from the indefeasibility section 'any easements acquired by enjoyment or user or subsisting over or upon or affecting such land'. Tasmania creates a partial exception for certain categories of easement. Under Tas, s 40(3)(e), protection is given to an easement either 'arising by implication' or created by statute, which would have given rise to a legal interest if the servient tenement had not been registered land. An equitable easement is also protected, but not as against a bona fide purchaser for value without notice who has lodged a transfer for registration. In the other jurisdictions, the exception is restricted to omitted and misdescribed easements: ACT, s 58(1)(b); Qld, s 185(1)(c), (3), (4); NT, s 189(1)(c); SA, s 69(d) ('not described or misdescribed'). In New South Wales the exception has been clarified and now protects an omitted or misdescribed easement 'subsisting immediately before the land was brought under the provisions of this Act or validly created at or after that time under this or any other Act or a Commonwealth Act': s 42(1)(a1). There is a separate exception 'in the case of the omission or misdescription of any profit à prendre created in or existing upon any land': s 42(1)(b). The provisions of all jurisdictions and relevant authorities are discussed at 10.101ff.

5.131 10.52–10.85 The end result is that in all jurisdictions a purchaser of Torrens system land is exposed to the risk of being bound by interests the existence of which cannot be ascertained from the register or, in some cases, from any other source at the time of the purchase. The risk to purchasers is greatest in Victoria and Western Australia, where the wide exception for easements means that there is little incentive to register them: Vic, s 72ff; WA, ss 63A, 64, 65, 69; but see *Riley v Penttila* [1974] VR 547. The legal effect of the exception for unregistered easements may need to reconsidered following *Perpetual Trustees Co Ltd v Smith*; 5.XXX. It was held in that case that the effect of the exception in Vic, s 42(2)(e) is to deny the registered proprietor the ability to rely on the indefeasibility of registered title to defeat the prior interest of a tenant in possession. If the same reasoning is applied to the easements exceptions, such as Vic, s 42(2)(b), the registered proprietor would be bound by an unregistered easement only if it had priority under general law priority rules.

Adverse possession

5.132 The general law of adverse possession and extinguishment of title under limitations legislation is discussed at 2.XX ff. In Australia, the problem of accommodating the limitation of actions legislation within the framework of the Torrens system has produced a variety of solutions. The result is that a uniform approach has yet to emerge and some of the legislation presents difficult questions of interpretation.

5.133 Victoria and Western Australia each has a broad exception to indefeasibility protecting the rights of a person in adverse possession of the land: Vic, s 42(2)(b); WA, s 68(1A).

It seems that the wording of the provisions ('any rights subsisting under any adverse possession of the land') is wide enough to protect inchoate possessory rights, where the land is in adverse possession at the time of the registration and the limitation period has commenced to run against the registered owner but has not yet expired. The registration of a transfer to a new owner does not stop the limitation period running, so long as the land remains in adverse possession. The legislation in both states (Vic, ss 60–62; WA, ss 222–223A) permits squatters to apply for an order vesting them with registered title on proof that their period of adverse possession has barred the title of the registered proprietor. Even without registration, the squatter's title will prevail against that of the registered proprietor once the latter's title is extinguished by the operation of the limitation legislation.

5.134 Tasmania's Land Titles Act 1980 was substantially amended in 2001. Rights acquired or in the course of being acquired (inchoate rights) under a statute of limitations are an exception to indefeasibility: s 40(3)(h). The Limitation Act 1974 applies to the title of the registered proprietor in the same manner as it does to the title of a proprietor of unregistered land: s 138W(1). However, the Act goes on to state that the estate of the registered proprietor is *not* extinguished by the Limitation Act, but that where the estate would have been extinguished had the land been unregistered, the registered proprietor holds the land in trust for the squatter, without prejudice to any interest which would not have been extinguished had the land been unregistered: s 138W(2). A squatter claiming the land is held in trust by virtue of his or her adverse possession may apply to the Recorder for an order vesting the legal estate in the squatter: s 138W(4). The right to apply is not affected by the registration of any dealing by the registered proprietor of the land: s 138W(6). While s 138X appears to give the Recorder discretion to reject the squatter's application, presumably a claimant who established that his or her period of adverse possession would have barred the title of the registered proprietor under the general law is entitled to a vesting order. In determining an application, the Recorder is required by s 138V to consider all the circumstances of the case, including matters listed in paras (a)–(f), which are similar to the tests used by courts in determining whether a person has been in adverse possession. Section 138Y allows the Recorder to refuse to register an application that may result in the creation of a 'sub-minimum lot', unless the council consents. A major restriction on adverse possession is that time does not run during any period during which council rates are paid by or on behalf of the owner: s 138U. The registered proprietor who continues to pay the rates does not hold the land on trust for the squatter: *Quarmby v Keating* [2008] TASSC 71.

5.135 In New South Wales, the starting point is still the proposition that no title adverse to that of the registered proprietor can be acquired by any length of possession, but this is subject to the provisions of Pt 6A: NSW, s 45C. Under Pt 6A, a person in possession of a 'whole parcel of land' may apply to the Registrar-General to be recorded as proprietor of the land. The application may be made if the title of the registered proprietor of the land would have been extinguished as against the squatter under the statutes of limitation: s 45D(1); *Addison v Billion* [1983] 1 NSWLR 586. The scheme of the legislation is that applications cannot be made in respect of sub-parcels of land, although encroachments by buildings may be dealt with under the Encroachment of Buildings Act 1922 (NSW). Nor can the squatter obtain a registered title as against a proprietor who has become registered without fraud and for valuable consideration, where the whole of the limitation period has not run against that proprietor: s 45D(4). It follows that unless the registered proprietor has been fraudulent, time

begins to run afresh upon registration of that proprietor's dealing. Presumably, knowledge of the squatter's possession would not of itself constitute fraud. A person claiming an estate in land the subject of a possessory application may lodge a caveat and the caveator may take proceedings challenging the validity of the application: ss 45H, 45I. While Pt 6A provides an administrative procedure for establishing title by adverse possession without the intervention of a court in the absence of a dispute about the title, it was held by Hamilton J in *Bartlett v Ryan* (2000) 10 BPR 18,007 that there was no legislative intent to exclude the jurisdiction of the court where there was a real contest concerning the rights of the paper owner and the adverse possessor. The provisions of ss 45E(2) and 45F clearly envisaged the role of a court. The legislation is examined and criticised by Woodman and Butt, 'Possessory Title and the Torrens System in New South Wales' (1980) 54 *ALJ* 79 at 85–8.

5.136 The Queensland legislation permits a person to apply to the Registrar to be registered as owner of a lot: Qld, s 99. The possessory interest of a person who on application under s 99 would be entitled to be registered as an owner is an exception to the indefeasibility of a registered title: s 185(1)(d). The Registrar may refuse to register the applicant as owner of the lot if not satisfied that the applicant is an adverse possessor: s 108. For these purposes, an adverse possessor is a person against whom the time for bringing an action to recover the lot has expired and who, apart from the Land Title Act, is entitled to remain in possession: Sch 2. Before registering the applicant, the Registrar must give written notice of the application to all registered proprietors of the lot and adjoining lots, to anyone else who may have an interest in the land and to the public: s 103. Any person claiming an estate in the land may lodge a caveat at any time before the application is granted: s 104. If the Registrar is not satisfied that the caveator has an interest in the lot or that any interest has not been extinguished under the Limitation of Actions Act 1974, the Registrar must require the caveator to commence a proceeding in the Supreme Court: s 105. The caveat will lapse if the caveator fails to commence a proceeding within six months, the proceeding is withdrawn or judgment is given against the caveator and there is no appeal: s 105. If no caveat is lodged, or all caveats lodged lapse or are removed, then the Registrar may register the adverse possessor as owner of the lot: s 108. An adverse possessor cannot apply to be registered in respect of an 'encroachment' or part only of a lot (s 98), although the Registrar can register an applicant as owner of all or part of a lot: s 108A.

5.137 The South Australian legislation on adverse possession is contained in the Real Property Act 1886 (SA) ss 251 and Pt 7A. Section 251 provides that title cannot be acquired by adverse possession except under the provisions of the Act. The Act permits a person 'who would have obtained a title by possession' if that land had not been under the Torrens system to apply to the Registrar for the issue of a certificate of title: s 80A. The application may be rejected at the discretion of the Registrar-General: s 80C. Any person claiming an estate in the land may lodge a caveat at any time before the application is granted, forbidding the issue of a certificate of title. If the Registrar 'is satisfied that the caveator is the registered proprietor of the land … or has an estate or interest in that land derived through, under or from the registered proprietor' then the application will be refused: s 80f. The language of this section is by no means clear, but it appears to allow the registered proprietor to prevent the issue of a certificate of title to the squatter even where the registered proprietor's title would have been barred had the land not been under the Torrens system: compare *Re Kay* [1969] SASR 1 at 4–5. If this is correct, the registered proprietor retains a right of veto over the issue of a certificate of title, provided he or she makes his or her objection known by way of a caveat.

See generally Duncan, 'Adverse Possession under the Real Property Act (Qld)' (1975) 4 *Qld Lawyer* 19, which discusses similar legislation.

5.138 In the Australian Capital Territory and the Northern Territory, no title to land adverse to that of the registered proprietor can be acquired by any length of possession, nor can the title of the registered proprietor be extinguished by the operation of a statute of limitations: ACT, s 69; Land Title Act 2000 (NT) s 198. The legislation provides no procedure to enable a squatter to obtain a certificate of title in his or her own name. Equivalent legislation, formerly in force in New South Wales, attracted a strict and literal interpretation: *Van den Bosch v Australian Provincial Assurance Assoc Ltd* (1968) 88 WN (NSW) (Pt 1) 357; [1968] 2 NSWR 550; *Spark v Meers* [1971] 2 NSWLR 1. It follows that under such legislation a squatter cannot hope to acquire an indefeasible title (except by purchase of the land), but must be content with possessory title of limited enforceability, which may be relied on in an action against a third party: see the related cases of *Spark v Three Minute Car Wash (Cremorne Junction) Pty Ltd* (1970) 92 WN (NSW) 1087; and *Spark v* Meers [1971] 2 NSWLR 1; *Refina Pty Ltd v Binnie* [2010] NSWCA 192; **2.78**.

5.139 For articles discussing the differences between the provisions and the options for reform, see O'Connor, 'The Private Taking of Land: Adverse Possession, Encroachments by Buildings, and Improvement Under a Mistake' (2006) 33(1) *UWALR* 31; McCrimmon, 'Whose Land is it Anyway? Adverse Possession and Torrens Title' in Grinlinton, p 157; Griggs, 'Possessory Titles in a System of Title by Registration' (1999) 21 *Adel LR* 157; Park and Williamson, 'An Englishman Looks at the Torrens System: Another Look 50 Years On' (2003) 77 *ALJ* 117.

Rates and taxes

5.140 The exception relating to rates and taxes in the Victorian legislation is a concession to the needs of government in its various forms. Victoria (s 42(2)(f)), Western Australia (s 68(1A)) and the Australian Capital Territory (s 58(1)(f)) specifically except liability for rates and other statutory charges from the indefeasibility of the registered proprietor's title, and Tasmania excepts any money charged on land under an Act: s 40(3)(g). South Australia excepts charges for unpaid succession duty: s 69(i). In other states the position depends on the language of the legislation imposing charges or, in certain cases, on the application of the presumption that the Torrens legislation does not bind the Crown: Sykes and Walker, pp 498– 502. It is sometimes difficult to determine whether statutes imposing charges are intended to bind Torrens system land and to override the principles established by the Torrens legislation: *South-Eastern Drainage Board (SA) v Savings Bank of South Australia* (1939) 62 CLR 603; [1940] ALR 1. The exception for liability for rates and taxes, whether created expressly or otherwise, represents no serious threat to a purchaser because the nature and amount of the charges can be ascertained from a certificate issued by the relevant authority and adjusted between vendor and purchaser at settlement of the sale of land.

Overriding statutes

5.141 The indefeasibility of registered titles derives from provisions of the Torrens statutes which can be repealed, in whole or in part, by a later statute. In *South-Eastern Drainage Board (SA) v Savings Bank of South Australia* (1939) 62 CLR 603, the High Court held that certain

unregistrable drainage charges took priority over registered mortgagee, as a result of provisons in the Drainage Acts that made them a first charge upon land. Latham CJ J stated at 6:

> The *Drainage Acts* are subsequent to the Real Property Act 1886, and, according to ordinary principles of construction, effect must be given to their provisions, notwithstanding any contrary provisions in the Real Property Act 1886. If there is an inconsistency between one statute and a later statute, the later statute prevails. In the present case it is plain that the *Drainage Acts* were intended to apply to all the lands which were improved by drainage schemes under the *Drainage Acts*. There is nothing to support an argument that lands under the Real Property Act 1886 were excluded. The result, therefore, is that the charges imposed by the later Acts take priority over the mortgages registered under the Real Property Act, whenever those mortgages were so registered. In no other way can effect be given to the clear enactments that the amount of construction costs and maintenance rates is to be a first charge upon the land. If there is inconsistency between one statute and a later statute, the later statute prevails.

5.142 Implied partial repeal may arise where a later statute overrides a registered interest, or creates an interest in land or a charge which is enforceable against the registered proprietor: *Miller v Minister for Mines* [1963] AC 484. If the later statute is irreconcilably inconsistent with the indefeasibility provisions of the Torrens statute, the later statute is said to effect an implied repeal *pro tanto* of the Torrens provisions, although it is more naturally understood as modifying their operation. For example, in *Pratten v Warringah Shire Council* (1969) 90 WN (NSW) (Pt 1) 134; [1969] 2 NSWR 161, a portion of land shown on the folio of the register as owned by the vendor was referred to on the registered plan as a 'drainage reserve'. Legislation then in force provided that whenever land was described as a drainage reserve in a registered plan, the title to the land by force of the statute (since repealed) vested in the local council. Street J concluded that the provisions of the Real Property Act 1900 in relation to conclusiveness of the register had to give way to the clear terms of the inconsistent later enactment. Notwithstanding registration of the plaintiff purchaser's transfer, title to the subject land was vested at all times in the defendant council.

See also *Quach v Marrickville Council (No 2)* (1990) 22 NSWLR 55, where the same statute was held to have vested land in the defendant council as a drainage reserve. Young J upheld the plaintiff's claim to have subsequently acquired title to the land by adverse possession, subject to appropriate rights of easement in respect of the council's drainage pipe. Young J observed that overriding statutes represent 'the weakest point in the Torrens system': at 61. They detract from the 'mirror principle' of the Torrens system as they are effective without recording in the title register and therefore impose significant burdens on purchasers.

Legislation has been passed in New South Wales which is designed to prevent the situation in the *Pratten* and *Quach* cases recurring, by ensuring the recording of all resumptions: NSW, s 31A(3) and Conveyancing Act 1919 s 196A. As to whether compensation available where a resumption or statutory charge or interest that the Registrar is empowered to record on the register is not in fact recorded, see **5.129**; and NSW, s 31A(4); Vic, s 56; Tas, s 127; Qld, s 189(1)(l).

5.143 *Pratten's* case was followed in *Calabro v Bayside City Council* [1999] 3 VR 688, another resumption case arising under a different statute. The appellant's registered title included a strip of land that was marked as a 'road' on a registered plan of subdivision, and was held to be a 'public highway'. Section 203 of the Local Government Act 1989 (Vic) provided that

a public highway vested in fee simple in the council, and did not require that the council's title be registered. The Supreme Court of Victoria ruled that s 203 operated to vest land in fee simple in the council without reference to s 42 (the paramountcy provision) of the Transfer of Land Act 1958 (Vic). Since it dealt with the same subject matter in a manner inconsistent with the latter provision, it must therefore prevail over it as the later statute. See also *Burton v Arcus* [2006] WASCA 71.

5.144 The later statute overrides the indefeasibility provisions only if the two statutes are unable to stand together. The assessment of whether the statutes can be reconciled is a question of statutory interpretation.

5.145C **Horvath v Commonwealth Bank of Australia**
(1999) 1 VR 643
Supreme Court of Victoria (Court of Appeal)

[In 1987 the appellant, then a child aged 15 years, bought a property together with his parents. He suffered judgment in the Supreme Court in favour of the respondent bank for possession of the land over which he had joined with his parents during his minority to give a mortgage. On appeal, the appellant argued that the mortgage was unenforceable against him, relying on the minor's relief provision in s 49(a) of the Supreme Court Act which provided that loan contracts entered into by a minor are void. The latter Act was re-enacted more recently than the relevant Victorian Torrens statute.]

Ormiston JA: After considering the effect of the minor's relief provision I would conclude that, unless registration of the mortgage in the present case has preserved the respondent's rights, then it was not entitled to sue on or otherwise enforce the mortgage itself …

[T]he second principal question is whether the relief provision conflicts with the sections relating to indefeasibility of title in the Act to the extent that the latter cannot apply, thereby denying the respondent any rights under the mortgage. This will be resolved by determining whether the relief provision overrides the indefeasibility provisions of the Act, in particular ss 42 and 43. It must be remembered that in the present case the respondent's mortgage has been registered, with the accepted legal consequences which flow from the present interpretation of the Act, ie, those consequences which would follow unless the relief provision prevails … Thus the issue is whether the relief provision in s 49(a) of the Supreme Court Act would deny the conclusive nature of the respondent bank's title as mortgagee. Is it so inconsistent with the essential provisions of the Act that it must prevail?

For this purpose an anterior question must be resolved. Inconsistency would only be relevant and prevalent in its consequences if it works an implied repeal pro tanto of some statutory provision. Omitting certain presently irrelevant circumstances, one must find that the legislature has later passed some inconsistent provision with which the earlier provision cannot stand. Ordinarily, if there be an inconsistency, the later passed statute or section will prevail …

Of course, the rule that later statutory provisions repealed earlier inconsistent statutory provisions requires for practical purposes that one must find an earlier and a later statute, and a relevant inconsistency, to which the rule might apply … Assuming therefore the relief provision in the Supreme Court Act to be the later passed enactment, what ought one to conclude as to its effect on the earlier passed critical provisions of the Act, being those relating to indefeasibility of title? It must be remembered that what the court is here dealing with is

not the creation of some new interest by virtue of the relief provision but what is asserted to be the statutory denial of the validity and enforceability of the respondent's mortgage. The issue is whether the mortgage when registered gave an indefeasible interest in the land to the respondent or whether the avoidance of the mortgage instrument by virtue of the relief provision denied forever the consequences of registration under the Act.

Nevertheless, in order to answer that question, one must ascertain whether there was true inconsistency between the relevant provisions. If the relief provision can be given effect to without the need to conclude that there has been an implied repeal pro tanto of the indefeasibility provisions of the Act, then the problem is resolved without the need to set at nought those earlier provisions which would otherwise apply…

The answer to the question posed, as I would understand it, flows from a correct characterisation of the two statutes as consistent or inconsistent one with the other. There is a strong presumption that Parliament does not intend to contradict itself but rather intends both relevant Acts to operate within their given spheres: *Butler v Attorney-General (Vic)* at 276 and 290. No earlier statutory provision is to be treated as repealed or derogated from by a later enactment unless an intention to do so must necessarily be implied, and ordinarily there must be a very strong basis supporting any such implication, for the Parliament is generally presumed to intend both provisions to operate without there being any such implicit repeal or derogation: cf *Saraswati v R* (1991) 172 CLR 1 at 17. Here, although there can be no doubt that, if not registered, the mortgage would have been unenforceable by the respondent because it was void by reason of the relief provision, that provision says nothing as to the effect of registration or the operation of any of the indefeasibility provisions of the Transfer of Land Act. It is directed to the enforceability of certain contracts. The respondent bank has conceded that it cannot enforce the loan agreement against the appellant. Nevertheless the better view seems to be that the word 'void' was never intended to mean that the contract in question was totally ineffective: cf *Pearce v Brain* [1929] 2 KB 310 and *Woolf v Associated Finance Pty Ltd* [1956] VLR 51 and see Greig and Davis, *Law of Contract* (1987), pp 779–80. Whether or not a different construction of the word 'void' may have had other consequences (and the forgery cases suggest otherwise), the fact is in this case that the mortgage was registered in the conventional way under the Act. Whatever may have been the position before such registration, the legislature must be treated, subject to the presently irrelevant exceptions as to fraud and the like, as having given an immediately indefeasible title in the land to the respondent bank as mortgagee unless the relief provision should prevail as being relevantly inconsistent.

In my opinion the relief provision is not inconsistent in that sense. The Act deals relevantly with the effect and consequences of registration of any document lodged purporting to deal with the title to land under the Act. The relief provision deals with the binding nature of certain agreements reached with minors. Neither deals directly with the subject matter in law of the other. They can be both left to operate within their respective spheres, unless it can be said that the latter plainly intended to repeal by implication the Act's provisions as to indefeasibility to the extent necessary to give effect to the 'avoidance' of contracts with minors pursuant to that provision. If properly an attempt is to be made to read the two statutes together, then the later relief provision may be seen as confined to controlling in the relevant manner the contractual rights of the parties and the indefeasibility provisions of the earlier Act may likewise be confined to the consequences of registration of instruments under the Act. Subject to one line of authority relating to leases, there is no difficulty in identifying the broad spheres of effect of each set of provisions, which ought to be seen as mutually exclusive or at least as capable of having effect without any necessary repugnancy or contradiction.

In every case where indefeasibility arises as an issue, it is because the means chosen by the parties seeking registration has been a transaction which had what is alleged to be a vitiating element of some description. The party seeking to rely on a registered title or interest has been met with a challenge that the transaction which was registered or which led to registration of such title or interest was ineffective to pass title or create the interest. Where the vitiating element is 'fraud', then that is recognised in the Act (see ss 42, 43 and 44) as allowing the other party to go behind the record of registration. Otherwise, but subject to the exceptions set out in s 42, the concept of immediate indefeasibility as spelled out in *Frazer v Walker* and *Breskvar v Wall* is ordinarily recognised as defeating any claim that the transaction giving rise to the registered interest was void, voidable, unenforceable, illegal or otherwise ineffective, unless that party has a 'personal equity' of a kind which would entitle that person to an order requiring the registered holder to transfer or surrender up the interest so acquired. As Barwick CJ expressed it in *Breskvar v Wall* at 386:

> Consequently, a registration which results from a void instrument is effective according to the terms of the registration. It matters not what the cause or reason for which the instrument is void …

It is that critical characteristic which demonstrates why there is no relevant inconsistency in the present case. The only inconsistency which would be relevant would arise from a provision which directly or by implication denied the consequence of indefeasibility to registration either generally or in a specified circumstance. The fact that another statute declares a class of contract 'void' is ordinarily of no significance once the instrument is registered. Before registration, as in the present case both contract and instrument (here the mortgage) may be taken to be void, as the relief provision requires. But, except in the case of fraud, or of any of the other relevant exceptions, that does not preserve the instrument (here the mortgage) from the consequences of registration. The relief provision says nothing as to that and one may envisage many transactions where that section operates in accordance with its terms. Before registration the appellant could have set aside both contract of loan and mortgage and restrained the respondent from registering the latter. In terms of the law of contract to which the relief provision (and the related provisions in the Supreme Court Act) were directed, both contract of loan and mortgage were void in the relevant sense and, if nothing more had occurred, the latter could not have been enforced against the appellant. Once registered, however, the mortgage took on the characteristics and had the effect of a duly executed mortgage, not because of its original contractual effects, but because as a matter of policy the Act created an immediately indefeasible interest in the land by way of mortgage in favour of the respondent. Of course registration has a number of consequential effects in that it makes the mortgage easier, or at least more certain, of enforcement but, for the purposes of the present appeal, the object of the relevant provisions of the Act is directed to certainty of title and they relate solely to the question of indefeasibility. About this latter question the relief provision had nothing to say. In those circumstances there was no relevant inconsistency for the relief provision never purported and was never intended to deny indefeasibility to a mortgage or other document once it becomes registered in the manner prescribed by the Act.

I would therefore conclude that the mortgage given to the respondent and registered under the Act was valid in that it bound the appellant's interest in the land … [T]he judge's order should stand and the appeal be dismissed.

[**Tadgell** and **Phillips JJA** gave separate judgments agreeing that the appeal should be dismissed.]

Order: Appeal dismissed.

5.146 Questions

The Court of Appeal in *Horvath* applied a 'sequential' approach to the assessment of inconsistency, in which each Act operates within its own sphere in temporal sequence. The effect is that the minor's relief provision operates to invalidate the mortgage before registration, but the indefeasibility provision operates to make the mortgage indefeasible after registration. The ruling is consistent with authorities following *Breskvar v Wall*, which hold that registration is effective to vest an indefeasible title even if the instrument used to procure registration is void: see 5.50. It is also consistent with the general approach to conflict of statutes as expounded by Fullagar J in *Butler v Attorney General (Vic)* (1961) 106 CLR 268 at 276. His Honour observed that 'there is a very strong presumption that the State legislature did not intend to contradict itself, but intended that both Acts should operate'. The result in *Horvath* was that the registered mortgage was enforceable against the appellant, notwithstanding that the loan contract which it secured was void because he was a minor when it was made. Does the court's interpretation of the minor's relief provision in s 49(a) obstruct its purpose? Is the court's approach to interpreting the provisions of other statutes consistent with the rule (enacted in all jurisdictions subsequently to *Breskvar v Wall)* which provides that a construction that would promote the purpose of the statute shall be preferred to a construction that would not promote the purpose? (See, for example, Interpretation of Legislation Act 1984 (Vic) s 35(a).)

5.147 The sequential approach entails reading the provisions of later statutes in a restrictive manner so as to avoid abrogating the indefeasibility provisions. Hepburn finds a dichotomy of approaches in the decided cases. The sequential approach is generally associated with a more narrowly textual interpretation of the later statute and an emphasis on the primacy of the indefeasibility provisions. The cases in which courts have found that a later statute conflicts with and impliedly repeals the indefeasibility provision are generally premised on a broader and more purposive interpretation of the later statute: Hepburn, 'Interpretive Strategies in the Overriding Legislation Exception to Indefeasibility' (2009) 2 *Bond L Rev* 86. See also, Lewis and Schroeder, 'The Indefeasibility of Title and Overriding Statutes: Determining Which Prevails in the Event of an Inconsistency' (2008) 16 *APLJ* 147.

The following cases are examples of the sequential approach. In *City of Canada Bay City Council v Bonaccorso* (2007) 156 LGERA 294; [2007] NSWCA 351, the Court of Appeal considered s 45(1) of the Local Government Act 1993 (NSW) which provided that a council had no power to sell, exchange or otherwise dispose of community land. The court said that 'on any reasonable construction of s 45' the provision could stand together with the indefeasibility provision in s 42 of the Real Property Act. The statutes could be reconciled by reading s 45 as operating to invalidate the transfer of community land up to the point of registration, while the indefeasibility provision operated to confer a 'new clean title' upon registration of the transfer: at [81]. The sequential approach was applied again by the Court of Appeal in *Koompahtoo Local Aboriginal Land Council v KLALC Property & Investment Pty Ltd* [2008] NSWCA 6. A disposal of land in breach of the Aboriginal Land Rights Act 1983 (NSW) is declared by s 40(2) of that Act to be void. It was held that s 40(2) could stand together

with the indefeasibility provisions because it declares the transaction, not the title obtained by registration of the transaction, to be void. See Edgeworth, '"Very High Bar to Clear": Implied Repeal of Torrens Legislation After *City of Canada Bay Council v Bonaccorso Pty Ltd*' (2008) 82 ALJ 436. See also *Solak v Registrar of Titles* [2011] VSCA 279. The Consumer Credit Code (Vic) s 38 provides that a mortgage that is not signed by the mortgagor is unenforceable. It was argued that a registered mortgage on which the mortgagor's signature had been forged was unenforceable. Inconsistency with the indefeasibility provisions was avoided by construing s 38 as applying only to unregistered mortgages. See Carruthers, 'Indefeasibility, Compensation and Anshun Estoppel in the Torrens System: The Solak Series of Cases' (2012) 20 *APLJ* 71.

5.148 Another way in which a later statute may be restrictively construed to avoid modifying the indefeasibility provisions is to interpret it as creating rights that operate only *in personam*, and do not run with the land. In *Hillpalm Pty Ltd v Heaven's Door Pty Ltd* (2004) 220 CLR 472; 211 ALR 588; [2004] HCA 59, the High Court considered whether a condition as to construction of a right of way in a council development consent could be enforced against a subsequent registered proprietor of the burdened land under s 123 of the Environmental Planning and Assessment Act 1979 (NSW). The High Court held by a majority (McHugh ACJ, Hayne and Heydon JJ) that the issue of overriding statute did not arise because the statement of intent to create a right of way in the plan of subdivision did not amount to the imposition of a condition by the council. Their Honours added *obiter* that even if such a condition existed, it would be a condition on subdivision that bound only the developer, not any successor in title. In his dissenting reasons, Kirby J observed that the restrictive interpretation of the provisions of the later planning Act tends to obstruct its purpose: at [70]–[75]. Edgeworth argues that the restrictive interpretation of later statutes in *Hillpalm* privileges the Torrens regime of private property rights over the public rights created by planning and environmental statutes: Edgeworth, 'Planning Law v Property Law: Overriding Statutes and the Torrens Systems after *Hillpalm v Heaven's Door* and *Kogorah v Golden Paradise*' (2008) 25 *EPLJ* 82; see also, Edgeworth, 'Overriding Statutes and the Torrens System (Again)' (2007) 81 *ALJ* 713. The narrow reading of the planning statute by the majority does seem to indicate a robust approach to what Griggs calls 'the paramountcy of indefeasibility': Griggs, '*Hillpalm Pty Ltd v Heaven's Door Pty Ltd*' (2005) 11 *APLJ* 244

The New South Wales Court of Appeal applied the interpretive approach of the majority in *Hillpalm* in *Kogarah Municipal Council v Golden Paradise Corporation* (2005) 12 BPR 23, 651; [2005] NSWCA 230. The council had transferred land to a company in breach of s 45(1) of the Local Government Act 1993 (NSW), the same provision considered in *City of Canada Bay City Council v Bonaccorso*; X.XX. The Court of Appeal interpreted s 45(1) as meaning that the restriction on the transfer of community land could be enforced against the council *in personam*, but could not be enforced against the transferee. See also *Epworth Group v Permanent Custodians* [2011] SASCFC 32. Section 20B of the Retail and Commercial Leases Act 1995 (SA) extends the minimum term of a retail shop lease to five years. The registered proprietor granted an unregistered lease for a term of two years and subsequently mortgaged the property. It was held that s 20B operated to extend the lease as between the landlord and tenant, but did not give the tenant rights enforceable against the registered mortgagee.

5.149 Even though the above cases create a 'very high bar' to a finding of inconsistency, New South Wales legislated in 2009 to entrench the indefeasibility provision in s 42 by inserting a new subsection (3):

(3) This section prevails over any inconsistent provision of any other Act or law unless the inconsistent provision expressly provides that it is to have effect despite anything contained in this section.

This subsection is similar to the Real Property Act 1886 (SA) s 6, which was considered by the High Court in *South-Eastern Drainage Board (SA) v Savings Bank of South Australia* (1939) 62 CLR 603; 5.XXX. The later-enacted Drainage Acts provided for unregistrable drainage charges to be a first charge on land. The High Court majority said that while a provision such as s 6 was relevant to the question of whether a later statute was intended to effect an implied repeal, it was not conclusive. If the later statute, considered as a whole, indicates an intention to operate notwithstanding the indefeasibility provisions and is inconsistent with those provisions, it must be given effect according to its terms. Edgeworth argues that the New South Wales provision will be no more effective than the South Australian provision: Edgeworth, 'Indefeasibility and Overriding Statutes: An Attempted Solution' (2009) 83 *ALJ* 655. See also Lane, 'Indefeasibility For What? Interpretive Choices in the Torrens System' in Moses, Edgeworth and Sherry, *Property and Security: Selected Essays*, Lawbook Co, 2009, p 149 at pp 150–5.

Insuring the risk of unrecorded statutory charges

5.150 The categories of interests, charges and restrictions that may be imposed by overriding statutes are so numerous that it is impractical for purchasers to make searches for them all. At one time there were some 250 provisions in Victorian statutes that authorised the creation of rights over land, or the imposition of charges or obligations on registered owners, which run with the land whether registered or not: O'Connor, 'Public Rights and Overriding Statutes as Exceptions to Indefeasibility of Title' (1994) 19 *MULR* 649 at 652, fn 18. The risks posed by statutory overriding interests to purchasers of land may be the subject of cover in title insurance policies. Title insurance is a specialty insurance line that has been marketed in Australia since 1998. It developed in the United States, where the Torrens system failed to take root, and where insurance emerged as an alternative method of assuring the security of a real estate transaction. Purchasers of land in Australia can now purchase an owner's policy, which may provide cover against the risk of unknown interests that were not disclosed in the contract of sale or actually known to the purchaser at the date of settlement: see O'Connor, 'Title Insurance: Is There a Catch?' (2003) 10(2) *APL* 120. In Australia, most title insurance policies issued are lenders' policies, which insure mortgagees against risks including the unenforceability of the mortgage through the operation of exceptions to indefeasibility (such as *in personam* claims) or limitations on the scope of indefeasibility as discussed in *Yazgi v Permanent Custodians Ltd* [2007] NSWCA 240; 5.62C. They are most often used in conjunction with securitised mortgages. Unlike the position in the United States, owners' policies have not been popular in Australia. See O'Connor, 'Double Indemnity — Title Insurance and the Torrens System' (2003) 3(1) *QUTLJJ* 141. Some jurisdictions have legislated to prevent an insurer being subrogated to an insured's entitlement to claim compensation under the Act: Qld, s 188D; NSW, s 133(1).

Recording of statutory charges etc

5.151 Various legislative attempts have been made to encourage the recording of statutory charges, rights and obligations to aid their discovery by purchasers. The Queensland Registrar must record in the freehold land register anything required to be recorded by an Act: s 28.

Section 29 empowers the Registrar to record in the freehold land register anything that an Act permits to be recorded, and anything else the Registrar considers should be recorded to ensure that the register is an accurate, comprehensive and useable record of freehold land in the state: Qld, s 29. In addition, the Registrar may keep separately from the freehold land register information that the Registrar considers necessary or desirable for the efficient operation of the register, including information provided by another entity: Qld, s 34. See Bell and Christensen, 'Use of Property Rights Register for Sustainability — A Queensland Case Study' (2009) 17 *APLJ* 86. In Victoria, any charge or easement acquired under another Act may be noted by entry on the register: Vic, s 88(2), (3). In New South Wales, s 43B(2) provides that the registered proprietor holds free of statutory restrictions unless the statutory restriction is recorded in a folio of the register. 'Statutory restriction', however, is defined narrowly to include restriction on alienation of land imposed by certain Acts relating to the alienation of Crown land: s 43B(1). Rights, obligations and restrictions that run with land are now so many and various that it is impractical to maintain an up-to-date record of all of them on title registers. Australian and overseas jurisdictions are now collaborating on the development of spatial data infrastructure projects that link the Torrens register with the databases of the authorities responsible for creating the rights, obligations and restrictions. See O'Connor, Christensen and Duncan, 'Legislating for Sustainability: A Framework for Managing Rights, Obligations and Restrictions Affecting Private Land' (2009) 35 *Monash LR* 233; Christensen and Duncan, 'Aligning Sustainability and the Torrens Register: Challenges and Recommendations for Reform' (2012) 20 *APLJ* 112.

5.152 In **Table 5.1** below, the main exceptions to indefeasibility found in the Torrens legislation of all jurisdictions are set out.

Table 5.1:

State/ Territory	Fraud	Prior C/T	Misdescription of boundaries	Reservation in grant	Adverse possession	Rights of way	Easements	Leases	Rates/Charges
New South Wales: Real Property Act 1900 (NSW)	ss 42, 43	s 42 (l)(a)	s 42 (l)(c)	see Baalman, pp 346–7	Not an exception but squatter may apply to register title: Pt 6A	Public rights of way not an exception (but see *Vickery v Municipality of Strathfield* (1911) 11 SR (NSW) 354. As to private rights see Easements.	Where omitted or misdescribed and existing before land brought under Act or validly created afterwards: s 42(l)(a1)	Tenant in possession or entitled to immediate possession for a term not exceeding 3 years + relevant notice by registered proprietor: s42(l)(d)	No express provision. Depends on interpretation of various Acts: Baalman, pp 351–3
Vic: Transfer of Land Act 1958 (Vic)	ss 42,43	s 42(l)(a)	s 42(1)(b)	s 42(2)(a)	Exception: s 42(2)(b)	s 42(2)(c)	Howsoever acquired: s 42(2)(d)	Tenant in possession: s 42(2)(e)	s 42(2)(f)
Qld: Land Title Act 1994 (Qld)	s 184(3)(b)	ss 184(3)(a), 185(l)(f)	ss 184(3)(a), 185(l)(e), (g)		Exception: ss 184(3)(a), 185(l)(d)	Similar to NSW	Where omitted or misdescribed ss 185(l)(c), 185(3)	Three year limit: ss 185(l)(b), (2)	Same as NSW

State/ Territory	Fraud	Prior C/T	Misdescription of boundaries	Reservation in grant	Adverse possession	Rights of way	Easements	Leases	Rates/Charges
SA: Real Property Act 1886 (SA)	s 69(a)	s 69(e)	s 69(c)		Not an exception after first registration: ss 69(f), 251, but squatter may apply to register title: Pt 7A	s 86	s 69(d)	Tenant in actual possession for a term not exceeding one year: s 69(h)	Succession duties: s 690
WA: Transfer of Land Act 1893 (WA)	ss 68(1), 134	s 68(1)	s 68(1)	s 68(1A)	Exception: s 68(1A)	s 68(1A)	s 68(1A)	Tenant in actual possession for a term not exceeding five years: s 68(1A)	s 68(1A)
Tas: Land Titles Act 1980 (Tas)	ss 40, 40(3)(a), 41	s 40(3)(b)	s 40(3)(f)	s 40(3)(c)	Exception: s 40(3)(h)	Where omitted or misdescribed: s40(3)(c); implied and equitable easements: s 40(3)(e)	Arising by implication or statute: s 40(3)(e)	Periodic and residential tenancies and tenants in possession not exceeding three years: s 40(3)(d)	s 40(3)(g) states 'any money charged on land under any Act'. Same as NSW.

ACT: Land Titles Act 1925	ss 58(1), 59	s 58(l)(a)	s 58(1)(c)	s 58(2)	Not an exception. No title to land may be acquired by adverse possession: s 69.	s 58(1)(b)	s 58(1)(b)	Year to year or not exceeding three years: s 58(l) (d); also s 58(1)(e)	s 58(l)(f)
N: Land Title Act 2000	s 188(3)(b)	ss 188(3)(a), 189(l)(d), (e)	ss 188(3)(a), 189(l)(d), (f)		No title to land may be acquired by adverse possession: s 198	Similar to Qld	Where omitted or misdescribed: s 189(l)(c), (3)	Lessee in actual possession: s 189(l) (b) for no longer than three years: s 189(2) (b)	Same as NSW

Torrens compensation — the assurance fund

5.153 At the time Torrens title was introduced, it was generally accepted that if the goals of the system were to be attained, the state should compensate all persons who sustained a loss by relying on the register where it proved to be inaccurate, and should also compensate those who were wrongfully deprived of a registered interest: see generally Sim, 'The Compensation Provisions of the [Land Transfer] Act' in *Centennial Essays*, p 138. Ruoff identified 'the insurance principle' as one of the three key principles of the Torrens system (Ruoff, *An Englishman Looks at the Torrens System*, Sydney, 1957), although not all title registration systems on the Torrens model have provision for statutory compensation (for example, Malaysia and Fiji do not).[13] In a joint discussion paper, the Law Reform Commission of Victoria and the New South Wales Law Reform Commission questioned the purpose of the compensation provisions: NSWLRC, DP 19 and LRCV, DP 16, 1989, paras 36–40; NSWLRC and LRCV, *Torrens Title: Compensation for Loss Issues Paper*, December 1989. The issues paper prompted debate on the benefits that a compensation scheme provides. See, for example Cooper, 'The Versatility of State Indemnity Provisions' in M Dixon (ed), *Modern Studies in Property Law Vol 5*, Hart, 2009, p 35. In its final report, the New South Wales Law Reform Commission recommended retention of the state guarantee of title, but without offering any clear conclusion on the purpose of the compensation provisions: NSWLRC, Report 76, *Torrens Title: Compensation for Loss*, 1996, paras 4.2–4.10.

The state guarantee means that 'a man is to have either his interest in the land or adequate monetary compensation therefor': Whalan, p 346. A key feature of the Torrens system is that the vesting and divesting of title is no longer effected by the parties, but by an entry on the register made by the Registrar. A person may suffer losses through an error or omission of the Registrar, for example, failure to register a lodged instrument. A person may also suffer loss through the operation of a rule of the Torrens system. For example, if a forged transfer to an innocent purchaser is registered, the purchaser gains an indefeasible title, and the former registered owner is deprived of an interest in land. The latter's loss would not have occurred but for the Torrens rule that registration of a forged instrument by a transferee acting without fraud gives an indefeasible title. If the Torrens system is not to operate in a confiscatory fashion, there must be provision to compensate a person who suffers a loss due to a Registrar's error or through the operation of the rules of the system. All Australian jurisdictions provide for compensation to be paid on an indemnity basis: that is, to compensate the claimant for losses suffered. Compensation was originally paid from an assurance fund which was originally intended to be accumulated from contributions levied on applicants seeking to bring old system land under the Torrens system. Partly because of the size of the funds' accumulated reserves, they have not always been preserved as separate entities and in some states contributions to the fund have been abolished. The statutes generally provide that if the balance in the assurance fund is inadequate to meet a claim, it is to be paid from Consolidated Revenue, the Consolidated

13. For a general comment on the assurance fund provisions, see O'Connor, 'Double Indemnity — Title Insurance and the Torrens System' (2003) 3(1) *QUTLJJ* 141; McCrimmon, 'Compensation Provisions in Torrens Statutes: The Existing Structure and Proposals for Reform' (1993) 67 *ALJ* 904; Stein, 'The Torrens System Assurance Fund in New South Wales' (1981) 55 *ALJ* 150. For an overview of compensation for deprivation, see Gray, 2nd ed, pp 345–51; Bradbrook, MacCallum and Moore, 4.80–4.86; Medelow, 'Fraudulent Deprivation and the Torrens Assurance Fund' (1994) 2 *APLJ* 279. See also, 'The Torrens System Assurance Fund in New South Wales' (1981) 55 *ALJ* 150; 'State Indemnified Title in Queensland — Success or Failure?' (1977) 10 *UQLJ* 15; Griggs, 'The Assurance Fund: Government Funded or Private?' (2002) 76 *ALJ* 250–7.

Fund or the Consolidated Account: see, for example, Tas, s 157(3); Vic, s 109(4); WA, s 210; cf NSW, s 134(2), (5); SA, ss 201(4)(a), 213(h). The Australian Capital Territory legislation does not provide for an assurance fund, the Commonwealth being liable to pay compensation in defined circumstances: ACT, ss 154, 155. See also NT, ss 192–6. Similarly, in Queensland the compensation provision takes the form of an entitlement to be indemnified by the state: ss 188–190.

Last resort or first resort

5.154 In South Australia, Western Australia, Tasmania and the Australian Capital Territory, compensation from the assurance fund is a remedy of last resort. In most cases, a claimant who has been deprived of an interest in land must first exhaust his or her remedies against the 'person liable' for the loss: SA, ss 203, 205; WA, s 201; Tas, s 152(2)(b); ACT, ss 154, 155. If action against the person liable would be futile or impossible for reasons such as the death or bankruptcy of the defendant, the claimant may bring an action against the Registrar as nominal defendant: SA, ss 205, 208; WA, ss 201, 205; Tas, ss 152(8)(b), (c), 153(1)(b); ACT, s 143.

Victoria, Queensland, New South Wales and the Northern Territory use a 'first resort' model. In these states, action may be taken directly against the Registrar as nominal defendant: Vic, s 110(2); Registrar-General: NSW, s 120(2); against the state: Qld, s 188(2); or against the territory: ACT, s 194(1); NT, s 194. In all jurisdictions, the Registrar may recover any amount paid out of the assurance fund from the person liable for the loss: ACT, ss 145, 146; NSW, ss 133, 134(2)(b); NT, s 196; Qld, s 190; SA, ss 217–219; Tas, s 159; Vic, s 109(3)(a), (4); WA, ss 195–196. See Carruthers and Skead, '150 Years On: The Torrens Compensation Provisions in the 'Last Resort' Jurisdictions' (2011) 19 *APLJ* 174.

5.155 The requirement in the 'last resort' jurisdictions to sue the Registrar in order to make a claim for compensation adds to costs and creates an adversarial relationship between the claimant and the Registrar. Accordingly, all states (but not the territories) now allow claims to be settled administratively without the need for court proceedings: NSW, ss 131, 135; SA, s 210; Tas, s 155; Vic, s 111; WA, s 208. In New South Wales, the Registrar-General's power to settle claims administratively is limited as to the amount of compensation that he or she may award: NSW, s 135(3). Court action will still be necessary if the Registrar does not settle the claim. New South Wales abandoned the 'last resort' model in 2000, following recommendations from the New South Wales Law Reform Commission in its Report 76 (1996). See Sherry, 'Torrens Title Compensation for Loss — Recommendations for Reform' (1996) 4 *APLJ* 251; Mitchell, 'Torrens Title Compensation for Loss — the Real Property Amendment (Compensation) Act 2000' (2001) 9 *APLJ* 40.

Circumstances giving rise to a claim

5.156 The loss for which compensation is claimed must have occurred in one of the limited circumstances specified in the legislation. The list of specified circumstances differs in each jurisdiction. Apart from losses incurred in bringing land under the Act, the most important grounds are those relating to fraud and error or misdescription in the register. As a result of amendments introduced in 2000, s 129(1) of the New South Wales Act adds the requirement that the loss or damage must have been 'a result of the operation of this Act'. For consideration of the effect of this requirement, see *Diemasters Pty Ltd v Meadowcorp Pty Ltd* (2001) 52 NSWLR 572; X.XX.

Loss resulting from error or omission

5.157 Recent authorities have recognised that the Torrens compensation provisions are remedial legislation that should be interpreted and administered in a beneficial manner: *Registrar-General v Harris* (1998) 45 NSWLR 404; *Diemasters Pty Ltd v Meadowcorp Pty Ltd* (2001) 52 NSWLR 572; *Solak v Registrar of Titles* [2011] VSCA 279 at [88]. The judicial interpretation of the compensation provisions has tended to be restrictive. An example of what might be regarded as an unduly restrictive approach to the assurance fund provisions is *Trieste Investments Pty Ltd v Watson* (1963) 64 SR (NSW) 98. In that case, a portion of the land comprised in the plaintiff's certificate of title was subject to an unregistered resumption order. The plaintiff's title to this portion of the land was not indefeasible because of the overriding effect of the statute pursuant to which the land was resumed. The plaintiff claimed damages from the Registrar-General on the ground that his certificate of title contained an error, omission or misdescription. Herron CJ and Nagle J held that, as there was no duty on the Registrar-General to note the resumption order on the certificate of title, it could not be said that the title contained an 'error or omission'. Ferguson J, who dissented, adopted the straightforward view that liability to pay compensation was not dependent on a breach of duty by the Registrar-General. The fact that the certificate of title misdescribed the true situation, in his opinion, gave rise to the claim in the person sustaining loss by reliance on the register. Subsequent authorities have preferred the broader view of Feguson J. In *Voudouris v Registrar General* (1993) NSWLR 195, it was held that even though the Registrar-General was not responsible for the incorrect information on the certificate of title, it did not prevent it from amounting to an 'error … or misdescription in the Register' within the meaning of s 127. See also *Cirino v Registrar General* (1993) 6 BPR 13,260 at 13,263; *Challenger Managed Investments v Direct Money Corp Pty Ltd* (2003) 59 NSWLR 452 at [72]–[75].

Loss resulting from fraud

5.158 A more liberal approach has been taken to the scope of compensation for fraud. In *Parker v Registrar-General* [1977] 1 NSWLR 22, the New South Wales Court of Appeal held that 'fraud' in the (since repealed) NSW s 126(1)(a) was not limited to fraud practised on the registration system, such as the forgery of a registrable transfer. The court held that a person could be deprived of land in consequence of 'fraud' where he or she was induced by fraud to execute a valid, albeit voidable, transfer in favour of the fraudulent party. Mahoney JA made the following comment (at 30):

> It is submitted that s 126(1)(a) should only apply to those consequences of fraud which have resulted from the operation of the system of title registration … I do not think that the context of the paragraph requires that the phrase be so limited. As I have said, the section provides a remedy primarily against the person who acquired title to the land through the fraud: s 126(2)(c). There is, in my opinion, no reason either in the terms or purpose of the section which would require that right of recovery against such a person should be so limited. The categories of fraud are not closed; frauds may take on many different forms. There is no reason why a right of recovery should be limited as against the person responsible for the fraudulent deprivation of land according to whether; eg the fraud involves the voluntary signing of a transfer induced by fraud, the signing of it by mistake, or the forgery of a document.

5.159 The fraud that causes the loss must be one for which the person who became registered thereby is responsible. In *Registrar of Titles (WA) v Franzon* (1975) 132 CLR 611, a solicitor forged the Franzons' signatures to a mortgage of their land in favour of a finance company and misappropriated the proceeds of the mortgage. Having discovered the fraud and paid out the mortgage, the Franzons claimed damages against the Registrar of Titles or, in the alternative, the finance company. The High Court held that the Franzons had been deprived of an estate by reason of registration of the mortgage, but that they had not been deprived 'in consequence of fraud' since the term 'fraud' referred to conduct for which the person being registered is responsible. Section 201 was complementary to the indefeasibility provisions and had to be read consistently with the interpretation of them in *Frazer v Walker* [1967] 1 AC 569; 1 All ER 649. The approach in *Registrar of Titles (WA) v Franzon* is consistent with that taken earlier in New South Wales: *Mayer v Coe* [1968] 2 NSWR 747; (1968) 88 WN (NSW) (Pt 1) 549; see also *Northside Developments Pty Ltd v Registrar-General* (1990) 170 CLR 146; 93 ALR 385; *Cirino v Registrar-General* (1993) 6 BPR 13,260; *Registrar-General v Cleaver* (1996) 41 NSWLR 713; 7 BPR 15,040. *Franzon's* case, in so far as it dealt with the interpretation of WA s 201, was distinguished by the High Court in *Saade v Registrar-General* (1993) 118 ALR 219.

Loss resulting from the registration of another as proprietor

5.160 In all jurisdictions, a claim of compensation may be made for losses sustained by the registration of another person as proprietor: NSW, s 129(1)(b); WA, s 205; SA, s 208; Qld, s 188(1)(b); ACT, s 155; Tas, s 153(1)(b); NT, s 192(1)(b); Vic, s 110(1)(c). This category often overlaps other grounds such as fraud and erroneous registration, but does have its own sphere of operation. In *Registrar of Titles (WA) v Franzon*, the Franzons failed to show that their loss occurred through fraud or an erroneous registration within WA, s 201, but were held entitled to compensation from the Registrar under WA, s 205 because they had sustained loss by 'the registration of any other person as proprietor'.

5.161 The Victorian section (s 110) takes a different form from the compensation provisions of the other states. The claimant does not have to establish deprivation of an estate or interest in land. Victoria has no equivalent to Qld, s 188(1)(a) which provides a statutory compensation remedy where the claimant has been deprived of land or an interest in land because of the fraud of another person. While fraud is not specifically mentioned, the loss of an interest through fraud may fall within other paragraphs of s 110(1), notably (b) 'an amendment of the Register Book', or (c) 'any error, omission or misdescription in the Register Book or the registration of any other person as proprietor': *Vassos v State Bank of South Australia* [1993] 2 VR 316 at 333–6. In *Fairless v Registrar of Title* [1997] 1 VR 404, damages were payable by the Registrar where a registered owner was induced by fraud to execute a valid, albeit voidable, transfer in favour of the fraudulent party. Cf the broad interpretation of the previous New South Wales provision (s 126) in *Parker v Registrar-General* [1977] 1 NSWLR 22.

Restrictions and exclusions on compensation

5.162 The legislation in all jurisdictions imposes restrictions and exclusions on claims for compensation from the fund. For example, Vic, s 109(2) provides that the Consolidated Fund shall not be liable for losses occasioned by a breach of trust, for a case in which the same land has been included in two or more Crown Grants, or for a case in which loss has been occasioned by misdescription of parcels or boundaries unless it is proved that the person liable is dead or

bankrupt or has absconded or is certified by the Sheriff as unable to pay the full amount. See also ACT, s 147; NT, s 195; SA, ss 211, 212 (no exemption for liability where the same land has been included in two or more grants: SA, s 214); NSW, s 129(2); Tas, s 151; Vic, s 109(2); WA, s 196. The Queensland provision (s 189) is more detailed and specifically refers to breach of a fiduciary duty as well as a trust: s 189(1)(a). There are other exclusions on claims that apply in certain jurisdictions, particularly in Queensland and New South Wales. For example, NSW, s 129(2)(l) excludes claims for loss or damage arising from the execution of an instrument by an attorney acting outside the authority conferred by a power of attorney. Queensland excludes claims for losses arising from the omission or misdescription of an easement in the register: s 189(1)(j), (k).

5.163 Recent amendments have narrowed the scope of the Torrens indemnity through fault-based exclusions or reduction of payments. Queensland excludes indemnity if the claimant, a person acting as agent for the claimant, or a solicitor covered by indemnity caused or substantially contributed to the loss by fraud, neglect or wilful default: Qld, s 189(1)(b) and (2); see also NT, s 136. The Queensland provisions are discussed in Selmes, 'Who Should Pay When Lawyers are Rogues? Queensland's Real Property Act Assurance Fund or the Legal Practitioners' Liability Fund? (1994) 20 *APLJ* 21. In 1983, South Australia introduced an amendment providing for adjustment of compensation in case of contributory negligence on the part of the claimant or a person through whom he or she claims: SA, s 216.

5.164 Under amendments made in 2000, compensation is not payable in New South Wales to the extent of loss or damage caused by the claimant's own acts or omissions: NSW, s 129(2)(a). Compensation is also excluded to the extent that the loss is a consequence of any fraudulent, wilful or negligent act or omission by any solicitor, licensed conveyancer or real estate agent and is compensable under an indemnity given by a professional indemnity insurer: s 129(2)(b). The fund is not liable where loss is sustained as a consequence of the failure of the claimant to mitigate loss: s 129(2)(c). The New South Wales provisions were considered in *Chandra v Perpetual Trustees Victoria Ltd* (2007) 13 BPR 24,675; [2007] NSWSC 694. Bryson AJ said that s 129(2)(a) operates only where the act or omission requires fault. The relevant act or omission must be that of the claimant personally or possibly that of the claimant's servant or agent acting within authority. Moreover, there was no indication that the legislation intended an apportionment regime. Therefore, the claimant's loss or damage was to be deemed to be, or not to be, wholly due to the act or omission of the claimant or agent, whether or not there were other causes operating (at [52]–[60]): Grattan, 'Forged But Indefeasible Mortgages: Remedial Options' in B Moses et al (eds), *Property and Security: Selected Essays*, Lawbook Co, 2010, p 171 at pp 184–9.

5.165 In Victoria, no indemnity is payable if the claimant or the claimant's solicitor or agent caused or substantially contributed to the loss by fraud, neglect or wilful default: s 110(3). The Victorian provision expressly places on the claimant the onus of negativing such fraud, neglect or wilful default. The potentially draconian limitation has been significantly cut down by the Victorian Supreme Court, Court of Appeal in *Fairless v Registrar of Title* [1997] 1 VR 404. Fairless, an elderly man, was duped by a trusted neighbour, Doran, into signing a transfer to Doran and Doran's wife. The transfer was registered, and the Dorans promptly mortgaged the land. The registered mortgagee, who was innocent of fraud, sold the land after the Dorans defaulted. When Fairless sought to be indemnified for his loss, the Registrar argued that no indemnity was payable under s 110(3). The Registrar contended that Fairless had himself been

guilty of relevant 'neglect' in signing the transfer to the Dorans, and alternatively, that Fairless' claim was precluded by the fraud of Doran, who acted as his agent in the transaction. Phillips JA (with whom Tadgell and Callaway JJA agreed) said that where the neglect or default on the part of the claimant, his solicitor or agent was a contributing rather than a sole cause of the loss, its contribution to the loss must be 'considerable, large or big'. What 'caused or substantially contributed to' Fairless' loss was not his neglect but Doran's deliberate deception. The Registrar's argument based on fraud by Fairless' agent also failed, the court holding that Doran's actions were unauthorised and quite beyond any agency relationship.

5.166 Since 2006, Queensland denies indemnity to a mortgagee (or any transferee of a mortgage) whose loss can fairly be attributable to the mortgagee's failure to take reasonable steps to confirm the identity of the person who purported to execute the mortgage as mortgagor: s 189(1)(ab). New South Wales legislated in 2009 to deny compensation for losses arising from the claimant's failure as mortgagee or transferee of a mortgage to comply with the provisions in s 56C (which requires steps to verify the identity of the person signing as mortgagee) or from the cancellation of the recording of the mortgage in the register: NSW, s 129(2)(j). See Grattan, 'Forged But Indefeasible Mortgages: Remedial Options' in B Moses et al (eds), *Property and Sustainability: Selected Essays*, Lawbook Co, 2010, p 171 at pp 177–98.

Limitation period

5.167 All states, except Queensland and South Australia, require a claim against the assurance fund to be brought within six years of the date the cause of action accrues, regardless of when the claimant becomes aware that he or she has a claim: Tas, s 158(1); WA, s 211; Limitation of Actions Act 1958 (Vic) s 5(1)(d). The limitation period in South Australia is 20 years: SA, s 215. Since 2000, New South Wales imposes a six-year time limit to make a claim for compensation with the Registrar-General: s 131(2). The limitation period is either six years after the act or omission causing the loss occurred or six years after the date on which the compensable loss arose: NSW, s 131(2). Court proceedings for the recovery of compensation from the fund are to be commenced against the Registrar-General as nominal defendant (s 132(1)) but only if administrative proceedings have been commenced and determined and it is not more than 12 months after such a determination: s 132(2)(a), (b).

The limitation section in the usual form may produce extreme hardship, since it is quite possible for a person to be unaware for a considerable period that he or she has been deprived of an estate in land. Queensland now allows 12 years after the person became aware, or ought reasonably to have become aware, of the circumstances giving rise to the cause of action, although the court has a discretion to grant a longer period if it thinks just: Qld, s 188C. If the limitation provisions are to be retained, the limitation period should commence only when the claimant becomes (or should become) aware of the loss of his or her interest or when the claimant becomes entitled to proceed directly against the assurance fund: see *Beardsley v Registrar of Titles* [1993] 2 Qd R 117.

Measure of compensation

5.168 If the registered proprietor is deprived of his or her estate, for example, by the registration of a forged transfer to a bona fide purchaser, damages should place the claimant in the same position as if the wrongful act had not occurred: *Registrar of Titles v Spencer* (1909) 9 CLR 641; *Registrar-General v Behn* [1980] 1 NSWLR 589. Where the deprivation consists of

the registration of a mortgage, prima facie, the damages are equivalent to the amount required to discharge the mortgage: see *Registrar of Titles (Q) v Crowle* (1947) 75 CLR 191. In *Registrar-General v Behn* [1980] 1 NSWLR 589 at 596, Holland J said that where the land had special value to the owner, the measure of damages may be the sum that was required to place him or her in the same position as if the fraud had not occurred (reversed without comment on this point). In *Keddell v Regarose Pty Ltd* [1995] 1 Qd R 172, the amount secured by the mortgage was approximately double the market value of the land. The Queensland Court of Appeal held that it was proper to award damages in an amount that might be required to purchase the land from the mortgagee and to cover the costs of the purchase. The court assumed that a prudent mortgagee would be willing to sell the land for its market value. All states now specifically limit the amount of damages recoverable: see, for example, SA, s 209; Tas, s 153(2); Vic, s 110(4); WA, s 201; NSW, s 129A. New South Wales and Queensland have also amended their legislation to limit excessive claims against the fund for losses resulting from the registration of mortgages obtained by fraud: Qld, s 189A; NSW, 129B. The provisions are compared and evaluated in Grattan, 'Forged But Indefeasible Mortgages: Remedial Options' in B Moses et al (eds), *Property and Sustainability: Selected Essays*, Lawbook Co, 2010, p 171 at pp 193–8.

5.169 The Victorian legislation contains restrictions, not found elsewhere, that are difficult to justify. The legislation (Vic, s 110(4)) stipulates that any indemnity paid in respect of the loss of an estate or interest shall not exceed:

a) where the Register Book is not amended, the value of the estate or interest at the time when the error … which caused the loss was made;
b) where the Register Book is amended, the value of the estate or interest immediately before the time of amendment.

These stipulations could cause hardship where the value of an estate in land increases significantly after the error is made but before it is discovered and action brought. The joint discussion paper of the Victorian and New South Wales Law Reform Commissions, June 1989, recommended that compensation be an amount equal to the value of the land at the date of the loss or at the date of the claim, whichever is the greater: p 17. New South Wales limits recovery to the market value of the land at the date the compensation is awarded, plus the claimant's reasonable costs of claim: NSW, s 129A.

5.170C **Diemasters Pty Ltd v Meadowcorp Pty Ltd**
(2001) 52 NSWLR 572; 10 BPR 18,769
Supreme Court of New South Wales

[The plaintiff mortgagee had a registered security over land of the defendant. The defendant was controlled by Tooth, a convicted fraudster, who was the sole director. Tooth procured a discharge of the mortgage using stolen and forged bank cheques. Before the discharge could be registered, the fraud was discovered and the plaintiff lodged caveats. The defendant had entered into a contract to sell the land to Chelliah and Jain as joint tenants. The contract could not be completed due to the plaintiff's caveats and undischarged mortgage. Chelliah was aware of Tooth's fraud but **Windeyer J** refused to draw an inference of fraud against Jain personally. Jain claimed compensation from the assurance fund. **Windeyer J** was of the view

that the fraud of one joint tenant infected the other but ruled on the assurance fund claim on the assumption that Jain was innocent of fraud.]

Windeyer J: The claim of Jain is made under s 129(1) of the Act which is as follows:

> **129** Circumstances in which compensation payable
> (1) Any person who suffers loss or damage as a result of the operation of this Act in respect of any land, where the loss or damage arises from:
> (a) any act or omission of the Registrar-General in the execution or performance of his or her functions or duties under this Act in relation to the land, or
> (b) the registration (otherwise than under section 45E) of some other person as proprietor of the land, or of any estate or interest in the land, or
> (c) any error, misdescription or omission in the Register in relation to the land, or
> (d) the land having been brought under the provisions of this Act, or
> (e) the person having been deprived of the land, or of any estate or interest in the land, as a consequence of fraud, or
> (f) an error or omission in an official search in relation to the land,

is entitled to payment of compensation from the Torrens Assurance Fund.

Jain had earlier obtained leave under s 132(2) of the Act to bring the claim for compensation. The claim is under s 129(1)(e)

… The compensation provisions in the Torrens legislation caused difficulties for many years and the new provisions incorporated in Pt 14 by the Real Property Amendment (Compensation) Act 2000 are in some respects an attempt to overcome those difficulties, although it is not certain they do so.

I approach this part of the judgment on the assumption that one joint tenant is not bound by or affected by the fraud of the other of which the first is unaware. As I have explained I do not consider that to be the correct position and I consider the claim against the fund fails. Nevertheless I should consider the matter on the basis Jain is not affected by his co-owner's fraud.

Counsel for Jain based his claim to entitlement through reasoning that the discharge was obtained by fraud of the mortgagor/vendor; that the handing over of the discharge of mortgage on settlement was fraudulent and that settlement would not have proceeded without such discharge; and that as a result of this Jain has suffered damage through being deprived of an interest in land, although Counsel did not put it this way because he argued Chelliah was innocent and seemed to accept Jain could not recover if Chelliah was party to the fraud. The interest of which he was deprived was an unencumbered estate in fee simple as joint tenant with Chelliah whose interest was encumbered, as opposed to an estate in fee simple subject to the registered mortgage to the plaintiff. This would or could follow from *Myers v Smith* (1992) 5 BPR 11,494.

The pleaded defence of the Registrar-General and the argument of counsel for the Registrar-General was: (a) Jain has not suffered any loss or damage 'as a result of operation of the Act'; and (b) Jain has not been deprived of the land or any estate or interest in it as a consequence of fraud.

The words 'as a result of the operation of the Act' which appear in s 129 did not appear in the earlier s 126 which was its predecessor. That section provided as follows:

126 Compensation for party deprived of land

(1) Any person deprived of land or of any estate, or interest in land;
(a) in consequence of fraud, or
(b) through the bringing of such land under the provisions of this Act, or
(c) by the registration of any other person as proprietor of such land, estate, or interest, or
(d) in consequence of any error, omission, or misdescription of the Register,
may bring and prosecute in any Court of competent jurisdiction an action for the recovery of damages.

It is, I think, clearly established that an interest in land referred to in the prior s 126 included an unregistered interest and it would do so under s 129: see *Robinson v The Registrar-General* [1983] NSW ConvR ¶55-128. It is also established that deprivation can extend, in the words of Professor Butt: to 'being outranked in priority by other interests': *Land Law* 3rd ed. paragraph 2085. *Heid v Connell Investments Pty Limited* (1987) 9 NSWLR 628 at 637; and *Robinson*.

This is a difficult matter. In general the compensation provisions of the Act were introduced because, in the absence of fraud on the part of a person obtaining title by registration, the act of registration conferred an indefeasible title on the transferee. This left the person subject to the fraud with only a claim for compensation or damages from the Fund or, under the old s 126, from the fraudster. It follows that in the ordinary case deprivation is the result of some interest lost as a result of the doctrine of indefeasibility, through registration of a subsequent dealing obtained by reason of fraud of a party or of mistake on the part of the Registrar-General, although such lost interest can be an unregistered prior interest such as an unregistered mortgage or a mortgage by deposit of title deeds, defeated by fraudulent application for a new certificate of title and subsequent registered mortgage. In the instant case, however, the interest of the mortgagees, which prevents Jain from obtaining an unencumbered title, is not a subsequently acquired registered interest. It is a right or an interest to retain priority as registered mortgagee by having the discharge delivered up for cancellation. The interest of Jain on the other hand arises under contract to purchase an estate in fee simple free from encumbrance and transfer pursuant thereto it being the obligation of Meadowcorp to deliver a clear title.

Had the land been under Old System title Jain, as bona fide purchaser for value without notice, would have taken a clear title had he received a re-conveyance from the mortgagees to Meadowcorp or a statutory discharge operating as a re-conveyance and a conveyance from Meadowcorp. It follows from this that it is because the land is under the Act that the mortgagees have maintained their priority. Thus the fact that Jain has not obtained unencumbered title is because the land is under the Act. The question is whether this failure, which has almost certainly caused damage to Jain, arises as a result of the operation of the Act through Jain having been deprived of an unencumbered title as a consequence of fraud.

The words 'as a result of the operation of the Act' are new. It is quite unlikely that they were intended to make access to the Assurance Fund more restrictive than under the old s 126, which it replaced. That is apparent from the report of the Law Reform Commission: Report 76 (1996) Torrens Title: Compensation for Loss; and the second reading speech of the Minister: Hansard NSW LA 3 May 2000 p 5187.

It was submitted by counsel for Jain on the authority of *Robinson*'s case that if the additional words were not present then the claim of Jain would certainly have been successful. I do not accept this follows. In *Robinson*'s case the interest of the Robinsons under their contract for

purchase was defeated by fraudulent transfer and mortgage procured by a legal clerk, the mortgagee obtaining an indefeasible title to its mortgage on registration. That interest was lost by subsequent registration not because some prior interest remained. However, it may well be the case that *Robinson*'s case would be decided differently under the new legislation, because the innocent mortgagee as bona fide purchaser without notice would have got a good title irrespective of the operation of the Act, so that the words 'as a result of the operation of this Act' may result in a reduction of available claims against the Registrar-General. It is, I think, quite unlikely this would be an intended result.

The argument of senior counsel for the Registrar-General is that the Act has not operated or been brought to bear on the transaction so as to cause damage as the loss has arisen through fraud, not by reason of the Act. The question however is whether or not the loss has arisen as a result of both. The argument of counsel for the Registrar-General seems to be based upon the assumption that loss as a result of the operation of the Act can only occur by reason of some dealing, later in time to the interest lost or reduced, having achieved priority by registration, thus giving an indefeasible title to the holder of such registered interest. It also seems to assume that loss which would not have arisen had the land been under Old System title is not necessarily loss resulting from the operation of the Act.

As I have said this is a matter of considerable difficulty. Nevertheless the purpose of compensation by access to the Fund is to balance disadvantage which can otherwise be brought about by indefeasibility of title. In principle I can see no reason to restrict access to the Fund to persons claiming that their interest has been lost through the registration of some subsequent dealing as a result of fraud. There is no particular logical reason why compensation should not be available to persons suffering damage as a result of fraud which has enabled the proprietor of a registered interest to maintain an indefeasible title to such interest based upon its continued registration. Such damage seems to me to arise out of the operation of the Act.

[His Honour concluded on this question that the claim of Jain, if he had been a sole purchaser, would have fallen within s 129(1(e)), but that the amount of compensation could not be assessed until the outcome of the mortgagee's sale was known.]

Equitable interests and unregistered instruments

5.171 Although the Torrens system is based upon the registration of dealings, the legislation recognises that unregistered or equitable interests can continue to exist with respect to registered land. For example, while the Registrar is forbidden to record in the register notice of any trust, whether express, implied or constructive, the legislation provides a procedure for depositing declarations of trust with the Registrar for safekeeping: ACT, s 124; NSW, s 282; NT, ss 125–126; Qld, ss 109–110; SA, s 162; Vic, s 37 (but see s 47(2)); WA, s 55; cf Tas, s 132 (recorder may describe registered proprietor as trustee). The statutory procedure is rarely used because of the caveat provisions, referred to below, but the legislation clearly acknowledges that trusts of Torrens system land may be declared, although they may not be registered. The accommodation of equitable interests within the framework of the Torrens system raises difficult issues.

5.172C Barry v Heider

(1914) 19 CLR 197; 21 ALR 93
High Court of Australia

[The appellant, Barry, was registered proprietor of land in New South Wales. He signed a memorandum of transfer to Hector Schmidt in consideration of a sum of £1,200, the receipt of which was acknowledged in the transfer. In the same month of October, Schmidt, through Peterson, who acted as his solicitor, applied to Messrs Gale & Gale, who were solicitors for the respondent Mrs Heider, for a loan of £800 on the security of the land comprised in the transfer from the appellant to Schmidt, which Peterson produced. On the faith of these documents, Messrs Gale & Gale paid over the £800 and Schmidt executed a memorandum of mortgage in favour of Mrs Heider. On 3 December Schmidt executed another mortgage for £400 in favour of the respondent Gale.

All the instruments remained unregistered, the delay having apparently been caused by the retention by the Registrar-General of the certificate of title for adjustment of the boundaries of the land. The appellant Barry commenced proceedings for a declaration that the transfer was void for fraud and should be cancelled. He alleged that Schmidt or his agent cheated him into executing the transfer, and moreover, that the purchase money mentioned in the transfer had not been paid to him. **Simpson CJ** in Eq declared that the transfer was void and should be cancelled, but that the respondent was entitled as against the appellant to charges upon the land in terms of her mortgages.]

Griffith CJ: The substantial ground of appeal is that upon a proper construction of the provisions of the Real Property Act the transfer was inoperative for any purpose until registration, so that no claim could be founded upon it of any kind, except, perhaps, a personal right of action by Schmidt himself …

The main contention for the appellant is that an unregistered instrument is inoperative to create any right with respect to the land itself. This argument is founded upon the provision in s 2(4) of the Act that:

> All laws, Statutes, Acts, ordinances, rules, regulations and practice whatsoever relating to freehold and other interests in land and operative on [1 January 1863] are, so far as inconsistent with the provisions of this Act, hereby repealed so far as regards their application to land under the provisions of this Act, or the bringing of land under the operations of this Act;

and upon s 41 …

In my opinion the only relevant words of s 2, 'All laws … rules … practice', are not of themselves sufficient to embrace the body of law recognised and administered by courts of equity in respect of equitable claims to land arising out of contract or personal confidence. But it is said that the words of s 41, 'No instrument until registered … shall be effectual to pass any estate or interests in land under the provisions of this Act', have that effect.

It is now more than half a century since the Australian colonies and New Zealand adopted, in substantially the same form but with some important variations, the system, sometimes called the 'Torrens' system, which is now in New South Wales embodied in the Real Property Act 1900. With the exception of one decision in South Australia, soon afterwards overruled, the contention of the appellant has never been accepted in any of them.

I proceed to consider the other provisions of the Act bearing on the question for the purpose of discovering whether equitable rights or claims with respect to land are recognised by it.

Part IX of the Act deals with trusts. By s 82 the Registrar-General is forbidden to make any entry of any notice of trusts, whether expressed, implied or constructive, in the register book. The section goes on to provide that trusts may be declared by any instrument, and that a duplicate or attested copy of the instrument may be deposited with him for safe custody and reference. The instrument itself is not to be registered, but the Registrar-General is required to enter on the register a caveat forbidding the registration of any instrument not in accordance with the trusts and provisions contained in the instrument so deposited. This is, in my opinion, an express recognition of the equitable rights or interests declared by that instrument. Section 86 provides that whenever any person 'interested in land' under the Act appears to be a trustee within the meaning of any Trustee Act then in force, and a vesting order is made by the court, the RegistrarGeneral shall enter the vesting order in the register book and on the instrument evidencing the registered title to the land, and that upon entry being made, the person in whom the order purports to vest the land shall be deemed to be the registered proprietor. No restriction is made as to the cases in which the court may declare a trust. The jurisdiction recognised by this section clearly includes any case in which the court can make a vesting order under the Trustee Acts. That jurisdiction has always included cases in which specific performance of a contract to sell land has been decreed by the court. This, again, is an express recognition of an equitable claim or title to land as existing before and irrespective of registration.

The provisions of the Act relating to caveats embody a scheme expressly devised for the protection of equitable rights. The caveat required by s 82 to be entered by the Registrar-General is one instance of the application of that scheme.

Section 72 provides that any person 'claiming any estate or interest' in land under the Act 'under any registered instrument' may by caveat forbid the registration of any interest affecting such land, estate or interest. This provision expressly recognises that an unregistered instrument may create a 'claim' cognisable by a court of justice, and the caveat is the means devised for the protection of the right of the claimant pending proceedings in a competent course to enforce it.

Section 44 deals with the case of suits for specific performance brought by a registered proprietor against a purchaser without notice of any fraud or other circumstances which would affect the vendor's right, which can only be circumstances creating an equitable right in a third person. I cannot think that the jurisdiction of the court to grant specific performance as against a registered proprietor vendor is not equally recognised.

[The Chief Justice then referred to *Cuthbertson v Swan* (1877) 11 SALR 102, which affirmed the jurisdiction of the court to award a decree of specific performance in such a case. He also referred to opinions to the same effect in cases decided in Victoria, New Zealand and New South Wales.]

In my opinion equitable claims and interests in land are recognised by the Real Property Acts.

It follows that the transfer of 19 October, if valid as between the appellant and Schmidt, would have conferred upon the latter an equitable claim or right to the land in question recognised by the law. I think that it also follows that this claim or right was in its nature assignable by any means appropriate to the assignment of such an interest.

It further follows that the transfer operated as a representation, addressed to any person into whose hands it might lawfully come without notice of Barry's right to have it set aside, that Schmidt has such an assignable interest.

The respondent Heider's case is mainly based upon this representation, but does not entirely rest upon it. Barry's letter on 23 October authorising the delivery of the certificate of title to Messrs Gale & Gale, and delivered to them upon their request to Schmidt for its production, was, in my opinion, an even more emphatic representation that Schmidt had such an interest as entitled him to possession of the certificate of title. Mrs Heider thereupon became in a position to register the transfer from Barry to Schmidt, and consequent upon it to register Schmidt's mortgage to herself. Her right to do so was complete, although actual registration was formally impended by the delay in the preparation of the new certificate. So far, therefore, as she is concerned, I think that Barry is not entitled to any relief against her except upon the terms of making good his representations …

[The Chief Justice then held that the mortgage to Gale was in a different position and was subject to Barry's lien for the purchase price of £1,200. This was because Barry's solicitor (who had also acted for Schmidt) had, on 30 October, lodged a caveat claiming an interest on behalf of Barry as unpaid vendor. Although the caveat had been withdrawn by the solicitor prior to Gale handing over the mortgage loan, Gale, because of his previous contacts with the relevant parties, was obliged to inquire further to ensure that Barry had in fact received the full price due to him. The caveat had qualified the earlier representations made by Barry (in the transfer and letter authorising delivery of the certificate of title) and the withdrawal of the caveat did not amount to a further representation by Barry that Schmidt's interest was free of any prior equitable interests. In these circumstances the usual rule, that the equitable interest earlier in time prevails, was to apply.

The end result was that the transfer to Schmidt was cancelled, but Barry's fee simple estate was subject to the mortgage to Heider. Gale was also entitled to a mortgage over the land in respect of his loan of £400, but this was subject to Barry's unpaid vendor's lien for £1,200.]

Barton J: I have read the judgment just delivered by the Chief Justice, and think it sufficient to express my agreement.

Isaacs J: … The transfer being voidable only, and now avoided, as against Schmidt for the gross fraud undoubtedly perpetrated by him in connection with the transaction, the next question is what is the effect of such avoidance?

Mr Loxton argued very strenuously that s 41 of the Real Property Act was decisive in his favour … His point was that the provision applied to both legal and equitable estates, interests, and liability. I agree with him so far as to the meaning of that provision. 'Estate' and 'interest' as used in the Act, include both legal and equitable estates and interests. The interpretation section, s 3, defines 'Proprietor' as 'any person seised or possessed of any freehold or other estate or interest in land at law or in equity in possession in futurity or expectancy', and 'Transfer' as 'the passing of any estate or interest in land under this Act whether for valuable consideration or otherwise'. But what follows? Mr Loxton contended that the consequence was that until registration no person can acquire any interest in land legal or equitable. He said that whatever personal liability existed might be enforced as 'a chose in action' against the person liable, but not against the land, for the Act recognises no interests legal or equitable except in the registered proprietor.

Such a contention is absolutely opposed to all hitherto accepted notions in Australia with regard to the Land Transfer Act. They have long, and in every State, been regarded as in the main conveyancing enactments, and as giving greater certainty to titles of registered proprietors, but not in any way destroying the fundamental doctrines by which courts of equity have enforced, as against registered proprietors, conscientious obligations entered into by them …

The Land Transfer Act does not touch the form of contracts. A proprietor may contract as he pleases, and his obligations to fulfil the contract will depend on ordinary principles and rules of law and equity, except, as expressly or by necessary implication modified by the Act. Section 43, for instance, makes provision with respect to the case of a bona fide purchaser without notice, and the section says 'any rule of law or equity to the contrary notwithstanding'. Consequently, s 41, in denying effect to an instrument until registration, does not touch whatever rights are behind it. Parties may have a right to have such an instrument executed and registered; and that right, according to accepted rules of equity, is an estate or interest in the land. Until that instrument is executed, s 41 cannot affect the matter, and if the instrument is executed it is plain its inefficacy until registered — that is, until statutory completion as an instrument of title — cannot cut down or merge the pre-existing right which led to its execution.

The basis of the contention therefore fails, and we have to consider the position as to equitable remedies as if the land were not under the statute.

This raises the question of the effect of Barry's conduct. Distinctions have been drawn as to whether such a case is to be solved by the doctrine of estoppel, or by the doctrine that, where one of two innocent persons has to suffer by the fraud of a third, he who, by what Lord Halsbury, in adopting the language of an American judge, calls 'an indiscretion', has enabled the third person to commit the fraud, shall bear the loss.

I see no real distinction in principle. I call them both estoppel, because the second principle simply compels the person who enabled the fraud to be committed to stand by the consequences of his own conduct and precludes him from asserting his really superior title. And I am strengthened in that view by the fact that the doctrine of estoppel *in pais* [by conduct] does not rest on the fraud or moral misconduct of the person estopped, but on the effects of his conduct upon the party claiming the estoppel …

I apprehend, therefore, the facts so far bring the case absolutely both within the principle of estoppel and the innocent person doctrine if there is really any difference between them. Mrs Heider lent her money believing and trusting to the accuracy of Barry's own statements in the transfer, and Barry must be held to the truth of those statements as to her …

I attach no importance to the letter signed by Barry dated 23 October and addressed to the Registrar of Titles. It is doubtful how that came into existence, and for what purpose, and I think Mrs Heider's rights quite well established without it, and not increased by it.

Mrs Heider, in my opinion has a good equitable claim against Barry to have her loan secured in some way on his land …

[**Isaacs J** agreed with the Chief Justice that Gale's mortgage was to be postponed to Barry's lien. The lodging of the caveat negated the previous representation by Barry that he had received the purchase price from Schmidt and the withdrawal of the caveat did not amount to a fresh representation by him. No express authority to withdraw the caveat had been given by Barry to his solicitor and a mere instruction to a solicitor to lodge a caveat does not carry with it implied authority to withdraw it and thereby represent that purchase money has been received when it has not.]

Appeal dismissed.

5.173 Questions

1. Was *Barry v Heider* (1914) 19 CLR 197; 21 ALR 93 a case of competition between equitable interests or of competition between a legal interest and a subsequent equitable interest?
2. Did the High Court in 1914 appreciate the significance of the concept of indefeasibility of the registered proprietor's title?
3. If the issue arose before the High Court today, would it be decided the same way?
4. What conduct on the part of the registered proprietor would justify the title being postponed?

5.174 The Privy Council approved *Barry v Heider* and specifically, the judgment of Griffith CJ in *Great West Permanent Loan Co v Friesen* [1925] AC 208, a case dealing with the Saskatchewan Torrens system. See also *Premier Group Ltd v Lidgard* [1970] NZLR 280; noted (1971) 4 *NZULR* 290. For equivalent provisions to NSW, s 2(4), referred to in the judgment of Griffith CJ (now s 6(1) of the Conveyancing Act 1919), see SA, s 6; Vic, s 3(1); WA, s 3; see also Francis, *Torrens Title in Australasia*, 1972, pp 1 at pp 20–7.

5.175 A person who acquires an unregistered interest in Torrens system land, whether pursuant to a registrable dealing or otherwise, cannot be described as having an 'equitable interest' in precisely the same sense in which that term is used under the general law. An unregistered interest in land under the Torrens system is liable to be defeated by the registration of an inconsistent dealing by a good faith purchaser, even if that purchaser has notice or indeed knowledge of the unregistered interest. This conclusion flows from the indefeasibility section, which gives the purchaser a conclusive title subject only to the interests recorded on the register and those protected by recognised exceptions to indefeasibility. Moreover, the notice provision absolves the purchaser, upon registration, from the need to investigate trusts or other outstanding unregistered interests, even if he or she is aware of them. It follows that the sphere of enforceability of an unregistered interest in Torrens system land is different from that of an equitable interest in old system land. Nonetheless, the use of the term 'equitable interest' in relation to the Torrens system is well established and the error in terminology, if it is one, has been sanctioned by long usage.

5.176 There is a divergence of views between Griffith CJ and Isaacs J as to the basis of the equitable interest of a person in the position of Schmidt. Griffith CJ attributes the equitable interest to the possession by Schmidt of a duly executed transfer from the registered proprietor. Isaacs J, on the other hand, regards the equitable interest as deriving, not from the transfer, but from the contractual transaction that lay behind the transfer. On general principles it would seem that Isaacs J's view is preferable. Under the general law a purchaser of an interest in land acquired an equitable interest by virtue of entering into a specifically enforceable agreement — the execution of the conveyance passed the legal estate — but was not the source of the equitable estate. Furthermore, *Cuthbertson v Swan* (1877) 11 SALR 102, on which the Chief Justice relies, clearly regarded the equitable interest of a purchaser of the fee simple estate in Torrens system land as deriving from the contract of sale. Indeed, suits for specific performance of contracts of sale necessarily arise before the transfer is executed. That is the point of the

purchaser's suit: to compel execution of a registrable transfer. The divergence of views is particularly important in the case where a volunteer obtains a transfer from the registered proprietor, which transfer is not yet registered: see *Brunker v Perpetual Trustee Co Ltd* (1937) 57 CLR 555 (4.70ff), where the view of Isaacs J seems to be adopted, although without careful examination of the issue.

The caveat provisions

5.177 The vulnerability of equitable interests to registered dealings presents a significant problem to the holder of such an interest, particularly in view of the prohibition against entering notice of any trust on the register. If a beneficiary under a trust, or the holder of any other unregistered interest, has no means of protection he or she is at the mercy of a person registering a transfer from the registered proprietor, even if that person is aware of the unregistered interest. The necessary protection is provided by the system of caveats against dealings. The caveat provisions are contained in: ACT, ss 104–108; NSW, ss 74F–74R; NT, ss 137–147; Qld, ss 121–131; SA, s 191; Tas, ss 133–138; Vic, ss 89–91; WA, ss 136K–142.[14] While the statutory language differs, in general, any person claiming an estate or interest in land under any unregistered instrument or otherwise may lodge a caveat with the Registrar forbidding the registration of any person as transferee, or proprietor, or of any instrument affecting the estate or interest. A memorandum of the caveat is entered on the relevant Crown grant, certificate of title or folio of the register. Notice of the caveat is given to the registered proprietor, who may commence proceedings to secure removal of the caveat. In most states the procedure is that when a transfer or other dealing is lodged for registration, the Registrar must notify the caveator, who then has a specified period in which either to consent to registration or to take proceedings to show cause why the dealing should be registered. If the caveator takes no action within this time the caveat lapses and the Registrar must register the dealing. A lapsed caveat cannot be renewed. In Queensland, the Northern Territory and South Australia, the provisions work somewhat differently. In Queensland and the Northern Territory, once a caveat is lodged, then, unless it has been lodged by or in some other limited circumstances,

14. For commentary on the caveat provisions, see Colbran and Jackson, *Caveats*, 1996, FT Law & Tax; Boyle, 'Caveatable Interests: the Common Lore Distinguished' (1995) 69 *ALJ* 237; Babie, 'Is Native Title Capable of Supporting a Torrens Title Caveat?' (1995) 20 *MULR* 588; McCrimmon, 'Protection of Equitable Interest Under the Torrens System' (1994) 20 *Mon ULR* 300; Doherty, 'Caveat Caveator' (1993) 67 *LIJ* 598; Butt, 'Does the Registered Proprietor Have a Caveatable Interest?' (1995) 69 *ALJ* 935; Wikrama, 'Do Caveats Need Supporting by Registrable Instruments?' (1995) 69 *LIJ* 101; Butt, 'Caveats: No More Black Holes?' (1996) 70 *ALJ* 683; Liew, 'Conditional Contracts and Caveatable Interests: A Mutual Exclusion?' (1995) 14 *U Tas LR* 63; Redfern, 'Caveats and Unregistered Interests Under the Victorian Transfer of Land Act' (1995) 3 *APLJ* 83; Reinhardt, 'Caveatable Interests' (1995) 69 *LIJ* 39; Lucas, 'Caveatable Interests in Land: *Crampton v French*' (1996) 4 *APLJ* 163; Cocks, 'Caveatable Interest' (1995) 3 *APLJ* 89; Latimer, 'Interest of a Partner in Partnership Land Gives Partner Caveatable Interest?' (1995) 69 *ALJ* 240; Jackson, 'Caveats — Limited Extensions Effectively Unlimited' (1996) *APLJ* 259; McPhee, 'Building Contracts — Charge Clauses and Caveats' (1995) 69 *ALJ* 484; Redfern, 'Caveats and Unregistered Leases Under the Victorian Transfer of Land Act' (1995) 3 *APLJ* 83; 'Caveats by Financiers' (1994) 8 *CLQ* (No 4) 5a; Butt, 'Developments in Caveats' (1997) 71 *ALJ* 585; Rodrick, 'The Response of Torrens Mortgagors to Improper Mortgagee Sales' (1996) 22 *Mon L R* 289; Cahill, 'Caveats: Current Issues' (2008) 16 *APLJ* 87; Aitken, 'Many Shabby Manoeuvres: The Use and Abuse of Caveats in Theory and Practice (2005) 26 *Aust Bar Rev* 16; Griggs, 'Curial Discretion in the Drafting of Caveats: Is it Preserving the Integrity of the Register?' (2009) 21 *Bond LR* 68; Aitken, 'Current Issues with Caveats: A Pan-Australian Conspectus' (2010) 84 *ALJ* 22; Aristei, 'Recent Developments in the Law of Caveats' (2008) 16 *APLJ* 62.

the caveator must take legal proceedings to establish the validity of the claim. If the caveator does not commence proceedings within three months, the caveat lapses and cannot be relodged on the same or substantially similar grounds without the leave of the court: Qld, s 129; NT, s 142. In other words, the onus is on the caveator to establish the claim from the beginning: Qld, s 126. This contrasts with the situation in most states where the caveator does not have to begin proceedings until some dealing which would defeat the claim is lodged for registration. In fact, caveats are rarely used in Queensland.

The South Australian Act does not establish a specific procedure to be followed where a dealing is lodged for registration and a caveat has already been noted on the register: SA, s 191. However, the registered proprietor or other interested party (caveatee) may apply to remove the caveat and the Registrar-General is thereupon to give the caveator 21 days' notice, after which the caveat will be discharged. The caveator may apply to the court for an order extending the caveat. The principles to be applied in such cases are discussed in *Galvasteel Pty Ltd v Monterey Building Pty Ltd* (1974) 10 SASR 176 and *Van Reesema v Giameos* (1978) 17 SASR 390. The principles which courts apply in deciding whether to remove or extend a caveat are discussed below; **5.157–5.159**. The court may require, as a condition of allowing a caveat to remain, that the caveator give an undertaking as to damages.

Caveatable interest

5.178 A caveat may only be lodged in respect of an estate or interest in land: *Valerica Pty Ltd v Global Minerals* (2001) NSW ConvR ¶55-963. The case law on the interests that will or will not support a caveat is vast: Gray, 3rd ed, pp XXX; Robinson, pp 357–64; Baalman, pp 504–11; Stein and Stone, pp 116–41; Whalan, *The Torrens System in Australia*, 1982, pp 230–2; Butt, pp 764–8; Bradbrook, McCallum, Moore and Grattan, 5th ed, pp 288–94; Aristei, 'Recent Developments in the Law of Caveats' (2008) 16 *APLJ* 62. Examples include: *Simons v David Benge Motors Pty Ltd* [1974] VR 585 (agreement to share profits on resale of land not caveatable); *Jessica Holdings v Anglican Property Trust* (1992) 27 NSWLR 140 (interest of purchaser under a conditional sale caveatable if the court would protect by injunction); *Bahr v Nicolay (No 2)* (1988) 164 CLR 604 at 645–6; *Jacobs v Platt Nominees Pty Ltd* [1990] VR 146 (interest arising under an enforceable option to purchase); *Gibson v Co-ordinated Building Services Pty Ltd* (1989) 4 BPR 9630 and *Rising Developments Pty Ltd v Hoskins* (1996) 39 NSWLR 157 (the interest of a builder during construction on the land if the contract provides for a charge); *Permanent Trustee Aust Ltd v Shand* (1992) 27 NSWLR 426 (an unregistered profit à prendre); *Avco Financial Services v White* [1977] VR 561; *Allen's Asphalt Pty Ltd v SPM Group Pty Ltd* [2010] 1 Qd R 202 (borrower under a contract of loan agrees to charge a specific property as security for payment of the loan, thereby creating an equitable charge which is sufficient to support a caveat); *Deanshaw v Marshall* (1978) 20 SASR 146 (oral agreement for the extension of an easement supported by acts of part performance sufficient to justify a caveat on the title to the servient tenement); claim for a property settlement under the Family Law Act 1975 or the Property (Relationships) Act 1984 (NSW) is not an interest in land so not caveatable: *Hayes v O'Sullivan* [2001] WASC 55; *Ryan v Kalocsay* [2009] NSWSC 1009.

In *Parker v Glenninda Pty Ltd* (1998) Q Conv R 54-499 the removal of a caveat was ordered where there was no sufficient memorandum in writing, and no consideration for giving of security over the relevant property. Similarly, in *Verebes v Verebes* (1995) 6 BPR 14,408 it was held that once a claim is statute-barred the claimant ceases to have an interest in land which is capable of supporting a caveat. A mere personal right is not caveatable and the law is no

different in this regard in Western Australia despite the arguably broader language of s 137 (WA): *Midland Brick Co Pty Ltd v Welsh* [2002] WASC 248. A claim to set aside a transfer on the ground of fraud is a claim *in personam* which may result in a proprietary interest but is not caveatable until such claim is successfully established: *Valerica Pty Ltd v Global Minerals Australia Pty Ltd* (2000) 10 BPR 18,463; [2000] NSWSC 1144; see also *Re Pile's Caveats* [1981] Qd R 81 (prima facie equity to set aside transaction for fraud not the same as a prima facie interest in land, hence not caveatable). A caveat to protect an option to acquire a lot in an unregistered strata plan was upheld as valid thus approving Brownie J's analysis in *Jessica Holdings Pty Ltd v Anglican Property Trust Diocese of Sydney* (1992) 27 NSWLR 140; *Forder v Cemcorp Pty Ltd* (2001) 10 BPR 18,615; *Palm Gardens Consolidated Pty Ltd v PG Properties Pty Ltd* [2009] SASC 311.

5.179 A caveatable interest need not be a registrable interest, nor one that gives the holder a right to compel the registered proprietor to deliver a registrable interest, so long as the interest is one in respect of which equity will give specific relief against the land: *Composite Buyers Ltd v Soong* (1995) 38 NSWLR 286 at 287; *Valeria v Global Minerals Australia Pty Ltd* (2000) 10 BPR 18,463; [2000] NSWSC 1144. In *Classic Heights Pty Ltd v Black Hole Enterprises Pty Ltd* (1994) V Conv R 54-506, Batt J held that to lodge a caveat, the caveator must have either a registrable instrument or the right to call for one. His Honour's view was based on dicta in *Miller v Minister of Mines and the Attorney General of New Zealand* [1963] AC 484 at 497 that the purpose of the caveat is to freeze the register to allow the caveator to register the instrument. The restrictive view of the caveat in *Classic Heights* is against the weight of authority and has not been followed in later cases: *Crampton v French* (1995) V Conv R 54-529, at 66,291; *Chiodo v Murphy* (1995) V Conv R 54-531 at 66-307; *Schmidt v 28 Myola Street Pty Ltd* (2006) 14 VR 447 at [19]; *Composite Buyers Ltd v Soong* (1995) 38 NSWLR 286 at 287.

Does a registered proprietor have a caveatable interest?

5.180 Legislation in Queensland and the Northern Territory permits the registered proprietor of land to lodge a caveat against dealings: Qld, ss 122(1)(c), 126(1)(a); NT, s 138(1) (c). New South Wales allows this action where the registered proprietor fears an improper dealing because of the loss of a certificate of title or for some other reason: NSW, s 74F(2). In the absence of express provision, some authorities indicate that the registered proprietor must have an interest that is separate and distinct from his or her registered title in order to lodge a caveat: *Re an Application by Haupiri Courts Ltd (No 2)* [1969] NZLR 353; *Swanston Mortgage Pty Ltd v Trepan Investments Pty Ltd* [1994] 1 VR 672; *Shaw Excavations Pty Ltd v Portfolio Investments Pty Ltd* (2000) 9 Tas R 444. The question usually arises in a case where a mortgagee has exercised a power of sale fraudulently or in breach of statute. In such a case, the mortgagor has an equity to set aside the sale. Does this equity afford a caveatable interest? The question was answered in the affirmative in *Sinclair v Hope Investments Pty Ltd* [1983] 2 NSWLR 870; *Re McKean's Caveat* [1988] 1 Qd R 524; *Re Cross and National Australia Bank Ltd* [1992] Q Conv R 54-433; *Capital Finance Australia Ltd v Bayblu Holdings Pty Ltd* [2011] NSWSC 24: and *Patmore v Upton* (2004) 13 Tas R 95. The Appeal Division of the Supreme Court of Victoria gave a negative answer to the question in *Swanston Mortgage Pty Ltd v Trepan Investments Pty Ltd* [1994] 1 VR 672. Brooking J (with whom Teague and Southwell JJ agreed) held that until the court makes an order setting aside a voidable sale by a mortgagee, the registered proprietor has a 'mere equity', which is not a caveatable interest. Brooking J said that the judgments of Kitto and Menzies JJ in *Latec Investments Ltd v Hotel*

Terrigal Pty Ltd (in liq) (1965) 113 CLR 265 (4.185C) supported the characterisation of the mortgagor's interest as an equity, not an equitable interest in the property: at 676–7.

The court's reliance on *Latec* is problematic. *Latec* is distinguishable on the ground that the subsequent purchaser had become registered by the time that the mortgagor sought to set the sale aside. The case was not concerned with whether the mortgagor had a caveatable interest. The judgment in *Swanston* has been criticised for inaccurately equating 'characterisation for the purpose of resolving a priorities conflict with its characterisation for the purpose of determining caveatability': Hughson, Neave and O'Connor, 'Reflections on the Mirror of Title: Resolving the Conflict Between Purchasers and Prior Interest Holders' (1997) 21 *MULR* 461 at 475; Rodrick, 'The Response of Torrens Mortgagors to Improper Mortgagee Sales' (1996) 22 *Monash UL Rev* 289 at 336; Wright, 'Does the Registered Proprietor have a Caveatable Interest?' (1995) 69 *ALJ* 935; Bradbrook, McCallum, Moore and Grattan, 5th ed, pp 293–4. In *Vasiliou v Westpac Banking Corporation* [2007] VSCA 113 at [121], a three-member bench of the Victorian Court of Appeal declared itself bound to apply *Swanston Mortgage* until such time as the ruling was overruled by a five-member panel. In *Schmidt v 28 Myola Street Pty Ltd* (2006) 14 VR 447 at [17], Warren CJ queried the correctness of the ruling in *Swanston Mortgage* while distinguishing it on the facts. In *Stone v Leonardis* [2011] SASC 153 at [42]– [48], White J reviewed the criticisms of *Swanston Mortgage* and declined to follow it.

Bradbrook, McCallum, Moore and Grattan, p 293, fn 61 report that Registrars will in practice allow registered proprietors to caveat their own titles in circumstances such as loss of a certificate of title or apprehension of a fraudulent dealing. Alternatively, the Registrar may be willing to enter a caveat on behalf of the Crown to prevent fraud or improper dealing with the title: Vic, s 106(1)(a)(iii); Tas, s 160(3); SA, s 220(g); WA, s 188(7). Mortgagors may also apply for an interlocutory injunction to restrain a voidable sale: see *Forsyth v Blundell* (1973) 129 CLR 477; 11.90C. The court will normally require that the mortgagor pay into court the amount owing under the mortgage.

Requirements for caveats

5.181 While the Registrar does not scrutinise caveats to determine whether there is evidence to support the factual basis of the claimed interest, the registered proprietor may apply to have the caveat removed and the Registrar is generally empowered to require the caveator to show cause why the caveat should not be removed. The statutes establish formal requirements for caveats: Qld, s 121; SA, s 191(a); WA, s 137; Vic, s 89(1); NSW, s 74F(5); ACT, s 104(2); NT, s 137; Tas, s 133(1). The caveator must specify the nature of the estate or interest claimed in the land, a description of the land and the facts on which the claim is based: *George v Biztole Corp Pty Ltd* (1995) V ConvR 54-519; *Sullivan v McMahon* [1999] WASC 84; *McCourt v National Australia Bank Ltd* [2010] WASC 12. *Kerabee Park Pty Ltd v Daley* [1978] 2 NSWLR 222 affirmed the need to specify the quantum of the estate claimed by the caveator and the facts on which the claim is founded. Amendments to the Real Property Act 1900 (NSW) in 1986 entrenched the reasoning in *Kerabee Park*. The legislation now requires the caveatable interest to be specified and verified by statutory declaration: s 74F(5). In *Ultra Marine Pty Ltd v Misson* (1981) ANZ ConvR 229, Wootten J made a valiant attempt to give a more flexible interpretation to the requirements. However, in *Beca Developments Pty Ltd v Idameneo (No 92) Pty Ltd* (1990) 21 NSWLR 459, Clarke JA stated that the line of authority commencing with *Palmer v Wiley* (1906) 23 WN (NSW) 90, which required 'a degree of particularity in the statement of the estate or interest

in a caveat' should be followed. Nevertheless, his Honour regarded a caveat which identified the caveator's interest as that of a lessee for a five-year lease pursuant to the exercise of an option, as satisfying the section. It is not inevitable that the New South Wales approach will be followed in all other states, since the statutory language varies: see Doherty, 'Caveat Caveator' (1993) 67 *Law Inst J* 598 at [23].

5.182 Section 74L of the New South Wales Act provides that if, in any legal proceedings, a question as to the form of a caveat is raised, the court shall disregard any failure of the caveator to comply strictly with the formal requirements. The ambit of s 74L is not quite clear. Presumably, the section is designed to prevent an order being made by the court for the removal of a caveat which is defective in form only. In *Hooper v Australia & New Zealand Banking Group Ltd* (1996) 5 Tas R 398, it was held that technical deficiencies in the form and content of a caveat should not be allowed to deprive a bona fide claimant from the advantage that prompt notification to the Registrar is intended to achieve. The court should not destroy or impede a bona fide claim either by declining to amend an arguably deficient caveat or by removing it from the register: Land Titles Act 1980 (Tas) ss 135, 136. See also *Four Oaks Enterprises Pty Ltd v Clark* [2002] TASSC 39; Griggs, 'Curial Discretion in the Drafting of Caveats: Is it Preserving the Integrity of the Register?' (2009) 21 *Bond LR* 68 at 75.

Application for removal of caveat

5.183 Most jurisdictions provide for the registered proprietor to apply to the court for the removal of a caveat: ACT, s 105(2), (3); NSW, s 74MA; NT, s 143; Qld, s 127, s 38; SA, s 191(d); Tas, s 135; WA, s 138. The provision for removal on application of the registered proprietor is necessary as the vendor's obligation under a contract for the sale of land to make good title requires it to remove all caveats on the title: *Zanee Pty Ltd v CG Maloney* [1995] 1 Qd R 105.

A court may remove a caveat because the prohibition on registration of dealings is stated too widely. Where a dealing has been lodged for registration and an application is made for removal of caveat, the court will order removal of the caveat if the claimed interest would not entitle the caveator to the assistance of the court. In *Kerabee Park Pty Ltd v Daley* [1978] 2 NSWLR 222, a second mortgagee lodged a caveat which purported to forbid registration of any dealing. The caveator had no right to prevent the registration of a transfer by the registered mortgagee to a purchaser where the registered mortgagee's power of sale had been properly exercised. *Kerabee Park Pty Ltd v Daley* was cited with approval by O'Bryan J in *Lewenberg and Pryles v Direct Acceptance Corp Ltd* [1981] VR 344, where the facts were similar to those in *Kerabee Park* in which the caveat prohibited all dealings. This prohibition was wider than the caveator's claim justified: see also *Commercial Bank of Australasia Ltd v Schierholter* [1981] VR 292; *Mir Brothers Projects Pty Ltd v 1924 Pty Ltd* [1980] 2 NSWLR 907; *McCourt v National Australia Bank Ltd* [2010] WASC 121; *Brogue Tableau Pty Ltd v Binningup Nominees Pty Ltd* [2007] WASCA 179.

5.184 The power of the court to order the removal of a caveat is not confined to cases where the caveat is bad in form: *Kerabee Park Pty Ltd v Daley* [1978] 2 NSWLR 222. An application for removal of a caveat is considered according to the principles applied on an application for an interlocutory injunction: namely, first, whether there is a serious question to be tried; and second, whether the balance of convenience favours the removal of the caveat. The principles were stated by Lord Diplock in *Eng Mee Yong v Letchumanan* [1980] AC 331 (PC) at 336–7:

> So far their Lordships have deliberately refrained from speaking of 'onus of proof'. It is an expression which, if it is used in relation to proceedings which are interlocutory in their legal character, is liable to lead to confusion. Their Lordships have already noted the analogy between the effect of a caveat and that of an interlocutory injunction obtained by the plaintiff in an action for specific performance of a contract for the sale of land restraining the vendor in whom the legal title is vested from entering into any disposition of the land pending the trial of the action. The court's power to grant an interlocutory injunction in such an action is discretionary. It may be granted in all cases in which it appears to the court to be just and convenient to do so … This is the nature of the onus that lies upon the caveator in an application by the caveatee under s 327 for removal of a caveat: he must first satisfy the court that on the evidence presented to it his claim to an interest in the property does raise a serious question to be tried; and, having done so, he must go on to show that on the balance of convenience it would be better to maintain the status quo until the trial of the action, by preventing the caveatee from disposing of his land to some third party.

5.185 In *ABC v O'Neill* (2006) 227 CLR 57, the High Court clarified the burden of proof imposed on an applicant for injunctive relief under the first limb of the test in *Eng Mee Yong v Letchumanan*, which requires 'a serious issue to be tried'. Gummow and Hayne JJ, with whom Gleeson CJ and Crennan J agreed on this point, decided that the first limb of the test requires that an applicant must show a prima facie case. The applicant for injunction is not required to show that it is more probable than not that he or she will succeed at trial. It is enough to show 'a sufficient likelihood of success to justify in the circumstances the preservation of the status quo pending trial': at [13]. The formulation of the test in *ABC v O'Neill* has been applied in applications for removal of caveat in *Piroshenko v Grojsman* [2010] VSC 240; *Stone v Leonardis* (2011) 110 SASR 503; and in an application under Qld, s 129 for leave to lodge fresh caveats over land in Queensland: *Cini v Pets Paradise Franchising (SA) Pty Ltd* [2009] SASC 7 where, at [20], Bleby J formulated the first limb of the test as follows: '[The applicant] must show a sufficient likelihood of success to justify, on the present state of the evidence, the preservation of its right to a caveatable interest in order to preserve that status quo pending the trial'. So expressed, there is some overlap between the second limb relating to the balance of convenience.

Caveats lodged without reasonable cause

5.186 Caveats are examined by the Registrar to ensure that a caveatable interest is claimed and the caveat satisfies formal requirements, but it is not the role of the Registrar to test the validity of the claimed interest. To deter abuse of the caveat provisions, several jurisdictions provide that a person who lodges a caveat without reasonable cause is liable to pay compensation to another person who suffers loss or damage as a consequence: Vic, s 118; NSW, s 74P; Tas, s 138; WA, s 140; ACT, s 108; Qld, s 130; NT, s 146. South Australia provides for compensation for a caveat lodged 'wrongfully and without reasonable cause': SA, s 44. Usually it is the plaintiff who bears the onus of proving that the caveator acted without reasonable cause: see, for example, *Bedford Properties Pty Ltd v Surgo Pty Ltd* [1981] 1 NSWLR 106; *Hooke v Holland* [1984] WAR 16; *Commonwealth Bank of Australia v Baranyay* [1993] 1 VR 589. The Queensland and Northern Territory provisions reverse the onus of proof: Qld, s 130; NT, s 146; Weir, 'Land Title Act 1994 — Statute for a New Millenium' (2000) 4 *FLJR* 185.

5.187 To have 'reasonable cause' the caveator must have believed on reasonable grounds that he or she had the interest claimed. The fact that a caveator fails to sustain the caveat at full trial

must not be equated with an absence of reasonable grounds for lodging the caveat in the first place: per Tipping J in *Savill v Chase Holdings (Wellington) Ltd* [1989] 1 NZLR 257 at 288. In *Bedford Properties Pty Ltd v Surgo Pty Ltd* [1981] 1 NSWLR 106, the defendant, Surgo Pty Ltd, had lodged a caveat forbidding registration of any dealing affecting the plaintiff's property. Bedford, the plaintiff, claimed that the caveat delayed the settlement of a contract of sale of the property with the result that it had to pay substantial sums in interest to a mortgagee of the property and additional sums by way of rates and charges. The court found that, contrary to the claim made in the caveat, there had never in fact been any promise or agreement to give a registrable mortgage. In considering the plaintiff's claim for compensation, Wootten J made the following comments:

> I think the foundation for reasonable cause must be, not the actual possession of a caveatable interest, but an honest belief based on reasonable grounds that the caveator has such an interest. That, of course, may not be enough. In *Young v Rydalmere Credits Pty Ltd* (1963) 80 WN (NSW) 1463, a caveator was held to have acted without reasonable cause when he lodged a caveat not for the protection of his interest but for an ulterior motive and without regard to its effect on transactions to which the caveator had agreed. Macfarlan J found that the caveator had been entitled to lodge the caveat, but he treated the question of whether or not he had the interest he claimed as irrelevant (at 1472).
>
> On the facts as I have found them, the defendant did not have any reasonable grounds for believing that it had what it claimed in the caveat, namely, an agreement giving it the right to an instrument of mortgage. I think that Mr Richards, who for the purposes of the transaction represented the defendant, was motivated simply by a desire to force Mr Quinn to pay, or at least formally acknowledge, the debt to Surgo by holding up the settlement of the subject land … The drastic nature of the power is relevant in considering what is 'reasonable cause' for its use, just as the dangerous character of a thing is relevant to deciding what is reasonable care in handling it. Before exercising such a power, a person can reasonably be expected to get proper advice, and be reasonably sure of his ground. If he does not, he may find that he has acted at his peril. This is all the more so when he knows, as Mr Richards knew, and indeed intended, that action will prevent an important transaction involving a large sum of money. I therefore hold that the caveat was lodged by Surgo without reasonable cause.

Bedford Properties Pty Ltd v Surgo Pty Ltd was followed in *Hooke v Holland* [1984] WAR 16. It appears, however, that a caveat lodged in 'deliberate infringement of the rights of the registered proprietor or interested person' may render the caveator liable: *Dykstra v Dykstra* (1991) 22 NSWLR 556. Similarly, a caveat lodged solely to place pressure on the registered proprietor to give something to which the caveator was not entitled cannot be maintained: *Wildshut v Borg Warner Acceptance Corp (Aust) Ltd* (1987) 4 BPR 9453. *Bedford Properties Pty Ltd v Surgo Pty Ltd* was applied in *Lee v Ross (No 2)* [2003] NSWSC 507, where compensation for wrongful lodgment of a caveat was awarded in circumstances where the caveator was honest but the solicitor for the caveator was neglectful and lacking in diligence in failing to advise the client that the vendor's termination of a contract for the sale of land (the alleged caveatable interest) was valid. It was held in *Lee v Ross (No 2)* 11 BPR 20,991 that the test of foreseeability, highly developed in the law of tort and contract, should not be applied in assessing the caveat's role in consequent loss or damage, as a caveator must accept the risk of liability to compensate the registered proprietor for loss realistically attributable to the wrongful lodgment: see Butt, 'Caveats without Reasonable Cause' (2005) 79 *ALJ* 18.

5.188 If a caveat has been lodged with reasonable cause, is it possible that the maintenance of the caveat may become unreasonable so as to attract the compensation provisions? The problem was adverted to by Macfarlan J in *Young v Rydalmere Credits Pty Ltd* [1964–65] NSWR 1001 at 1014 and by Brinsden J in *Hooke v Holland* [1984] WAR 16 at 20 without resolution. In the latter case, Brinsden J was of the opinion that it was doubtful whether the maintenance of a caveat which was lodged reasonably was compensable. On the issue of removal of caveats and compensation, see generally Jackson, 'Compensation for Removal of a Caveat Without Reasonable Cause' (1995) 3 *APLJ* 95; Jackson, 'Removal of a Caveat — How Convenient?' (1996) 4 *APLJ* 1; Jackson, 'Caveat in Queensland: Getting it Off!' (1996) 16 *Qld Lawyer* 204.

Competing equitable interests

5.189C **Abigail v Lapin**
[1934] AC 491; All ER Rep 720; (1934) 51 CLR 58
Privy Council

Lord Wright: On 5 December 1923, Mr and Mrs Lapin executed two memoranda of transfer, duly witnessed by a solicitor in the statutory form required by the Real Property Act 1900 of New South Wales, of two properties, in respect of which they were then respectively registered as proprietors of an estate in fee simple, to Mrs Heavener; in the one case the consideration money was expressed to be £1800, and in the other case £1200; the receipt of these sums respectively was acknowledged on the transfers. The titles of the Lapins were at the time subject to a registered mortgage of £1320 to the Union Bank, which was discharged on 7 December 1923. On 18 December 1923, Mrs Heavener or Heavener on her behalf, lodged these transfers and the certificate of title, which she had received from the respondents, at the land registry, where the transfers were entered in the land registry books, and particulars were endorsed on the certificate of title which the Heaveners held and which accordingly showed Mrs Heavener as the proprietor in fee simple of the estates. On 14 March 1924, Mrs Heavener mortgaged the properties in statutory form to the English, Scottish and Australian Bank; this mortgage was duly registered, as appears on endorsements on the certificates of title, which the mortgagee bank held. On 2 September 1925, as appears from further endorsement on the certificates of title, these mortgages were discharged, as is sufficiently clear, out of moneys lent by Abigail to the Heaveners on or about 2 September 1925; these moneys, which amounted in all to £5500, were secured by a statutory mortgage dated 2 September 1925, granted by Mrs Heavener in terms as 'being the registered proprietor of an estate in fee simple in the specified properties, including the two properties in question; the mortgage was also signed by Abigail as being correct. Abigail thereafter held the certificates of title. On 4 September 1925, Abigail as mortgagee lodged a caveat under the Act in respect of these two properties. On 24 February 1926, Abigail lodged the mortgage for registration, but it was referred back by the registrar for the correction of some minor formal defects; before it was finally reloaded the respondents lodged caveats and in due course brought the present action.

The respondents claimed as against the Heaveners that the register should be rectified by registering them as full proprietors of the lands and that the certificates of title should be delivered up to them; they alleged that they had handed over the certificates of title solely as collateral security for a loan in respect of another transaction, but the loan had since been discharged; they further alleged as regards the transfers that they did not sign them at all, or,

if they did, were induced to do so by Heavener's fraud in the belief that they were by way of further security for the other transaction. Heavener by way of answer alleged that the lands were transferred absolutely in order to discharge the Union Bank mortgage and in payments of costs due to him. Abigail was joined as defendant by the respondents, as having no better title than the Heaveners because he did not take bona fide as a purchaser for value and without notice. It was also alleged that the security was void because Abigail was acting as a moneylender in the transaction without being registered as such.

The trial before Long Innes J took a somewhat unusual course: after evidence had been given and closed on these issues, the respondents were allowed to amend as against the Heaveners, though not in terms as against Abigail, by alleging that, if they knowingly signed the transfers, they did so on the terms that Heavener would hold the transfers as security for his professional costs and not otherwise, and that he registered the transfers in fraud of that understanding and without their knowing what he had done until October 1925. This was a new case, contrary to the evidence given by both parties.

By his judgment delivered on 22 March 1929, Long Innes J did not accept the evidence of the respondents, but found that they did sign the transfers, and signed them, moreover, knowing that they were signing transfers of the properties, that they were signing as transferors and that the transferee was Mrs Heavener; he did, however, further find that they understood the transfers were to be by way of security only for Heavener's costs and for repayment of the mortgage debt to the Union Bank. In so finding the judge took a midway course, disbelieving the sworn evidence of both parties. As to Abigail, who gave, so the judge said, his evidence with great frankness and whose evidence the judge accepted, he found that it was not established that he was a moneylender within the meaning of the Moneylenders and Infants Loan Act 1905: the judge also found that Abigail, as regards the mortgage in question, discharged the onus of establishing that he was a bona fide purchaser for value without notice: he further found that Abigail made the advance in question on the faith of the transfers of 5 December 1923, and of the certificate of title in Mrs Heavener's name and of the mortgage executed by Mrs Heavener as registered proprietor. He accordingly held in regard to the mortgage of 2 September 1925 that the respondents were estopped by their representations from asserting as against Abigail that their equity was prior in point of time to that of Abigail …

This judgment was on appeal affirmed by the Full Court of the Supreme Court of New South Wales. The court agreed with the findings of the fact of the trial judge: in effect, the court held that the case was covered by the decision of the High Court of Australia in *Butler v Fairclough* (1917) 23 CLR 78; 23 ALR 62; that Abigail's equity, though subsequent in time, was the better equity; that the respondents' conduct 'in executing a memorandum of transfer on the face of it clear and unfettered', and the failure to place on the register any embargo which would prevent the Heaveners from using those transfers at their face value, is such unreasonable and negligent conduct as to make their equity 'inferior' to Abigail's. They also agreed with the judge's finding that Abigail was not carrying on business as a moneylender. They accordingly dismissed the appeal.

The respondents then appealed to the High Court of Australia, the judges of which by a majority (Knox CJ, Isaacs and Dixon JJ) allowed the appeal, Gavan Duffy and Starke JJ dissenting.

It is difficult fairly to summarize these carefully reasoned judgments; but taking the crucial issue to be whether the equitable interest of the respondents was to be postponed to that of Abigail, the conclusion on that point of the late learned Chief Justice, Sir Adrian Knox, long a distinguished member of the Judicial Committee, may be found in substance in the following passage from his judgment ((1930) 44 CLR 166 at 183; [1930] ALR 178 at 181):

> The registration of Mrs Heavener as proprietor in fee simple was consistent with the existence of an equitable interest outstanding in some other person, and not inconsistent with the whole beneficial title to the land being in the appellants. Mrs Heavener was in a fiduciary relation to the appellants, and was entitled under the arrangement between them and Heavener to become registered as proprietor and to hold the documents of title until the debt intended to be secured was paid off. The [authorities] seem to me to indicate that the possessor of the prior equity is not to be postponed to the possessor of a subsequent equity unless the act or omission proved against him has conduced or contributed to a belief on the part of the holder of the subsequent equity, at the time when he acquired it, that the prior equity was not in existence. On the evidence as it stands no such act or omission on the part of the appellants has, in my opinion, been proved. The transfers did not amount to such an act, for there is no evidence that Abigail saw them. The certificates of title showing Mrs Heavener as registered proprietor were consistent with the beneficial ownership of the lands being in the appellants or any other persons, and did not indicate that she held the beneficial as well as the legal interest. The omission to lodge a caveat can have had no effect in inducing Abigail to advance the money, for it is not proved that any search was made before the money was advanced.

Isaacs J, dealing with the same issue, said:

> The Full Court's concurrence on that point is open, as I think, to the observation that too great significance is attached to the single fact of Heavener's registration, and too little both to the lack of evidence as to Abigail's conduct being in part influenced by the absence of a caveat, and to the silence of Harris.[15]

Dixon J lays emphasis on the fact that:

> … although the appellants did not caveat, it does not appear that any search for caveats was made on Abigail's behalf, or that he acted in the belief that there was no caveat. The default of the appellants — if default it be — therefore did not contribute directly to any assumption upon which Abigail may have dealt with the Heaveners.

On the other hand, the final conclusion of Gavan Duffy and Starke JJ is summed up in the following words:

> In our opinion, the Lapins are bound by the natural consequences of their acts in arming Olivia Sophia Heavener with the power to go into the world as the absolute owner of the land and thus execute transfers or mortgages of the lands to other persons, and they ought to be postponed to the equitable rights of Abigail to the extent allowed by the Supreme Court.

In this conflict of eminent judicial opinion their Lordships find themselves in agreement with Gavan Duffy and Starke JJ in regard both of their reasoning and their conclusion.

The Real Property Act 1900 of New South Wales embodies what has been called, after the name of its originator, the Torrens system of the registration of title to land. It is a system

15. Harris was Abigail's clerk; his connection with the case appears later.

which is in force throughout Australasia and in other parts as well. It is a system for the registration of title, not of deeds, the statutory form of transfer gives a title in equity until registration, but when registered it has the effect of a deed and is effective to pass the legal title; upon the registration of a transfer, the estate or interest of the transferor as set forth in such instrument with all rights, powers and privileges thereto belonging or appertaining is to pass to the transferee. No notice of trusts may be entered in the register book, but it has long been held that equitable claims and interests in land are recognized under the Real Property Acts. This was held in *Barry v Heider* (1914) 19 CLR 197; 21 ALR 93, for the protection of such equitable interests or estates, the Act provides that a caveat may be lodged with the registrar by any person claiming as *cestui que trust*, or under any unregistered instrument or any other estate or interest; the effect of the caveat is that no instrument will be registered while the caveat is in force affecting the land, estate or interest until after a certain notice to the person lodging the caveat. Thus, though the legal interest is in general determined by the registered transfer, and is in law subject only to registered mortgages or other charges, the register may bear on its face a notice of equitable claims, so as to warn persons dealing in respect of the land and to enable the equitable claimant to protect his claim by enabling him to bring an action if his claim be disputed. In the registry all statutory transfers are filed and duplicate certificates of title are kept and noted up from to time with all registered dealings; the other duplicate certificate of title is held by the registered proprietor. The register is open to inspection and search.

Provision is made by the Act for mortgages in statutory form, and for their registration; in such a case the legal estate remains in the registered proprietor of the fee simple, and the mortgage constitutes a charge of debt on the land; hence it may not be technically correct, though it is common, to speak of the mortgagor as having the equity of redemption, though the legal title remains in him. But a practice has sprung up of [effecting] what amounts to a mortgage by registering an instrument of transfer of the legal title from the mortgagor, and at the same time executing a document certifying that it was by way of security only. This is no doubt done for the purpose of facilitating dealings with the land by the transferee. Such a practice has been recognized in various decisions of the courts, and in particular in *Currey v Federal Building Society* (1929) 42 CLR 421; [1929] ALR 320. In the present case the same result was effected as the judge found as between the parties by an oral agreement; but all that appeared in the registry was the absolute grant of transfer as for full consideration paid and received; no document of qualification was executed and no caveat was lodged. In the result the public register showed to all the world, that is to anyone who cared to inspect, that the fee simple was in the two estates vested in Mrs Heavener; the equity of redemption (if it is so to be called for convenience) was in no way indicated to any searcher of the register.

The Full Court of New South Wales regarded the present case as governed in principle by *Butler v Fairclough,* already mentioned, where there was a conflict of equities between a prior equitable incumbrancer who had lodged no caveat and a subsequent transferee who had, after a search of the register and without notice of the unregistered equitable charge, paid the purchase consideration. It was held that the former was to be postponed: Griffith CJ thus summed up the position ((1917) 23 CLR 78 at 91; 23 ALR 62 at 67):

> It must now be taken to be well settled that under the Australian system of registration of titles to land the courts will recognise equitable estates and rights except so far as they are precluded from doing so by the statutes. This recognition is, indeed, the foundation of the scheme of caveats which enable such rights to be temporarily protected in anticipation of legal proceedings. In dealing with such equitable rights

> the courts in general act upon the principles which are applicable to equitable interests in land which is not subject to the acts. In the case of a contest between two equitable claimants the first in time, all other things being equal, is entitled to priority. But all other things must be equal, and the claimant who is first in time may lose his priority by any act or omission which had or might have had the effect of inducing a claimant later in time to act to his prejudice. Thus, if an equitable mortgagee of lands allows the mortgagor to retain possession of title deeds, a person dealing with the mortgagor on the faith of that possession is entitled to priority in the absence of special circumstances to account for it.
>
> Under the Australian system a clear title on the register is, for some purposes at any rate, equivalent to possession of the title deeds. A person who has an equitable charge upon the land may protect it by lodging a caveat, which in my opinion operates as notice to all the world that the registered proprietor's title is subject to the equitable interest alleged in the caveat. In the present case the plaintiff might, if he had been sufficiently diligent, have registered his charge of 30 June on that day. The defendant, having before parting with the purchase money to Good found on searching the register that Good had a clear title, and relying on the absence of any notice of defect in Good's title, paid the agreed price.

Their Lordships think that case was rightly decided, though it may be that the statement as to retention of the title deeds needs some qualification. But the only distinction between *Butler v Fairclough* and the present case appears to be that in the present case it was not proved that (though he had no notice of the prior charge) Abigail made any search before lending the money: he said he instructed his conveyancing clerk Harris to examine the title and left it to him. Though there is no reason why Harris should have neglected his duty, Harris was not called, it seems, because of the unfortunate course taken at the trial of raising fresh issues after the evidence was closed. That the question whether or not a search of the register had been made might be regarded as of decisive importance, does not emerge on the record or in any of the judgments until those in the High Court. The question is whether in such a case as this, where the title on the register was clear, the failure to prove a search by the second incumbrancer can make any difference. There is no reason to think that Heavener would have ventured to claim that Mrs Heavener was proprietor in fee simple unless she was so registered, and in that sense the grant of the transfer by the respondents to her did cause or contribute to Abigail's lending the money. A search by or on behalf of Abigail would merely have shown that the transfer purported to be for full consideration, thus excluding any idea of it being by way of security. The case is closely parallel to that of *Honeybone v National Bank of New Zealand* (1890) 9 NZLR 102, where the second incumbrancer's equity was preferred, on the ground that the act of the plaintiff in falsely representing the transaction with the first incumbrancer to have been a sale and not a mortgage, and in placing him in a position to obtain a title as registered proprietor and so obtain an advance from the bank the second incumbrancer, disentitled him to put his equity in competition with the later equity. No question is raised in that case whether the second incumbrancer made any search or inquiries: the emphasis is placed on the conduct of the mortgagor. This is in accordance with the judgment of Kindersley V-C in *Rice v Rice* (1854) 2 Drew 73; 61 ER 646, where the question was whether the equity of the plaintiff in respect of his lien as unpaid vendor should be preferred to that of a subsequent equitable mortgagee, who had lent his money to the purchaser against a deposit of the title deeds and of an assignment showing payment

of the purchase money in full. The opinion of the Vice-Chancellor no doubt has not been approved in so far as he says that priority in time is only taken as the test where the equities are otherwise equal: it is now clearly established that prima facie priority in time will decide the matter unless, as laid down by Lord Cairns LC in *Shropshire Union Railways and Canal Co v R* (1875) LR 7 HL 496, that which is relied on to take away the pre-existing equitable title can be shown to be something tangible and distinct having grave and strong effect to accomplish the purpose. The Vice-Chancellor did not treat the possession of the title deeds as necessarily decisive: he said that the conduct of the parties having the equitable interests and all the circumstances must be taken into consideration in order to determine which has the better equity. He held that the second incumbrancer was not bound to go and inquire of the vendors whether they had received all the purchase money: he then describes the conduct of the vendors in this language:

> They voluntarily armed the purchaser with the means of dealing with the estate as the absolute legal and equitable owner, free from every shadow of incumbrance or adverse equity. In truth it cannot be said that the purchaser in mortgaging the estate by the deposit of the deeds has done the vendors any wrong, for he has only done that which the vendors authorised and enabled him to do.

These words can aptly be applied to the present case if 'for deposit of the deeds' there is substituted that the respondents had authorized and enabled Mrs Heavener to register herself as owner in fee simple. Apart from priority in time, the test for ascertaining which incumbrancer has the better equity must be whether either has been guilty of some act or default which prejudices his claim; in the present case the respondents on the one hand enabled the Heaveners to represent themselves as legal owners in fee simple, while on the other hand it cannot be said that Abigail did or omitted to do anything which he should have done in lending the money on the security, though he might, by registering the mortgage, have secured the legal title; it may be that he accepted Heavener's word that he or his wife were registered as having the legal title, but that was a true statement, and no search or inquiry that could have been made would have displaced it.

[**Lord Wright** then referred to English cases which held that the equitable interest of a beneficiary under a trust was not in general to be postponed to that of an encumbrancer who took for value from the trustee without notice that the trustee was committing a breach of trust. It was unnecessary to consider whether this rule, perhaps 'induced by the partiality of courts of equity for their protege, the *cestui que trust*, applied to the Torrens system, since the rule related only to trusts and not to equitable estates such as those of unpaid vendors or equitable mortgagees, nor to equities such as the equity to set aside a conveyance for fraud. His Lordship also rejected an argument that there had to be something in the nature of a direct representation by the respondents to Abigail to warrant the postponement of their interest.]

It is true that in cases of conflicting equities the decision is often expressed to turn on representations made by the party postponed … But it is seldom that the conduct of the person whose equity is postponed takes or can take the form of a direct representation to the person whose equity is preferred: the actual representation is in general, as in the present case, by the third party, who has been placed by the conduct of the party postponed in a position to make the representation, most often, as here, because that party has vested in him a legal estate or has given him the *indicia* of a legal estate in excess of the interest which he was entitled in

fact to have, so that he has in consequence been enabled to enter into the transaction with the third party on the faith of his possessing the larger estate. Such is the position here, which in their Lordships' judgment entitles the appellants to succeed in this appeal.

In the High Court, Gavan Duffy and Starke JJ also relied on a further or supplementary reasoning, based on the principle of an authority being acted upon to create the later equity contrary to or in excess of the authority actually intended to be given. As they point out, the form of actual transfer was adopted 'so that Olivia Sophia Heavener might deal with the lands as if they were her own and without restrictions created by an instrument of mortgage under the Act of New South Wales'; she was thus necessarily trusted by the respondents as to the time and method of realisation (that is, in order to pay the cash due to her husband) and not to exceed the limits of her security. On this view the case falls within the general principles laid down in *Brocklesby v Temperance Permanent Building Society* [1895] AC 173 at 180. Lord Herschell LC thus sums up the rule:

> Where a person has thus been entrusted with the possession of title deeds with authority to raise money upon them, the owner of the deeds cannot take advantage of any limitation in point of amount which he has placed upon the authority as against a lender who had no notice of it.

The same principle, it was held, had been applied in equity in the case of *Perry-Herrick v Attwood* (1857) 2 De G & J 21; 44 ER 895. This decision of the House of Lords was followed in the later case of *Rimmer v Webster* [1902] 2 Ch 163 …

The foundation of the rule is that there has been an authority to deal with the property, as Gavan Duffy and Starke JJ in the High Court have here found that there was; no doubt they have so found as an inference from all the facts, but their Lordships accept the finding. The case then becomes one of an agent exceeding the limits of his authority but acting within its apparent *indicia. Rimmer v Webster* has been approved by this Board … Their Lordships agree with Gavan Duffy and Starke JJ that on this ground also the appellants should succeed.

In the result their Lordships are of opinion that the appeal should be allowed, the order of the High Court should be set aside and the order of the trial judge, as varied by the order of the Full Court, should be restored; the cross appeal should be dismissed …

Appeal allowed; cross appeal dismissed.

5.190 At first sight it would seem that what is now s 43 of the Victorian Act (the notice provision) provided the complete answer to the Lapins' claim. Abigail was proposing to take a transfer from the registered proprietor (Mrs Heavener) and was therefore not to be affected by notice of any unregistered interest. However, it was held in *Templeton v Leviathan Pty Ltd* (1921) 30 CLR 34; 28 ALR 95, that a purchaser only gains statutory protection from prior unregistered interests when he or she becomes registered. Knox CJ (at 54–5) cited with approval a passage from Hogg, *Registration of Title to Land Throughout the Empire*, 1920, pp 125–7:

> Before becoming registered it is open to any adverse claimant to step in and assert a claim, and for the purpose of trying that claim registration may be stayed — by caveat or otherwise … The doctrine of notice is not, in fact, affected by these enactments except as regards registered interests, and any questions of priority between unregistered interests that depend on that doctrine will have to be decided on general principles of equity jurisprudence.

See also per Higgins J (1921) 30 CLR 34 at 69–70; 28 ALR 95 at 107–8. This view was accepted by the High Court in *Lapin v Abigail* (1930) 44 CLR 166 at 182, 188, 196, 203, and although challenged in the Privy Council, no ruling was made on the point: see the third last paragraph in the judgment of Lord Wright. In *IAC (Finance) Pty Ltd v Courtenay* (1963) 110 CLR 550; [1964] ALR 971 (5.XXX) two members of the court expressly accepted the principle of *Templeton v Leviathan Pty Ltd*. Taylor J said it was 'unthinkable' that the High Court should 'unsettle' a point authoritatively decided 30 years earlier: (1963) 110 CLR 550 at 582; [1964] ALR 971 at 985; see also *Jonray (Sydney) Pty Ltd v Partridge Bros Pty Ltd* (1969) 89 WN (NSW) 568; [1969] 1 NSWR 621.

5.191 The influence of the judgment of Griffiths CJ in *Butler v Fairclough* (1917) 23 CLR 78; 23 ALR 62, referred to by Lord Wright, has been considerable in this area of the law. In that case, Good, the registered proprietor of a Crown lease subject to a registered mortgage, executed an agreement on 30 June 1915, by which he agreed to charge the lease with a debt then due by him to the plaintiff and agreed, if required, to execute 'a proper and legal mortgage'. On 2 July 1915, only two days later, Good agreed to sell the lease to the defendant, subject only to the registered mortgage. The defendant on the same day searched Good's title, paid the purchase price and obtained a transfer in registrable form. The defendant had no notice of the plaintiff's charge. The plaintiff did not lodge a caveat claiming an estate as equitable mortgagee until 7 July 1915. The three members of the High Court to consider the question held that the plaintiff's equitable charge was postponed to the equitable interest of the defendant. What was the principle applied by Griffith CJ, in the passage quoted by Lord Wright in *Abigail v Lapin*, to reach the conclusion that the plaintiff's equitable charge was postponed to the later equitable interest? What should be the effect of a failure to lodge a caveat in a contest for priority between two equitable interests? Is it proper to postpone an interest because the holder has delayed, by two days, the lodging of a caveat? See Sackville, 'Competing Equitable Interests in Land under the Torrens System' (1971) 45 *ALJ* 396 at 403.

Compare *Lapin v Abigail* (1930) 44 CLR 166 at 205; [1930] ALR 178 at 190 per Dixon J; *J & H Just (Holdings) Pty Ltd v Bank of New South Wales* (1971) 125 CLR 546 (5.170C) per Barwick CJ.

5.192 Questions

Why, precisely, was the interest of the Lapins postponed to that of Abigail? How was the Privy Council able to conclude that Abigail had been misled, notwithstanding that he had not been proved to have searched the title before t*aking* the mortgage from Mrs Heavener? Was it simply because the Lapins had failed to lodge a caveat? If not, what part did the Lapins' omission to lodge a caveat play in the ultimate postponement of their interest? See Sackville, 'Competing Equitable Interests in Land under the Torrens System' (1971) 45 *ALJ* 396 at 405–7.

5.193 The general principles relating to priority between competing equitable interests were applied in *Avco Financial Services v White* [1977] VR 561; see also *Jacobs v Platt Nominees Pty Ltd* [1990] VR 146; *Avco Financial Services Ltd v Fishman* [1993] 1 VR 90. In *Cash Resources Australia Pty Ltd v BT Securities Ltd* [1990] VR 576 the same principles were applied to a competing interests in shares.

5.194 In *Heid v Reliance Finance Corp Pty Ltd* (1983) 154 CLR 326, the appellant Heid was registered proprietor of certain land registered under the Real Property Act 1900 (NSW). He agreed to sell this land to Connell Investments Pty Ltd, one of a group of companies controlled by a firm of mortgage brokers, Newman, McKay & Co. The appellant was content to accept the advice of the principal of Newman, McKay & Co that one Gibby, an employee of Newman, McKay & Co, should act as solicitor for the appellant in the conveyancing transaction. In fact, unknown to Heid, Gibby was unqualified. Heid duly signed a contract and a transfer and left these documents, together with the certificate of title, in the hands of Gibby. On settlement of the matter, Heid was to place a substantial part of the proceeds of sale on investment with a company controlled by Newman, McKay & Co and another sum by way of mortgage secured on the subject land. Heid then left for a holiday in the United States. Newman, McKay & Co lodged the transfer for registration and immediately set about raising much-needed finance by way of mortgage on the subject land. One such mortgage was to the respondent which advanced money before the transfer to Connell was registered. After registration of Connell's transfer, but before registration of the respondent's mortgage, Heid discovered the fraud and took proceedings claiming an equitable interest in the land paramount to that of the respondent. Heid's principal argument was that he was entitled to trust his solicitor and to leave signed documents with his solicitor in anticipation of the settlement. This accorded with normal conveyancing practice. Heid claimed that he was entitled to believe that Gibby was a solicitor. The High Court was not persuaded by the appellant's submission. The court applied *Abigail v Lapin* [1934] AC 491; (1934) 51 CLR 58; [1934] All ER Rep 720 (5.164C) and *Rice v Rice* (1858) 2 Drew 73; 61 ER 646, and held that the appellant armed Gibby and Connell with the ability to represent to third persons that Connell was the unencumbered owner of the land in fee simple. The appellant was thus estopped from denying that the respondent's interest took priority. The court took the view that it was not reasonable for the appellant to believe that Gibby would act honestly in the best interest of the appellant when the appellant knew that Gibby was an employee of a company which controlled the purchaser. Mason and Deane JJ commented (at 342) that the failure to lodge a caveat is 'just one of the circumstances to be considered in determining whether it is inequitable that the prior owner should retain his priority'.

5.195C **J & H Just (Holdings) Pty Ltd v Bank of New South Wales**
(1971) 125 CLR 546
High Court of Australia

[In 1961 Josephson, the registered proprietor of residential land in Sydney, executed a memorandum of mortgage in registrable form in favour of the defendant bank. The bank received the mortgage and duplicate certificate of title, but lodged neither a caveat nor the mortgage for registration. In May 1964, Josephson executed a mortgage in registrable form in favour of the plaintiff company. This transaction was completed very quickly and, in order to save expense, it was decided not to register the mortgage. The plaintiff company did not receive the duplicate certificate of title, its governing director being satisfied with Josephson's explanation that his bank held the title for safekeeping. The company's solicitor searched Josephson's title and found no encumbrances recorded thereon. No inquiry was made at the bank as to the terms on which it held the certificate of title. In June 1964 the company's solicitor lodged a caveat with the Registrar-General. In August 1964 the

bank lodged its mortgage for registration. The Registrar-General duly notified the plaintiff company which commenced proceedings claiming a declaration that its equitable mortgage was entitled to priority over the bank's interest. The company also sought a declaration that its mortgage ought to be registered by the Registrar-General in priority to that of the bank. Subsequently, a sequestration order was made against Josephson by the Federal Court of Bankruptcy.]

Barwick CJ: Upon the appellant's appeal to the Court of Appeal Division of the Supreme Court (1970) 92 WN (NSW) 803 Jacobs JA, with whose reasons Mason and Moffitt JJA agreed, held that a failure to give notice by lodging a caveat should not be regarded as entitling any person subsequently dealing with the registered proprietor to regard the title as clear of any outstanding equitable interest. He thought it unheard of that one who proposes to become a first mortgagee should dispense with either production or delivery of the duplicate certificate of title upon the faith of a clear register. In this respect he accepted the evidence of the solicitor which I have quoted. He therefore found no ground for postponing the memorandum of mortgage given to the bank. He further found that, because of its gross carelessness in not sighting or obtaining the duplicate certificate of title, the appellant could not claim any benefit from s 43A.

Much has been said in the course of this case about the failure of the bank to lodge with the Registrar-General a caveat against dealings. It is important in this connection to observe the nature and purpose of what is sometimes called an 'unofficial caveat', distinguishing a caveat lodged by a private person from a caveat lodged by the Registrar-General a caveat against dealings. It is important in this connection to observe the nature and purpose of what is sometimes called an 'unofficial caveat', distinguishing a caveat lodged by a private person from a caveat lodged by the Registrar-General, eg under ss 12(1)(f) or 83 of the Act. Its form is scheduled to the Act. See Sch 16. It is directed to the Registrar-General and may properly be given by a person claiming an estate or interest in the land, against dealings with which it is lodged. It must describe the estate or interest claimed. But it is not a registrable instrument: nor is the Registrar-General required by the Act to enter a notation of it on the relevant certificate of title, though the form of the caveat provided in the schedule of the Act does make provision on its reverse side for a record to be made of the entry of its particulars in the register book. Now by s 8(1)(a) of Act No 30 of 1938, however, the Registrar-General is authorised to place 'notifications' on the Register. In practice, however, the caveat is given a number: and a note of its lodgment and of the estate or interest claimed, is made on the relevant certificate of title, but not necessarily at the time of the lodgment of the caveat. Its purpose is to act as an injunction to the Registrar-General to prevent registration of dealings with the land until notice has been given to the caveator. This enables the caveator to pursue such remedies as he may have against the person lodging the dealing for registration. The purpose of the caveat is not to give notice to the world or to persons who may consider dealing with the registered proprietor of the caveator's estate or interest though if noted on the certificate of title it may operate to give such notice. If the caveator does not take proceedings in due time against the person who had lodged a dealing for registration, and the dealing is registered, awareness of the existence of the caveat, and through it, that an estate or interest is claimed by the caveator, will be irrelevant except possibly as an element in establishing fraud in the procurement of the registration. But of itself such awareness will not vitiate the registration.

In *Abigail v Lapin* [1934] AC 491; [1934] 51 CLR 58, husband and wife, the respondents, each the registered proprietor of a separate parcel of land each executed a memorandum of

transfer in favour of a nominee of a solicitor. The memoranda were executed as security for certain costs and for the payment of a sum due to a bank. As the matter was ultimately viewed, the respondents in executing and handing over the memoranda of transfer had authorized the solicitor to deal with the property but not for his own benefit or for that of his nominee otherwise than as mortgagee. The transfers were subsequently registered in breach of that authority. The transferee became the registered proprietor of the fee simple in each parcel of land. After other dealings, the appellant lent money on the security of registrable memoranda of mortgage of the land executed by the registered proprietor and of the deposit with him of the duplicate certificates of title. Caveats by the respondents prevented registration of these memoranda of mortgage. The respondents sued the appellant and others claiming that they were entitled to an order that the registered proprietor should transfer the land to them free of incumbrances. Thus the case was one in which the equitable interest of the appellant was derived from a registered proprietor who had come to the place on the register by the misuse of his authority from the respondents and possession of the duplicate certificate of title. That interest was in competition with the equitable interest of the respondents, as mortgagors.

The lodgment of a caveat by the respondents even whilst they were still registered proprietors might well have been thought appropriate, once the duplicate certificates of title and executed memoranda of transfer had been given to the mortgagee. This would be a means of safeguarding themselves against an abuse of the authority which they had given their mortgagee. The respondents in this respect were in a very different situation to that of the bank. The holder of the executed memoranda of transfer and the duplicate certificate of title was in a position to have the transferee registered as proprietor. Once that person was registered the legal estate in the land would vest in the transferee. But in the case of the bank no change in the register could properly take place without its concurrence. The difference in the need of the parties for protection against the registration of dealings is thus quite clear.

But it was the respondents' conduct in thus arming the mortgagee with the capacity to become the registered proprietor and able to deal with others as such and not any failure by them to lodge a caveat that was decisive in *Abigail v Lapin.* Their Lordships' decision was an application of Kindersley VC's judgment in *Rice v Rice* (1854) 2 Drew 73; 61 ER 646, from which Lord Wright quotes a passage. A passage from the judgment of Knox CJ in the case was adopted as setting out the relevant principles for resolving the competition of the parties' interest in the land. Ultimately 'the case then becomes one of an agent exceeding the limits of his authority but acting within its apparent *indicia'* per Lord Wright. I emphasise these aspects of the decision *Abigail v Lapin* by the Privy Council because, once it is recognized that the respondents' conduct in handing over the memoranda of transfer and the duplicate certificates of title provided the *ratio decidendi*, much of what Lord Wright says about the consequences of a failure by a claimant to an equitable interest to lodge a caveat and particularly his comments on *Butler v Fairclough* (1917) 23 CLR 78 became, in my opinion, *obiter*.

Whilst it may be true in some instances that 'the register may bear on its face a notice of equitable claims', this is not necessarily so and whilst in some instances a caveat of which the lodgment is noted in the certificate of title may be 'notice to all the world' that the registered proprietor's title is subject to the equitable interest alleged in the caveat this, in my opinion, is not necessarily universally the case. To hold that a failure by a person entitled to an equitable estate or interest in land under the Real Property Act to lodge a caveat against dealings with the land must necessarily involve the loss of priority which the time of the creation of the equitable interest would otherwise give, is not merely in my opinion unwarranted by general principles or by any statutory provision but would in my opinion be

subversive of the well recognised ability of parties to create or to maintain equitable interests in such lands. Sir Owen Dixon's remarks in *Lapin v Abigail* (1930) 44 CLR 166 at 205, with which I respectfully agree, point in this direction.

Of course, there may be situations in which such a failure may combine with other circumstances to justify the conclusion that 'the act or omission proved against' the possessor of the prior equity 'has conduced or contributed to a belief on the part of the holder of the subsequent equity, at the time when he acquired it that the prior equity was not in existence': cf per Knox CJ in *Lapin v Abigail*. This is the relevant principle to apply if it is claimed that the priority of a prior equitable interest has been lost in competition with a subsequent equitable interest:

> In general an earlier equity is not to be postponed to a later one unless because of some act or neglect of the prior equitable owner. In order to take any pre-existing admitted title, that which is relied upon for such a purpose must be shown and proved by those upon whom the burden to show and prove it lies, and … it must amount to something tangible and distinct, something which can have the grave and strong effect to accomplish the purpose for which it is said to have been produced: per Lord Cairns LC in *Shropshire Union Railways and Canal Co v R* (1875) LR 7 HL 496 at 507. The act or default of the prior equitable owner must be such as to make it inequitable as between him and the subsequent equitable owner that he should retain his initial priority. This in effect means that his act or default must in some way have contributed to the assumption upon which the subsequent legal owner acted when acquiring his equity.

In my opinion, the failure to lodge a protective caveat cannot properly be said necessarily to be such an act or default. It could not properly be said to be so in the present case.

Mention should now be made of a second reason why in this case the failure to lodge a caveat could not be held to be privative of the bank's priority. The bank held the certificate of title and a memorandum of mortgage in registrable form. Whilst there is no express provision of the Act which forbids the registration of a dealing without the production of the duplicate certificate of title, it is the practice of the Registrar-General's office to refuse to accept an instrument of transfer or mortgage for registration without production of the duplicate certificate of title, unless the certificate is already in the Registrar-General's hands … Thus a person in the situation of the bank could reasonably rely upon this practice and his possession of the duplicate certificate of title as a reasonably sufficient protection.

In any case the failure by such a person to lodge a protective caveat cannot of itself properly be held to be an act fulfilling the requirements to which I have referred of conduct which will deprive a prior equity of its priority. As I have said, the purpose of the caveat is protective: it is not to give notice. The holder of the subsequent equity in my opinion could not properly rely upon the absence of any notification in the register book of the lodgment of a caveat as a representation or as the basis for a conclusion that no equitable interest in the land existed in any person. In my opinion the conclusion and the reasoning of the Court of Appeal Division were correct on this aspect of the case.

In my opinion, the appeal should be dismissed.

Windeyer J: I agree entirely in the judgment of the Chief Justice. Merely to emphasize my agreement I shall briefly state my view of the effect of the Bank's not lodging a caveat against dealings, the matter in the forefront of the appellant's argument … A caveat noted in the register book is no doubt a notice, to anyone who searches at the Registrar-General's Office,

of the caveator's claim. I understand that the Registrar-General records all documents as they are lodged and that he lists caveats as if they were dealings and that this record is available for inspection. It is perhaps a register kept under the Act within the meaning of s. 43 (2). However, the fact that a caveat discoverable by a search of the title is 'notice to all the world' of the interest claimed does not mean that the absence of a caveat is a notice to all and sundry that no interest is claimed. To say that would, it seems, be to equate the noting of a caveat in the register book with the registration of a dealing: it would make competing equitable interests depend not upon priority of creation in time and other equitable considerations, but upon priority of the lodgment of caveats. After all, the primary purpose of a caveat against dealings is not to give notice to the world of an interest. It is to warn the Registrar-General of a claim. The word caveat has long been used in law to describe a notice given to an official not to take some step without giving the caveator an opportunity to oppose it … But a caveat is not the only way in which a purchaser from the registered proprietor can be made aware of the prior equitable claims of another person. It is merely one way, and no doubt a very sure way, in which such a claimant may protect his interest against its subversion by the registered proprietor in favour of another person …

[**Mc Tiernan, Menzies** and **Owen JJ** expressed agreement with the judgment of **Barwick CJ**.]

Appeal dismissed.

5.196 For a discussion of the judgments of Helsham J (the trial judge) and the Court of Appeal in *Just's* case, see Sackville, 'Competing Equitable Interests in Land under the Torrens System' (1971) 45 *ALJ* 396 at 397–9. The High Court judgments are discussed in Sackville, 'Competing Equitable Interests in Land under the Torrens System — A Postscript' (1972) 46 *ALJ* 344.[16]

In *Black v Garnock* (2007) 230 CLR 438; 237 ALR 1; [2007] HCA 31, Gleeson CJ at [7] cited with approval the view of Barwick CJ in *Just's* case as to the purpose of the caveat, while Callinan J (at [76]–[78]) expressed strong disagreement. Callinan J said that the caveat served both as an injunction to the register, and to give notice to anyone searching the register that another dealing or transaction was on foot. In the following passage (at [80]), his Honour refuted the view of Barwick CJ that it would be subversive of the system of registered title to hold that failure to caveat a prior interest necessarily results in postponement:

> I must respectfully disagree. What is much more likely to be subversive of the whole of the scheme of the Torrens system is that a person interested in, or entitled to deal with, land, who has not acted fraudulently, might suddenly and unexpectedly be saddled with, or postponed to, an equitable estate or interest in land which could have been, but was not made the subject of protection by prompt lodgment of an instrument or the filing of a caveat pending the lodgment.

16. For other general analyses of the problem, see Sykes and Walker, pp 464–71; Palmer, 'Caveats and their Effect on Equitable Priorities' in *Centennial Essays*, pp 79–119; Stubb, 'Equitable Priorities and the Failure to Caveat' (1989) *AULR* 199; Purich, 'The Caveat: An Uncertain Instrument in an Exact System' (1982–3) 47 *Sask L Rev* 353; McCrimmon, 'Protection of Equitable Interests Under the Torrens System: Polishing the Mirror of Title' (1994) 20 *Mon LR* 300.

5.197 Questions

What are the implications of the different views of the purpose of the caveat? Is it possible to reconcile *Just's* case with *Butler v Fairclough* and *Abigail v Lapin*? After *Just's* case, in what circumstances will a failure to lodge a caveat ever lead to the postponement of an equitable interest in Torrens system land in favour of an equitable interest in the same land created subsequently? Compare *Breskvar v Wall* (1971) 126 CLR 376; 5.45C. Consider *Australian Guarantee Corporation (NZ) Ltd v CFC Commercial Finance Ltd* [1995] 1 NZLR 129 in which the Court of Appeal of New Zealand (Richardson Gault and Tompkins JJ) held that a failure to lodge a caveat may justify a reversal of priority between equitable interests. The relevant facts were that the first mortgagee delayed about nine days after acquiring interest before lodging its caveat. By the time the caveat was lodged the second mortgage had been created. In addition, the first mortgagee failed to take possession of the certificate of title. The second mortgagee had no knowledge of the first mortgage at the time it acquired its interest. The court cited with approval the views of Mason and Deane JJ in *Heid v Reliance Finance Corp Pty Ltd* (1983) 154 CLR 326; 5.169. It held that the combination of the delay in registering the caveat and the failure to obtain the title justified the conclusion that it was just and fair that the priorities should be reversed. However, because the second mortgagee had delayed in asserting its rights and in challenging the first mortgagee's position, the court held that it had a discretion to require as a condition of granting that interest, that an allowance of over $50,000 be made to the first mortgagee. See also *Swan v Secureland Mortgage Investment Nominees Ltd* (1992) 2 NZLR 144.

5.198 The failure by a person entitled to an equitable interest to lodge a caveat and the effect of *Butler v Fairclough, Abigail v Lapin* and *Just's* case have been considered in a number of cases. In Victoria, much concern was prompted by *Osmanoski v Rose* [1974] VR 523, in which Gowans J held that a failure to caveat a purchaser's interest under a contract of sale warranted the postponement of a prior to a later purchaser. Gowans J cited the observations of Barwick CJ as to the nature and purpose of caveats. He distinguished these (at 528) on the ground that the Victorian provisions (ss 89, 89A) meant that a caveat was not merely directed to the Registrar-General:

> … The lodging of a caveat under the Victorian Act operates, whether a 'cloud' or a 'blot' or by whatever name it is called as an obstacle to a registered proprietor making title to a purchaser and to a purchaser obtaining title from the registered proprietor.

This view was rejected in *Jacobs v Platt Nominees Pty Ltd* [1990] VR 146, although *Osmanoski v Rose* was not specifically overruled. In a joint judgment, the full bench of the Victorian Supreme Court (Crockett, King and Gobbo JJ) observed (at 151) that 'the Victorian legislation is not so different that it provides a necessary reason for distinguishing *Just's* case. This is particularly evident in the judgment of Windeyer J who described the practice in New South Wales in provisions'. The court also considered that the other basis on which Gowans J had distinguished the two cases, the fact that the party which had failed to caveat had possession of the certificate of title in *Just's* case and not in *Osmonosk*i, was determinative: 'It does not bear out a proposition that the holder of the prior equitable interest is expected to give notice to

the world': at 151. The court added that 'the practice of lodging caveats is at best that and not a duty, much less a duty to the world at large': at 159.

Their Honours took into account a number of factors in deciding that, in fairness and in justice, the appellant's failure to caveat her equitable interest acquired by exercise of an option to purchase should not deprive her of her prima facie priority as the holder of the earlier interest. The relevant circumstances included that it was not the practice of Victorian conveyancers in all cases to lodge a caveat to protect an interest under an option, and that there was no settled practice for purchasers to search the title for prior interests before entry into contract. It was also significant that the appellant had been granted the option by a company controlled by her parents in circumstances where it was 'inconceivable' that the company would sell to another in breach of the option.

In *Handberg v MIG Property Services Pty Ltd* [2010] VSC 388, ANZ Bank had failed to caveat its earlier unregistered mortgage before Velos and Davis acquired their subsequent unregistered charge. Robson J held that on either an estoppel basis or under the broader approach of Mason and Deane JJ in *Heid v Reliance* preference be given to the better equity — the earlier interest of ANZ Bank should be postponed. His Honour said that failure to caveat 'by itself may be sufficient to defer priority if the circumstances otherwise make it fair and just to do so': at [198]. ANZ Bank's failure to caveat its interest had led the chargees to act to their detriment in acquiring their later interest upon the supposition that the earlier interest did not exist. The detriment consisted of the incurring of additional legal fees and expenses. Robson J distinguished *Jacobs v Platt Nominees* on the facts. Mrs Jacobs had good reason to expect that her father would not prejudice her interest. In the present case, there was no explanation for ANZ's failure to follow usual practice and lodge a caveat. As a major banking corporation, it was deemed to be aware of conveyancing practice and the function of caveats.

5.199 *Jacobs v Platt Nominees* was also distinguished on the facts in *Mimi v Millennium Developments Pty Ltd* [2003] VSC 260. The plaintiff had entered into a contract to purchase land from the first defendant but did not lodge a caveat for some months. The first defendant sold the land to the third defendant who entered into a building contract with the first defendant for the construction of a home. The plaintiff noticed construction works upon the land but did not lodge a caveat until after settlement of the contract with the third defendant. In these circumstances, Nettle J held that the failure by the plaintiff to lodge a caveat justified the plaintiff's postponement to the interest of the third defendant. The arm's length commercial relationship between the plaintiff and the first defendant and the total lack of communication between the plaintiff and the first defendant where there was reason to suspect a subsequent equitable interest might have been created were significant matters of difference from the facts in *Jacobs*. The third defendant had established detriment in that loss of priority would result in deprivation of the land, the house built upon the land and the money laid out to acquire the land and house.

These cases show that a failure to caveat is significant if it contributes to a later interest being acquired in the supposition that the earlier interest does not exist. It is relevant to consider whether the failure to caveat is inconsistent with usual conveyancing practice: see, for example, *Person-to-Person Financial Services v Sharari* (1984) NSW ConvR ¶55-187, in which McLelland J declined to follow Needham J's decision in *Ryan v Nothelfer* (1983) NSW ConvR ¶55-119, that a second mortgagee who had failed to caveat had priority over a third mortgagee as there was 'no feature in this case … which may be added to the failure of the plaintiff to lodge a caveat so as to effect a postponement of his interest'. His Honour found that it was the settled practice of competent lawyers acting for second mortgagees in New South Wales either

to register the mortgage or lodge a caveat promptly. The failure of the second mortgagee to follow this practice would naturally lead anyone searching the register, such as the plaintiff, to assume that no second mortgage was in existence: see *Finlay v R & I Bank of Western Australia Ltd* (1993) 6 BPR 13,232; *Elderly Citizens Homes of SA Inc v Balnaves* (1998) 72 SASR 210. See also *Taleb v National Australia Bank Ltd* [2011] NSWSC 1562.

The significance of notice in equitable priorities

5.200 The proper application of the maxim *qui prior est tempore, potior est iure* to a resolution of competing equitable interests in land is not without uncertainty. It will be recalled that in *Rice v Rice* (1854) 2 Drew 73; 61 ER 646 (4.179C) the Vice-Chancellor was of the view that the maxim was applied as a device of last resort. As he put it: 'As between persons having only equitable interests, if their equities are *in all other respects* equal, priority of time gives the better equity …'. This statement invites a court to examine the conduct of both parties with a view to weighing their respective merits and according priority by time only if the merits are in all respects equal. Some later authorities have not endorsed this approach but rather favour the view that priority will be determined in accordance with time unless the first equitable encumbrancer is guilty of some conduct deserving of postponement and reversal of the 'natural' order. This conduct has been variously described as 'estoppel', 'negligence' or 'gross negligence'. However described, the focus is upon the conduct of the first equitable encumbrancer. Thus, in *Abigail v Lapin* (5.164C), Lord Wright, in speaking for the Privy Council, said: 'The opinion of the Vice-Chancellor [Kindersley in *Rice v Rice*] no doubt has not been approved in so far as he says that priority in time is only taken as the test where the equities are otherwise equal: it is now clearly established that prima facie priority in time will decide the matter unless, as laid down by Lord Cairns LC in *Shropshire Union Railways and Canal Co v R* (1875) LR 7 HL 496, that which is relied on to take away the pre-existing equitable title can be shown to be something tangible and distinct having grave and strong effect to accomplish the purpose'. And in *J&H Just (Holdings) Pty Ltd v Bank of New South Wales*, Barwick CJ stated: 'As I have pointed out, unless the priority which time gives to the bank's [the first encumbrancer] equitable interest in land is to be lost by reason of the bank's own conduct, there is no need in my opinion, to consider the conduct of the appellant [the second encumbrancer]. That conduct might be relevant if, after the bank's priority derived simply from earlier creation of its interest had been lost, a further question of the comparative claims of the holders of the equitable interest should arise'. The distinction between the two approaches and the proper role of time in resolving a competition between two conflicting equitable interests were analysed by Brooking and Ormiston JJA in *Moffett v Dillon*. Although there is some common ground in the views expressed in their separate judgments, there is a significant difference in emphasis in relation to the role of notice as a decisive factor.

5.201C **Moffett v Dillon**
(1999) 2 VR 480
Supreme Court of Victoria (Court of Appeal)

[The plaintiff entered into a terms contract of sale of his land to the defendant. The contract was later rescinded. The parties agreed that moneys owing under this contract be secured by a charge given by the defendant to the plaintiff over the subject property. The plaintiff lodged a caveat. At a later date, the defendant gave a mortgage to a bank. The bank took its

mortgage with notice of the plaintiff's earlier charge. When the bank lodged its mortgage for registration, the plaintiff took proceedings for an injunction. By mistake, the bank's mortgage was registered but the dispute between the parties was conducted on the footing of a competition between unregistered interests.]

Brooking JA: It is conceded that at the time the bank took its mortgage it had full actual knowledge, not casually acquired, of the creation and continued existence of the charge. At least in the circumstances of the present case, this is fatal to the contention that the later equitable interest should prevail over the earlier. I know of no decision in which a later equity has been held to prevail where its holder acquired it with knowledge of the creation and continued existence of the earlier equity.

[After considering the authorities his Honour continued:]

The authorities use language suggesting that a later equitable interest can never prevail over an earlier one where the holder of the later interest had at the time of its acquisition notice of the earlier interest. (I exclude the case where although there was notice of the coming into existence of the earlier interest the holder of the later interest had by the time of its acquisition a belief that the earlier interest no longer existed.) The rule is correctly stated in terms of 'notice' of the earlier interest. The present case is one of admitted actual and full knowledge. This is either to be regarded as actual notice or, according to the analysis of Pomeroy, *Equity Jurisprudence*, paras 591 et seq, to be treated as having the same consequences as notice.

The best known doctrine of equity regarding the effect of notice on priorities concerns the bona fide purchaser for value of the legal estate … The rule applies whether the estate or interest taken by the purchaser is legal or equitable and whether the equity held by a third person in relation to the same subject matter does or does not amount to an equitable interest according to the distinction that has been drawn between 'mere equities' and equitable interests …

I have said that there are two rules or principles at work in cases like the present, the rule that a person taking with notice of an equity takes subject to it and the rule where the equities are equal the first in time prevails. As regards the second rule, I have referred to the wide view taken by Mason and Deane, JJ in *Heid v Reliance Finance Corporation Pty Ltd* (1983) 154 CLR 326 at 341 that broad principles of right and justice will guide the court in determining whether the equities are equal. As what I have already written should make plain, I do not regard the question whether a person who acquired an equity did so with notice of a prior equity as no more than a consideration to which regard is to be had in determining whether one of the equities is better than the other. I regard the rule about notice as a distinct and fundamental one and I do not consider that Mason and Deane, JJ intended to question its existence or to subsume this particular matter of notice under a broad question so as to make it no more than a consideration bearing upon which was the better equity.

The judge was right in this case to hold that the charge had not lost its priority over the subsequent mortgage.

Ormiston JA: I have had the benefit of reading the judgment of Brooking, JA in draft form and, subject to what appears below, I agree both in the reasoning and in the conclusions which he has reached.

In my opinion the learned judge was correct in concluding that the appellant's charge had priority over the bank's equitable mortgage inasmuch as it was the security and interest first created …

As to the other basis upon which Brooking, JA would dismiss the cross-appeal and give priority to the appellant's charge, I have greater difficulty and, for the present, I feel obliged, regrettably, to withhold my concurrence with it …

I have preferred to conclude, as was held below and as the appellant has argued, that Moffett as holder of the equitable interest first in time should be preferred unless and until the bank established that it had the better equity in the sense of a better equitable interest, and that is what the bank failed to do … What the bank would have had to do is to show that it took its interest for value without notice or had the better equity for some other reason, or that is what I believe is the essence of the present difference of opinion.

The better view, although I would not wish to resolve it in present circumstances, seems to be that the principle favouring the bona fide purchaser without notice has been one not ordinarily applied (except in circumstances which have been criticised) as between competing equitable interests … Perhaps the solution lies in Lord Westbury's analysis which would allow of the second interest holder to take an interest but only subject to the earlier equity. If that be so, that later holder of an equitable interest would have to show why he or she should be preferred over the earlier equitable interest holder. This might involve some nice balancing of competing equities of the kind contemplated by the High Court in *Heid's* Case but, as a generalisation only, such an enquiry may be cut short by it being demonstrated that the later holder knew of the earlier interest when he or she took. So, subject to the possible existence of rights under a prioritisation or subordination deed or other contract or by reason of a common assumption created by the holder of the prior interest at the time the later holder acquired his or her interest (or the like), there would be little reason for further examination as to which party held the 'better equity', the later holder facing an effectively insuperable hurdle at that stage. However, without resolving all these difficulties, I would prefer to reiterate that Mr Moffett's interest was created first in time and nothing had been demonstrated in this case to show that the bank's later interest should be preferred in equity.

[**Buchanan JA**, in a short separate judgment, agreed with the reasoning in the judgment of **Brooking JA**.]

5.202 Brooking and Ormiston JJA agree that the holder of a later equitable interest who has notice of an earlier interest takes subject to it, but differ in the reasons. According to Brooking JA, if there is notice, there is no need to apply the test in *Heid*. Ormiston JA doubts that the doctrine of notice applies where the later interest is equitable rather than legal. In his Honour's view, notice is an important consideration in determining whether there is postponing conduct on the part of the holder of the later interest. The two approaches are discussed and analysed by Rodrick, 'Resolving Priority Disputes Between Competing Equitable Interests in Torrens System Land — Which Test?' (2001) 9 *APLJ* 172. The author makes a compelling case for the adoption of the test embraced by Ormiston JA and concludes that notice should not be used as a separate stand-alone test.[17]

Moffett v Dillon was a case of actual notice, but equity regards a purchaser as having *imputed* notice of facts known to his or her agent, and *constructive* notice of facts that would have come to his or her notice if proper inquiries had been made. The definition of notice in the Property

17. See also McConvill, 'Equity in the Torrens System' (2001) 8 *APLJ* 191; Butt, 'Priority Between Unregistered Torrens Title Interests' (1999) 73 *ALJ* 538.

Law Act 1958 (Vic) s 199, which includes constructive and actual notice, applies to registered land, and was applied in *IGA Distribution Pty Ltd v King & Taylor Pty Ltd* [2002] VSC 440. See *Commonwealth Bank of Australia v Platzer* [1997] 1 Qd R 266 (4.176) and the discussion of the doctrine of constructive notice at 4.165–4.170.

5.203C **Perpetual Trustees Co Ltd v Smith**
(2010) 186 FCR 566; 273 ALR 469; [2010] V ConvR 54-779
Federal Court of Australia (Full Court)

[Pursuant to a scheme whereby retirees and other elderly persons used their equity in their homes in Victoria to generate an income stream, the respondents sold their homes to Money for Living Australia Property Holdings Pty Ltd (MFLPH) in consideration of a lump sum, an annuity and a lease for life over the property. The retirees handed over at settlement of their contracts an instrument of transfer and their certificates of title, and did not lodge caveats. Perpetual made a number of loans to MFLPH entities to finance the purchase of the properties and took first registered mortgages over the homes as security. After MFLPH ceased trading, the respondents brought representative proceedings on behalf of the retirees to protect their leasehold interests in their homes. Perpetual appealed the trial judge's ruling that its mortgage was subject to the retirees' interest as tenant in possession, and the retirees cross-appealed his Honour's ruling that Perpetual's mortgage was not subject to their equitable vendor's liens for the unpaid balance of purchase moneys. On appeal, the Full Federal Court held that the statutory exception to indefeasibility in Vic, s 42(2)(e) operated to deprive the registered proprietor of the indefeasibility it would otherwise enjoy, leaving a competition between the retirees' equitable leases and Perpetual's equitable mortgage to be resolved under common law principles as a competition between unregistered interests.]

Moore and Stone JJ: In the case of all the respondents, the equitable interest of the tenants preceded the interests of the mortgagees. If the equities between the retirees and Perpetual were equal then the retirees' interest, being first in time would take priority. That principle does not apply where the merits as between the parties are not equal. In this case it might be argued, although Perpetual made no such argument, that by giving MFLPH a registrable transfer and certificate of title, the retirees had armed MFLPH with the ability to enter into the mortgages, without Perpetual having any knowledge of their interests. Thus, it might be argued, although Perpetual did not, that the retirees had an obligation to correct the impression so created by lodging caveats to protect their interest. While Perpetual's failure to raise the question of notice might be regarded as fatal to its claim (see *Barclays Bank plc v Boulter* [1997] 2 All ER 1002; [1998] 1 WLR 1) …

We disagree with the primary judge's comment that the failure to caveat was 'of no moment' because the only purpose of a caveat would have been to prevent registration. His Honour's comment overlooks the capacity of a caveat to give notice 'to all the world that the registered proprietor's title is subject to the equitable interest alleged in the caveat': *Butler v Fairclough* (1917) 23 CLR 78 at 91; 23 ALR 62 at 67 per Griffith CJ. This purpose is not inconsistent with the capacity of a caveat to give notice as the following comment of Barwick CJ in *J & H Just (Holdings) Pty Ltd v Bank of New South Wales* (1971) 125 CLR 546 at 552; [1972] ALR 323 at 325–6 (*Just*), indicates:

> Its purpose is to act as an injunction to the Registrar-General to prevent registration of dealings with the land until notice has been given to the caveator … The purpose

of the caveat is not to give notice to the world or to persons who may consider dealing with the registered proprietor of the caveator's estate or interest *though if noted on the certificate of title, it may operate to give such notice.* [Emphasis added.]

The conduct of the retirees in giving MFLPH the ability to create the subsequent mortgages to Perpetual would indicate that the merits would be with Perpetual unless Perpetual had, at the very least, constructive notice of the retirees' interests. While a caveat may give notice of an unregistered interest there is no obligation to caveat. To hold otherwise would be to convert a facility that the TLA provides into an obligation. If the circumstances are such as to give notice in some other way, so that the later interest holder is, or ought to be, aware of the prior interest, the failure to caveat, in so far as notice is concerned, will be immaterial. In the absence of a caveat it is necessary to consider all the relevant circumstances in determining the issue of notice: *Heid v Reliance Finance Corporation Pty Ltd* (1983) 154 CLR 326; 49 ALR 229 per Mason and Deane JJ.

In the present circumstances, it beggars belief that the appellant did not have notice, at the very least constructive notice, of the retirees' interests. In the absence of clear evidence to the contrary (and there was none) the inescapable inference is that Perpetual did have notice. Perpetual entered into many mortgages with MFLPH and made extensive funds available to it. In the normal course of events a lender in Perpetual's position would approve a loan facility on which MFLPH could draw in respect of the individual mortgages. Whether or not this was the case here, it is inconceivable that Perpetual would have agreed to make extensive funds available to MFLPH without having any idea of the nature of their business … In any event, the very name of the company granting the mortgages, Money for Living Property Holdings Pty Ltd, would or should have alerted the mortgagee to the need to make enquiries. Furthermore, the fact that the mortgaged properties were residential premises occupied by an elderly person or an elderly couple should have alerted a potential purchaser or mortgagee of the need to make enquiries.

The situation here is quite different from that pertaining in cases such as *Caunce v Caunce* [1969] 1 All ER 722; [1969] 1 WLR 286 (*Caunce*) and *Williams and Glyn's Bank Ltd v Boland* [1981] AC 487; [1980] 2 All ER 408 (*Williams and Glyn's Bank*). In both these cases the prior unregistered interest in the matrimonial home being claimed was that of the wife whose husband had created the later interest. In *Caunce* it was held that the wife's occupation was not notice of her unregistered interest (arising from her contributions to the purchase price) because it was consistent with the title offered to the bank by the husband. In *Williams and Glyn's Bank* the issue was whether the wife was 'in actual occupation' of the matrimonial home within the meaning of s 70(1)(g) of the Land Registration Act 1925 (UK). The court rejected the view that the wife's occupation should be regarded as a 'shadow' of her husband's and held that because the wife was physically present on the land she should be regarded as being in actual occupation. Occupation by the retirees cannot be so explained in relation to title offered by a company such as MFLPH.

It was not necessary for the retirees to caveat their interests in order to alert any future purchaser or mortgagee to their interest in the property. The fact of their occupation was constructive notice of their interest which would thus prevail even against a bona fide purchaser of the legal interest: *Barnhart v Greenshields* (1853) 9 Moo PCC 18; 14 ER 204; *Hunt v Luck* [1902] 1 Ch 428. Irrespective of whether Perpetual's interest is regarded as legal or equitable the result is the same. In the absence of an obligation to caveat and in the light of their actual possession, there was no postponing conduct on the part of the retirees. As such the merits did not lie with Perpetual and therefore, in a competition between the two equitable interests the prior interest of the retirees would prevail: *Rice v Rice* (1853)

2 Drew 73; 61 ER 646; *Lapin v Abigail* (1930) 44 CLR 166 at 204; [1930] ALR 178 at 189 per Dixon J, quoted with approval by Barwick CJ in *Just* at 555. The protection afforded by s 42(2)(e) strips the registered mortgagee of the indefeasibility that would otherwise protect it. In the competition between Perpetual and the tenants in possession the interests of the tenants must take priority over those of Perpetual.

…

It is not in contention that a vendor's lien is an equitable interest. More to the point in the present circumstances, it is an unregistered interest. In this case the unregistered interests are competing with Perpetual's registered mortgages. There is no suggestion that these mortgages were acquired and registered other than in good faith; there was no fraud. There is no suggestion that any other exception to indefeasibility applied. In the absence of any such exception (as for instance the exception that s 42(2)(e) provides in favour of a tenant in possession) the registered interest must prevail.

Section 42(2)(e) does not apply to the vendors' liens as it is independent of the retirees' tenancies. As the primary judge observed:

> A vendor's lien does not grow out of, and is severable from, the retiree's right to continue in occupation as a tenant; it is not an interest to which the retiree's occupation as a tenant is incident.

In this regard the vendor's lien may be contrasted with the claim for rectification considered in *Downie v Lockwood* [1965] VR 257. The plaintiff's unregistered lease included rates and insurance premiums as outgoings to be paid by the tenant. The court accepted that, as against the lessor, the tenant was entitled to have the lease rectified by deleting the reference to rates and premiums. The issue was whether the tenant could exercise this remedy against a purchaser for value of the lessor's reversionary interest. The court held that although the tenant's equity of rectification did not touch and concern the land and thus under general law principles would not be enforceable against a purchaser of the legal estate for value and without notice, the interest fell within the exception in s 42(2)(e) of the TLA. It was an interest to which his occupation as a tenant in possession was incident …

[Their Honours dismissed the appeal and cross-appeal.]

Dowsett J (in dissent): … I have read the reasons prepared by Moore and Stone JJ. I gratefully adopt their Honours' statement of the relevant facts. In so far as their reasons deal with the operation of s 42(2)(e) of the Transfer of Land Act 1958 (Vic) (the TFL Act) I am in general agreement with them. However there are a number of areas in which I have reservations which I should express.

The operation of s 42 deprives the appellant (Perpetual) of the benefit of registration of its mortgages. As a result we must consider the respective priorities of each of the interests held by the relevant respondents (the retirees) as against the respective competing interests held by Perpetual pursuant to its notionally unregistered mortgages …

… As I understand it, an enquiry as to the respective merits of competing equities arises only where the holder of the later equity took without notice of the former. If the later equity holder took with notice of the former equity, he or she would take subject to that equity, and no reference to the merits would generally be appropriate …

… As I have said his Honour concluded that the effect of s 42(2)(e) was to give absolute priority to the interests of a tenant in possession so that any consideration of conflicting equities was irrelevant. We have rejected that view …

Much depends upon whether Perpetual knew, or ought to have known that the respective retirees were to remain in possession of the premises after settlement (as opposed to their being in possession prior to settlement). The distinction between possession by an owner who has agreed to sell, and possession by a third party may also be important. While there is substantial authority for the proposition that knowledge that a tenant is in possession may fix a purchaser with knowledge of the terms of the tenancy, that proposition says nothing about the possession of a vendor under an uncompleted contract of sale. See *Williams & Glyn's Bank Ltd v Boland* [1981] AC 487 at 504–5; [1980] 2 All ER 408 at 412–13. The distinction reflects common sense. While occupation by somebody other than the owner may suggest a tenancy, presence of the owner suggests occupation pending completion of the contract of sale, which almost invariably provides for vacant possession on completion. I am unable to discern from the reasons for judgment the factual basis upon which it was asserted that Perpetual had any relevant knowledge as to occupation or the extent of that knowledge …

On the question of conflicting equities, Perpetual focusses primarily upon the failure to caveat. However that conduct must be seen in light of the fact that the various retirees supplied MFLPH with the indicia of title and memoranda of transfer necessary to put itself in the position of registered proprietor and to charge the land in favour of Perpetual. There can be little doubt that Perpetual made advances in the expectation that it would receive the benefit of those charges … In my view reliance on failure to caveat inevitably raises for consideration the retirees' conduct in equipping MFLPH with their indicia of title and memoranda of transfer. The points are inextricably connected.

… Had the retirees established that Perpetual took with notice, it would not have been necessary to consider the respective merits of the competing equities. However the case seems not to have been decided on the basis that Perpetual took with notice, but rather upon comparison of the merits. In my view the primary judge failed to address the true significance of the retirees' failure to caveat.

Given that if the equities are equal, the first in time will prevail, Perpetual bore the burden of establishing that its interests should have priority. However I am unable to determine from the facts, as they are presently before the court, how the question of priority should be resolved. It is difficult to identify the facts which were raised and relied upon by the parties as being relevant to its resolution. However my views concerning the learned primary judge's conclusions lead me to conclude that he erred. The appeal should be allowed and the relevant orders set aside, the matter being remitted for further consideration, limited to the question of priority. However, as I am in dissent, the actual orders which I favour are of no importance. In all other respects I agree with the reasons of Moore and Stone JJ and with their conclusions.

5.204 Questions

1. Do the judgments in this case support the view of Brooking JA or Ormiston JA in *Moffett v Dillon* as to the role of notice in determing the priority of unregistered interests?; **5.XXX**.
2. Why was the mortgagee bound by the retirees' leases, but not by their equitable liens for the balance of the purchase moneys, according to Moore and Stone JJ?

Would Dowsett J have found that the mortgagee was affected by notice of the retirees' leases if the retirees were not also vendors in possession?

3. What are the implications of the decision for the protection of tenants under the short-term tenancies exception to indefeasibility in each jurisdiction?; 5.XXX.

5.205 What priority rule applies as between the holder of a prior equity and a subsequent equitable interest? See *Latec Investments Ltd v Hotel Terrigal Pty Ltd (in liq)* (1965) 113 CLR 265 (4.185C); *Ruthol Pty Ltd v Mills* [2003] 11 BPR 20,793; NSWCA 56 (4.192C); *Double Bay Newspapers v AW Holdings Pty Ltd* (1996) 42 NSWLR 409. Note that the principles discussed in these cases apply also to unregistered interests in land registered under the Torrens system. There is in fact a significant range of interests which could be classified as equities rather than equitable interests for purposes of resolving their priority in relation to a later-acquired interest. For example, consider the interest of a person claiming under a common intention constructive trust before the claimant has obtained the assistance of a court of equity. See questions and discussion at 4.193–4.194. See also Wright, 'The Continued Relevance of Divisions in Equitable Interests to Real Property' (1995) 3 *APLJ* 163; Hepburn, 'Reconsidering the Benefits of Equitable Classification' (2005) 12 *Aust Property Law Journal* 157.

Statutory protection for the purchaser between settlement and registration

5.206 Legislative measures have been introduced in some states to improve the position of the purchaser in the 'registration gap' between settlement of the transaction and registration of the dealing. Part 7A of the Queensland Act provides for a system of settlement notices. The deposit of a settlement notice by a purchaser or mortgagee will prevent registration of an instrument affecting the relevant lot until the notice lapses, is withdrawn, cancelled or removed: Qld, ss 138, 141(1). The settlement notice does not prevent registration of an instrument that was lodged before the notice was deposited: s 141(2). An instrument which is lodged after the settlement notice and which is prevented from being registered by the settlement notice is deemed to be lodged after the instrument specified in the settlement notice: Qld, s 150. Since instruments are registered in the order in which they are lodged (Qld, s 177(1)), the effect is to ensure that the instrument specified in the settlement notice is the first to be registered. Tasmania provides for lodgment of a priority notice which preserves priority for a dealing specified in the notice: s 52. The priority notice expires after 60 days if no specified dealing is lodged: s 52(4), (5A). See also WA, ss 148–50, which provides for an administrative procedure under which a purchaser may obtain a 'stay order', staying registration of any instrument affecting the land for 48 hours. It has been suggested that provisions for settlement or priority notices are cheaper and easier for purchasers to use than the caveat provisions, and should be more widely adopted: Griggs, 'Curial Discretion in the Drafting of Caveats: Is it Preserving the Integrity of the Register?' (2009) 21 *Bond LR* 68.

5.207 New South Wales has a unique provision which may affect priority in the registration gap. Section 43A was introduced into the Real Property Act in 1930 and was designed to overcome, at least in part, the established interpretation of the notice section (NSW, s 43)

whereby the purchaser is protected against unregistered interests only after registration of the dealing.[18] The section states:

> **43A** (1) For the purpose only of protection against notice, the estate or interest in land under the provisions of this Act taken by a person under a dealing registrable, or which when appropriately signed by or on behalf of that person would be registrable under this Act shall, before registration of that dealing be deemed to be a legal estate.
>
> (2) No person contracting or dealing in respect of an estate or interest in land under the provisions of this Act shall be affected by notice of any instrument, fact, or thing merely by omission to search in a register not kept under this Act.

The section was discussed in detail, and competing interpretations put forward, in the following case.

5.208C **IAC (Finance) Pty Ltd v Courtenay**
(1963) 110 CLR 550; (1964) ALR 971
High Court of Australia

[Miss Austin (the vendor) contracted to sell the relevant land to the Courtenays (the purchasers), to be partly financed by a mortgage back to the vendor. In accordance with usual practice, the Courtenays allowed the vendor's solicitor to lodge the transfer and mortgage, and did not lodge a caveat to protect their interest. Since the sale involved only part of the land owned by Miss Austin, the duplicate certificate of title was retained by the Registrar-General so that a new duplicate certificate could be issued for the residue of the land. Upon settlement of the sale, the vendor's solicitor lodged the transfer and mortgage for registration, but subsequently withdrew them before they were registered, without the Courtenay's knowledge. On the following day, the vendor contracted to sell the land to Denton Subdivisions Pty Ltd.

At settlement of the 'sale', Denton's solicitor learned that a transfer from the vendor, Miss Austin, to the Courtenays, together with a mortgage back, had previously been lodged for registration but then withdrawn. However, he accepted the explanation of Miss Austin's solicitor that this was the means of settling the resale from the Courtenays to Miss Austin. To confirm this story (which was untrue) Miss Austin's solicitor produced the contract of sale executed by the Courtenays. However, Denton's solicitor did not ask whether the contract had been completed or the purchase money paid, but accepted that the Courtenays' interest in the land had ceased. The 'purchase' by Denton was being financed by IAC (Finance) Pty Ltd. At settlement, IAC received the transfer from Miss Austin to Denton and the mortgage from Denton. The documents were duly lodged for registration and were awaiting registration when the plaintiffs, the Courtenays, commenced their action. The Courtenays claimed to be entitled to have their transfer from the vendor, Miss Austin, registered in preference to the transfer to Denton and the mortgage to IAC. The trial judge, **Hardie J**,

18. For a general discussion of s 43A and its interpretation, see Gray, 2nd ed, pp 341–3.

upheld the claim and made the necessary orders to give effect to his determination. Denton and IAC appealed to the High Court, relying on three arguments:

- The transfer to the Courtenays having been withdrawn, the only candidate for registration was the transfer to Denton, as well as the mortgage to IAC. Further, under NSW, ss 43 and 43A they could gain registration of their instruments notwithstanding any notice that may have been received of the Courtenays' unregistered interest.
- The Courtenays had resold the land to Miss Austin and they could not, therefore, have their transfer registered.
- The Courtenays, by their conduct in leaving the transfer with the vendor's solicitor and failing to lodge a caveat, had lost their priority to the subsequent equitable interests of Denton.]

Kitto J: [His Honour, after outlining the facts, dealt with the first argument of Denton and IAC:]

The purpose and effect of s 43A(1) have been the subject of controversy among legal writers, and they are not apparent until the provision is read, as its numbering suggests that it should be, as a supplement to the preceding provisions, and in particular ss 41, 42 and 43. Until registration, a person who has dealt with a registered proprietor cannot have more than an equitable interest, for until that event even a registrable instrument cannot pass the estate or interest, which it specifies: s 41. After registration, he holds, by virtue of s 42, free from all incumbrances, liens, estates or interests not notified on his certificate of title (with immaterial exceptions); but this does not exclude equitable interests. Even as regards equitable interests he has a degree of immunity by virtue of s 43. But the immunity under that section is limited: it is only such immunity as is created by exonerating him from the effect of notice of any trust or unregistered interest. 'Except in the case of fraud', the section says, 'no person contracting or dealing with or taking or proposing to take a transfer from the registered proprietor of any registered estate or interest shall be affected by notice, direct or constructive, of any trust or unregistered interest'. It is settled law that the immunity thus conferred, upon a purchaser, for example, is afforded to him if and when he becomes registered and not before … A purchaser, his interest before registration being necessarily equitable only, derives no priority over the holder of a preexisting equitable interest from absence of notice. Consequently, a provision that a person is not to be affected by notice of prior interests has no application to him so long as he remains unregistered. For the same reason, it has no applications even to one who has become registered, if he acquired his estate or interest as a volunteer. It is only a person having a legal estate or legal interest acquired for value whose position is prejudiced by his having received, before paying his money, direct or constructive notice of an outstanding equitable interest. This is so even under the Real Property Act, for a registered interest is not (as was suggested in the course of the appellants' argument) some special kind of statutory interest — it is a legal interest, acquired by a statutory conveyancing procedure and protected from competition to the extent provided for by the Act, but having, subject to the Act, the nature and incidents provided by the general law. So all that provision does which I have quoted from s 43 is to protect against notice of any trust or unregistered interest a legal estate acquired for value. The statement that it has no operation in favour of a person before he becomes registered means, simply, before he acquires a legal estate by registration.

It is to this situation, as I understand the matter, that s 43A(1) is addressed. Indeed, the introductory words by which its operation is limited, 'For the purpose only of protection against notice', preclude, I think, any other view. Something which is less than a legal estate is to be deemed a legal estate for the purpose of protection against notice which s 43 provides

for a legal estate. What is to receive this protection is the estate or interest in land 'taken' by a person under an instrument which either is registrable, or if signed by or on behalf of that person, would be registrable. The word 'taken' must be construed having regard to the provision in s 41 that no instrument until registered shall be effectual to pass any estate or interest in land under the Act. The estate or interest 'taken' under an unregistered instrument must therefore mean the estate or interest which the instrument on its true construction purports to confer, and upon its being registered will confer. That estate or interest is given by s 43A the same immunity from the effect of notice as s 43 provides for registered estates or interests in virtue of their being legal estates or interests. The result is that (fraud apart) a purchaser may pay his money to the registered proprietor in exchange for a registrable instrument (or one that will be registrable upon his signing it) without troubling about any notice that he may have received of a trust or unregistered interest. Provided that he lodges his instrument for registration before the holder of a competing prior interest renders the purchaser's instrument no longer registrable by lodging a registrable instrument for registration or entering a caveat, s 36(1) will ensure that the purchaser obtains the protection of s 43: see also s 36(3). This is so because, by reason of a proviso added to s 74 by the amending Act which inserted s 43A, no caveat subsequently entered can defeat him, and the holder of the competing interest will not be entitled to the intervention of a court of equity on the ground that the purchaser acquired his right to registration with notice of that interest.

Accordingly in the present case Denton would be entitled by virtue a s 43A, in my opinion, to have its transfer from Miss Austin registered, notwithstanding that before the settlement of its purchase it had express notice of the Courtenays' interest, if the Courtenays' prior application for registration had been effectually determined by the action that was taken by Miss Austin's solicitor … In my opinion the proper conclusion in the present case is that the purported withdrawal of the transfer by Miss Austin's solicitor, being unauthorised, left the application for registration on foot notwithstanding the physical removal of the document from the Registrar-General's custody. The appellants' first contention, in my opinion, fails.

[**Kitto J** dealt with the second argument as follows:]

The contention based on the resale by the Courtenays to Miss Austin ought also, I think, to fail … Where, as in the present case, the contract of sale has been carried out to the extent that a transfer has been lodged for registration, and the original vendor is unwilling or unready to complete his repurchase, there is no ground whatever for holding that the existence of the contract of resale provides a legal obstacle to the registration.

[**Kitto J** dealt with the third argument as follows:]

I turn to the appellants' third contention. In relation to each of the appellants, the case is one of competing equitable interests, with the addition that the Courtenays have not only the prior equity but also a statutory right to registration. Neither can be postponed to the interests of the appellants unless the Courtenays have by act or omission made it inequitable that they should be allowed to insist upon the priority which order in time prima facie gives them. The general principle applicable in such a case is thus stated in the judgment of the Privy Council in *Abigail v Lapin* [1934] AC 491 at 498–9:

> [T]he possessor of the prior equity is not to be postponed to the possessor of a subsequent equity unless the act or omission proved against him has conducted or contributed to a belief on the part of the holder of the subsequent equity, at the time when he acquired it, that the prior equity was not in existence …

Hardie J found as a fact that Denton, before the settlement of its contract of purchase from Miss Austin, received through its solicitor positive and unambiguous notice, by the oral statements made by her solicitor in the conversation which preceded the settlement, that the Courtenays had been the owners (his Honour meant, of course, the beneficial owners) of the subject land at the date of Miss Austin's contract with Denton, and his Honour held that nothing contained in the contract of resale or said in the conversation before the settlement justified the conclusion that the resale agreement had been carried out, or that Miss Austin has been restored to the position of beneficial owner of the land. This is plainly correct. Denton's solicitor took the chance that the Courtenays' rights as purchasers from Miss Austin had ceased. Miss Austin's solicitor no doubt meant him to understand that this was so, and he saw the contract; but he did not trouble to go into the question whether the contract had been completed, and in particular he made no inquiry of the Courtenays or their solicitor. The question, however, is not whether he acted wisely or unwisely, reasonably or unreasonably; and it is not to the point that what he was told gave his client notice of the Courtenays' rights. This is not a case of competition between a legal interest and an equitable interest. The question is whether Denton is entitled in equity to insist that the Courtenays' statutory right to get a legal title be postponed to its own; and in order to succeed it must show that by something tangible and distinct having grave and strong effect to accomplish the purpose the Courtenays led it to acquire its interest in the belief that the Courtenays' interest did not exist. Denton's solicitor having been told enough to show that the Courtenays' interest existed unless by or under the contract of resale to Miss Austin it had been terminated, what was there to induce the belief that it had been so terminated? Nothing whatever, beyond the statement of Miss Austin's solicitor to that effect; and for that statement the Courtenays neither gave any authority nor can properly be held responsible. The only ground suggested for holding that they should be postponed to Denton because of the representation made by Miss Austin's solicitor is that by letting him lodge their transfer for registration they put him in a position to take advantage of the Registrar-General's practice in the matter of withdrawals, and, having done that, by not entering a caveat to guard against the possibility of an unauthorised withdrawal they provided him with the opportunity of persuading Denton that the Courtenays no longer had any interest in the land. But the question is not whether anything they could possibly have done would have prevented the deception of Denton's solicitor; it is whether their conduct was such that the deception was a natural consequence, so that they may fairly be said to have 'armed' Miss Austin's solicitor, as Lord Selbourne would have said, 'with the power of going into the world under false colours': *Dixon v Muckleston* (1872) LR 8 Ch 155 at 160. I am prepared to assume, though I do not say it was established, that all the solicitors concerned were well aware of the Registrar-General's practice. Even so, the answers to the question, in my opinion, is that in the circumstances it was not reasonably to be foreseen by the Courtenays or their solicitor that a third party might, without inquiring of them, part with money on an assumption that, contrary to all ordinary experience, their transferor's solicitor had their authority to withdraw from registration the transfer which to all appearances they were absolutely entitled to have registered. It is true that a caveat would have given notice to the world of the continuing claim of the Courtenays to an interest as purchasers of the land; but the mere lodging of the transfer gave clear notice that the interest had come into existence, and put persons in the position of Denton upon inquiry as to whether the interest had ceased. We have been reminded that in *Butler v Fairclough*, Griffith CJ said ((1917) 23 CLR 78 at 92):

> If a man having a registrable instrument neither lodges it for registration nor lodges a caveat to protect it, it is clear that a registrable instrument later in date, but lodged

before his, will have precedence, notwithstanding notice of the earlier instrument received before lodging his own. That is by reason of the express provisions of the statute.

But the Courtenays did lodge their transfer for registration, and in my judgment it is not to be laid at their door that Denton's solicitor was deceived by the assurances of a rogue.

In my opinion the appeal fails and should be dismissed.

Taylor J: [After outlining these facts, his Honour proceeded:] … So far I have not attempted to traverse or to refer to the whole of the facts relevant to all of the contentions advanced by the appellants. But what has been said is sufficient to enable us to deal with two fundamental submissions which they made. The first of these was based upon s 43 of the Real Property Act and it is asserted that Denton's dealings with Austin as the registered proprietor of the subject land had resulted in the acquisition by the former of an indefeasible title. In other words, it was contended that the protection given by that section to a person contracting or dealing with a registered proprietor does not await the registration of the appropriate instrument but is afforded from the time when the contract is made with the registered proprietor or, perhaps, from the time when a registrable instrument is obtained. The contention, however, is directly contrary to law which has been settled for a great many years …

Alternatively, it was contended that the effect of s 43A was such to enable Denton to assert that its interest in the subject land should be held to prevail over that of Courtenays. [His Honour quoted the terms of s 43A and proceeded:] Clearly enough, the section was designed to deal with the position of the holder of a registrable instrument between the time of its receipt and the time of its registration. But its effect is by no means clear … It is, however, not unreasonable to assume that the section was intended to achieve some object. And that object, it seems, was to make some appropriate provision for 'filling' what has been called the 'gap' left in s 43 by the 'settled law' concerning that section. Does the section then go further than merely to avoid a so-called protection against notice and operate to give to the holder of a registrable memorandum of transfer priority over an earlier equitable interest where he has, without notice thereof, paid his purchase money and obtained his registrable instrument? The suggestion that it does is based upon the contention that the holder of a registrable instrument in such circumstances is enabled to assert, as against the prior equitable interest, that he has by virtue of the section a legal estate in the land acquired without notice of the earlier interest and that he is, therefore, entitled to perfect his title by registration. Such a construction, it is said, does some violence to the terms of the section but it is, it seems to me, the result, which notwithstanding its 'ungainly approach' to the subject, the section was intended to produce.

A further suggestion is that the section was intended to advance in point of time the protection afforded by s 43 upon registration. That is to say, that the concluding words of the section — 'legal estate' — should be understood to mean 'the estate of a registered proprietor'. But if it was intended so to advance the unqualified protection given by s 43 upon registration it would have been a simple matter to say so. To my mind the expression 'a legal estate' was used advisedly and with a view to affording, at the most, the same measure of protection as that given at common law to a person who has acquired a legal estate in land without notice of some prior equitable interest. Some light is, I think, thrown on this particular problem by the provisions of s 42(d) of the Act, which, itself, was introduced into the Act at the same time as s 43A. That sub-section contains an exception from the conclusiveness of a registered proprietor's title in respect of any tenancy 'whereunder the tenant is in possession or entitled

to immediate possession … of which … the registered proprietor before he became registered as proprietor had *notice against which he was not protected*'. The italicised expression, it seems to me, is intended as a reference to the measure of protection afforded by s 43A. So read, the provision acknowledges that the protection afforded by s 43A is not unqualified and provides some indication that the expression in sub-s (1) of the section — 'legal estate' — is not to be understood as synonymous with 'the estate of a registered proprietor'. Further, if the other view as the meaning of the expression 'legal estate' were to be entertained, it would have been unnecessary for the purposes of the section to make the specific provisions contained in sub-s (2) and (3). Under the stated hypothesis notice either before or after the acquisition of a registrable instrument would be quite irrelevant.

Once the contention that the expression 'legal estate' in s 43A(1) is synonymous with 'the estate of a registered proprietor' be rejected — as I think it must — it is unnecessary for us to express any positive view as to the meaning of the sub-section. I say this because it is clear upon the facts that Denton had express notice of Courtenay's interest before the contract of sale between Austin and Denton was carried to completion. This will appear from the facts to which I shall presently refer. In the circumstances of the case, therefore, the rights of the parties must, subject to one matter, be determined according to the ordinary principles upon which a court of equity would proceed …

In relation to the appellant's third argument, his Honour concluded that there was no neglect on the part of the Courtenays and no grounds to postpone the Courtenays' interest to that of Denton, which had taken with express notice of their interest. IAC was not protected by s 43A which speaks of 'the estate or interest in land under the provisions of this Act, taken by a person under an instrument registrable … under this Act'. IAC's mortgage would become registrable only once Denton became registered proprietor.

Taylor and Dixon JJ agreed that the appeals should be dismissed.

Appeals dismissed with costs.

5.209 Questions

1. Why was the equitable interest of the Courtenays not postponed to that of Denton in this case? Apart from any question raised by s 43A, what is the distinction between *IAC v Courtenay, Butler v Fairclough* and *Abigail v Lapin*? Do any of the judgments in *IAC v Courtenay* imply a retreat from the principles enunciated in *Abigail v Lapin*? For a good discussion of the principles involved in *IAC v Courtenay*, see Vincent, 'Some Practical Reflections on *Courtenay v Austin*' (1964) 38 *ALJ* 204; see also Sackville, 'Competing Equitable Interests in Land under the Torrens System' (1971) 45 *ALJ* 396 at 408–14.
2. Independently of s 43A, why was it significant that Denton had notice of the interest of the Courtenays at or before settlement of the sale from Miss Austin to Denton? Compare *Lynch v O'Keefe* [1930] St R Qd 74; *Taddeo v Catalano* (1975) 11 SASR 492; *Moffett v Dillon*; 5.177C. What should Denton's solicitor have done before proceeding with settlement of the transaction?
3. The Real Property Act 1900 (NSW) now makes specific provision for the redelivery of instruments by the Registrar-General to persons who lodge them.

The Act provides that the Registrar-General may assume that the person lodging the dealing has authority to withdraw it and that an uplifted dealing shall be deemed not to be in registrable form until relodged in registrable form: NSW, ss 33A(5)(b), 36(6)(a). Would *IAC v Courtenay* be decided in the same way after these amendments? What role did NSW, s 36 (as it then was) play in the decision in *IAC v Courtenay*? In the face of such a statutory direction is there any room for the operation of the judicial doctrines concerning competition between equitable interests where an instrument has been lodged for registration?

4. The protection afforded by s 43A is to 'a dealing registrable'. However, the only definition in the Act is restrictive in that s 36(6)(b) refers to when a dealing is *not* in registrable form and does not state the positive. Consideration of cases such as *IAC (Finance) Pty Ltd v Courtenay* (1963) 110 CLR 550; [1964] ALR 971 (**5.181C**), *Just's* case (1971) 125 CLR 546 (**5.170C**) and *Finlay v R & I Bank of Western Australia* (1993) 6 BPR 13,232 indicate that a dealing is in registrable form when it is formally in order, executed by and received from the registered proprietor and accompanied by the certificate of title or appropriate authorisation to obtain the certificate of title. However, where this is not the case, whether the dealing is registrable may depend on the practice of the Land Titles Office and, in particular, on the practice concerning the use of the Registrar-General's power under s 39(2) and (3) to correct patent errors and omissions. In *Taleb v National Australia Bank Ltd* [2011] NSWSC 1562, it was held that an instrument of mortgage was not a registrable dealing until it had been duly stamped.

   In *IAC v Courtenay*, Kitto and Taylor JJ put forward different interpretations of s 43A. What is the significance of the difference between the competing interpretations? What does the discussion of the meaning of s 43A demonstrate about the position of a purchaser of Torrens system land after settlement and before registration independently of such a section? What should be done to improve the position of the purchaser during that interval? Which of the competing interpretations of s 43A does more to advance the goals of the Torrens system? The interpretation of Taylor J has been adopted in preference to that of Kitto J: see, for example, *Jonray (Sydney) Pty Ltd v Partridge Bros Pty Ltd* (1969) 89 WN (NSW) (Pt 1) 568; [1969] 1 NSWR 621; *Meriton Apartments Pty Ltd v McLaurin & Tait Developments Pty Ltd* (1976) 133 CLR 671; *Black v Garnock* (2007) 230 CLR 438 at 450; *Weller v Williams* [2010] NSWSC 716. See Giles, 'Protection to a Purchaser Before Registration' (1965) 5 Syd LR 108.

5. Refer to the facts in *Heid v Reliance Finance Corp Pty Ltd* (1983) 154 CLR 326; **5.169**. That case came on appeal to the High Court from the Supreme Court of New South Wales. Consider whether the respondent could have pleaded the benefit of NSW, s 43A. The respondent's mortgage came under requisition from the Registrar-General after lodgment. It will be recalled that the respondent had no notice of Heid's interest at settlement although, at the time of settlement, the transfer to Connell had not been registered. Why was s 43A of no avail to the respondent at the time of settlement? Before the respondent became aware of Heid's interest, the transfer to Connell was registered. Could the respondent have pleaded the benefit of s 43A at that time? See Rossiter, (1983) 57 *ALJ* 360.

6. A, the registered proprietor of an estate in fee simple in Blackacre (vacant land), sells to B. The purchase price of $500,000 is to be satisfied by payment of $50,000, the balance to be secured by a mortgage back to the vendor, A. On settlement A's solicitor retains the duplicate certificate of title, the transfer and the mortgage all of which he is to lodge at the Titles Office. In fact, the documents are never lodged, as A and his solicitor fraudulently plan to resell the land. Accordingly, A contracts to sell the land to C for $600,000. C searches the register and finds that A is the registered proprietor. On settlement he pays the purchase price in return for a transfer from A.

   What is the position in the following circumstances?

   a. C lodges the transfer and becomes registered. Does it matter if, prior to receiving the transfer, he hears in casual conversation with B that B has previously purchased the land?

   b. Before C can lodge his transfer B, realising his transfer has not been lodged for registration, lodges a caveat which prevents C obtaining registration. Again, does it matter if C, before settlement, learns of B's prior purchase of the land but deliberately makes no further inquiries? In either case does s 43A of the New South Wales Act affect the issue?

5.210 Several cases have examined the consequences for conveyancing practice of the accepted interpretations of the indefeasibility and notice provisions of the state Acts and the presence in New South Wales of the special protection afforded by NSW, s 43A. The major issues were raised in *Jonray (Sydney) Pty Ltd v Partridge Bros Pty Ltd* (1969) 89 WN (NSW) (Pt 1) 568; [1969] 1 NSWR 621. In that case M contracted to sell land to J. At the date of the contract M was not the registered proprietor, but was the purchaser under a contract of sale from A, the land being subject to a mortgage in favour of B. To settle the sale to J, M proposed to hand over a transfer of the land to J, executed by A at the direction of M, together with a discharge of mortgage executed by the mortgagee, B. The proposal was in accordance with common conveyancing practice, transfers by direction often being used where the vendor sells land before becoming the registered proprietor. J refused to accept M's proposal, insisting that it was entitled to receive a transfer directly from the registered proprietor and that therefore M should, at the date of settlement, be registered as proprietor free from encumbrances. It followed on J's argument that the discharge of mortgage should be registered *before* settlement. The case therefore raised two questions: first, whether a purchaser of Torrens system land can be compelled to accept a transfer by direction; second, whether a purchaser is bound to accept on settlement a discharge of mortgage or whether the purchaser can insist on the discharge being registered before settlement.

5.211 As to the first question, the Court of Appeal held that, while the Act did not specifically refer to transfers by direction, the mere presence in a transfer of a directing party did not affect the operation of the instrument as a registrable dealing and the Registrar could accept it as such. There was no significant disadvantage to the purchaser in receiving such a transfer and thus J's objection to the form of the transfer could not be sustained. A purchaser taking a transfer from the registered proprietor at the direction of the vendor was entitled to the benefits of ss 42 and 43 on registration and would receive the benefits of s 43A, to the extent that it

was applicable, before settlement. In other words, the purchaser would not lose the benefit of any protection afforded by the Act by accepting a transfer by direction. The court indicated its preference for the view of Taylor J in *IAC v Courtenay* (1963) 110 CLR 550; [1964] ALR 971, so that s 43A would protect a purchaser taking a transfer by direction from unregistered interests provided he or she had no notice of them before settlement. The views of the Court of Appeal on these matters were followed by the High Court in *Meriton Apartments Pty Ltd v McLaurin & Tait Developments Pty Ltd* (1976) 133 CLR 671. The purchaser in that case argued that the vendor could not impose the burden of verifying the signature of a person who was not a party to the contract, pointing out that this would be required in the case of a transfer by direction — that is, the purchaser would be exposed to the risk of the transfer being a forgery. However, the High Court did not consider this to be a sustainable objection, observing that the appropriate conveyancing procedures had to be decided in the light of 'practical considerations'. The court also specifically approved Taylor J's interpretation of s 43A.

5.212 The second issue in *Jonray's* case posed difficult questions because of the risk to which the purchaser would be exposed between settlement, when the discharge of mortgage would be accepted, and registration of the discharge. On registration there would be no difficulty, since the purchaser would gain the protection of s 42 in relation to prior interests and would be protected against any defect in the discharge itself. It was argued, however, that because the purchaser did not deal directly with the mortgagee executing the discharge (that is, the registered proprietor of the mortgage), the purchaser was denied the benefit of s 43A. The court held that, on Taylor J's interpretation of s 43A, the purchaser could claim the protection of the section by relying on its 'successive effect'. This effect followed from the application to the section of the general law principle that a successor in title to a bona fide purchaser for value without notice takes free of outstanding equities even though that successor has notice of the equities: *Wilkes v Spooner* [1911] 2 KB 473; 4.166. Thus, while the purchaser could not claim the benefit of s 43A directly, he could rely on the immunity enjoyed by the vendor/mortgagor under the section. If the vendor/mortgagor had no notice of outstanding equities at the time he received the registrable discharge he would be protected against them and the purchaser would be entitled to the same protection. The court concluded that the purchaser was therefore obliged to accept a registrable discharge of mortgage ((1969) 89 WN (NSW) (Pt 1) 568 at 577; [1969] 1 NSWR 621 at 628):

> It would therefore appear to us that the only areas of risk are (1) where the discharge of mortgage is void, or (2) where notice of an equitable interest has been received before settlement. In both cases there are risks of the same kind on the settlement of any transaction under the Real Property Act. It is true that the quantity of the risk is increased because there are two interests awaiting registration instead of one. It is also true that the purchaser has the added risk that the mortgagor, unknown to the purchaser, may have received some notice which has deprived him of the benefit of s 43A. It seems to us that the nature of the risk remains substantially the same. It may be said that the risk is there and that is a sufficient reason. However, the risk must inevitably be weighed against the gross conveyancing difficulties which would arise on a different view, and these are practical difficulties which would not be readily solved by making some special provisions in the contract of sale.

5.213 The approach of the Court of Appeal on the second issue in *Jonray's* case has not been accepted without qualification. In *Neeta (Epping) Pty Ltd v Phillips* (1974) 131 CLR 286, the High Court held that a purchaser was justified in rejecting a proffered surrender of a

lease apparently executed by a lessee who was still in possession of the land. The purchaser was entitled to require the vendor to register the surrender of lease before proceeding to completion of the transaction. In their joint judgment Barwick CJ and Jacobs J (at 304) emphasised that in *Jonray's* case:

> … the court was dealing with the usual case where the mortgagee was to be represented on settlement and where the discharge of mortgage would be handed over in present payment [sic] of the mortgage debt either to the transferee or to a further distinct party, such as a new mortgagee from the proposed transferee. What was offered in the present case was something different. The surrender of lease was to be handed over but there was no suggestion that any representative of the lessee was to be present in order to receive present payment of the consideration for the surrender. The execution of the surrender had clearly been an execution conditional upon receipt of the consideration and if that consideration were not paid either before or at the time of settlement the surrender would not be effective on settlement even though it might be made so by lodgment and registration. On all these matters the purchaser was in the dark, and in these circumstances it was entitled to claim that the certificate of title be clear. If that did not suit the vendor then it was for her to suggest some other effective mode of settlement such as representation of the lessee on settlement so that the consideration could be paid over in return for delivery of the surrender or possibly settlement at the office of the Registrar-General and immediate lodgment for registration. But certainly the mere offer from the possession of the vendor of a form of surrender of lease purporting to be signed by the lessee, when it was known that the lessee was still in possession of the land, was not a sufficient protection to the purchaser.

5.214 Refer to *Diemasters Pty Ltd v Meadowcorp Pty Ltd*; 5.137C. It will be recalled that the discharge of mortgage had been procured by the mortgagor through fraud. The innocent purchaser receiving the signed discharge of mortgage upon settlement of the contract did not get the benefit of the 'successive' operation of s 43A. This was for the reason that the transferee — the mortgagor — was not bona fide for value without notice of the rights of the mortgagee. The mortgagor did not have the benefit of s 43A to pass on to the purchaser.

Strata titles legislation

5.215 An important challenge to the adaptability of the Torrens system has been created by the demand for secure title to residential flats or units purchased on an 'own-your-own' basis. Purchasers of home units have sought the benefits of indefeasible title under the Torrens system and of a full statutory scheme regulating the respective rights and obligations of unit owners in a particular development. This has resulted in the introduction of 'strata titles' legislation, designed to permit and control the horizontal subdivision of land and buildings for residential use, as well as for commercial and industrial purposes. More recently, the legislation has provided for mixed use developments which enable one building to accommodate a number of different uses. These changes have been made in response to increasing demand for residential property in the central business districts, particularly in capital cities. For instance, the one structure might contain a retail department store at the ground level, a hotel above the department store and residential apartments above that, or perhaps some commercial office space. The legislation is detailed and often quite complicated, but represents a distinctive attempt to cope with some of the legal problems associated with high density living and the need to make the best economic use of scarce resources.

Before the introduction of modern strata titles legislation, several techniques were used to meet the needs of purchasers of residential units or, more precisely, the needs of developers who constructed blocks of flats or units and wished to sell them to individual buyers. (The issue of whether Torrens title land could be subdivided horizontally before the introduction of strata titles legislation was discussed in a number of cases: see, for example, *Bursill Enterprises Pty Ltd v Berger Bros Trading Co Pty Ltd* (1971) 124 CLR 73; 5.140C.) The three most important schemes used in Australia were the leasehold scheme, the tenancy in common arrangement and the home unit company. None of these schemes was entirely satisfactory to all parties involved in the development and sale of residential units. However, they were the best available responses to the strong community demand in the absence of specific legislation providing for horizontal subdivisions: see Rath, Grime and Moore, *Strata Titles*, 1962, pp xi–xiii.

Leasehold scheme

5.216 One method of conferring title on a purchaser of a home unit was to grant the purchaser a lease for a long term (say, 999 years) at a nominal rental, the purchase price comprising a premium for the grant of the lease paid to the vendor (initially the developer of the block of units). The lease, of course, could be registered under the Torrens system. Obviously, this scheme did not give the purchaser a freehold title to the premises, an important psychological factor in Australia, but it did give many of the advantages and some of the security of a freehold title. The lease regulated the purchaser's (lessee's) use of the premises and governed such matters as payment of rates, taxes, insurance and repairs. Usually, the lease also provided for forfeiture in the event of breach, a provision which constituted a potential threat, albeit remote, to the security of the purchaser's title. However, the terms and conditions of the lease varied from development to development and some documents imposed onerous conditions on purchasers of units. On the other hand, despite the terms of the lease, individual unit owners (lessees) had no ready means of checking the annoying or improper behaviour of their neighbours, at least without the assistance of the lessor. The position was unsatisfactory from the developer's point of view, since the developer was not released entirely from the enterprise after 'selling' all units, but remained as lessor with active duties to perform.

Tenancy in common

5.217 An alternative approach was to transfer a freehold title to purchasers acquiring units within the development, with the result that all unit 'owners' took a fee simple estate in the premises as tenants in common. The problem with this approach arose from the rule that each tenant in common is entitled to possession of the whole of the premises subject to co-ownership and not to exclusive possession to a defined portion of the premises. Thus, although a purchaser was able to receive a certificate of title covering his or her interest as a tenant in common of the premises, the title did not confer rights of exclusive possession in relation to a particular unit. This difficulty was often tackled by an agreement between all unit owners, whereby each was granted rights of exclusive occupation of their 'own' unit. Such an agreement was not enforceable against subsequent purchasers, nor registrable under the Torrens system, unless executed in the form of a lease. If it did take the form of a lease, some of the problems of the leasehold scheme applied to the development and a sale by one of the unit owners was more than usually complicated.

Home unit companies

5.218 The most common scheme in operation prior to the introduction of strata titles legislation involved the use of home unit companies. This scheme required the incorporation of a company which became the registered proprietor of the residential building. The purchaser of a unit acquired a block of shares in the company carrying with it the right to occupy a defined portion of the building. The memorandum and articles of association of the company contained restrictions on the holding of blocks of shares and the use of the unit similar to those imposed by the leases employed in the leasehold scheme. The major disadvantage of the company scheme was the fact that each shareholder did not acquire an interest in the land or building, but merely contractual rights arising from ownership of the shares in the company. Thus, the shareholder was unable to take advantage of the usual legal remedies of a landowner to protect his or her unit, but had to rely on the company taking proceedings on their behalf: *H H Halls Ltd v Lepouris* (1964) 82 WN (NSW) (Pt 2) 87. In theory, it was possible to alter the articles of association of the company against the will of a particular shareholder by a vote of 75 per cent of all shareholders even to the extent of depriving that shareholder of the rights of occupation of the unit, although such an amendment might have been regarded as a fraud on the minority shareholder or in breach of the company's contractual duty: *Fischer v Easthaven Ltd* (1963) 80 WN (NSW) 1155. For these reasons, lending institutions were (and still are) reluctant to advance a loan on the security of a company title unit.

5.219 The inadequacies of the various schemes eventually resulted in the enactment of strata titles legislation, the first legislation being the Transfer of Land (Stratum Estates) Act 1960 (Vic). This provided for the subdivision of a building into stratum estates and for the formation, under the (now repealed) Companies Act 1958 (Vic), of a service company to hold title to all common parts of the building and its curtilage. The term 'stratum estate' was defined as 'an estate in fee simple in an allotment in a building subdivision above or below or between certain levels corresponding spatially with a part or parts of a building or buildings which part or parts are intended for separate occupation'. The service company entered into service agreements with the proprietor of each stratum estate, covering such matters as the maintenance of the common parts of the property, insurance of the premises as a whole and payment of necessary outgoings. Service agreements could be registered with the Registrar of Titles and, if registered, were enforceable as between the service company and its successors and the registered proprietor from time to time of each stratum estate: see Transfer of Land Act 1958 (Vic) s 98C(3). The purchaser of each flat or unit received a block of shares in the service company specifically attached to his or her stratum estate and which could be transferred only with that estate: Transfer of Land Act 1958 (Vic) s 98A(1)(b). Provision was made for the notification of easements on the plan of subdivision in favour of the registered proprietors of the stratum estates who became entitled to the benefit (and subject to the burden) of such easements: Transfer of Land Act 1958 (Vic) s 98.

5.220 The sophistication of the strata title legislation was carried further by the Conveyancing (Strata) Titles Act 1961 (NSW). The 1961 Act, which has since been replaced first by the Strata Titles Act 1973 and now by the current legislation (see **5.209**), adopted the basic principle of the Victorian legislation but introduced some important changes and extensions. For example, under the 1961 New South Wales legislation, the body corporate (equivalent to the Victorian owners' corporation) was automatically formed on registration of the strata plan and given certain powers and functions without the need for formal

incorporation or the making of service agreements with individual lot owners: ss 14, 15. The common property was not held by the body corporate, but by the proprietors as tenants in common in shares proportional to the 'unit entitlement' of their respective lots: s 9. The unit entitlement of each lot in relation to the aggregate unit entitlement of all lots was specified in the original strata plan and determined the voting rights of the proprietor, the share of the proprietor in the common property and the proportion of contributions levied by the body corporate to cover administrative and other expenses: s 18. The certificate of title issued by the Registrar-General in respect of each lot in the strata plan specified the share of the common property held by the proprietor: s (9)(2). This share passed automatically following any dealing with the lot to which it was appurtenant, without the necessity for any specific mention in the transfer: s 9(3). The Real Property Act 1900 (NSW) applies to land which has been subdivided by registration of a strata plan: *Rochester Investments Pty Ltd v Couchman* (1969) 90 WN (NSW) (Pt 1) 371.

5.221 The 1961 Act covered many other matters related to strata subdivisions. There were extensive provisions for cross-easements of support and shelter and the passage of services such as water, sewerage and drainage: ss 5–8. The legislation, of course, required strata plans lodged with the Registrar-General to indicate that the necessary local government approvals had been obtained, as well as provided detailed plans and informations concerning the subdivision: s 4. The Act sought to regulate the behaviour of lot owners by setting out by-laws providing for the control, management, use and administration of the lots and common property: s 18; Schs 1 and 2. The by-laws in Sch 1 could not be altered except by unanimous resolution, while those in Sch 2 might be altered by the body corporate. The by-laws might not have been amended, however, to restrict the assignability of lots within the subdivision: s 13(3). The Act covered the contingency of destruction of the building by providing that upon registration of a notification by the body corporate that the building had been destroyed, the lot proprietors shall be entitled to the parcel as tenants in common in shares proportional to the unit entitlement of their respective lots: s 11. In addition, the court had broad powers to effect an adjustment between the proprietors in cases of substantial destruction of the building: s 19.

5.222 Following the enactment of the 1961 New South Wales Act, the other Australian jurisdictions also passed strata titles legislation. Although the legislation was originally based on that in New South Wales, increasingly there is very great variation between the different jurisdictions, both in the detail and the form of the legislation. There have been many changes over the years and it is beyond the scope of this book to explore them in any detail. The increasing demand for mixed use developments has greatly increased the variety and complexity of legislation in this area and in some jurisdictions the provisions dealing with development and management have been split into separate statutes. However, the main Acts now in force are as follows: Unit Titles Act 2001 (ACT); Strata Schemes (Freehold Development) Act 1973 (NSW), Strata Schemes Management Act 1996 (NSW); Unit Titles Act (NT); Body Corporate and Community Management Act 1997 (Qld) (largely replacing the Building Units and Group Titles Act 1980) and the Mixed Use Development Act 1993 (Qld); Land Title Act 1994 (Qld); Community Titles Act 1996 (SA); Strata Titles Act 1998 (Tas) (as per s 3 of the Strata Titles Act 1998 (Tas), this Act repealed Pt XIA of the Conveyancing and Law of Property Act 1884 (Tas) and as per Sch 2, a plan registered under the old Act is taken to be a plan under the Strata Titles Act 1998 (Tas)); Subdivision Act 1988 (Vic) Pts 1 and 5 and the Owners Corporations Act 2006 (Vic); Strata Titles Act 1985 (WA).

5.223 Since the original strata titles legislation, the flexibility which this type of subdivision allows has been progressively exploited to permit a strata development to proceed in stages. This procedure considerably benefits the developer who may use the proceeds of sale of units in the completed stage to finance the development of the next stage. An example is Div 2A of the Strata Schemes (Freehold Development) Act 1973 (NSW). On lodging an application for approval of a strata development scheme, the developer must complete a strata development contract which includes a concept plan and a description of the land identifying the lot to which it relates and any land which is proposed to be added to the parcel at a later time: ss 28B, 28C. The concept plan must illustrate the sites proposed for buildings, the nature of the buildings and works which would result from the development: s 28D. The strata development contract has effect as a deed between the developer, the proprietors of lots (both present and future), mortgagees, lessees and occupiers. It may not be excluded, modified or varied by contract and does not merge on transfer of a lot: s 28I. There are provisions for amendment of the strata development contract in certain circumstances: s 28J.