

In Personam, *Garcia v NAB* and the Torrens System – Are They Reconcilable?

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A recent article in the *Australian Law Journal* raised the following issue. “[A] final question remains. It is not of principle, but of policy: Would the allowance of some or all claims within the law of unjust enrichment in relation to registered title undermine the objectives of the Torrens system? This final question is undoubtedly the most important.”¹ This article is an attempt to explore this issue by an examination of a hypothetical, based loosely on the facts of *Garcia v NAB*² - and how that case would have been resolved if the argument had been put that the title of the mortgagee was indefeasible because of the operation of the Torrens system.³ This paper thus explores the relationship between the concept of indefeasibility of title; the very foundation of Torrens, and how the use of the in personam exception to indefeasibility (with an extension to claims in unjust enrichment) may undermine the central tenets of a land registration system that on the whole, has been extraordinarily successful.⁴ The importance of this lies in the fact that if unjust enrichment type claims are not ‘subject to’ the indefeasibility provisions, then the in personam exception, which for so many years had been restricted following the New South Wales Court of Appeal decision in *Mercantile Mutual v Gosper*⁵ may in fact have a reach that is undesirable within the context of claims that relate to Torrens land.

Accordingly, Part 1 of this paper will examine the policy goals of the Torrens system, Part 2, the decision in *Garcia v NAB* with Part 3 bringing these disparate threads together.

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¹ J Moore, ‘Equity, restitution and in personam claims under the Torrens system: Part Two’ (1999) 73 *ALJ* 712 at 715. This article followed an earlier piece by the same author, J Moore, ‘Equity, restitution and in personam claims under the Torrens system’ (1998) 72 *ALJ* 258.

² (1998) 72 *ALJR* 1243. It is unclear from the case whether the land in question was Torrens land.

³ See R Chambers, ‘Indefeasible Title as a Bar to a Claim for Restitution’ [1998] *Restitution Law Review* 126 where he examines the technical issues associated with the relationship between indefeasibility and the concept of unjust enrichment. This paper concentrates more on the policy issue as outlined.

⁴ See Whalan, ‘Immediate Success of Registration of Title to Land in Australasia and Early Failures in England’ (1967) 2 *NZULR* 416.

⁵ (1991) 25 *NSWLR* 32.

The Goals of Torrens

The starting point for analysis of the Torrens system can be provided by the man who gave his name⁶ to the reforms that have reshaped land registration in Australia in the last 150 years. The design of the system was to

give security and simplicity to all dealings with land by providing that the title shall depend upon registration, that all interests shall be capable of appearing or being protected upon the face of the registry, and that a registered title or interest shall never be affected by any claim or charge which is not registered.⁷

As the oft-repeated statement of the High Court in *Breskvar v Wall*⁸ says: “[it is] not a system of registration of title but a system of title by registration”.⁹ Title is not historical or derivative, in essence each transfer of land involves surrender back to the Crown and a fresh grant from the State¹⁰ - because of this surrender and reissue philosophy, there is no necessity to search the antecedents to the title.¹¹ The title of the registered proprietor was to be indefeasible, subject only to such estates, or interests that are noted on the Register – in a number of jurisdictions this very concept of indefeasibility being statutorily delineated.¹² What the concept of indefeasibility does is provide for the underlying ideals of the “curtain and mirror” principle of land registration. The curtain being represented by the Register – nothing behind the Register (or the curtain) would effect the title of the registered proprietor. Further, the mirror¹³ (again the Register) would accurately and precisely reflect the estates and interests that were appurtenant to the title of the land. Each title is, if you like, independent of what has gone on previously. To reflect the importance of the register and to provide compensation to those who suffer loss, an assurance fund was to be established to benefit those who have been deprived.¹⁴ Allied to the “curtain and mirror” was the express recognition that

⁶ There is considerable controversy as to whom the authorship of the Torrens system should actually be attributed. For a discussion of this see P Moerlin Fox, ‘The Story behind the Torrens system’ (1950) 23 *ALJ* 489; Robinson, *Transfer of Land in Victoria*, Law Book Co Melbourne 1979 at ch 1.

⁷ Opening Statement in the Report of the Real Property Law Commission in November 1861 (SA): Parl Paper No 192 (1861). Sir Robert Torrens was one of the Commissioners. For a discussion of the history behind the legislation, see D Pike, ‘Introduction of the Real Property Act in South Australia’ (1960) 1 *Adel LR* 169.

⁸ (1971) 46 *ALJR* 68.

⁹ *Breskvar v Wall* (1971) 46 *ALJR* 68 at 70 per Barwick CJ.

¹⁰ R R Torrens, *The South Australian System of Conveyancing by Registration of Title*, Adelaide Register and General Observer Printing Offices 1859 at 9.

¹¹ In most States the period of prior searching required for General Law or old system title land is 30 years: *Conveyancing Ordinance* 1951 (ACT); *Conveyancing Act* 1919 (NSW) s 53; *Property Law Act* 1974 (Qld) s 237; *Conveyancing and Law of Property Act* 1884 (Tas) s 35 (20 years); *Property Law Act* 1958 (Vic) s 44; *Property Law Act* 1969 (WA) s 22.

¹² *Land Title Act* 1994 (Qld) ss 38, 169, 170; *Real Property Act* 1886 (SA) ss 10, 69; *Land Titles Act* 1980 (Tas) s 40.

¹³ See L McCrimmon, ‘Protection of Equitable Interests under the Torrens System: Polishing the Mirror of Title’ (1994) 20 *Mon LR* 300.

¹⁴ *Transfer of Land Act* 1958 (Vic) ss 109-111; *Real Property Act* 1900 (NSW) ss 126-127; *Land Title Act* (1994) (Qld) s 189; *Real Property Act* (1886) (SA) ss 203-211; *Transfer of Land Act* 1983 (WA) ss 201, 205; *Land Titles Act* 1980 (Tas); ss 152-153; *Land Titles Act* 1925 (ACT) ss 145-6.

notice of prior interests was irrelevant and that knowledge of prior interests was not to be imputed as fraud.¹⁵

This change was dramatic. Previously, right to pass title to land had traditionally been subject to proof of ownership.¹⁶ Further, there would be interests, which though not evident in the title documentation, would bind the purchaser, because either they were enforceable by the court of equity, or the purchaser was deemed to have notice of them. To further the aims of the “curtain and mirror”, Torrens argued that no interest in land should be created or accepted prior to registration – the title as represented by the Register was to be paramount.

Instruments when executed are merely personal contracts between the parties, upon which action for damages may be raised, but they do not bind the land. The entry on the folium of the Register alone passes the property, creates the charge or lesser estate, discharges, or transfers it.¹⁷

Arguably this omission to take account of unregistered interests (though conversely, one suspects that Torrens would not have regarded it as an omission, given that he considered that unregistered interests were only to operate between the parties) has led to the obscuring of some of the important and critical policy objectives of the system.¹⁸ In a contemporary environment, where the importance and significance of equity jurisprudence is not to be underestimated, the Torrens system has had to adapt to the complexity of interests that attach to modern land holdings and to provide some form of mechanism for their recognition and protection.¹⁹

Despite these policy aims of indefeasibility of title, the paramountcy of the register, and the inconsequential relevance of knowledge of earlier interests, the courts have consistently held that this does not permit the registered proprietor to decline to enforce contracts that he or she has entered into.²⁰ Furthermore, the judiciary has consistently accepted that they retain the residual discretion to recognise the personal equity and give effect to it.

¹⁵ See the following provisions: *Transfer of Land Act* 1958 (Vic) s 43; *Real Property Act* 1900 (NSW) s 43; *Land Title Act* (1994) (Qld) s 184; *Real Property Act* (1886) (SA) s 186-7; *Transfer of Land Act* 1983 (WA) s 134; *Land Titles Act* 1980 (Tas); s 41; *Real Property Act* (NT) s 71A/71B; *Land Titles Act* 1925 (ACT) s 59.

¹⁶ See the discussion by S Robinson, ‘Claims in Personam in the Torrens System: Some General Principles’ (1993) 67 *ALJ* 355 at 355.

¹⁷ R Torrens, *A Handy Book on the Real Property Act of South Australia*, (1862) at 8.

¹⁸ See the comments by M Hughson, M Neave & P O’Connor, ‘Reflections on the Mirror of Title: Resolving the Conflict between Purchasers and Prior Interest Holders’ (1997) 21 *MULR* 460 at 462.

¹⁹ The High Court in *Barry v Heider* (1914) 19 CLR 197; 21 ALR 93 accepting that interests prior to registration do operate in equity. The caveat system provides for the necessary protection of unregistered interests. See the following provisions: *Transfer of Land Act* 1958 (Vic) ss 89-91; *Real Property Act* 1900 (NSW) ss 74F-74R; *Land Title Act* (1994) (Qld) s 121-131; *Real Property Act* (1886) (SA) s 191; *Transfer of Land Act* 1983 (WA) ss 136K-142; *Land Titles Act* 1980 (Tas); ss 133-138; *Land Titles Act* 1925 (ACT) ss 104-108.

²⁰ See for example *Maddison v McCarthy* (1865) 2 WW and aB(Eq) 151; *Robinson v Keith* (1870) 1 VR(Eq) 11; and recently *Mercantile Mutual Life Insurance Co Ltd v Gosper* (1991) 25 NSWLR 32 – though of course, strictly speaking, “Implementation of this goal [the idea that transactions giving rise to equitable interests only resulted in a contractual interests, rather than proprietary interests] would have required abandonment of the principle that a specifically enforceable contract passes an equitable interest in land” M Hughson, *supra* n 18 at 461.

Registration... confers upon the registered proprietor a title to the interest in respect of which he is registered which is... immune from adverse claims, other than those specifically excepted... this principle in no way denies the right of the plaintiff to bring against the registered proprietor a claim in personam, founded in law or in equity, for such relief as court in personam may grant.²¹

As asked at the outset, can we now add a further subset of in personam claims, today based on unjust enrichment – and would the allowance of these types of claims undermine the aforesaid objectives of the Torrens legislation – in essence the concept of the “curtain and mirror”. Chambers²² thinks not. What this article proposes to examine is whether from a policy perspective, this is correct. Will the allowance of the policy motivated relief²³ that was evident in *Garcia v NAB* undermine the Torrens system and its critical imperatives.

Indefeasibility is “designed to protect a transferee from defects in the title of the transferor, not to free him from interests which he has burdened his own title”.²⁴ But beyond this, what are the limits or the content of the in personam exception, can they be stated so that some conclusion can be drawn as to whether the type of unjust enrichment claim evident in *Garcia* should be admissible against the title of Torrens land. At the outset, there is no doubt that the limits of the in personam exception have not been clearly defined.²⁵ In determining the high or low-water mark²⁶ of the content of the in personam exception, recourse must be had to the decision of the New South Wales Court of Appeal in *Mercantile Mutual Life Insurance Co Ltd v Gosper*.²⁷

Mercantile Mutual Life Insurance Co Ltd v Gosper

Mrs Gosper was the sole registered proprietor of land. At the time of purchase, it was mortgaged to the extent of \$205,000. Subsequently Mrs Gosper’s husband varied the mortgage so that the total sum secured rose to some \$550,000. Mrs Gosper’s signature was forged to the relevant documentation. Upon the death of Mr Gosper, the fraud was discovered. Mrs Gosper argued that she was entitled to have the mortgage discharged upon repayment of the original sum, whereas Mercantile Mutual argued that as its interest was registered, its title was indefeasible and the property secured the larger amount.

²¹ *Frazer v Walker* [1967] NZLR 1069 (PC) at 1078. This principle can be seen as early as 1927 in *Tataurangi Tairuakena v Mua Carr* [1927] NZLR 688.

²² Chambers, *supra* n 3 at 134 considers not: “A primary objective of the Torrens system is the avoidance of the expense, difficulty, and delay of investigating and proving the validity of a vendor’s title. The inclusion of claims for restitution of unjust enrichment in the category of ‘in personam exceptions’ does not conflict with this objective.”

²³ As described by J Moore (1999) *supra* n 1 at 714.

²⁴ *Bahr v Nicolay (No. 2)* (1988) 164 CLR 604 at 653.

²⁵ C McDonald, L McCrimmon, A Wallace & M Stephenson, *Real Property Law in Queensland*, LBC Information Services Sydney 1998 at 335: “In 1969 one commentator noted that, ‘it is evident that the limits of the registered proprietor from adverse claims *in personam* have not been clearly defined.’ This observation applies with equal force today.”

²⁶ As described by D Skapinker, ‘Equitable interests, mere equities, ‘personal’ equities and ‘personal equities’ – distinctions with a difference’ (1994) 68 *ALJ* 593 at 596.

²⁷ (1991) 25 NSWLR 32.

The reasoning of the New South Wales Court of Appeal was that the forged instrument could be set aside where there was an enforceable personal equity against Mercantile Mutual – ie where in personam could apply. In the case, it was held that the personal equity arose against the appellants because of their use of the certificate of title without the consent or authority of the registered proprietor.

But the company had no authority to produce or otherwise use the certificate of title for such a purpose. It had, of course, no implied authority as mortgagee under the (valid) existing mortgage standing in its name. And no authority was in fact given for the purpose by Mrs Gosper... Therefore what Mercantile Mutual Life Insurance Co Ltd did in this regard was done without any authority.

The proper conclusion is, in my opinion that the company used the certificate of title in breach of its obligations to Mrs Gosper and that its use of it in that way was a necessary step in securing the registration of the forged variation of mortgage.²⁸

Thus it was the use of the certificate without the authority that gave rise to the personal equity. There was no requirement or necessity that the company had used the documents negligently or without proper care.²⁹ Further, Mahoney J considered that it was possible that the personal equity could arise, not merely from the acts of the registered proprietor, but from the acts of some other person.³⁰ The following criticism can be made of this case.

Given that registration confers indefeasibility, that the mortgagee had no knowledge of the fraud, and that production of the certificate of title was an essential – albeit mechanical – requirement for registration, the personal equities principle should not be used in a case like the present to cut back the benefits of indefeasibility. If [the husband] had stolen the certificate of title from [his wife] and given it to the mortgagee for registration of the variation, there would have been no argument for a personal equity, even though it had been used without [the wife's] authority. The fact that the mortgagee already had possession of the certificate of title should not – in the absence of fraud, or knowledge of fraud, on its part – give rise to a personal equity. Any other result undermines the confidence in the Torrens register.³¹

It is this conundrum that is at the heart of the issue in this paper. Should a personal equity arise in circumstances of what is ultimately policy motivated relief - where to allow the claim cuts back the operation of the Torrens legislation. That is, if the acts of the registered interest holder do not involve any misrepresentation, there is no misuse of power, no improper attempt to rely on legal rights and no knowledge of wrongdoing³² –

²⁸ *Mercantile Mutual Life Insurance Co Ltd v Gosper* (1991) 25 NSWLR 32 at 48.

²⁹ *Ibid.*

³⁰ *Ibid* at 46.

³¹ P Butt, 'Indefeasibility and Sleights of Hand' (1992) 66 *ALJ* 596 at 597.

³² To borrow the wording of Hayne J of the Supreme Court of Victoria in *Vassos v State Bank of South Australia* (1992) V ConvR 54-443 at 65,180-65,181.

should the goals of the Torrens system override the principles which permit a remedy being granted to an aggrieved individual.

Garcia v National Australia Bank Ltd³³

In 1979, Mrs Garcia and her then husband executed a mortgage over their home. Ultimately, the National Australia Bank Ltd succeeded to the rights in respect of this mortgage. This mortgage, although initially for a loan of \$5,000 secured all moneys which the mortgagors might subsequently owe the mortgagee, including moneys owing under any guarantee that they might give. Between 1985 and 1987, the appellant signed a number of guarantees in favour of the National Australia Bank – the guarantees related to business activities controlled by her husband. In September of 1988, Mrs Garcia and her husband separated. She requested to the respondents that they keep the bank account within limits. Subsequently, the parties were divorced and Mrs Garcia sought a declaration that the guarantees that she had given were of no force or effect and void. Not surprisingly, the National Australia Bank Ltd sought to enforce them.

The trial judge³⁴ held that no moneys were owing under the mortgage. To this effect, (and despite the fact that she presented herself as a capable and presentable professional) he relied upon the rule in *Yerkey v Jones*.³⁵ Under this rule, a married woman was entitled to a presumption that the credit provider knows that she is under the undue influence of her husband, or is unaware of the nature and effect of the guarantee. If this presumption is not rebutted – the guarantee will be set aside. Furthermore, the trial judge held that Mrs Garcia was not entitled to relief under the principles of *Commercial Bank of Australia Ltd v Amadio*,³⁶ since the National Australia Bank Ltd did not have notice of any unconscionability by the husband.

The appeal by the National Australia Bank Ltd to the New South Wales Court of Appeal was successful.³⁷ The principle in *Yerkey v Jones* was no longer to be applied in New South Wales.³⁸ Similarly, as relief under the *Amadio* principle was unavailable, the plaintiff was unsuccessful. Special leave to appeal to the High Court was granted, principally on the challenge to its previous decision of *Yerkey v Jones*.

All judges of the High Court came to the conclusion that the plaintiff, Mrs Garcia, was entitled to her declaration that the mortgage was not enforceable. The majority of the High Court and Callinan J considered that the rule in *Yerkey v Jones* was still applicable within Australia today. The fact that a surety does not understand the nature and effect of a transaction; that the surety obtained no gain from the contract; that the lender understands that the wife may repose trust and confidence in her husband, and that the lender has not explained the transaction or to ensure that she received independent advice, led to a conclusion that it was unconscionable for the creditor to rely on the guarantee.³⁹

³³ (1998) 72 ALJR 1243.

³⁴ *Garcia v National Australia Bank Ltd* (1993) 5 BPR 11,996.

³⁵ (1939) 63 CLR 649.

³⁶ (1983) 151 CLR 447.

³⁷ (1996) 39 NSWLR 577.

³⁸ *Ibid* at 598.

³⁹ (1998) 72 ALJR 1243 at para 33.

This paper does not propose to analyse this judgment.⁴⁰ Rather, to put the hypothetical – assuming that the land was registered under the Torrens system, would the result have been different if the National Australia Bank Ltd had submitted that its mortgage was indefeasible because of the operation of that system of land registration.⁴¹ In this context it is important to note that the conduct of the National Australia Bank could hardly have been described as fraudulent – given that this connotes something akin to personal dishonesty or moral turpitude,⁴² or actual fraud, not what could be called constructive or equitable fraud.⁴³ As stated by the High Court in *Bank of South Australia v Ferguson*:⁴⁴

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 [Torrens legislation] 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.

This is supported by the notice provisions of the legislation, which provides that a registered proprietor shall not be affected by notice, direct or constructive of any trust or unregistered interest, any rule of law or equity to the contrary, and that knowledge that any such trust or unregistered interest is in existence shall not of itself be imputed as fraud.⁴⁵

Therefore, assuming that the National Australia Bank Ltd had notice of a interest held by Mrs Garcia, was there sufficient to found a personal equity, such that a claim in personam could be established. Is the arguable unconscionability of the bank in *Garcia* sufficient⁴⁶ to raise the equity. Consider what Moore has to say: “A vague and amorphous concept such as unconscionability would, if sufficient on its own to defeat a registered interest in land, drive a horse and buggy through the Torrens system. That is precisely the reason why the courts have insisted that the personal equity must be

⁴⁰ See T Cockburn, ‘Yerkey v. Jones: The Phoenix’s New Clothes’ (1998) 9 *Journal of Banking and Finance Law and Practice* 308; A Hanak, ‘The wife’s special equity survives the High Court’ (1998) 6 *Insolvency Law Journal* 202; S Hii, ‘From Yerkey to Garcia: 60 years on and Still as Confused as Ever!’ (1999) *APLJ Lexis* 3.

⁴¹ Interestingly the majority of the High Court in *Garcia* refused to follow the English House of Lords decision in *Barclays Bank v O’Brien* (a decision which was accepted and modified by Kirby J in *Garcia*). As raised by P Milne, ‘Lenders, co-owners and solicitors’ (1999) 149 *New Law Journal* 168 at 168, “It is not apparent from the reports whether O’Brien involved registered or unregistered land. In any event, the approach set out in the case was clearly intended for general application. But the doctrine of notice does not operate in the context of registered land.”

⁴² *Wicks v Bennett* (1921) 30 CLR 80 at 91.

⁴³ *Assets Co v Mere Roihi* [1905] AC 176 at 210.

⁴⁴ (1998) 151 ALR 729 at 732.

⁴⁵ *Land Titles Act* 1925 (ACT) s 59; *Real Property Act* (NT) ss 72, 186, 187; *Land Title Act* 1994 (Qld) s 184; *Real Property Act* 1886 (SA) ss 72, 186, 187; *Land Titles Act* 1980 (Tas) s 41; *Transfer of Land Act* 1958 (Vic) s 43; *Transfer of Land Act* 1893 (WA) s 134; *Real Property Act* 1900 (NSW) ss 43, 43A.

⁴⁶ Remembering of course that the trial judge had decided that there was no unconscionability: *Garcia v National Australia Bank Ltd* (1993) 5 BPR 11,996.

founded upon a recognised legal or equitable cause of action”.⁴⁷ In the context of restitution Birks considers that the multiplication of suits in this area derives from identifying the precise basis of the relief.⁴⁸ The relief in Garcia was granted on the basis that National Australia Bank was unconscientiousness in retaining the benefit of the guarantee, rather than unconscionability in the acquisition of the interest.⁴⁹ “But that kind of unconscientiousness ex post is itself fictitious... It does not tell us in an honest and straightforward way why we are sure that the lending bank ought to give up its security.”⁵⁰

Nevertheless, the High Court has, on at least three known occasions, imposed a constructive trust in respect of unconscionable conduct that occurred in relation to Torrens land – these three cases being the seminal authorities of *Muschinski v Dodds*,⁵¹ *Baumgartner v Baumgartner*⁵² and *Bahr v Nicolay (No. 2)*.⁵³ But the one fundamental difference between these cases and the hypothetical under consideration is that, in those cases, the registered proprietors themselves acted unconscionably. Given this it would have been unfair to allow the registered proprietor to rely on indefeasibility to defeat the claim of the plaintiff.⁵⁴ However, it is a significant step from allowing a claim by a plaintiff in circumstances where the defendant has acted unconscionably, to a situation where there is a general jurisdiction to intervene in circumstances of unconscionability.⁵⁵

Two recent cases, *Pyramid Building Society (in liq) v Scorpion Hotels Pty Ltd*⁵⁶ and *Macquarie Bank Ltd v Sixty-Fourth Throne Pty Ltd*⁵⁷ have suggested that necessary limitations within judicial interpretation must be adopted to ensure the sanctity of the Torrens system. The facts of these two cases shared an underlying similarity. In *Pyramid Building Society*, five individuals used their redundancy monies to form a company, Scorpion Hotels, to purchase a guesthouse. One of the five caused the guesthouse to be mortgaged to the Pyramid Building Society. The other members were not aware of the mortgage to Pyramid – the document being executed by the individual and his wife, the wife having no authority to undertake this transaction. The mortgage was registered under the Torrens system. Whilst the trial judge found the mortgage unenforceable,⁵⁸ the Victorian Court of Appeal held that the mortgage was valid and enforceable. The reasoning of the Court of Appeal was that Pyramid’s mortgage would have been indefeasible unless it had been guilty of fraud and that constructive notice of the fraud of the individual was not statutory fraud within the meaning of the Torrens legislation. Further, no personal equity could be raised against Scorpion.⁵⁹ Chambers⁶⁰

⁴⁷ Moore (1998), *supra* n 1 at 260: though of course that it should be noted that he reconsidered some aspects of his view in a later piece: Moore (1999), *supra* n 1.

⁴⁸ P Birks, ‘The Law of Restitution at the End of an Epoch’ (1999) 28 *UWA Law Review* 13 at 27.

⁴⁹ *Ibid* at 28.

⁵⁰ *Ibid* at 29.

⁵¹ (1985) 160 CLR 583.

⁵² (1987) 164 CLR 137.

⁵³ (1988) 164 CLR 604.

⁵⁴ See the comments by Moore (1998), *supra* n 1 at 265.

⁵⁵ *Ibid*.

⁵⁶ [1998] 1 VR 188.

⁵⁷ [1998] 3 VR 133.

⁵⁸ (1996) 136 ALR 166 (TJ); [1998] 1 VR 188 (CA).

⁵⁹ [1998] 1 VR 188 at 196.

⁶⁰ *Supra* n 3.

considers that to follow this case would prove a “difficult road”⁶¹ and that the exclusion of “rights generated by unjust enrichment would require a highly artificial and unsatisfactory barrier. It would also mean uprooting several well established principles”.⁶² The response to this is that to allow these claims as an in personam exception involves an uprooting of the foundation principles of the Torrens system of land registration, and this, given the success of the Torrens system, must surely be undesirable.

In the *Macquarie Bank* case, the factual matrix was basically indistinguishable – the affixing of the company seal had been made by people who were not directors of the company. In this case and in *Pyramid*, the solicitors for the mortgagee did not check the signatures of the purported directors against the company search. The Victorian Court of Appeal in *Macquarie* accepted that even though the bank had the means of checking the attestation clause on the mortgage documentation with the information about the directors – there was no obligation to make this comparison. As commented by Tadgell J⁶³

If the doctrine of constructive notice was held to apply generally to the ordering of priorities under the Torrens system it would, in effect, introduce into the scheme of title by registration the notion of priority determinable by reference to the doctrine of the bona fide purchaser for value without notice, a doctrine at odds with the Torrens system.

The significance of these two cases in the context of the present discussion is the important reaffirmation of the principles and policies that underlie the Torrens system. In both cases the mortgagee had registered their documentation – there was no obligation to make inquiries which could easily have established the fraud.⁶⁴ The in personam exception (and thus the raising of the personal equity) was to be limited by known legal or equitable causes of action. In support of this the court cited cases such as *Grgic v Australia and New Zealand Banking Group Ltd*⁶⁵ and *Garafano v Reliance Finance Corporation Ltd*.⁶⁶

Accordingly, can it be said that the policy motivated relief⁶⁷ accorded to Mrs Garcia – an example of the rising importance of restitution, amounts to a known cause of action that is sufficient to raise an equity against the registered proprietor.⁶⁸ In an analogous context, it has recently been reiterated that indefeasibility of title can be used to override a right to rectify a transaction. In *Tanzone Pty Ltd v Westpac Banking Corp*⁶⁹ the

⁶¹ *Ibid* at 132.

⁶² *Ibid*.

⁶³ [1998] 3 VR 133 at 152.

⁶⁴ As to whether wilful blindness would constitute a finding of fraud, Tadgell J didn't decide. At [1998] 1 VR 133 at 146 his Honour had this to say: “I understand the expression to connote more than a failure to see or look: the adjective is to be given its due value. The compound expression connotes a concealment deliberately and by pretence, from oneself – a dissembling or dissimulation. In other words wilful blindness connotes a form of designed or calculated ignorance, of which none on the part of the appellants or its agents is proved.”

⁶⁵ (1994) 33 NSWLR 202.

⁶⁶ (1992) NSW ConvR 55-640.

⁶⁷ As described by Moore (1999) *supra* n 1 at 714.

⁶⁸ Birks, *supra* n 48 at 29 recognises that in many cases, the resolution of a dispute between a domestic borrower and a business lender involves a case of policy-motivated restitution.

⁶⁹ (1999) NSW ConvR 55-908.

original agreement between the lessor and lessee contained a rent review clause – which neither party appreciated would result in the amount of the rent escalating greatly over the term of the lease. The agreement did not reflect the true intent of the parties and rectification would normally have been available. However the lessor had sold to a purchaser who had obtained title by registration. The purchaser was fully aware that the agreement between the original lessor and lessee did not reflect the true intent of the parties. Despite this, registration granted the purchaser indefeasibility and thus the equity of rectification was extinguished.⁷⁰ Also consider the New Zealand decision of *Davies v Laughton*.⁷¹ The Laughtons had provided a second mortgage over their property to assist their son – who was purchasing the importing business of the appellants. The respondents signed the mortgage, prepared by the solicitor of the son. At a subsequent date, the solicitor for Laughton’s son altered the mortgage (at the request of solicitors for Davies) with the result that the mortgage was collateral to a first, not a second, debenture. The mortgage was registered. The appellants sought the discharge of an interim injunction preventing them from selling the home. The New Zealand Court of Appeal held that Davies was unable to rely on indefeasibility of title to defeat any claim by the Laughtons that the mortgage had been registered without their consent. “In short, equity’s protection over sureties defeated the registered mortgage.”⁷²

The conscience of a mortgagee who, unbeknown to the mortgagor, alters the terms of the debtor's obligations which the mortgage is to secure, must be pricked as assuredly as if the alteration were made after settlement... A hapless guarantor who has been exploited in this way is just as entitled to the protection of a Court of Equity as one whose liability has been altered following settlement or registration.⁷³

Bringing the strands of indefeasibility and policy motivated relief together

It seems to their Lordships that the learned judges... have been too much swayed by the doctrines of English equity, and not paid sufficient attention to the fact that they are here dealing with a totally different land law, namely a system of registration of title contained in a codifying enactment.⁷⁴

There is no doubt that the imposition of equitable doctrines seriously inroads into the concepts that underlie the Torrens System. But what balance is to be achieved? Few of us would argue that indefeasibility of title should not be used to defeat a claim, where the registered proprietor has not only notice of an interest, but has given an express

⁷⁰ See the brief note on this case: P Butt, ‘Rectification thwarted by indefeasibility’ (2000) 74 *ALJ* 280 where he notes that the different wording of the Victorian legislation may have led to a different result: Section 42 of the *Transfer of Land Act* 1958 excluding from the doctrine of indefeasibility, the “interest of a tenant in possession of the land.”

⁷¹ [1997] 3 NZLR 705 (CA).

⁷² E Toomey, ‘Certainty of title in the Torrens System – Shifting Sands as the Millennium Approaches’ Paper delivered to 1999 Real Property Law Teachers Conference – The Flinders University Law School, 30 September 1999 – 2 October 1999.

⁷³ [1997] 3 NZLR 705 at 714-715 per Thomas J.

⁷⁴ *Haji Abdul Rahman v. Mahomed Hassan* [1917] AC 209 at 216 per Lord Dunedin (Privy Council). S Hepburn, ‘Concepts of Equity and Indefeasibility in the Torrens System of Land Registration’ (1995) *APLJ Lexis* 8 at 1 also states: “The ambiguous and pejorative nature of equity does not fit easily into a statutory structure centred around the guarantee of land title upon registration. Indefeasibility of title upon registration necessitates a level of certainty and determination which is, in many ways, directly oppositional to the approach taken by equitable principles of fairness.”

assurance that the interest would be recognised and protected. Nevertheless, the balance needs to be made between the certainty, security, and simplicity of the Torrens system on one hand and the fairness and discretionary nature of equitable jurisdiction on the other. Whilst most would accept the result in *Bahr v Nicolay (No. 2)*;⁷⁵ many more of us question⁷⁶ the reasoning of the New South Wales Supreme Court in *Mercantile Mutual v Gosper*.⁷⁷

Consider now the decision of *Garcia v National Australia Bank Ltd*.⁷⁸ Had the bank acted unconscionably? Certainly the High Court considered so. Support for its conclusion that the conduct of the National Australia Bank was unconscionable (even though the trial judge thought otherwise) lay in analogies to the recognised jurisdiction of the court to set aside gifts made by a mistaken donor,⁷⁹ the ability to provide relief to a surety where some particular fact is not made known,⁸⁰ and where the creditor has not disclosed some material features of the transaction.⁸¹ Having said this however, “[d]espite the attempt by the majority in *Garcia* to justify the decision in terms of unconscionable conduct on the part of the bank, the better view is that unconscionability cannot explain the result in *Garcia* itself”.⁸² If this is correct, and I would suggest that it is,⁸³ then any restitutionary claim which policy dictates should be successful will give rise to a personal equity that can potentially infringe the operation of the Torrens system. Is this desirable?⁸⁴ Does the allowance of this type of claim permit the flexibility and discretion that is needed within a land registration system that demands certainty and stability? Are we eating away at the crumbling foundations of Torrens, or providing the flexibility within the building itself so that it can meet the changes resonating through society? Is the “justifiable aim of controlling a species of transaction... achieved by damaging and diluting established doctrines”?⁸⁵

Conclusion

There is no doubt that the Torrens system, as a form of land registration, has been an unqualified success in Australia.⁸⁶ It has introduced a conveyancing system which is reliable, simple, cheap, speedy and suited to the social needs of the community.⁸⁷ Further, and specifically in respect of claims made in personam, it could be argued that it preserves the concepts of contract and equity,⁸⁸ but as Deane J states:

⁷⁵ (1988) 164 CLR 604.

⁷⁶ See for example P Butt, ‘Indefeasibility and Sleights of Hand’ (1992) 66 *ALJ* 596.

⁷⁷ (1991) 25 *NSWLR* 32.

⁷⁸ (1998) 72 *ALJR* 1243.

⁷⁹ *Ibid* at para 35.

⁸⁰ *Ibid* at para 37.

⁸¹ *Ibid* at para 36.

⁸² Moore (1999), *supra* n 1 at 714 quoting from Gardner, ‘Wives Guarantees of their Husbands’ Debts’ (1999) 115 *LQR* 1 at 3-4.

⁸³ See R Baxendale [1999] 21 *Sydney Law Review* 313 at 319-320.

⁸⁴ See S Hepburn, *supra* n 74 at 8.

⁸⁵ [1997] All ER Rev 385 at 394.

⁸⁶ Whalan, *supra* n 4.

⁸⁷ M A Neave, C J Rossiter & M A Stone, *Sackville and Neave Property Law Cases and Materials*, 6th edn Butterworths 1999 at 418.

⁸⁸ As noted by J G Tooher, ‘Muddying the Torrens Waters with the Chancellor’s Foot? *Bahr v Nicolay*’ (1993) 1 *APLJ* at 1.

Long before Lord Seldon's anachronism identifying the Chancellor's foot as the measure of Chancery relief, undefined notions of 'justice' and what was 'fair' had given way in the law of equity to the rule of ordered principle which is of the essence of any coherent system of rational law. The mere fact that it would be unjust or unfair in a situation of discord for the owner of a legal estate to assert ownership against another provides, of itself, no mandate for a judicial declaration that ownership in whole or in part lies, in equity, in that other.⁸⁹

This ideal must be met – notions of what is fair or just must give way to the rule of ordered principle. To this end, the fundamental tenet of indefeasibility of title represents this rule. It is only from this genesis that the modifications and qualifications to the principle should be articulated and justified. To do otherwise leaves the imprint of the Chancellor's foot on recognised doctrines and fundamental tenets of Property Law. If, contrary to the statements of the High Court in *Garcia*, it is accepted that the basis of the result in that case was not unconscionability but, policy-motivated relief, the end result for the Torrens system of land registration is that this policy-motivated restitutionary relief⁹⁰ affords a recognised cause of action that supports the personal equity necessary for an in personam claim.

Is this acceptable? Only, I would suggest, if the circumstances of the case are explained as a modification or qualification to the fundamental tenet of indefeasibility. These circumstances must be articulated and justified as an anomalous exception to the critical imperatives of the Torrens system. To do otherwise leaves the law without any broad unifying principle and with the consequential practical difficulty of providing adequate and clear advice to subsequent clients.

A better system of land registration for Australian conditions than the Torrens system has not been devised. Its fundamental doctrines need be reinforced not qualified. Any analysis of a case involving Torrens land should start from the fundamental precepts of indefeasibility of title and the irrelevancy of notice – if these are to be waived, the justification for this action must be established. In doing this, the courts need to articulate the reasons for the departure, but importantly, also indicate that it is an isolated departure from the 'house of Torrens' and its foundations.

⁸⁹ *Muschinski v Dodds* (1985) 160 CLR 583 at 616.

⁹⁰ Birks *supra* n 48 at 30 describes the problems encountered in *Garcia* as "incredibly difficult" and there is a need to avoid "pseudo-solutions and, in particular, not to go in for distorting or denaturing particular unjust factors."