WHITHER TORRENS TITLE IN SINGAPORE?

The Torrens system was designed to deal with problems of 19th century conveyancing practice and it is questionable whether it meets the needs of the 21st century. The doctrine of immediate indefeasibility of title exacerbates the growing problem of identity fraud and is capable of causing much injustice, which in itself leads to a high volume of litigation. This article considers the possibility of reform, in particular the introduction of a comprehensive insurance scheme and a move away from immediate indefeasibility. The article concludes with a consideration of the impact of *United Overseas Bank v Bebe bte Mohammad* [2006] 4 SLR 884.

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1 A century and a half have now passed since the introduction of the Torrens system in South Australia in 1858. Half a century has elapsed since the passing of the Land Titles Ordinance in 1956, which introduced the system into Singapore. More recently, the Court of Appeal handed down in 2006 probably the most important decision in Singapore on the Torrens system, *United Overseas Bank v Bebe bte Mohammad*.[1] It is an appropriate time to step back and ask where we are going with the system and whether what began life as a 19th-century project in a predominantly rural environment can continue to answer the needs of a highly urbanised society in the 21st century. The Torrens system has been part of Singapore law for a long time and it is going to remain so for the foreseeable future. Nevertheless, it is surprising that some of the basic tenets of the system – such as the central concept of indefeasibility of title – still remain the subject of contention despite the passing of the years.[2]

1 [2006] 4 SLR 884.
2 The literature inspired by *United Overseas Bank v Bebe bte Mohammad* [2006] 4 SLR 884 alone bears witness to this. See Seow Zhixiang, "Rationalising the Singapore Torrens System" [2008] 1 Sing JLS 165; Tang Hang Wu, "Beyond the Torrens Mirror: A Framework of the *in personam* Exception to Indefeasibility" (2008) 32 MULR 672; Kelvin F K Low, "The Story of 'Personal Equities' in Singapore: Thus Far and Beyond" [2009] Sing JLS 161. The present writer must also confess to contributing to the ink spilt on this subject in "A Hard Look at *Bahr v Nicolay*" in *Lives in the Law: Essays in Honour of Peter Ellinger, Koh Kheng Lian, Tan Sook Yee* (Dora Neo, Tang Hang Wu & Michael Hor eds) (Faculty of Law, National University of Singapore & Academy Publishing, Singapore Academy of

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2 The Torrens system is the perfect answer to the conveyancing problems of the 19th century. The problem at that time was that the common law system of conveyancing offered insufficient security to purchasers of land. A person might buy land only to discover that the vendor was not the true owner, in which case the land could be claimed back by the true owner, leaving the purchaser with an action for breach of contract against the vendor. Again, even if the vendor was the true owner, there might be some interest owned by a third party which bound the land and which the purchaser had not discovered before completion of the purchase. The difficulties to which these problems gave rise have been graphically described.[3]

> The process of examining and abstracting all previous titles and facts relevant thereto had to be gone through whenever a new sale or mortgage took place, for a mistake in a link of title would probably make the solicitor liable to a ruinous action for negligence. Add to the uncertainty, complication and expense inevitable in such a system, the lengthy recitals and parcels of the purchase-deed, its formality of seal and delivery, the doctrine of constructive notice, the technicalities of the working in premises and habenda, the fiction of the legal estate and its sequela in the case of mortgages, the shadowy equities 'born of fraud and fear' haunting the most perfect conveyances, the subtleties of the judicial amendments and repeals of the Statute of Uses, weak-kneed remainders without an antecedent estate, or limitations of chattels real without a trust, receipts for consideration sacrilegiously omitted from the endorsement of a deed, scholastic 'possibilities on possibilities' stalking through modern daylight, usual covenants, 'fruitful mothers of costs', and estate clauses barren of estate, covenants for title that may be construed as notice of a flaw in title, and the constant fear of long and complex proceedings in the courts from some unsuspected deed coming to light … add these, and it is not difficult to sustain the proposition that reform was desirable.

3 This may possibly describe the difficulties of common law conveyancing in the 19th century, but similar claims – if less exaggerated and couched in less colourful language – for the difficulties of unregistered conveyancing can be found in more recent literature.[4] The Torrens system undoubtedly did much to solve these problems. However, it should not be assumed that unregistered conveyancing in the 20th century was as troublesome as in the 19th. By this time, reforms to the substantive rules of land law, coupled with notification requirements, such as those contained in the English Land Charges Act

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Law, 2007) at p 191 and "Indefeasibility of Title: Developments in Singapore" (2007) 15 APLJ 91.

3 Frank Duffy & James Eagleson, *The Transfer of Land Act, 1890* (Charles F Maxwell, 1895) at pp 6–7.

4 See, *eg*, Tan Sook Yee, Tang Hang Wu & Kelvin F K Low, *Principles of Singapore Land Law* (LexisNexis, 3rd Ed, 2009) at paras 13.1 and 13.2.

1925 (c 22) or in Singapore's Registration of Deeds Act,[5] meant that there was little risk that the vendor was not the true owner of the land or that the land was subject to encumbrances of which the purchaser was unaware. In unregistered conveyancing, the vendor proves his ownership by tracing his title back to a good root of title. In the 19th century, it was necessary to trace the title back to a good root of title which was at least 60 years old.[6] This period was first reduced to 40 years,[7] then to 30 years,[8] and finally to only 15 years.[9] This progressive reduction of the period in respect of which the vendor had to deduce title is clear evidence that, whatever enthusiasts of land registration might claim, conveyancing in unregistered land was not giving rise to serious risks at the time.

4 The problems which had impelled Torrens and other reformers to push for registration of title over a hundred years ago ceased to be so serious in the 20th century. This point is worth making not in order to suggest the Torrens system should now be abolished in favour of a return to common law conveyancing. It is too late to turn the clock back and in any case there are many advantages in having a central register of interests in land. The point is that the Torrens system was designed to solve problems which were acute at the time of its initial introduction in South Australia – the difficulty of proving title and the existence of interests in the land which would bind the purchaser and which were difficult to discover. The Torrens system dealt with these problems in a radical way through reversing the common law rule that *nemo dat quod non habet* and substituting for it a new rule of indefeasibility of title. The common law rule had maximised security for owners of interests in land, while minimising security for purchasers. The new rule maximises security for purchasers at the expense of owners of interests in land, whose position has now become quite insecure. There are two legitimate interests in issue here, both of which are protected by property law in different circumstances and which clash. Where a system protects the rights of an owner of property against later purchasers, it has been termed a system of "static security". Where the system protects the rights of purchasers at the expense of prior owners of the property, it is a

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5 Cap 269, 1989 Rev Ed.

6 This was according to the custom of conveyancers. See T Cyprian Williams, *A Treatise on the Law of Vendor and Purchaser* (Sweet & Maxwell, 4th Ed, 1936) at p 114.

7 Conveyancing and Law of Property Ordinance 1886 (SS Ord No 6 of 1886), s 3(4). In England the period was reduced to 40 years by the Vendor and Purchaser Act 1874 (c 78), s 2.

8 Conveyancing and Law of Property (Amendment) Ordinance 1952 (No 26 of 1952), s 2. In England the period was reduced to 30 years by the Law of Property Act 1925 (c 20), s 44(1).

9 Land Titles Act 1993 (No 27 of 1993), s 174, amending s 3(4) of the Conveyancing and Law of Property Act (Cap 61, 1985 Rev Ed). In England the period was reduced to 15 years by the Law of Property Act 1969 (c 59), s 23.

system of "dynamic security".[10] The move towards dynamic security, brought about by the Torrens system, leads inevitably to insecurity for owners of interests in land, which is the cause of many of the problems which the system faces in the 21st century.

5 Dynamic security – or, in the language of the Torrens system, "indefeasibility of title" – involves the notion that A, who owns an interest in land, may forfeit that interest in favour of B, who has purchased the land, even though B may have known all about A's interest at the time he contracted to buy the land. This may seem unfair. In truth, however, it is the price that has to be paid for moving from a system where the purchaser has to make extensive searches to discover the interests that bind the land, towards a system where the purchaser has to do little more than check the register. Needless to say, the advantage of the second system is a reduction in transaction costs. The Land Titles Act[11] provides different methods for holders of interests in land to protect themselves. If A failed to avail himself of the protections afforded by the legislation, he has only himself or his legal advisors to blame. A system which held that B should be bound by A's interest of which he is aware, but which is unprotected by any of the mechanisms of the Land Titles Act, would run the risk of reintroducing a requirement to make extensive searches. Once one says that B is bound because he knows of an interest, it will not be long before it is held that B is bound because he *ought* to have known of an interest.

6 Dynamic security also involves the notion that A, who owns the land may lose it to B, who has purchased it innocently from a fraudster, who has forged A's signature to the transfer document. At a time when identity fraud is increasingly becoming a serious problem, the second example is a cause for particular concern. While the move towards dynamic security is the hallmark of all Torrens systems, potentially at least the problems this poses are particularly severe in Singapore, where the Land Titles Act opts for an extremely high degree of dynamic security. At first sight, the result may appear less objectionable than the previous example. This is a classic case where one of two innocent parties must suffer for a fraud committed by someone else. A and B are equally innocent, so the fact that the Land Titles Act favours B may seem no more objectionable than the fact that the common law favours A. A system of conveyancing should, however, operate in a way which

10 See R Demogue, "Security" in *Modern French Legal Philosophy* (Alfred Fouillée *et al* eds) (Boston Book Co, 1916) at p 428. R Demogue was referring to the law of transactions in the French Civil Code. Pamela O'Connor was the first to investigate the application of Demogue's theory of static and dynamic security in the context of land registration. See Pamela O'Connor, "Registration of Invalid Dispositions: Who Gets the Property" in *Modern Studies in Property Law* (Elizabeth Cooke ed) (Hart Publishing, 2005) at p 45 and pp 47–49.

11 Cap 157, 2004 Rev Ed.

serves to reduce so far as possible the incidence of fraud. B is the party who actually deals with the fraudster. Of the two, he is in the better position to take steps to discover whether he is actually dealing with the true owner. However, dynamic security means that he will get a good title regardless of whether or not he takes any such steps. Perversely, indefeasibility of title operates in this case to encourage an attitude of carelessness towards doing anything practical to prevent identity fraud. This is the outline of the problem, but the challenge posed to the Torrens system by identify fraud will be discussed later in greater detail.

7 There is another feature of the Torrens system, which somewhat surprisingly seems to have attracted little attention. In virtually all jurisdictions which have adopted the system, there are many reported cases dealing with the concept of indefeasibility of title. In turn, these decisions have generated a voluminous academic literature.[12] Perhaps it is unfair to criticise the academic literature for not biting the hand that feeds it, but it is no compliment to the Torrens system to say that it generates a high volume of litigation, and it is perhaps surprising that little has been written discussing why this should be so.[13] There is a marked contrast here between the Torrens experience and that of the English land registration system. Even in a small jurisdiction like Singapore, the Court of Appeal has had to consider the question of indefeasibility of title in two leading cases in the last ten years.[14] By contrast, one searches in vain for any House of Lords decision on similar issues arising under the English system.

8 It has been suggested that the reason for the difference in the level of litigation in the two systems stems from the existence in England of a discretionary remedy of rectification, a process by which the Registrar or the court can set aside a registered title on some or all of the grounds which would invalidate the disposition under the ordinary common law rules.[15] This seems doubtful. On the face of it, one would expect that giving the Registrar or the court a discretionary power to set aside dynamic security would increase litigation. Clear rules, even if they are harsh, discourage litigation. Vague discretions serve only to

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12 To which the present paper is yet another contribution!

13 See, however, Pamela O'Connor, "Deferred and Immediate Indefeasibility: Bijural Ambiguity in Registered Land Systems" (2009) 13 Edin LR 194. See also Pamela O'Connor, "Registration of Title in England and Australia: A Theoretical and Comparative Analysis" in *Modern Studies in Property Law* vol 2 (Elizabeth Cooke ed) (Hart Publishing, 2003) at p 95.

14 See *Ho Kon Kim v Lim Gek Kim Betsy* [2001] 4 SLR 340; *United Overseas Bank Ltd v Bebe bte Mohammad* [2006] 4 SLR 884.

15 See Pamela O'Connor, *Registered Land Title, Indefeasibility and the Problem of Bijural Inaccuracy*, 8th Real Property Teachers' Conference, University of Tasmania (13 July 2007) at pp 2–3 (unpublished).

encourage litigation.[16] To go back to the earlier example of identity fraud, if as Singapore's Land Titles Act provides, the law says that B gets good title to the land where A's signature has been forged unless he (B) has been guilty of fraud, A is likely to seek legal advice as to how he can get his land back. If he is advised that it will be difficult and expensive to prove fraud on B's part, he may take the view that he will only be increasing his loss if he takes expensive legal action, which may well not succeed. If, however, he is advised that although B has acquired title, the court may at its discretion cancel B's registration and restore the land to A, it would be strange if A did not go to court.

9 Moreover, the Singapore experience seems to negative the view that the existence of a discretionary remedy of rectification might reduce litigation. As it happens, Singapore had a rectification provision modelled on that contained in the English Land Registration Act 1925 (c 21) from 1970[17] until 2006.[18] That did not stop two cases from reaching the highest court of the land during that period.

10 It is submitted that the real reason for litigation in Torrens systems lies in the limited insurance cover these systems offer in the event of loss. Unfortunately, Singapore's Land Titles Act is one of the least generous of any insurance scheme based on the Torrens system. Faced with the prospect of losing a valuable piece of land without compensation, it is hardly surprising that defrauded property owners have refused to accept their loss and have sought ways to set aside the dynamic security provided by the system. Hence one experiences constant litigation around the concept of indefeasibility of title and its exceptions. To illustrate this point, it is necessary to explore further the operation of the insurance principle in the Torrens system and particularly under the Land Titles Act.

I. Insurance principle

11 Theodore B F Ruoff ("Ruoff") identified three fundamental principles to which any system of registered title should conform. In his view, these are of such importance that in any given jurisdiction, the

16 *Cf* Anthony Mason, "Indefeasibility – Logic or Legend?" in *Torrens in the Twenty-First Century* (David Grinlinton ed) (LexisNexis, 2003) at p 18.

17 When what is now s 160 of the Land Titles Act was enacted. See Tan Sook Yee, *Principles of Singapore Land Law* (Butterworths, 2nd Ed, 2001) at p 215 and following for a contemporary view of the meaning of this provision. The interpretation of s 160 is considered in more detail by the present writer in "Back to Basics: Indefeasibility of Title under the Torrens System" [2007] Sing JLS 117 at 119–122.

18 When the Court of Appeal in *United Overseas Bank Ltd v Bebe bte Mohammad* [2006] 4 SLR 884 interpreted the provision as being merely procedural.

system will succeed or fail according to the degree to which it conforms with these principles. These are the mirror principle, the curtain principle and the insurance principle. The mirror principle "involves the proposition that the register of title is a mirror which reflects accurately and completely and beyond all argument the current facts that are material to a man's title".[19] The curtain principle "is one which provides that the register is the sole source of information for proposing purchasers, who need not and, indeed, must not concern themselves with trusts and equities which lie behind the curtain".[20] While both the mirror and the curtain principles are ideals and will never be complied with perfectly, the Land Titles Act comes very close to meeting these objectives. There are inevitably some interests which override the register and to that extent there is a lack of conformity with both the mirror and the curtain principles. However, the list of overriding interests in the Singapore legislation is not particularly long and compares favourably with similar lists in other systems, particularly with the very long list of overriding interests to which the English land register is subject. There is no need for us to concern ourselves further with these principles.

12 The troublesome area is the insurance principle. "The true principle is this, that the mirror that is the register is deemed to give an absolutely correct reflection of the title but if, through human frailty, a flaw appears, anyone who thereby suffers loss must be put in the same position, so far as money can do it, as if the reflection were a true one. A lost right is converted into hard cash."[21]

13 Contrary to Ruoff's suggestion, it cannot be said that insurance is essential to the operation of a Torrens system. The Malaysian National Land Code operates well without any provision for an indemnity fund.[22] However, there is no doubt that a system which implements Ruoff's insurance principle will be more successful and will command a greater degree of public confidence. As Thomas W Mapp ("Mapp") points out, once almost all the land in a jurisdiction has been registered, as has happened in Singapore, virtually the only remaining risk to a properly registered owner is defeasibility through error.[23] This is a classic example

19 Theodore B F Ruoff, *An Englishman Looks at the Torrens System* (Lawbook Co, 1957) at p 8.
20 Theodore B F Ruoff, *An Englishman Looks at the Torrens System* (Lawbook Co, 1957) at p 11.
21 Theodore B F Ruoff, *An Englishman Looks at the Torrens System* (Lawbook Co, 1957) at p 13.
22 See S Rowton Simpson, *Land Law and Registration* (Cambridge University Press, 1976) at pp 179–193, for a discussion of registration systems operating without insurance provisions.
23 Thomas W Mapp, *Torrens Elusive Title* (University of Alberta, Faculty of Law, Edmonton, 1978) at p 70.

of the type of risk generally distributed through insurance. The registered owner has an economic interest, which can be valued in monetary terms and which is subject to a defined peril. A large group of people – all registered proprietors – are subject to the same risk, which will strike infrequently and randomly, but which will generally be disastrous to any individual proprietor. People have invested their life savings in buying a roof over their heads and they are almost certainly unaware of the risk they face. But if they did know and if no compensation scheme existed to meet it, there would undoubtedly be political pressure to set up such a scheme.[24] Prior to the introduction of the Torrens system, landowners were not subject to this risk. Purchasers of land were subject to greater risks, but solicitors sought to minimise these risks by making extensive searches on behalf of their clients. The state has set up the Torrens system to simplify conveyancing and has thereby created a risk for landowners. It seems only right that insurance provision should be an integral part of the state's title registration scheme.

14 A second reason for having a compensation system based on sound insurance principles is that such a system would contribute to the efficient administration of the registration process. The Registrar has the responsibility for determining the authenticity of transfers submitted for registration. There is little doubt that the more stringent the procedures demanded of those submitting documents to the Registry, the less chance there would be of errors. However, the cost of more stringent registration requirements would fall on all users and in fact, the overwhelming majority of documents submitted are authentic. The cost to society of increased documentation could be far in excess of the cost of accepting risks and paying for them on an insurance basis. If the Registrar knows that an adequate insurance scheme is in existence, he or she can tailor protective requirements to meet only risks of sufficient frequency to justify them.[25]

15 It has to be said that unfortunately the Singapore system fails to meet adequately the objectives of the insurance principle. An assurance fund is set up under the Land Titles Act, but s 155 provides:

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24 This has certainly been the experience in Malaysia as a result of the case of *Adorna Properties Sdn Bhd v Boonsom Boonyanit* [2001] 1 MLJ 241 (noted Teo Keang Sood, "Demise of deferred indefeasibility under the Malaysian Torrens system?" [2002] Sing JLS 403). Numerous articles have appeared in the popular press on the topic. See *eg* "Tighten rules to prevent land scams, govt urged", *New Straits Times* (16 March 2007); V Vasudevan, Anis Ibrahim & Ranjeetha Pakiam, "Fraudulent land transfers up", *New Straits Times* (10 July 2007); Joseph Lo, "Land scams on the rise", *The Sunday Star* (23 December 2007); Chelsea L Y Ng, "Protecting the landowners", *The Star* (17 March 2008).

25 Thomas W Mapp, *Torrens Elusive Title* (University of Alberta, Faculty of Law, Edmonton, 1978) at p 70.

> (1) [A]ny person who is deprived of land or sustains loss or damage through any omission, mistake or misfeasance of the Registrar, or any member of his staff, in the bringing of the land under the provisions of this Act or in the registration of any instrument, and who is barred by this Act from bringing any action for the recovery of land, proceeds of the sale of land, moneys secured by a registered mortgage or interests protected by a caveat notified on a folio, may bring an action for the recovery of damages against the assurance fund.

16 If a fraudster has transferred A's land to B, who is an innocent purchaser, B will acquire an indefeasible title. This risk is created by the Torrens system, as under the common law a forged conveyance is a nullity. Nevertheless, A has no claim under the assurance fund, as the registration of the transfer in favour of B was not caused "through any omission, mistake or misfeasance of the Registrar, or any member of his staff".

17 Given that claims against the assurance fund are only possible where the Registrar or members of the Registrar's staff are at fault in some way, it seems that claims against the fund merely replicate actions that would otherwise be available against the Registrar in accordance with the normal principles of tort law. The assurance fund is necessary simply because under s 157(2) of the Act, neither "the Registrar nor any person acting under … his authority shall be personally liable in respect of any action, suit or proceeding in respect of any act or matter in good faith done or omitted to be done in the administration of this Act".

18 There is a contrast between the very limited indemnity possible under Singapore's Land Titles Act and the more generous provision available under the English Land Registration Act 2002, which comes much closer to meeting fully the objectives of the insurance principle. The English system stresses the idea of a "state guaranteed title" rather than "indefeasibility of title". Although the notion of obtaining indefeasibility of title is accepted in this system,[26] it is easier than in most Torrens systems for the register to be rectified, so as to prejudicially affect the title of the registered proprietor.[27] However, this is linked with the availability of indemnity. Where the register is rectified to the prejudice of the registered proprietor, the proprietor is entitled to be indemnified.[28] Generally speaking, the register cannot be rectified so as

26 See Land Registration Act 2002 (c 9) (UK), s 58(1).

27 See Land Registration Act 2002 (c 9) (UK), Sch 4, para 1.

28 Land Registration Act 2002 (c 9) (UK), Sch 8. There are some exceptions. See, *eg*, Land Registration Act 2002 (c 9) (UK), Sch 8, para 5(1) according to which "No indemnity is payable … on account of any loss suffered by a claimant – (a) wholly or partly as a result of his own fraud, or (b) wholly as a result of his own lack of proper care." Under para 5(2) "Where any loss is suffered by a claimant partly as a result of his own lack of proper care, any indemnity payable to him is to be reduced to such extent as is fair having regard to his share in the responsibility for the loss."

to affect the title of a proprietor who is in possession of the land. Where rectification is refused in such a case, an indemnity is payable to the party who has suffered a loss through the failure to rectify.[29]

19 The relatively generous insurance provisions of the English system are almost certainly responsible for the low level of litigation in this jurisdiction on the subject of rectification of the register, as compared with the high level of litigation on the same subject,[30] which is such a notable feature of the various Torrens systems. Another feature of the English system worth noting is the preference shown for protecting the property rights of the registered proprietor who is in possession. Where the dispute is between two innocent parties, this means that the person who is already in occupation will keep the land, whereas the person who is not in occupation will receive monetary compensation. Again, this serves to reduce the incidence of litigation, as faced with the possibility of forcible eviction, an innocent party might well choose to go to court, whereas the person who is not in possession of the land is more likely to find monetary compensation an acceptable remedy.[31]

20 While the Singapore system may be egregious in its limited adherence to the insurance principle, it appears that the various Australian systems are also lacking in different ways. It is not possible within the confines of this paper to go into the details of the various systems. However, Butt's view is that, "Whether the assurance fund has fulfilled its original purposes may be doubted. As the reported cases show, access to the fund is circumscribed in significant respects, and not all who are deprived of interests in land through the operation of the Act have rights against the fund."[32] One limitation which is particularly worthy of note in this context is the requirement that before making any claim against the assurance fund, the person who has suffered the loss must first bring an action against the individual who was responsible for the loss. If the loss is caused by fraud, an action must first be brought against the person who has registered through fraud.[33] A cynic might be forgiven for thinking that the requirement to commence legal proceedings before making a claim seems almost to be designed to maximise litigation around the concept of indefeasibility of title.

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29 Land Registration Act 2002 (c 9) (UK), Sch 8, para 1(b).

30 Or on the subject of the exceptions to indefeasibility, as it is usually termed in the Torrens system.

31 This point is discussed further below. See text accompanying n 40 of this article.

32 Peter J Butt, *Land Law* (Lawbook Co, 5th Ed, 2006) at p 803.

33 Real Property Act, 1886 (SA), ss 203 and 205; Transfer of Land Act, 1893 (WA), s 201; Land Titles Act, 1980 (Tas), ss 152(2) and 152(8); Land Titles Act, 1925 (ACT), ss 154(1)(a)(3) and 143(b). Until the commencement of the Real Property Amendment (Compensation) Act 2000 (NSW), there was a similar requirement in New South Wales under the Real Property Act 1900, ss 126 and 127. See now Real Property Act 1900 (NSW), s 120.

21 In addition to the various legal difficulties facing those seeking to make claims against the assurance fund in the various Torrens jurisdictions, there have also been suggestions of a tendency – at least in the past – to place administrative barriers against claimants. John Baalman ("Baalman"), the draftsman of the Singapore Act, wrote in his commentary on the New South Wales system of the "indecent solvency" of many funds.[34] Ruoff wrote in *An Englishman Looks at the Torrens System*, "When I meet a registrar or other official from a titles office or land registry in another country I always enquire about the state of his insurance fund. All too often I receive a smug reply to the effect that there has been no successful claim on the fund for ten or twenty, or perhaps thirty years."[35]

22 No doubt as a response to the difficulties of obtaining compensation from the Torrens assurance funds, Australia has seen a growth in privately-funded title insurance.[36] American title insurance companies now have an active business in Australia. By contrast, private title insurance is still unknown in ordinary domestic conveyancing in England.

23 In answer to the question posed in this paper – *Whither Torrens title in Singapore?* – the ideal response must be that in an age of growing property fraud, the Singapore system should strive to move closer to following the insurance principle, perhaps along the lines of the English system. It is unfortunate that the opportunity to do this was not taken at the time the system was first introduced. To graft a full recognition of the insurance principle on to the existing system is not easy. Singaporeans have grown used to a relatively cheap registration system and even practising lawyers do not seem to have much awareness of the risks entailed in the system. Currently, a landed property can be transferred for a registration fee of $68.30.[37] It is clear that it would be necessary to increase the current level of fees substantially to support a comprehensive insurance scheme. A second difficulty is that a full blown indemnity scheme following normal insurance principles would be a major industry insuring all titles in the country. It is doubtful whether in the 21st century, there would be much appetite for establishing what would be in effect a large nationalised industry. In theory, it is possible that arrangements could be made for the role to be undertaken by a

34 John Baalman, *The Torrens System in New South Wales* (Lawbook Co, 1951) at p 56. See also S Rowton Simpson, *Land Law and Registration* (Cambridge University Press, 1976) at pp 180–181.

35 Theodore B F Ruoff, *An Englishman Looks at the Torrens System* (Lawbook Co, 1957) at p 13.

36 See Peter J Butt, *Land Law* (Lawbook Co, 5th Ed, 2006) at p 803. See also Pamela O'Connor, "Double Indemnity – Title Insurance and the Torrens System" (2003) Vol 3, No 1, QUTLJJ 141.

37 See Land Titles Rules (Cap 157, R 1, 1999 Rev Ed), Schedule.

private title insurance company. However, private title insurance companies do not presently operate in Singapore and, so long as title insurance remains a purely voluntary matter, there may not be much incentive for such companies to begin operations in a relatively small jurisdiction such as Singapore. At some point in the future, a case on indefeasibility of title may reach the courts and generate enough publicity to cause public disquiet about the possibility of disastrous losses occurring through the operation of the Torrens system. This has happened in Malaysia,[38] and one fears that it can only be a question of time before similar cases reach the courts in Singapore and are publicised in the press. When that happens, there is likely to be pressure to reform the system to provide adequate insurance cover for landowners.

24 It has to be recognised, however, that there is little likelihood of a comprehensive insurance scheme being introduced for registered land in Singapore at any time in the immediate future. Neither the general public, nor even the legal community, are aware of the risks involved in the current setup. To some extent, therefore, this paper is intended as an exercise to raise consciousness of the potential problems. In the absence of a comprehensive insurance scheme, there are palliative measures that can be undertaken by the legislature or by the courts. The rest of this paper will consider some of these measures. It will be seen that while there are significant steps that the legislature could take to reform the current system, the courts can only do justice in individual cases with the risk that the precedents set will further destabilise the system.

II. Mortgagees

25 The case of the fraudulent mortgage calls for special comment because this is one of the easiest types of property fraud to commit. In this situation, A's land is mortgaged without his knowledge to B Bank, which also has no knowledge of the fraud. Sadly, this type of fraud is sometimes committed by solicitors.[39] In the absence of insurance, the question is which of two innocent parties must suffer for a fraud committed by a third party. In the context of an insurance scheme, a simpler question is asked – which party should keep the land and which should get monetary compensation.[40] When the question is framed in this way, it is quite clear that the bank's only interest is in money. The only reason why the bank obtained an interest in the land

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38 *Adorna Properties Sdn Bhd v Boonsom Boonyanit* [2001] 1 MLJ 241. See n 24 of this article.

39 See, eg, *Malayan Banking Berhad v Sivakolunthu Thirunavukarasu* [2008] 1 SLR 149.

40 A useful discussion on this is to be found in Scottish Law Commission Discussion Paper No 125, *Discussion Paper on Land Registration: Void and Voidable Titles* (February 2004) at Part 4 ("The Nature of the Guarantee").

was to serve as security for its money. It is obvious therefore that A should keep the land, while B Bank should receive compensation for the loss of its security. That is the approach adopted in England and it is obviously consistent with the view that land registration offers a state guaranteed title.

26 Torrens lawyers, however, rarely speak of a "state guaranteed title", but rather of "indefeasibility of title". This concentration on the notion of indefeasibility of title leads to perverse results. Once the case is viewed through the prism of indefeasibility, then if the system follows the logic of immediate indefeasibility, as do the Singapore and the Australasian systems, the inevitable result is that, unless B Bank is guilty of fraud, it has an indefeasible title to its mortgage. Assuming that compensation is available from the assurance fund in cases of fraud, this means that B Bank keeps the mortgage, whereas A is compensated by the fund for the loss of value to his property interest.[41] No doubt, A can then use the money to pay off the bank's mortgage, but it does seem an unnecessarily complicated way of reaching a just result.

27 If the system does not pay compensation in cases such as these, the result is that B Bank keeps its mortgage. Unless A has the money to pay it off, the bank will sell his land to recover its debt. The problem is that although both A and B Bank are innocent parties, it is by no means clear that it is fair to push the entire loss on to A. Typically A is an individual, whose entire life savings have been invested in the property. Placing the entire loss on him is a devastating blow, whereas if B Bank lost its mortgage, it would probably be easily absorbed. Placing the entire loss of a third party's fraud on any one of two innocent parties is never fair, but it seems particularly unfair to place it on the party least able to bear the loss. Even worse is the fact that whereas typically there is nothing that A could have done to avoid the loss, B Bank is in a position to take steps to minimise the risk of fraud in cases like this. As Pamela O'Connor ("O'Connor") writes,[42]

> There are sound policy reasons for denying indefeasibility to registered mortgagees. Too much dynamic security undermines fraud control by creating a moral hazard. Institutional lenders are well placed to prevent identity fraud, since they can make the provision of loans conditional upon proof of the borrower's identity. In the language of law and economics, mortgagees are the cheaper cost avoider in the transaction. … [T]he extension of immediate indefeasibility to mortgagees undermines the incentive for mortgagees to verify the

41 See Elise Histed, *Immediate Indefeasibility: A Moral Abdication*, 8th Real Property Teachers' Conference, University of Tasmania (13 July 2007) at pp 14–15 (unpublished).

42 Pamela O'Connor, "Deferred and Immediate Indefeasibility: Bijural Ambiguity in Registered Land Systems" (2009) 13 Edin LR 194 at 207.

> identity of the person signing as mortgagor. Detecting an identity fraud will cost them a transaction; while that which they fail to discover is at the landowner's risk. A careless failure to check the identity of the borrower will not imperil their title.

28 The facts of *Grgic v Australian and New Zealand Banking Group Ltd*[43] illustrate O'Connor's last point well. A bank employee attested the signature of a person who had just been introduced to him as the registered owner, certifying that the person was known to him personally. This did not affect the indefeasibility of the bank's title to its mortgage on the grounds that "a less than meticulous practice as to the identification of persons purporting to deal with land registered under the provisions of the Act does not constitute a course of conduct so reckless as to be tantamount to fraud".[44]

29 In *Russo v Bendigo Bank Ltd*,[45] a conveyancing clerk with three years' experience falsely attested Mrs Russo's signature on the mortgage, knowing that she was breaching a standing instruction from her employer, the mortgagee's solicitor, never to attest a signature unless she had seen the person sign. The solicitor subsequently lodged the mortgage for registration, ignorant both of the forgery of Mrs Russo's signature and his clerk's false attestation. The Victorian Court of Appeal held that even if the clerk had acted dishonestly, she had not acted fraudulently because there was no evidence that the clerk knew that she was putting the mortgage on the path to registration. The solicitor who actually lodged the mortgage for registration certainly understood the consequences of a false attestation, but he was ignorant of the clerk's action and was found to have acted without fraud. Fraud could not be brought home to the mortgagee by aggregating the clerk's knowledge of what had happened with the solicitor's knowledge of the consequences of a false attestation.

30 Cases such as these set the bar for fraud at a high level, but it seems that a similar approach obtains in Singapore too. Both *Grgic v Australian and New Zealand Banking Group Ltd* and *Russo v Bendigo Bank Ltd* were cited with approval in *United Overseas Bank v Bebe bte Mohammad*.[46] It will be remembered that in that case the solicitor's conveyancing clerk who acted for the bank knew that a replacement certificate of title had been applied for, but nevertheless presented the mortgage for registration with the cancelled certificate of title. This was held not to be fraud. At worst, she was guilty of negligence or failure to exercise due diligence and therefore the bank had an indefeasible title to

43 (1994) 33 NSWLR 202.
44 (1994) 33 NSWLR 202 at 122, *per* Powell JA.
45 [1999] 3 VR 376.
46 [2006] 4 SLR 884 at [22] and [34].

its mortgage. To be fair, fraud is a serious allegation and should not be imputed lightly to people. As Chan Sek Keong CJ said, "The hallmark of fraud is dishonesty or moral turpitude, which usually stems from greed, and greed simply means taking something of value which does not belong to you."[47]

31 It is not suggested that these cases have misinterpreted the law as it currently stands. Fraud is an exception to indefeasibility and negligence is not. To blur the line between the two concepts is to destabilise the system causing uncertainty in the law and inviting litigation. The concept of immediate indefeasibility of title is a harsh one. To attempt to ameliorate its effects by inviting litigation around the meaning of "fraud" simply makes matters worse. There are real problems in the current system and they are not solved by generating work for litigation lawyers. Having said that, however, what emerges from these cases is that even gross negligence on the part of a mortgagee will not affect its indefeasibility of title. It seems extremely unfair that careless mortgagees should be able to look to the previous registered proprietors of the land, who may have been totally innocent, to act as their unpaid insurers, effectively protecting them from the consequences of their own negligence. As O'Connor points out, far from discouraging fraud and forgery, immediate indefeasibility removes any incentive to institute procedures to limit fraud on the part of those best placed to do something about the problem.

32 It is only fair to point out that the absence of an identity card system makes identity fraud easier to carry out in Australia than in Singapore. Section 59 of the Singapore Land Titles Act requires a certificate of correctness to be endorsed on any instrument dealing with land. Where a solicitor is employed to act for a party to the instrument, as will obviously be the usual case, the solicitor must sign the certificate and that solicitor must hold a current practising certificate. The identity card numbers of the parties have to be given in the instrument.[48] There is no actual requirement for the documents to be signed in the presence of the solicitor or for the person signing to produce his or her identity card, but in practice this is usually done. This procedure may reduce the possibility of fraud, but there are obvious gaps. In the first place, a system which uses solicitors as gatekeepers will inevitably be ineffective if the solicitor is guilty of fraud.[49] In the second place, while the incidence of forged identity cards in Singapore appears to be low, it is no secret that the current system of identity cards does not use the type of higher security devices that are now to be found in passports.

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47 [2006] 4 SLR 884 at [34].

48 See Form 19 "Transfer", approved under the Land Titles Act, s 51.

49 See, eg, *Malayan Banking Berhad v Sivakolunthu Thirunavukarasu* [2008] 1 SLR 149.

The risk of identity fraud being perpetrated through the use of fake identity cards cannot be dismissed out of hand.

33 It is interesting to note that Queensland amended its system in 2005 to meet concerns about lax identity checking procedures by mortgagees.[50] The Queensland Land Titles Act now denies indefeasibility to mortgagees who fail to take reasonable steps to check the identity of the person purporting to sign as mortgagor, if the signature is actually forged.[51] A mortgagee is deemed to take reasonable steps if it complies with practices prescribed by the Registrar.[52] A mortgagee who seeks the protection of indefeasibility has the burden of proving that it complied with the provisions.[53] The result of failure to comply with these provisions is that the mortgagee will not only lose the benefit of indefeasibility of title, but will also be denied compensation under the Torrens assurance fund.[54]

34 Similar provisions have recently been adopted in New South Wales.[55] These provisions were no doubt enacted in response to particular difficulties which had arisen in these states.[56] Viewed from outside Australia, however, one wonders whether these provisions are perhaps too specific. A simpler alternative approach might be to deny indefeasibility to mortgagees in all cases, as O'Connor suggested. This would place the loss on the party better able to bear it. Also, as has been seen, this would place the loss on the party which is in a position to take steps to minimise the risk of fraud. An additional factor is that institutional mortgagees – even where they are not able to prevent the fraud from incurring – are in a position to factor the risk of fraud into the cost of the mortgages they grant, thereby spreading the risk across the entire community of borrowers. A slight increase in the cost of borrowing would enable institutional mortgagees to self-insure against the risk of loss through fraud in property transactions, just as is done in cases of credit card fraud. An additional advantage of removing the benefits of dynamic security from mortgagees is that it would focus attention on the problem on the part of those best placed to do something about it. It is worth noting that American title insurance companies first entered the Australian market to offer title insurance to mortgagees.[57] It was only at a later stage that they offered title insurance

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50 See Michael Weir, "Indefeasibility: Queensland Style" (2007) 15 APLJ 79.
51 Land Titles Act 1994 (Qld), s 185(1A).
52 Land Titles Act 1994 (Qld), s 11A.
53 Land Titles Act 1994 (Qld), s 185(5).
54 Land Titles Act 1994 (Qld), s 189(1)(ab).
55 See Real Property and Conveyancing Legislation Amendment Act 2009 (NSW), introducing the new s 56C to the Real Property Act 1900 (NSW).
56 See Michael Weir, "Indefeasibility: Queensland Style" (2007) 15 APLJ 79 at 80.
57 Pamela O'Connor, "Double Indemnity – Title Insurance and the Torrens System" (2003) Vol 3, No 1, QUTLJJ 141 at text accompanying n 8 of that article.

policies to home owners. Denying indefeasibility of title to mortgagees might have the salutary effect of creating a market in Singapore for title insurance, which could subsequently be used more generally.

III. Deferred indefeasibility

35 It is only fair to say that any proposal to remove indefeasibility from mortgagees would likely be met with howls of outrage from the banking community. The present system, however, means that mortgagees – even if they are guilty of negligence – can look to innocent homeowners to act as their unpaid insurers in cases of identity fraud. While any proposal to discriminate against mortgagees is unlikely to meet with success, what may be possible is a more far reaching reform to substitute a rule of deferred indefeasibility for the present system of immediate indefeasibility. This reopens an old debate in the Torrens system as to the precise meaning of the concept of indefeasibility. Under a system of immediate indefeasibility, once registration has occurred, a transferee's title is valid and indefeasible, regardless of any irregularity (*eg* fraud or forgery), which may have occurred in the transaction which led to the registration, so long as the transferee is not party to the fraud. Under a system of deferred indefeasibility, the initial registration which is tainted by fraud is not itself indefeasible, even though the transferee is not guilty of fraud. The previous owner has the right to be restored to the register, but only until it is transferred to a third party. Once a third party is registered as owner of the land, the title is considered to be indefeasible. In other words, the indefeasibility is deferred to the next transfer of title after the one tainted by the irregularity.

36 An example may make this clearer. Suppose B steals A's certificate of title and, pretending to be A, forges his signature to a transfer for value of the land to C, who is ignorant of the fraud and then becomes the registered proprietor. C's title is immediately indefeasible, whereas at common law, a forged document would have been a nullity and title would have remained with A. It can be seen that immediate indefeasibility is a rule of pure dynamic security. Under the system of deferred indefeasibility, A could set aside C's title. However, if D, ignorant of the fraud had purchased the land from C and become registered as a proprietor, A could not set aside his registration. C's title, though not itself indefeasible, forms the basis of D's title. The indefeasibility is thus deferred. The logic here is that D relied on the register, which showed C to be the owner, and therefore he is entitled to immunity from A's claim. Although C was innocent, it cannot be said that he relied on the register when he effected the purchase from B. There is therefore no reason why the Torrens system should confer on him an indefeasible title.

37 The theory of deferred indefeasibility was generally accepted in Australia and New Zealand after the Privy Council decision in *Gibbs v Messer*.[58] The registered proprietor of land, Mrs Messer, left the duplicate certificate of title with her solicitor for safekeeping while she went abroad together with a power of attorney in favour of her husband. The family solicitor, Cresswell, forged the signature of her husband as her attorney to a transfer of Mrs Messer's land to a fictitious person, "Hugh Cameron". Cresswell then secured the registration of "Hugh Cameron" as the proprietor of the land. Subsequently, Cresswell executed a mortgage, with "Hugh Cameron" as the mortgagor to two persons named McIntyre, who acted in good faith. When Mrs Messer returned and discovered the fraud, she instituted proceedings, seeking cancellation of the registration in favour of "Hugh Cameron" and cancellation of the registered mortgage in favour of the McIntyres. The McIntyres claimed that they had an indefeasible title to their mortgage, but this was not accepted by the Privy Council. In the words of Lord Watson, "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."[59]

38 This statement seems to be almost a definition of deferred indefeasibility and indeed the case was so understood during the early years of the Torrens system. Subsequently, however, the Privy Council in *Frazer v Walker*[60] in an appeal from New Zealand adopted the theory of immediate indefeasibility, and this in turn was adopted by the High Court of Australia in *Breskvar v Wall*.[61] Interestingly enough, it has been suggested that one of the reasons for the change in approach is because of the nature of the Torrens Assurance Fund.[62]

39 This can best be illustrated by a slight variation to the example given earlier. Suppose B steals A's certificate of title and, pretending to

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58 [1891] AC 248.

59 [1891] AC 248 at 255.

60 [1967] 1 AC 569.

61 (1971) 126 CLR 376. *Gibbs v Messer* has not been overruled, but it is today confined to its peculiar facts. In *Garofano v Reliance Finance Corporation Ltd* (1992) NSW ConvR 55-640 at 59,662, Meagher JA said, "*Frazer v Walker* is authority for the proposition that *Gibbs v Messer*, insofar as it is still good law, only applies when the forgery is in the name of a fictitious person."

62 Robert Chambers, *An Introduction to Property Law in Australia* (Lawbook Co, 2nd Ed, 2008) at p 452.

be A, forges his signature to a transfer for value of the land to C, who is ignorant of the fraud and then becomes the registered proprietor. Subsequently, C grants a registered mortgage of the land to D. Immediate indefeasibility would mean both C and D would have an indefeasible title to their respective interests and that A could recover compensation from the assurance fund, given that he is unlikely to be able to make a successful claim against the fraudster, B. Deferred indefeasibility would mean that C's title would be cancelled and A would regain his interest in the land. However, D's mortgage was created by a valid document and he relied on the state of the register. The mortgage is therefore indefeasible and A recovers the land subject to it. A would be able to claim compensation from the assurance fund to pay D and discharge the mortgage (assuming B did not repay the loan), as his loss is caused by the operation of the Torrens system. However, C would not be entitled to compensation from the assurance fund, as he was not deprived of an interest in land by the system. He was tricked into paying money by the fraudster, B, who was not the person he pretended to be. The same loss would have occurred if the land had been unregistered. In the context of the usual Torrens assurance fund, it may have been felt that it made more sense to let C keep the land and compensate A, than to let A get his land back and bankrupt C. While this may explain the switch from deferred to immediate indefeasibility, the problem here is caused by the restrictions on compensation from the assurance fund. A more sensible result might be to give the land back to A and compensate C. After all, C's interest in the land is relatively recent. It might have been A's land for generations.

40 As the above example shows, in the context of a comprehensive insurance scheme, the conflict between immediate and deferred indefeasibility resolves itself into the question of who should keep the land and who should get monetary compensation. Under the English system it is indeed possible to permit A to recover the land and compensate C,[63] which no doubt explains the almost total absence of any discussion in the English case law or legal literature about the two types of indefeasibility. However, the Torrens system, with its restrictions on insurance coverage, creates a "winner takes all" situation, which no doubt explains the large number of cases in different jurisdictions on whether indefeasibility is immediate or deferred.[64] In

63 Normally the register is not rectified to defeat the title of a proprietor in possession, but this is possible either with the proprietor's consent or where "he has by fraud or lack of proper care caused or substantially contributed to the mistake" or "it would for any other reason be unjust for the alteration not to be made". See Land Registration Act 2002 (c 9) (UK), Sch 4, para 3(2).

64 See, eg, *Frazer v Walker* [1967] 1 AC 569; *Breskvar v Wall* (1971) 126 CLR 376; *Adorna Properties Sdn Bhd v Boonsom Boonyanit* [2001] 1 MLJ 241; *Household Realty Corp Ltd v Liu* (2005) 261 DLR (4th) 679; *Lawrence v Maple Trust Co* (2007) 278 DLR (4th) 698.

the context of a system where there is virtually no insurance coverage of any type, a system of deferred indefeasibility is arguably fairer because it places the risk of fraud on the party best able to take steps to prevent it. In most cases this is the purchaser or the mortgagee, who can take steps to ascertain the identity of the person purporting to be the registered proprietor. As has been pointed out above, passing the risk to the registered proprietor leads to a moral hazard, as it encourages the purchaser or the mortgagee to be negligent in ascertaining the identity of the vendor. It is worthy of note that the move from deferred to immediate indefeasibility in Malaysia occasioned by *Adorna Properties Sdn Bhd v Boonsom Boonyanit* has coincided with a dramatic increase in property fraud cases. It is true that the registered proprietor can minimise the risk of property fraud by taking steps to prevent loss of the certificate of title.[65] However, as the facts of *United Overseas Bank v Bebe bte Mohammad*[66] suggest, this precaution may not be effective. There is still the risk of a replacement certificate of title being obtained. Furthermore, the registered proprietor cannot be faulted for handing over his certificate of title to a solicitor who then goes on to commit fraud. A further advantage of deferred indefeasibility is that it cuts the Gordian knot in relation to the problem of personal equities or the *in personam* exception to immediate indefeasibility, which has become such a fruitful source of litigation in those Torrens systems which opt for immediate indefeasibility.

41 It is possible that the absence of any provision for an assurance fund in the Malaysian National Land Code led to that statute adopting a rule of deferred indefeasibility. Certainly, when *Adorna Properties Sdn Bhd v Boonsom Boonyanit* reinterpreted the statute as providing for immediate indefeasibility, this was greeted with dismay in legal circles amid calls for a return to the old system.[67] Difficulties have occurred in other jurisdictions because of the unclear drafting of the relevant statutes. The Singapore position is quite clear. Baalman inserted the words "whether or not he dealt with a proprietor" in what is now s 46 of the Land Titles Act to ensure that *Gibbs v Messer* would not be followed here.[68] Singapore does have an assurance fund but, as has been seen, it

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65 See Robin Edwards & Jennifer O'Reilly, "The Duel between Immediate and Deferred Indefeasibility" [1999] Sing JLS 82 at 109.

66 [2006] 4 SLR 884.

67 See n 24 of this article. The Malaysian Bar Council has called for legislation to overturn the ruling in *Adorna Properties Sdn Bhd v Boonsom Boonyanit* [2001] 1 MLJ 241. See "Code Change Vital to Curb Land Scams", *New Straits Times* (22 March 2007). The Attorney-General's Chambers has recently announced that it will propose amendments to the National Land Code to achieve this. See V Anbalagan, "Land Code Changes in Store to Tackle Fraud", *New Straits Times* (30 October 2009).

68 John Baalman, *The Singapore Torrens System* (Singapore Government Printer, 1961) at pp 78–80. See also *United Overseas Bank v Bebe bte Mohammad* [2006] 4 SLR 884 at [92] and the paragraphs that follow.

can not unfairly be described as vestigial. While the best answer to the problem would be a comprehensive insurance scheme, in the absence of such an arrangement, deferred indefeasibility would be a better approach than the current rule of immediate indefeasibility. Given the clear wording of the Singapore statute, it is not open to the courts to effect a change. It must come from the legislature.[69]

IV. Hard cases make bad law

42 The unfairness inherent in the present system[70] means that the courts are faced with difficult cases from time to time. Inevitably, courts try to reach a fair result in spite of the obstacles placed in their path by the legislation. The most common techniques for doing this are an expansion of the notion of fraud and the finding of a personal equity. In the first case, actual notice[71] or gross negligence is equated with fraud, thus enabling the court to rely on the statutory exception to indefeasibility embodied in s 46(2)(*a*) or its equivalent in other jurisdictions. In the case of a personal equity, reliance is placed on the statement in *Fraser v Walker*[72] as to the validity of claims *in personam* and effectively a common law exception to indefeasibility is created. However, hard cases make bad law. In subsequent cases plaintiffs who have lost their land as a result of the system strive to extend further these inroads into indefeasibility. The result is increasing litigation and instability in a system which was designed to promote an easy and stable system of conveyancing. Faced with this reality, in recent years the courts have tried to tighten the exceptions to indefeasibility. This process has already been noted in the context of the discussion of the meaning of fraud.[73] *United Overseas Bank v Bebe bte Mohammad* achieves the same goal in relation to claims *in personam* by declaring that "having

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69 If this approach is adopted, care will need to be taken in the wording of any reformulation of the meaning of indefeasibility. Pamela O'Connor, "Deferred and Immediate Indefeasibility: Bijural Ambiguity in Registered Land Systems" (2009) 13 Edin LR 194 at 208–216 analyses the complexity in the Canadian cases, where the courts have distinguished between single transaction fraud (the forger takes on the identity of the registered proprietor and sells the land to an unsuspecting purchaser) and double transaction fraud (where the wrongdoer procures registration in his name and then transfers to another).

70 Interestingly enough, even a supporter of immediate indefeasibility has referred to "the often harsh, immoral nature of this doctrine". See Lynden Griggs, "Resolving the Debate Surrounding Indefeasibility Through the Eyes of a Consumer" (2009) 17 APLJ 259.

71 This should not be possible in Singapore, given the wording of s 47(2) of the Land Titles Act.

72 "[T]his principle [of immediate 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": *Frazer v Walker* [1967] 1 AC 569 at 585.

73 See text accompanying n 43 of this article.

regard to the policy objectives of the LTA to reduce uncertainty and to give finality in land dealings, our courts should be slow to engraft onto the LTA personal equities that are not referable directly or indirectly to the exceptions in s 46(2) of the LTA".[74] Some may object to this process, as it means that unjust results are allowed to stand. The difficulty, however, is that a fair result obtained only after protracted litigation – often up to the highest court of the land – is a very expensive and unsatisfactory way of achieving justice. Moreover, it is arguable that by reaching what appear to be fair results within the terms of the existing system, the courts are actually obscuring the problems and thus delaying reform which can only be brought about by legislation.

43 Nevertheless, there can be no doubt that immediate indefeasibility of title is a harsh doctrine. While it is submitted that the harshness cannot be ameliorated by encouraging litigation, the doctrine should be kept within its natural limits and not extended artificially. It needs to be borne in mind that although the language of s 46(1) of the Land Titles Act is very broad, it provides only that the registered proprietor shall hold the land "free from all encumbrances, liens, estates and interests". It does not provide the registered proprietor with any immunity from personal claims. It is a defence only against proprietary claims or proprietary remedies with respect to the land in question. There is nothing in the section to prevent claims being brought against the registered proprietor for personal remedies. The registered proprietor may, therefore, be sued at common law, *eg* in tort or in contract, or in equity, *eg* for dishonest assistance in a breach of trust or receipt of trust property. To the extent that the remedy in these cases is a monetary or other personal order and does not lie against the land itself, indefeasibility of title offers no defence to the registered proprietor. There is, therefore, no need to resort to the doctrine of personal equities to support such claims.

44 This view has been criticised. "If a plaintiff brought an action against a registered proprietor on the basis of their prior title (by for example, alleging that the transfer was effected on a forged instrument and so was a nullity), it matters not whether the plaintiff was seeking ejectment or simply a personal remedy. The claim would fail because it is prohibited by the indefeasibility principle. In short, indefeasibility is concerned not with the remedial prospects of the claim but with the basis of the claim."[75] With respect, this criticism overlooks the fact that the granting of an indefeasible title to the registered proprietor has

74 [2006] 4 SLR 884 at [91], *per* Chan CJ. The Australian courts have also sought to rein in the personal equity exception to indefeasibility. See, *eg*, *Garofano v Reliance Finance Corporation Ltd* (1992) NSW ConvR 55-640.

75 Kelvin F K Low, "The Nature of Torrens Indefeasibility: Understanding the Limits of Personal Equities" (2009) 33 Melb U L Rev 205.

effects across the entire legal system. It does so simply because it makes the registered proprietor the owner of the land. Section 46(1) clearly prevents proprietary claims against the registered proprietor, but it does not purport to bar personal claims. Nevertheless, in the example given, the plaintiff cannot bring an action for damages in trespass against the registered proprietor. The reason is not because the claim is barred by the language of s 46(1), but rather because the registered proprietor, as the owner of the land, has a better right to possession of the land than the plaintiff and therefore has a defence to the claim recognised at common law.

45 In other cases the registered proprietor has no defence at common law or in equity to a personal claim. An example would be a claim for monetary compensation in satisfaction of the inchoate equity arising against the registered proprietor in cases of proprietary estoppel. Under the Singapore Torrens system, as interpreted in *United Overseas Bank v Bebe bte Mohammad*, exceptions to indefeasibility should be found within the language of the statute. As the inchoate equity is unfortunately not listed as an exception to indefeasibility, the court cannot grant a proprietary remedy, for example, the transfer of the fee simple from the registered proprietor to the estoppel claimant, but damages can be awarded against the registered proprietor.[76]

46 The suggestion that indefeasibility of title can operate directly on personal claims is potentially a very dangerous one. The suggestion has been made in Australia that the indefeasibility of a forged mortgage validates the personal covenant to repay the loan contained in the mortgage document.[77] If correct, this would mean not only that the registered proprietor would find his land subject to a mortgage he had not created,[78] but also that he would become personally liable under a covenant to which he had never agreed to repay moneys he had never received. This raises the unpalatable prospect that where the value of the land is less than the amount of money outstanding on the loan, defrauded registered proprietors might lose more than their land. Such an appalling result can be avoided by recognising that indefeasibility of title is a creation of statute, which cannot therefore be extended beyond the clear language of s 46(1).

47 *United Overseas Bank v Bebe bte Mohammad* creates a clear framework for the operation of the doctrine of indefeasibility of title

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76 If, contrary to the *obiter dicta* in *United Overseas Bank v Bebe bte Mohammad*, constructive trusts are within the trust exception to indefeasibility, then a proprietary remedy can be achieved through the indirect method of imposing a constructive trust on the registered proprietor's land.

77 Peter J Butt, *Land Law* (Lawbook Co, 5th Ed, 2006) at para 2022.

78 This is clearly the law in Australia after *Frazer v Walker* [1967] 1 AC 569 and *Breskvar v Wall* (1971) 126 CLR 376.

and the exceptions to it, which should do much to stabilise the Singapore system. The main difficulty arising from this case is the narrow construction put in *obiter dicta* on the exception to indefeasibility contained in s 46(2)(*c*) according to which one can "enforce against a proprietor who is a trustee the provisions of the trust". This was understood as limited to express trusts and not covering resulting or constructive trusts. If this is correct, then where W contributes towards the acquisition of a house registered in H's name, her claim to a share in the house on resulting trust principles is defeated by H's indefeasible title. The same would be true where W claims a share in the house on the basis of a common intention constructive trust.[79] This seems most unjust. Strictly speaking, it means that W cannot even rightfully lodge a caveat to protect her interest.[80] Section 46(1) states that H holds the property "free from all encumbrances, liens, estates and interests". If W's interest under the resulting trust is not an exception to indefeasibility, then H's indefeasible title has defeated her interest. However, in the recent case of *Loo Chay Sit v Estate of Loo Chay Loo*[81] it was stated in *obiter dicta* that resulting trusts are an exception to indefeasibility of title. If this is correct, then the same must be true of constructive trusts,[82] as there is no basis to distinguish between the two types of trust. In these circumstances, W will probably be safe in lodging a caveat if she is in dispute with H. Given the doubts as to whether or not an interest under a resulting or constructive trust is indeed an exception to indefeasibility, there is little risk of her being ordered to pay compensation under s 128, even if H were successful in obtaining the removal of the caveat under s 127 on the grounds that her interest has been defeated by his indefeasible title.

48 In contrast to the narrow interpretation placed on the trust exception, a wide construction was given in *United Overseas Bank v Bebe bte Mohammad* to s 46(2)(*b*), which enables a claimant "to enforce against a proprietor any contract to which that proprietor was a party". This was understood not as limited to actions for specific performance or damages for breach of contract against the registered proprietor, as a plain reading of the language might suggest, but rather as extending to

79 It may sometimes be possible to bring a claim to an interest under a resulting or constructive trust within the contract exception contained in s 46(2)(*b*). The application of s 46(2)(*c*) to resulting and constructive trusts is discussed in more detail by the present writer in "Back to Basics: Indefeasibility of Title under the Torrens System" [2007] Sing JLS 117 at 124–127.

80 However, *cf United Overseas Bank v Bebe bte Mohammad* [2006] 4 SLR 884 at [96]. See also W J M Ricquier, *Land Law* (LexisNexis, 3rd Ed, 2007) at p 122.

81 [2009] SGCA 47 at [14], *per* Phang JA.

82 However, for the avoidance of doubt, it should be said that a constructive trust which arises simply because the registered proprietor has notice of a prior unregistered interest cannot be an exception to indefeasibility, given the clear language of s 47.

the enforcement of any right arising out of the contract against the registered proprietor. An illustration is provided by the Malaysian case of *Oh Hiam v Tham Kong*.[83] A purchaser was registered (by a common mistake of both the vendor and the purchaser) as proprietor of a greater part of the land than should have been the case. Had this case arisen in Singapore, "it would have been a case of one party enforcing his contractual rights against the registered proprietor to correct a common mistake under s 46(2)(*b*) of the LTA".[84] In this case, the vendor was seeking rectification of the transfer, and it is not unreasonable to characterise this as a form of enforcement of his contractual rights.

49 Where one party seeks to set aside the transfer on the basis of some vitiating factor in the underlying contract, this cannot be described as "a case of one party enforcing his contractual rights". Claims to set aside a transfer or a mortgage on the grounds of undue influence, misrepresentation, duress, unconscionability[85] and the like are not exceptions to indefeasibility under s 46(2)(*b*). However, they can be dealt with under the fraud exception contained in s 46(2)(*a*). Some commentators object to this on the basis that it stretches the meaning of "fraud".[86] However, "fraud" is not defined in the Act except for statements that knowledge of the existence of any unregistered interest shall not of itself be imputed as fraud.[87] As Baalman pointed out, "Fraud is not defined by the Ordinance, for the reason that it would be no more practicable to attempt a definition now than it has been at any other period in the history of the Torrens System … The general meaning has been left at large, to be determined by the Court in the particular circumstances of each case."[88] Lord Lindley's statement that, "Fraud means actual fraud, dishonesty of some sort, not what is called constructive or equitable fraud"[89] has been widely quoted, but it is not a statutory definition. In *Bahr v Nicolay (No 2)*[90] Mason CJ and Dawson J expressed the view that this statement did not rule out all forms of equitable fraud.[91] More recently, a unanimous High Court of Australia has said, "Not all species of fraud which attract equitable remedies will

83 [1980] 2 MLJ 159.

84 *United Overseas Bank v Bebe bte Mohammad* [2006] 4 SLR 884 at [53], *per* Chan CJ.

85 See, *eg*, *Commercial Bank of Australia v Amadio* (1983) 115 CLR 447.

86 See, *eg*, Tan Sook Yee, Tang Hang Wu & Kelvin F K Low, *Principles of Singapore Land Law* (LexisNexis, 3rd Ed, 2009) at paras 14.107 and 14.109.

87 Sections 47(2) and 49(2).

88 John Baalman, *The Singapore Torrens System* (Singapore Government Printer, 1961), quoted with approval by Chan CJ in *United Overseas Bank v Bebe bte Mohammad* [2006] 4 SLR 884 at [29].

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

90 (1988) 164 CLR 604 at 614.

91 See also *Latec Investments Ltd v Hotel Terrigal Pty Ltd* (1965) 113 CLR 265 at 273–274, where Kitto J held that a collusive and colourable sale by a mortgage company to its subsidiary was a plain case of fraud. See also *United Overseas Bank v Bebe bte Mohammad* [2006] 4 SLR 884 at [91].

amount to fraud in the statutory sense",[92] which clearly implies that some might do so. As to which, Powell JA said in *Grgic v Australian and New Zealand Banking Group Ltd*, that "those species of 'equitable fraud' which are regarded as falling within the concept of 'fraud' for the purposes of … the Act are those … in which there has been an element of dishonesty or moral turpitude on the part of the registered proprietor of the subject interest or on the part of his or its agent".[93]

50 As can be seen, so long as the trust exception in s 46(2)(*c*) is understood to cover all types of trust, there is really no need to go outside the statutory codification of the *in personam* doctrine. If the language of the statute is felt to be inadequate in some way, or if it is desired to add further exceptions on policy grounds,[94] the best way to do this is by amending the statute.[95] In any case, while accepting the basic notion that the exception had been codified in Singapore, Chan Sek Keong CJ did not rule out completely the possibility of further exceptions being made by the courts, should the need arise. His precise words were that "having regard to the policy objectives of the LTA to reduce uncertainty and to give finality in land dealings, our courts should be *slow* to engraft onto the LTA personal equities that are not referable directly or indirectly to the exceptions in s 46(2) of the LTA".[96] [emphasis added]

51 The crucial point here is the policy objective of reducing uncertainty and giving finality in land dealings. The great merit of Baalman's codification of the *in personam* doctrine is that it goes a long way towards meeting this central objective of the Torrens system. It

92 *Bank of South Australia Ltd v Ferguson* (1998) 192 CLR 248 at 255.

93 (1994) 33 NSWLR 202 at 221.

94 A possible candidate might be the case of undue influence in tripartite relationships, as occurred in *Barclays Bank v O'Brien* [1994] 1 AC 180 and *Royal Bank of Scotland v Etridge (No. 2)* [2002] 2 AC 773. The claim by the wife to set aside a mortgage she has granted the bank under the undue influence of her husband cannot come under the contract exception in s 46(2)(*b*), nor could such a claim generally be brought under the fraud exception in s 46(2)(*a*), as the bank's failure to take the necessary steps to ensure the wife receives independent legal advice is more likely to be the result of negligence than dishonesty or moral turpitude. It is suggested in Tan Sook Yee, Tang Hang Wu & Kelvin F K Low, *Principles of Singapore Land Law* (LexisNexis, 3rd Ed, 2009) at para 18.191 that there is a policy that the banks should act as gatekeepers to prevent undue influence by a husband on his wife and that this policy should override that of immediate indefeasibility. However, there is nothing in the statute to enable the courts to ignore the clear wording of s 46(1) on policy grounds, nor is it clear why banks should be gatekeepers in cases of undue influence, when they are clearly not gatekeepers in cases of identity fraud: see text accompanying n 42 of this article and following.

95 It might be desirable to amend the statute to include in s 46(2) the inchoate equity arising in cases of proprietary estoppel. However, see n 76 of this article.

96 *United Overseas Bank v Bebe bte Mohammad* [2006] 4 SLR 884 at [91].

would be a retrograde step for Singapore to return to the inherent vagueness of the extra-statutory common law exception to indefeasibility, as developed in other jurisdictions which do not have the benefit of a statutory codification.[97] While there is no doubt that immediate indefeasibility is capable of causing great unfairness, the problem needs root and branch reform. Tinkering with it by developing unclear and uncertain exceptions to indefeasibility merely encourages litigation, making a bad situation worse.[98]

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97 The advantages of statutory codification of the *in personam* doctrine are considered in detail by the present writer in "A Hard Look at *Bahr v Nicolay*" in *Lives in the Law: Essays in Honour of Peter Ellinger, Koh Kheng Lian, Tan Sook Yee* (Dora Neo, Tang Hang Wu & Michael Hor eds) (Faculty of Law, National University of Singapore & Academy Publishing, Singapore Academy of Law, 2007) at p 191.

98 In this connection it is telling that the current editors of Tan Sook Yee, Tang Hang Wu & Kelvin F K Low, *Principles of Singapore Land Law* (LexisNexis, 3rd Ed, 2009) at paras 14.105 and following, having rejected the view taken in *United Overseas Bank v Bebe bte Mohammad* as "narrow", proceed to advance two completely different and mutually conflicting approaches to the *in personam* exception.