Published on e-First 21 March 2024

THE TORRENS SYSTEM UNDER THE LAND TITLES ACT

A "*Bebe*"[1] Retrospective

This article advances a principled approach to give certainty and finality to the registered title under the Land Titles Act 1983 ("LTA"). It requires the court to interpret the statutory exceptions to indefeasibility under the LTA as exclusive categories or instances of the prescribed causes of action that may defeat or encumber the registered title wholly or partially. It is argued that this approach gives effect to the purpose of the LTA. No adverse claim against the registered title, if not based on such cause of action, is permissible. These causes of action are, respectively: (a) fraud; (b) breach of contract; (c) breach of trust; (d) legal disability; and (e) illegality.

CHAN Sek Keong SC
LLB (University of Malaya in Singapore), LLD (Hons) (National University of Singapore), LLD (Hons) (Singapore Management University); Distinguished Fellow (Hon), Faculty of Law, National University of Singapore.

I. Introduction

1 The Land Titles Ordinance 1956 ("Ordinance") introduced the Torrens system of land titles and dealings in Singapore to replace the common law conveyancing system by deeds that were required to be registered under the Registration of Deeds Ordinance 1886[2] ("1886 Ordinance"). The Ordinance was "designed to provide simplicity and certitude in transfers of land",[3] *ie*, finality of the registered title of the proprietor. The Ordinance was re-enacted, with amendments, and is now referred to as the Land Titles Act 1993 ("LTA").

1 *United Overseas Bank Ltd v Bebe bte Mohammad* [2006] 4 SLR(R) 884. This author delivered the judgment of the court in this appeal.

2 Section 13(4) of the Registration of Deeds Ordinance 1886 was enacted as s 14 of the Yorkshire Registries Act 1884 (c 54) (UK). Currently, the 1886 Ordinance is known as the Registration of Deeds Act 1988 (2020 Rev Ed).

3 The Privy Council said in *Oh Hiam v Tham Kong* [1980] 2 MLJ 159: "The Torrens system is designed to provide simplicity and certitude in transfers of land, which is amply achieved without depriving equity of the ability to exercise its jurisdiction *in personam* on grounds of conscience."

© 2024 Contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.

2 The Land Titles Bill (the "Bill") was drafted by John Baalman ("Baalman") and modelled on the Real Property Act 1900,[4] a Torrens statute. In 1956, the Torrens system was more than a century old, having been first introduced in Australia, New Zealand, Canada and even in the Malay States by 1891.

3 The Bill was passed by the Legislative Assembly without amendment, despite objections from the local Bar Committee to certain clauses in the Bill. Baalman helpfully wrote a detailed commentary, entitled *The Singapore Torrens System: Being a Commentary on the Land Titles Ordinance 1956 of the State of Singapore*[5] ("*Commentary*"), to familiarise administrators, lawyers and the courts with the new system. He explained:[6]

> It would not be strictly accurate to describe this Ordinance as a new land 'code'. Planted as it is in a jurisdiction already subject to English law, it would be more apt to call it a new conveyancing system. It certainly makes new inroads on certain aspect of the substantive law of property, e.g., where it devalues the effect of instruments (s. 27); and abrogates the doctrine of notice (s. 29). But it will be found that the alterations go no further than is necessary to ensure the smooth running of this conveyancing machine which replaces the horse-and-buggy of the common law.
>
> *Principles of equity still survive to the extent to which they do not conflict with the new statutory provisions. Equitable interests in registered land still subsist and be dealt with until they clash with the rights of a registered proprietor*. 'The whole course of judicial interpretation of the Real Property Act has recognised the old law and land under the Act': per *Harvey in Tietyens v Cox* (1916) 17SR 48, 54. When those interests do clash, the rights of the proprietor prevail – see *Haji Abdul Rahman v Mahomed Hassan* [1917] AC 209; *Abigail v Lapin* [1934] AC 49; *Barry v Heider* (1914) 19 CLR; *Butler v Fairclough* (1917) 23 CLR 78.
>
> The most fundamental change in law effected by the Ordinance is that which replaces the legal estate of the common law, with a statutory 'registered estate'. Title to land under the provisions of the Ordinance rests, not on any rule of the common law which says that ownership passes from one person to another by the act of the owner in executing a certain document, but on sections of the Ordinance (notably ss. 27, 28) which say that the title passes when a certain Government official enters and signs a memorial on the folium of the book – s. 27. It is the act of the signing this memorial which divests the existing

4 NSW. See Alvin W-L See, "The Torrens System in Singapore: 75 Years from Conception to Commencement" (2022) 62 AJLH 66. See also Melissa Mak, "Land Law: Establishing Principles in Discrete Aspects" in *Singapore Law – 50 Years in the Making* (Goh Yihan & Paul Tan gen eds) (Academy Publishing, 2015) at pp 714–717.

5 Government of the State of Singapore, 1961.

6 John Baalman, *The Singapore Torrens System: Being a Commentary on the Land Titles Ordinance 1956 of the State of Singapore* (Government of the State of Singapore, 1961) at p 7.

© 2024 Contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.

owner and vests in his successor a statutory title corresponding, in most of its terminology and incidents, with a title under the common law. 'It is not the parties who effectively transfer the land, but it is the State that does it, and so in certain cases more fully than the party could. In short, a transferee seeking registration of transfer seeks State affirmation of his position'.

Estates and interests in land under the Ordinance are either 'registered' or 'unregistered'. Almost invariably the latter will be equitable estates or interests. And it is customary to call them such, just as it is customary to refer to the registered proprietor's 'legal' estate. But in estimating the relative vulnerability of an unregistered interest, nothing will hinge on whether it rests on doctrines of equity or otherwise. It is simply an unregistered interest, and unless protected by a caveat,[7] has no status against a purchaser dealing with a proprietor of registered land.

[emphasis added; reference added]

II. Legislative framework

4 The Ordinance provided the following framework for the new system:

(a) a statutory land register to record all land titles converted from state or common law titles;[8]

(b) provisions for the estate or interest in registered land to pass upon registration of the instrument of transfer, for particulars to be entered in the land register[9] and for priority according to the date of registration;

(c) the land register to be conclusive evidence in all courts of law that the person named as proprietor is the owner of a paramount estate or interest in the land described therein, subject to any entries or notifications entered therein;[10] and

(d) provisions to keep all trusts off the land register, for all unregistered interests to be protected by caveat notified in the land register,[11] and for priority according to the date of notification.[12]

7 See s 115(1) of the Land Titles Act 1993.
8 Land Titles Act 1993 (2020 Rev Ed) ss 8–9.
9 Land Titles Act 1993 (2020 Rev Ed) ss 45(1) and 45(3).
10 Land Titles Act 1993 (2020 Rev Ed) s 36(1).
11 Land Titles Act 1993 (2020 Rev Ed) s 115.
12 Land Titles Act 1993 (2020 Rev Ed) s 119.

© 2024 Contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.

A. *Estate of proprietor paramount*

5 The conception of the paramount or indefeasible title[13] is the foundation of the Torrens system of title.[14] However, as Baalman has explained, principles of equity survive and equitable estates subsist so long as they do not conflict with the new statutory provisions or the rights of the registered proprietor under the principle of indefeasibility.

6 Baalman explained further:[15]

> The Torrens System of land registration is predominantly a purchaser's system. Its aim is to facilitate the transfer of land as a commercial commodity by removing most of the financial loss which beset purchasers under the general law. As a transferee who does not give value for his land is not exposed to that risk, there is no need to protect him.[16] [reference added]

To achieve this objective, s 46(1) of the LTA vests in the purchaser,[17] upon becoming proprietor, a paramount estate or an indefeasible title to the land. However, indefeasibility is not absolute, as ss 46(1) and 46(2) of the LTA provide the instances in which it may be defeated, wholly or partially.

---

13 In *Frazer v Walker* [1967] 1 AC 569, the Privy Council explained the origin of this usage (at 580–581):

> It is these sections [62 and 63 which provide protection to the registered proprietor against claims and proceedings] which, together with those next referred to, confer upon the registered proprietor what has come to be called 'indefeasibility of title.' The expression, not used in the Act itself, is a convenient description of the immunity from attack by adverse claim to the land or interest in respect of which he is registered, which a registered proprietor enjoys. This conception is central in the system of registration. It does not involve that the registered proprietor is protected against any claim whatsoever; as will be seen later, there are provisions by which the entry on which he relies may be cancelled or corrected, or he may be exposed to claims in personam. These are matters not to be overlooked when a total description of his rights is required. But as registered proprietor, and while he remains such, no adverse claim (except as specifically admitted) may be brought against him.

The Land Titles Act 1993 also does not use the expression "indefeasible" to describe the nature of proprietor's title.

14 *Bahr v Nicolay (No 2)* (1988) 164 CLR 604 at [10], *per* Mason CJ and Dawson J.

15 John Baalman, *The Singapore Torrens System: Being a Commentary on the Land Titles Ordinance 1956 of the State of Singapore* (Government of the State of Singapore, 1961) at p 86.

16 Section 46(3) of the Land Titles Act 1993 provides: "Nothing in this section shall confer on a proprietor claiming otherwise than as a purchaser any better title than was held by his immediate predecessor."

17 "Purchaser" is defined in s 4 of the Land Titles Act 1993 to mean "a person who, in good faith and for valuable consideration, acquires an estate or interest in land, and includes a mortgagee, chargee and lessee; and 'purchase' shall have a corresponding meaning".

(cont'd on the next page)

© 2024 Contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.

7 Section 46(1) of the LTA provides:

Estate of proprietor paramount

46.—(1) Despite —

(*a*) the existence in any other person of any estate or interest, whether derived by grant from the State or otherwise, which but for this Act might be held to be paramount or to have priority; and

(*b*) any failure to observe the procedural requirements of this Act,

any person who becomes the proprietor of registered land, whether or not that person dealt with a proprietor, and despite any lack of good faith on the part of the person through whom that person claims, holds that land free from all encumbrances, liens, estates and interests except such as may be registered or notified in the land-register, but subject to —

(*c*) subsisting exceptions, … contained or implied in the State title thereof;

(*d*) any subsisting easement or public right of way … and any statutory easement implied under … the State Lands Act 1920;

(*e*) any statutory obligation as defined in section 142;

(*f*) the power to correct errors conferred on the Registrar by section 159;

(*g*) the power to rectify the land-register conferred upon the court by section 160;

(*h*) any tenancy not exceeding;

(*i*) the power conferred on the court to make a declaration in respect of any transfer or an order to rectify the land-register and the power conferred on the Registrar to suspend or cancel the registration of the transfer and any related instrument by section 24 of the Residential Property Act 1976 in respect of any residential property [… as defined therein].

8 The header of s 46 of the LTA ("Estate of proprietor paramount") signifies that the proprietor's title is paramount, rather than "indefeasible" in its ordinary sense of not being defeasible. It is paramount to the extent that the proprietor "holds that land free from all encumbrances, liens, estates and interests except such as may be registered or notified in the

---

The Land Titles Ordinance 1956 did not define "purchaser". However, s 18(5) provided: "When a memorial of registration has been signed by the Registrar and sealed, the person named therein as taking an estate or interest shall become the proprietor of that estate or interest."

In *Bahr v Nicolay (No 2)* (1988) 164 CLR 604, Wilson and Toohey JJ said at [45] that "*bona fide*" must be equated with "in the absence of fraud".

© 2024 Contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.

land-register". Paramountcy or indefeasibility ensues by overreaching all such unregistered or un-notified encumbrances and interests. It may therefore be said that the concept of indefeasibility excludes all such interests. Hence, the proprietor does not need to be protected from any claims based on prior title as they have been overreached.

B. Defeasibility of the registered title

9 Sections 46(2)(*a*)–46(2)(*e*) of the LTA specify the defeasible claims or causes of action, as follows:

> (2) Nothing in this section shall be held to prejudice the rights and remedies of any person —
>
> (*a*) to have the registered title of a proprietor defeated on the ground of fraud or forgery to which that proprietor or that proprietor's agent was a party or in which that proprietor or that proprietor's agent colluded;
>
> (*b*) to enforce against a proprietor any contract to which that proprietor was a party;
>
> (*c*) to enforce against a proprietor who is a trustee the provisions of the trust;
>
> (*d*) to recover from a proprietor land acquired by him or her from a person under a legal disability which was known to the proprietor at the time of dealing; or
>
> (*e*) to recover from a proprietor land which has been unlawfully acquired by him or her in purported exercise of a statutory power or authority.

10 The specified claims or causes of action under ss 46(2)(*a*)–46(2)(*e*) are, respectively: (a) fraud or forgery by the proprietor or his agent; (b) breach of contract to which he is a party; (c) breach of trust of property of which he is a trustee; (d) acquisition of land from a person under a legal disability known to him at the time of dealing; and (e) unlawful acquisition by the proprietor in purported exercise of a statutory power or authority.

11 The remedies and reliefs which a court may grant in the exercise of its statutory (including legal and equitable) jurisdiction are as follows:

(a) an injunction to restrain the proprietor from disposing of the land pending the decision of the court;

(b) specific performance of a contract of sale of the land;

(c) restitution of land unlawfully or wrongfully acquired by the proprietor;

© 2024 Contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.

(d) an order for the transfer of the land to the claimant on the basis of an equitable or proprietary estoppel, which would be dishonest, or unconscionable or inequitable on the part of the proprietor to deny; and/or

(e) damages as an alternative claim, in the event that the land cannot be recovered, (*eg*, where the proprietor has disposed of it to a purchaser).

12 The above remedies were available under Singapore law in 1956. A currently undecided issue is whether the remedial constructive trust is available to a claimant to recover land from the proprietor. In 1956, Baalman would not have known of the remedial constructive trust since it was not part of English or Australian or Singapore law. In 1996, Lord Browne-Wilkinson said in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council*:[18]

> [T]he remedial constructive trust, *if introduced into English law*, may provide a more satisfactory road forward. The court by way of remedy might impose a constructive trust on a defendant who knowingly retains property of which the plaintiff has been unjustly deprived … [emphasis added]

In *Ching Mun Fong v Liu Cho Chit*,[19] the Court of Appeal decided the appeal on the basis, but without holding, that the remedial constructive trust was part of Singapore law. In *FHR European Ventures LLP v Cedar Capital Partners LLC*[20] ("*FHR*"), the Supreme Court of the United Kingdom held, *per curiam*, that the concept of a remedial constructive trust is not part of English law.[21]

13 *FHR* has yet to be considered by the Singapore Court of Appeal. This article takes the position that the remedial constructive trust is not applicable to claims to recover land under the LTA, or is an unnecessary remedy in any event.

18 [1996] AC 669 at 716.
19 [2000] 1 SLR(R) 53.
20 [2015] AC 20.
21 *FHR European Ventures LLP v Cedar Capital Partners LLC* [2015] AC 20 at [47]. For a comparison between the law in England and in Australia, see Bruce Collins QC: "The Remedial Constructive Trust 'Between a Trust and a Catch-phrase'" (2014) 20 *Trusts & Trustees* 1055.

© 2024 Contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.

III. Purpose of listing exceptions to indefeasibility

14 The proposition in this article is that Baalman's purpose in listing the exceptions to indefeasibility is to exclude all unknown or yet to exist exceptions that could be implied in the future by judicial order. The listing promotes greater certainty (or less uncertainty) to the finality of the indefeasible title. Otherwise, the listing would be pointless.

15 Baalman explained the purpose of listing the exceptions to indefeasibility as follows:[22]

> The broad scheme of the section is to declare the title of every registered proprietor to be conclusive or indefeasible against all unregistered interests, *but subject to a list of exceptions*. Although the number of items in the list will seem unduly large, there are still fewer exceptions from indefeasibility in this Ordinance than in most other Torrens statutes. *What makes the list seem a long one is the fact that here practically all the exceptions have been expressed, whereas in other Torrens statutes some of them have been left to implication*. For example, in the New South Wales Real Property Act only four exceptions are expressly listed, but at least eight others are left to necessary implication. *It is regrettable, of course, that there should have to be any exceptions: but a glance at the list will show that the cost of extreme conclusiveness would not only be prohibitive, but it would be out of all proportion to its administrative value.*
>
> … the draftsman of this Ordinance has endeavoured to surmount the controversies which inspired the various sub-titles, and to minimise implied exceptions from, or qualifications on, the measure of indefeasibility. The extent of his success is still to be decided by experience; but the net result of his endeavours will at least be less uncertainty.
>
> [emphasis added]

16 Baalman later clarified:[23]

> As previously stated (p.77) most Torrens statutes leave more exceptions from indefeasibility to implication than to express enactment. *In this Ordinance those implied exceptions have either been expressed or they have ceased to be exceptions.* [emphasis added]

22 John Baalman, *The Singapore Torrens System: Being a Commentary on the Land Titles Ordinance 1956 of the State of Singapore* (Government of the State of Singapore, 1961) at p 77.

23 John Baalman, *The Singapore Torrens System: Being a Commentary on the Land Titles Ordinance 1956 of the State of Singapore* (Government of the State of Singapore, 1961) at p 88.

© 2024 Contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.

IV. Nature of the *in personam* claim under the Land Titles Act

17 In *Frazer v Walker*, the Privy Council observed:[24]

> First, in following and approving in this respect the two decisions in *Assets Co. Ltd. v. Mere Roihi*[25] and *Boyd v. Mayor, Etc., of Wellington*,[26] their Lordships have accepted the general principle that registration under the Land Transfer Act, 1952, confers upon a registered proprietor a title to the interest in respect of which he is registered which is (under sections 62 and 63)[27] immune from adverse claims, other than those specifically excepted. *In doing so they wish to make clear that this principle in no way denies the right of a plaintiff to bring against a registered proprietor a claim* in personam*, founded in law or in equity, for such relief as a court acting* in personam *may grant.* That this is so has frequently, and rightly, been recognised in the courts of New Zealand and of Australia: see, for example, *Boyd v. Mayor, Etc., of Wellington*[28] and *Tataurangi Tairuakena v. Mua Carr*.[29]
>
> Their Lordships refer to these cases by way of illustration only without intending to limit or define the various situations in which actions of a personal character against registered proprietors may be admitted. The principle must always remain paramount that those actions which fall within the prohibition of sections 62 and 63 may not be maintained.
>
> [emphasis added; references added]

18 The "*in personam* claim" is a claim against a person as distinct from a claim against a thing.[30] However, an *in personam* claim under s 46(2) of the LTA is, by its nature and purpose, a claim to recover land from the proprietor. Damages may be an alternative claim, in case recovery of the land is no longer possible.

19 In *United Overseas Bank Ltd v Bebe bte Mohammad*[31] ("*Bebe*"), the Court of Appeal said:[32]

> … all the Singapore decisions[33] to date that have accepted or purported to accept, following *Frazer v Walker*, that there existed *in personam* claims

24 [1967] 1 AC 569 at 585. The Land Titles Act 1993 also does not use the expression "indefeasible" to describe the nature of proprietor's title.

25 [1905] 1 AC 176.

26 [1924] NZLR 1174.

27 Sections 62–63 of the Land Transfer Act 1952 (NZ) are enacted as ss 37(5), 46(1), 48, 154 and 155 of the Land Titles Act 1993 (2020 Rev Ed).

28 [1924] NZLR 1174 at 1223.

29 [1927] NZLR 688 at 702.

30 See the High Court (Admiralty Jurisdiction Act) 1961 (2020 Rev Ed) for claims *in rem* against ships.

31 [2006] 4 SLR(R) 884.

32 *United Overseas Bank Ltd v Bebe bte Mohammad* [2006] 4 SLR(R) 884 at [87].

33 Namely, *United Overseas Finance Ltd v Victor Sakayamary* [1996] 2 SLR(R) 20, a case of fraud by the proprietor; and *Ho Kon Kim v Lim Gek Kim Betsy* [2001]
(cont'd on the next page)

© 2024 Contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.

> against the registered proprietor could have been brought under the relevant exceptions in s 46(2) of the LTA, or the powers of the court under s 160 of the LTA. [reference added]

20 In *Ho Kon Kim v Lim Gek Kim Betsy*[34] ("*Betsy*"), the Court of Appeal held that, as between Mdm Ho and Ms Lim, who were the parties to the agreement, it was not open to Ms Lim to say that the title she acquired to the property was free of Mdm Ho's equitable interest in Plot 3, having regard to ss 46(2)(*b*) and/or 46(2)(*c*). Under the provisions of the sale agreement, Mdm Ho had two separate rights and remedies against Betsy. First, an equity to have transferred to her a detached house built on Plot 3 without payment and free of any encumbrance. Second, a right to damages for failing to do so. The first is a proprietary claim to land to which Mdm Ho was entitled under the sale agreement. The second is a personal claim for damages for breach of contract.

21 Baalman referred to such equities in *Commentary* under the heading "Personal equities":[35]

> The Courts have consistently upheld against the proprietor of registered land, contracts created by that proprietor himself, although not protected by caveat. 'It is to my mind a clear principle of equity and I have no doubt there are abundant authorities on the point that equity will interfere to prevent the machinery of an Act of Parliament being used to defeat equities which he himself has raised, and to get rid of a waiver created by his own acts' per Darley CJ, N.W.S., approved by the Privy Council in *Wilson v McIntosh* [1894] AC 129, 144. See also *Barry v Heider*, *Great West Permanent Loan Co v Friesen* [1925] AC 208, 233.
>
> *The principle which in other Torrens jurisdictions thus rested on case-law, is now made statutory by s. 28(2)(b) of this Ordinance*. For example, if A the proprietor of registered land, sold it on contract to B, A could not repudiate his obligations on the ground that the folium of the land-register which bears his name as proprietor is conclusive of the ownership of the land. Subclause 2(b) expressly preserves B's contractual rights in the land, but only so long as A remains the proprietor. If A in breach of his contract transfers the land to a bona fide purchaser, registration of that transfer will overreach B's claims against the land, and he will have only personal rights against A for damages.
>
> [emphasis added]

---

3 SLR(R) 220, which could have been decided on the basis of equitable fraud under s 46(2)(*a*), or a trust under s 46(2)(*c*). In retrospect, RHB's repudiation constituted actual fraud.

34 [2001] 3 SLR(R) 220.

35 John Baalman, *The Singapore Torrens System: Being a Commentary on the Land Titles Ordinance 1956 of the State of Singapore* (Government of the State of Singapore, 1961) at p 84.

© 2024 Contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.

22 Baalman's illustration is based on *Shaw v Foster*,[36] where the House of Lords held that, under a contract of sale of land, the vendor becomes a trustee of the land in equity for the purchaser pending completion. A constructive trust arises by operation of law. This is an institutional constructive trust distinguishable from the more recent remedial constructive trust imposed by a court based on conscience, to treat the proprietor *as if* he were a trustee.[37]

23 In *Bebe*, although the Court of Appeal observed that Baalman did not explicitly say that the listed exceptions to indefeasibility were exhaustive, it also said:[38]

> As regards all other unspecified personal equities, we are of the view 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. These exceptions are, as we have shown, capable of encompassing most of the *in personam* actions at common law or in equity that a court exercising *in personam* jurisdiction may grant.[39] [reference added]

24 In his essay entitled "A Hard Look at *Bahr v Nicolay*",[40] Prof Barry Crown expressed his agreement with the observations in *Bebe*:[41]

> [*Bebe*] is to be welcomed as restoring certainty to the law and reinstating the original scheme of indefeasibility as devised by Baalman. Singapore will in future be free from the uncertainties that have plagued the Australian courts in operating the doctrine of personal equities.

---

36 (1872) LR 5 HL 321 and John Baalman, *The Singapore Torrens System: Being a Commentary on the Land Titles Ordinance 1956 of the State of Singapore* (Government of the State of Singapore, 1961) at p 77.

37 In *Paragon Finance Plc v DB Thakerar & Co* [1999] 1 All ER 400 at 413, Lord Millett said it is "the distinction between an institutional trust and a remedial formula – between a trust and a catch-phrase". See also Lord Sumption's judgment in *Williams v Central Bank of Nigeria* [2014] AC 1189 at [9].

38 *United Overseas Bank Ltd v Bebe bte Mohammad* [2006] 4 SLR(R) 884 at [91].

39 In *Hong Leong Singapore Finance Ltd v United Overseas Bank Ltd* [2007] 1 SLR(R) 292, the High Court held there was proprietary estoppel where the bank foreclosed a mortgage under s 76(3) of the Land Titles Act after encouraging a developer to continue developing the mortgaged property in the belief that the developer would be given a unit in the development. The claim in this case could have been made under s 46(2)(*b*) of the Land Titles Act.

40 Published in *Lives in the Law: Essays in Honour of Peter Ellinger, Koh Kheng Lian and Tan Sook Yee* (Dora Neo, Tang Hang Wu & Michael Hor eds) (National University of Singapore & Academy Publishing, 2007).

41 *Lives in the Law: Essays in Honour of Peter Ellinger, Koh Kheng Lian and Tan Sook Yee* (Dora Neo, Tang Hang Wu & Michael Hor eds) (National University of Singapore & Academy Publishing, 2007) at pp 209 and 212.

© 2024 Contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.

> *Bebe* has returned Singapore to the basic principles enunciated by Baalman … Exceptions to indefeasibility must found within the four corners of the statutory language. As a result, the operation of Singapore's system of registration become considerably more certain.

25 This article supports Prof Crown's conclusions, and further asserts that s 46(2) has the effect of subsuming, or making redundant, the personal equities claim, which was its legislative purpose (see para 30 below on the *inter se* rule).

V. *United Overseas Bank Ltd v Bebe bte Mohammad* controverted

26 In *Tan Sook Yee's Principles of Singapore Land Law*,[42] ("*Tan Sook Yee*") the joint authors controvert the observations made in *Bebe* on the redundancy of the personal equities claim. In an earlier article,[43] Prof Kelvin FK Low commented that *Bebe*:[44]

(a) did not consider (i) whether the personal equities exception was a true exception or not, or (ii) the scope of the indefeasibility principle in the context of the Singapore Torrens system;

(b) in rejecting the "personal equities exception", did not consider the possibility some claims may exist which, though falling outside s 46(2) of the LTA, might not be prohibited by s 46(1); and

(c) in rejecting "personal equities", the Court of Appeal was not rejecting claims falling outside s 46(1) altogether – rather, it was rejecting claims dependent on the "amorphous concept of conscience", and that "[if] it were true that 'personal equities' were simply claims based on unconscionability, then surely they cannot justify penetrating the curtain of indefeasibility".

27 With respect, these comments are misdirected:

(a) First, the Court of Appeal did not do the things mentioned in para 26(a)(i) above because no dispute arose on those matters. The issues before the court were whether United Overseas Bank

---

42 Tang Hang Wu & Kelvin FK Low, *Tan Sook Yee's Principles of Singapore Land Law* (Lexis Nexis, 4th Ed, 2019).

43 "The Story of 'Personal Equities' in Singapore: Thus Far and Beyond" [2009] Sing JLS 161.

44 Kelvin FK Low, "The Story of 'Personal Equities' in Singapore: Thus Far and Beyond" [2009] Sing JLS 161 at 166.

© 2024 Contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.

Ltd ("UOB") committed fraud through its solicitors in taking the mortgage, and whether the respondent, Bebe, had an equity against UOB based on *Mercantile Mutual Life Insurance Co Ltd v Gosper*[45] ("*Gosper*"). The court held that UOB did not commit any fraud, and that Bebe did not have an equity claim against UOB based on *Gosper*. However, the court observed that it could have, based on its findings in *Betsy*, held that RHB committed fraud against Mdm Ho or breach of trust (having regard to the holdings of Mason CJ and Dawson J in *Bahr v Nicolay (No 2)*[46] ("*Bahr*") on similar facts).

(b) Second, *Bebe* did not reject the "personal equities" claim. The Court of Appeal distinguished *Gosper* on the facts, and cautioned that the Singapore 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, since they are capable of encompassing most of the *in personam* actions at common law or in equity (see para 23 above).

(c) Third, the Court of Appeal's comment on conscience was made in response to the Privy Council's statement in *Oh Hiam v Tham Kong*[47] on conscience – that under the LTA, such a claim could be against the proprietor under s 46(2)(*b*) of the LTA to set aside the transfer on the ground of common mistake, where conscience would not be relevant.

28 Prof Low also commented that the word "exception" was used inaccurately:[48]

> The correct view of the so-called 'personal equities exception' … is that it is not really an exception.[49] Indeed, it does not originate in equity, nor does it result in merely a personal remedy. It applies whenever the claim being brought against

45 (1991) 25 NSWLR 32.

46 (1988) 164 CLR 604 at [23], *per* Mason CJ and Dawson J:

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

47 [1980] 2 MLJ 159.

48 Kelvin FK Low, "The Story of 'Personal Equities' in Singapore: Thus Far and Beyond" [2009] Sing JLS 161 at 169.

49 See Tang Hang Wu & Kelvin FK Low, *Tan Sook Yee's Principles of Singapore Land Law* (Lexis Nexis, 4th Ed, 2019) at para 14.104, where the expression "personal equities" was abandoned in favour of the term "*in personam* exception".

© 2024 Contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.

> the registered proprietor is not excluded by the principle of indefeasibility as conferred by the terms of section 46(1) … *Since the terms of section 46(1) … are intended to protect the registered proprietor from former property rights, where a claim is brought that is not based on prior property rights, it is not excluded by Torrens indefeasibility. The test is one of whether the claim is based on a prior property right, not whether or not the claim is one to property.* If it is not based on a prior property right, then it may be pursued even if the claim will terminate in the recovery of the land in specie. Thus, for example, if a registered proprietor contracts to sell his land to a purchaser, the purchaser may seek the remedy of specific performance as against the registered proprietor because his claim is based, not on a prior property right, but on the contract of sale. [emphasis added; references added]

29 It is suggested that Prof Low's criticism is inconsequential. The crucial issue is whether the list of statutory exceptions in s 46(2) is exhaustive. Even if the personal equities exception were not a true exception to indefeasibility under s 46(1), it is an exception that extinguishes indefeasibility under s 46(2). Further, the proposition that s 46(1) was intended to protect the proprietor from former property rights is also questionable. All prior property rights have been overridden before the proprietor's title becomes indefeasible under s 46(1). Hence, there are no prior property claims for s 46(1) to protect.

30 Prof Low gave other reasons for rejecting the proposition that Baalman intended the listing of the statutory exceptions to be exhaustive, as summarised below:

> (a) The *inter se* rule (Prof Low's term for the *in personam* claim, because it is a claim between the claimant and the proprietor "*inter se*"[50]) does not render ss 46(2)(*b*)–46(2)(*e*) of the LTA[51] otiose, "since it will hardly be the first occasion where the Parliamentary draftsman has inserted language that is strictly speaking otiose *ex abundanti cautela*".[52] He then refers to the uncertainty over some claims admitted under the *inter se* rule, such as claims by infant vendors against registered proprietors,[53] as a reason why the draftsman might have "considered it helpful to clarify as much as he could under the circumstances".

50 See Kelvin FK Low, "The Nature of Torrens Indefeasibility: Understanding the Limits of Personal Equities" [2009] MULR 7.

51 Barry Crown, "Equity Trumps the Torrens System" [2002] Sing JLS 409 at 413.

52 Kelvin FK Low, "The Story of 'Personal Equities' in Singapore: Thus Far and Beyond" [2009] Sing JLS 161 at 170.

53 See the contrasting decisions of *Percy v Youngman* [1941] VLR 275 and *Coras v Webb & Hoare* [1942] QSR 66. See also John Baalman, *The Singapore Torrens System: Being a Commentary on the Land Titles Ordinance 1956 of the State of Singapore* (Government of the State of Singapore, 1961) at p 85.

© 2024 Contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.

(b) Baalman's comments are ambivalent as to his purpose in listing the exceptions to indefeasibility. He might only have wanted to minimise the number of implied exceptions, and that its success could only be decided by experience, even though the net result would at least be less uncertainty.

(c) Baalman's reference to two other "implied exceptions" which are not listed in s 46 of the LTA strongly suggests that he did not consider his list exhaustive.

(d) Section 46 of the LTA cannot be read to exclude all exceptions to indefeasibility not expressed therein. Baalman's intention might have been to allow few, if any, "personal equities" to be added judicially to the statutory list, or that he felt that he had not contradicted the principle of indefeasibility by listing as many of the exceptions arising out of the *inter se* rule that had been judicially considered. Therefore, the courts can continue to recognise new personal equities that have not been considered by Baalman. Further, Baalman's objective in listing all the known "personal equities" might be to minimise litigation – otherwise, more litigation would ensue.

31 With respect, reason (a) (as stated at para 30(a) above) does not answer the objection that if the *inter se* rule were to exist, it would make s 46(2) of the LTA otiose. Reason (a) is not only conjectural but also a *non sequitur*. It also turns on its head the established principle of statutory interpretation that statutory words must be given effect to. If the meaning contradicts or overlaps the common law (including equity), the latter is either abrogated or becomes inoperative. Reason (b) (as stated at para 30(b) above) views Baalman's painstaking listing of all the known implied exceptions as an exercise in futility. Reason (c) (as stated at para 30(c) above) does not affect the exclusive nature of the listing in s 46 of the LTA, or of their scope. By mentioning the two implied exceptions which could arise from the inherent weakness of the Torrens system itself, *viz*; (i) registered land could be misdescribed due to bad survey; and (ii) the Registrar could erroneously enter or notify non-interests in land in the land register, Baalman was effectively listing them expressly. These were remote possibilities in land administration in Singapore even in 1956. Neither exception has occurred to date. Reason (d) (as stated at para 30(d) above) is illogical. It makes no sense to argue that listing the exceptions would minimise litigation when, absent such listing, litigation would be minimised anyway from their known existence. Further, it is odd to argue that it is open to the courts to imply exceptions that Baalman had not considered, since he could not have considered what was unknown to him.

© 2024 Contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.

32 Finally, the suggestion that Baalman felt that he "did not contradict the principle of indefeasibility" by his "near exhaustive" listing of the exceptions arising out of the *inter se* rule that had been judicially considered, implies a desire or need to preserve the *inter se* rule. To the contrary, Baalman's desire was to promote more certainty (or less uncertainty) to the finality of the registered title, by not leaving it exposed to disturbance unknown or yet to exist. Having fewer exceptions to indefeasibility will promote more certainty (or less uncertainty) to the indefeasible title.

33 The crucial issue is whether Baalman intended the listed exceptions to indefeasibility to be exhaustive. This article contends that, in the light of his explanation for listing all the known exceptions in the LTA that had been implied by case law in all the Torrens jurisdictions, Baalman intended the list to be exhaustive, and to exclude all unknown or yet to exist exceptions that may pop out of the minds of future judges, and disturb the certainty of the indefeasible title. Baalman took the road to certainty by closing the road to uncertainty.

A. The **inter se** *rule*

34 Prof Low argues that the *inter se* rule can exist alongside the statutory exceptions, so the courts could continue to imply more exceptions. However, as Baalman has explained (at para 3 above), principles of equity or equitable estates and interests remain undisturbed under the LTA provided they do not clash with the "new statutory provisions", *ie*, they do not contradict s 46(1) of the LTA (which confers the indefeasible title) or s 46(2) which provides the specific exceptions to indefeasibility. Therefore, the *inter se* rule is bound to contradict s 46(2) if it provides an implied exception outside s 46(2) that will cause the principle of indefeasibility to be defeated. In the modified words of *Frazer v Walker*,[54] "the principle must always remain paramount that those actions which fall within the prohibition of section 46(2) may not be maintained". Therefore, in so far as the *inter se* rule maintains a claim capable of defeating the indefeasible title, this will be in conflict with the principle of indefeasibility unless it is made under s 46(2).

35 An *in personam* claim is a personal claim founded in law or equity, *ie*, based on a recognised legal or equitable cause of action, for which the claimant may seek reliefs or remedies from the court. Procedurally, under rules of court, any claim to recover land from the proprietor starts as a personal action against the proprietor. A claim under the LTA is

54 [1967] 1 AC 569 at 585.

© 2024 Contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.

by its nature a claim to recover land from the proprietor, whether to an interest existing prior to or created after the purchaser has acquired an indefeasible title to the land. It may also include, alternatively, damages. Both types of claims must not clash with s 46 or contradict the principle of indefeasibility.

36 If the claim arises from the proprietor's refusal to give effect to an overriding interest under s 46(1), then it is a straightforward claim for a court order to compel the proprietor to give effect to the overriding interest by an appropriate remedy. If the claim is based on any of the exceptions under ss 46(2)(*a*)–46(2)(*e*), its validity is determined by principles of law or equity. No conflict with s 56(1) arises if it falls under s 46(2). For example:

> (a) An equitable or proprietary estoppel claim against the proprietor will conflict with the principle of indefeasibility unless it is made under: (i) s 46(2)(*a*), arising from the proprietor's fraud; or (ii) s 46(2)(*b*), arising from breach of contract (including a contractual licence); or (iii) s 46(2)(*c*), arising from a breach of trust.
>
> (b) A resulting trust claim, although not a trust claim, becomes a fraud claim under s 46(2)(*a*) if the proprietor denies the claim of the settlor or the testator's estate. Alternatively, it may fall under s 46(2)(*c*) if it has provisions enforceable against the trustee.

B. Tan Sook Yee *rejects* United Overseas Bank Ltd v Bebe bte Mohammad

37 The authors of *Tan Sook Yee* reject what they describe as the narrow view taken by *Bebe* of the trust exception in s 46(2)(*c*) of the LTA, and the personal equities exception in s 46(2)(*b*) on the ground that it limits the law's capacity to fashion appropriate remedial responses in respect of many areas in the law of obligations to meet changing social circumstances.[55] They also argue that it makes no sense to simply prohibit proprietary remedies *per se*.

38 The following criticisms are repeated subsequently by the authors:[56]

55 Tang Hang Wu & Kelvin FK Low, *Tan Sook Yee's Principles of Singapore Land Law* (Lexis Nexis, 4th Ed, 2019) at para 14.92.

56 Tang Hang Wu & Kelvin FK Low, *Tan Sook Yee's Principles of Singapore Land Law* (Lexis Nexis, 4th Ed, 2019) at paras 14.107–14.109.

© 2024 Contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.

(a) it straightjackets the development of the law in many areas, especially in the context of remedies, such as a proprietary response, *ie*, the declaration of a constructive trust is not possible as there has been a breach of confidence, or as a response to a situation where a *Pallant v Morgan*[57] constructive trust is said to arise;[58] and

(b) it leads to an expansion and ultimately a strained construction of the concept of Torrens fraud and the other exceptions to indefeasibility, such as: (i) a promise honestly made, but subsequently repudiated, may be characterised as "fraudulent"; (ii) a claim to undo the effect of a common mistake in a contract may be characterised as an enforcement of the contract; and (iii) a claim based on undue influence such as in *Royal Bank of Scotland v Etridge (No 2)*.[59]

39 This article does not share these views. First, in respect of the trust exception, the Court of Appeal in *Bebe* interpreted s 46(2)(*c*) according to its plain meaning. It is pertinent to note that in *Assets Co Ltd v Mere Roihi*[60] ("*Assets*"), the Privy Council dealt with a similar issue, as follows:[61]

> Then it is contended that a registered owner may hold as trustee and be compelled to execute the trusts subject to which he holds.[62] This is true; for, although trusts are kept off the register, a registered owner may not be beneficially entitled to the lands registered in his name. But if the alleged cestui que trust is a rival claimant, who can prove no trust apart from his own alleged ownership, it is plain that to treat him as a cestui que trust is to destroy all benefit from registration. Here the plaintiffs set up an adverse title and nothing else; *and to hold in their favour that there is any resulting or other trust entitling them to the property is, in their Lordships' opinion, to do the very thing which registration is designed to prevent.* [emphasis added; reference added]

This passage limits the viability of the resulting trust claim or any other trust claim, except a claim to execute an express trust, as it falls foul of the principle of indefeasibility. For this reason, this article argues such kinds of trusts arising by operation of law or imposed by judicial order, and also proprietary claims arising from equitable or proprietary estoppel, may only be claimed on the basis of fraud, if they are not to conflict with the principle of indefeasibility.

57 [1953] Ch 43.
58 Tang Hang Wu & Kelvin FK Low, *Tan Sook Yee's Principles of Singapore Land Law* (Lexis Nexis, 4th Ed, 2019) at para 14.108.
59 [2002] 2 AC 773.
60 [1905] 1 AC 176.
61 *Assets Co Ltd v Mere Roihi* [1905] 1 AC 176 at 204–205.
62 *Cf*, the wording of s 46(2)(*c*) of the Land Titles Act 1993.

© 2024 Contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.

40 Second, the Court of Appeal in *Bebe* did not examine the proprietary claim in the context of s 46(2) of the LTA, as no such issue was before it. Therefore, the court could not have said anything in *Bebe* to suggest that the proprietary claim was prohibited under the LTA. However, by its nature, a proprietary claim is bound to conflict with the principle of indefeasibility because if proved, it will defeat the proprietor's registered title. Therefore, in order to exist, the proprietary claim has to come within s 46(2). This article contends that a proprietor who refuses to honour a proven proprietary claim is sufficiently dishonest to constitute fraud under s 46(2)(*a*) of the LTA.

41 Fraud cannot be strained, as it is infinite. Its manifestation in different kinds and degrees of dishonesty or moral turpitude, or unconscionable or inequitable conduct is par for the course in equity jurisdiction. Giving an undertaking honestly, but not honouring it subsequently when circumstances change is a dishonest or unconscionable breach of the undertaking, when it is used to defeat the rights of the claimant (*cf*, *Bahr* and *Betsy*). Equally dishonest is giving an undertaking with no intention whatever to honour it (*cf*, *Loke Yew v Port Swettenham Rubber Co, Ltd*[63] ("*Loke Yew*")). If, as contended, the statutory concept of fraud in s 46(2)(*a*) of the LTA refers to fraud as an ancient head of equity jurisdiction, as it should, it provides a cause of action that covers all manner of dishonesty by the proprietor in his dealings with the land that would prick the conscience of equity. In such cases, the claimant is entitled to relief or a remedy commensurate or proportionate in the circumstances of each case.[64]

42 Third, a claim to undo the effect of a common mistake in a contract is not to enforce the contract, but to correct it.

43 Claims founded on undue influence or resulting trusts, *etc*, may fall under ss 46(2)(*a*)–46(2)(*c*) of the LTA, but fraud is the ultimate ground. Claims founded on breach of confidence, the common intention constructive trust and the *Pallant v Morgan* constructive trust all involve various degrees of dishonesty, unconscionable or inequitable conduct on the part of the registered proprietor. All of them are species of fraud, if redressable in equity, whether committed in a commercial, social or familial environment (see para 67 *ff* below on fraud in equity). Any species of fraud redressable in equity is fraud under s 46(2)(*a*) of the

63 [1913] AC 491 at 504.
64 See *Guest v Guest* [2022] 3 WLR 911.

© 2024 Contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.

LTA.[65] Fraud is fraud, after all. Equity does not permit a statute to be used as an instrument of fraud.

44 In *Tan Sook Yee*, the authors discuss what they consider as the inadequacies of the LTA in relation to new types of claims which affect the principle of indefeasibility. They reject the approach in *Bebe* to the constructive trust[66] and the *in personam* claim[67] as being too narrow. They discuss two other plausible approaches. The first is Prof Low's wide approach based on the *inter se* rule, and on the basis that s 46(2) of the LTA is otiose, which is fundamentally wrong. They have difficulty with some aspects of this approach. The second approach is a middle-of-the-road approach, sandwiched between the narrow and the wide approaches. There are also some reservations with this approach, but seven salient features in respect of the *in personam* exception were identified. However, the authors can only agree between themselves on a number of matters. They see some issues with unconscionability, and the doctrine of undue influence, as it applies to tripartite relationships within the context of the Torrens system. They agree that *Gosper* should be abandoned. They suggest that the indefeasible title can be defeated if it is acquired under misrepresentation, mistake, duress, unconscionable dealing and undue influence (even though they are not expressed as causes of action under s 46(2) of the LTA), suggesting that these causes of action operate under the *inter se* rule. Their analysis of the problems arising from the interface between the principle of indefeasibility and the personal equities exception suggests that to them there is a vast gap between what Baalman hoped to be able to achieve and what can be achieved.

45 This article does not agree with the authors' negative views. Properly construed, s 46 of the LTA is capable of resolving all the problems identified by them. Construing the listed exceptions to indefeasibility as exhaustive solves the problems raised by the authors. Giving a liberal interpretation of "fraud" in s 46(2) solves the problems of dishonesty in its different kinds and degrees. The *in personam* exception is either subsumed under or abrogated, especially by s 46(2)(*b*), as it is bound to conflict with the principle of indefeasibility as a free-standing cause of action. Any cause of action in law or equity on which the remedial constructive trust may be imposed either has to fall under s 46(2), but if not, is impermissible, and if so, is unnecessary. The spate of litigation

65 See LA Sheridan's views in *Fraud in Equity* (Pitman, 1957): "fraud is a species of redressable transaction" (at p 208) and "so far as equity in concerned, 'fraud' is nothing if not a ground of redress" (at p 209).

66 Tang Hang Wu & Kelvin FK Low, *Tan Sook Yee's Principles of Singapore Land Law* (Lexis Nexis, 4th Ed, 2019) at para 14.92.

67 Tang Hang Wu & Kelvin FK Low, *Tan Sook Yee's Principles of Singapore Land Law* (Lexis Nexis, 4th Ed, 2019) at para 14.105.

© 2024 Contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.

in our courts in the last few years where the resulting trust or the common intention constructive trust has been raised in social or familial situations did not involve the proprietor relying on his indefeasible title. Such disputes were usually resolved on the intention of the parties.[68] Indefeasibility is rarely pleaded as a defence by the proprietor. It is suggested that that is because the proprietor's rejection of the claimant's rights, if proven on the facts, is dishonest, constituting fraud in its wider sense under s 46(2)(*a*), and/or that the court will not allow the LTA to be pleaded as an instrument of fraud.

46 This article suggests that the authors' perceived problems with the trust and *in personam* exceptions are misconceived, as they are conceived substantially on the case law and academic writings on these issues under the Australian Torrens statutes (which are differently structured and provisioned from the LTA). Although Baalman might not have anticipated the development of new equitable rights or remedies, such as the constructive remedial trust, or proprietary estoppel (although s 95(2) of the LTA could be said to have foreseen the future) or unjust enrichment, the rights and interests in land could be accommodated within the terms of ss 46(2)(*a*)–46(2)(*e*) of the LTA, especially if fraud is given a meaning wider than that in *Assets* and in *Bahr*.[69]

C. Proprietary estoppel as an exception to indefeasibility

47 In his article, "Proprietary Estoppel and the Land Titles Act",[70] Prof Teo Keang Sood argues that since that the Torrens system does not abrogate principles of equity, a proprietary estoppel claim may be made against the proprietor personally.[71] This argument is logical, but incomplete, in that it ignores the caveat that it must not conflict with s 46(1) as qualified by s 46(2). A proprietary estoppel which does not

---

68 See *Chia Hang Kiu v Chia Kwok Yee* [2014] SGHC 197.

69 In *Bahr v Nicolay (No 2)* (1988) 164 CLR 604 at [15], Mason CJ and Dawson J said:

> Indeed, we agree with Higgins J. in Stuart v. Kingston when his Honour said (at p 345) that there was much to be said for the view, expressed by Stawell C.J. on the equivalent Victorian provision, that the section should be 'construed strictly' and the exception 'liberally'. The section restricts, in the interests of indefeasibility of title, rights which would exist otherwise at law or in equity.

70 [2020] Sing JLS 323.

71 Teo Keang Sood, "Proprietary Estoppel and the Land Titles Act" [2020] Sing JLS 323 at para 29.

© 2024 Contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.

come within s 46(2) will conflict with the *principle* of indefeasibility conferred by s 46(1).[72]

VI. The scope of sections 46(2)(*a*), 46(2)(*b*) and 46(2)(*c*) of the Land Titles Act

A. *The meaning of "fraud" in the Land Titles Act*

48 The word "fraud" is used in ss 46(2)(*a*), 47(1)–47(2),[73] 49(2),[74] 154(1)(*d*),[75] 154(3),[76] 154(5),[77] 160(1) and 160(2)[78] of the LTA. In drafting these provisions, Baalman would have been aware that the term "actual fraud" was used: (a) by Lord Hardwicke LC and the Privy Council in *Assets*; (b) in the 1886 Ordinance; and (c) by Stirling J in *Battison v*

72 See Teo Keang Sood, "Proprietary Estoppel and the Land Titles Act" [2020] Sing JLS 323 at 326, where Prof Teo interpreted [94] of *United Overseas Bank Ltd v Bebe bte Mohammad* to mean that the proprietor's indefeasible title cannot be defeated by any personal equity arising after the purchaser acquires immediate indefeasibility under s 47(3). This paragraph is taken out of context of a discussion on immediate indefeasibility at [93]. It is a misstatement if read literally, as is obvious from the preceding discussion on the defeasibility of the proprietor's indefeasibility of title under ss 46(1) and 46(2).

73 Sections 47(1) and 47(2) provide that notice of any trust (actual or constructive) or knowledge of unregistered interest is not fraud.

74 Section 49(2) provides that knowledge of the existence of an unregistered interest which has not been protected by a caveat is not fraud.

75 Section 154(1)(*d*) provides:

> No action of ejectment or other action for the recovery of registered land lies or may be sustained against the proprietor thereof except in the case of –
>
> …
>
> (*d*) a person deprived of land by fraud against the person who has become registered as proprietor of the land by fraud, or against any person claiming through that proprietor otherwise than as a purchaser.

76 Section 154(3) provides: "In any action based on fraudulent deprivation, the court may make an order for payment of damages either in addition to or in substitution for an order for the recovery of land."

77 Section 154(5) provides: "For the purposes of this section, any unlawful acquisition of land, whether by a person purporting to act under statutory authority or otherwise, is deemed to be fraudulent."

78 Section 160(1)(*b*) provides that the court may order rectification of the land-register where it is satisfied that any registration or notification of an instrument has been obtained through fraud.

Section 160(2) provides: "The land-register must not be rectified so as to affect the registered estate or interest of a proprietor who is in possession unless that proprietor is a party or privy to the … fraud in consequence of which the rectification is sought, or has caused that … fraud … or substantially contributed thereto by that proprietor's act …".

© 2024 Contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.

Hobson.[79] In view of these precedents, he could have used the term in the LTA but did not do so. He explained:[80]

> Fraud is not defined by the Ordinance, for the reason that it would be no more practicable than it has been at any period of 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.* But without disturbing the general meaning, the scope of fraud is reduced by this section [28] and by s. 29. *The only fraud which can vitiate a registered title is unilateral fraud on the part of the proprietor of that title.* That was the law that was laid down by the Privy Council in *Assets Co Ltd v Mere Roihi* [1905] 1 AC 176. By this Ordinance, the case law has become statute law. There is a corresponding provision in s. 15(4) of the Registration of Deeds Ordinance 1886, which excepts from the benefits of priority conferred by registration 'cases of actual fraud to which the person or on whose behalf the registration is made is a party'. …
>
> The juridical consequence known as fraud derives from various sources. It probably had its origin in the common law action of deceit. Forgery, which is not a tort but is a crime also appears to be inseparable from a fraudulent intent. Again, the Courts of Chancery evolved their own particular species of fraud, which is closely linked with the equitable doctrine of notice. As Starke J said in *Stuart v Kingston* (1923) 32 CLR 309 at 359, '*No definition of fraud can be attempted, so various are its forms and methods*.'
>
> This section helps to clarify the meaning of fraud, not by an attempted definition, but by declaring what is not fraud. It at least devalues that Brocard of the equity jurisdiction – 'Notice is Fraud' – which seems to be traceable to the case of *Le Neve v Le Neve* (1747) 26 ER 1172.[81] Section 28 has said that if you become registered as a proprietor honestly, then your title is indefeasible. This section says that it is not dishonest to ignore unregistered interests which

79 [1896] 2 Ch 403. Stirling J said at [412]: "'Actual fraud' I understand to mean fraud in the ordinary popular acceptation of the term, i.e., fraud carrying with it grave moral blame, and not what has sometimes been called legal fraud, or constructive fraud, or fraud in the eye of a court of law or a court of equity."

See LA Sheridan, *Fraud in Equity* (Pitman, 1957) at p 158, where the author commented that although Stirling J found that there was actual fraud, he did not go into the differences (if any) between s 14 and the equitable doctrine.

80 John Baalman, *The Singapore Torrens System: Being a Commentary on the Land Titles Ordinance 1956 of the State of Singapore* (Government of the State of Singapore, 1961) at pp 83–84 and 92.

81 In this case, Lord Hardwicke said:

> … the taking of a legal estate after notice of a prior right, makes a person a *mala fide* purchaser (and not, that he is not a purchaser for a valuable consideration in every other respect); this is a species of fraud, and *dolus malus* [bad deceit] itself; for he knew that the first purchaser had the clear right to the estate, and after knowing that, he takes away the right of another person by getting the legal estate.

© 2024 Contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.

> are known to exist; and that in any case you need not look for trouble behind the land-register.[82]
>
> [emphasis added; references added]

49 As noted above, but for s 47(3), "fraud" in the LTA would have included the equitable doctrine of notice of prior unregistered interests in land. It follows that where a proprietor, *also undertakes* to recognise the prior unregistered interest, and to give effect to it, the failure to do so must *a fortiori* be a fraud in equity.

50 Although Baalman referred to *Assets*, and to the use of "actual fraud" in the 1886 Ordinance, he could not have used "fraud' in s 46(2)(*a*) to have *only that meaning*, as that would be inconsistent with his decision to leave the general meaning to be determined by the courts in the particular circumstances of each case.

51 Further, although "fraud" cannot be defined exhaustively, it can be described in specific situations, and Baalman did just that with s 154(5) for the purpose of ejectment proceedings against the proprietor.[83] He explained:[84]

> Only the most optimistic of lawyers would attempt to define 'fraud' exhaustively. But that is not to say that certain specific acts which are capable of precise description cannot be included in the meaning of fraud. [Section 154(5)] exposes to ejectment any proprietor who has attained to registration unlawfully, whether his action comes within *a known form of fraud or otherwise*. [emphasis added]

For this reason, too, "fraud" in the LTA is not limited only to "actual fraud" as described in *Assets*, and should cover any equitable fraud.

B. Meaning and application of "fraud" in Torrens statutes

52 In *Assets*, the Privy Council held that fraud in the Land Transfer Act, 1870 "meant actual fraud, i.e., dishonesty of some sort, not what is called constructive or equitable fraud".[85] The Privy Council identified

---

82 John Baalman, *The Singapore Torrens System: Being a Commentary on the Land Titles Ordinance 1956 of the State of Singapore* (Government of the State of Singapore, 1961) at pp 92–93.

83 See n 77 for the text of this provision.

84 John Baalman, *The Singapore Torrens System: Being a Commentary on the Land Titles Ordinance 1956 of the State of Singapore* (Government of the State of Singapore, 1961) at p 255.

85 *Assets Co Ltd v Mere Roihi* [1905] 1 AC 176 at 210. The term "constructive or equitable fraud" is used in the sense of having constructive, instead of actual, notice of the fraud, *eg*, where there is notice without knowledge, as where notice is given

(cont'd on the next page)

© 2024 Contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.

some instances of actual fraud, in finding that there was "no evidence whatever of any fraudulent statement made by the company's agents to the registrar, nor of any bribery, corruption, or dishonesty in the matter.[86]

53 In *Waimiha Sawmilling Co v Waione Timber Co*,[87] the Privy Council said: "If the designed object of a transfer be to cheat a man of a known existing right, that is fraudulent, and so also fraud may be established by a deliberate and dishonest trick causing an interest not to be registered and thus fraudulently keeping the register clear."[88]

54 In *Loke Yew*, the purchaser had notice of the existence of Loke Yew's unregistered interest in the land, represented to the transferor that it would arrange to buy out Loke Yew's unregistered interest, but with no intention of doing so. The Privy Council held that the purchaser acquired its title through fraudulent misrepresentation.

55 None of these authorities was concerned with the issue as to whether fraud could be committed by the proprietor after acquiring the registered title.

56 In *Bahr*, the second respondents purchased Lot 340 from the first respondent with notice of the Appellant's right to re-purchase the land (constituting an equitable interest in equity), and later had agreed to honour the first respondent's obligation to the Appellants. Mason CJ and Dawson J said:[89]

> Sections 68 and 134 give expression to, and at the same time qualify, the principle of indefeasibility of title which is the foundation of the Torrens system of title. …
>
> …
>
> Neither the two sections nor the principle of indefeasibility preclude a claim to an estate or interest in land against a registered proprietor arising out of the acts of the registered proprietor himself: Breskvar v. Wall (1971) 126 CLR 376,

to an agent but is not communicated to the principal, the fraud is constructive: see para 69 below. The Privy Council said further at 210: "Fraud by persons from whom he claims does not affect him unless knowledge of it is brought home to him or his agents. The mere fact that he might have found out fraud if he had been more vigilant, and had made further inquiries which he omitted to make, does not of itself prove fraud on his part." This use is different from the species of equitable fraud described by Mason CJ and Dawson J in *Bahr v Nicolay (No 2)* (1988) 164 CLR 604 at [10] (see para 56 below) which is part of the doctrine of equitable fraud as classified by Lord Hardwicke LC in *Earl of Chesterfield v Janssen* (1751) 2 Ves Sen 125.

86 *Assets Co Ltd v Mere Roihi* [1905] 1 AC 176 at 212.

87 *Waimiha Sawmilling Co v Waione Timber Co* [1926] AC 101.

88 *Waimiha Sawmilling Co v Waione Timber Co* [1926] AC 101 at 106–107.

89 *Bahr v Nicolay (No 2)* (1988) 164 CLR 604 at [10].

© 2024 Contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.

> at pp 384-385. Thus, an equity against a registered proprietor arising out of a transaction taking place after he became registered as proprietor may be enforced against him: Barry v. Heider (1914) 19 CLR 197. So also with an equity arising from conduct of the registered proprietor before registration (Logue v. Shoalhaven Shire Council (1979) 1 NSWLR 537, at p 563), so long as the recognition and enforcement of that equity involves no conflict with ss.68 and 134. Provided that this qualification is observed, the recognition and enforcement of such an equity is consistent with the principle of indefeasibility and the protection which it gives to those who deal with the registered proprietor on the faith of the register.

57 Mason CJ and Dawson J held that the second respondents were fraudulently resiling from their agreement on the ground that the statutory concept of fraud in s 68 was not confined to actual fraud:[90]

> [Not] all species of equitable fraud stand outside the statutory concept of fraud. Far from it. In Latec Investments Ltd v. Hotel Terrigal Pty Ltd (In Liquidation) (1965) 113 CLR 265, Kitto J. (at pp 273-274) held that a collusive and colourable sale by a mortgage company to its subsidiary was a plain case of fraud. According to his Honour (at p 274), '(t)here was pretence and collusion in the conscious misuse of a power', this being a 'dishonest course'. Likewise, in Loke Yew v. Port Swettenham Rubber Co, Ltd (1913) AC 491, Lord Moulton (at p 504) instanced the case of an agent who has purchased land on behalf of his principal but has taken the conveyance in his own name, and in virtue thereof claims to be the owner of the land, though he is in law a trustee for his principal.

58 They further held:[91]

> In the context of s.68 there is no difference between the false undertaking which induced the execution of the transfer in Loke Yew and an undertaking honestly given which induces the execution of a transfer and is subsequently repudiated for the purpose of defeating the prior interest. The repudiation is fraudulent because it has as its object the destruction of the unregistered interest notwithstanding that the preservation of the unregistered interest was the foundation or assumption underlying the execution of the transfer. For the same reason the subsequent repudiation by a transferee of property of a limited beneficial interest in that property is fraudulent, when the transferee took the property on terms that the limited beneficial interest would be retained by the transferor. It is immaterial that the transferee 'may have been innocent of any fraudulent intent in taking the conveyance in absolute form': Bannister v. Bannister (1948) 2 All ER 133, at p 136.

---

90 *Bahr v Nicolay (No 2)* (1988) 164 CLR 604 at [12].
91 *Bahr v Nicolay (No 2)* (1988) 164 CLR 604 at [15].

© 2024 Contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.

59 Brennan J, agreeing, said:[92]

> Waimiha Sawmilling Co. v. Waione Timber Co. does not suggest that a registered proprietor who has purchased on terms that his title will be subject to an unregistered interest is able to defeat that interest upon the registration of his transfer.
>
> A registered proprietor who has undertaken that his transfer should be subject to an unregistered interest and who repudiates the unregistered interest when his transfer is registered is, in equity's eye, acting fraudulently and he may be compelled to honour the unregistered interest. A means by which equity prevents the fraud is by imposing a constructive trust on the purchaser when he repudiates the unregistered interest. … The principles are stated in Bannister v. Bannister (1948) 2 All ER 133 and Lyus v. Prowsa Ltd. (1982) 1 WLR 1044 …

60 Wilson and Toohey JJ said:[93]

> [T]he fraud to which ss.68 and 134 refer is fraud committed in the act of acquiring a registered title: see Loke Yew v. Port Swettenham Rubber Company, Limited, at pp 503-504; Stuart v. Kingston, at p 329; Breskvar v. Wall (1971) 126 CLR 376, at p 384 …

They found that the second respondents' objective in taking the transfer from the first respondent was not designed to cheat the appellants of their rights in the land, and therefore not fraudulent. However, they agreed that a personal equity could arise from the proprietor's conduct after taking the transfer:[94]

> But, equally, they [ss.68 and 199] do not protect a registered proprietor from the consequences of his own actions where those actions give rise to a personal equity in another. *Such an equity may arise from conduct of the registered proprietor after registration:* Barry v Heider (1914) 19 CLR 197. And we agree with Mahoney J.A. in Logue v. Shoalhaven Shire Council (1979) 1 NSWLR 537, at p 563 that it may arise from conduct of the registered proprietor before registration. [emphasis added]

61 It may be noted that "equity" and "personal equity" in these passages are used interchangeably: see also the quote at para 21 above, on personal equities under s 46(2)(*b*). A personal equity is enforceable against the proprietor provided it does not conflict with ss 46(1) and 46(2).

92 *Bahr v Nicolay (No 2)* (1988) 164 CLR 604 at [13]–[14].
93 *Bahr v Nicolay (No 2)* (1988) 164 CLR 604 at [33].
94 *Bahr v Nicolay (No 2)* (1988) 164 CLR 604 at [48].

© 2024 Contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.

C. The interpretation of "fraud" in the Land Titles Act adopted in Ho Kon Kim v Lim Gek Kim Betsy

62 In *Betsy*, the Court of Appeal said:[95]

> We consider first the concept of fraud in relation to the conduct of RHB and determine whether there was any fraud committed by RHB in disregarding the interest of Mdm Ho in the property. The term fraud in the Act means actual fraud, *ie* dishonesty of some sort, and not constructive or equitable fraud: *Assets Company, Limited v Mere Roihi* [1905] AC 176 at 210, and *Waimiha Sawmilling Company, Limited (in liquidation) v Waione Timber Company, Limited* [1926] AC 101 at 106. In *Bahr v Nicolay* ([41] supra), Mason CJ and Dawson J said (164 CLR 604 at 614; 78 ALR 1 at 6), that these authorities '*do not mean that all species of equitable fraud stand outside the statutory concept of fraud*', and in their view the statutory concept of fraud means 'actual fraud, personal dishonesty or moral turpitude'. Their Honours held that fraud could arise both from dishonest repudiation of a prior interest which the registered proprietor had acknowledged or had agreed to recognise as the basis for obtaining the title, as well as for fraudulent conduct which enabled him to obtain the title by registration … [emphasis added]

63 The Court of Appeal was conspicuously reticent about whether or not fraud in the LTA included the species of equitable fraud mentioned by Mason CJ and Dawson J in *Bahr*. This article contends that fraud in s 4(2)(*a*) means actual fraud in the *Assets* sense, in the *Bahr* sense, and also any kind of equitable fraud redressable by a court exercising equitable jurisdiction (see para 67 *ff* below), *ie*, any act that disturbs the conscience of the court as to justify intervention to put right an unacceptable wrong.

64 However, it would appear that the Court of Appeal, *without any explanation*, adopted an extremely narrow approach in applying the concept of fraud only to fraud committed in, but not after, taking the mortgage:[96]

> RHB repudiated the unregistered interest of Mdm Ho and reneged from the agreement made with Ms Lim with regard to Mdm Ho's interest as provided in cl 6(2)(b) of the regulating agreement. However, such repudiation does not amount to fraud, personal dishonesty or moral turpitude on their part. The facts in the instant case do not justify a finding of dishonest repudiation of an unregistered interest. In our judgment, what RHB did certainly did not amount to fraud.
>
> … when RHB took the mortgage of the property, they had knowledge of the sale agreement made between Mdm Ho and Ms Lim and recognised Mdm Ho's equitable interest in the property. They made an allowance of her interest and discounted it in their evaluation of the property as security for the overdraft

95 *Ho Kon Kim v Lim Gek Kim Betsy* [2001] 3 SLR(R) 220 at [43].
96 *Ho Kon Kim v Lim Gek Kim Betsy* [2001] 3 SLR(R) 220 at [46] and [49].

© 2024 Contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.

> facilities offered to Earling. By cl 6(2)(b) of the regulating agreement they not only expressly acknowledged and recognised the existence of Mdm Ho's equitable interest in the property but also committed themselves to discharging the mortgage on the plot of land of Mdm Ho without any payment. … Thus, cl 6(2)(b) was 'a stipulation of the bargain' RHB made with Ms Lim that they would be bound by Mdm Ho's interest in the property. In our opinion, the effect of this stipulation is that RHB had accepted the particular plot of Mdm Ho as not being subject to the mortgage, thereby preserving Mdm Ho's interest in the property. Having taken the mortgage of the property on that basis, it is, in our opinion, 'utterly inequitable' for RHB to renege from their obligation and insist on the absolute nature of their interest as a mortgagee of the whole of the property and repudiate the equitable interest of Mdm Ho in the property. *Such a stand taken by RHB is certainly unconscionable, though not fraudulent or dishonest. In the circumstances, equity would compel them to honour their obligation and a constructive trust ought to be imposed. In our judgment, RHB took the mortgage of the property subject to the constructive trust in favour of Mdm Ho.*
>
> [emphasis added]

65 The Court of Appeal's finding in the above passages is baffling, since RHB's conduct in repudiating Mdm Ho's equitable interest in Plot 3, and in setting up its absolute title as proprietor (mortgagee) as a defence to her claim, was far worse in dishonesty than that of the second respondents in *Bahr*. It can only be rationalised on the basis that fraud in s 46(2)(*a*), as understood by the Court of Appeal, applies in, but not after, taking the mortgage.[97] If so, there is no logical or rational basis for this distinction, as pointed out by Mason CJ and Dawson J in *Bahr*. Further, such a holding is inconsistent with s 46(2)(*a*) where fraud is not qualified by any temporal limitation as to when it is committed. The Court of Appeal in *Bebe* suggested that *Betsy* should be reviewed, if a similar case should come before a court in a future case.

66 Fraud is an ancient head of equity jurisdiction that encompasses many varieties of fraudulent acts involving different degrees of dishonesty or moral turpitude, including unconscionable or inequitable acts redressable in equity. Giving this meaning to fraud in s 46(2)(*a*) will resolve the problems noted by the authors of *Tan Sook Yee* (see para 44 above) concerning adverse claimants to land wrongfully taken or withheld by the proprietor. The principles and the authorities are discussed at para 67 *ff* below.

97 *Cf*, *Loke Yew v Port Swettenham Rubber Co, Ltd* [1913] AC 491 and *Bahr v Nicolay (No 2)* (1988) 164 CLR 604 at [33], *per* Wilson and Tooley JJ.

© 2024 Contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.

D. The nature of fraud in equity

67 In *Frank Reddaway v George Benham*,[98] Lord Macnaghten famously said: "[F]raud is infinite in variety … But fraud is fraud all the same; and it is the fraud, not the manner of it, which calls for the interposition of the Court."[99] Prof LA Sheridan began his treatise, *Fraud in Equity: A Study in English and Irish Law*, by citing this dictum, and noted: "Fraud is one of the ancient heads of equity jurisdiction, the common law having no adequate machinery for trying questions of fraud until the development of the action on the case for deceit in the late eighteenth century."[100]

68 In his classic judgment in *Earl of Chesterfield v Janssen*,[101] ("*Earl of Chesterfield*") Lord Hardwicke LC affirmed the Court of Chancery's jurisdiction to relieve against every species of fraud, and enumerated them under five classes, beginning with "actual fraud". Prof Sheridan reviewed this classification in the light of the case law up to 1956, and reformulated the five classes generally as follows:[102]

> (1) making a false statement of fact, not having a belief in its truth or a wilful intention to lie or indifference to the truth, or if a fiduciary relation exists, less impropriety is required, and the attitude may be mere carelessness;
>
> (2) improper use of due legal forms and procedure, with the intention to overreach the lawful rights of another person, a basic element of frauds (a) in litigation, (b) giving rise to constructive notice, and (c) registry provisions;
>
> (3) taking advantage of power over another, whether by entering into a transaction for value with that other to his detriment or by accepting a gift from him, and whether the power arises out of the relative bargaining capacities of the parties or out of confidence reposed by one in the other;[103] in each case, with knowledge of the power;
>
> (4) improper dealing with another's property received for use on behalf of another by claiming to keep it, or trying to buy it; or by making a secret profit out of the transaction;

98 [1896] AC 199 at 221.
99 *Frank Reddaway v George Benham* [1896] AC 199 at 221.
100 LA Sheridan, *Fraud in Equity: A Study in English and Irish Law* (Pitman, 1957) at p 4.
101 (1751) 2 Ves Sen 125 at 155–157.
102 LA Sheridan, *Fraud in Equity: A Study in English and Irish Law* (Pitman, 1957) at p 204, combining a short and a long classification.
103 At p 179, Prof Sheridan explained: "(iv) in undue influence, the bargain is set aside because it is a breach of confidence reposed in respect of a relationship existing independently of the transaction impeached. It is a case of a bargain with a person not equal to protecting himself … undue influence can be classified with taking advantage of other weaknesses".

© 2024 Contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.

> (5) attempting to use a statute as an instrument of fraud (e.g., pleading the Statute of Fraud where there is part performance by the other party).
>
> [reference added]

69 In relation to class (5), Prof Sheridan wrote:[104]

> Fraud however, ought to be the essence of the equitable doctrine, for it is generally considered that only in cases of fraud can equity disregard or modify a statute: in the language of the courts: equity will not allow a statute to be used as a statute of fraud. But the maxim does not speak of actual fraud, and it may be that courts of equity would say that where there was notice without knowledge, as where notice is given to an agent is not communicated to the principal, the fraud is constructive.

70 Prof Sheridan commented that Lord Hardwicke had used the term "actual fraud" without explaining what it meant, and that other judges had also used it, but not always to mean the same thing. Prof Sheridan cited Prof JN Pomeroy's description of fraud in equity as follows:[105]

> Fraud in equity includes all wilful or intentional acts or omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence, and are injurious to another, or by which an undue and unconscientious advantage over another.
>
> …
>
> Constructive fraud is simply a term applied to a great variety of transactions, having little resemblance either in form or in nature, which equity regards as wrongful, to which it attributes the same or similar effects as those which follow from actual fraud, and for which it gives the same or similar relief as that granted in cases of real fraud. It covers different grades of wrong. It embraces contracts illegal, and therefore void in law as well as in equity; transactions voidable in equity because contrary to public policy; and transactions which merely raise a presumption of wrong, and throw upon the party benefited the burden of proving his innocence and the absence of fault.

71 In *First City Capital Ltd v British Columbia Building Corp*,[106] a case of mistake, McLachlin CJ expounded the wider meaning of fraud as follows:[107]

104 LA Sheridan, *Fraud in Equity: A Study in English and Irish Law* (Pitman, 1957) at p 158.

105 JN Pomeroy, *Equity Jurisprudence and Equitable Remedies* vol 2 (Bancroft-Whitney, 3rd Ed, 1905) at pp 1555 and 1662–1663.

106 (1989) 43 BCLR 29.

107 *First City Capital Ltd v British Columbia Building Corp* (1989) 43 BCLR 29 at [27]. This was cited in *Chwee Kin Keong v Digilandmall.com Pte Ltd* in the High Court ([2004] 2 SLR 594) and in the Court of Appeal ([2005] 1 SLR(R) 502).

© 2024 Contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.

> Fraud in this wider sense refers to transactions falling short of deceit but where the court is of the opinion that it is unconscientious for a person to avail himself of the advantage obtained. Fraud in the 'wider sense' of a ground of equitable relief 'is so infinite in its varieties the Courts have not attempted to define it', but 'all kinds of unfair dealing and unconscionable conduct in matters of contract come within its ken'.

72 In *Quah Hong Lian Neo v Seow Teong Teck*,[108] Mills J held that "fraud" in s 39 of the Johore Land Enactment 1910 "should be construed to mean every aspect of 'fraud' including 'constructive fraud' and 'actual fraud'". Mills J declined to follow *Assets* and distinguished it on the ground that the statute was differently worded.[109]

E. Meaning of "fraud" under the general law

73 The meaning of "fraud" under the general law of Singapore is stated in *Halsbury's Laws of Singapore* vol 9(3):[110]

> The courts of equity exercise a well-established jurisdiction to give relief to a victim of fraud. Fraud is meant not only actual fraud but also constructive fraud or equitable fraud. In the view of equity, actions performed with an intention to cheat or deceive are fraudulent … However, equity also intervenes to protect against 'constructive' or 'equitable' fraud where there is an absence of any intention to cheat or deceive. No comprehensive definition of constructive or equitable fraud has been laid down; and notable judges have thought it dangerous to do so. The result is that the notion of constructive or equitable fraud has sometimes appeared 'as no more than a generic description of precise and well-known' equitable principles or as a generic formula for equitable relief. However, although a common definition is impossible, it may not be too far off the mark to conceive of constructive or equitable fraud as a kind of presumed dishonesty raised where circumstances are found to in the judicial experience to warrant it, so that equity may justly afford relief notwithstanding proof of dishonesty is lacking. Thus, equity will not allow a statute be used as an engine of fraud, may be understood as a means to afford relief when in the circumstances it would be inequitable to permit the defendant to take advantage of an informal arrangement from which he has derived significant benefit by relying on statute to destroy it. In numerous other instances, equity considers that a person under a duty to act in the best interest of or to respect the confidence of another is guilty of constructive fraud if he fails to act in accordance with good conscience towards him or her, notwithstanding the

108 [1936] MLJ 161. The Federal Court has held otherwise: see *Datuk Jaginder Singh v Tara Rajaratnam* [1983] 2 MLJ 196 and *Doshi v Yeoh Tiong Lay* [1975] 1 MLJ 85.

109 *Cf*, *Tueh Guat Choo v Cheah Ah Hoe* [1932] MLJ 109, where Gerathy J held that "fraud" in s 42 of the Land Code 1926 meant actual fraud, citing *Assets Co Ltd v Mere Roihi* [1905] 1 AC 176 and *Waimiha Sawmilling Co v Waione Timber Co* [1926] AC 101.

110 LexisNexis, 2012 Reissue at para 110.958.

© 2024 Contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.

> incumbent may not have been dishonest. Equity's jurisdiction to give relief against fraud extends to making any person sufficiently implicated in the fraud accountable in equity. [references omitted]

74 There is no reason why fraud in the LTA should bear a meaning different from that under the general law, and since fraud cannot be defined exhaustively, it should be restricted to be the meaning given to it in *Assets* or in *Bahr*.

VII. The meaning of "trust" in section 46(2)(*c*) of the Land Titles Act

75 The word "trust" in s 46(2)(*c*) plainly refers to a trust that is enforceable against the trustee according to its provisions. It refers to a trust voluntarily created *inter vivos* by the settlor or under a will by the testator. It may be for a private or public purpose. If the trust fails or its purpose cannot be carried out, the undisposed property may revert to the settlor or the testator's estate as a resulting trust. If the terms of the settlement or the will are unclear as to whether they constitute a trust, and the court construes its provisions as such, then an express trust is implied. By its terms, s 46(2)(*c*) excludes trusts which arise by operation of law (*eg*, the institutional constructive trust and resulting trust[111]) or imposed by a court (*eg*, the remedial constructive trust).[112] The facts in *Betsy* supported a finding that the first respondent held Mdm Ho's equitable interest in Plot 3 on an express trust under the terms of the sale agreement,[113] (*cf*, Mason CJ's and Dawson J's analysis in *Bahr* of the second respondents' agreement to resell Lot 340 to the appellants).

---

111 *Assets Co Ltd v Mere Roihi* [1905] 1 AC 176 at 205. See also para 39 above.

112 See paras 12 and 39 above.

113 In *Vandepitte v Preferred Accident Insurance Corporation of New York* [1933] AC 70 at 79, Lord Wright said: "[A] party to a contract can constitute himself a trustee for a third party of a right under the contract and thus confer such rights enforceable in equity on the third party. The trustee then can take steps to enforce performance to the beneficiary by the other contracting party as in the case of other equitable rights. The action should be in the name of the trustee; if, however, he refuses to sue, the beneficiary can sue, joining the trustee as a defendant." In *Bahr v Nicolay (No 2)* (1988) 164 CLR 604 at [16], Brennan J said:

> … *As the Bahrs' interest was created by an antecedent agreement pursuant to which Nicolay was bound to enforce the Thompsons' undertaking to honour the Bahrs' interest, there can be no reason for denying the Bahrs' standing to enforce the undertaking against the Thompsons directly in a suit in which Nicolay is a party:* Snelling v. John G. Snelling Ltd. (1973) QB 87, at p 99. Moreover, the constructive trust on which the Thompsons hold their title is a trust to give effect to the Bahrs' interest. *As beneficiaries of that trust, the Bahrs may enforce their interest against their trustee directly*: *Neale v. Willis* (1968) 19 P & CR 836, and cf. *Hersey v. Giblett* (1854) 18 Beav 174 (52 ER 69). *The Bahrs are therefore*

(cont'd on the next page)

© 2024 Contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.

76 In his essay, "A Hard Look at *Bahr v Nicolay*",[114] Prof Barry Crown raised certain objections to interpreting "trust" in s 46(2)(*c*) of the LTA to refer to express trusts, using the following examples:

(a) a common arrangement between family members or partners to buy a house registered in the name of one of them that is termed a "common intention constructive trust";

(b) where, if the terms are oral, it would not be provable under s 7(1) of the Civil Law Act (Revised 1999), and even where there is part performance as a defence, it might not have survived the Application of English Law Act 1993 ("AELA"); and

(c) that proprietary estoppel is also not applicable as being in conflict with the principle of indefeasibility, but that a constructive trust, if it is a trust under s 46(2)(*c*), would not be.

77 This article suggests the following answers to Prof Crown's points:

(a) The claimant in such an arrangement is likely to be able to prove some oral terms of the agreement on the ownership of the house, *inter se*.

(b) An oral agreement is not an impediment to the application of the maxim that equity will not allow a statute to be used as an instrument of fraud.[115] In any case, the doctrine of part performance has survived the AELA: see *Joseph Mathew v Singh Chiranjeev*.[116]

(c) Indefeasibility is not a defence to a proprietary estoppel claim: (i) as denying it is dishonest and constitutes fraud under

---

> *entitled to enforce their right of purchase directly against the Thompsons. They do not thereby impeach the registration of the transfer to the Thompsons.* Nor does the T.L.A. present a bar to the enforcement of the undertaking, though (to adopt what Barwick C.J. said in *Breskvar* at p 385) the terminal point of a decree enforcing the undertaking might be an order directing the Thompsons to divest themselves wholly of the estate vested in them by that registration. [emphasis added]

114 Published in *Lives in the Law: Essays in Honour of Peter Ellinger, Koh Kheng Lian and Tan Sook Yee* (Dora Neo, Tang Hang Wu & Michael Hor eds) (National University of Singapore & Academy Publishing, 2007).

115 In *Bahr v Nicolay (No 2)* (1988) 164 CLR 604 at [15], Brennan J said:

> As to the Statute of Frauds, Scott L.J. held in Bannister v. Bannister that it presents no obstacle to the imposition of a constructive trust in cases where the constructive trust has its origin in an oral agreement. If a statute enacted to prevent fraud could be raised by a purchaser as a cloak for unconscionable conduct, the statute would be put to a purpose for which it was not intended: Rochefoucauld v. Boustead (1897) 1 Ch 196; Cadd v. Cadd (1909) 9 CLR 171, at p 187.

116 [2010] 1 SLR 338 at [47]–[61].

© 2024 Contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.

s 46(1)(*a*); or (ii) if the claim is founded on a contract under s 45(2(*b*), or a licence envisaged under s 95(2)(*b*).

78 In *Tan Sook Yee*,[117] the authors criticised *Bebe* for suggesting that Mdm Ho could have sued RHB in contract under s 46(2)(*b*) of the LTA, without explaining why. The explanation is that the reference to s 46(2)(*b*) was a typographical error. This is evident from the immediately preceding statement:[118]

> In our view, the facts in *Betsy* as found by the court would have allowed it to find that there was actual fraud on the part of RHB. The facts showed that RHB had induced Betsy to accept the mortgage on the promise that they would release Mdm Ho's plot of land back to her without payment, thus bringing the case within s 46(2)(*b*) of the LTA.

79 The authors have also argued that the *Bebe* approach to the trust exception is too narrow, and question how *Bebe* would deal with the case of a fiduciary who accepts bribes and acquires land with the proceeds, citing *Attorney-General for Hong Kong v Reid*.[119] There, the Privy Council held:[120]

> If a fiduciary acting honestly and in good faith and making a profit which his principal could not make for himself becomes a constructive trustee of that profit then it seems to their Lordships that a fiduciary acting dishonestly and criminally who accepts a bribe and thereby causes loss and damage to his principal must also be a constructive trustee and must not be allowed by any means to make any profit from his wrongdoing.

The answer, it is respectfully suggested, is that wrongfully withholding from the Crown the land purchased with bribed moneys obtained in a breach of fiduciary duty was dishonest and constituted fraud by the fiduciary (see para 68 above).

VIII. Does "trust" in section 46(2)(*c*) of the Land Titles Act include the constructive trust and the resulting trust?

80 In two articles, "The Trust Statutory Exception to Indefeasibility in the Singapore Torrens System"[121] and "Legal Education in Property

117 Tang Hang Wu & Kelvin FK Low, *Tan Sook Yee's Principles of Singapore Land Law* (Lexis Nexis, 4th Ed, 2019) at para 14.87.
118 *United Overseas Bank Ltd v Bebe bte Mohammad* [2006] 4 SLR(R) 884 at [73].
119 [1994] 1 AC 324. See n 17 above. This decision was applied in *Grimaldi Chameleon Mining NL (No 2)* [2012] ALR 22 by the Federal Court of Australia.
120 *Attorney-General for Hong Kong v Reid* [1994] 1 AC 324 at [1153].
121 [2017] Sing JLS 151.

© 2024 Contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.

Law at NUS: Some Reflections",[122] Prof Teo has advanced five new arguments that "trust" in s 46(2)(*c*) of the LTA includes the constructive trust (institutional and remedial) and also the resulting trust. The five arguments are discussed below.

A. The section 95(2) licence

81 Section 95(2) of the LTA provides:[123]

> **Licences not to be registered**
>
> **95.**— …
>
> (2) The Registrar must not notify any licence in the land-register, but in any case where a licence relating to the use or enjoyment of land is by law binding on assigns of the licensor, the licensee thereunder is deemed to have an interest in the land for the purposes of section 115.

Prof Teo argues that:[124]

> … in certain circumstances, a constructive trust may be imposed on a third party to bind him to a contractual licence where the third party's conscience is affected. This would be the case where, for example, the third party had notice of the contractual licence and paid a lower price for the land or where he expressly undertook to honour the contract. It is the constructive trust, and not the contractual licence *per se* that binds the party.[125]
>
> …
>
> Where a constructive trust arises, it results in the acquisition of an equitable interest by the licensee in the land against the third party. This would entitle the licensee to lodge a caveat without the need to deem him or her as having an interest in land as provided in section 95(2). …
>
> [reference added]

82 With respect, since s 95(2) deems such a licensee to have an interest in land, the constructive trust is redundant.

122 [2017] Sing JLS 285.

123 Section 95(2) of the Land Titles Act was enacted to give effect to a new interest in land derived from a right to occupy land which is binding on the assigns of the licensor: see *Errington v Errington* [1952] 1 KB 290 and *Bendall v McWhirter* [1952] 2 QB 466, and the commentary at [162].

124 Teo Keang Sood, "The Trust Statutory Exception to Indefeasibility in the Singapore Torrens System" [2017] Sing JLS 151 at 154.

125 Citing *Ashburn Anstalt v W J Arnold & Co* [1988] 2 WLR 706.

© 2024 Contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.

B. Policy objectives of the Land Titles Act not compromised

83 Prof Teo argues:[126]

> The unconscionable behaviour of the registered proprietor is one of the key elements for the imposition of the constructive trust. This is so, be it in a two-party or three party-situation, or a commercial or a non-commercial situation, so long as the rights of the purchaser (the strongest person under the LTA) have not intervened. *Where the circumstances call for the imposition of a constructive trust, for the courts to do nothing, on the ground that a constructive trust is construed as not coming within the ambit of section 46(2)(*c*), would be more unconscionable.* [emphasis added; references omitted]

84 With respect, the statement that unconscionable behaviour gives rise to a constructive trust does not cohere with the conclusion that it is doubly unconscionable for the court not to hold that it is a trust under s 46(2)(*c*), unless it is already a trust.

C. Constructive trusts as a last resort

85 Prof Teo argues:[127]

> [T]he conscience of the registered proprietor may be clearly affected which calls for the imposition of a constructive trust … [a] constructive trust emerges, in effect, where it would have been fraudulent for the owner of the legal estate to maintain his sole beneficial ownership in derogation of rights which have already been bargained away informally to another …

With respect, this argument is self-explanatory. If a constructive trust is based on a fraudulent act, then the cause of action is fraud under s 46(2)(*a*) of the LTA.

D. Resulting trusts under the Land Titles Act

86 In *Loo Chay Sit v Estate of Loo Chay Loo*,[128] the appellant had claimed against Loo Chay Loo (the proprietor) a resulting trust of property on the ground that he had paid the purchase price. The appellant failed to prove this allegation. The Court of Appeal said:[129]

> [In] order to impugn Loo Chay Loo's title so as to fend off the counterclaim, the appellant has to prove the exceptional circumstances in the LTA, as a result

126 Teo Keang Sood, "The Trust Statutory Exception to Indefeasibility in the Singapore Torrens System" [2017] Sing JLS 151 at 155.

127 Teo Keang Sood, "The Trust Statutory Exception to Indefeasibility in the Singapore Torrens System" [2017] Sing JLS 151 at 156.

128 [2010] 1 SLR 286.

129 *Loo Chay Sit v Estate of Loo Chay Loo* [2010] 1 SLR 286 at [14].

© 2024 Contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.

of which the presumption of indefeasibility of title is displaced. In so far as the appellant relies on the doctrine of resulting trusts as one such exception, he has to prove that he had paid for the property so as to establish a resulting trust in his favour.

87 Prof Teo argues thus:[130]

> The recognition in *Loo Chay Sit* that resulting trusts constitute an exception to indefeasibility provides further support for the inclusion of constructive trusts in the trust exception provided in the LTA. In addition, both resulting and constructive trusts arise by operation of law. Hence, to exclude solely constructive trusts from the ambit of section 46(2)(*c*) would be strange indeed.

88 With respect, even if a resulting trust were a trust under s 46(2)(*c*), it is not clear how, logically, it would support the inclusion of constructive trusts under s 46(2)(*c*). Furthermore, under a resulting trust, the proprietor is a volunteer, who is not protected by the LTA.[131] Unless he is a donee, a volunteer cannot acquire an indefeasible title under s 46(1), read with s 46(3), against the creator of the trust. Equity will not allow him to plead his indefeasible title against the creator of the trust, as that would be tantamount to using the LTA as an instrument of fraud. Baalman explained:[132]

> The cases have been numerous in which a registered volunteer has been declared by the Court to be a trustee for some undisclosed beneficiary. How far these declarations have turned on the fact that the proprietor was a volunteer or, as other writers have expressed it, on the application of the resulting trusts, it would be difficult to estimate. But it is probable that in no case did the declaration rest on that fact unaccompanied by other evidence of an intention to create a trust. A registered proprietor would not be allowed to plead indefeasibility of title to defeat some personal confidence on which his ownership could be based.

E. Increasing application of constructive trust analysis

89 The implications for the doctrine of indefeasibility have not been explained. If the constructive trust is not a trust under s 46(2)(*c*) (see paras 12–13 and 39 above), it cannot become one no matter how often it is applied to myriads of situations.

---

130 Teo Keang Sood, "The Trust Statutory Exception to Indefeasibility in the Singapore Torrens System" [2017] Sing JLS 151 at 157.

131 See para 6 above.

132 John Baalman, *The Singapore Torrens System: Being a Commentary on the Land Titles Ordinance 1956 of the State of Singapore* (Government of the State of Singapore, 1961) at p 88.

© 2024 Contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.

F. *The mischaracterisation of* Ho Kon Kim v Lim Gek Kim Betsy

90 Prof Teo criticises *Bebe* for mistiming RHB's dishonest repudiation of Mdm Ho's equitable interest in Plot 3 as having taken place during, when it was instead committed after, the mortgage was taken. He then concludes that *Bebe*'s comment – that there was actual fraud in *Betsy* in RHB taking the mortgage – was unwarranted[133] and that "the non-application of actual fraud and the application of the constructive trust in *Betsy Lim* were correct".[134]

91 With respect, the mistiming, if it be so, does not automatically make the Court of Appeal's imposition of a constructive trust correct in law. There is no correlation between the two events. On the factual findings in *Betsy*, one version supported the holding that RHB's post-mortgage repudiation of Mdm Ho's equitable interest was fraudulent, and in another, that it was a breach of trust.

IX. Summary of conclusions

92 The main conclusions in this article are summarised below:

(a) The paramount estate or indefeasible title of the proprietor conferred under s 46(1) of the LTA is the foundation of the Torrens system. No claim may be made to recover registered land from the proprietor, except as specified in s 46(2) of the LTA.

(b) The exceptions to indefeasibility listed in ss 46(2)(*a*)–46(2)(*e*) of the LTA prescribe claims or causes of action for a claimant to recover land wrongfully taken or withheld by the proprietor. They correspond to: (i) fraud; (ii) breach of contract; (iii) breach of trust; (iv) legal disability of claimant; and (v) unlawful taking of claimant's land. The remedies or reliefs available to the claimant are: (A) a declaration of title; (B) an order of specific performance; (C) an order of restitution or restoration of title; and/or (D) damages.

(c) "Fraud" in s 46(2)(*a*) and other sections of the LTA means actual fraud and any species of equitable fraud redressable by a court in exercise of its equitable jurisdiction. The proprietor's denial of his obligations under a constructive trust, a resulting

133 Teo Keang Sood, "Legal Education in Property Law at NUS: Some Reflections" [2017] Sing JLS 285 at 294.

134 Teo Keang Sood, "The Trust Statutory Exception to Indefeasibility in the Singapore Torrens System" [2017] Sing JLS 151 at 161.

© 2024 Contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.

trust, the common intention constructive trust or equitable or proprietary estoppel constitutes fraud under s 46(2)(*a*).

(d) "Trust" in s 46(2)(*c*) of the LTA means any written or oral trust, whether *inter vivos* or by testamentary disposition, and excludes all other kinds of trusts.

(e) Any claim to acquire the proprietor's land under a contract may only be brought under s 46(2)(*b*) in respect of a contract to which the proprietor is a party.

93 The LTA is exceptional among Torrens statutes. It is differently structured and provisioned so as to make it efficient and effective in simplifying land dealings in Singapore and in promoting certainty and finality to the registered title.

© 2024 Contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.