

**Australasian Law Teachers Association - ALTA
2007 Refereed Conference Papers**



**Australasian Law Teachers Association – ALTA
Annual Conference**

62nd Annual ALTA Conference

University of Western Australia, Perth, Western Australia
23rd- 26th September 2007

Law and Public Policy: Taming the Unruly Horse?

Published Conference Papers

This paper was presented at the 2007 ALTA Conference in the
Property Law Interest Group

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Conference Papers published by the ALTA Secretariat
2007

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**TAMING THE UNRULY *IN PERSONAM* EXCEPTION:
AN EXAMINATION OF THE LIMITS OF THE *IN PERSONAM* EXCEPTION TO
INDEFEASIBILITY OF TITLE**

PENNY CARRUTHERS*

I INTRODUCTION

Indefeasibility of title is the cornerstone of the Torrens system. A person who becomes the registered proprietor of an interest in Torrens land obtains a title which is immune from attack by adverse claims other than those which are specifically excepted. The most significant express exception to indefeasibility is the fraud exception which renders a registered proprietor's title defeasible where the registered proprietor, or his or her agent, is guilty of fraud in becoming registered. In Australia the courts have adopted a narrow definition of fraud and accordingly the fraud exception to indefeasibility has been "tightly policed"¹ and it is only the most egregious examples of personal dishonesty that will constitute Torrens fraud.²

Of course, this restrictive interpretation of the fraud exception only serves to reinforce the sanctity of the indefeasibility of a registered proprietor's title.

However, a registered proprietor's title is also subject to the so called "*in personam*" exception which allows a claimant to bring a personal action against the registered proprietor. The principle of indefeasibility, as Lord Wilberforce has famously said,

... in no way denies the right of the plaintiff to bring against the registered proprietor a claim *in personam*, founded in law or in equity, for such relief as a court acting *in personam* may grant.³

Over the past few decades there has been an expansion in the scope of the *in personam* exception with the inevitable consequence of a corresponding erosion of the principle of

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¹ Sir Anthony Mason, "Indefeasibility – Logic or Legend?" in Grinlinton D, *Torrens in the Twenty-first Century* (2003) 16.

² Griggs L, "Indefeasibility and mistake – the utilitarianism of Torrens" (2003) 10 APLJ 108 at 108.

³ *Frazer v Walker* [1967] 1 AC 569 at 585.

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indefeasibility. In keeping with the theme of this Conference, the question that arises is; has the development of the *in personam* exception become too unruly? This issue, of whether the *in personam* exception has “outflanked”⁴ the principle of indefeasibility, is one which, quite rightly, is kept under constant review in the cases⁵ and also the commentaries.⁶ However, in order to assess accurately if the *in personam* exception has become too unruly, it is worthwhile first to reflect on the fundamental nature of this exception.

Accordingly, the purpose of this paper is to identify the generally accepted limits of the *in personam* exception and to analyse critically these limits in the light of a few selected recent cases.

Before turning to this examination a preliminary comment should be made as to whether it is strictly correct to label rights *in personam* an “exception” to indefeasibility. To call these rights an exception to indefeasibility has been described as a “misnomer”⁷ and “misleading”⁸. The statutory exceptions to indefeasibility, for example the fraud exception, give the claimant a statutory right to call upon the court to rectify the Register. As Langford says, “This is a right enforceable directly against the property”.⁹ *In personam* claims on the other hand, do not operate upon the registered title directly, but rather have as their basis the enforcement of personal claims against the registered proprietor which may give rise to orders requiring the registered proprietor to deal with the property in a particular manner.¹⁰

II THE LIMITS TO THE *IN PERSONAM* EXCEPTION

As noted above, the principle of indefeasibility does not interfere with a claimant’s right to bring a personal action against a registered proprietor. In *Frazer v Walker* Lord Wiberforce

⁴ Hughson, Neave and O’Connor, “Reflections on the Mirror of Title: Resolving the Conflict Between Purchasers and Prior Interest Holders” 21 [1997] Melb Uni LR 460 at 489.

⁵ For recent examples see: *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22; *Tara Shire Council v Garner*[2003]1 Qd R 556; *White v Tomasel* [2004] 2 Qd R 438 and *McGrath v Campbell* [2006] NSWCA 180

⁶ See, for example, Stevens L, “The In Personam Exceptions to the Principle of Indefeasibility” (1969) 1 Auckland Univ LR 29; Hughson, Neave and O’Connor, above n 4; Stevens L and O’Donnell K “Indefeasibility in Decline: the In Personam Remedies” in Grinlinton D, above n 1.

⁷ Thomas J in *CN and NA Davies Ltd v Laughton* [1997] 3 NZLR 705 at 712.

⁸ Butt P *Land Law* (5th ed 2006) 788.

⁹ Langford R “The *In Personam* Exception to Indefeasibility” in Rosemary Langford and Julie Dodds Streeton, “Aspects of Real Property and Insolvency Law” Research Paper No 6, Adelaide Law Review, 1994 91,121.

¹⁰ See also Hughson *et al* above n 4 at 490.

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referred to two New Zealand cases as illustrations of the *in personam* exception and then continued:

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.*¹¹ (Emphasis added)

Thus, in *Frazer v Walker* the court expressly disavowed any intention to define the parameters or limits of the *in personam* exception. However, cases both before and after *Frazer v Walker* have recognized and articulated various limitations on the *in personam* exception. These limitations may be thought of as pre-requisites or elements of the *in personam* exception and may be listed as follows:

1. A recognised legal or equitable cause of action enforceable against the registered proprietor;
2. The cause of action must give rise to a remedy relating to the registered proprietor's land;
3. The registered proprietor's conscience must be affected as a result of the cause of action; and
4. The recognition of the cause of action as an *in personam* exception must not be inconsistent with the policy and purposes of the Torrens system.

Although the first two limitations are clearly fundamental to the existence of an *in personam* exception, the last two limitations are more contentious. It is proposed to examine rigorously each of these limitations considering first the case law from which the limitation is derived and then exploring any deficiencies of these limitations. It should be noted that there is an element of artificiality to this examination. In a practical sense these limitations overlap and dovetail one into the other. However, for the purposes of this paper it is useful to identify and examine the limitations separately.

¹¹ *Frazer v Walker* n 2 at 585. Lord Wilberforce continued, "The principle must always remain paramount that those actions which fall within the parameters of s62 and s63 may not be maintained." These provisions roughly equate to the "paramountcy" and "ejectment" provisions in the Torrens legislation. This aspect of Lord Wilberforce's comment is picked up in the fourth limitation discussed below, that is, the personal action must not be inconsistent with the Torrens system.

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A A recognised legal or equitable cause of action

In *Grgic v Australian and New Zealand Banking Group* Powell JA described *in personam* claims as follows:

... the expressions “personal equity” and “rights in personam” encompass only known legal causes of action or equitable causes of action, albeit that the relevant conduct that may be relied upon to establish a “personal equity” or “right in personam” extends to include conduct not only of the registered proprietor but also for those whose conduct he is responsible, which conduct might pre-date or post-date the registration of the dealing which it is sought to have removed from the register.¹²

From this we can see that in order for there to be an *in personam* exception there must be a known legal or equitable cause of action that is based on the conduct of the registered proprietor or others for whose conduct the registered proprietor is responsible. The conduct on which the action is based may have occurred before or after the registration of the registered proprietor.¹³

But what are the types of causes of action that may constitute an *in personam* exception? Kerr has said,

The statutory protection has no reference to contracts entered into by the registered proprietor himself, nor to his relations with *cestuis que trustent* on whose behalf he became registered or on behalf of whom he has, since registration impressed the land with a trust.¹⁴

It is apparent from this statement that a claim may constitute an *in personam* exception where the claim is based either on a contract with the registered proprietor or is based on a trust over the land, whether express, implied or constructive.¹⁵ However, the *in personam* exception may operate in numerous other situations where there is a legal or equitable cause of action

¹² (1994) 33 NSWLR 202 at 222-223.

¹³ This is to be contrasted with the availability of the fraud exception which, according to the traditional view, may only be invoked against a registered proprietor in relation to dishonest conduct of the registered proprietor prior to registration. *Bahr v Nicolay (No 2)* (1988) 164 CLR 604 at 633 per Wilson and Toohey JJ. Though for a contrasting view see Mason CJ and Dawson J at 614-615.

¹⁴ Kerr, *Principles of the Australian Land Titles (Torrens) System* (1927) 183.

¹⁵ Accordingly, where a registered proprietor enters a specifically enforceable contract to sell land to a purchaser, the purchaser is entitled to enforce the contract against the registered proprietor and the registered proprietor is not entitled to rely on having an indefeasible title as a defence to the purchaser’s claim. Similarly, beneficiaries of a validly constituted trust of Torrens land can enforce the trust against the registered proprietor. See *Oh Hiam v Tham Kong* (1980) 2 BPR 9451 at 9454(PC).

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enforceable against the registered proprietor.¹⁶ The following examples give a useful, though non-exhaustive, list of the grounds upon which a claimant may challenge a registered proprietor's title:

- (a) Where the claimant may invoke a claim based on equitable doctrines including undue influence;¹⁷ illegitimate pressure;¹⁸ estoppel;¹⁹ unconscionable dealing;²⁰ the *Garcia* principle;²¹ and breach of fiduciary duty. In these situations the claimant must be able to show that the registered proprietor was directly involved in the conduct giving rise to the equitable doctrine.
- (b) Where the registered proprietor has become registered pursuant to a dealing which is voidable for mistake.²²
- (c) Where the registered proprietor has undertaken to be bound by a prior unregistered interest.²³
- (d) Where the registered proprietor has become registered through the unauthorised use of the duplicate certificate of title by the registered proprietor or his or her agent.²⁴

However, it must be kept in mind that there are claims that would be enforceable under the general law as a recognised cause of action but which cannot be invoked in the Torrens system against the registered proprietor. Thus, those claims which are based purely on the

¹⁶ Langford considers that the circumstances giving rise to an *in personam* obligation can be divided into two categories: "(1) those cases where the registered proprietor has entered into a transaction which gives rise to the obligation, either on its terms, or by operation of law; and (2) those cases where the registered proprietor has created the obligation by their words or conduct." Langford gives examples of each category. See Langford n 9 126.

¹⁷ *Johnson v Buttress* (1936) 56 CLR 113.

¹⁸ *Crescendo Management Pty Ltd v Westpac Banking Corporation* (1988) 19 NSWLR 40.

¹⁹ *Barry v Heider* (1914) 19 CLR 197.

²⁰ *Parker v Mortgage Advance Securities Pty Ltd* [2003] QCA 275.

²¹ *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395. This case affirmed the so called "wife's special equity" that was recognized in *Yerkey v Jones* (1939) 63 CLR 649. This principle allows a wife, who has guaranteed her husband's debts, to have the guarantee set aside in certain circumstances. If the guarantee is secured by a registered mortgage over the property of the wife, the wife may be able to rely on the *Garcia* principle to invoke an *in personam* claim against the registered mortgagee's otherwise indefeasible title. There has been a considerable amount of discussion as to whether the recognition of the *Garcia* principle, and its expanded operation to include situations where the guarantor reposed trust and confidence in the debtor (not necessarily the husband) in business matters, as an *in personam* exception would undermine the principle of indefeasibility of title. See for a more detailed discussion, Bradbrook, MacCallum and Moore, *Australian Real Property Law* (4th ed 2007) 172-173.

²² The application of the law regarding mistake to registered Torrens titles has produced a number of inconsistent decisions. See Griggs L, "Indefeasibility and Mistake – the Utilitarianism of Torrens" (2003) 10 APLJ 108.

²³ *Bahr v Nicolay (No 2)* above n 13.

²⁴ *Mercantile Mutual Insurance Co Ltd v Gosper* (1991) 25 NSWLR 32.

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invalidity of the underlying transaction without any reference to the conduct or dealings of the registered proprietor cannot give rise to an *in personam* exception.²⁵ The classic illustration of this is where the registered proprietor becomes registered pursuant to a dealing which is, unbeknown to the registered proprietor, forged.

In *Vassos v State Bank of South Australia*²⁶ the defendant bank became registered as mortgagee pursuant to a forged mortgage. The bank was innocent of any fraud or knowledge of fraud. However the plaintiffs, the mortgagors, sought to challenge the registered mortgage by arguing that the lack of assent by the mortgagors gave rise to an *in personam* claim that could be enforced against the registered mortgagee. Hayne J soundly rejected the plaintiffs' argument, saying,

That flies in the face of indefeasibility of title for without any fault of any kind on the part of the mortgagee he could always be compelled to discharge his security and his title obtained by registration could always be set aside at the suit of the defrauded party.²⁷

There is no doubt that the reasoning of Hayne J is correct. Essentially the sole basis for the plaintiffs' claim was the invalidity of the mortgage. This, of itself, will not give the claimant any right to challenge the registered mortgage. In order to invoke an *in personam* exception the claimant must establish other conduct of the claimant that makes the registered proprietor responsible for or involved in the forgery.

Another area where the courts have refused to recognise an *in personam* claim is where a public authority or official has become registered in breach of a statutory or administrative power (the "public authority" cases). In *Palais Parking Station Pty Ltd v Shea*²⁸ (*Palais Parking*) the Director General of Medical Services acquired land, in good faith, on the basis of compulsory acquisition powers. However, the Director General was mistaken in his belief that he was authorized to acquire the land. The former owner sought to recover the land by raising an *in personam* claim that it was unconscionable for the Director General to retain the land once the Director General became aware of the invalidity in the acquisition. The majority of the court held that there was no conceivable *in personam* claim that could be

²⁵ Hughson *et al*, n 4 at 491.

²⁶ [1993] 2 VR 316.

²⁷ *Ibid* 332.

²⁸ (1980) 24 SASR 425.

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enforced against the Director General who had become registered in good faith. As King CJ said,

[The doctrine of immediate indefeasibility] would be virtually meaningless if the courts were to regard mere retention of the land after it becomes known that the instrument is void as unconscionable so as to give rise to an equitable claim *in personam* on the part of the previous registered owner to have the land retransferred.²⁹

In this case, the transfer to the Director General was void, however, the Director General had become registered in good faith. A challenge to the Director General's registered title that is based solely on the ground of knowledge of the invalidity post registration should, rightly, be rejected. To this extent the statement of King CJ is, with respect, absolutely correct. If this were not the case, then the registration of any void transaction would always be sufficient to defeat the registered proprietor's title. And, as noted by Hayne J above, this would "fly in the face of indefeasibility".

However, where there has been an unlawful exercise of statutory power, as in *Palais Parking*, it is submitted that there are other grounds upon which to raise an *in personam* exception. In these cases, unlike the situation where a person has unwittingly become registered pursuant to a void or forged instrument, an *in personam* claim arises from the wrongful conduct of the registered proprietor himself. As Hughson, Neave and O'Connor say,

It is not the invalidity of the instrument but the wrongful expropriation of property through an illegal exercise of power that founds an *in personam* claim against the public authority.³⁰

It is submitted that the recognition of an *in personam* claim in cases where a statutory authority has exceeded its powers in becoming registered, is not inconsistent with the Torrens scheme. Such an *in personam* claim ought to be recognised as a legitimate *in personam* exception to the registered proprietor's title.³¹

B A remedy relating to the registered proprietor's land

²⁹ Ibid at 430.

³⁰ Hughson *et al* n 4 at 493.

³¹ There is support for this view. See, for example; Bradbrook *et al* n 21 at 167; Hughson *et al* n 4 at 494 and Langford n 9 at 147-154.

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The second limitation on the *in personam* exception is that the cause of action must give rise to a remedy relating to the registered proprietor's land. This limitation to the exception is so fundamental that it may appear redundant. After all, if the claimant is not seeking a remedy that relates to the registered proprietor's title, then the claim is "in no way an exception to the indefeasibility of the registered title."³²

In *Breskvar v Wall*³³ Barwick CJ appeared to recognise that the cause of action must give rise to a remedy in relation to the land:

Proceedings may of course be brought against the registered proprietor ... by persons setting up matters depending upon the acts of the registered proprietor himself. These may have as their terminal point *orders binding the registered proprietor to divest himself wholly or partly of the estate or interest vested in him* by registration and endorsement of the certificate of title ...³⁴ (Emphasis added)

Despite the comment made above of the apparent redundancy in articulating this particular limitation, it is important that this limitation on the *in personam* exception is identified. There may be a valid cause of action against the registered proprietor regarding a transaction with the land which does not give rise to a remedy relating to the land and therefore does not constitute an *in personam* exception. An example of this was suggested by Hayne JA in *Pyramid Building Society(In liquidation) v Scorpion*.³⁵ In that case, there was an argument by a mortgagor that it had a claim against the registered mortgagee for negligence in relation to the transaction. Hayne JA dismissed the mortgagor's argument, however, Hayne JA went on to say that if the mortgagee did owe a duty to the mortgagor and if that duty was breached, that may give rise to a claim for damages but he did not consider it gave rise to a claim to have the registered mortgage set aside.³⁶

C The registered proprietor's conscience must be affected

³² Chambers R, "Indefeasible Title as a Bar to a Claim for Restitution" [1998] *Restitution Law Review* 126.

³³ [1971] 126 CLR 376.

³⁴ *Ibid* at 384-385.

³⁵ [1998] 1 VR 188.

³⁶ *Ibid* 195.

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The third generally accepted limitation on the *in personam* exception is that the registered proprietor's conscience must be affected as a result of the cause of action. It should be noted at the outset that a registered proprietor's conscience will not be affected merely on the basis that the registered proprietor had notice of an unregistered interest prior to becoming registered.³⁷ This is in stark contrast to the old system priority rule regarding disputes between prior equitable and subsequent legal interests.³⁸ A subsequent legal interest holder with notice of the prior equitable interest would be subject to the prior interest. This aspect is considered further in this paper when the fourth limitation on the *in personam* exception is discussed.

Although there is an abundance of judicial authority to support the recognition of this limitation, there is considerable confusion in the case law regarding its application. For this reason, this limit on the *in personam* exception is somewhat contentious. It will be useful to review briefly the case law that sets out this limitation and then review some of the more problematic cases in this area.

Isaacs J in *Barry v Heider*³⁹ indicated that the Torrens legislation may be seen as giving greater certainty of title to registered proprietors,

... but not in any way destroying the fundamental doctrines by which Courts of Equity have enforced, as against registered proprietors, conscientious obligations entered into by them.⁴⁰

In similar vein, Hayne J in *Vassos v State Bank of South Australia* remarked that:

... whatever limits may be on such "personal" equities the very language used to describe the right and the reference to the remedies being "*in personam* remedies" is a clear reference to the remedies being available in circumstances where equity would act, ie, in cases which equity would classify as unconscionable or unconscientious.⁴¹

³⁷ This is based on the "notice" provisions in the Torrens legislation which are considered further in this paper in the discussion of the fourth limitation.

³⁸ *Pilcher v Rawlins* (1872) LR 7. A bona fide purchaser for value of the legal estate without notice of the prior equitable interest takes free of the prior equitable interest.

³⁹ (1914) 19 CLR 197.

⁴⁰ *Ibid* at 213.

⁴¹ [1993] 2 VR 316 at 333.

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The authors of the standard real property texts also readily identify this limitation to the *in personam* exception. Thus the authors of *Australian Real Property Law*⁴² say, "...the registered proprietor's conscience must be affected, such that it would be unconscionable for the registered proprietor to assert an unencumbered title."⁴³

Clearly these statements emphasise the need for some form of unconscionable or unconscientious conduct by the registered proprietor in order to establish an *in personam* exception. Before turning to consider the cases relating to this limitation it is appropriate to consider the meaning of unconscionable and unconscientious conduct. A useful starting point is the classic statement by Lord Haldane LC in *Nocton v Lord Ashburton*⁴⁴ in which he explained the nature of equitable fraud:

When fraud is ... used in Chancery in describing cases which were within its exclusive jurisdiction, it is a mistake to suppose that an actual intention to cheat must always be proved. A man may misconceive the extent of the obligation which a court of Equity imposes on him. His fault is that he has violated however innocently because of his ignorance, an obligation which he must be taken by the court to have known, and his conduct has in that sense always been called fraudulent...It was thus that the expression "constructive fraud" came into existence...What it really means in this connection is, not moral fraud in the ordinary sense, but breach of the sort of obligation which is enforced by a court that from the beginning regarded itself as a court of conscience.⁴⁵

This lengthy quote is very helpful in giving us some understanding of the nature of equitable fraud and unconscionable conduct. Importantly, equitable fraud does not require an actual intention to cheat and does not involve any "moral fraud in the ordinary sense". Rather, a person may be guilty of equitable fraud, "however innocent[ly] because of his ignorance", simply because he has breached an obligation which is enforced by a court of equity.⁴⁶ These statements on the meaning of equitable fraud and unconscionable conduct will be commented upon later in this paper.

⁴² Bradbrook, MacCallum and Moore, above n 21.

⁴³ Ibid at 166. Also see Butt who refers to the statement by the Privy Council in *Oh Hiam v Tham Kong* (1980) 2BPR 9451 at 9454 that the concept of indefeasibility does not interfere with "the ability of the court, exercising its jurisdiction *in personam* to insist on proper conduct in accordance with the conscience which all men should obey" Butt P, *Land Law* (5th ed 2006) 788.

⁴⁴ [1914] AC 932.

⁴⁵ Ibid at 954.

⁴⁶ Dal Pont and Chalmers, *Equity and Trusts in Australia* (3rd ed 2004) at 235 re-enforce this notion of unconscionable conduct: "In this context, the term "unconscionable" sets a *relatively low threshold*, being used in a broad sense interchangeably with the terms "unconscientious", "inequitable", or the phrase "inconsistent with honesty and fair dealing". (Emphasis added).

If the *in personam* exception is genuinely limited by the need to establish that the registered proprietor's conscience is affected as a result of the cause of action (the "unconscionable element"), one would expect to see a clear demarcation line in the cases between those cases where the unconscionable element is present and accordingly the *in personam* exception is established⁴⁷ and those cases where it is not present and the *in personam* exception is therefore not established. However, the cases do not reveal any such clear cut demarcation line. Rather, in reviewing the cases it is possible to identify two broad categories of cases: the "regular" cases and the "irregular" cases.

(a) The regular cases. In the regular cases, the court identifies the unconscionable element as being a limitation on the *in personam* exception and accordingly finds on the facts either (i) that the exception is established, or (ii) that the exception is not established;

(b) The irregular cases. The irregular cases considered in this paper deal with the situation where the unconscionable element is not present yet an *in personam* exception is established.

D Regular cases

1 Unconscionable element present and in personam exception established

In *Bahr v Nicolay*⁴⁸ the Bahrs had a right to repurchase land that they had previously sold to Nicolay. The right to repurchase was to arise at a future date. Before this date, Nicolay sold the land to the Thompsons who became the registered proprietors. The court found that the Thompsons, in their contract with Nicolay, had undertaken to honour the Bahrs' right to repurchase. When the Bahrs sought to repurchase, the Thompsons reneged on their undertaking. The Bahrs sought specific performance and ultimately all the members of the High Court, for slightly different reasons, found the Thompsons were subject to an *in personam* exception.

⁴⁷ Assuming of course, that the other three limitations on the *in personam* exception are satisfied.

⁴⁸ (1988) 164 CLR 604.

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One of the difficulties the Bahrs faced in establishing an *in personam* claim was that there was no direct contractual relationship between them and the Thompsons. However, all the members of the High Court considered that the Thompsons were subject to either an express⁴⁹ or constructive⁵⁰ trust in favour of the Bahrs.

The reason for the imposition of an express or constructive trust in this case was to counter the unconscionable conduct of the Thompsons in repudiating their prior contractual undertaking to honour the Bahrs' right of repurchase.⁵¹

2 Unconscionable element not present and in personam exception not established

In *Vassos v State Bank of South Australia*,⁵² discussed above, the defendant bank became registered as mortgagee pursuant to a forged mortgage. The bank was unaware of the forgery and Hayne J rejected the plaintiffs' *in personam* claim against the bank.⁵³ However, Hayne J also made important comments regarding the unconscionable element which are highly relevant here.

In the present case, for reasons which I will refer to later, it may well be that the bank did not act without neglect but there is in my view no material which would show that the bank acted unconscionably. There was no misrepresentation by it, no misuse of power, no improper attempt to rely upon its legal rights, no knowledge of wrongdoing by any other party. ... Even if by making reasonable enquiries the bank could have discovered the fact of the forgery I do not consider that that fact alone renders its conduct unconscionable. I do not consider that the plaintiffs have any *in personam* right against the bank; all that they have shown is the mere fact of forgery of the instrument.⁵⁴

This quote is enlightening. It gives us a good idea of conduct by a registered proprietor that may be viewed as unconscionable and therefore as capable of supporting an *in personam*

⁴⁹ Ibid Mason CJ and Dawson J at 619.

⁵⁰ Ibid Wilson and Toohey JJ at 638; and Brennan J at 654-656.

⁵¹ For a comprehensive discussion of *Bahr v Nicolay* see Tooher JG "Muddying the Torrens Waters with the Chancellor's foot"; *Bahr v Nicolay*" (1993) APLJ 1.

⁵² [1993] 2 VR 316.

⁵³ As noted earlier, unlike the position under the general law, the simple fact of the forgery, without more, did not give rise to a cause of action in the Torrens system so as to constitute an *in personam* exception to the registered proprietor's title.

⁵⁴ Ibid at 333.

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claim,⁵⁵ and it also indicates conduct that is not unconscionable, for example, mere neglect.⁵⁶ As noted in the quote, the failure of the plaintiffs to prove any unconscionable conduct by the bank meant that the plaintiffs could not establish an *in personam* claim in this case.

The recent New South Wales Court of Appeal decision in *McGrath v Campbell*⁵⁷ is similar to *Vassos v State Bank of South Australia*, in that an *in personam* claim was not established as the claimant was unable to establish unconscionable conduct by the registered proprietor.

In this case, the Campbells sought to establish that the McGraths' land was subject to an implied easement in favour of the Campbells' land on the basis of the *Wheeldon v Burrows*⁵⁸ principle. Both the Campbells' and the McGraths' land had previously been owned by a common owner who had executed simultaneous conveyances of the respective lots to the Campbells and the McGraths. The express statutory exception regarding easements was not applicable to this situation and therefore the Campbells sought to establish a right to an easement over the McGraths' land on the basis of an *in personam* exception.

A unanimous Court of Appeal⁵⁹ rejected the Campbells' *in personam* claim. Tobias JA made the following comment:

... in order for a "personal equity" to be created in favour of the Campbells enforceable against the McGraths, it was necessary that some conduct on the part of the McGraths ... constituted a breach of an obligation owed to the party seeking the benefit of the equity or was otherwise unconscionable.⁶⁰

As there was no unconscionable conduct by the McGraths there could be no *in personam* claim enforceable against them by the Campbells.

E Irregular Cases

1 Unconscionable element not present yet in personam exception established

⁵⁵ For example: misrepresentation, misuse of power, improper reliance on legal rights and knowledge of wrongdoing in another.

⁵⁶ In this regard the comments of Hayne J are consistent with his later comments in *Pyramid Building Society v Scorpion* [1998] 1 VR 188, mentioned above, that mere neglect would not give rise to an *in personam* claim.

⁵⁷ [2006] NSWCA 180.

⁵⁸ [1879] 12 Ch D 31.

⁵⁹ Giles and Hodgson JA agreeing with the reasons of Tobias JA.

⁶⁰ *Ibid* para [98].

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The next case, *Mercantile Mutual Life Insurance Co Ltd v Gosper*⁶¹ (*Gosper*), is difficult to categorise. The court does not refer specifically to the unconscionable element and arguably, on one view of the facts, there is no unconscionable conduct by the registered proprietor. However, a majority of the court find that the registered proprietor is subject to an *in personam* claim.

In the *Gosper* case, Mrs Gosper owned land over which there was a registered mortgage in favour of the defendant. As mortgagee, the defendant had possession of the certificate of title. Mr Gosper forged Mrs Gosper's signature to a variation of mortgage and the defendant registered the variation. To enable the variation of mortgage to be registered the defendant produced the certificate of title to the Land Titles Office. The defendant was unaware of the forgery.

Mahoney JA and Kirby P were in the majority and for different reasons found that the defendant's registered mortgage was subject to an *in personam* exception. Meagher JA dissented.⁶² The focus in this paper is on the judgment of Mahoney JA.⁶³

Mahoney JA referred to an oft quoted passage of Barwick CJ in *Breskvar v Wall*⁶⁴ that an *in personam* claim may arise from "matters depending upon the acts of the registered proprietor himself". In a thoughtful discussion Mahoney JA rejects the notion that a personal equity may only arise from the acts of the registered proprietor himself. His Honour refers to the fiduciary duty cases to illustrate his view and gives as an example the case where land is bequeathed to a solicitor who may be required to return it to the estate notwithstanding that the solicitor did nothing himself to procure the bequest.⁶⁵

⁶¹ (1991) 25 NSWLR 32.

⁶² Meagher JA referred to the cases that dealt with the registration of a forged mortgage. Provided the registered mortgagee had no knowledge of the forgery the mortgagee obtained an indefeasible title. Accordingly, as the defendant in *Gosper* had no knowledge of the forgery, the defendant had an indefeasible title to its registered variation of mortgage. *Ibid* at 50-52.

⁶³ Kirby P found that Mrs Gosper had a personal equity against the defendant based upon her pre-existing valid mortgage with the bank. In the view of Kirby P Mrs Gosper's personal covenants under the original mortgage could only be varied by deed and the forged variation of mortgage was not a deed due to the forgery. The judgement of Kirby P has been criticised, see Butt P, "Indefeasibility and sleights of hand" (1992) 66 ALJ 596.

⁶⁴ (1971) 126 CLR 376 at 384-385.

⁶⁵ (1991) 25 NSWLR 32 at 46.

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With respect, it is submitted that these comments of Mahoney JA are correct. As noted above, Lord Haldane in *Nocton v Lord Ashburton*⁶⁶ made it clear that a person may be guilty of equitable fraud, even though innocent of any moral fraud, on the basis that he/she has breached an obligation enforced by a court of equity. The example given by Mahoney JA, of a breach of fiduciary duty due to a conflict arising in a solicitor - client relationship, is a good illustration of a breach of an equitable obligation without any necessary proof of “moral fraud”.

Mahoney JA then went on to consider whether a personal equity in favour of Mrs Gosper had in fact arisen in this case. Mahoney JA noted that the forged variation of mortgage could only be registered upon production, by the defendant, of the certificate of title at the Land Titles Office. The defendant had no authority from Mrs Gosper to use her certificate of title in this way and therefore the defendant had breached its obligations to Mrs Gosper. Mahoney JA said that it was not necessary to consider whether the defendant was acting negligently or without proper care in using the certificate of title in this way. In his view, where registration of a forged mortgage has been produced by such a breach, that is sufficient to create a personal equity enforceable against the registered proprietor. This is the case whether the obligations of the mortgagee are strictly fiduciary or not.⁶⁷

The judgment of Mahoney JA has been criticised as unnecessarily expanding the scope of the *in personam* exception.⁶⁸ There are three comments that should be made in this regard.

First, in *Gosper*, Mahoney JA was not concerned to identify the nature of the breach of duty though he suggests, or at least does not preclude the possibility, that the breach may be a negligent breach. This is somewhat at odds with statements in other cases⁶⁹ and in the commentaries⁷⁰ that the mere neglect by the registered proprietor is insufficient to create a personal equity.

⁶⁶ [1914] AC 932.

⁶⁷ (1991) 25 NSWLR 32 at 49.

⁶⁸ Bradbrook, MacCallum and Moore, n 21 at 168.

⁶⁹ *Vassos v State Bank of South Australia* [1993] 2 VR 316 and *Macquarie Bank Ltd v Sixty-Fourth Throne Pty Ltd* [1998] 3 VR 133.

⁷⁰ Butt P n 43 at 790 and Bradbrook et al n 21 at 168.

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Second, and this is related to the first point, the defendant had no knowledge of the forgery and therefore could not be said to have acted unconscionably. The defendant had received a letter from a reputable firm of solicitors advising the defendant that they acted for Mrs Gosper in relation to the variation of mortgage.⁷¹ The defendant's use of the certificate of title to obtain registration was therefore consistent with the solicitor's letter and has been described as a "mechanical"⁷² act in the circumstances. If the defendant is to be treated as subject to an *in personam* claim by Mrs Gosper it would seem it should be based on either a breach of fiduciary duty or breach of some other equitable obligation. It is suggested that on the facts there is neither a breach of fiduciary duty, as the defendant was not in a fiduciary relationship with Mrs Gosper, nor a breach of other equitable obligation.⁷³ As noted above, though the defendant may have been negligent in its use of Mrs Gosper's certificate of title, this is insufficient to create a personal equity.

Third, on the other hand, an analogy may be drawn between *Gosper* and the public authority cases. In *Palais Parking*,⁷⁴ discussed earlier, the court refused to recognise an *in personam* claim in a case where a public officer exceeded his authority in becoming registered. In *Gosper*, the defendant exceeded its authority in becoming registered. Why should an *in personam* claim be available in *Gosper* yet not in *Palais Parking*? It was argued earlier that an *in personam* claim should be recognised in the public authority cases like *Palais Parking*. If *Gosper* is to be upheld as valid law, then this provides further support for the argument in favour of recognising an *in personam* claim in the public authority cases.

The final case to be considered in this section is *White v Tomasel*.⁷⁵ This case may be likened to the *Gosper* case in that there is no unconscionable conduct by the registered proprietor yet a majority of the court holds that an *in personam* claim is established.

⁷¹ See *Gosper* at 34 and 35 where Kirby P discusses this aspect of the case and makes the comment that some share of the responsibility for the losses may rest with the solicitors who (without taking actual personal instructions from [Mrs Gosper]) purported to act on her behalf.

⁷² Butt P n 63 at 597.

⁷³ Mrs Gosper would not be able to assert any of the equitable doctrines of undue influence, illegitimate pressure or unconscionable dealing against the defendant and there does not appear to be any other equitable cause of action that Mrs Gosper could bring against the defendant.

⁷⁴ See n 28.

⁷⁵ [2004] 2 Qd R 438.

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The facts were that the Tomasels purchased land at an auction from an agent of White, the vendor. There was a dispute between White and the agent as to whether the contract had been validly executed and White refused to proceed with the sale. The Tomasels obtained an order for specific performance of the contract from the District Court. White refused to execute a transfer and so the Registrar of the District Court executed the transfer and the Tomasels became registered. White appealed from the decision of the District Court to the Queensland Court of Appeal. The Court of Appeal found that the District Court had no power to make the orders that resulted in the registration of the transfer to the Tomasels.

The Tomasels argued that as they were now the registered proprietors, without fraud, they had an indefeasible title. The issue for the court was whether, in these circumstances, White could establish an *in personam* exception to the Tomasels' registered title.

Davies JA, in dissent, found that the Tomasels had an indefeasible title. Davies JA referred in detail to the case law regarding the unconscionable element and concluded that the Tomasels were innocent purchasers. There was no act making it unconscionable for the Tomasels to have obtained registration.⁷⁶

Williams JA and McMurdo J delivered separate judgments in which they found the Tomasels' title was subject to the *in personam* exception. Williams JA did not specifically refer to the unconscionable element. However, he did note that the indefeasibility provisions do not free a registered proprietor "from interests with which he has burdened his own title".⁷⁷ In this case the respondents, the Tomasels, sought the assistance of the court in order to become registered. Williams JA said:

By securing registration through the aid of a court order the respondents impliedly accepted that their rights were conditional upon the validity of that order. It followed that if that order were to be set aside, the court could order the respondents to restore the appellant's rights to the property.

McMurdo J considered that an *in personam* claim was established on the basis of unjust enrichment and the court's concern to restore to a party to proceedings property of which he

⁷⁶ Ibid para [32].

⁷⁷ Ibid para [58].

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was involuntarily divested by the erroneous exercise of judicial power.⁷⁸ McMurdo J expressly rejected the need to establish proof of unconscientious conduct on the part of the registered proprietor.⁷⁹ However, McMurdo J also said that if an element of unconscionability was required it came from the Tomasels' refusal to comply with their restitutionary obligation.⁸⁰ These comments of McMurdo J regarding unconscionable conduct were firmly rejected by Davies JA.⁸¹

There is no doubt that this case is an "unusual"⁸² and indeed a difficult case. However, the dissenting judgment of Davies JA is more in accord with the traditional view of the *in personam* exception. In this case there was no unconscionable conduct by the Tomasels in becoming registered pursuant to a court order and therefore, arguably, an *in personam* claim should not be recognised.⁸³

F The recognition of the cause of action not to be inconsistent with the policy and purposes of the Torrens system

The final limitation on the *in personam* exception is that the recognition of the cause of action as an *in personam* exception must not be inconsistent with the policy and purposes of the Torrens system. This limitation is referred to frequently in the cases. In *Frazer v Walker*⁸⁴ Lord Wiberforce recognised the existence of *in personam* claims in the Torrens system and stated:

The principle must always remain paramount that those actions which fall within the prohibition of sections 62 and 63 may not be maintained.⁸⁵

⁷⁸ Ibid para [68].

⁷⁹ Ibid para [67].

⁸⁰ Ibid para [74].

⁸¹ Ibid para [33] – [35].

⁸² Christenson and Duncan, "Is Indefeasibility of Title a Bar to Restitution After Reversal of a Judgment on Appeal?" (2005) 11 APLJ 81 at 86.

⁸³ The view of Davies JA is also consistent with the decision in *Palais Parking* n 28. The Director General had no legal power to obtain a registered title yet the court held there was no *in personam* claim and the Director General had an indefeasible title. As Christenson and Duncan have suggested, the fact the registration in *White v Tomasel* occurred as a result of a court order later set aside as opposed to a void proclamation (or other void dealing) is "of no moment", n 82 at 84.

⁸⁴ [1967] 1 AC 569.

⁸⁵ Ibid at 585. As noted earlier at n 11 these provisions roughly equate to the "paramountcy" and "ejectment" provisions in the Torrens legislation.

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This statement has been interpreted in the cases to mean that the recognition of the *in personam* claim must not be inconsistent with the terms, policy or purposes of the Torrens legislation.⁸⁶ There are two broad categories of claim that may be viewed as being inconsistent with the Torrens statutes:

(a) Those claims which would allow a former owner of land, who has been deprived of an interest in land, to bring an action against an innocent registered proprietor who has become registered pursuant to a forged or void instrument. It is now beyond doubt that claims based solely on the invalidity of the registered instrument will not give rise to an *in personam* claim against the innocent registered proprietor.⁸⁷ Such claims are clearly inconsistent with the Torrens system and further discussion of these claims is not required in this paper.⁸⁸

(a) Those claims which are based wholly or substantially on the notion that the registered proprietor had notice of the claimant's interest prior to becoming registered.

The "notice" provisions in the various Torrens legislation provide that knowledge of an unregistered interest or trust is not of itself to be imputed as fraud.⁸⁹ This provision has been interpreted so that a person holding an unregistered interest in land cannot challenge the registered proprietor's title simply on the ground that the registered proprietor had knowledge of the unregistered interest prior to becoming registered, or, indeed on the basis of knowledge that the registration will defeat the prior unregistered interest.⁹⁰

⁸⁶ See for example: *Bahr v Nicolay* n 48 per Mason CJ and Dawson J at 613; *Wilson and Toohey* JJ at 638.

⁸⁷ As Barwick in *Breskvar v Wall* (1971) 126 CLR 376 at 386 has said, the Torrens system is a system of "title by registration" and "registration which results from a void instrument is effective according to the terms of the registration." See also the earlier discussion in this paper of *Vassos v State Bank of South Australia* n 26. See the comments of Mahoney JA in *Gosper* n 61 at 40-41.

⁸⁸ It should be noted that if the registered proprietor was a volunteer, that is, he or she did not provide any consideration for his or her interest, then this of itself may constitute an exception to indefeasibility. The law regarding the position of the registered volunteer varies across the different states and territories of Australia. As this is a potential exception to indefeasibility that is separate from the *in personam* exception, the registered volunteer exception will not be considered further in this paper. However, for a thoughtful discussion of the registered volunteer see Atherton R, "Donees, Devisees and Torrens Title: The Problem of the Volunteer under the Real Property Acts" (1998) 4 Aust J Leg Hist 121.

⁸⁹ Section 134 *Transfer of Land Act* (WA) and the equivalent "notice" provisions in the other States.

⁹⁰ *Mills v Stockman* (1967) 116 CLR 61 at 78.

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Thus, as a result, an *in personam* claim that is wholly or substantially based on the registered proprietor's knowledge of a prior unregistered interest will be inconsistent with the Torrens scheme and will therefore not give rise to an *in personam* exception.⁹¹

In recent years, however, there has been a great deal of controversy regarding a particular *in personam* claim known as the first limb in *Barnes v Addy*,⁹² the "knowing recipient of trust property" principle. Under this principle a person will become liable as a constructive trustee where he or she receives trust property with knowledge that it is trust property and that it is transferred in breach of trust. Does a "knowing recipient" who becomes registered under the Torrens system obtain an indefeasible title or is he or she subject to a claim *in personam* under the first limb in *Barnes v Addy*?⁹³

There has been a marked divergence of opinion in the cases. On one view, the recognition of the *Barnes v Addy* principle is seen as inconsistent with the Torrens system as it is based on notice of an unregistered interest and the "notice" provisions preclude this from being a ground for challenging a registered title.⁹⁴ On the other view, such a challenge is considered consistent with the Torrens system as the claim is based not solely on the basis of knowledge of the trust, but additionally on knowledge that the transfer is in breach of trust.⁹⁵

⁹¹ It is worth noting here that the Australian and New Zealand courts have adopted divergent approaches to the interpretation of the notice provisions in relation to the fraud exception. The New Zealand position is based on the approach taken in the early New Zealand case of *Locher v Howlett* (1894) 13 NZLR 584 per Richmond J at 595-596: "It may be considered as the settled construction of this enactment that a purchaser is not affected by knowledge of the mere existence of a trust or unregistered interest, but that *he is affected by knowledge that the trust is being broken, or that the owner of the unregistered interest is being improperly deprived of it* by the transfer under which the purchaser himself is taking" (Emphasis added) Thus, the New Zealand courts are more likely to find that fraud is established in the "notice" cases whilst in Australia it is more likely that fraud will not be found on the basis of the "notice" provisions. For a discussion of the different approaches see: Butt "Notice and Fraud in the Torrens System: a Comparative Analysis" (1977) 13 UWALR 354; and generally, Grinlinton *Torrens in the Twenty-first century* n 1. It is beyond the scope of this paper to consider these divergent approaches in more detail.

⁹² (1874) LR 9 Ch App 244.

⁹³ As noted in n 91, in New Zealand, if the facts establish that the recipient has actual knowledge that the trust is to be "broken", the fraud exception may be established and the need for recourse to an *in personam* claim is therefore unnecessary.

⁹⁴ *Macquarie Bank Ltd v Sixty Fourth-Throne Pty Ltd (Macquarie Bank)* [1998] 3VR 133 per Winneke P and Tadgell JA; and *LHK Nominees Pty Ltd v Kenworthy* [2002] WASCA 291 per Murray, Anderson, Steytler and Pullin JJ. This view is generally supported in the commentaries: Griggs L, "The Tectonic Plate of Equity – establishing a fault line in our Torrens landscape." (2003) 10 *APLJ* 78; Butt P "Indefeasibility and "knowing receipt of trust property" (2002) 76 *ALJ* 606; and Butt P, "Rights in personam and the knowing receipt of trust property" (2003) 77 *ALJ* 280.

⁹⁵ *Tara Shire Council v Garner* [2002] QCA 232 per Atkinson J and McMurdo P and *Macquarie Bank* n 91 per Ashley AJA. The reasoning of the New South Wales Court of Appeal in *Say-Dee Pty Ltd v Farah Constructions Pty Ltd* [2005] NSWCA 309 takes a slightly different tack. The court, Tobias JA, Mason P and Giles JA,

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In late May 2007 this controversy was resolved by a unanimous decision of the High Court in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd*⁹⁶ (*Farah*). The High Court referred extensively to the judgement of Tadgell JA in *Macquarie Bank Ltd v Sixty Fourth-Throne Pty Ltd*⁹⁷ and rejected the knowing receipt doctrine as an *in personam* exception in the Torrens system.⁹⁸ The High Court was also highly critical of the decision of the New South Wales Court of Appeal.⁹⁹

A final point should be noted here. Although a claim based purely on the knowing receipt doctrine will not be accepted as an *in personam* claim, there may be circumstances where the registered recipient's title will be subject to an exception. Thus if dishonesty or collusion by the registered proprietor is established, the fraud exception may be invoked.¹⁰⁰

III CONCLUSION

In considering *in personam* claims as an exception to indefeasibility the courts are involved in a delicate balancing act. Legitimate legal or equitable claims against the registered proprietor

appears simply to accept that a registered proprietor's title is subject to claims *in personam* [236]-[238]. However, the court, in considering the equitable doctrine of knowing receipt, "saw no reason why the proverbial bullet should not be bitten" [232] and recognised the unauthorised receipt of trust property as being part of the law of unjust enrichment and subject to strict liability. That is, provided a receipt of trust property is established, the knowledge of the recipient is irrelevant [228]. The court therefore upheld a claim based on "recipient liability" as an *in personam* exception to the registered proprietor's title. This judgement has received a great deal of comment. It has been described as an "excellent decision" by James Edelman, "A Principled Approach to Unauthorised receipt of Trust Property" 122 [2006] *Law Quarterly Review* 174 at 177 and as a decision that is "not one to be celebrated, or repeated", Strahorn B, "The end of knowing receipt? A riposte to unjust enrichment" (2006) 80 *ALJ* 765. See also Toy A, "Knowing Receipt in the Torrens Context" [2006] ALTA Refereed Conference Papers.

⁹⁶ [2007] HCA 2.

⁹⁷ [1998] 3VR 133.

⁹⁸ [2007] HCA [193]-[196].

⁹⁹ The High Court, in a firmly worded rebuke, criticised the decision of the Court of Appeal and its adoption of the Birks/Hansen approach of strict liability for knowing receipt claims. [130]. The High Court said, "It was a grave error for the Court of Appeal to have taken this step. That is so for two reasons: it was very unjust and it has caused great confusion." [131].

¹⁰⁰ It should also be noted that the application of the knowing receipt doctrine to a registered volunteer is unclear. Although in most jurisdictions the registered volunteer obtains an indefeasible title, the case law is not clear as to whether a registered volunteer who had notice of an unregistered interest can rely on the protection afforded by the "notice" provision. See, for example the careful survey of the law by Owen J in *Conlan v Registrar of Titles* [2001] 24 WAR 299 at 330-337. See also *Bogdanovic v Koteff* (1988) 12 NSWLR 472 at 480. Though query the full ramifications of the single sentence of the High Court in *Farah* "Hence the registered proprietors prevail over Say-Dee even if they are *volunteers*." [198] (Emphasis added).

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should not be “emasculated”¹⁰¹ by setting the limits on the *in personam* exception too high. On the other hand the limits should not be set so low as to erode the sanctity of indefeasibility.

In this paper the limits to the *in personam* exception have been examined. By and large, and despite some areas of difficulty¹⁰², the limits are reasonably well settled and well understood. However, this cannot be said of the third limitation, that is, that the registered proprietor’s conscience must be affected as a result of the cause of action. Although the case law provides clear authority for an “unconscionable element” as part of the *in personam* exception, there are a number of irregular cases where the court has recognized an *in personam* exception yet there does not appear to be any unconscionable conduct by the registered proprietor.

Perhaps it is not surprising that this limitation gives rise to some inconsistencies in the decisions. After all, the definition of equitable fraud and unconscionable conduct does not equate to moral fraud in the ordinary sense but rather the definitions are designed to allow for flexibility in the decisions of a “court of conscience.” Doubtless this flexibility may mean that the limits to the *in personam* exception may appear to have been set too low in some cases and overridden the principle of indefeasibility. However, if this has been the case, there may be some solace in the High Court’s recent decision in *Farah*, which has, at the very least, firmly bolted the stable door on the recognition of one potential *in personam* claim.

¹⁰¹ Per Winneke P, *Macquarie Bank Ltd v Sixty-Fourth Throne* [1983] 3VR 133 at 136.

¹⁰² For example, in relation to the mistake cases, see n 22 and the public authority cases.