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BACK TO BASICS: INDEFEASIBILITY OF TITLE UNDER THE TORRENS SYSTEM

United Overseas Bank Ltd. v. Bebe bte Mohammad

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I. INTRODUCTION

In *United Overseas Bank Ltd. v. Bebe bte Mohammad*[1] the Court of Appeal had the opportunity to revisit one of the basic doctrines of the Torrens system—indefeasibility of title. The bank granted a loan to the defendant's adopted daughter and her husband on the security of a registered mortgage over the defendant's property. The searches conducted by the bank's solicitors revealed that a replacement certificate of title had been applied for. However, the borrowers' agent handed over to them the original certificate, which had been cancelled, but which was used to register the mortgage. As a result, the mortgage was registered on the strength of an erroneous document. At first instance it was ordered that the land register should be rectified by cancelling the mortgage.

It might have been thought that the bank would have had an indefeasible title to its registered mortgage, but Lai Kew Chai J. held that the mortgage could be set aside on three grounds. First, the conveyancing clerk who handled the transaction for the bank's solicitors was guilty of wilful blindness amounting to fraud, if not guilty of actual fraud, in procuring registration of the mortgage on the basis of a cancelled certificate of title. As the registered proprietor's agents were guilty of fraud, the mortgage could be defeated under section 46(2)(a) of the *Land Titles Act*.[2] Second, in registering the mortgage on the faith of the original certificate of title, the staff of the Registry of Titles had made a mistake. The land register could therefore be rectified by cancelling the registration of the mortgage under section 160(1)(b) of the Act. Third, in the words of Lai Kew Chai J., "[T]he defendant has a personal right recognised by equity to set aside the transaction on the ground that the plaintiff's agents had unlawfully used the cancelled original duplicate certificate of title to get on the land-register as a mortgagee to the defendant's detriment and when they were not entitled to do so … The case of *Mercantile Mutual Life Insurance Co. Ltd. v.*

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1 [2005] 3 S.L.R. 501 (H.C.) [*Bebe* (H.C.)]; [2006] 4 S.L.R. 884 (C.A.) [*Bebe*].

2 Cap. 157, 2004 Rev. Ed. Sing.

Gosper[3] … is relevant … the use of the original duplicate certificate of title to register the Mortgage was in my view unconscionable."[4]

Given that the doctrine of indefeasibility of title is supposed to be one of the central planks of the Torrens system, it is somewhat disturbing to note that three completely different ways could be found to defeat the title of the registered proprietor under the law as it then stood. Section 46 of the *Land Titles Act*, lays down the basic principle of indefeasibility of title in clear terms as follows:

> 46. Estate of proprietor paramount
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> (1) Notwithstanding—
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> (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;
> (b) any failure to observe the procedural requirements of this Act; and
> (c) any lack of good faith on the part of the person through whom he claims,
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> any person who becomes the proprietor of registered land, whether or not he dealt with a proprietor, shall hold 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 —
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> …
>
> (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 his agent was a party or in which he or his 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;
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> …

Fortunately, in a thorough and well-reasoned judgment, the Court of Appeal took the opportunity to clarify the law and return to the basic principles of the Torrens system, as laid down by John Baalman, the draftsman of the Singapore *Land Titles Act*.

The Court of Appeal held that the conveyancing clerk was not guilty of fraud in failing to make further enquiries as to the existence of the replacement certificate of

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[3] (1991) 25 N.S.W.L.R. 10 [*Gosper*]. Mrs Gosper was the sole registered proprietor of land, which was mortgaged to the extent of $205,000 at the time of purchase. Subsequently, Mrs Gosper's husband varied the mortgage so that the total sum secured rose to some $550,000. Mr Gosper forged Mrs Gosper's signature to the relevant documentation, which was registered under the Torrens system. Upon the death of Mr Gosper, the fraud was discovered. Mrs Gosper argued that she was entitled to have the mortgage discharged on repayment of the original sum. Mercantile Mutual argued that as its interest was registered, its title was indefeasible and the sum secured by the registered mortgage was the larger amount. The New South Wales Court of Appeal held that the forged instrument could be set aside where there was an enforceable personal equity against the registered proprietor. In this case, the personal equity arose against Mercantile Mutual because of their use of the certificate of title without the consent or authority of the registered proprietor.

[4] *Bebe* (H.C.), *supra* note 1 at paras. 40-42.

title. At most, this amounted to negligence. Giving the judgment of the court, Chan Sek Keong C.J. laid down important guidelines as to the meaning of fraud in the *Land Titles Act*.[5]

II. Rectification

So far as section 160(1)(b) was concerned, the Court of Appeal held that rectification was only possible where the "fraud, omission or mistake" was that of the registered proprietor. Section 160 should not be understood as providing additional exceptions to indefeasibility of title beyond those contained in section 46(2). It was of a procedural nature, designed to provide the machinery for rectifying the register once one of the exceptions to indefeasibility contained in section 46(2) had been invoked.

Section 160, which was added to the *Land Titles Act* in 1970, provides as follows:

> 160. Rectification of land-register by court
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> (1) Subject to subsection (2), the court may order rectification of the land-register by directing that any registration be cancelled or amended in any of the following cases:
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> (a) where 2 or more persons have, by mistake, been registered as proprietors of the same registered estate or interest in the land comprised in a folio;
> (b) where the court is satisfied that any registration or notification of an instrument has been obtained through fraud, omission or mistake; or
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> …
>
> (2) The land-register shall 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 omission, fraud or mistake in consequence of which the rectification is sought, or has caused that omission, fraud or mistake or substantially contributed thereto by his act, neglect or default.
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> …

Section 160 is one of the most problematic sections in the statute. Contrasting with John Baalman's carefully crafted exceptions to indefeasibility in section 46, it appears at first sight to give the court a wide ranging power to rectify the register and thereby override the supposedly indefeasible title of the registered proprietor. What is particularly strange is that one of the grounds for rectification in section 160 is fraud, yet fraud is already stated in section 46(2) as an exception to indefeasibility of title. Even more perplexing is the fact that whereas in section 46 the title of the registered proprietor can be defeated only on the grounds of "fraud or forgery to which that proprietor or his agent was a party or in which he or his agent colluded," in section 160(1)(b) the court can order rectification "where the court is satisfied that any registration or notification of an instrument has been obtained through fraud, omission or mistake." On the face of it, there appears to be no necessity for the fraud to be that of the registered proprietor or his agent in section 160(1)(b).

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5 *Bebe*, *supra* note 1 at paras. 12-36.

The *Land Titles Act* itself was based on Australian models and one would not be surprised to find amendments drawn from Australian or other Torrens systems. Strangely, however, the inspiration for section 160 appears to be section 82 of the English *Land Registration Act 1925*.[6] Although England does indeed have a system of land registration, the English system operates rather differently from the Torrens system, and therefore the English Act seems a most unlikely source for a technical amendment to Singapore's Torrens system. The similarity between the two sections can, however, be seen readily from the extracts from the English statute quoted below:

> 82. Rectification of the register
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> (1) The register may be rectified pursuant to an order of the court or by the registrar, subject to an appeal to the court, in any of the following cases, but subject to the provisions of this section:
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> …
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> (d) Where the court or the registrar is satisfied that any entry in the register has been obtained by fraud;
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> (e) Where two or more persons are, by mistake, registered as proprietors of the same registered estate or of the same charge;
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> …
>
> (h) In any other case where, by reason of any error or omission in the register, or by reason of any entry made under a mistake, it may be deemed just to rectify the register
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> …
>
> (3) The register shall not be rectified, except for the purpose of giving effect to an overriding interest, so as to affect the title of the proprietor who is in possession —
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> (a) unless such proprietor is a party or privy or has caused or substantially contributed, by his act, neglect or default, to the fraud, mistake or omission in consequence of which such rectification is sought …[7]

So far as fraud is concerned, section 82(1) gives the court a wide power to rectify whenever an entry is obtained by fraud. There is no need to show that the registered proprietor is privy to the fraud.[8] However, a defence is provided to the registered proprietor who is in possession of the land by subsection (3). The register is not to be rectified so as to affect his title unless he is party or privy to the fraud or has contributed to it in some way.[9]

Section 82 is a statement of the exceptions to indefeasibility of title, occupying the same role in the English system as the list of exceptions in section 46 of Singapore's *Land Titles Act*. If one looks at the entire section—which is too long to be quoted here in full—what strikes the lawyer brought up on the Torrens system is the large number of exceptions and their width of application. It needs to be appreciated, however, that although the *Land Registration Act 1925* does indeed provide for indefeasibility

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6 (U.K.), 1925, c. 21

7 The quotations are from the Act in its original form. See now *Land Registration Act 2002* (U.K.), 2000, c. 9, s. 65 and Sch. 4.

8 *Argyle Building Society v. Hammond* (1984) 49 P. & C.R. 148 [*Argyle*].

9 See *Hayes v. Nwajiaku* [1994] E.G.C.S. 106; *London Borough of Hounslow v. Hare* (1990) 24 H.L.R. 9.

of title,[10] unlike the Torrens system, that is not its main aim. The aim of the system rather is to provide for a state guaranteed title. In other words, in contrast to the Torrens system, it is relatively easy for the title of the registered proprietor to be defeated, but if this happens it is possible to claim an indemnity from the fund set up under the Act. Unlike the position under section 155 of the Singapore *Land Titles Act*, there is no need to show negligence on the part of the registrar in order to claim an indemnity. Although there are exceptions, of course, section 83(1) of the English Act states the basic rule that "any person suffering loss by reason of any rectification of the register under this Act shall be entitled to be indemnified."

Section 160 of the Singapore Act essentially transplants elements of the English system to the alien environment of the Singapore Torrens system, and it does so without regard to the existing exceptions to indefeasibility contained in section 46. It should be noted that the section provides that the court "may" rectify the register in certain circumstances. This has been understood in England as giving the court discretion to rectify in the circumstances listed in the section.[11] This suggests a way of reconciling the two sections. Section 46 states mandatory exceptions to indefeasibility of title. If one of the exceptions listed in the section applies, the court must rectify the register as against the registered proprietor. Section 160 adds to the list a number of discretionary exceptions to indefeasibility. If one of the exceptions in section 160 applies, the court may rectify the register, but it is under no obligation to do so. So far as fraud is concerned, where a registration has been obtained by fraud, but the registered proprietor was not privy to the fraud, there is no mandatory exception to indefeasibility under section 46(2)(b). However, the court has discretion to rectify the register in these circumstances under section 160(1). Even in such circumstances, however, a defence is provided to the registered proprietor who is in possession under section 160(2). The register cannot be rectified as against him, unless he was party or privy to the fraud or contributed to it in some way as stated in the subsection.

It would be perfectly possible to imagine a scheme in which section 46 and section 160 operated together as illustrated in the previous paragraph. Whether such a scheme would be desirable is another matter altogether. It would drive a coach and horses through Baalman's system of immediate indefeasibility of title. More seriously, a more relaxed rule of indefeasibility of title, as would operate under such a system, would need to be backed up by a liberalisation of the provisions relating to the assurance fund. If registered proprietors are to be at risk of losing their title even when they are not guilty of wrongdoing, it is only fair that they should be compensated for this. Registration is not optional and fees are collected by the registrar for the service. It is only reasonable that these fees should be used to compensate those who suffer through no fault of their own as a result of the system, even if neither the registrar nor his staff were personally to blame for the loss.

Returning to *Bebe,* this is the first reported case in which the relationship between section 46 and section 160 was discussed. In a bold interpretation, the court avoided the difficulties pointed out above. Section 160 was seen not as adding to the exceptions to indefeasibility propounded in section 46, as a plain reading might suggest, but rather as providing the procedural framework for the exercise by the court of its powers to defeat the title of the registered proprietor. The words in section 160(1)(b)

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[10] *Land Registration Act 1925*, s. 69(1).

[11] *Re Sea View Gardens, Warden, Claridge, Tingey* [1967] 1 W.L.R. 134; *Argyle*, *supra* note 8.

giving the court power to rectify the register where the registration was obtained "through fraud, omission or mistake" referred only to the fraud, omission or mistake of the party who presented the instrument to the registry for registration. In other words, rectification can be ordered by the court only in the case of fraud to which the registered proprietor or his agent is a party or in which he or his agent colluded. There is therefore no contradiction between section 46(2)(a) and section 160(1). In the case of omission or mistake, rectification is only possible in the circumstances set out in sections 46(2)(b) to (e).

There are problems in this interpretation,[12] but the simple truth is that section 160 is poorly drafted and it is not possible to give any interpretation to it which is totally free of difficulties. The great advantage of the construction placed on the section in *Bebe* is that it enables Singapore to return to the basic principles laid down by Baalman in his original draft of the system. The only grounds for defeating the title of the registered proprietor are those set out in section 46 itself.

III. Claim in Personam

On the issue of personal equity or the claim *in personam* exception to indefeasibility, *Gosper*[13] was distinguished on the basis that as there was no pre-existing relationship between the bank and the defendant, the bank owed the defendant no obligation with respect to the use of the original certificate of title. Moreover, since the bank's solicitors were not aware that the original certificate had been cancelled, their use of it could not give rise to a personal equity in favour of the defendant against the bank. Although this would have disposed of the issue, the Court of Appeal went on to consider the role of personal equities within the framework of the Singapore *Land Titles Act*. The conclusion reached was that section 46(2) is a statutory codification of the doctrine of personal equities and that there was no further room for the operation of personal equities outside the section. In the words of Chan Sek Keong C.J., "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."[14]

The difficulty with the doctrine of personal equities or the claim *in personam* exception, as adopted in most Torrens jurisdictions, is that it amounts to an open-ended exception to indefeasiblity of title. Unfortunately, few jurisdictions have an equivalent to Singapore's sections 46(2)(b) and (c), which allow for a statutory exception to indefeasibility to enable a contract or a trust to be enforced against the registered proprietor.

This gives rise to an embarrassing problem, as shown by the following illustration. In a Torrens jurisdiction, which has no equivalent to sections 46(2)(b) and (c), a registered proprietor enters into a contract to sell his land. At common law the registered proprietor is now subject to a legal obligation to convey his title in accordance

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[12] In particular, it is difficult to see what meaning can be ascribed to s. 160(2) if the fraud, omission or mistake referred to s. 160(1) can only be that of the registered proprietor.

[13] *Supra* note 3. However, at para. 87, Chan Sek Keong C.J. said that "if the facts in Gosper had occurred here, the *in personam* claim might well be covered by the exception in s 46(2)(b) of the LTA, in that the mortgagee had breached an implied term of the security agreement that it would not misuse the certificate of title in its custody."

[14] *Bebe*, *supra* note 1 at para. 91.

with the terms of the contract. In equity—thanks to the maxim that equity regards as done that which ought to be done—the registered proprietor holds his title on a constructive trust for the purchaser.[15] This is trite law. The statement of indefeasibility in section 46(1) says, however, that the registered proprietor holds "that land free from all encumbrances, liens, estates and interests except such as may be registered or notified in the land-register." The contract cannot be registered or notified in the land-register.[16] It follows from the clear language of the statute that the equitable interest created by the contract has no force against the registered proprietor, who holds the "that land free from all … interests." Although the statutory language is very broad, it would be difficult to go further and argue that section 46(1) exempts the registered proprietor from a claim for breach of contract because such a claim could not fairly be characterised as giving rise to an encumbrance or a lien or an estate or interest over the land. It is merely a personal claim. Nevertheless, the purchaser in this scenario might have difficulties in obtaining any remedy for breach of contract other than damages from the registered proprietor. Even if a court of equity were prepared to grant specific performance in the absence of a constructive trust in favour of the purchaser, there remains the practical difficulty that the registered proprietor would be able to transfer his title to a third party with impunity. Lacking any interest in the land, the purchaser would not even be able to lodge a caveat to protect his contractual rights.[17]

Clearly the hypothetical situation described in the previous paragraph would be intolerable. The Torrens system was designed to simplify conveyancing, not to enable registered proprietors to defraud people who entered into contracts with them. Put in more legalistic terms, it was not the intention of the Torrens system to abolish the basic rules of the law of contract and the law of trusts in relation to registered land. The difficulty, however, is to find any statutory exception to the doctrine of indefeasibility to deal with this situation. Clearly the fraud exception is inapplicable. Breaking a contract is not necessarily a fraudulent act. It may simply be a logical response to a change of circumstances which falls short of frustration. It was never possible therefore to rely on the fraud exception to indefeasibility, and the courts were forced to develop what can be seen as a common law exception—the claim *in personam* or the personal equity exception.

It is unfortunate that most Torrens jurisdictions do not have a statutory exception to indefeasibility along the lines of Singapore's sections 46(2)(b) and (c). The advantage of a statutory exception is that, if appropriately drafted, it enables clear guidelines to be set in advance. Of its nature, a common law exception tends to be open-ended. Since a court can only decide on the basis of the facts before it, it is difficult to lay down guidelines for the future. Any attempt to do so is liable to be dismissed by a future court as *obiter dicta*. Hard cases make bad law, so there is always the risk that the exception to indefeasibility will be extended to do justice in a given case, while setting a dangerous precedent for the future. The much criticised case of *Gosper*[18] is the best known example of this phenomenon in the present context.

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15 *Lysaght v. Edwards* (1876) 2 Ch. D. 499.

16 As to whether lodging a caveat amounts to notification, see Choo, "Caveats—Two Questions" (1987) 29 Mal. L.R. 219.

17 See *Land Titles Act*, s. 115 and the definition of "interest" in s. 4.

18 *Supra* note 3.

Exceptions to the doctrine of indefeasibility of title strike at the very heart of the Torrens system, which is designed to provide certainty of title. Of course, some exceptions are necessary, but the goal should be to define them in advance with as much precision as possible, so as to limit the need to resort to litigation. A common law exception to indefeasibility tends to proceed in the opposite direction, growing incrementally with each successive case and lacking clear limits.

The judgment of the court in *Bebe* contains a penetrating analysis of the law relating to the exceptions to indefeasibility of title, both in relation to rectification and personal equities. The case is to be welcomed as restoring certainty to the law and reinstating the original scheme of indefeasibility of title as devised by Baalman. Singapore will in future be free from the uncertainties that have plagued courts in other Torrens jurisdictions in operating the doctrine of personal equities.

Given the obvious merits of the decision, it may seem somewhat churlish to focus on slight points of disagreement, but for the sake of completeness, it is appropriate to draw attention to a few minor issues. Since it was held that the bank's solicitors were not guilty of fraud, the court's remarks on the ambit of the fraud exception to indefeasibility are strictly *obiter dicta*. It was pointed out that the *Land Titles Act* is based on the concept of immediate indefeasibility of title and therefore "any fraud … must *exist before and at the time* the contract is entered into or at the time of registration of the instrument."[19] This amounts to an endorsement of the views of the majority in *Bahr v. Nicolay*,[20] although the reasoning is different.[21]

Immediate indefeasibility is the general rule under the Singapore Torrens system, but fraud is an exception to indefeasibility. It is submitted that the exception—precisely because it is an exception—does not have to be limited by reference to the general rule. As a matter of policy, the difficulty is that if one limits fraud within the meaning of section 46(2)(a) to fraud which exists before registration, a fraudster, who committed his fraud afterwards, would in theory be able to enjoy the benefits of indefeasibility of title. In practice, it is most improbable that any court would allow a fraudster to keep the fruits of his fraud, so some other exception to indefeasibility would have to be found. Indeed, it is arguable that this is what happened in *Bahr v. Nicolay* itself, one of the leading cases on personal equities. It is better, however, to deal with all cases of fraud directly through the fraud exception than to run the risk of introducing further distortions into the law of indefeasibility of title by having to stretch other exceptions to prevent fraud.

It has been suggested that the trust exception in section 46(2)(c) covers all trusts and is not limited to express trusts.[22] However, in the present case it was said that, "The language of this subsection seems to apply only to express trusts and not constructive trusts."[23] Again these remarks are *obiter dicta,* as the trust exception was not applied in the case. But it must be conceded that there is considerable force

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19 *Bebe* , *supra* note 1 at para. 94, *per* Chan Sek Keong C.J.

20 (1988) 164 C.L.R. 604. The minority judgment of Mason C.J. and Dawson J. was cited on this point at para. 32, but this must clearly be read subject to the express remarks on the issue of the timing of fraud in para. 94.

21 In *Bahr v. Nicolay* this was based largely on s. 199 (iv) of the *Transfer of Land Act, 1893* (W.A), which is similar in wording to Singapore's *Land Titles Act*, s. 154(1)(d).

22 The present writer expressed this view in "Equity Trumps the Torrens System" [2002] Sing. J.L.S. 409 at 413.

23 *Bebe*, *supra* note 1 at para. 81, per Chan Sek Keong C.J.

in this view. First, section 46(2)(c) speaks of enforcing "against a proprietor who is a trustee the provisions of the trust." One does not naturally speak of enforcing the provisions of a trust in any case other than that of an express trust. Second, if section 46(2)(c) covers constructive trusts, the risk exists that the doctrine of personal equities might be re-introduced through the back door by the simple expedient of labelling as a constructive trust a claim that in other jurisdictions might be called a personal equity. However, as against this, it might be said that although there are many areas of uncertainty concerning constructive trusts, nevertheless, there is a wealth of authority in the leading Commonwealth jurisdictions as to when a constructive trust can be imposed, which contrasts favourably with the inherent vagueness of the concept of personal equity.

Unfortunately, limiting the trust exception to express trusts may well cause difficulties. Suppose A and B buy a house together, which they orally agree to share equally, although B only pays 20 per cent of the deposit and mortgage instalments. The house is registered in A's name alone. Under general law principles, B will have a half share in the property under what has been termed a "common intention constructive trust,"[24] but if constructive trusts are not covered under section 46(2)(c), can A plead indefeasibility of title to deny B her share? One might argue that this is in truth an express trust, but express trusts of immovable property have to be evidenced in writing under section 7(1) of the *Civil Law Act*.[25] As an alternative, one might argue that the contract exception under section 46(2)(b) applies. However, under section 6 of the *Civil Law Act*, a contract for the disposition of an interest in immovable property is unenforceable in the absence of a memorandum or note of the contract in writing. It might possibly be argued that payment of the instalments amounts to part performance of the contract, but it is doubtful whether the doctrine of part performance has survived the *Application of English Law Act*.[26] One might be tempted to use proprietary estoppel to achieve a just result, but it appears that indefeasibility of title is a defence to a proprietary claim based on proprietary estoppel.

On the subject of proprietary estoppel, it needs to be borne in mind, as was pointed out above,[27] that although the language of section 46(1) of the *Land Titles Act* is very broad, it provides only that the registered proprietor shall hold the land "free from all encumbrances, liens, estates and interests." It does not provide the registered proprietor with any immunity from personal claims. It is a defence only against proprietary claims or proprietary remedies with respect to the land in question. There is nothing in the section to prevent claims being brought against the registered

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[24] See *Gissing v. Gissing* [1971] A.C. 886; *Lloyds Bank plc v. Rosset* [1991] 1 A.C. 107; *Oxley v. Hiscock* [2005] Fam. 211.

[25] Cap. 43, 1999 Rev. Ed. Sing. Following *Rochefoucauld v. Boustead* [1897] 1 Ch. 196, it might be argued that the express trust can be enforced even in the absence of statutory formalities pursuant to the principle that equity will not allow a statute to be used as an instrument of fraud, but the statute in question at the time of the case was the Statute of Frauds 1677. It is doubtful whether a court today would be prepared to assert a jurisdiction to ignore directly the clear words of a modern statute. This is, no doubt, why the English courts prefer to speak of a common intention constructive trust, which enables them to rely on the statutory exception from formalities, which applies to constructive trusts.

[26] Cap. 7A, 1994 Rev. Ed. Sing. See Crown, "Cutting the Apron Strings: The Localisation of Singapore's Land and Trust Law" [1995] Sing. J.L.S. 75 at 77-81.

[27] See text at *supra* note 16.

proprietor for personal remedies. The registered proprietor may, therefore, be sued at common law, *e.g.* in tort or in contract, or in equity, *e.g.* for dishonest assistance in a breach of trust or receipt of trust property. To the extent that the remedy in these cases is a monetary or other personal order and does not lie against the land itself, indefeasibility of title offers no defence to the registered proprietor. There is, therefore, no need to resort to the doctrine of personal equity to support such claims.

The difficulty[28] referred to above is the case of the inchoate equity which arises where the elements of proprietary estoppel have been satisfied and before the equity has crystallised in a court order.The registered proprietor is subject to an equity and the court has a broad discretion as to how this may be satisfied. In some cases, the court awards monetary compensation,[29] but in many cases the estoppel claimant is granted an interest in the land itself.[30] Can the registered proprietor resist the imposition of a proprietary remedy on the basis that his or her title is indefeasible?[31] A robust court might be prepared to hold that the inchoate equity amounts to a "trust" within the meaning of section 46(2)(c), but it must be admitted that it is doubtful whether an interest as amorphous as the inchoate equity can be properly characterised as a trust in the sense the word is used in the section.[32] It might be best to amend section 46(2) to deal expressly with this situation.

Similar difficulties to the case of the common intention constructive trust arise where there is no agreement between the parties, but B has paid the whole of the 10 per cent deposit on the house, while A has paid the balance and the house has been registered in A's name alone. B has a 10 per cent share in the house under resulting trust principles, but again it would seem that A can plead the indefeasibility of his title to deny her the share, if only express trusts are included under section 46(2)(b). It is difficult to see how the trust in this case could be characterised as an express trust. Perhaps one could see it as a case of implied contract, although again there would be formality difficulties, and it is difficult to see how one could imply a contract in such a case, if one of the parties were a minor.

Where a fiduciary receives bribes in breach of his fiduciary obligations, which he invests in land, can the principal lodge a caveat against the land? The fiduciary holds the money received on a constructive trust.[33] If the money can be traced into land, the land itself is held on a constructive trust for the principal, who has therefore a caveatable interest in the land.[34] However, if constructive trusts are not included in the trust exception, can the fiduciary limit his principal to a personal claim? The answer presumably is that this case comes under the fraud exception.

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[28] Another possible difficulty may be claims based on undue influence. However, undue influence is a type of equitable fraud, and there is authority for the view that some species of equitable fraud are inside the statutory concept of fraud. See *Bahr v. Nicolay*, *supra* note [] at 614, per Mason C.J. and Dawson J.

[29] See *e.g.*, *Dodsworth v. Dodsworth* (1973) 228 E.G. 1115.

[30] See *e.g.*, *Pascoe v. Turner* [1979] 1 W.L.R. 431.

[31] If s. 46(2)(c) is read to include constructive trusts, then one proprietary remedy that could be awarded would be the imposition of a constructive trust. See *e.g.*, *Re Basham* [1986] 1 W.L.R. 1498. In a case like *Pascoe v. Turner*, *supra* note 30, therefore, a Singapore court might not be able to order directly the transfer of the fee simple from the defendant to the plaintiff, but it could declare that the defendant should hold the property on constructive trust for the plaintiff. In practice, the end result would essentially be the same.

[32] The word "trust" is not defined in the Act. In any case, *Bebe* stands as authority for the view that only express trusts are covered by s. 46(2)(c).

[33] *Sumitomo Bank Ltd. v. Kartika Ratna Thahir* [1993] 1 S.L.R. 735.

[34] *A-G for Hong Kong v. Reid* [1994] 1 A.C. 324.

The difficult case, however, would be where the fiduciary makes a profit in breach of his fiduciary obligations, but is not guilty of fraud. The obvious example would be a case where the fiduciary makes a profit for himself using information which came to him in his capacity as a fiduciary. Even though the principal would not have used the information himself, the fiduciary will hold his profit on a constructive trust.[35] Suppose, however, he invests the profit in land, can he plead his indefeasible title and thereby limit his principal to a personal claim? If constructive trusts are not included in section 46(2)(c), it is difficult to see how one can avoid this result.

IV. Conclusion

Inevitably when commenting on any case, one tends to focus on points which lend themselves to criticism, but in the present context, these are relatively minor matters. John Baalman created a Torrens system for Singapore, which drew on almost a century of experience in other jurisdictions. At its heart was a clear and unequivocal statement of the doctrine of indefeasibility of title, essential for the efficient working of the system. Unfortunately, this clarity was lost subsequently as a result of both legislative and judicial developments. The enactment of section 160 raised considerable doubts as to the scope of the exceptions to indefeasibility. The import of the *in personam* exception to indefeasibility—unfortunately necessary in other jurisdictions—further muddied the waters. *Bebe* has returned Singapore to the basic principles enunciated by Baalman. Section 160 has been interpreted, so as to be consistent with Baalman's scheme, and the common law *in personam* exception has been removed. Exceptions to indefeasibility must now be found within the four corners of the statutory language. As a result, the operation of Singapore's system of registration of title has become considerably more certain.

In *Bebe* the mortgage was registered on the faith of an erroneous document, but this point was overlooked by the Registry of Titles. As a result, although the defendant could not obtain rectification of the register, it seems that she would be able to claim compensation from the assurance fund. In practice successful claims against the assurance fund are exceedingly rare, given the necessity to show fault on the part of the registrar. Although it has been said above that the English land registration system is not generally an appropriate source of inspiration for reforms to a Torrens system, there is one aspect of the English system that does merit further investigation. This is the more relaxed attitude to claims against the assurance fund. The concept of indefeasibility of title, which lies at the heart of the Torrens system, is a harsh one. It involves the notion that X, who owns an interest in land, may forfeit that interest in favour of Y, who has purchased the land, even though Y may have known all about X's interest at the time he contracted to buy the land. *Bebe* has restored the doctrine of indefeasibility of title to its original place at the heart of the system, but that only serves to highlight the inherent harshness in the doctrine. Perhaps the time has come to look again at the possibility of making fuller use of the assurance fund by using it to compensate anyone who innocently loses an interest in land as a result of the operation of the system, regardless of whether or not the registrar was at fault.

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[35] *Boardman v. Phipps* [1967] 2 A.C. 46 is generally understood as allowing a proprietary claim in these circumstances.