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RATIONALISING THE SINGAPORE TORRENS SYSTEM

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The purpose of the Torrens system is to facilitate transactions in land. It does so by creating a conclusive land-register, which can be absolutely relied on to provide accurate title information. It therefore follows that claims asserting an unregistered right in registered land must fail, except when a person is precluded from claiming that he has relied on the information recorded on the land-register. Such preclusion occurs when a registered proprietor did not furnish consideration, or took with the knowledge that his predecessor in title did not genuinely consent to transfer to him, or voluntarily undertakes obligations. The mechanics of the Torrens system of centralised land transactions mean that any right concerning land ought to be capable of protection by caveat.

I. INTRODUCTION

In 1857,[1] Sir Robert Torrens introduced in South Australia what was promised to be a "cheap, simple, expeditious and accurate system of transfer of land."[2] The Torrens system of land registration was adapted by John Baalman for this jurisdiction in the form of the *Land Titles Ordinance*, 1956,[3] the predecessor of today's *Land Titles Act*.[4] Yet, at a distance of one and a half centuries from its inception and half a century from its introduction into this jurisdiction, the law on the Torrens system remains unclear. The rot runs deep—the very heart of the Torrens system, *i.e.* the effect of registration and the definition of a caveatable interest, is mired in controversy.

This Article aims to demonstrate that the provisions of the *Land Titles Act* can be rationalised, and the controversies surrounding them resolved, by reference to the purpose underlying the Torrens system. It will refer in some detail to two

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1 Through the *Real Property Act*, 1857 (S.A.).

2 Robert Torrens, *A Handy Book on the Real Property Act of South Australia* (1862) at 11, cited in Mary-Anne Hughson, Marcia Neave & Pamela O'Connor, "Reflections on the Mirror of Title: Resolving the Conflict Between Purchasers and Prior Interest Holders" [1997] 42 Melbourne U.L. Rev. 460 at 461.

3 No. 21 of 1956 ['the Ordinance']. Baalman's gloss on the Ordinance, *The Singapore Torrens System: Being a Commentary on the Land Titles Ordinance, 1956, of the State of Singapore* (Singapore: Acting Government Printer, 1961) has been judicially acknowledged as the authoritative text in interpreting the Ordinance and the subsequent *Land Title Acts*. See *e.g. United Overseas Bank v. Chia Kin Tuck* [2006] 3 S.L.R. 322 at para. 21 *per* V K Rajah J. (H.C.) ("Given that the LTA was inspired by and modelled upon the Australian Torrens System, counsel will find it far more profitable to refer to John Baalman's several treatises…").

4 Cap. 157, 2004 Rev. Ed.

recent decisions of the Courts—*United Overseas Bank v. Bebe bte Mohammad*[5] and *Ho Seek Yueng Novel v. J & V Development Pte Ltd*[6]—which respectively discussed at some length the effects of registration and the definition of a caveatable interest.

II. The Land-Register and the Effects of Registration

It is axiomatic that the Torrens system is not "a system of registration of title but a system of title by registration."[7] It affords certain protections to both the proprietor[8] and persons dealing with a proprietor. In the *Land Titles Act*, these protections, insofar as they are expressly provided for, are mainly set out in sections 46 and 47. The marginal note to section 46 declares the estate of the proprietor to be paramount (the more common term is 'indefeasible'[9]). Section 46 itself explains that this means an estate "free from all encumbrances, liens, estates and interests except such as may be registered or notified in the land-register". This paramountcy or indefeasibility is subject to section 46(1)(i) to (vii) and (2) but notwithstanding the factors in section 46(1)(a) to (c). Section 47 exonerates persons dealing with proprietors, or with persons entitled to become proprietors, from the effect of notice. In commenting on section 28 of the Ordinance (presently section 46), Baalman, while emphasising that only experience could determine the successfulness of his work, hoped that the "net result of his endeavours will at least be less uncertainty."[10]

However, as even a brief perusal of the Court of Appeal's exposition of the law in *Bebe* will show, the operation of the *Land Titles Act*, particularly section 46, is far from certain. The controversy surrounding section 46 can be categorised under three heads: (1) What is the ambit of each of the express "exceptions to indefeasibility", *e.g.*, the section 46(2)(a) fraud exception? (2) Are the express exceptions exhaustive? (3) If not, what are the factors that determine whether a cause of action at general law (including equity) qualifies as an implied exception to indefeasibility? The controversy surrounding the section, in turn, is part of a larger question: what is the effect of registration under the Torrens system?

In *Bebe*, the Court of Appeal declined to express a concluded opinion on these questions, preferring instead to confine itself to a number of tentative opinions. On a general level, the Court identified the conclusive nature of the land-register as the

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5 [2006] 4 S.L.R. 884 (C.A.) ['*Bebe*']. The Court comprised Chan Sek Keong C.J. (who delivered the judgment of the Court), Andrew Phang Boon Leong J.A. and Woo Bih Li J.

6 [2006] 2 S.L.R. 742 (H.C.) ['*Ho Seek Yeung*']. The Court comprised Andrew Phang Boon Leong J.

7 *Breskvar v. Wall* (1971) 46 A.L.J.R. 68 at 70 *per* Barwick C.J.

8 In this Article, 'proprietor' is not used in the general sense of an owner of property, but in the special sense defined in the *Land Titles Act*, *supra* note 4, section 4, *i.e.* a "person who appears from the land-register to be the person entitled to an estate or interest in any land which has been brought under the provisions of [the *Land Titles Act*], and includes a mortgagee, chargee and lessee".

9 Woodman and Grimes trace the origins of the term 'indefeasible', which is not actually used in any Torrens legislation, to the *Land Registry Act*, 1862 (U.K.), 25 and 26 Vict., c. 53 (also known as *Lord Westbury's Act*): *The Torrens System in New South Wales*, 2nd ed. (Sydney: The Law Book Company Limited, 1974) at 175.

10 Baalman, *supra* note 3 at 75.

"central idea" behind the *Land Titles Act*,[11] and repeatedly emphasised the need for the case law to develop consistently with the statute.[12] The Court also observed that the express exceptions are "capable of encompassing most of the *in personam* actions at common law or in equity that a court exercising *in personam* jurisdiction may grant."[13] With respect to possible implied exceptions to indefeasibility, the Court opined that an implied exception should (1) exhibit at least the same degree of moral turpitude as fraud (an express exception)[14] and (2) be "referable to" the express exceptions.[15] It also considered that implied exceptions should be kept to a minimum.[16] Specifically, the Court expressed a disapproving attitude towards the enforcement of constructive trusts and personal equities (beyond those enumerated in section 46) against a proprietor.[17]

The Court of Appeal did not explain, and it is not obvious, why the balance between the conclusive registered title and the exceptions thereto should be struck in these terms. For example, even if we accept that exceptions ought to be minimised, this does not explain why certain exceptions are allowable whilst others are not. The Court's reluctance to further rationalise the law is disappointing, given its declared intention to "clarify the legal position in Singapore."[18] Given this state of affairs, it is timely to re-examine the operation of the Torrens system from first principles. This Part will first identify the purpose behind the conclusive land-register that is the centrepiece of the Torrens system.[19] It will then examine, in light of this purpose, the necessary consequences of having a conclusive land-register[20] and the general circumstances in which the land-register need not be conclusive.[21] The general principles thus elucidated will then be applied to specific situations, including the facts of *Bebe*.[22] Reference will be made, wherever relevant, to the particular views expressed in *Bebe*.

A. *The Need for a Conclusive Land-Register*

Before the introduction of the Torrens system, the priority between competing interests in property was determined by two rules. One, legal property binds the world. Two, equitable property binds the world save the purchaser of the legal estate for value without notice. These two rules meant that a prudent prospective purchaser had to investigate whether he was in fact obtaining clear title to the land, which was

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11 *Bebe*, *supra* note 5 at para. 90. The Court actually referred to the paramountcy of the registered title and the 'mirror' effect of the land-register, but, as this Part will show, both are actually corollaries of the conclusive nature of the land-register.

12 *Ibid*. at paras. 66, 77, 85 and 91.

13 *Ibid*. at para. 91. It is queried whether this observation helps to resolve the general question of whether to admit *in personam* claims under the *Land Titles Act*.

14 *Ibid*.

15 *Ibid*.

16 *Ibid*. at paras. 88 and 91.

17 *Ibid*. at paras. 77 and 91.

18 *Ibid*. at para. 10.

19 See Part II.A below.

20 See Part II.B below.

21 See Part II.C below.

22 See Part II.D below.

expensive, troublesome and (in the case of legal property) not necessarily productive. This was an unacceptable cost of transacting in land, which the Torrens system sought to eliminate by creating a conclusive land-register, which would:

> save persons dealing with registered land from the trouble and expense of going behind the Register in order to investigate the history of their author's title and to satisfy themselves of its validity.[23]

In other words, the Torrens system aims to protect a purchaser from being ambushed by existing claims to the land, and does so by creating a conclusive land-register that can be absolutely relied on to provide accurate title information.[24] The conclusiveness of the land-register means that a prospective purchaser can deal with a proprietor in the confident knowledge that he will thereby obtain all the proprietor's rights as described on the land-register. As the following discussion will show, the various provisions of the *Land Titles Act* can and ought to be understood with reference to this basic aim. As a stylistic point, the discussion will generally avoid the controversy-laden term "indefeasible".

B. *The Consequences of a Conclusive Land-Register*

1. *Generally*

The necessary and immediate consequence of the land-register's conclusiveness is the affordance of a full defence against any claim alleging that the land-register is inconclusive as to title. In other words, if the land-register records that X is the owner in fee simple of Greenacre, then any claim founded on an allegation that any entity other than X possesses any interest in Greenacre must fail. The range of claims that are incompatible with a conclusive land-register and must therefore fail is not restricted to claims to directly enforce an unregistered interest in land. Claims which simply assert an unregistered interest in land, such as a claim by an unregistered beneficiary for knowing receipt, are also excluded for incompatibility with a conclusive land-register. Expressed in terms of the conventional property-personal dichotomy, it is not merely proprietary claims that may be incompatible with a conclusive land-register—property-based personal claims, to the extent that they assert unregistered property in registered land, are also incompatible with a conclusive land-register. To take the position that the Torrens system "in no way denies the right of a plaintiff to bring against a proprietor a claim in personam, founded in law or equity, for such relief as a court acting in personam may grant,"[25] is to say that the land-register is good only for determining title for the purposes

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[23] *Gibbs v. Messer* [1891] A.C. 248 at 254 *per* Lord Watson (P.C.). This part of the Judicial Committee's advice was cited during the Second Reading of *Land Titles Bill*: Sing., *Parliamentary Debates*, vol. 1, col. 569 at 570 (24 August 1955) (Inche Abdul Hamid Bin Haji Jumat, Minister for Local Government, Lands and Housing).

[24] The land-register is sometimes called a 'mirror of title': see *e.g. Bebe*, *supra* note 5 at paras. 78 and 90. This is not, strictly speaking, accurate—a mirror shows an image, whereas the land-register is the real thing; in fact, everything: see *e.g. Fels v. Knowles* (1906) 26 N.Z.L.R. 604 at 620 *per* Edwards J. (C.A.) ("The cardinal principle of the Statute is that the register is everything".), cited approvingly by Lord Buckmaster in *Waimiha Sawmilling Co. v. Waione Timber Co.* [1926] A.C. 101 at 106 (P.C.).

[25] *Frazer v. Walker* [1967] 1 A.C. 569 at 585 *per* Lord Wilberforce (P.C.).

of proprietary claims but not for the purposes of property-related personal claims, *i.e.* that the land-register is inconclusive as to title. *Bebe* doubted the correctness of an unqualified admission of *in personam* claims into the Torrens system,[26] and it is hoped that the heresy will be comprehensively rejected when the opportunity arises.

Specifically, it should be emphasised that the conclusiveness of the land-register excludes more claims than expressly provided for by the *Land Titles Act*. For example, if liability for wrongful receipt of trust property is regarded as restitutionary in nature and not fault (*i.e.* notice)-based,[27] it would fall outside the exonerative effect of section 47(1)(c), but should still be excluded for incompatibility with the conclusive nature of the land-register, since it claims that persons other than the proprietor, *i.e.* the beneficiaries, have an interest in the land (which they have been unjustly deprived of).

2. *Defining an interest in land*

What, then, is an interest in land? The answer is plainly important—upon it rests the ambit of the protection afforded by registration (and on a more specific level the protection afforded by sections 46(1), and 47(1)(c) and (2)). One possible approach is to simply adopt the purely conventional general law categorisation, in which case the list of interests in land is closed and comprises the legal and equitable forms of the various estates, as well as the easements, covenants and profits which attach to land. Under such an approach, the operation of rights not falling within the *numerus clausus* is entirely unaffected by the Torrens system. For example, X's 'equity' to rescind a registered transfer to Y for undue influence will not amount to an interest in land and will therefore not clash with the conclusiveness of the land-register (and specifically will fall outside the exonerative effect of section 47(1)(c)). If Y subsequently transfers to Z, Z's title may be set aside at X's instance if Z had constructive notice of X's equity. This is the view taken by Barwick C.J. in *Breskvar v. Wall*, where his Honour said:

> It is really no impairment of the conclusiveness of the register that the proprietor remains liable to one of the excepted actions any more than his liability for "personal equities" derogates from that conclusiveness. So long as the certificate is unamended it is conclusive and of course when amended it is conclusive of the new particulars it contains.[28]

As the example illustrates, this approach is patently unsatisfactory. A prospective purchaser is only concerned with the fact of liability—he does not care whether his liability arises from an 'inherently defective' title or from a 'personal equity'

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[26] *Bebe*, *supra* note 5 at para. 77, doubting *Ho Kon Kim v. Lim Gek Kim Betsy* [2001] 4 S.L.R. 340 at para. 47 (C.A.), which followed *Frazer v. Walker*, *supra* note 25.

[27] As is the currently favoured academic view—see Lord Nicholls of Birkenhead, "Knowing Receipt: The Need for a New Landmark" in W.R. Cornish *et al.*, eds., *Restitution: Past, Present and Future: Essays in Honour of Gareth Jones* (Oxford: Hart Publications, 1998) 231. The protection afforded by a conclusive land-register is different from the change of position defence—the former completely negatives a restitutionary claim by a non-registered party; whereas the latter may be a complete or partial defence depending on the extent to which the recipient has changed his position in good faith: see *Lipkin Gorman v. Karpnale Ltd* [1991] 2 A.C. 548 at 579–81 *per* Lord Goff of Chieveley (H.L.).

[28] (1971) 126 C.L.R. 376 at 385 (H.C.).

affecting his 'good' title.[29] If protection is afforded against 'inherently defective' titles but not 'personal equities', a prospective purchaser would still have to go behind the land-register to make sure that he is not caught by any personal equities, which defeats the very purpose of having a conclusive land-register in the first place. Mary-Anne Hughson, Marcia Neave and Pamela O'Connor take a similar position, saying that a formal classification "fail[s] to recognise that to admit certain kinds of *in personam* claims against a proprietor would seriously undermine the security of registered titles generally."[30] They prefer the view where registration protects against the "invalidity of the underlying transaction [at general law]", but not claims arising from "conduct or dealings attributable to the proprietor personally."[31] However, their suggested classification is objectionable on the basis that the jurisdiction of equity is, formally and historically at least, entirely *in personam*. It cannot explain, for example, the distinction between the unconscionable conduct of a person who takes with notice of a trust, which carries no liability under the Torrens system,[32] and the unconscionable conduct of a person who defrauds another, which does.[33]

The problem with these approaches stems from the fact that they strive to apply general law concepts, which may or may not be compatible with the purpose of the Torrens system. It is submitted that the definitional problem is better approached with regard to the purpose of the Torrens system. As said, the Torrens system created a conclusive land-register in order that a prospective purchaser can deal confidently with the proprietor. In order to serve this purpose, the land-register must be an *exhaustive* statement of all the existing rights concerning the land which may be enforced against a prospective purchaser—any omission would require the prospective purchaser to undertake independent inquiries, which is anathema to the Torrens system. In other words, an interest in land should simply be defined as a right concerning land—a purchaser who takes free of all unregistered interests in the land therefore takes free of all unregistered rights concerning the land.

3. *Specific corollaries of the land-register's conclusiveness*

Since the land-register is conclusive as to title, the registered estate affects the world, and in this respect is identical to the legal estate at general law. A transfer of property, in the sense of a right capable of binding third parties, can therefore only take place through registration.[34] Conversely, since the existence of unregistered interests is incompatible with a conclusive land-register, notice of an unregistered interest is notice of nothing and therefore creates no obligations, and specifically is

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[29] It is also to be queried whether the distinction is always theoretically tenable—the right of the beneficiary under a trust, which is now axiomatically proprietary, is in fact a personal equity protected by the equitable doctrine of notice: see A.H. Chaytor & W.J. Whittaker, eds., *Equity: A Course of Lectures by F. W. Maitland* (revised by John Bruyante) (Cambridge: Cambridge University Press) at 115 ("the benefit of an obligation has been so treated that is has come to look rather like a true proprietary right".).

[30] Hughson, Neave & O'Connor, *supra* note 2 at 490.

[31] *Ibid*. at 491.

[32] *Land Titles Act*, sections 47(1)(c) and 166(4).

[33] For an explanation of the distinction, see Part I.C.2.i below.

[34] *Land Titles Act*, section 45(1) and (2).

not fraudulent, as is expressly provided for by section 47(1)(c) and (2) respectively.[35] Thus a contract of sale, by itself, is incapable of affecting subsequent dealings, which can proceed on the basis that the vendor-proprietor remains fully entitled to the land.[36] The contract only confers upon the purchaser a right to transfer property to himself, either provisionally by lodging a caveat, or finally by registering his dealing. Thus, in the statutory language, "[n]o instrument until registered. . .is effectual to pass any estate or interest in land,"[37] and only "[u]pon registration of an instrument the estate or interest therein specified shall pass."[38]

The conclusiveness of the land-register also explains why adverse dealings are prioritised according to the time at which they are registered.[39] A transferor can only transfer what he has, and what he has is conclusively stated on the land-register. Thus, the quantum of property actually transferred is independent of unregistered interests but dependent on the extent of the transferor's registered interest at the time of registration—if an adverse dealing is caveated or registered first, property will pass first to the adverse dealer, with the result that less (or no) property is available for transfer to the original transferee when he eventually registers his dealing.

C. *Situations which Preclude a Claim to have Relied on the Land-Register*

The discussion thus far has focussed on what a conclusive land-register entails. In the following paragraphs, the conclusiveness of the land-register will be more closely related to its purpose, in order to identify the situations where a proprietor is not entitled to claim the protections afforded by the land-register's conclusiveness. The general thesis is that, since the land-register is conclusive so that it can be relied on, a person who is precluded from claiming reliance on the land-register should therefore be denied the protections afforded by the land-register's conclusiveness. Specifically, it is argued that there are four kinds of situations where a person is precluded from claiming that he relied on the information on the land-register, *viz.* (1) when a proprietor has not furnished consideration, (2) when he has voluntarily assumed obligations, (3) when he took with the knowledge that his predecessor in title did not genuinely consent to transfer to him, and (4) when policy considerations intervene. Since preclusion depends on the particular acts of a person, it is therefore possible for the same piece of information recorded on the land-register to be inconclusive for one person, *e.g.* a proprietor who defrauded his predecessor in title, but conclusive

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35 On a purposive reading of section 47(1)(c) and (2), the exoneration provided by them should extend to notice as to the breach of trust—for it would be quite pointless to say to a prospective purchaser that he can ignore the existence *per se* of a trust, but must pay close attention to whether the vendor was in breach of trust in selling the property. This interpretation is fortified by section 166(4), which provides that "any purchaser dealing with the registered land which is held in a fiduciary capacity shall not be concerned to enquire whether a dealing of that land is within the powers of the registered proprietor and the purchaser is entitled to assume that the registered proprietor has all the powers of disposition of a beneficial owner and as the absolute proprietor of the estate or interest in question".

36 See the discussion in Baalman, *supra* note 3 at 93-4 and 96. As between two unregistered and uncaveated interests, the later interest takes priority, because the owner of the earlier interest, by delaying in protecting his own interest through registration or caveating, is estopped from claiming priority.

37 *Land Titles Act*, *supra* note 4, section 45(1).

38 *Ibid.*, section 45(2).

39 *Ibid.*, sections 46(1), 48 and 49.

for another, *e.g.* the person who takes in good faith from the fraudulent proprietor. When and insofar as the land-register is inconclusive, disputes fall to be resolved by the general law.

1. *When a proprietor has not furnished consideration*

As Baalman says:

> The Torrens System of land registration is predominantly a purchaser's system. Its aim is to facilitate the transfer of land as a commercial commodity by removing most of the risks of financial loss which beset purchasers under the general law. As a transferee who does not give value for his land is not exposed to that risk, there is no need to protect him. But the Torrens statutes have not always said so in plain words; in many of them it has simply been left to necessary implication. While the Courts have consistently drawn that implication, [the *Land Titles Act*] relieves them of the necessity to do so by the express enactment of [section 46(3)].[40]

It might be argued, by analogy to estoppel principles, that a volunteer transferee who subsequently changes his position can be as much prejudiced as a purchaser providing consideration when their titles are vitiated, especially since nominal consideration is sufficient for the purposes of section 46(3). On the other hand, given that a volunteer, unlike a purchaser, does not rely on the land-register when he initially receives his donation, there is no reason to extend the protection of registration to him.[41]

2. *When a proprietor knowingly takes without consent*

(a) *Generally*. Before elaborating this exception to the land-register's conclusiveness, it must first be observed that it is not strictly accurate to say that each registration constitutes a fresh grant by the State to the new proprietor.[42] The Torrens system clearly envisages a transactional link between two consecutive proprietors whose interests overlap, in the form of the registration of a duly executed transfer form, before property is transferred from the former to the latter.[43] In the absence of such a transfer form, the two interests are adverse to each other, with the earlier registration taking priority.[44]

Given that such a transactional link is necessary, and given the conclusive nature of the land-register, it follows that when X acts with the *actual* knowledge that the proprietor has not consented to transfer to him (including situations where the proprietor has apparently but not genuinely consented, *e.g.*, when the proprietor consented in consequence of a fraud), X cannot rely on the conclusiveness of the

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40 Baalman, *supra* note 3 at 86.

41 It might be argued that, given the express provision in section 46(3) of the *Land Titles Act*, it would be unreasonable for a volunteer to change his position in the belief that his title can be better than that held by his predecessor. However, this begs the question of what is the purpose of section 46(3) in the first place.

42 *Breskvar v. Wall*, *supra* note 28.

43 *Land Titles Act*, *supra* note 4, sections 45(1) and (2), 56(1) and 63. Also, it is virtually impossible in practice to electronically lodge a transfer (or other dispositions) when the name of the transferor as stated on the transfer form is different from that recorded on the land-register.

44 *Ibid.*, section 48.

land-register even though he becomes a proprietor. For X acts with the knowledge that the only person, *i.e.*, the original proprietor, who is able to consent to the transfer that would entitle him (X) to become registered and claim the consequent protections, has not given such consent. X cannot therefore complain if the protections flowing from the conclusiveness of the land-register were denied him.

Of course, the factors that negative or vitiate consent must be known to the general law, specifically the law of contract, since a proprietor must at least stand in an *apparent* contractual relationship with his immediate predecessor in order to claim the protection of the conclusive land-register.[45] Section 46(2)(a) and (d)[46] expressly provide that the general law rights and remedies of defrauded and legally disabled persons against the proprietor are preserved (in the latter case provided that the legal disability was known to the proprietor), but there is no reason why remedies in respect of other factors vitiating consent, such as duress, undue influence, and mistake, should not apply as well, provided that the facts giving rise to the vitiation were known to the proprietor when dealing with his immediate predecessor.[47] It makes no difference, insofar as his ability to claim to have relied on the conclusiveness of the land-register is concerned, whether a proprietor was himself responsible for the vitiation, or whether he simply acted with knowledge of such vitiation—in both cases he knows that the only person who can give him a good title has not consented to do so. Thus, as was held in *Bebe*,[48] acting with notice of fraud is tantamount to acting fraudulently.[49] By the same reasoning, it should not matter, again insofar as the transferee proprietor's ability to claim the protection of registration is concerned, whether the particular defect in consent renders the contract between the transferor and transferee void or merely voidable at general law. Thus, for example, and as section 46(2)(a) expressly provides, both a fraud, which renders a transfer voidable at general law, and a forgery, which renders a transfer void at general law, equally precludes the guilty transferee from being able to rely on the protection of registration.[50]

The question then arises: does constructive knowledge of non-consent suffice? Robert Chambers argues that it does:

> There is a great deal of difference between an investigation into the quality of the vendor's title, which the Torrens system is designed to alleviate, and an investigation into the validity of the transaction through which title will be obtained. If the defendant knew *or ought to have known* that the plaintiff was operating under mistake, duress, undue influence, or in ignorance of the transaction itself,

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45 *Ibid.*, section 46(3).

46 *Ibid.*, section 46(2)(e), can be regarded as a species of fraud. Since knowledge of the law is presumed, any false claim to exercise a statutory power or authority must be regarded as being made with full knowledge of its falsehood.

47 Actual knowledge is already an essential ingredient at general law for some of these vitiating factors, *e.g.* legal unilateral mistake.

48 See the discussion in *Bebe*, *supra* note 5 at paras. 14-9 and 29-36.

49 While Baalman did consider that "[t]he only fraud which can vitiate a registered title is unilateral fraud on the part of the proprietor of that title", this must be read together with his approval of *Assets Co. v. Mere Roihi* [1905] A.C. 176 at 210 *per* Lord Lindley (P.C.), holding that acting with knowledge of fraud is by itself fraudulent. See Baalman, *supra* note 3 at 84 and 80 respectively.

50 However, while the transferees in both cases are precluded from relying on the protection of the land-register, this does not mean that both of them will be subject to the same liability. Liability depends on the remedy available in respect of the particular form of vitiation at general law. Thus, in the case of fraud, the transferor may not be able to recover his land if he is barred from rescission.

> the plaintiff's interest in obtaining restitution of the unjust enrichment can prevail over the defendant's interest in the security of his or her receipt, without undermining the objectives of the Torrens system.[51]

While there certainly is a conceptual distinction between the duty to ascertain the validity of the vendor's title and the duty to ascertain the vendor's consent, it seems impossible to say as a general matter that one is more onerous than the other, and therefore impossible to argue that one duty should be excluded but not the other, if the concern is with relieving prospective purchasers from the burden imposed by such duties. Further, as a matter of internal consistency, if a Torrens statute excludes liability for constructive knowledge of non-consent in one case, it should exclude liability in all cases. Given that most, if not all, Torrens systems exclude liability for constructive fraud,[52] liability for constructive knowledge of other factors vitiating consent ought to be excluded as well. As the following paragraphs will show, the *Land Titles Act* in particular, as well as Baalman in his commentary, has uniformly observed these principles.

First, when confronted with conflicting Australian authorities as to the right of an infant to recover land transferred in excess of his capacity, Baalman resolved the issue for this jurisdiction by drafting section 28(2)(d) of the Ordinance (presently section 46(2)(d)) to provide for an express right of recovery, but only when there is actual knowledge of a legal disability.[53]

Second, section 148(1) expressly provides that a purchaser may generally presume that a person claiming to be acting under a power of attorney from a proprietor does in fact have such a power. This is in marked departure from the general law of apparent agency, under which a claimant can rely on an appearance of authority only if the apparent *principal* has given some representation of authority in respect of the apparent agent, *and* if it was *reasonable* for the claimant to rely on that representation.

Third, section 40(1) provides that "[i]n favour of any purchaser of registered land, a corporation shall be deemed to have the same powers of acquisition and disposition as a natural person of full age and legal capacity", predating similar provisions in the *Companies Act*.[54]

Fourth, Baalman, in his commentary on section 28 of the Ordinance (presently section 46), considered that when X has dealt in good faith with Y, who purported to be the agent of a proprietor who is actually non-existent, X should be allowed to claim the protection of the land-register. There was no need, in Baalman's opinion, to deal with the true proprietor. He criticised *Gibbs v. Messer*, where the Privy Council reached the opposite result, as necessitating "some system of checking the thumbprints of all proprietors", which "would involve the very thing—'going behind the register'—which . . . the Torrens System was designed to avoid."[55] Clearly, Baalman regarded a requirement to ascertain the identity of the person being dealt with as

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51 Robert Chambers, "Indefeasible Title as a Bar to a Claim for Restitution" [1998] R.L.R. 126 at 134 [emphasis added].

52 See *Assets Co. Ltd. v. Mere Roihi Pty. Ltd.*, *supra* note 49 at 210 *per* Lord Lindley ("by fraud in these Acts is meant actual fraud, *i.e.* dishonesty of some sort, not what is called constructive or equitable fraud").

53 Baalman, *supra* note 3 at 85.

54 (Cap. 50, 2006 Rev. Ed.), sections 25A and 26.

55 Baalman, *supra* note 3 at 79-80.

'going behind the register', which is anathema to the Torrens system. The same reasoning can be applied to any requirement to ascertain the genuine consent of the person being dealt with.

Finally and more generally, Baalman repeatedly emphasises that "Section 28 [says] that if you become registered as a proprietor honestly, then your title is indefeasible,"[56] *i.e.*, that "[a]ll that is necessary [for indefeasibility to attach] is to be innocent and to become a proprietor *somehow*."[57]

It therefore seems fairly clear that, under the *Land Titles Act*, a proprietor is precluded from relying on the conclusiveness of the land-register, and therefore fully susceptible to the general law claims against him, only when he takes with the knowledge that the proprietor immediately preceding him has not consented to transfer to him. The exoneration from constructive notice of non-consent is not a necessary consequence of a conclusive land-register; rather, it results from a policy judgment, reflected in the above paragraphs, that investigating consent, like investigating title, is unacceptably burdensome. In this regard, if the Legislature were to consider that investigating consent is acceptable in certain situations but not others, it will do well to specify the circumstances and the default position clearly.

It can now be seen that the distinction made by the cases between taking with notice of a fraud on the transferor, which constitutes both general law *and* Torrens fraud,[58] and taking with notice of an unregistered interest, which constitutes general law but *not* Torrens fraud,[59] is not arbitrary but founded in principle. In the former case, there is notice of the fact that the transferor-proprietor has not consented to transfer, which precludes a claim to have relied *bona fide* on the land-register. In the latter case, the conclusiveness of the land-register negatives the proprietary effect that the unregistered interest has at general law, and notice of it is therefore legally irrelevant. To reiterate: exoneration from actual and constructive notice of unregistered rights is a necessary consequence of the conclusive land-register; exoneration from *actual* notice of the proprietor's lack of consent is an open invitation to trickery and coercion.

Before moving on, it is instructive to consider the approach taken by Chambers, who initially urged that a proprietor should not be able to claim indefeasibility when he takes with actual or constructive knowledge of his predecessor's non-consent,[60] but later argued that this "directly interfere[s] with indefeasibility of title."[61] In arguing for his first position, Chambers argued that indefeasibility "cures defects in the vendor's title and protects the purchaser from pre-existing unregistered interests in the property", but "does not prevent the creation of new unregistered interests in the property."[62] As a functional description, this is accurate enough. However, Chambers understood this to mean that a plaintiff's right to restitution for a defective transfer, which "aris[es] for the first time on or after the transfer of legal title…[and] is, therefore, not subject to indefeasibility."[63] This distinction between the original

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56 *Ibid.* at 92.
57 *Ibid.* at 84.
58 See the discussion in *Bebe*, *supra* note 5 at paras. 14-19 and 29-36.
59 *Land Titles Act*, *supra* note 4, section 47(2).
60 See the quotation and discussion accompanying *supra* note 51.
61 Robert Chambers, *An Introduction to Property Law in Australia* (Sydney: LBC Information Services, 2001) at 480.
62 Chambers, "Indefeasible Title as a Bar to a Claim for Restitution", *supra* note 51 at 128.
63 *Ibid.* at 129.

right and the remedial right is highly problematic—the remedial right is founded on the original right and protecting the remedial right also protects the original right. If Chambers were right, a beneficiary ought to be able to claim restitution for a transfer in breach of trust, since the restitutionary right "arises for the first time on or after the transfer of legal title and is therefore not subject to indefeasibility."[64] This is clearly prohibited under a Torrens system. In this regard Chambers reasoning does not support his distinction between "an investigation into the quality of the vendor's title" and "an investigation into the validity of the transaction through which title will be obtained."[65]

Chambers seems to have recognised the problem with his initial reasoning, acknowledging that it "ha[d] the effect of undoing registrations [and] directly interfer[ing] with indefeasibility of title,"[66] However, Chambers is now wrong to consider that anything that interferes with indefeasibility is therefore anathema to the Torrens system (and must therefore be justified by some consideration external to a normative Torrens system). Indefeasibility (or the conclusive nature of the land-register, in the terminology preferred here) is most emphatically not the *end* of the Torrens system, to be pursued without exception. Indefeasibility is a *means* towards the *end* of facilitating transactions in land, and is only pursued to the extent that it achieves that end. And, as argued, there is no reason why a Torrens system would allow a proprietor who knowingly took without consent to rely on the conclusiveness of registration. In other words, Chambers' initial distinction between notice of unregistered interests and notice of the proprietor's non-consent was more consistent with the Torrens system,[67] but for the wrong reasons, which unfortunately led him to change his mind later on.

(b) *Material time to establish knowledge of non-consent.* A typical Torrens transaction consists of two steps: a contract, followed by the registration of the dealing. In the first step, the voluntarily assumed obligations *inter partes* are created by the bilateral action of the purchaser and the vendor. In the second step, property is passed by the unilateral act of the purchaser in registering the transfer.[68]

Since property in registered land passes only and immediately upon registration, any defect in the transfer must have occurred at least before registration—anything after the transfer can only operate as a disposition.[69] The Court of Appeal in *Bebe* took the same position in *obiter dicta*, rejecting the doctrine of deferred indefeasibility.[70] It should be added that any notice, after the contract, of fraud or legal disability or

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64 *Ibid.*

65 *Ibid*. at 134.

66 Chambers, *An Introduction to Property Law in Australia*, *supra* note 61 at 480.

67 As argued, Chambers' admission of claims against a proprietor arising from his taking with constructive notice of non-consent does not square with the purpose of a Torrens system and the explicit provisions of most Torrens statutes: see text accompanying *supra* note 51.

68 *Land Titles Act*, *supra* note 4, section 45.

69 Therefore, the minority view of Mason C.J. and Dawson J. in *Bahr v. Nicolay (No. 2)* (1988) 164 C.L.R. 604 at 615-6 that a registered title is defeated by the subsequent fraudulent repudiation of an assurance to respect an unregistered interest, should not be followed. The correct view should be that fraud must have occurred in the circumstances leading up to registration: see *ibid.* at 633 *per* Wilson and Toohey JJ., and *Loke Yew v. Port Swettenham Rubber Co. Ltd* [1913] A.C. 491 at 503-4 *per* Lord Moulton (P.C.).

70 *Bebe*, *supra* note 5 at paras. 92-95. However, the Court's reasoning is somewhat difficult to follow, being partly based on a misconception that section 47(3) of the *Land Titles Act* is applicable to section 46: see *Bebe*, *supra* note 5 at para. 93. Notably, paragraph 93 was not quoted by Paul Tan A.R.

other factors vitiating the vendor's consent is irrelevant to affect the purchaser's good faith *in respect of the transfer*, since by then the dealings between the parties have been concluded in the sense that the obligations *inter partes* have been established. The act of registration is merely an exercise by the purchaser of his contractual-statutory rights.[71] In this regard, the exoneration from the need to see to the application of the purchase money[72] and the presumption of an attorney's authority,[73] both of which relate to post-contractual protection, may have the confusing effect of suggesting that post-contractual notice of non-consent is (*prima facie* at least) relevant to the ability to claim the protection of registration. It is submitted that the post-contract exoneration is not directed at the contractual transfer, but rather at the vendor's lien on the property for the purchase money, which will be regarded as discharged if the purchaser paid someone who he believes to be the vendor or the vendor's agent. This is why the presumption of authority persists until completion, when the purchase moneys are paid over. Thus, when a purchaser contracts in the belief that the vendor has consented via an agent, but completes with the agent knowing that the agent is defrauding the vendor, the vendor cannot set aside the sale directly but can claim a vendor's lien (which is caveatable) over the property.[74]

3. *When a person has voluntarily assumed obligations*

Since the conclusive nature of the land-register is designed to protect a prospective purchaser from being ambushed by claims on the land, *i.e.* claims that the prospective purchaser never undertook to answer, it follows that the protection afforded by the land-register should not absolve anyone from having to honour obligations that he voluntarily assumed, whether such obligations arose before, during or after registration. As Baalman notes, it would make a mockery of the statute if a proprietor could point to his registered status as a reason for not honouring his contractual obligation to sell his land,[75] and accordingly section 46(2)(b) expressly provides that contractual obligations remain fully enforceable.[76]

The enforceability of voluntarily assumed obligations explains the partial survival of the express trust under the Torrens system. Since they relate to voluntarily assumed obligations, the beneficiaries' remedies against the express trustee[77] remain

in *Sim Lian (Newton) Pte Ltd v. Gan Beng Cheng Raynes* [2007] SGHC 84, where his Honour (at para. 44) followed *Bebe* in respect of its holding on immediate indefeasibility.

71 See Part II.B.3, above.

72 *Land Titles Act*, *supra* note 4, section 47(1)(b).

73 *Ibid.*, section 48(1).

74 The practical difference between fraud on or before contract and fraud during completion is that, in the latter case the vendor only has a security interest in the land, which the purchaser may discharge by paying damages, whilst in the former case, the vendor might attach non-commercial value to his interest in the land, entitling him to recover the land *in specie*.

75 Baalman, *supra* note 3 at 84-5. See also *Bahr v. Nicolay* (1988) 164 C.L.R. 604 at para. 13 *per* Brennan J. (H.C.) ("[The Torrens system is] designed to protect a transferee from defects in the title of the transferor, not to free him from interests with which he has burdened his own title"); and Barry Crown, *Back to Basics: Indefeasibility of Title under the Torrens System*, [2007] Sing. J.L.S. 117 at 122-3.

76 See also *Land Titles Act*, *supra* note 4, section 45(3). In fact, as argued above, the Torrens system has increased the situations in which contractual obligations are enforceable, by preventing the avoidance of transfers where the transferee took with the belief that the transferor-proprietor has consented to the transfer.

77 This includes the intermeddling third party, whose juristic status is the same as that of an express trustee.

fully enforceable, as is expressly provided for by section 46(2)(c). Conversely, the beneficiaries' remedies against third parties assert an interest in the land despite the trust's non-appearance on the land-register, and are therefore excluded by the conclusive nature of the land-register. It is not proposed to examine whether constructive trusts are enforceable under section 46(2)(c). It suffices to say that the language of section 46(2)(c) is not unequivocal, and that the more important question is whether the enforcement of constructive trusts is consistent with the principles underlying the Torrens system. This will be examined later.[78]

While contractual obligations and the obligations of the express trustee are voluntarily assumed obligations *par excellence*, they are certainly not the only species of voluntarily assumed obligations known to the general law. There is no reason why the rights and remedies associated with other voluntarily assumed obligations should not be enforceable. For example, a false representor, whether fraudulent, negligent or innocent, has essentially breached an undertaking as to the truth of his representations, and should be liable to the representee to the extent he would be under the general law. However, it should be reiterated that only the remedies against the representor are preserved—there is no question of third parties taking on the faith of the land-register being bound by the representee's right to rescind, unless of course it is caveateable and caveated. Also, whether a person is liable is a different issue from whether he can meet his liability. For example, if the land has passed into the hands of a proprietor entitled to rely on the conclusiveness of the land-register, specific enforcement will no longer be available.

It should be clarified that despite their (partial) inclusion in a common list, *viz.* section 46(2), the position of the proprietor who took with the knowledge that the previous proprietor did not genuinely consent to the transfer is conceptually distinct from the position of the proprietor who voluntarily assumed obligations. In the former case, the whole transfer is completely vitiated from the start—registration is *never* conclusive for the proprietor who took knowing that the transfer was non-consensual. He is fully susceptible to the personal and proprietary claims under which he is liable at general law. In the latter case, the proprietor's ability to claim the protection of the land-register is only eroded to the extent of his voluntarily assumed obligations. The erosion may be complete—the proprietor who declares a trust over all his property has nothing left, and a proprietor who made a negligent misrepresentation when he contracted for his land stands in risk of the remedy of rescission. But it need not be—the proprietor of a fee simple estate who sells a 20-year lease is still fully entitled to the protection of registration in respect of the remainder.

Before moving on, it is acknowledged that the arguments canvassed above mean that, in theory at least, a larger variety of claims can be enforced against the proprietor than those enumerated in section 46(2). It might therefore be queried why Baalman did not see fit to expressly provide for those claims. Before answering that query, it is submitted that, whatever prevented Baalman from providing for these claims, they are indistinguishable from—or, in terms of the Court of Appeal's tentative test, "referable to"[79]—the claims expressly provided for in section 46(2), and historical

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[78] See Part II.D.2, below.

[79] *Bebe*, *supra* note 5 at para. 91. See also the summary of the holdings in *Bebe* in the opening paragraphs of Part II, above.

speculation should not impede the rationalisation of the law. In terms of principle, there is very little to be said for protecting persons who took knowing that the transfer was non-consensual or who had voluntarily assumed obligations (and even less for protecting some but not all of these persons). In the former case, it might be argued that lay persons might not be aware that a particular fact amounts to a vitiation of consent. But this is in effect arguing that ignorance of the law is a defence. For both cases (more so in the latter case), it might be argued that a rectification of the land-register is a disproportionate response to relatively minor wrongdoing. In reply, it is pointed out that, when the land-register is inconclusive, rectification need not result—whether rectification is available depends on whether, under the general law, the court would grant a specific remedy, *e.g.* rescission. For example, the vendor who transferred in consequence of an innocent or negligent misrepresentation may only be able to recover damages. It is also pointed out that any issue of remedial proportionality is an issue arising from the general law—the Torrens system only says that the relevant wrongdoers are not entitled to rely on the conclusiveness of the land-register.

As for why Baalman did not provide for other situations where a purchaser takes with the knowledge of his vendor's non-consent, a possible reason might be that some of the factors recognised today as vitiating consent or amounting to a voluntarily assumed obligation were not recognised or settled at the time of the Ordinance's drafting, though it is appreciated that this is not a completely satisfactory explanation. The likelier reason, it is speculated, is that Baalman might be more concerned to resolve the controversies surrounding issues that occur more frequently in conveyancing practice, rather than to lay down the basic principles underlying the Torrens system, though, given the remarkable consistency in the Ordinance and his commentary, he must have been keenly aware of those principles. This conjecture finds support in Baalman's discussion of section 28 of the Ordinance (presently section 46), where he said that the section represents the draftsman's endeavours to "surmount the controversies which inspired the various sub-titles", and also his discussion of section 120 of the Ordinance (presently section 148), where the reaction to contemporary Australian practice is evident.[80]

4. *When policy considerations intervene*

As a statutory creature, the conclusiveness of the land-register is of course subject to statutory derogation. Such derogations, being based on policy reasons instead of the internal logic of the Torrens system, should only be made by the Legislature. It is noteworthy that the derogations thus far relate in the main to easily noticed rights, for example the rights of short-term lessees in occupation,[81] and the rights over a bankrupt's property.[82]

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[80] Baalman, *supra* note 3 at 77 and 243ff respectively.

[81] *Land Titles Act*, *supra* note 4, section 46(1)(vii). See Baalman, *supra* note 3 at 80-3.

[82] See *Land Titles (Amendment) Act 2001* (No. 25 of 2001), section 14 (amending section 47 to abolish exoneration from notice (actual or constructive) of any bankruptcy proceeding), and Sing., *Parliamentary Debates*, vol. 73, col. 1915 at 1917-8 (25 July 2001) (A/P Ho Peng Kee, Minister of State for Law). The institution of bankruptcy proceedings is now searchable via the due diligence module in LawNet.

D. *Analysis of Specific Situations*

In this part, the principles developed above will be applied to the three areas of law discussed in *Bebe*, *viz.* (1) fraud, (2) constructive trusts, and (3) personal equities, as well as (4) to the facts of *Bebe* itself. The protection given to the vendor by the Torrens system will also be briefly reviewed.

1. *Fraud*

As the Court of Appeal held in *Bebe*, fraud involves actual dishonesty or moral turpitude. Acting with knowledge of fraud is fraud, as is a wilful refusal to investigate for fear of discovering fraud.[83] To these holdings the following observations are added.

First, there is a situation where notice of fraud does not constitute fraud. It is when X is defrauded into transferring Greenacre to Y, who then transfers to Z, who knows of the fraud. Z is not liable for fraud. The explanation is simple. At general law, property in Greenacre has fully passed to Y, with X only retaining an equity to rescind the transfer to Y, an equity which is binding on all purchasers of Greenacre save the *bona fide* purchaser of the legal estate for value without notice. This effect of the equity is in fact identical to the situation where Y holds Greenacre on trust for X and transfers it in breach of trust—it results, against the persons to whom it is applicable, in the transfer of title back to X. X's equity is, in other words, an interest in land under a Torrens system.[84] Being unregistered and uncaveated, its enforcement against anyone other than Y (who took knowing that X did not consent to the transfer) is incompatible with a conclusive land-register. The situation is of course different if Z participates in the fraud against X, in which case X will have a tortious cause of action against Z right from the beginning.

Second, a representation is fraudulent only if it involves a false representation of fact, made knowingly or recklessly as to its truth. As Lord Wilberforce said, there is "a distinction in law between a promise as to future action, which may be broken or kept, and a statement as to existing fact, which may be true or false."[85] The breach of a promise may indicate that a statement of intent to honour the promise was made fraudulently, but that is the end of its relevance. This general law definition of fraud is trite, and is in no way affected by Torrens legislation. Therefore, an assurance by a proprietor to honour the rights of a third party amounts to fraud only if (1) the assurance is construed as a representation of his present intentions, and (2) he has no present intention to honour the assurance.

Third, given that fraud and dishonesty remains somewhat ill-defined, Courts must strenuously resist the temptation to take advantage of this elasticity to provide a remedy in hard cases. As was held in *Bebe*, "courts should exercise caution *as well as* vigilance in scrutinising allegations of fraud in land dealings."[86] Specifically, it is submitted that fraud should not be conflated with other situations where a transferee takes with the knowledge that the transferor did not consent to the transfer. While

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[83] See the discussion in *Bebe*, *supra* note 5 at paras. 14-19 and 29-36.

[84] See Part I.B.2, above.

[85] *British Airways Board v. Taylor* [1976] 1 W.L.R. 13 at 17 (H.L.).

[86] *Bebe*, *supra* note 5 at para. 28 [emphasis added].

such transferees exhibit a similar degree of moral turpitude, the factors constituting non-consent are various and should not, in the interest of clarity in the law, be confused with each other.

2. *Constructive trusts*

The constructive trust is not a monolithic creature—it is a trust which equity imposes in response to a variety of situations. Therefore, it cannot categorically be said, without more, that a constructive trust is or is not enforceable on registered land. It is submitted that a constructive trust can be enforced against a proprietor: (1) if he is a volunteer; (2) he took with the knowledge that the transfer was non-consensual; or (3) if it relates to an obligation voluntarily assumed by the proprietor. In other situations, the constructive trust will not be enforceable, since it asserts that the constructive beneficiary, whose name does not appear on the land-register, has an interest in land.

Therefore, the constructive trust—in effect a bare trust—imposed on recipients of trust property other than the bona fide purchaser of the legal estate for value without notice, being the very mechanism that makes the trust a proprietary construct at general law, is generally excluded by the conclusive nature of the land-register. It will only be enforceable against a proprietor who is not entitled to rely on the conclusiveness of the land-register. The constructive trusteeship (actually a personal, not proprietary remedy) imposed on dishonest recipients of trust property is similarly excluded, since, as explained above, notice of a trust on registered land is notice of nothing and cannot constitute dishonesty. The constructive trusteeship (again a personal remedy) imposed on a dishonest assistant in a breach of trust is irrelevant to the Torrens system, since a dishonest assistant without more does not acquire the trust property. On the other hand, a trustee who misapplies trust monies in purchasing the land is unable to prevent the beneficiaries from tracing into the land, since the errant trustee has not provided any of his own money towards purchasing the land, and therefore stands in the same position as a volunteer. A common intention constructive trust also remains enforceable, since its juristic basis is the express or implied agreement of the parties, *i.e.*, a voluntarily assumed obligation. Similarly for the constructive trust imposed on a vendor of land. Of course, a constructive trust will only be enforceable against the proprietor on whom it was first imposed, unless it is caveated.

Imposing a constructive trust might be appropriate when no other remedies are available. Particularly, a constructive trust might be an appropriate remedy when a proprietor obtained his title by a false assurance to his predecessor that the unregistered rights of third parties will be respected.[87] In such a case, other remedies may be unavailable. The previous proprietor may no longer be around to enforce the contractual term or rescind for misrepresentation, as the case may be, and the enforcement rights of the third party might have been excluded.[88] Finding an express trust would be extremely artificial—if the assurance was fraudulent it precludes any

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[87] If the proprietor merely acknowledged the third party's rights, no obligations attach: see *ibid*. at para. 76.

[88] Third party enforcement rights, since they merely hold a promisor to the contractual obligations he voluntarily assumed, are consistent with the Torrens system. *Ibid.* at para. 80, acknowledged the possibility of third parties enforcing a contract against the proprietor.

intention on the part of the fraudulent proprietor to benefit the third party.[89] Rectification of the land-register in favour of the third party may not be possible if the third party's right is unregistrable for some reason, for example if it is expressed to be for a duration that is not sufficiently certain to constitute a lease,[90] or if it requires a subdivision of land not approved by the Chief Surveyor.[91] If these difficulties obtain, and if there is no remedy, the fraudster will unjustly be able to retain the spoils of his fraud. It is suggested that a constructive trust in favour of the third party would be an appropriate means to extract the spoils of his fraud from the fraudster. Because the constructive trust is imposed on someone who is unable to rely on the conclusiveness of the land-register, its enforcement does not constitute an invasion of "the inner sanctum of the land-register."[92]

3. *Personal equities*

As the Court of Appeal observed in *Bebe*,[93] it is not clear at all what constitutes a 'personal equity'. It is not even clear whether a 'personal equity' has anything to personal and equitable causes of action as these terms are understood at general law—Baalman discussed the right to enforce a contractual term under personal equities,[94] and the Court of Appeal seemed to regard the imposition of a constructive trust as being within its *in personam* jurisdiction.[95] However, it is not necessary to define the term here. A personal equity is enforceable against a proprietor in the general circumstances described above, *i.e.*: (1) when the proprietor is a volunteer; (2) when the proprietor took knowing that the transfer was non-consensual; or (3) when the personal equity derives from the proprietor's voluntarily assumed obligations. Otherwise, personal equities are unenforceable against a proprietor, unless they can be and were caveated before his registration.

4. *The facts of* Bebe

The facts are as follows.[96] The respondent (B) was the proprietor. She had two daughters, H and S. B lost her original duplicate certificate of title and applied for a replacement, which was kept at all times by H. S sought to mortgage the property to secure a loan facility for her benefit. The mortgagee, UOB, through its solicitors performed the normal searches and discovered that a replacement certificate had been applied for, but not issued. After the search, B executed the mortgage. It was agreed that: (1) B was not asleep nor was there a misrepresentation made to her when she

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89 If the assurance was made honestly, it may be regarded as a declaration of trust—see *Bahr v. Nicolay*, *supra* note 75 at para. 23 *per* Mason C.J. and Dawson J. (H.C.). The fraud found by their Honours in that case related to subsequent events. Their Honours' holding with respect to the declaration of trust was cited approvingly in *Bebe*, *supra* note 5 at para. 77.

90 If section 87(2)(b) is read as importing the *ab initio* certainty of duration requirement laid down in *Street v. Mountford* [1985] A.C. 809 (H.L.).

91 *Land Titles Act*, *supra* note 4, section 54A.

92 *Bebe*, *supra* note 5 at para. 8.

93 *Ibid.* at para. 66, citing Barry Crown, "Equity Trumps the Torrens System" [2002] Sing. J.L.S. 409 at 415 ("The notion of an "*in personam* claim" or a "personal equity" is inherently vague".).

94 Baalman, *supra* note 3 at 84.

95 *Bebe*, *supra* note 5 at para. 77.

96 The facts are mainly set out at *ibid.* at para. 2.

executed the mortgage; (2) B would not plea the defence of *non est factum*; (3) UOB and its solicitors were unaware of any legal disability that B may have suffered,[97] and (4) UOB (by itself) was unaware of any fraud perpetuated by S against B. In the event, the mortgage was registered with the original duplicate certificate of title, which was presented to UOB's solicitors by S (who stole the certificate), even though the certificate had already been cancelled. S defaulted and UOB sought to enforce the mortgage.

B sought to have the mortgage set aside on the basis of fraud by the clerk of UOB's solicitors. From the judgment of the Court, it is difficult to see what the vitiating fraud B sought to plea was. Counsel for B argued that

> [UOB] through [its solicitors] had knowledge that the Replacement CT had been issued for [B's] Property… Accordingly, when [UOB's solicitors obtained] the Original CT, [they] were put on inquiry and had they just inquired where the Replacement CT was, it would have been discovered that the same was being held by [H] and [S] would have been prevented from arranging the fraudulent mortgage of [B's] Property. The [respondent] therefore contends that [UOB], through their solicitors, failed to make further inquiries which were clearly necessary and by failing to do so, [UOB] are guilty of fraud.[98]

B could not be merely alleging that the knowing use of a cancelled certificate amounted to a fraud against her, because the knowing use of a cancelled certificate to register a dealing is by itself only an offence[99]—if the transferor had fully consented to the dealing she has no cause for complaint. The emphasis on notice also makes it unlikely that B was arguing that UOB originated a fraud against her. It seems more probable that B was arguing that the cancellation of the original duplicate certificate disclosed a fraud against her, and that by being wilfully blind to such a fraud while obtaining the mortgage, UOB through its solicitors was also fraudulent. If indeed this was B's argument, then it must be necessary for B to prove that (1) there was a fraud perpetuated against her in the first place, presumably by S, and (2) UOB through its solicitors knew or were wilfully blind to the facts constituting such fraud. B does not seem to have done either.[100] Even if S stole the original duplicate certificate, this does not bring B very far. If B was arguing that the execution of the mortgage was forged, proving a theft will be pertinent, since a forger needs the certificate to obtain registration. Acting with knowledge of the theft, or perhaps even of the cancellation of the stolen certificate, will then render UOB complicit in the forgery. However, it was conceded that B did execute the mortgage (by thumbprint),[101] in which case she could only have argued that she was deceived into executing the mortgage, and it is very difficult to see how a theft of the duplicate certificate without more deceived B into execution. Therefore, while agreeing with the Court of Appeal's reasons for finding that UOB's solicitors' clerk was not wilfully blind to the fact that the original

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97 The Court of Appeal disagreed with the High Court's finding that B was unsound of mind: *ibid*. at para. 6. However, given that it was agreed that neither UOB nor its solicitors knew that B was unsound of mind (*ibid.* at para. 2(g)(vi)), the disagreement was immaterial, and the Court of Appeal was content to leave the High Court's finding on the record.

98 Para. 6 of the defence, quoted in *Bebe*, *supra* note 5 at para. 21.

99 *Land Titles Act*, *supra* note 4, section 169(1)(b).

100 In *Bebe*, *supra* note 5 at para. 99, the Court said that B was defrauded by S. However, this observation finds no support from the rest of the judgment.

101 *Ibid*. at para. 2(i)(i).

duplicate certificate was cancelled,[102] it is submitted that B's argument on fraud fails because B simply did not prove that she was defrauded into signing the mortgage in the first place, and there was therefore nothing that UOB could have noticed that made it (UOB) fraudulent.

B, in the alternative, prayed for the court to exercise its powers under section 160 to rectify the land-register by setting aside the mortgage. The Court held that section 160 creates no substantive rights but merely gives the Court remedial powers in respect of the rights of the parties, but not in respect of departmental errors by the Registry. In the absence of any ground on which the mortgage could be set aside, the Court rightly declined to exercise its remedial powers under section 160.

B, in the further alternative, argued that she had a personal equity to set aside the mortgage under the personal equity recognised in *Mercantile Mutual Life Insurance Co Ltd v. Gosper.*[103] In *Gosper*, G was a proprietor of mortgaged land. At the time of purchase, it was mortgaged to the extent of $205,000. Subsequently, G's husband, by forging her signature, obtained an increase in the secured sum. The mortgagee, who had custody of the duplicate certificate of title, was not privy to or even put on notice as to the perpetration of the fraud. The New South Wales Court of Appeal found that G had a personal equity to set aside the mortgage. The *Bebe* Court chose to distinguish *Gosper* on narrow grounds, namely that (1) there was no pre-existing relationship between B and the mortgagee to give rise to any obligation on the part of the mortgagee with respect to the custody or use of the original duplicate certificate; and (2) the clerk of the mortgagee's solicitors "did not facilitate the registration of the Mortgage in the same way that the bank in *Gosper* did."[104]

It is puzzling why the Court distinguished *Gosper* so narrowly. At an elementary level, it seems that a more vital distinction between *Gosper* and *Bebe* was the fact that B did consent to the mortgage. Further, while agreeing with the Court that the result in *Gosper* may be justified by finding an implied term that the mortgagee would be strictly liable for any unauthorised use of the duplicate certificate,[105] it is surprising that the Court did not reject the *Gosper* equity more comprehensively, given its disapproval of enforcing personal equities under a Torrens system. The *Gosper* equity was founded on the unauthorised use by the mortgagee of the duplicate certificate in its custody. Since the mortgagee in *Gosper* did not have actual or even constructive knowledge of the fraud, the *Gosper* equity must have operated strictly (by itself an unjustifiable expansion of equity's conscience-based jurisdiction). In other words it would have fallen far short of the Court's own (admittedly tentative) threshold of fraud for admitting an implied exception to indefeasibility. It is reiterated that, where the consent of the transferor is lacking or vitiated, the lack or defect gives rise to no cause of action unless brought to the transferee's knowledge before the conclusion of the contract.

Finally, in the penultimate paragraph of its judgment, the Court of Appeal indicated that it considered the Registrar, who registered the mortgage on the strength of a

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[102] See *ibid*. at paras. 21 and 24-27.

[103] (1991) N.S.W. L.R. 32 (C.A.) ['*Gosper*'].

[104] *Bebe*, *supra* note 5 at para. 64. The second ground of distinction is somewhat opaque, given that the Court of Appeal found that the clerk, like the mortgagee in *Gosper*, acted honestly.

[105] *Ibid.* at para. 87. However, while such a justification is unobjectionable in principle, it seems unlikely that an ordinary borrower can obtain such a favourable term from a commercial lender.

cancelled certificate, to be responsible for B's loss.[106] The Court then urged the Registrar to "do what is right by [B] and required of him by law", *i.e.* to make good B's losses out of the Assurance Fund. The Court's solicitousness in pointing out a remedy for B is to be applauded, but it is respectfully submitted that B had no remedy against the Registrar. Section 155 provides that only a person "who is deprived of land or sustains loss or damage through any omission, mistake or misfeasance of the Registrar, or any member of his staff" can bring a claim against the Registrar to be satisfied by the Assurance Fund. It is true that the Registrar, by registering the mortgage with a cancelled certificate, was remiss in his duty under section 42(1). However, even if the Registrar had initially refused to register the mortgage, the mortgage would likely still have been registered in the end, either with or without the replacement certificate, because the Registrar has the discretion, under section 42(2)(e), to dispense with the need to produce a certificate "where satisfactory evidence has been furnished to show that the certificate of title or duplicate lease has been lost, mislaid, destroyed or is being improperly or wrongfully withheld". Certainly, any refusal by B to produce the replacement certificate would have been wrongful, since she executed the mortgage herself, and UOB or its solicitors would have been able to provide satisfactory evidence to that effect. In other words, the Registrar's negligence did not cause B's loss. It is submitted that, if B's consent was indeed vitiated in some way (though given the agreed facts this is far from clear), B's remedy lies against her solicitors, if they did not properly advise her as to the consequences of the transaction, or all else failing prevent her from entering the transaction.

5. *Protecting the vendor*

As the preceding discussion has shown, the Torrens system favours the purchaser at an inevitable cost to the vendor, who is bound by a non-consensual sale if the purchaser takes in ignorance of the non-consent. The *Land Titles Act* is not blind to this, and has striven, through auxiliary provisions, to protect the vendor, for example by providing that the Registrar may notify on the land-register the fact that the proprietor suffers from a legal disability,[107] thereby affixing any prospective purchaser with notice of the disability. It is pertinent to note that these protections build on the mechanisms of land registration, which offer a greater range of prophylactic possibilities than the coarse choice between different degrees of notice at general law.

The duplicate certificate of title is an important part of the protection afforded by the Act to the vendor. It is trite that a proprietor must execute a transfer form. However, if this were the only formal requirement to obtain registration, the whole process would be entirely susceptible to forgery, which the Registrar, being an administrative officer only, is not concerned with. By issuing a unique duplicate certificate of title to the proprietor and requiring it to be produced for registration,[108] it is more likely that a registered transfer is one that the proprietor genuinely consented to.[109]

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[106] *Ibid.* at para. 98.
[107] *Land Titles Act*, *supra* note 4, section 39.
[108] *Ibid.*, sections 34, 35 and 42(1)-(2).
[109] See Baalman, *supra* note 3 at 243.

But, as Baalman himself acknowledged,[110] the protection is far from absolute—the proprietor remains entirely vulnerable to forgeries perpetuated by trusted persons, arguably the situation where protection is most needed.[111]

In the *Land Titles Act*, the superior protection takes the form of a certificate of correctness, whose attachment allows the Registrar to presume that an instrument has been duly executed. The certificate must be signed by solicitors acting for the parties and containing the terms set out in section 59(2) and (3A), the most significant of which is the one which states that the instrument submitted for transfer is made in good faith. The protection afforded by the certificate is an indirect one—given that it is in practice virtually impossible to register a dealing without a certificate of correctness, a solicitor who negligently certifies a vitiated dealing as correct is likely to be tortiously liable to his client. No case has yet arisen in this jurisdiction, but there seems no reason why ill-advised vendors should not obtain a remedy from their solicitors.[112]

III. The Caveat System

The controversy affecting the caveat machinery is exactly opposite to that affecting registration. For registration, it is clear what can or cannot be registered—the controversy lies with the effect of registration. For caveats, the effect of lodging a caveat is clear—the controversy lies with what can or cannot be caveated. The answer is plainly important—a right which is validly caveated has practically the same effect as a registered right.[113]

A. *The Statute and Case Approach to Caveatability*

Section 115 provides that anyone claiming "an interest in land" may lodge a caveat. The *Land Titles Act* does not define the term—Baalman in his commentary on section 115 (section 93 of the Ordinance) considered that what constitutes an interest in land falls to be determined by the general law, and did not elaborate on the distinguishing features of an interest in land.[114] The definition does not affect whether a caveat

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[110] Though not directly—what he said was: "History shows that the ability to produce, or to control the production of, the duplicates of registered instruments, is probably the greatest factor in the prevention of fraud. In practically every case which has come before the courts the wrongdoer has been some trusted agent of the proprietor, or some other person who has improperly gained access to the documents of title. The forger who is not in that category is wasting his time": *Ibid*. at 47.

[111] The requirement of production has also caused inconvenience in relation to the severance of a joint tenancy: see *Diaz v. Diaz* [1998] 1 S.L.R. 361 (C.A.). This resulted in the introduction of section 53(8) of the *Land Titles Act*, which empowered the Registrar to dispense with the production of the duplicate certificate if satisfied that a party seeking severance is unable to procure it: see Sing., *Parliamentary Debates*, vol. 60, col. 374 at 374-7 (18 January 2003) (Professor S. Jayakumar, Minister for Law).

[112] This possibility is expressly left open by section 117(3) of the *Real Property Act 1900* (N.S.W.).

[113] For the formal effect of a caveated interest in land, see the *Land Titles Act*, *supra* note 4, sections 119 to 122. A validly caveated interest in land has practically the same effect as a registered right because the vendor and/or the purchaser usually negotiates with the caveator to withdraw his caveat so that the purchaser can obtain clear title.

[114] Baalman, *supra* note 3 at 195-6.

can be successfully lodged, which merely requires compliance with administrative procedures. What it affects is the ability to *maintain* a caveat upon challenge in interlocutory proceedings[115] or at trial.

However, there has been a lack of anything like a settled definition of what constitutes an interest in land at general law, save for the very trite requirement that there must be a present (including contingent) right and not a mere expectancy.[116] The closest the general law has come to a definition of property is Lord Wilberforce's dictum in *National Provincial Bank v. Ainsworth*[117] that before a right or interest can be admitted into the "category of property, or of a right affecting property", it must be "definable, identifiable by third parties, capable in its nature of assumption by third parties, and have some degree of permanence or stability". Gray has criticised this definition for confusing proprietary character and proprietary consequence.[118] While such circularity should be tolerated at general law, the Torrens system brooks no such "radical and obscurantist nonsense."[119] Proprietary consequence is provided by the caveat machinery. The courts have to squarely confront what imparts proprietary character.

B. *Defining an Interest in Land*

1. *The relevance of specific remedies*

In *Ho Seek Yueng*, Phang J. (as he then was) held that the availability of injunctive relief, like the availability of specific performance, is indicative of the status of a right as an interest in land.[120] To generalise, the availability of specific remedies in respect of a right concerning land indicates its status as an interest in land. By implication, therefore, the availability of one type of specific remedy, as opposed to another, is only relevant to determining the *magnitude* of the interest in land, not whether the relevant right is an interest in the first place. Thus, the fact that a right of pre-emption can only be protected by a decree of specific performance only when the grantor decides to sell does not affect the status of the right as an interest in land *ab initio*, since the right is capable of protection by injunction before the grantor decides to sell. The reasoning is equally applicable to contingent (as opposed to vested) rights.

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115 Even though a caveat has been compared to an administrative or statutory interlocutory injunction (see *Eng Mee Yong v. Letchumanan* [1979] 3 W.L.R. 373 at 376 *per* Lord Diplock (P.C.)), it is by itself only effective to delay an adverse registration for up to 30 days after the Registrar has served notice on the caveator of his intention to lodge the adverse registration (sections 119, 120 and 121 of the *Land Titles Act*, *supra* note 4). A further, curial interlocutory injunction may therefore be needed before the rights of the parties can be finally determined at trial.

116 *Lim Kaling v. Hangchi Valerie* [2003] 2 S.L.R. 377 (H.C.).

117 [1965] A.C. 1175 at 1247-8 (H.L.).

118 Kevin Gray, "Property in Thin Air" [1991] 50 C.L.J. 252 at 293. He says, pithily, that Lord Wilberforce's dictum essentially proclaims that "property is property because it is property".

119 *Ibid*.

120 *Ho Seek Yeung*, *supra* note 6 at paras. 93 and 110. This proposition finds statutory support in section 115(3)(b) of the *Land Titles Act*, which provides that a person claiming an interest in land includes a person who has obtained an injunction in respect of an estate or interest in land.

His Honour did not elaborate beyond the citation of academic authority[121] why the availability of specific relief is indicative of a right's status as an interest in land, but it is submitted that it is clear why the availability of specific remedies is *conclusive* (as opposed to merely *indicative*) of such status.

A specific remedy, in respect of land, requires a person to deal with land in a specified way—which includes, of course, requiring a person *not* to deal with land in a specified way. Therefore, if a specific remedy is ordered against an owner of property in land, it reduces the quantum of property held by said owner, with, logically, a corresponding increase in the quantum of property held by the person entitled to the specific remedy.[122] Of course, the quantum of property owned may vary in an infinite number of ways, ranging from a decree to convey title all the way to an injunction not to sell property without first offering it to someone.

This argument is predicated on the proposition that property in land is infinitely gradable. One can take the contrary position, *viz.*, that property can only be gradated in limited ways. The contrary position is essentially the *numerus clausus* doctrine, which holds that the list of proprietary interests in land should be closed.[123] *Prima facie* the doctrine is mathematically unsatisfactory—it asserts that a diminution in one person's property in land caused by the availability of specific remedies against him does not necessarily result in a corresponding increase in another's property in the same land. The classic justification for the doctrine is found in Lord Brougham L.C.'s judgment in *Keppell v. Bailey*, where his Lordship declared that:

> great detriment would arise and much confusion of rights if parties were allowed to invent new modes of holding and enjoying real property, and to impress upon their lands and tenements a peculiar character which should follow them into all hands, however remote.[124]

The law and economics argument for the *numerus clausus* doctrine states that a large freedom to shape proprietary rights makes the investigation of title intolerably difficult, and therefore reduces the marketability of land.[125] A similar defence may be made from principle—certain rights, even if specifically enforceable, are less noticeable than others, and should therefore not bind third parties.

Before addressing these justifications, it should first be observed that the *numerus clausus* was never the closed list it held itself out to be. The lease was added in the late Middle Ages.[126] The restrictive covenant was added more than 150 years ago in the

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[121] *Ho Seek Yeung*, *supra* note 6 at para. 93, citing Paul M. Perell, "Options, Rights of Repurchase and Rights of First Refusal as Contracts and as Interests in Land" (1991) 70 Can. Bar Rev. 1 at 24.

[122] As Callinan J. puts it in *Commonwealth of Australia v. Western Australia* (1999) 196 C.L.R. 392 at para. 281 (H.C.): "To be able to prevent the usage of property in a certain way is just as much an incident of ownership as is an ability to use it without restriction".

[123] See *e.g. Hill v. Tupper* (1863) 159 E.R. 51 at 53 *per* Pollock C.B. ("A new species of incorporeal hereditament cannot be created at the will and pleasure of an individual owner of estate; he must be content to take the estate and the right to dispose of it subject to the law settled by decisions, or controlled by act of parliament".).

[124] (1834) 39 E.R. 1042 at 1049 (Ch.).

[125] See *e.g.* Bernard Rudden, "Economic Theory v. Property Law: The *Numerus Clausus* Problem" in John Eekelar & John S Bell, eds., *Oxford Essays in Jurisprudence (Third Series)* (Oxford: Clarendon Press, 1987) 239.

[126] See the exposition and sources cited in Kevin Gray & Susan Francis Gray, *Elements of Land Law*, 4th ed. (New York: Oxford University Press, 2005) at paras. 7.72 and 7.73.

seminal case of *Tulk v. Moxhay*, where Lord Brougham's dictum was distinguished by Lord Cottenham L.C.[127] The covenant must "run with the land"—a somewhat circular requirement, but one which unquestionably acknowledges the ability of private persons to "invent new modes of holding and enjoying real property". Gray regards the contractual license and the equity by estoppel as being on the verge of morphing into proprietary rights.[128]

Returning to the justifications for the *numerus clausus* doctrine, the law and economics argument seems to carry no weight in Torrens land, where an inspection of the land-register is all the investigation that a prospective purchaser needs to do. The same can be said of the defence from principle—a right is noticeable if notified on the land-register, and irrelevant if it is not.[129] It is further doubtful that the traditional temporal division of property in land, *i.e.* the doctrine of estates, is always the most efficient way to transact in real property.[130] More generally, it seems that a more pro-market approach would be to let proprietors divide their property as they see fit and as the market demands. Given that there is no good reason for the *numerus clausus* doctrine to apply in registered land and therefore no good reason why property should not be infinitely gradable, it is submitted that the availability of specific remedies ought to be conclusive of proprietary status. This would mean that all rights concerning land are at least *prima facie* interests in land, since land is presumed to have unique value and therefore incommensurable with monetary remedies.[131]

2. *The irrelevance of the possibility of non-specific remedies*

What, then, is the relevance of the fact that specific remedies, being discretionary, do not *necessarily* attend a right concerning land? Tan Sook Yee, who leans against the recognition of the inchoate equity created by a proprietary estoppel as an interest in land because the equity might sound only in damages, seems by necessary implication to also tend towards the view that there must at least be a certain degree of likelihood that specific remedies will be available before a right is an interest in land.[132] She argues (with regard to the inchoate equity, but the reasoning is generally applicable) that giving proprietary effect to a remedially uncertain right is anathema to a system that aims to facilitates dealings in land, since third parties would be "disconcerted when informed that they will not know how they are affected until the

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[127] (1848) 41 E.R. 1143 at 1147 (Ch.) ("With respect to the observations of Lord Brougham in *Keppell v. Bailey* he never could have meant to lay down, that this court would not enforce an equity attached to land by the owner unless under such circumstances as would maintain an action at law. If that be the result of his observations, I can only say that I cannot coincide with it".).

[128] Kevin Gray & Susan Francis Gray, *supra* note 126 at para. 2.97.

[129] It also seems doubtful that the argument from principle justifies the particular interests recognised by the *numerus clausus*. The rights of occupants, for example, are certainly highly visible but do not always constitute interests in land. If visibility is associated with paper title, the defence from principle becomes question-begging.

[130] See Kevin Gray & Susan Francis Gray, *supra* note 126 at para. 2.97.

[131] *Ho Seek Yeung*, *supra* note 6 at paras. 62 and 64, citing *RSP Architects Planners & Engineers (Raglan Squire & Partners FE) v. MCST Plan No. 1075* [1999] 2 S.L.R. 449 at para. 43 (C.A.) to the effect that the uniqueness of land was *a fortiori* given this jurisdiction's geographical and socio-economic conditions.

[132] Tan Sook Yee, *Principles of Singapore Land Law*, 2nd ed. (Singapore: Butterworths Asia, 2001) at 110-1.

matter is tested in court."[133] With respect, requiring such certainty would be impractical and unnecessary. It would entail, for example, that the land-register constantly updates the amount owing under a security (which requires more than just registering the terms of repayment), so that a prospective purchaser can precisely gauge the instantaneous extent of the encumbrance. Practically, it seems sufficient that a prospective purchaser knows his total possible liability (in contrast to his *probable* liability)—something that the conclusive land-register can tell him—because he can then plan for the worst. If a mortgage is registered, a prudent prospective purchaser should assume that the mortgagee may have a claim on the land for the entire mortgage amount. If an inchoate equity is caveated, a prudent prospective purchaser should proceed on the assumption that he may well get nothing for his money.

Additionally, outlandish consequences result if a right becomes an interest in land only when specific remedies are definitely or probably available. For example, security interests would only become interests in land when the debtor cannot or is unlikely to be able to discharge his debts, instead of *ab initio*. They might also become interests in land simultaneously, instead of in the order of their creation.

Besides the difficulties with the alternative views, it is submitted that there are positive reasons why the contingent availability of specific remedies in respect of a right concerning land should not affect its status as an interest in land. First, the recognition that all rights concerning land are capable of protection by caveat will sever the Gordian knot posed by the debates about proprietary status. For example, it can simply be said that the contractual license, by virtue of its relation to land, is a right capable of protection by caveat. The extent of the right will naturally depend on the (caveated) contractual terms from which the right derives. This is all that a person who deals with, or claims through, either licensor or licensee needs to know. In this regard, the labels—lease, life estate, etc.—that once magically conferred proprietary status will no longer have *per se* legal significance,[134] but will become mere shorthand for commonly transacted bundles of rights.

Secondly, as the U.K. Law Commission has pointed out, there are several rights, such as those under an estate contract, that are regarded as giving rise to equitable interests in land notwithstanding the discretionary nature of specific remedies.[135]

Thirdly, allowing a caveat to be lodged in respect of a right for which specific remedies are not definitely available strikes a just balance between the caveator and the caveatee. For the caveator, his contingent right to specific remedies will be preserved, and not be made to depend on the vagaries of circumstance.[136] As for the

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[133] *Ibid.* at 111. The commentator's other argument—"If notice of rights based on a contract, a clear, defined and accepted legal relationship in itself, does not *per se* make the contract bind a purchaser, why should notice of rights based on equitable estoppel make the right binding on a third party?"—is itself begging the question (and is also a veiled assertion of the *numerus clausus* doctrine, which has been rejected in the preceding paragraphs). William Wade Q.C., for example, argues that, as a matter of principle, a person taking with knowledge of another's contractual rights should be bound by them, even if those rights do not create an interest in land: see *infra* note and accompanying text.

[134] The fee simple will of course continue to describe the maximum amount of property in land that can be held by a private individual.

[135] U.K., Law Commission, *Land Registration for the Twenty-First Century: A Conveyancing Revolution* (Law Com. No. 271) (London: The Stationary Office, 9 July 2001) at 88, fn. 100. The Report resulted in the *Land Registration Act* 2002 (U.K.), 2002, c. 9, of which sections 115 and 116 recognised the right of pre-emption and the inchoate equity by proprietary estoppel respectively as interests in land.

[136] A sentiment also expressed by Phang J.: *Ho Seek Yeung*, *supra* note 6 at para 62.

caveatee-proprietor, if the rights claimed do exist, he has only himself to blame for creating them or purchasing knowing that they exist in the first place; if the rights claimed do not exist, he is entitled to damages.[137] It is true that the caveator may not be good for damages, but the impact of such a possibility on the caveatee is minimised by the automatic lapsing of the caveat if the caveator does not show cause within 30 days of being notified of the Registrar's intention to register an adverse dealing,[138] and the rule that, in interlocutory proceedings to maintain a caveat, the court will decide against the party who is unable to meet an award for damages, since the other party has more to lose.[139]

Fourthly, such an expansive approach reduces the extremely high cost of certainty brought about by the Torrens system. As discussed above, the certainty brought about by the Torrens system stands on the conclusiveness of the land-register and therefore necessitates the general emasculation of all rights in land that are unregistrable or unregistered. By allowing these affected rights to be protected via the caveat, the Torrens system can be said to have achieved its primary aim of certainty in land transactions at a minimum disruption (the disruption being the need to lodge a caveat) to the efficacy of rights at general law, a good thing by any measure. In this connexion, it should be pointed out that the definition of an interest in land for the purposes for sustaining a caveat coheres with the definition of an interest in land which is excluded by a conclusive land-register.[140] Thus, the enforcement of any right concerning land against anyone but the grantor is excluded by the conclusive land-register unless such right is caveated (or registered).

Fifthly and in close relation, an expansive approach will reduce the losses arising from adverse dealings, by preventing adverse dealings from occurring in the first place. The loss caused by adverse dealings arises from the fact that a specific remedy can only be available to one party. Ideally, such a loss will be shifted to the capricious proprietor via personal actions against him, but damages may not be adequate, not least because the proprietor might not be good for damages. Such a loss is inevitable at general law, which has no machinery to forewarn subsequent dealers that they might be prejudiced by earlier dealings. It can however be easily prevented in a Torrens system by allowing an earlier dealing to be caveated and therefore brought to the notice of subsequent dealers, who can then deal in full knowledge of the consequences. And there is powerful incentive for the earlier dealer to caveat his dealing—the rules of priority at general law, which overwhelmingly favour earlier dealings, are inapplicable to Torrens land, where the first to caveat has priority.[141]

The tenor of Phang J.'s judgment seems to favour such a generous approach towards protecting rights. His Honour declared that:

> as a matter of justice and fairness, a person who feels that he or she has a legitimate interest ought to be given the opportunity to make out his or her case *vis-à-vis* the

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[137] *Land Titles Act*, *supra* note 4, sections 128(1)(a) and (c); *Tan Soo Leng David v. Wee, Saktu & Kumar Pte Ltd* [1993] 3 S.L.R. 569 at paras. 25-32 *per* G P Selvam J.C. (H.C.).

[138] *Land Titles Act*, *supra* note 4, sections 120, 121 and 127.

[139] *Good Property Land Development Pte Ltd v. Societe Generale* [1989] S.L.R. 229 at 244 (H.C.). Also, the burden of establishing that the caveat should be maintained lies on the caveator: *Eng Mee Yong v. Letchumanan* [1979] 3 W.L.R. 373 at 376 *per* Lord Diplock (P.C.).

[140] See Part II.B.2., above.

[141] *Land Titles Act*, *supra* note 4, section 49.

> proposed registration of other dealings which would otherwise adversely affect such an interest[.][142]

His Honour then went on, in the later part of his judgment, to note approvingly Wade Q.C.'s (as he then was) proposition that "one who attempts to buy *with full knowledge of* another person's prior contractual rights, whether or not creating an interest in land, *is obliged to respect them*."[143] While his Honour indicated that these broad considerations of justice are only applicable *after* a right has been determined to be an interest in land, it has been argued above that, as long as a right concerning land might possibly be protected by a specific remedy, it should be considered an interest in land. Of course, whether a right is an interest in land is a distinct question from whether a particular person has such a right.[144] The latter question is determined by the law on transfers, and it should be reiterated that a transfer of a registrable interest in registered land is good if the transferee believes that the transferor-proprietor has consented to the transaction.[145]

IV. Conclusion

The Torrens system is animated by one central consideration—that a prospective purchaser of land ought not to be saddled with the burden of investigating a proprietor's title or consent to the transaction. The conclusiveness of the land-register, and the exceptions thereto, follow from this purpose. While the validity of the Torrens philosophy can legitimately be questioned, the workings of the Torrens system are, as intended, simple and straightforward. This should not be forgotten as lawyers continue to deal with the interaction between the Torrens system and a continually evolving general law.[146] On a jurisprudential level, the Torrens system, by changing the way property rights work, has also subtly but surely challenged traditional conceptions of property. Specifically, with the advent of a centralised system of land registration and transaction, there seems no general reason why any right concerning land should not be given proprietary effect via the caveat system.

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142 *Ho Seek Yeung*, *supra* note 4 at para. 58.

143 *Ho Seek Yeung*, *supra* note 6 at para. 95, citing "Rights of Pre-Emption: Interests in Land?" (1980) 96 Law Q. Rev. 488 at 492 [emphasis by Phang J.].

144 Thus the rule against remoteness of vesting is not a restriction on the ability of a proprietor to divide his property—the rule does not say that a proprietor cannot transfer such and such a interest—it merely specifies that that all the conditions relating to the transfer (including the existence of an ascertainable transferee but excluding the passage of time) are to be fulfilled within the perpetuity period.

145 See Part II.C.2 above.

146 Nor should it be forgotten that the Torrens system is a *legislative* creation.