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# THE STORY OF "PERSONAL EQUITIES" IN SINGAPORE: THUS FAR AND BEYOND

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The story of "personal equities" in Singapore is a fascinating one. The first successful claim of a "personal equity" outside the statutory regime in Singapore surfaced some forty years after the introduction of the Torrens system in 1956. Subsequently, the "personal equities exception" was affirmed by one Court of Appeal and rejected by another. Since then, the Singapore courts have proceeded on the basis that there is a finite list of "personal equities" listed in section 46(2) of the *Land Titles Act*. This article proposes to explore these developments and demonstrate that the "personal equities exception" is in truth not an exception to indefeasibility. As a matter of statutory interpretation, such claims are simply not caught in the first place by the principle of indefeasibility as conferred by section 46(1) of the *Land Titles Act*. As such, potential "personal equities" claims ought not to be limited by section 46(2) exclusively.

## I. INTRODUCTION

The Torrens system of land registration was pioneered by Sir Robert Torrens in South Australia in 1858.[1] Developed in response to the poor fit the unnecessarily complex English laws of real property and conveyancing had proven to the colony, it is not surprising that the Torrens system of land registration quickly spread to other colonies in Australia as well as to other English colonies. The Torrens system arrived in Singapore in 1956 in the form of the *Land Titles Ordinance*,[2] almost a century after its original conception in South Australia. With almost a century's worth of experience to draw upon, it is not surprising that the draftsman of the *Land Titles Ordinance*, John Baalman, took the opportunity to clarify a number of uncertainties that had arisen in the Antipodes over that time. For example, it was clarified by section 27(2) of the *Land Titles Ordinance* that although subsection (1) of the same section prevented an unregistered instrument from passing title, an unregistered contract nevertheless had contractual force.[3] The draftsman further sought to statutorily enshrine the principle of immediate indefeasibility in the language of section 28(1) of the

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1 For a background as to how the Torrens system was conceived, developed and eventually born, see P.M. Fox, "The Story Behind the Torrens System" (1950) 23 Austl. L.J. 489. *Cf.* S. Robinson, *Transfer of Land in Victoria* (Sydney: The Law Book Company, 1979) at 1, see generally "Chapter 1: The Origins of the Real Property Act 1858 of South Australia".

2 Ord. 21 of 1956 [*Land Titles Ordinance*].

3 J. Baalman, *The Singapore Torrens System* (Singapore: The Government of the State of Singapore, 1961) at 72-73 [*Baalman*].

*Land Titles Ordinance*,[4] which also clarified that *Gibbs v. Messer*[5] had no application in the colony of Singapore.[6] The implication in many Torrens statutes that indefeasibility is not accorded to a volunteer was expressly provided in section 28(3) of the *Land Titles Ordinance*.[7] The most controversial of these clarifications, however, are to be found in section 28(2)(b)-(e) of the *Land Titles Ordinance*, today numbered section 46(2)(b)-(e) of the *Land Titles Act*.[8]

On one view, these provisions were a statutory codification of the "exception" to indefeasibility that has come to be variously known as the "personal equities exception" or the "*in personam* exception", with the result that in Singapore at least, there is a fixed list of such "exceptions" which the courts have no business adding to.[9] On another view, the presence of these statutory exceptions is not incompatible with the judicially developed "personal equities exception".[10] It is possible to overstate the importance of this issue as the vast bulk of "personal equity" claims will fall within the statutory regime. Hence, it was not until forty years after the Torrens system was introduced into Singapore that the courts saw a need to resort to a non-statutory "personal equity" claim in *United Overseas Finance Ltd. v. Victor Sakayamary*.[11] However, the issue remains important as a refusal to admit of any non-statutory "personal equities" will force the courts to strain and warp both the statutory "personal equities" as well as the important sister doctrine of fraud. Since its introduction in *Sakayamary*, it has been the latter view that has held sway in Singapore,[12] culminating in its affirmation by the Court of Appeal in *Ho Kon Kim v. Lim Gek Kim Betsy*.[13] However, the mood seems to have swung in the opposite direction since the Court of Appeal decision of *United Overseas Bank Ltd. v. Bebe bte Mohammad*.[14] According to the Court of Appeal in *Bebe*,

> having regard to the policy objectives of the [*Land Titles Act*] to reduce uncertainty and to give finality in land dealings, our courts should be slow to engraft onto the [*Land Titles Act*] personal equities that are not referable directly or indirectly to the exceptions in s 46(2) of the [*Land Titles Act*].[15]

A noted commentator has suggested that the effect of *Bebe* is that "[e]xceptions to indefeasibility must now be found within the four corners of the statutory language [of the *Land Titles Act*]", with the welcome effect of greater certainty.[16] *Bebe* has since been followed in two decisions of the High Court, in which claims in "personal

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4 *Ibid*. at 77.

5 [1891] A.C. 248 (P.C.).

6 *Baalman, supra* note 3 at 78-80.

7 *Ibid.* at 86-87.

8 Cap. 157, 2004 Rev. Ed. Sing. [*Land Titles Act* or *LTA*].

9 B.C. Crown, "Equity Trumps the Torrens System" [2002] Sing. J.L.S. 409 at 413 [*Equity Trumps the Torrens System*].

10 Tan Sook Yee, *Principles of Singapore Land Law*, 2nd ed. (Singapore: Butterworths Asia, 2001) at 246-247.

11 [1997] 3 S.L.R. 211 (H.C.) [*Sakayamary*].

12 See also *Teo Siew Peng v. Neo Hock Pheng* [1999] 1 S.L.R. 293 (H.C.) [*Teo Siew Peng*].

13 [2001] 4 S.L.R. 340 (C.A.) [*Betsy Lim*].

14 [2006] 4 S.L.R. 884 (C.A.) [*Bebe*].

15 *Ibid*. at para. 91.

16 B.C. Crown, "Back to Basics: Indefeasibility of Title under the Torrens System" [2007] Sing. J.L.S. 117 at 127 [*Back to Basics*].

equity" were rejected for falling outside the scope of section 46(2) of the *Land Titles Act*.[17] In *Sim Lian*,[18] it was suggested that the earlier Court of Appeal decision in *Betsy Lim*, which had affirmed the existence of "personal equities" and had actually enforced one, had been "all but prospectively overruled" by *Bebe*.

It is the objective of this article to disprove the proposition that in Singapore, all "personal equities" are to be located within the terms of the *Land Titles Act* by exploring the true nature of such claims. It will first be demonstrated that, as a matter of precedent, the general availability of a non-statutory "personal equity" remains an open question. Moreover, should the facts of *Betsy Lim* recur, it is *not* open to a subsequent Singapore court, other than the Court of Appeal, to decide the case differently on the issue of "personal equities". Secondly, it will be demonstrated that the statutory language of the *Land Titles Act*, contrary to suggestions elsewhere, does not point to the absence of a general "personal equities exception" in Singapore. Rather, it demonstrates that the Court of Appeal in *Betsy Lim* was clearly correct to admit of "personal equities" outside of those specifically listed in section 46(2) of the *Land Titles Act*. This is because the "personal equities exception" is, strictly speaking, neither personal in nature nor equitable in origin and most importantly, it is *not* an exception to indefeasibility. A closer examination of the concept of Torrens indefeasibility, as enacted in Singapore, demonstrates that, as in other Torrens jurisdictions, "personal equities" co-exist with indefeasibility rather than detract from it. "Personal equity" claims are claims falling *outside* the principle of indefeasibility. Hence, it is not necessary to struggle to explain their existence as an exception to indefeasibility. This conclusion necessitates a shift in the thinking of both the courts and commentators from conceiving the "exception" as a true exception to conceptualising the "personal equities" principle as a co-existing rule. To avoid further confusion, it will also be suggested that the label "personal equities exception" be dropped altogether in favour of a more appropriate label.

## II. Stare Decisis

It is trite that decisions of superior courts bind courts lower in the hierarchy if the decision formed part of the *ratio decidendi* of that court. It is equally trite that they are only binding if the decision formed part of the *ratio decidendi* of that court.[19] The issue of "personal equities" has arisen only twice in the Court of Appeal. Indeed, its first reported appearance in Singapore was in the case of *Sakayamary*, decided in 1996. The belated development of a "personal equities" jurisprudence in Singapore is not difficult to explain. By far the most commonly encountered "personal equities" are statutorily enshrined in section 46(2)(b)-(e) of the *Land Titles Act*. The conversion of all land in Singapore to the Torrens system is likewise a recent phenomenon. It is no surprise therefore that it took forty years for a case of "personal equities" lying outside the terms of the *Land Titles Act* to surface before the courts. It is not proposed to discuss the decisions of the High Court as to "personal equities" in this section of

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[17] *Malayan Banking Berhad v. Sivakolunthu Thirunavukarasu* [2008] 1 S.L.R. 149 (H.C.) [*Sivakolunthu*] and *Sim Lian (Newton) Pte. Ltd. v. Gan Beng Chye Raynes* [2007] SGHC 84 [*Sim Lian*].

[18] *Ibid.* at para. 48.

[19] R. Cross & J.W. Harris, *Precedent in English Law*, 4th ed. (Oxford: Clarendon Press, 1991) at 39-43 [*Precedent in English Law*].

the article since a judge of first instance is "not bound to follow the decision of a judge of equal jurisdiction".[20] This leaves us with only two Court of Appeal decisions to consider.

The first occasion in which the "personal equities exception" was considered by the Court of Appeal is the case of *Betsy Lim*. Here, Mdm. Ho Kon Kim had sold a plot of land to Ms. Betsy Lim for $4.2 million plus the construction of a detached house on one of the three proposed subdivided lots of the land. Under the contract, Ms. Lim was to obtain consent from the paramount mortgagee to lodge a caveat over that subdivided plot upon allocation. The plot of land was mortgaged first to the Oversea-Chinese Banking Corporation Ltd. and then remortgaged to another bank, RHB Bank Bhd. The mortgage agreement between Ms. Lim and RHB Bank Bhd. contained a clause providing:

> [a] partial discharge of the Legal Mortgage will be given free of payment for the second unit provided that the second unit is transferred to [Mdm. Ho] or as [she] may direct in accordance with the agreement between the Mortgagor and [Mdm. Ho].

Mdm. Ho's claim against RHB Bank Bhd. was allowed by the Court of Appeal on the basis that she could rely on an "exception" to the bank's indefeasible title by way of a "personal equity". The recognition of a "personal equities exception" therefore formed part of the reasoning of the court. It was part of the *ratio decidendi* of the court. Of course, the *ratio* of the case only extended to the facts of the case itself since it is trite that the *ratio* of a case is to be read in light of its facts.[21] As to the existence of a general "personal equities exception", therefore, the reasoning in *Betsy Lim* is merely *obiter dicta*, albeit persuasive *obiter* as it emanates from the final appellate court in Singapore. Two consequences follow. First, unless overruled, *Betsy Lim* continues to bind lower courts as to the existence of "personal equities" on facts mirroring those in *Betsy Lim* itself. Secondly, lower courts are still obliged to give due weight to its *dicta* in respect of the general "personal equities" exception unless these have been overruled on particular facts.

The second occasion for the Court of Appeal to consider the "personal equities exception" is the recent case of *Bebe*. In this case, Bebe was an old lady who suffered from Alzheimer's disease. In early 2000, the original certificate of title to her property had gone missing and she applied for and was issued a replacement certificate of title, which was left in the safekeeping of one of her daughters. It transpired that the original certificate of title was in the hands of another of her daughters, who caused Bebe to mortgage her property to the United Overseas Bank Ltd. as security for a loan to her company. When the bank sought to enforce the mortgage on default in repayment of the loan, Bebe sought to rely on the fact that the mortgage had been registered using the original certificate of title, rather than the replacement certificate of title. It was argued that the bank, in unlawfully making use of the cancelled original certificate of title to register the mortgage, had breached a duty owed to Bebe in equity, thus giving rise to a "personal equity", relying on the controversial case of *Mercantile Mutual Life Insurance Co. Ltd. v. Gosper*.[22] On

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[20] *Huddersfield Police Authority v. Watson* [1947] K.B. 842 at 848.

[21] Cross & Harris, *Precedent in English Law, supra* note 19 at 43-45.

[22] (1991) 25 N.S.W.L.R. 32. (C.A.) [*Gosper*].

appeal, the Court of Appeal reversed the trial judge, reasoning that there was no claim in "personal equity" in *Bebe*. In the course of its judgment, the Court of Appeal also appeared to favour the view, already mentioned, that section 46(2) of the *Land Titles Act* had codified the "personal equities exception" in Singapore. Whilst not going so far as to conclude that *all* personal equities must be therein located, the Court of Appeal nevertheless opined that the Singapore courts "should be slow to engraft onto the *LTA* personal equities that are not directly referable directly or indirectly to the exceptions in s. 46(2) of the *LTA*".[23]

Subsequent Singapore courts have latched on to this statement by the Court of Appeal to dismiss out of hand any claims falling outside the terms of section 46(2) of the *Land Titles Act*.[24] In *Sivakolunthu*,[25] no reference at all is made to *Betsy Lim*. In *Sim Lian*,[26] Paul Tan A.R. suggested that *Betsy Lim* had "all but" been overruled and proceeded to consider the case before him as if *Betsy Lim* was no longer persuasive authority. With respect, this is neither here nor there. A decision is either overruled or it is not. It cannot be "all but … overruled". This, in turn, depends on whether what was said in *Bebe* amounts to *dicta* or *ratio*. *Dicta* in another Court of Appeal decision, however strong the language, cannot denude a binding precedent of its authority.

At this point, it is important to note that the comments by the Court of Appeal in *Bebe* as to the general availability of a "personal equities exception" are merely *dicta*. First, Chan Sek Keong C.J. clearly states that the appeal was allowed on the basis that "the respondent had no personal equity against [UOB]" because the facts of the case were distinguishable from those of *Gosper*, which the trial judge had relied upon for his decision. Secondly, the Court of Appeal expressly states that "[s]hould a dispute on similar facts [to *Betsy Lim*] come before this court in future, the decision in *Betsy* would have to be reconsidered for consistency with the policy of the *LTA*".[27] This hardly amounts to overruling *Betsy Lim*. Furthermore, since a *ratio decidendi* can only be deduced from a case in light of its facts, it goes without saying that any comments on *Betsy Lim* by the Court of Appeal in *Bebe* must be *obiter*. Indeed, the general comments of the Court of Appeal in *Bebe* as to the general availability of the "personal equities exception" must be *obiter*.

Therefore, as a matter of precedent, Singapore courts are faced with a binding *ratio decidendi* from *Betsy Lim* and arguably contradicting *obiter dicta* from *Betsy Lim* and *Bebe*. Accordingly, the Singapore courts should not, as the judges in *Sivakolunthu* and *Sim Lian* appear to have done, simply dismiss "personal equities" out of hand. At the very least, lower courts must be careful to apply the *ratio decidendi* of *Betsy Lim* as they remain bound to do so by the rules of *stare decisis*. Furthermore, where the facts of a subsequent case do not mirror either those of *Betsy Lim* or *Bebe*, the courts should also consider the *obiter dicta* of both Court of Appeal decisions rather

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

[24] *Sivakolunthu, supra* note 17.

[25] *Ibid*.

[26] *Supra* note 17 at para. 48. The remark that the almost "overruling" was "prospective" is bewildering since the Court of Appeal in *Bebe* did not at any point discuss prospective overruling. In as much as the decision obviously was not intended to affect the outcome in *Betsy Lim*, that is simply the result of *res judicata* and will have been the result even if the Court of Appeal in *Bebe* was capable of overruling and had decided to overrule *Betsy Lim* retrospectively.

[27] *Supra* note 14 at para. 77.

than assume that *Betsy Lim* is no longer authoritative because of adverse comments in *Bebe*.

## III. The Principle of Indefeasibility

In *Betsy Lim*,[28] the Court of Appeal cited with approval the following passage by Lai Siu Chiu J. in *Teo Siew Peng*: "indefeasibility of title conferred by [the *Land Titles Act*] does not prevent claims *in personam* being made against the registered proprietor *by reason of his own conduct*".[29] Although both courts refer to such claims as "exceptions" to indefeasibility, the passage demonstrates that they regard them as "exceptions" only in a very loose sense of the word. They are an "exception" only to the extent that they are not claims prohibited by indefeasibility. A true exception must first fall within the terms of the rule,[30] *i.e.*, indefeasibility. In *Bebe*, the Court of Appeal did not consider whether the "personal equities exception" was a true exception or not. Indeed, it did not consider the scope of the indefeasibility principle in the context of the Singapore Torrens system at all. In rejecting the "personal equities exception" therefore, it did not consider the possibility that some claims may exist which, though falling outside section 46(2) of the *Land Titles Act*, might not be prohibited by section 46(1) of the *Land Titles Act* to begin with. In rejecting "personal equities", the court was not rejecting claims falling outside of section 46(1) of the *Land Titles Act* altogether. Rather, they were rejecting claims dependent on "the amorphous concept of conscience".[31] If it were true that "personal equities" were simply claims based on unconscionability, then surely they cannot justify penetrating the curtain of indefeasibility.

The future of any "personal equities" claim therefore depends on a study of its nature. Are "personal equities" claims resting upon a vague concept of unconscionability? Or are they simply claims falling outside the Torrens principle of indefeasibility as conferred by section 46(1) of the *Land Titles Act*? Section 46 of the *Land Titles Act*, originally numbered section 28, has been described by its draftsman as the "habendum section" of the *Land Titles Act*, reflecting its importance in relation to the *Land Titles Act*.[32] *Bebe* has been lauded for being the first Singapore court to pay close attention to the statutory language of section 46(2)(b)-(e) of the *Land Titles Act* in demarcating the extent of the exceptions to the rule. In *Sim Lian*, it was suggested that "[i]t was only in *Bebe* that the Court of Appeal recognised [the] philosophical inconsistency" between "personal equities" and indefeasibility.[33] The court there suggested that "there is some conceptual difficulty in reconciling [a general "personal equities exception"] with sections 46(2) and 160 of the *LTA*".[34] Yet, surprisingly, no Singapore case has closely studied the rule itself. Perhaps this is because the earlier courts considered the scope of the rule obvious, as the courts

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[28] *Supra* note 13 at para. 40.

[29] *Teo Siew Peng*, *supra* note 12 at para. 19 [emphasis added].

[30] See *The Oxford English Dictionary*, 2nd ed. (1989), *s.v.* "exception", online: OED Online <http://dictionary.oed.com/cgi/entry/50079540?query_type=word&queryword=Exception&first=1&max_to_show= 10&sort_type=alpha&result_place=1&search_id=kwgH-haXsgT-22348&hilite=50079540>.

[31] *Bebe*, *supra* note 14 at para. 78.

[32] *Baalman, supra* note 3 at 77.

[33] *Sim Lian*, *supra* note 17 at para. 47.

[34] *Ibid.* at para. 48.

of other Torrens jurisdictions have assumed, but their loose reference to claims for "personal equities" as exceptions[35] and even looser references to unconscionability[36] have created the impression that such claims are true exceptions and disguised the true nature of such claims.

A close study of Torrens indefeasibility suggests otherwise.[37] Even a plain and cursory reading of section 46(1) of the *Land Titles Act* will reveal that indefeasibility does not provide the registered proprietor wholesale immunity from suit apart from the statutory exceptions. The relevant part of section 46(1) provides:

> *Notwithstanding—*
> (a) *the existence in any other person of any estate or interest, whether derived by grant from the State or otherwise*, which but for this Act might be held to be *paramount or to have priority*;
> (b) any failure to observe the procedural requirements of this Act; and
> (c) any lack of good faith on the part of the person through whom he claims,
> *any person who becomes the proprietor of registered land*, whether or not he dealt with a proprietor, *shall hold that land free from all encumbrances, liens, estates and interests except such as may be registered or notified in the land-register,* but subject to—[38]

We may begin with a linguistic consideration before employing a hypothetical test. Let us consider first the phrase "any person who becomes the proprietor of registered land … shall hold that land free from all encumbrances, liens, estates and interests". It is noteworthy that the section does not state that the registered proprietor shall be immune from suit. It states clearly instead that he holds the land free from "all encumbrances, liens, estates and interests". Even without reference to the *noscitur a sociis* principle,[39] it is tolerably clear that the language references only prior proprietary interests rather than a general immunity from suit. If one needs further evidence that only prior proprietary interests are excluded by indefeasibility, this is provided in the subsequent part of section 46(1) of the *Land Titles Act*. Section 46(1) contemplates that "encumbrances, liens, estates and interests" will bind the registered proprietor if they are registered or notified in the land-register since he holds the land free from such interests "except such as may be registered or notified in the land-register". It is trite law that only proprietary interests may be registered or notified in the land-register, lending further evidence that only prior proprietary interests are intended to be excluded by the indefeasibility conferred by section 46(1) of the *Land Titles Act*. But if further evidence that this is the correct interpretation is required, this may be found in the opening words to section 46(1). Section 46(1) opens with the phrase "[n]otwithstanding the existence in any other person of any

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[35] See *e.g.*, *Teo Siew Peng*, *supra* note 12 at paras. 18-19; *Betsy Lim*, *supra* note 13 at paras. 40-41; *United Overseas Bank Ltd. v. Bebe bte Mohammad* [2005] 3 S.L.R. 501 (H.C.) at para. 7 [*Bebe (High Court)*].

[36] See *e.g.*, *Bebe (High Court)*, *ibid.* at paras. 40-42. In *Betsy Lim*, *supra* note 13 at para. 49, the Court of Appeal described the registered proprietor's behaviour as "utterly inequitable".

[37] For a more detailed discussion, see Kelvin F.K. Low, "The Nature of Torrens Indefeasibility: Understanding the Limits of "Personal Equities" forthcoming, (2009) 33 Melbourne U.L. Rev. [*Understanding the Limits of "Personal Equities"*].

[38] *Land Titles Act,* s. 46(1) [emphasis added].

[39] See generally, F. Bennion, *Bennion on Statutory Interpretation*, 5th ed. (London: LexisNexis, 2008) at 1225-1231.

estate or interest," referring yet again to prior proprietary interests. This is confirmed by the references to "grant from the State" as well as to the reference to paramountcy and priority apart from the *Land Titles Act*, phrases again apt only to describe proprietary interests. Even the side note to the section,[40] "Estate of proprietor paramount", confirms this view.

Consider then this example.[41] A registered proprietor enters into a contract to sell his land in a Torrens jurisdiction. At common law he becomes, by contract, subject to a legal obligation to convey his title in accordance with its terms. In equity, by the operation of the maxim that equity regards as done that which ought to be done, the registered proprietor holds his title on constructive trust for the purchaser. A careful study of section 46(1) of the *Land Titles Act* would suggest that the claim in contract, even where specific performance is sought, is not prohibited by its terms since such a claim is not concerned with the paramountcy or priority of the estate of the registered proprietor. It has been suggested, however, that such a vendor is free, by the principle of indefeasibility conferred by the Torrens system, to ignore his contractual obligations. Such a result, though, is conceded to be "intolerable" and that in the absence of an equivalent provision to section 46(2)(b),[42] the courts were forced to develop a common law exception to indefeasibility so as to avoid this "embarrassing problem". This is because the "Torrens system was designed to simplify conveyancing, not to enable registered proprietors to defraud the people who entered into contracts with them".[43] There are two problems with this view. First, in suggesting that the courts have created a judge-made exception to a statutory rule, it flies in the face of authority respecting Parliamentary sovereignty.[44] Secondly, in suggesting that indefeasibility *prima facie* protects the vendor/registered proprietor, it also fails to point to any part of the statutory language of any Torrens legislation that mandates such a result, to say nothing of the insult it levies against the drafters of the various Torrens legislations. The Torrens system has spread far and wide from its humble beginnings in South Australia. It seems improbable that a system so fundamentally flawed would be so well received. In fact, nothing in section 46(1) of the *Land Titles Act* or any provision conferring indefeasibility in any Torrens statute states anything about immunity from suit *in contract*.[45]

The only possible means of engineering an obstacle from the terms of section 46(1) is to refer to the constructive trust that is created as a result of the contract and to then suggest that this is precluded by its terms. However, to achieve such a conclusion requires an inversion of the orthodox reasoning process. A registered proprietor who contracts to sell his land is not bound to do so as a result of the constructive trust. Rather, he holds the land on constructive trust for the purchaser because he is bound by the contract. In as much as the constructive trust arises, it arises in the context of the Torrens system *not* to bind the vendor/registered proprietor but to bind other *unregistered* parties who may, in similar fashion, acquire proprietary rights to the

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[40] On referring to side notes, see generally, Bennion, *ibid*. at 747-749.

[41] Borrowed from Crown, *Back to Basics*, *supra* note 16 at 122-123.

[42] *Cf. Real Property Act* 1886, s. 71 (South Australia) [*RPA*]; however, see *RPA,* s. 249.

[43] Crown, *Back to Basics, supra* note 16 at 122-123.

[44] In respect of the Australian courts, see *e.g*., *Durham Holdings Pty. Ltd. v. New South Wales* (2001) 205 C.L.R. 399 (H.C.A.).

[45] This is freely admitted in Crown, *Back to Basics*, *supra* note 16 at 123.

land, as well as to enable the purchaser to lodge a caveat. A related suggestion posits that the principle of indefeasibility is concerned with prohibiting claims *to* the land so that where the claim is for something else, for example, damages, the plaintiff does not face the same obstacle.[46] However, this suggestion is also flawed. After all, "it is a hollow victory for the registered proprietor to retain the land if he or she has to pay a sum equivalent to the value of the land in terms of equitable compensation to the defendant".[47] In the context of land scarce Singapore, it would be a rare defendant who would be able to retain possession of his land on the basis of indefeasibility if he were otherwise liable for its value in damages. Even then, he is unlikely to be particularly enamoured of this mirage of indefeasibility.

Such a warped view of the Torrens system cannot seriously be entertained. It suggests that one of the most significant legal innovations of the Antipodes sought merely to create an illusion of indefeasibility that may, on occasion, be easily sidestepped by a mere alteration in a plaintiff's statement of claim from a claim to the land *in specie* to one for damages reflecting its value. Not only would indefeasibility be in many respects illusory, it also suggests that the original draftsman was so inept that he failed to see that the Torrens system, as originally drafted and as copied many times over, severely handicapped dealings in land. Indeed, so great was his ineptitude that the courts felt compelled to step in to create a general exception to indefeasibility by turning a blind eye to Parliamentary sovereignty. This cannot be correct.

The correct view of the so-called "personal equities exception", as alluded to from the outset, is that it is not really an exception. Indeed, it does not originate in equity,[48] nor does it result in merely a personal remedy. It applies whenever the claim being brought against the registered proprietor is not excluded by the principle of indefeasibility as conferred by the terms of section 46(1) of the *Land Titles Act*. Since the terms of section 46(1) of the *Land Titles Act* are intended to protect the registered proprietor from former property rights, where a claim is brought that is *not* based on prior property rights, it is not excluded by Torrens indefeasibility. The test is one of whether the claim is *based* on a prior property right, *not* whether or not the claim is one *to* property. If it is not based on a prior property right, then it may be pursued even if the claim will terminate in the recovery of the land *in specie*. Thus, for example, if a registered proprietor contracts to sell his land to a purchaser, the purchaser may seek the remedy of specific performance as against the registered proprietor because his claim is based, not on a prior property right, but on the contract of sale.

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[46] *Ibid.* See also B.C. Crown, "A Hard Look at *Bahr v. Nicolay*" in D. Neo, Tang Hang Wu & M. Hor, eds., *Lives in the Law: Essays in Honour of Peter Ellinger, Koh Kheng Lian and Tan Sook Yee* (Singapore: NUS Faculty of Law, 2007) 191 at 207 [*Hard Look at Bahr*].

[47] Tang Hang Wu, "Beyond the Torrens Mirror: A Framework of the *In Personam* Exception to Indefeasibility" (2008) 32 Melbourne U.L. Rev. 672 at 691 [*Beyond the Torrens Mirror*]. See also M. Harding, "*Barnes v. Addy* Claims and the Indefeasibility of Torrens Title" (2007) 31 Melbourne U.L. Rev. 343 at 356.

[48] *Frazer v. Walker* [1967] 1 A.C. 569 at 585 [*Frazer*]. See also *Garafano v. Reliance Finance Corporation Pty. Ltd.* (1992) N.S.W. Conv. R. 55-640; *Grgic v. Australian and New Zealand Banking Group* (1994) 33 N.S.W.L.R. 202; *Pianta v. National Australia Bank Ltd.* (1994) 17 Fam. L.R. 34; *Macquarie Bank Ltd. v. Sixty-Fourth Throne Pty. Ltd.* [1998] 3 V.R. 133; *Horvath v. Commonwealth Bank of Australia* (1999) Vic. Conv. R. 54-595.

It remains to be emphasised that the so-called "exception" is not, in truth, an exception and ought to be rechristened to avoid further confusion. The least confusing label that this author has encountered is the "*inter se* rule".[49]

## IV. Statutory Codification or Statutory Clarification

A consideration of the language of section 46(1) of the *Land Titles Act*, being the provision conferring indefeasibility upon the registered proprietor, therefore supports, rather than detracts from, the *inter se* rule. What of the language of section 46(2)(b)-(e) of the *Land Titles Act* and the writings of the draftsman, John Baalman? It has been suggested that they deny the existence of the *inter se* rule. It has been suggested that if the *inter se* rule may be admitted without considering these provisions, then they (in particular paragraphs (b) and (c)) would be otiose.[50] This argument is unconvincing since it will hardly be the first occasion where the Parliamentary draftsman has inserted language that is strictly speaking otiose *ex abundanti cautela*. Indeed, in view of the uncertainty over some claims admitted under the *inter se* rule, such as claims by infant vendors against registered proprietors,[51] it is hardly surprising that the draftsman considered it helpful to clarify as much as he could under the circumstances. To a very large extent, this clarification has been most successful. Hence, it was some forty years before a claim on the basis of the *inter se* rule was brought in a Singapore court.

Furthermore, a more careful examination of the statutory language of paragraphs (b) to (e) suggests that they are not true exceptions to indefeasibility. First, in beginning with the phrase "[n]othing in this section shall be held to prejudice the rights and remedies of any person", section 46(2) does not explicitly set itself out as laying down exceptions. The statutory language is equally consistent with clarifying provisions being laid down *ex abundanti cautela*. This may be contrasted with the exceptions laid down in section 46(1)(i)-(vii), which are introduced by the phrase "but subject to", marking them out as clearly true exceptions in the eyes of the draftsman. It is also noteworthy that, out of all the paragraphs to section 46(2) of the *Land Titles Act*, only paragraph (a) refers explicitly to defeating the registered title of the proprietor. Paragraphs (b) to (e) make no reference to defeating the proprietor's registered title, further suggesting that the draftsman considered only paragraph (a) to be a true exception to indefeasibility.

References to the writings of the draftsman are equally ambivalent. Baalman comments, for example, that if the list of exceptions in the *Land Titles Ordinance* appears unduly large, this is because "practically all of the exceptions have been expressed, whereas in other Torrens statutes some of them have been left to implication".[52] He further states that the near exhaustive listing is intended to "surmount the

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[49] Derived from B. Ziff, *Principles of Property Law*, 4th ed. (Toronto: Thomson Carswell, 2006) at 453 and adopted in Low, *Understanding the Limits of "Personal Equities"*, *supra* note 37.

[50] Crown, *Equity Trumps the Torrens System*, *supra* note 9 at 413.

[51] See the contrasting decisions of *Percy v. Youngman* [1941] V.L.R. 275 and *Coras v. Webb & Hoare* [1942] Q.S.R. 66. See also *Baalman, supra* note 3 at 85.

[52] *Baalman, supra* note 3 at 77.

controversies which inspired the various sub-titles, and to minimise implied exceptions from, or qualifications on, the measure of indefeasibility".[53] As to the success of this endeavour, he adds that "[t]he extent of [the draftsman's] success is still to be decided by experience; but the net result of his endeavours will at least be less uncertainty".[54]

On no reading can one conclude that Baalman intended the listing of "personal equities" in the *Land Titles Ordinance* to be exhaustive so that one may look no further than the four corners of the statute for "personal equities".[55] It is plausible that Baalman meant that the list is intended to cover the vast majority of all "personal equities" so that few if any "personal equities" ought to be added judicially to the statutory list.[56] However, another equally plausible reading is that Baalman felt that he had listed as many of the exceptions arising out of the *inter se* rule that had been judicially considered and that he felt did not contradict the principle of indefeasibility. On this reading, there is nothing to stop or even slow the courts from recognising new "personal equities" that Baalman had not considered. The primary objective of the listing of known "personal equities" was to clarify as best one can, and the most commonly occurring claims will indeed fall within the terms of section 46(2)(b)-(e), so as to minimise litigation as to whether such claims fell within or outside the indefeasibility principle, as would be necessary if they were not explicit. It is suggested that this is the more plausible reading as otherwise, Baalman's remark that his success must be determined by future experience would mean that he was concerned that the courts may refuse to give effect to his, the draftsman's, intentions. It seems more reasonable to construe this remark as a concession to the possibility that, despite having almost a century's experience to draw upon in drafting the *Land Titles Ordinance*, he may not have identified all the claims that fell within the *inter se* rule. It seems less likely for Baalman to have claimed omniscience whilst fearing impotence than for him to have simply acknowledged his lack of omniscience.

This view is strengthened by his subsequent reference to "implied exceptions" within the framework of the *Land Titles Ordinance*.[57] Although he referenced only two such "implied exceptions", the fact that he admitted of them at all strongly suggests that Baalman did not consider his list exhaustive. Indeed, his examples of "implied exceptions" suggests very strongly that he uses the term "exception" very liberally to include both true exceptions and "exceptions" that simply fall outside the rule. Thus, in respect of unrecognised interests, Baalman opines that "[t]he Registrar's power to make good titles out of bad ones can apply only to titles which are capable of subsisting".[58] Although one may say, as Baalman does, that this is the result of an implied exception to indefeasibility, it would be far more accurate to state that such a scenario simply falls outside the scope of the principle of indefeasibility as conferred by section 46(1) of the *Land Titles Act* altogether, in the same way that claims falling within the *inter se* rule do.

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[53] *Ibid*.
[54] *Ibid*.
[55] Crown, *Back to Basics, supra* note 16 at 127.
[56] *Bebe, supra* note 14 at para. 88.
[57] *Baalman, supra* note 3 at 88-90.
[58] *Ibid*. at 89.

## V. Case Studies

It is impossible to canvass all possible claims falling within the *inter se* rule without compiling a book since every possible cause of action known to the common law and equity will have to be individually examined and sorted. It is proposed therefore to consider only claims under the *inter se* rule that have been considered by the Singapore courts. Before "personal equities" went out of fashion, there were only two claims in which they were successful: *Betsy Lim* and *Sakayamary*. The former is consistent with the thesis presented whereas the latter is probably wrongly decided on this point. The only non-Singaporean case that will be considered is the controversial case of *Gosper*. *Gosper* will be considered because it was applied by the trial judge in *Bebe* and seems to have met with the approval of the Court of Appeal as well. It is also necessary to study *Gosper* as it is only by dismissing the case that the result in *Bebe* is explicable. The cases of *Teo Siew Peng* and *Sivakolunthu*, both of which rejected claims alleged to fall within the *inter se* rule, also provide interesting perspectives. The former supports the present thesis whereas the latter, whilst correctly decided, may potentially mislead subsequent courts. The case of *Sim Lian* will not be considered as both the factual and legal bases of the claims are there unclear, the respondents having appeared in person and having failed to adduce any evidence to support their claims. The judge's analysis of the claims can therefore be described fairly as both unnecessary and speculative.

### A. *Sakayamary: Recipient Liability?*

The first case in which the *inter se* rule was applied to permit a claim against a registered proprietor in Singapore is that of *Sakayamary*, and it marked a perhaps inauspicious start to Singapore's introduction to the rule. It is unnecessary to refer to the full facts of the case as they are extremely complex and are not all relevant to the claim on the basis of the *inter se* rule. The simplified facts are that the registered proprietor purchased the property from the vendors, the personal representatives of the deceased, who were also registered at the relevant time. The transaction was tainted by actual fraud and fraud was one basis of the decision. This much is uncontroversial. Another claim on the basis of omission under section 160(1)(b) of the *Land Titles Act* is not directly relevant to our current discussion. The interesting claim relates to a claim permitted by the High Court purportedly under the *inter se* rule. According to the High Court, a recipient who receives land transferred in breach of fiduciary duty with knowledge of such breach is not protected by the principle of indefeasibility. According to G.P. Selvam J.:[59]

> *Tataurangi Tairuakena v. Mua Carr*[60] which was approved by the Privy Council in *Frazer v. Walker*[61] is clear authority for the proposition that the court exercising its equitable jurisdiction has the power to set aside a dealing carried out in breach of fiduciary duty (without fraud) if the proprietor had knowledge of the circumstances giving rise to the breach of fiduciary duty. The proprietor in such

[59] *Sakayamary, supra* note 11 at para. 100.
[60] [1927] N.Z.L.R. 688 (N.Z.S.C.).
[61] *Supra* note 48.

> circumstances is not a bona fide purchaser for valuable consideration without notice. The court would set aside the transaction in the interest of the beneficiaries. Indefeasibility of title by registration does not afford the plaintiffs a defence in this case.

This is a highly controversial proposition and it is unfortunate that the account was as short as it was. In the context of the case, this short reference to the *inter se* rule was perhaps understandable. After all, the trial judge had already decided the case on the basis of actual fraud and section 160 of the *Land Titles Act*.[62] In *Farah Constructions Pty. Ltd. v. Say-Dee Pty. Ltd.*,[63] the High Court of Australia explicitly rejects recipient liability in equity as surviving registration. Whereas the unfortunately brief reasons offered by the Australian court are not wholly satisfying, the result is nevertheless correct. This is because recipient liability claims, whether or not they are understood to be premised upon unjust enrichment or the law of wrongs, are concerned with the oblique protection of the property rights of the beneficiary.[64] There being no other action required on the part of a defendant to such a claim apart from receipt of the property of the plaintiff, it is difficult to conceive of the action as being premised on anything other than his prior property right. If so, then such a claim is clearly excluded by section 46(1) of the *Land Titles Act*. The reference to the registered proprietor *not* being a bona fide purchaser for value without notice also unfortunately colours the initial introduction of the *inter se* rule into Singapore with a flavour clearly inconsistent with the aims of the Torrens system. What then of *Mua Carr*? In fact, *Mua Carr* is not authority for the proposition enunciated by the learned judge. *Mua Carr* is authority for a far more limited proposition and indeed supports the present thesis. Where a fiduciary transfers land to himself in breach of fiduciary duty, registration does not protect him from the beneficiary's action for breach of fiduciary duty. That is surely correct and entirely consistent with the *inter se* rule. Indefeasibility protects him from claims on the basis of prior title, not his breach of fiduciary duty. There is no need therefore to explain *Mua Carr* on the basis of section 46(2)(d) of the *Land Titles Act*.[65]

The claim on the basis of "personal equity" is but one of many reasons offered by the trial judge in *Sakayamary*. The registered proprietor in *Sakayamary* was clearly afflicted by actual fraud. It seems unnecessary to attempt to explain the decision on the basis of the *inter se* rule[66] and it was unfortunate that the *inter se* rule was saddled with this difficult case upon its introduction in Singapore.

### B. *Teo Siew Peng*

The second case in Singapore to deal with the *inter se* rule is the case of *Teo Siew Peng*. In this case, the plaintiffs were the registered proprietor of a plot of land which shared a common boundary with two other plots of land that belonged to the defendants.

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[62] His decision on *Land Titles Act*, s. 160 has since been disapproved by the Court of Appeal in *Bebe*, *supra* note 14 at paras. 37-61.

[63] (2007) 230 C.L.R. 89 (H.C.A.).

[64] *Supra* note 37.

[65] *Bebe, supra* note 14 at para. 82.

[66] In *Bebe*, the Court of Appeal sought to explain *Sakayamary* on the basis of a disability falling within s. 46(2)(d) of the *Land Titles Act*: see *ibid*.

The various plots of land were part of a 200 unit residential development known as Eastview Gardens developed by a third party real estate company. In early 1983, the third party discovered that the land owned by the defendants had encroached upon the plot of land that would come to be owned by the plaintiffs. As a result, the defendants and the third party entered into a licence agreement in respect of the encroachment. The defendants, in reliance on the agreement, made various improvements to the encroached land. The plaintiffs subsequently purchased their plot of land from the third party and sued the defendants for possession of the encroached land. The defendants sought to argue that the plaintiffs were bound by the agreement between them and the third party.

Lai Siu Chiu J. prefaced her consideration of the defendants' claims by noting that, as the land had been registered under the Torrens system, the plaintiffs *prima facie* had indefeasible title according to section 46 of the *Land Titles Act*. The trial judge dismissed the defendants' claim that the plaintiffs could *ipso facto* be bound by the licence agreement between the defendants and the third party on the basis that outside of the Torrens system, licences were not even interests in land capable of binding third parties. There are perceptive, albeit unfortunately only implicit, suggestions in the judgment that suggest that the trial judge considered that "interests" in the context of section 46(1) of the *Land Titles Act* were references to interests *in land*, *i.e.*, property interests.[67] Leaving aside the claim on the basis of fraud, the court also considered it established that "claims in personam" were "consistent with the scheme of registration under the Act".[68] Three such claims in all were considered by the court—procurement of a breach of contract, fraudulent conspiracy, and proprietary estoppel—though none succeeded as they could not be established by the defendants on the facts of the case. Each claim that was considered by the learned judge was not premised upon prior property rights and therefore correctly considered to be claims falling within the *inter se* rule that had to be considered to determine if the plaintiffs' claim to recover the encroached land should succeed since indefeasibility only protected them from claims on the basis of prior property rights.

### C. *The Many Faces of Betsy Lim*?

The consistency of the *inter se* rule with the principle of indefeasibility, as established in *Teo Siew Peng*, was affirmed by the Court of Appeal in *Betsy Lim*. To recapitulate, in *Betsy Lim*, Mdm. Ho Kon Kim had sold a plot of land to Ms. Betsy Lim for $4.2 million plus the construction of a detached house on one of the three proposed subdivided lots of the land. Under the contract, Ms. Lim was to obtain consent from the paramount mortgagee to lodge a caveat over that subdivided plot upon allocation. The plot of land was mortgaged first to the Oversea-Chinese Banking Corporation Ltd. and then remortgaged to another bank, RHB Bank Bhd. The mortgage agreement between Ms. Lim and RHB Bank Bhd. contained a clause providing that "[a] partial discharge of the Legal Mortgage will be given free of payment for the second unit provided that the second unit is transferred to [Mdm. Ho] or

[67] *Teo Siew Peng, supra* note 12 at para. 17.
[68] *Ibid.* at para. 19.

as [she] may direct in accordance with the agreement between the Mortgagor and [Mdm. Ho]".

The Court of Appeal in *Betsy Lim* held that RHB Bank Bhd. could not rely on its indefeasible title as mortgagee to defeat Mdm. Ho's claim, following the decision of the majority of the High Court of Australia in *Bahr v. Nicolay (No. 2)*.[69] There were some unfortunate references to the bank's behaviour as unconscionable but it is clear from the context that they were remarks admonishing the bank rather than the basis for the Court of Appeal's decision. Like *Bahr*, *Betsy Lim* is part of a family of cases with a long and well-established pedigree.[70] They all fall within the same fact pattern. A, a registered proprietor confers certain rights over land to B. A then sells the land to C, who agrees with A to be bound by B's rights. C then denies that he is bound by B's rights. Outside the Torrens system, C's denial of B's rights is usually premised upon the basis that B's rights are merely rights which were personal and operated only against A and therefore did not bind C. Where the land is registered land, C has an additional string to his bow—indefeasibility so that there is greater scope for the operation of the principle. The Court of Appeal in *Betsy Lim* and the majority in the High Court of Australia in *Bahr* upheld C's liability by imposing a constructive trust on C on the basis that this constructive trust fell within the scope of the *inter se* rule and outside the scope of the principle of indefeasibility. Such constructive trusts fall outside the principle of indefeasibility because they do not protect prior property rights. This is clearly demonstrable because, outside the Torrens system, such constructive trusts are asserted *only* when B's rights are *not* originally property rights.[71]

This decision is surely correct. Although *Bebe* sought to recharacterise Mdm. Ho's claim as being based on contract, fraud, and an express trust, a plain reading of section 46(1) of the *Land Titles Act* suggests that this is simply unnecessary. Mdm. Ho's claim, not being based on a prior property right but on the agreement between RHB Bank Bhd. and Ms. Lim, is simply not prohibited by section 46(1) of the *Land Titles Act*. Moreover, the recharacterisation in *Bebe* is unconvincing. According to the Court of Appeal in *Bebe*, "[t]he facts showed that RHB had induced Betsy to accept the mortgage on the promise that they would release Mdm. Ho's plot of land back to her without payment, thus bringing the case within s. 46(2)(b) of the *LTA*".[72] Also, "the facts in *Betsy* are on all fours with those in *Loke Yew*"[73] which was based on actual fraud. It further considered that the decision could be justified on the basis of an express trust.[74] With respect, none of these reformulations are satisfactory. First, no explanation is proffered as to how Mdm. Ho could enforce the contract between RHB Bank Bhd. and Ms. Betsy Lim.[75] It is trite law that only parties to the contract may sue or be sued upon the contract. At the time the facts of *Betsy Lim* occurred, the *Contracts (Rights of Third Parties) Act*[76] was not yet in force. Nor

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[69] (1988) 164 C.L.R. 604 (H.C.A.) [*Bahr*].

[70] See *e.g.*, *Binions v. Evans* [1972] Ch. 359 (C.A.), which is also cited in *Betsy Lim*, *supra* note 13 at para. 51.

[71] *Ibid*.

[72] *Bebe*, *supra* note 14 at para. 73.

[73] *Ibid*.

[74] *Ibid.* at para. 76.

[75] *Ibid.* at para. 80.

[76] Cap. 53B, 2002 Rev. Ed. Sing. [*CRTPA*].

will the Act always apply in every case following the fact pattern of *Betsy Lim* since enforceability by the third party under that Act is dependent on the intentions of the parties to the contract.[77] The explanation that *Betsy Lim* is explicable on the basis of an enforceable contractual right on the part of Mdm. Ho is thus somewhat lacking.

The explanation on the basis of actual fraud is equally unconvincing. The Court of Appeal in *Bebe* suggested that the facts of *Betsy Lim* mirrored those of *Loke Yew v. Port Swettenham Rubber Co. Ltd*.[78] Here, land was held under the Selangor *Registration of Titles Regulation* 1891. One Haji Mohamed Eusope, who was the registered proprietor of 322 acres of land, had sold 58 acres of the same through some Malay cultivators to Loke Yew under various unregistered allotments. Loke Yew failed to protect his interest in these 58 acres by lodging a caveat. Subsequently, the Port Swettenham Rubber Co. Ltd., through its agent Mr. Glass, negotiated to purchase all of Eusope's 322 acres as comprised in the original grant. The agreement reached between the Port Swettenham Rubber Co. Ltd. and Eusope comprised the whole 322 acres less Loke Yew's 58 acres at the price of $350,000, reflecting the reduced size of the plot. In order to encourage Eusope to agree to transfer the whole 322 acres, Mr. Glass assured him that "[a]s regards Loke Yew's … land which is included in the said grant I shall have to make my own arrangements". The Privy Council found as a fact that this was a false and fraudulent representation of the Port Swettenham Rubber Co. Ltd.'s *present* intention, so that the company was not protected by the principle of indefeasibility. In contrast, the only similarity between *Betsy Lim* and *Loke Yew* is that in both cases, the registered proprietor had agreed to a condition in his purchase of the land and had received a reduction in value of the land in the relevant transaction. But in and of themselves, these facts do not indicate fraud. An honest intention to respect another party's property rights which is subsequently repudiated is not fraudulent. In *Loke Yew*, actual fraud was found because the representation that the Port Swettenham Rubber Co. Ltd. would respect Loke Yew's interest was made fraudulently with no intention *at the time* of so doing. This distinction is recognised by the Court of Appeal in *Bebe* itself as it states that "any fraud … that can defeat the title of the registered proprietor must exist *before and at the time* the contract is entered into or at the time of registration of the instrument".[79] This must be correct but it also contradicts the court's explanation of *Betsy Lim* as a case of actual fraud.

Finally, very little explanation is given of the express trust analysis by the Court of Appeal. There is a hint in the Court of Appeal's decision in *Betsy Lim* of the existence of an express trust[80] but this is entirely in relation to Mdm. Ho's relationship with Ms. Lim, which as a result of the principle of indefeasibility conferred by section 46(1) of the *Land Titles Act*, cannot bind RHB Bank Bhd. The suggestion that an express trust may be found on the basis of the contractual clause in the contract between Ms. Lim and RHB Bank Bhd., following the minority judges in *Bahr*, is both unconvincing and unsatisfactory. First, it is unconvincing because it is doubtful if an express trust was actually intended by the parties and charges of artificiality

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[77] *CRTPA,* s. 2, *ibid*.
[78] [1913] A.C. 491 (P.C.) [*Loke Yew*].
[79] *Bebe*, *supra* note 14 at para. 94.
[80] *Betsy Lim, supra* note 13 at paras. 26 and 28.

in construction would not be out of place. Secondly, it is unsatisfactory because an express trust analysis will cause results to turn on the presence or absence of writing. Under section 7(1) of the *Civil Law Act*,[81] a declaration of trust respecting any interest in land must be manifested and proved by some writing signed by a person who is able to declare such a trust. Thus, if an express trust is the explanation for the decision in *Betsy Lim*, a subsequent registered proprietor would be well advised to keep the assurance out of the signed written document and the action would automatically fail.

*Betsy Lim* is best explained, indeed it can only be explained, on the basis that the claim by Mdm. Ho fell outside the principle of Torrens indefeasibility and instead within the *inter se* rule.

### D. *Gosper: An Aberration*

*Gosper* is an extremely controversial case. Many consider it to have been wrongly decided.[82] In *Gosper*, Mrs. Gosper mortgaged the property to Mercantile Mutual Life Insurance Co. Ltd. for a certain sum, the mortgage of which was registered. Subsequently, Mr. Gosper, without the consent or knowledge of Mrs. Gosper, increased the amount of the loan by forging Mrs. Gosper's signature to the variation of mortgage. This variation was itself registered, which would not have been possible if Mercantile Mutual Life Insurance Co. Ltd. had not used the certificate of title that Mrs. Gosper had deposited with Mercantile Mutual Life Insurance Co. Ltd. without her consent. A majority of the New South Wales Court of Appeal, Meagher J.A. dissenting, ruled that Mercantile Mutual Life Insurance Co. Ltd.'s registration of the variation of mortgage was not protected by the principle of indefeasibility.

The majority judges gave slightly different reasons for allowing Mrs. Gosper's claim. Starting first with Kirby P.'s analysis, it will be seen that it is entirely unsatisfactory. On this analysis, upon the registration of the first mortgage, Mrs. Gosper had a right to redeem the property which fell within the scope of the *inter se* rule. This must be correct. However, Kirby P. then suggests that the rights which existed prior to the registration of the forged variation were "wholly unaltered by the registration, purportedly effected on behalf of [Mrs. Gosper] of a variation of mortgage signed by someone else".[83] This surely cannot be correct. The entire point of indefeasibility is to give effect to instruments which would otherwise be void apart from the Torrens system. If there was no initial mortgage, there would be no doubt that a forged registered mortgage would bind Mrs. Gosper. It is difficult to see how the first mortgage would prevent the second forged registered variation of mortgage from having any effect according to the relevant indefeasibility provisions. Mrs. Gosper's right to redeem the land at the original mortgage price would be trumped by Mercantile Mutual Life Insurance Co. Ltd.'s rights under the registered varied mortgage to the higher security, even though apart from the Torrens system, the forged variation would be a nullity as against Mrs. Gosper.

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[81] Cap. 43, 1999 Rev. Ed. Sing.

[82] See *e.g.*, P. Butt, "Indefeasibility and Sleights of Hand" (1992) 66 Austl. L.J. 596; Crown, *Hard Look at Bahr*, *supra* note 46 at 202-203, and Tang, *Beyond the Torrens Mirror*, *supra* note 47.

[83] *Gosper, supra* note 22 at 37.

Mahoney J.A.'s reasoning, which Kirby P. agreed with, shows more promise. According to Mahoney J.A., the claim falling within the ambit of the *inter se* rule arose when Mercantile Mutual Life Insurance Co. Ltd. produced the certificate of title for registration without Mrs. Gosper's authority.[84] The difficulty lies with distinguishing such a case from cases whereby a forged transfer has been registered using the original proprietor's certificate of title (as it usually must) without his authority. It is clearly contemplated by many if not all Torrens systems that indefeasibility will protect the new registered proprietor from a claim by the original registered proprietor except in cases of actual fraud. Yet if one can simply bypass indefeasibility by alleging breach of a duty in relation to the certificate of title and thereby affect the registered title itself, either directly as in *Gosper* or indirectly by way of a claim in damages measured by the value of the land, then surely it would be simple enough to rely on a claim in conversion. After all, the certificate of title would be a chattel and conversion is a strict liability tort. Indeed, there should arguably have been no need to artificially construct an implied term on the basis of the original mortgage that Mercantile Mutual Life Insurance Co. Ltd. would not use the certificate of title without Mrs. Gosper's authority. Such a right would exist quite apart from any contractual promise simply as a result of her ownership rights to the certificate of title. Yet this cannot be the result contemplated by the various drafters of the Torrens legislations. In as much as unauthorised use of the certificate of title is necessary for the registration of forged transfers, claims on the basis of unauthorised use must be impliedly excluded as claims on the basis of prior title to the land itself. To that extent, the certificate of title, as a document of title loosely so-called, is treated as part of the land itself and such claims stand and fall together with claims on the basis of the land itself.

### E. *Bebe: An Unnecessary Excursus*

In *Bebe*, Bebe was an old lady who suffered from Alzheimer's disease. In early 2000, the original certificate of title to her property had gone missing and she applied for and was issued a replacement certificate of title, which was left in the safekeeping of one of her daughters. It transpired that the original certificate of title was in the hands of another of her daughters, who caused Bebe to mortgage her property to the United Overseas Bank Ltd. as security for a loan to her company. When the bank sought to enforce the mortgage on default in repayment of the loan, Bebe sought to rely on the fact that the mortgage had been registered using the original certificate of title, rather than the replacement certificate of title. The claim in "personal equity" was allowed by the trial judge on the basis that the bank, in unlawfully making use of the cancelled original certificate of title to register the mortgage, had breached a duty owed to Bebe in equity, following *Gosper*. The Court of Appeal reversed the trial judge on the basis that the facts in *Bebe* were distinguishable from those of *Gosper*. That is surely correct, as is the result. As explained, the decision in *Gosper* is incompatible with indefeasibility as conferred by section 46(1) of the *Land Titles Act*. It goes without saying that where, as in *Bebe*, the certificate

[84] *Ibid.* at 48.

of title is employed again as a Trojan horse to penetrate the curtain of indefeasibility, this time without even the artifice of a contrived contract, the claim should fail.

## F. *Sivakolunthu*

*Sivakolunthu* is, like many cases where Torrens indefeasibility is an issue, a hard case. Here, Mdm. Sim and two of her siblings were involved in litigation with a fourth sibling, Sim Thiam Oh, that was eventually settled. Part of the settlement involved Sim Thiam Oh transferring his 25% share to the three siblings. This transaction was handled by M/s. M. Dass & Co., in which Sivakolunthu practised as a consultant. Sivakolunthu fraudulently caused two other transactions to be simultaneously completed in relation to the property in addition to the one in accordance with the terms of the settlement. The first disputed transaction saw the three siblings transferring their interests to Sivakolunthu and Mdm. Sim on a 75% to 25% share basis. The second disputed transaction saw Sivakolunthu and Mdm. Sim mortgaging the property to the Malayan Banking Bhd. to secure a loan to Sivakolunthu alone. In perpetrating her fraud, Sivakolunthu caused Mr. Dass, who was then Mdm. Sim's husband, to appear on the record as acting for the siblings in the first disputed transaction. Both disputed transactions, it appears, were complete forgeries committed by Sivakolunthu. After the fraud was uncovered and Sivakolunthu had absconded, Malayan Banking Bhd. sought a declaration that the mortgage remained valid and indefeasible and various other remedies related to the mortgage.

The three siblings defended the action by alleging, *inter alia*, "an action in equity to set aside the Mortgage as against the Plaintiff [Malayan Banking Bhd.] by reason of undue influence".[85] The undue influence alleged was that of Mr. Dass over the siblings as his clients in transferring the property to Sivakolunthu and Mdm. Sim, on the basis that Mr. Dass was Mdm. Sim's husband. In other words, the transaction being challenged was the first disputed transaction. Malayan Banking Bhd. was alleged to have been affected by the undue influence because, in the second disputed transaction, it had, through its solicitors, notice of the undue influence in the first transaction. Reliance was placed upon *Barclays Bank plc. v. O'Brien*[86] and *Royal Bank of Scotland v. Etridge (No. 2)*.[87] The action was dismissed by the trial judge on the basis that "[t]his is a wider application of personal equities than the Court of Appeal considered permissible in [*Bebe*]".[88]

It is not clear precisely why the trial judge considered the claim precluded by *Bebe*. It is possible that the trial judge considered that three-party undue influence claims were precluded by *Bebe* as the only relevant statutory "personal equity" claim lay under section 46(2)(d) of the *Land Titles Act* because undue influence is a form of legal disability and such claims are only permitted under the Act where the disability was known to the registered proprietor at the time of the dealing. Mere notice is insufficient. Such a conclusion will be most unfortunate for "notice" in the context

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[85] *Sivakolunthu*, *supra* note 17 at para. 43.
[86] [1994] 1 A.C. 180 (H.L.) [*O'Brien*].
[87] [2002] A.C. 773 (H.L.) [*Etridge*].
[88] *Sivakolunthu*, *supra* note 17 at para. 44.

of such cases does *not* involve notice of prior property rights, and hence is not precluded by indefeasibility. Nor, in fact, does "notice" involve any notice at all. As Lord Nicholls recently clarified in *Etridge*:[89]

> There is a further respect in which *O'Brien* departed from conventional concepts. Traditionally, a person is *deemed* to have notice (that is, he has 'constructive' notice) of a prior right when he does not actually know of it but would have learned of it had he made the requisite inquiries. A purchaser will be treated as having constructive notice of all that a reasonably prudent purchaser would have discovered. In the present type of case, the steps a bank is required to take, lest it have constructive notice that the wife's concurrence was procured improperly by her husband, do not consist of making inquiries. Rather, *O'Brien* envisages that the steps taken by the bank will reduce, or even eliminate, the risk of the wife entering into the transaction under any misapprehension or as a result of undue influence by her husband. The steps are not concerned to discover whether the wife has been wronged by her husband in this way. The steps are concerned to minimise the risk that such a wrong may be committed.

The case though is evidently correctly decided. Reliance on *O'Brien* and *Etridge* by the siblings had been misplaced. In these cases, or so-called three-party undue influence cases, there is only ever one transaction being impugned—the mortgage transaction itself. The borrower is alleged to have exercised undue influence over the surety in the mortgage transaction and the mortgagee is alleged to have notice of the undue influence in the same transaction. In *Sivakolunthu*, the undue influence alleged by the siblings occurred, *not* in the disputed mortgage transaction, but in the disputed transfer from the siblings to Sivakolunthu and Mdm. Sim. If correct, that will give rise to a claim falling within the *inter se* rule, but only as against Sivakolunthu and Mdm. Sim since Malayan Banking Bhd. was not party to that transaction. If that allegation of undue influence was to have any effect on Malayan Banking Bhd. at all, it must be on the basis that the right to rescind for undue influence is proprietary in nature and binds subsequent purchasers but this is precisely prohibited by section 46(1) of the *Land Titles Act*.

## VI. Conclusion

Non-statutorily enshrined claims falling within the *inter se* rule were a late development in the Singapore Torrens system, emerging only some forty years after the enactment of the *Land Titles Ordinance*. This is in part the result of the initially slow conversion to the Torrens system of land in Singapore. In part, it is the result of the genius of John Baalman in clarifying as best he could the controversies surrounding the Torrens system at the time of the enactment of the *Land Titles Ordinance*. It is remarkable how much grief Baalman saved the Singapore courts by drawing upon the experience of almost a century of disputes over the precise scope of the Torrens system. Recently, however, it has been suggested that the draftsman's efforts were intended to arrest the future development of claims falling outside the indefeasibility principle by listing them exhaustively. Partly as a result of a warped presentation of

[89] *Supra* note 87 at para. 41.

the idea—that such claims were true exceptions and were based on an amorphous concept of conscience—the Singapore courts have been lured into favouring this view. However, it has been shown that this view is unsustainable. It disregards the clear terms of section 46(1) of the *Land Titles Act* and is thus contrary to basic principles of statutory interpretation. It also demonstrates a misunderstanding of the basis of earlier cases such as *Teo Siew Peng* and *Betsy Lim*. Furthermore, for this view to operate fairly as between parties, it is necessary to warp and strain certain other concepts within section 46 of the *Land Titles Act*, as the Court of Appeal in *Bebe* sought to do to explain the result in *Betsy Lim*. This article proposes a return to the principle of indefeasibility in the earlier cases and demonstrates how the *inter se* rule both co-exists and operates consistently with the Torrens principle of indefeasibility.