

## FURTHER THOUGHTS ON INDEFEASIBILITY IN THE LAND TITLES ACT

TEO KEANG SOOD\*

This article seeks to further clarify the following issues on indefeasibility: (1) the availability of the remedy of specific performance in an LTA, s 47(3) situation; (2) the applicability of constructive trusts in post-registration fraudulent situations; and (3) the power of the courts to rectify the land-register under LTA, s 160. The discussion will attempt to provide a principled and just approach in resolving the conundrums posed by these loose ends.

### I. INTRODUCTION

The Land Titles Act 1993<sup>1</sup> (“LTA”) provides for the foundation and the application of the Torrens system of conveyancing in Singapore.<sup>2</sup> It is a system where legal title and interests are acquired by registration.<sup>3</sup> As in other Torrens jurisdictions,<sup>4</sup> registration will, in turn, confer on the acquired title and interests the quality of indefeasibility which is a hallmark of the Singapore Torrens system.<sup>5</sup> However, this quality of indefeasibility is not absolute as it is not immune from attack by adverse claims. Thus, exceptions to indefeasibility are statutorily provided for in the LTA<sup>6</sup> and also by case law as will be seen below.

The issues arising from the three loose ends mentioned in the abstract above have their origins in statements of law on indefeasibility laid down in the judgment of the leading Court of Appeal case of *United Overseas Bank Ltd v Bebe bte*

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\* Emeritus Professor, Faculty of Law, National University of Singapore. Thanks to the anonymous reviewer for the comments. The usual caveats apply.

<sup>1</sup> 2020 Rev Ed [LTA].

<sup>2</sup> This system of conveyancing was first introduced in Singapore with the enactment of the Land Titles Ordinance 1956 (No 21 of 1956) [*Land Titles Ordinance*] which came into force in 1959 with different commencement dates for the respective parts of the Land Titles Ordinance. For the legislative and historical background of the LTA, see Baalman, *The Singapore Torrens System: Being a Commentary on the Land Titles Ordinance, 1956 of the State of Singapore* (Singapore: Government Printer, 1961) and Alvin See, “The Torrens System in Singapore: 75 Years from Conception to Commencement” (2022) 62(1) *Am J Leg Hist* 66.

<sup>3</sup> LTA, *supra* note 1, s 45(1).

<sup>4</sup> See *Frazer v Walker* [1967] 1 AC 569 at 580F (PC, NZ) [*Frazer v Walker*]; *Bahr v Nicolay (No 2)* (1988) 78 ALR 1 at 23 (HC, Aust) [*Bahr v Nicolay (No 2)*] and the National Land Code 1965 (Act No 56) (M’sia) s 340(1) [*National Land Code 1965*].

<sup>5</sup> *United Overseas Bank Ltd v Bebe bte Mohammad* [2006] 4 SLR(R) 884 at [8] [*Bebe*]. For a description of the concept of indefeasibility, see Lord Wilberforce in *Frazer v Walker*, *supra* note 4 at 581.

<sup>6</sup> See LTA, *supra* note 1, s 46(1) which provides for overriding interests and s 46(2).

*Mohammad*<sup>7</sup>(“*Bebe*”). The significance of these issues, which are interrelated, can be seen in the discussion below.

## II. SPECIFIC PERFORMANCE AND THE LAND TITLES ACT SECTION 47(3)

As noted above, registration under the LTA will result in the proprietor<sup>8</sup> acquiring a legal title to, or an interest in, the land,<sup>9</sup> as the case may be, which is indefeasible.<sup>10</sup> Prior to registration, it is only prudent and wise for the parties to the transaction to enter into a written contract (be it a sale and purchase agreement of the land, an agreement to lease the property, *etc*) so as to regulate, *inter alia*, their respective rights and obligations thereunder.<sup>11</sup> Hence, the conveyancing practice in Singapore will, generally, entail a two-stage process: the first is the contract stage, followed by the second stage involving the registration of the relevant instrument for the transaction.

At the contract stage, a person dealing with a proprietor of the land or with a person who is entitled to become a proprietor is conferred certain protection under s 47(1) of the LTA.<sup>12</sup> The person concerned (“prospective purchaser”) is not required to inquire or ascertain the circumstances which the current proprietor or any previous proprietor is or was registered.<sup>13</sup> Neither is the prospective purchaser required to see to the application of the purchase money or any part thereof<sup>14</sup> nor be affected by notice (actual or constructive) of any trust or other unregistered interest, despite any rule of law or equity to the contrary.<sup>15</sup>

The protection set out above will only be available provided there is no fraud involved as can be seen in the opening words of s 47(1) of the LTA “Except in the case of fraud...”. However, these words cannot be taken to mean the protection will be unavailable just because there is fraud present in the circumstances which the prospective purchaser is not aware of. To be deprived of the protection, the prospective purchaser must also have committed the fraud or be a party or privy to it. This is the only logical and reasonable interpretation to be accorded to the opening words of s 47(1).

In the event that there is no fraud on the part of the prospective purchaser as understood in the immediately preceding paragraph, the protection afforded by s 47(1) will commence at the date of the contract evidencing the transaction as provided in s 47(3). Immediate indefeasibility will not arise under s 47(3) as the

<sup>7</sup> *Bebe*, *supra* note 5.

<sup>8</sup> *Ie*, “any 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 LTA], and includes a mortgagee, chargee and lessee...” (LTA, *supra* note 1, s 4(1)).

<sup>9</sup> See *ibid*, ss 45(1) and (2).

<sup>10</sup> See *ibid*, s 46(1).

<sup>11</sup> See also the requirements in the Civil Law Act 1909 (2020 Rev Ed), s 6(d) [CLA] in respect of contracts relating to land which must, *inter alia*, be evidenced in writing.

<sup>12</sup> This section is placed under the sub-heading “Indefeasibility and Priority” in Division 1 of Part 5 of the LTA, *supra* note 1.

<sup>13</sup> *Ibid*, s 47(1)(a).

<sup>14</sup> *Ibid*, s 47(1)(b).

<sup>15</sup> *Ibid*, s 47(1)(c).

transaction is only at the contract stage and *registration has yet to take place*.<sup>16</sup> The crucial question which arises for determination then is whether the protection in s 47(3) will continue all the way to registration of the relevant instrument in respect of the transaction. The Court of Appeal in *Bebe* appeared to have answered in the affirmative. The court was of the view that any fraud that can defeat the interest of the prospective purchaser<sup>17</sup> “must exist before and at the time the contract is entered into”, and any personal equity claim (including fraud) that arises *after* the prospective purchaser has obtained his protection under s 47(3) of the LTA cannot affect his interest as giving effect to it would be inconsistent with s 47(3) itself.<sup>18</sup>

It is respectfully submitted that the following illustration will demonstrate that the view expressed in *Bebe* cannot be supported for the reasons discussed below.<sup>19</sup> One can think of a situation where a third party, X, has committed fraud on the registered proprietor of the land by forging the signature of the latter. X, without registering the land in his name, then sells the land to the prospective purchaser who is not aware of the fraud at the time of execution of the contract of sale. X has also falsely represented that he is acting on behalf of the registered proprietor of the land and the contract of sale entered into is between the registered proprietor as the seller and the prospective purchaser as the buyer. There is nothing to put the prospective purchaser on inquiry in the circumstances as the fraud is perfectly carried out. In light of what *Bebe* has said as noted above, the prospective purchaser will get the protection conferred by ss 47(1)(a)–(c) which commences from the date of the contract of sale pursuant to s 47(3). In addition, the prospective purchaser does not come within the opening words in s 47(1), the effect of which has been discussed above.

Suppose that before completion, the prospective purchaser becomes aware of the fraud committed by X. This would be a situation where the prospective purchaser now has knowledge of, and is privy to, the fraud of X which comes *after the date* of the contract of sale. The prospective purchaser, nevertheless, takes steps to complete the transaction of the land. In this situation, the prospective purchaser can be taken to have wilful blindness of the fraud of X.<sup>20</sup> Assume that, at this point in time,

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<sup>16</sup> Hence, ss 46(1) and 46(2) are not engaged. *Cf* Chan Sek Keong, SC, “The Torrens System under the Land Titles Act: A “*Bebe*” Retrospective” (2024) SAcLJ 42 at note 72 therein. There is no equivalent provision to s 47(3) of the LTA in the New South Wales Real Property Act 1900 (No 25 of 1900) [*New South Wales Real Property Act*] and the New Zealand Land Transfer Act 2017 (No 30 of 2017) [*New Zealand Land Transfer Act*].

<sup>17</sup> Including that of a prospective lessee or mortgagee.

<sup>18</sup> *Bebe*, *supra* note 5 at [94] (emphasis in original).

<sup>19</sup> In Teo Keang Sood, “The Trust Statutory Exception to Indefeasibility in the Singapore Torrens System” Sing JLS [2017] 151 at 166 (1<sup>st</sup> paragraph), the example given was one in which *registration* has been *obtained* and s 46(2)(a) of the LTA is, thus, engaged. The current illustration deals with a situation where registration has yet to occur being at the contract stage, albeit *after* the execution of the contract, and where the remedy of specific performance is sought by the prospective purchaser against the registered proprietor of the land.

<sup>20</sup> See *Assets Company Limited v Mere Roihi* [1905] AC 176 at 210 (PC) [*Assets*] (“[I]f it be shewn that [the purchaser’s] suspicions were aroused, and that he abstained from making inquiries for fear of learning the truth, the case is very different, and fraud may be properly ascribed to him.”) and *Waimiha Sawmilling Co Ltd v Waione Timber Co Ltd* [1923] NZLR 1137 at 1175 (CA) [*Waimiha* (CA)] (“The true test of fraud is ... whether the purchaser ... knew enough [of the existence of the adverse right] to make it his duty as an honest man to hold his hand, and either to make further inquiries before purchasing, or to abstain from the purchase ...”).

the registered proprietor of the land now also knows of the fraud committed by X and refuses to complete the transaction as demanded by the prospective purchaser. In the circumstances, using the metric of specific performance, will the prospective purchaser succeed in getting this remedy from the court against the registered proprietor?

It is trite that specific performance, being an equitable remedy, is given at the discretion of the court and is not granted as of right. The court will have to take into account all the circumstances of the case in order to ensure that it would be just and equitable to grant the relief.<sup>21</sup> The pertinent issue in every case is whether specific performance constitutes the just and appropriate remedy in the circumstances.<sup>22</sup> A number of factors or circumstances militate against the grant of specific performance in favour of the prospective purchaser in the illustration above. First, the registered proprietor, being the current owner of the land, has *prima facie* indefeasibility of title. The burden of proof is, thus, on the prospective purchaser to begin by showing that the overriding interests in s 46(1) and the statutory exceptions to indefeasibility in s 46(2) apply to defeat the registered proprietor's title.<sup>23</sup> He is unlikely to succeed in discharging the burden placed on him as none of these provisions apply. Second, the prospective purchaser did not come to court with clean hands as he is privy to the fraud committed by X which would enable him to achieve a dishonest purpose. This would, in all the circumstances, be inequitable.<sup>24</sup> Third, the commencement of the protection provided in ss 47(1)(a)–(c) from the date of the contract of sale pursuant to s 47(3) is premised on the opening words of s 47(1) itself as explained earlier, *ie*, no fraud on the part of the prospective purchaser in the circumstances. The consequence of the prospective purchaser having knowledge of the fraud committed by X and being privy to it, albeit after the date of the contract of sale, must mean that the protection in ss 47(1)(a)–(c) can no longer be conferred on or be enjoyed by the former. Fourth, s 47(3) can no longer apply. This is because given that the protection afforded by s 47(1) no longer exists for the reason given immediately above, there can no longer arise any question of the protection commencing from the date of the contract of sale anymore. Lastly, in the illustration, what the prospective purchaser has knowledge of is fraud. In this connection, s 47(2) of the LTA provides that the knowledge that any unregistered interest is in existence is not of itself imputed as fraud.<sup>25</sup> Further, ss 47(1) and 47(1)(c) of the LTA expressly declare that, in the absence of fraud on the part of the prospective purchaser, he is not “to be affected by notice (actual or constructive) of any ... unregistered interest, despite any rule of law or equity to the contrary”. It is clear that knowledge of fraud and knowledge of an unregistered interest are worlds apart, the two being completely distinct and

<sup>21</sup> *E C Investment Holding Pte Ltd v Ridout Residence Pte Ltd* [2012] 1 SLR 32 at [103] (CA).

<sup>22</sup> *Lee Chee Wei v Tan Hor Peow Victor* [2007] 3 SLR(R) 537 at [55] (CA).

<sup>23</sup> *Tay Jui Chuan v Koh Joo Ann* [2010] 4 SLR 1069 at [24] (CA) [*Tay Jui Chuan*] and *Loo Chay Sit v Estate of Loo Chay Loo, deceased* [2010] 1 SLR 286 at [14] (CA) [*Loo Chay Sit*].

<sup>24</sup> See I C F Spry, *The Principles of Equitable Remedies: Specific Performance, Injunctions, Rectification and Equitable Damages*, 9th Ed (Pyrmont, New South Wales: Lawbook Co, 2014) at 254.

<sup>25</sup> See also *Waimiha Sawmilling Co Ltd v Waione Timber Co Ltd* [1926] AC 101 at 107 (PC) [*Waimiha (PC)*] (“dishonesty must not be assumed solely by reason of knowledge of an unregistered interest.”) and at 108 (acting “upon the faith of [a court] judgment” is not fraud) and *Fragrance Realty Pte Ltd v Rangoon Investment Pte Ltd* [2013] 2 SLR 1007 at [26] (HC).

separate matters. Mere notice or knowledge of an unregistered interest in itself is not fraud. Fraud, on the other hand, must mean actual fraud under the Torrens system, *ie*, dishonesty.<sup>26</sup>

As a result, it is untenable for the protection conferred on the prospective purchaser to run and continue indefinitely pursuant to s 47(3), especially where the fraud on his part arises *after* he has obtained his protection from the date of the contract of sale under s 47(3). Even if he has obtained registration of the land in his name, his title can still be defeated pursuant to s 46(2)(a) of the LTA on the ground of fraud. Thus, whether *before* registration has taken place (*ie*, at the contract stage) or *after* registration has been obtained, the outcome is the same, namely, that the prospective purchaser will lose out in either situation. Further, in the situation where registration has been obtained, the previous registered proprietor can apply under s 160(1)(b) of the LTA to ask the court to rectify the land-register to restore back his ownership to the land on the ground that the prospective purchaser has obtained registration by way of fraud. This power of rectification of the court is discussed in greater detail below.

### III. APPLICABILITY OF CONSTRUCTIVE TRUSTS IN POST-REGISTRATION FRAUDULENT SITUATIONS

In order to come within the statutory exceptions to indefeasibility specified in ss 46(2)(a)–(e) of the LTA so as to defeat a registered title or interest, the respective vitiating factors complained of therein must be that which resulted in registration of the title or interest. Hence, these vitiating factors must occur or arise before, or at the latest at the time of, registration. In this manner, there will be an established causal link between the relevant vitiating factor(s) and the registration of the title or interest which is induced by the former. It is obvious then that ss 46(2)(a)–(e) of the LTA have no application to situations where the fraudulent conduct or behaviour complained of arose after registration (post-registration situations) and where the registration has been obtained in good faith and for value as it is not possible to argue, in terms of timing, that the registration of the title or interest concerned is induced by the impugned conduct or behaviour which came later.

In post-registration situations, the relevant statutory exceptions to indefeasibility in s 46 and s 47 of the LTA will, accordingly, have no application as the transaction is above board at the time of registration.<sup>27</sup> Thus, it is surprising that in *Bebe*, the court took the position that the earlier Court of Appeal in *Ho Kon Kim v Lim Gek Kim Betsy*<sup>28</sup> (“*Betsy*”), which involved a post-registration situation, “in imposing a constructive trust by reason of a promise made *after* the contract was entered

<sup>26</sup> See *Assets*, *supra* note 20 at [210]; *Frazer v Walker*, *supra* note 4, at 580E; *Waimiha (PC)*, *supra* note 25 at 106–107 and *Bahr v Nicolay (No 2)*, *supra* note 4 at 5 and 18.

<sup>27</sup> Otherwise, if the transaction, at the time of registration, is not in good faith and for value, it will be caught by ss 46(2)(a)–(e) of the LTA which render the title or interest defeasible and liable to be set aside. For an earlier article which dealt with the applicability of constructive trusts coming *within* s 46(2)(c) of the LTA, see Teo, *supra* note 19 at 151.

<sup>28</sup> [2001] 3 SLR(R) 220 [*Betsy*].

into and *after* registration of the mortgage, ... [decided] inconsistent[ly] with ss 46(1) and 47(3) of the LTA.”<sup>29</sup> It is respectfully submitted that the position taken by *Bebe* on the effect of these two statutory provisions in the LTA cannot be supported as post-registration fraudulent conduct or behaviour situations can still arise as happened in *Betsy* itself (a case which *Bebe* has re-characterised as involving a fraudulent transaction). The party concerned cannot and should not be allowed to benefit from such conduct or behaviour in the circumstances. In any case, given that *Bebe* regarded certainty and finality in land transactions to be of utmost importance which are paramount objectives of the Singapore Torrens system which the statutory framework in ss 46(2)(a)–(e) seeks to achieve,<sup>30</sup> it re-characterised *Betsy* so as to bring the case as coming within this statutory framework.<sup>31</sup>

The question which arises for consideration then is whether constructive trusts can apply in post-registration fraudulent situations. This will be where, as noted above, the registration of the title or interest has been obtained by the relevant party in good faith and for value. The impugned or questionable fraudulent conduct and behaviour of the party comes thereafter. At this juncture, it should be noted that *Bebe*'s view that Singapore courts should be slow to engraft onto the LTA personal equities, such as constructive trusts, in appropriate cases has no application to post-registration situations as the statement was made in the context of the statutory framework in s 46(2) of the LTA<sup>32</sup> which deals with the application of the various vitiating factors therein at the time of registration (and not conduct thereafter).

It is possible to think of a situation which is on all fours with the case of *Betsy* except for the material differences that the arrangement to recognise the unregistered interest in the land is made orally and that the mortgage transaction is obtained in good faith and for value at the time of registration.<sup>33</sup> Briefly, in *Betsy*, Madam Ho, by a written agreement, sold her land to Betsy in consideration of the latter building a house on the land for Madam Ho which was to be transferred to her upon completion. RHB Bank, in granting a loan to Betsy, took a registered mortgage of the land as security. RHB Bank acknowledged in writing the equitable interest of Madam Ho in the lot earmarked for her and recognised her interest therein by agreeing with

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<sup>29</sup> *Bebe*, *supra* note 5 at [94] (emphasis in original in italics; emphasis added in bold italics). The court in *Bebe* has opined that “[a]ny personal equity claim that arises after the registered proprietor has obtained his protection under s 47(3) or s 46(1) of the LTA cannot affect his right to an indefeasible title as giving effect to it would be inconsistent with ss 46(1) and 47(3) itself.” (at [94]). This then explains why the court in *Bebe* was of the view that the decision in *Betsy* may have to be reconsidered at an appropriate time given its inconsistency with the statutory framework in the LTA (at [91]).

<sup>30</sup> *Ibid* at [91], [92] and [94].

<sup>31</sup> *Ibid* at, *inter alia*, [73] and [76]–[77].

<sup>32</sup> *Ibid* at [91]: “...our courts should be slow to engraft onto the LTA personal equities that are not referable directly or indirectly to the exceptions in s 46(2) of the LTA. These exceptions are, as we have shown, capable of encompassing most of the *in personam* actions at common law or in equity that a court exercising *in personam* jurisdiction may grant.”

<sup>33</sup> This is to ensure that the findings of a court like in *Betsy* that the bank acted in good faith at the time of registration of the mortgage as they merely had notice and there was no dishonest intention on their part (*Betsy*, *supra* note 28 at [30]), will be upheld and that there is no room for a subsequent court to follow *Bebe* (*supra* note 5 at [76] and [77]) in justifying the later conduct of the bank in *Betsy* as being fraudulent at the time of registration of the mortgage and hence, coming within s 46(2)(a) of the LTA. Further, since the arrangement with the bank to recognise the unregistered interest is now not in writing, an express trust will not arise (see CLA, *supra* note 11, s 7(1)).

Betsy that the lot would be discharged from the mortgage without any payment as the bank had discounted the value of Madam Ho's interest when granting the loan to Betsy. The bank acted in good faith at the time of registration of the mortgage in its favour. The Court of Appeal held that the bank could not subsequently, in the sale of the property upon Betsy being made a bankrupt, assert its absolute rights as a registered mortgagee over the whole of the property and repudiate the interest of Madam Ho. A constructive trust was, thus, imposed on the bank in light of its unconscionable conduct.<sup>34</sup>

Would the imposition of a constructive trust by the court on the bank in the circumstances be consistent with the scheme of registration under the LTA? It would be difficult to characterise the situation as coming within the ambit of the statutory framework in s 46(2) of the LTA which *Bebe* was able to do with the actual case of *Betsy*. This is because, in our situation at hand, the bank has obtained the mortgage in good faith at the time of registration.<sup>35</sup> It also involves a post-registration situation which will not fall within the statutory framework in s 46(2) as the impugned fraudulent conduct or behaviour which came after registration cannot be said to have resulted in registration of the mortgage. But a solution has to be formulated to provide a remedy to redress the wrong that the person in the position of Madam Ho has suffered.

It has been suggested that "fraud" in s 46(2)(a) of the LTA should be given a liberal interpretation which will then solve the "problems of dishonesty in its different kinds and degrees".<sup>36</sup> Moreover, there is no logical or rational basis for distinguishing between fraud which is present at the time of registration and fraud which occurs after registration, *ie*, a post-registration situation.<sup>37</sup> It is respectfully submitted that one can only meaningfully speak of a registered title or interest being defeasible if the fraud is one that resulted in registration of the title or interest in question. Hence, in the absence of fraud at the time of registration, the title or interest acquired must be one that is indefeasible. A post-registration fraudulent conduct cannot somehow retrospectively turn an otherwise indefeasible title into a defeasible one. This is for the simple reason that the subsequent fraudulent conduct did not result in or cause the registration of the title or interest.<sup>38</sup> The registration has already taken place earlier in circumstances where there is no fraud and the registered proprietor at that earlier point in time, acted in good faith and for value.<sup>39</sup> Accordingly, it was necessary then for the court in *Bebe* to re-characterise the post-registration fraudulent conduct of RHB (the mortgagee) in *Betsy* as taking place at the time of registration of the

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<sup>34</sup> A constructive trust was also imposed by the majority in *Bahr v Nicolay (No 2)*, *supra* note 4, involving a post-registration situation. The case dealt with a sale and lease-back agreement.

<sup>35</sup> In *Bebe*, *supra* note 5 at [34], the court made the general observation that "when a financial institution ... gives a secured loan to a customer, its primary interest in the security is in ensuring that it is a valid and enforceable security. It has no commercial interest beyond that. Accordingly, in ordinary banking transactions, there is no reason for the bank to act dishonestly ...".

<sup>36</sup> See Chan, *supra* note 16 at [45] and [92(c)].

<sup>37</sup> *Ibid* at [65].

<sup>38</sup> See Teo, *supra* note 19 at 161 (2nd last paragraph). See also the Malaysian Federal Court case of *Tai Lee Finance Co Sdn Bhd v Official Assignee & Ors* [1983] 1 MLJ 81 at 85. The fraud exception in the Malaysian National Land Code 1965, *supra* note 4, s 340(2)(a) has the same effect as that provided in the LTA, s 46(2)(a) (*ie*, actual fraud). See further, *infra* note 50 and the cases therein.

<sup>39</sup> See the definition of "purchaser" in s 4(1) of the LTA, *supra* note 1.

mortgage instead<sup>40</sup> so as to render the mortgage defeasible under s 46(2)(a). This would not have been necessary if the scope of fraud in s 46(2)(a) is indeed so wide as suggested above<sup>41</sup> since the post-registration fraudulent conduct in itself would have come within the ambit of s 46(2)(a) anyway. That the time of registration is crucial can be seen in *Bebe* itself where the court had clarified thus:

... any ... event, act or omission prescribed by ss 46(1) and 46(2) as capable of defeating the title of the registered proprietor *must exist before or at the time the instrument is registered*, as once registered the proprietor's title becomes indefeasible.

This being the statutory framework provided by s 46 ... of the LTA, we are of the view that any fraud, or personal claim, or defeasible condition, or event or overriding interest that can defeat the title of the registered proprietor *must exist before and at the time ... of registration of the instrument*. Any personal equity claim that arises *after* the registered proprietor has obtained his protection under ... the LTA cannot affect his right to an indefeasible title as giving effect to it would be inconsistent with [the LTA] itself.<sup>42</sup>

[emphasis in original]

It will be inconsistent with *Bebe* and problematic in principle to say now that any vitiating circumstances occurring *after* registration can render an indefeasible title or interest defeasible *within* the framework of the LTA, effectively doing away with the concept of immediate indefeasibility described above and employed in the LTA.<sup>43</sup> Further, given that the quality of indefeasibility only arises *solely* by virtue of *registration under the LTA*,<sup>44</sup> in post-registration fraudulent circumstances where there is no further registration involving the very same transaction, the issue whether a title or interest is or is not indefeasible *under the LTA* is, thus, *not* engaged. This fits squarely with *Bebe*'s passages above that the time of registration is paramount and not any fraud or claim which comes thereafter, encapsulating the very essence of the concept of immediate indefeasibility in the LTA.<sup>45</sup>

In the case of the title or interest registered earlier, it is indefeasible as it has been acquired in good faith and for value at the time of registration.<sup>46</sup> Otherwise, the title or interest acquired earlier at the time of registration will be rendered defeasible pursuant to s 46(2) of the LTA as its registration was effected *under* the LTA. As the

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<sup>40</sup> In *Betsy*, the court found that RHB merely had *notice* of the material facts, including Madam Ho's interest in the property, at the time of registration of the mortgage and there was *no* dishonesty on their part (*Betsy*, *supra* note 28 at [30]). See also *Bebe*, *supra* note 5 at [73] and [76].

<sup>41</sup> See *supra* note 36 and the accompanying text.

<sup>42</sup> *Bebe*, *supra* note 5 at [93] and [94]. See also, *infra* notes 50 and 51 and the accompanying texts respectively.

<sup>43</sup> See *supra* note 37 and the accompanying text. *Cf supra* note 38 and the accompanying text, and *infra* notes 44 – 48, 50 and 71 and the accompanying texts respectively.

<sup>44</sup> See also *Tay Jui Chuan*, *supra* note 23 at [24] and *Loo Chay Sit*, *supra* note 23 at [14].

<sup>45</sup> See *supra* note 42 and the accompanying text.

<sup>46</sup> See, *infra* notes 50 and 51 and the accompanying texts respectively.



position is different in post-registration fraudulent circumstances given the timing issue and the effect of immediate indefeasibility which is to *exclude* any fraud or personal equity claim that arises *after* registration from the vitiating factors in ss 46(1) and 46(2),<sup>47</sup> the appropriate remedy or relief to be granted in the circumstances so as to defeat the title or interest of the registered proprietor would have to be that available at general law outside of the LTA.

Another argument in support of the proposition that the time of registration of the title or interest is crucial can also be seen in the discussion in Heading IV below, where one of the requirements provided in s 160(1)(b) of the LTA which must be satisfied for the court to exercise its power to rectify the land-register under s 160 is that the fraud or mistake, as the case may be, must have resulted in or caused the registration of the title or interest concerned. What counts is that *registration* has been obtained through fraud or mistake and not due to circumstances post-registration. This also aligns with the concept of actual fraud employed in s 46(2)(a) of the LTA.<sup>48</sup>

The reference to the minority judgments of Mason CJ and Dawson J in the Australian High Court case of *Bahr v Nicolay (No 2)*<sup>49</sup> is not particularly helpful as they were there dealing with the concept of equitable fraud which is wider than actual fraud and which allows for factors beyond registration to be taken into account, potentially opening the floodgates to more uncertainty in the LTA. At the moment, the concept of actual fraud, *ie*, dishonesty at the time of registration,<sup>50</sup> represents the law in Singapore. As *Bebe* stated thus:

... the inclusion of the exception of fraud [in s 46(2)(a)] to which the registered proprietor or his agent is a party would, by implication, also *exclude* from such exception all conduct which in law or equity has a *lesser degree* of moral turpitude than *actual fraud*. The Privy Council in *Waimiha* and *Assets* has defined ‘fraud’ in Torrens statutes to mean actual fraud, dishonesty or moral turpitude.<sup>51</sup>

[emphasis added]

Although *Bebe* did express the view that whether equitable fraud also comes within s 46(2)(a) “is an open question in Singapore”,<sup>52</sup> this must be left to a future court to decide by taking a principled approach in resolving the matter.

In light of the discussion above, it is respectfully submitted that, for post-registration fraudulent conduct situations, the appropriate remedy or relief to be given must be that available at general law outside of the LTA as s 46(2)(a) is not

<sup>47</sup> See, *supra* note 42 and the accompanying text. See also, *Bebe*, *supra* note 5, at [95].

<sup>48</sup> See, *infra* notes 50 and 51 and the accompanying texts respectively.

<sup>49</sup> *Supra* note 4. See also Chan, *supra* note 16 at [57]–[58], [63] and [65]. Cf Samantha Hepburn, “Concepts of Equity and Indefeasibility in the Torrens System of Land Registration” (1995) 3 *Austl Prop LJ* 41 at 46.

<sup>50</sup> See *supra* note 42 and the accompanying text. See also *Loke Yew v Port Swettenham Rubber Co Ltd* [1913] AC 491 at 503–505 (PC); *Bahr v Nicolay (No 2)*, *supra* note 4 at 20; and *Conlan v Registrar of Titles* (2001) 24 WAR 299 at 329 (SC, WA).

<sup>51</sup> *Bebe*, *supra* note 5 at [91]. Cf Chan, *supra* note 16.

<sup>52</sup> *Bebe*, *supra* note 5 at [91].

engaged. Given that fraud is present in the post-registration situation, an institutional constructive trust, which comes about by operation of law, should rightfully be granted to right the wrong.<sup>53</sup>

It is settled that the Torrens system is not an unfair system as equity has a role to play. The Privy Council and the Australian High Court have made it clear that the doctrine of indefeasibility does not prevent a court from granting appropriate relief on a claim founded in law or in equity against the registered proprietor by reason of his own conduct.<sup>54</sup> The doctrine does not interfere with the ability of the court to insist upon proper conduct in accordance with the conscience which all men should obey.<sup>55</sup> In exercising its jurisdiction on grounds of conscience, the court will strike a proper balance between facilitating the policy objectives of the Torrens system to provide certainty and finality in land transactions on the one hand, and ensuring fairness and justice on the other.<sup>56</sup>

In imposing the appropriate constructive trust on the bank which acted fraudulently in the post-registration situation above, the court will have to weigh carefully the merits of the case. It is obvious that a constructive trust cannot be imposed unless the circumstances are such that the conscience of the bank is affected.<sup>57</sup> While a constructive trust on the basis of unconscionability should not be imposed in a manner which gives rise to uncertainty in the Singapore Torrens system,<sup>58</sup> it should also not deter the courts from imposing one in an appropriate case and where the circumstance justifies it. To do otherwise is to leave the person in the position of Madam Ho with no effective remedy given that the oral arrangement is not made between the bank and the former but with a person in the position of Betsy. By imposing the appropriate constructive trust on the bank, it will be required to hold the lot and the interest therein earmarked for the person entitled to it as a constructive trustee as ordered by the court, albeit an unregistered equitable interest.<sup>59</sup> The bank will not be able to ride roughshod over the equitable interest of the person in the position of Madam Ho and the lot will, ultimately, be discharged from the mortgage without payment being made to the bank as agreed in the arrangement entered into. Thus, a constructive trust is a better remedy to give in the circumstances.<sup>60</sup>

Different views have been expressed in academic literature on the question whether the list of exceptions to indefeasibility provided in s 46(2) of the LTA is

<sup>53</sup> As to when an institutional or remedial constructive trust arises, see *Wang Xiaopu v Koh Mui Lee and others* [2023] 5 SLR 717 at [79] and [81] (HC) [*Wang Xiaopu*].

<sup>54</sup> See *Frazer v Walker*, *supra* note 4 at 585B and *Bahr v Nicolay (No 2)*, *supra* note 4 at 23. See also, generally, *United Overseas Finance Ltd v Victor Sakayamary* [1996] 2 SLR(R) 20 at [27]–[32] (HC) [*Victor Sakayamary*].

<sup>55</sup> *Oh Hiam v Tham Kong* [1980] 2 MLJ 159 at 165 (PC) [*Oh Hiam*].

<sup>56</sup> *Ibid* at 164.

<sup>57</sup> Kevin Gray and Susan Francis Gray, *Elements of Land Law*, 5th Ed (New York: Oxford University Press, 2009) at para 7.3.7 [Gray & Gray], citing *Ashburn Anstalt v Arnold* [1988] 2 WLR 706 at 728 (CA). The unconscionable behaviour or conduct of the bank as registered mortgagee is one of the key elements for the imposition of a constructive trust (Gray & Gray at para 7.3.8).

<sup>58</sup> See generally, Barry Crown, “Equity Trumps the Torrens System” [2002] Sing JLS 409 at 415.

<sup>59</sup> A caveat may be lodged under LTA, *supra* note 1, s 115(1) to protect such an unregistered interest which comes within the definition of “interest” in LTA, *supra* note 1, s 4 (1) which would apply to an interest arising under a trust.

<sup>60</sup> See also Brendan Edgeworth, *Butt’s Land Law* 7th Ed (Pyrmont, New South Wales: Thomson Reuters, 2017) at paras 4.180 and 4.200. See also *Wang Xiaopu*, *supra* note 53.

exhaustive. If so, there will then be no room for other vitiating factors or other personal equities to apply where they do not come within the list of specified exceptions provided in s 46(2). One view takes the position that the list is not exhaustive as there may exist some claims not prohibited by s 46(1) of the LTA.<sup>61</sup> The opposing view is that the list is exhaustive.<sup>62</sup> It is respectfully submitted that the latter view takes an extreme approach. As noted earlier in this article, in the case of fraud, to take the position that a fraud arising subsequent to registration also comes within s 46(2)(a) is problematic in principle.<sup>63</sup>

Moreover, to argue that the list of exceptions in s 46(2) is exhaustive is to treat the LTA as operating as a code which Baalman had stated is not the case. As he succinctly observed:

It would not be strictly accurate to describe this Ordinance [*ie*, the Land Titles Ordinance] as a new land ‘code’. Planted as it is in a jurisdiction already subject to English law, it would be more apt to call it a new conveyancing system.<sup>64</sup>

As seen below, given the myriad of potential new developments that may arise which may touch on the question of indefeasibility in the LTA, it would be difficult to conclude in no uncertain terms that the list of exceptions in s 46(2) is definitively exhaustive. Needless to say, the application of equitable principles and doctrines<sup>65</sup> in appropriate cases has, as noted by Baalman in his passage above, long preceded the enactment of the Land Titles Ordinance, the LTA’s predecessor.

Further, the view that the list of exceptions is exhaustive also goes against the tenor of what was said in *Bebe*. In fact, the Court of Appeal in that case stated thus:

Baalman did *not* go as far as to suggest that the enactment of the long list of overriding interests and exceptions to the principle of indefeasibility in s 46 of

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<sup>61</sup> Kelvin Low, “The Story of ‘Personal Equities’ in Singapore: Thus Far and Beyond” [2009] Sing JLS 161 at 166.

<sup>62</sup> Chan, *supra* note 16 at [92(a)] (“No claim may be made to recover registered land from the proprietor, except as specified in s 46(2) of the LTA.”). The approaches to dealing with the *in personam* exception discussed and adopted in Tang Hang Wu, “Beyond the Torrens Mirror: A Framework of the In Personam Exception to Indefeasibility” (2008) 32(2) Melbourne UL Rev 672 and Kelvin FK Low, “The Nature of Torrens Indefeasibility: Understanding the Limits of Personal Equities” (2009) 33(1) Melbourne UL Rev 205 as well as in Tang Hang Wu and Kelvin FK Low, *Tan Sook Yee’s Principles of Singapore Land Law*, 4th Ed (Singapore: LexisNexis, 2019) at [14.92], [14.105] and [14.107]–[14.109] have been criticised by Chan, *supra* note 16 at [46], as being “misconceived, as they are conceived substantially on the case law and academic writings on these issues under the Australian Torrens statutes (which are differently structured and provisioned from the LTA).” This is because “[t]he LTA is exceptional among Torrens statutes [which seeks] to make [the Act] efficient and effective in simplifying land dealings in Singapore and in promoting certainty and finality to the registered title” (Chan, *supra* note 16 at [93]).

<sup>63</sup> See *supra* note 38 and the accompanying text as well as *supra* notes 42–48, 50 and *infra* note 71 and the accompanying texts respectively.

<sup>64</sup> See Baalman, *supra* note 2 at 7. *Cf* the Malaysian National Land Code 1965, *supra* note 4, which is “... a complete and comprehensive code of law governing the tenure of land in Malaysia ... and there is no room for the importation of any rules of English law in that field except in so far as the Code itself may expressly provide for this.” (see *United Malayan Banking Corporation Bhd & Anor v Pemungut Hasil Tanah, Kota Tinggi* [1984] 2 MLJ 87 at 91 (PC)).

<sup>65</sup> See also, generally, the Application of English Law Act 1993 (2020 Rev Ed), ss 3(1) and (2) [AELA].

the LTA was *exhaustive of all claims*, including personal equities, that could be made against a registered proprietor.<sup>66</sup>

[emphasis added]

Hence, *implied* exceptions to indefeasibility are still recognised even though not expressed in the LTA.<sup>67</sup> This view in *Bebe* aligns with what the court subsequently said in its conclusion on this matter:

As regards all other unspecified personal equities, we are of the view that having regard to the policy objectives of the LTA to reduce uncertainty and to give finality in land dealings, our courts should be slow to engraft onto the LTA personal equities that are not referable directly or indirectly to the exceptions in s 46(2) of the LTA.<sup>68</sup>

The court in *Bebe* went on to say that the list of exceptions is “capable of encompassing *most* of the *in personam* actions at common law or in equity that a court exercising *in personam* jurisdiction may grant”.<sup>69</sup>

Thus, it can be seen from the various statements in *Bebe* above that nowhere did the court suggest that the list of exceptions in s 46(2) is categorically exhaustive. On the contrary, *Bebe* did not disapprove absolutely the application of personal equities (*ie*, *implied* exceptions) not coming within s 46(2) in appropriate circumstances, for example, where no fraud (*ie*, no dishonesty) is involved but only unconscionable conduct falling short of fraud is present, in which case the appropriate constructive trust may be imposed in the circumstances. The caveat *Bebe* laid down is that courts should be slow to apply such personal equities (*not* that they are *prohibited* from doing so) given the policy objectives of the LTA to reduce uncertainty and to give finality in land dealings.

It is also trite that the status and/or persuasiveness of academic articles or opinions written in the extrajudicial context cannot make law and bind the courts. The judicial statements in *Bebe* would, thus, continue to represent the current judicial thinking or views on the matter in question and prevail over the views argued for in extrajudicial academic articles. As the Court of Appeal in *BOM v BOK*<sup>70</sup> succinctly put it: “It is commonsensical and obvious that *extrajudicial* pronouncements are *not* binding on the *courts*.”<sup>71</sup> Hence, the question whether the list of exceptions in s

<sup>66</sup> *Bebe*, *supra* note 5 at [91]. See also *Salaya Kalairani v Appangam Govindhasamy* [2023] SGHC(A) 40 at [37] (“... the opening words of s 46(2) – ‘[n]othing ... shall be held to prejudice the rights and remedies...’ – reflects that it operates to preserve rights [as the] list is *not* expressed as a comprehensive list that *excludes* other rights. *Bebe* states likewise.”) (emphasis in original)

<sup>67</sup> *Cf* Baalman, *supra* note 2 at 88 (last paragraph): “In [the Land Titles Ordinance] [the] implied exceptions have either been expressed or they have ceased to be exceptions.”, cited in Chan, *supra* note 16 at [16].

<sup>68</sup> *Bebe*, *supra* note 5 at 91.

<sup>69</sup> *Ibid* (emphasis added).

<sup>70</sup> [2019] 1 SLR 349 [*BOM v BOK*].

<sup>71</sup> *Ibid* at [166] (emphasis in original). See also, Lord Sumption, “A Response” in N W Barber, Richard Elkins & Paul Yowell (eds), *Lord Sumption and the Limits of the Law* (Oxford: Hart Publishing, 2016) 213, cited in *BOM v BOK*, *ibid* at [166].

46(2) of the LTA is exhaustive must await the decision of a future court and the legal pronouncement in *Bebe* that it is not exhaustive must continue to represent the law.

In light of the foregoing discussion, it is clear that ensuring fairness and justice and providing certainty in land transactions can co-exist at the same time and are not mutually exclusive. This will also better reflect the true state of affairs of the land in the post-registration situation discussed above as well as instil confidence and certainty in land dealings in the Singapore Torrens system. To do otherwise is to simply sacrifice fairness and justice before the altar of certainty, which should be eschewed.

#### IV. RECTIFICATION OF THE LAND-REGISTER BY THE COURTS

The power of the courts to order rectification of the land-register is provided in s 160 of the LTA. The court may do so where, *inter alia*, it is satisfied that pursuant to s 160(1)(b) of the LTA, the registration of an instrument has been obtained through fraud or mistake, among others. Thus, the court has the discretion to order rectification in the circumstances. However, the opening words of s 160(1) “Subject to subsection (2)...” limit the rectification power of the court to a further consideration of the provisions in s 160(2), where the court has no power to rectify the land-register so as to affect the title or interest of a registered proprietor<sup>72</sup> who is in possession unless he is a party or privy to the fraud or mistake, or has caused that fraud or mistake or substantially contributed to it by his act, neglect or default. It should also be noted that this power of rectification by the court is elevated to the status of an overriding interest as provided in s 46(1)(g) of the LTA with the result that a registered title or interest is made subject to it.<sup>73</sup> Being an overriding interest, this statutory power of rectification has the effect of overriding a registered title or interest automatically where the requirements in ss 160(1)(b) and (2) are satisfied.

##### A. *Bebe’s Approach*

The language in s 160(1)(b) does not specify whose fraud or mistake will trigger the power of the court to order rectification. The fraud or mistake can be that of a third party (eg, forgery committed by a third party or the mistake of the land registry staff) and not necessarily that of the registered proprietor. However, in *Bebe*, the court construed the meaning of the words “registration of any instrument has been obtained through fraud ... or mistake” in s 160(1)(b) to refer to the fraud or mistake of the party who presents the instrument to the registry for registration, *ie*, the registered proprietor, in light of conveyancing practice in Singapore.<sup>74</sup> This interpretation aligns with the meaning of fraud as a vitiating factor in s 46(2)(a) of the LTA. As for mistake, it should only still be the mistake of the registered proprietor that is capable of prejudicing the rights of other parties in the circumstances set out in ss

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<sup>72</sup> Including a registered mortgagee and lessee (LTA, *supra* note 1, s 4(1) – definition of “proprietor”).

<sup>73</sup> There are no provisions identical to ss 46(1)(g) and 160 of the LTA in the New South Wales Real Property Act, *supra* note 16 and the New Zealand Land Transfer Act, *supra* note 16.

<sup>74</sup> *Bebe*, *supra* note 5 at [45]–[46].

46(2)(b)–(e) of the LTA.<sup>75</sup> As the court explained in detail the reasons for adopting this interpretation:

... the words ‘through the fraud ... or mistake’ refer to the person through whose fraud ... or mistake the registration was obtained. They do not refer to any other person who might have been fraudulent or who had made a mistake ... at a less proximate point of time. The relevant fraud ... or mistake under s 160(1)(b) should be the last or proximate cause in the chain of events leading to the registration of the instrument.

... [C]onveyancing practice in Singapore has imposed on the transferee or the mortgagee the burden of obtaining the registration of the transfer or the mortgage ... [C]ompletion of his title to the property only takes place when the conveyance or the mortgage instrument is registered in the relevant registry. To this end, his solicitor has to present the requisite documents to the registry staff in order to *obtain* the registration of the transfer or the mortgage.

... With respect to fraud, this interpretation provides the linkage to s 46(2)(a) as it is only the fraud to which the registered proprietor or his agent is a party or in which he or his agent colluded that is capable of defeating his otherwise indefeasible title. With respect to ... mistake, this interpretation provides the linkage to ss 46(2)(b)–46(2)(e) as it should only be the mistake ... of the registered proprietor that is capable of prejudicing the rights of other parties in relation to the properties in question.<sup>76</sup>

[emphasis in original]

### B. *Intention of Parliament*

The difficulty posed by *Bebe*'s interpretation is that, while the circumstances specified in s 160(1)(b) will be aligned with the meaning of fraud and mistake in ss 46(2)(a)–(e) so that there is no contradiction between them, the provision in s 160(1)(b) will then constitute the only consideration in determining whether the court can exercise the power of rectification. Further, the fraud or mistake must be that of the registered proprietor (and no one else) which resulted in registration. So if the fraud or mistake is that of the registered proprietor, the court will have the power to rectify the land-register pursuant to s 160(1)(b) but not if it is otherwise. Seen in this light, the final outcome to whether rectification can be ordered will be resolved in practically every situation by merely looking at s 160(1)(b) only. The upshot of *Bebe*'s interpretation is that there is then no role for s 160(2) to play when a further consideration of the requirements in s 160(2) is mandated by Parliament as seen in the opening words of s 160(1) “Subject to subsection (2)”. Section 160(2) will, accordingly, be rendered redundant and otiose.

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<sup>75</sup> *Ibid* at [47].

<sup>76</sup> *Ibid* at [45]–[47].

One of the canons of statutory interpretation is that Parliament does not legislate in vain nor does it legislate tautologously.<sup>77</sup> Further, Parliament is presumed not to have intended an unworkable or impracticable result, such that an interpretation that leads to such a result would not be regarded as a possible one.<sup>78</sup> Provisions in a statute or in a section must be interpreted in a manner that gives significance to every word therein.<sup>79</sup> Hence, both provisions in s 160(1)(b) and s 160(2) should be interpreted in a way such that both have a useful purpose to serve.

As noted earlier, this power of the court to order rectification under s 160 of the LTA also has the effect of an overriding interest provision in s 46(1)(g) of the LTA. It should not be seen as just a procedural provision in the LTA as it has a wider substantive and policy role to play as will be seen below. As such, it need not necessarily align with the scope and effect of s 46(2) given the way s 160 is structured as well as the difference in language employed in them. It is noteworthy that this rectification power of the court in s 46(1)(g) and s 160, specifically ss 160(1)(b) and (2), has remained in the statute book since its enactment in 1970<sup>80</sup> (some 54 years ago) and these provisions have remained substantively the same thus far even after *Bebe* was decided more than 17 years ago in 2006. This may be contrasted with s 53 of the LTA on co-ownership. It was amended in 2001 by way of the Land Titles (Amendment) Act 2001 (“Amendment Act”),<sup>81</sup> with s 16(c) of the Amendment Act providing for a new s 53(8) of the LTA to overcome the difficulties arising from the Court of Appeal’s decision in *Diaz v Diaz*<sup>82</sup> in 1997, soon after the case was decided. This shows that if Parliament’s intention is to change the law as reflected in ss 46(1)(g) and 160 after *Bebe*’s decision, it could have done so early on but decided not to, thus, reaffirming its intention that the law should be that as reflected in these two provisions.

### C. Approach in *Ho Dat Khoon* – The New Way Forward

The recent High Court case of *Ho Dat Khoon v Chan Wai Leen*<sup>83</sup> (“*Ho Dat Khoon*”) is to be commended for construing s 160 of the LTA the way it did and in the process, giving s 160(2) a new lease of life. The decision represents an important breakthrough in the interpretation of s 160 since *Bebe* was decided almost two decades ago. In *Ho Dat Khoon*, the plaintiff was operating under a mistake when she executed, by way of an *inter vivos* gift, the transfer of the property to her grandniece, the second defendant. She had, on the same day that she made the *inter vivos* gift through the transfer, also executed a will for the property to be a testamentary gift to the second defendant. The General Division of the High Court found that what the

<sup>77</sup> *Tan Cheng Bok v Attorney-General* [2017] 2 SLR 850 at [38] (CA). See also Diggory Bailey and Luke Norbury, *Bennion, Bailey and Norbury on Statutory Interpretation*, 8th Ed (London: LexisNexis, 2020), Chap 13 at 496–497 and *Halki Shipping Corp v Sopex Oils Ltd* [1998] 2 All ER 23 at 43–44 (CA).

<sup>78</sup> *Hong Leong Bank Bhd v Soh Seow Poh* [2009] 4 SLR(R) 525 at [40] (CA).

<sup>79</sup> *JD Ltd v Comptroller of Income Tax* [2006] 1 SLR(R) 484 at [43] (CA).

<sup>80</sup> Via the Land Titles (Amendment) Act 1970 (Act 37 of 1970) [*Land Titles (Amendment) Act*], s 6(c) and s 19 respectively. These provisions did not appear in the original Land Titles Ordinance, *supra* note 2.

<sup>81</sup> No 25 of 2001.

<sup>82</sup> [1997] 3 SLR(R) 759.

<sup>83</sup> [2023] SGHC 326 [*Ho Dat Khoon*].

plaintiff had intended to do was to make a testamentary gift, and not an *inter vivos* gift, when she executed the transfer. The plaintiff sought, *inter alia*, rectification of the land-register under s 160 of the LTA.<sup>84</sup> The court, accordingly, set aside the transfer as the plaintiff was, at the time of the transfer, under a mistaken belief as to the legal effect of the transfer and it was unconscionable to deny relief.

In light of the finding that the transfer should be set aside, the court ordered the rectification of the land-register pursuant to ss 160(1)(b) and 160(2) of the LTA. The court noted that there are two *cumulative* requirements to be fulfilled for rectification to be made under s 160. First, the registration of the instrument of transfer must have been obtained through mistake as had happened on the evidence of the present case. The mistake of the plaintiff (previous proprietor) resulted in registration of the transfer. Second, the registered proprietor (*ie*, second defendant) who is in possession must be a party or privy to the mistake in consequence of which the rectification is sought, or has caused that mistake or substantially contributed thereto by that proprietor's act, neglect, or default.<sup>85</sup>

Since it had been established that the plaintiff executed the transfer upon the mistaken belief that she was not making an *inter vivos* gift<sup>86</sup> but a testamentary one, the question was whether the second defendant, who became the sole registered proprietor after the transfer and who was in possession, fell within the ambit of the second requirement allowing rectification of the land-register. The court found that the second defendant did as she was privy to the plaintiff's mistake given that she, together with the first defendant (who was the plaintiff's niece-in-law), would have been apprised as to the legal effect of the transfer, as they had discussions with the plaintiff about the transfer.<sup>87</sup> However, the facts and evidence did not show that the second defendant committed fraud.

Given that the requirements in ss 160(1)(b) and 160(2) were met, the court ordered the cancellation of the registration of the transfer and the rectification of the land-register to reflect the plaintiff's ownership of the property.

The approach in *Ho Dat Khoon* is commendable. The court noted that there are two requirements (not one) to be satisfied in s 160 and that these requirements are cumulative, not separate or independent of one another, which must be satisfied before the court can exercise the power of rectification. A two-stage process is thus involved which requires a consideration of the provision in s 160(1)(b) first, followed by that in s 160(2).<sup>88</sup> In the circumstances, the court in *Ho Dat Khoon* first held that s 160(1)

<sup>84</sup> *Ibid* at [14].

<sup>85</sup> *Ibid* at [52].

<sup>86</sup> As the second defendant was a volunteer and not a purchaser, her registered title can be defeated under s 46(3) of the LTA. Rectification of the land-register can then be ordered, a point further discussed below.

<sup>87</sup> *Ho Dat Khoon*, *supra* note 83 at [53]. The High Court (Appellate Division), in dismissing the appeal, affirmed that there are two requirements to be fulfilled in s 160, discussed above (see [2024] SGHC(A) 24 at [56], [59] (“Hopefully, *Bebe* will be clarified in the future ...”) and [61]).

<sup>88</sup> See also *Quinto v Santiago Castillo Limited* [2009] UKPC 15 [*Quinto*], where the Privy Council in dealing with ss 143(1) and (2) of the Belize Registered Land Act 1974 (Cap 194), the equivalent of ss 160(1) and (2) of the LTA, allowed rectification of the land-register by the court. It held that the registration of the fraudster gave the court a discretion to rectify the register against any successors in title of the fraudster however far down the line of the original fraud. However, this power to rectify was subject to a protection afforded to *bona fide* purchasers for value who were in possession unless they had, *inter alia*, caused the fraud or mistake or substantially contributed to it by their acts, neglect or default.



(b) can be invoked, after holding that it was the mistake of the plaintiff (previous proprietor) which resulted in the registration of the transfer. This shows that s 160(1)(b) is not limited to a situation where the mistake that counts is only that of the registered proprietor. For s 160(1)(b) to apply, all that matters is that registration comes about because of a mistake, be it that of the registered proprietor or a third party.<sup>89</sup> In contrast, *Bebe's* approach will require a consideration of only s 160(1)(b) and whether it is the mistake of the second defendant (registered proprietor) which resulted in registration. Applying *Bebe's* approach, the effect is that, since the registration did not come about because of the mistake of the second defendant as found by the court, it will have no power to rectify the land-register on the ground of mistake in s 160(1)(b), which means that the second defendant will remain as the registered proprietor of the land. This can result in a miscarriage of justice as can be seen in the outcome when s 160(2) is also considered. In *Ho Dat Khoon*, upon further consideration of s 160(2), the court found that it had the power to order rectification as the second defendant (registered proprietor) was privy and contributed to the plaintiff's mistake.<sup>90</sup> Even if it can be argued (applying *Bebe's* approach) that s 160(1)(b) applies to defeat the second defendant's registered title since it is her "mistake" as well which resulted in registration (given that she was party and privy to the plaintiff's mistake), the fact still remains that s 160(2) will be rendered redundant.

It may be noted that *Ho Dat Khoon* made no reference to *Bebe's* case. However, these two cases involve different transactions, a transfer in *Ho Dat Khoon* and a mortgage in *Bebe*, the latter transaction requiring different considerations in light of s 160(2).<sup>91</sup> Both dealt with the vitiating element of mistake on the part of a third party for the purposes of s 160, namely, that of the land registry staff in *Bebe* who registered the mortgage in favour of the bank and that of the plaintiff in *Ho Dat Khoon* who was the previous registered proprietor.

As seen above, the general tenor of the approach taken in *Bebe* (in contrast to that in *Ho Dat Khoon*) when dealing with the provisions in s 160 of the LTA is that s 160(1)(b) is the only governing provision and that the fraud or mistake of a non-registered proprietor will not trigger its application. Hence, the court in *Bebe* was of the view that its interpretation of s 160(1)(b) will avoid:

... the incongruence of Parliament conferring indefeasibility upon the registered proprietor in terms of s 46(1) while, at the same time, empowering the court to take it away not on the basis of the dishonest act or conduct of the registered proprietor but on the basis of someone else's dishonest act or conduct of which the registered proprietor might have had no knowledge.<sup>92</sup>

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<sup>89</sup> In *Oh Hiam*, *supra* note 55, a Malaysian case on appeal to the Privy Council, the common mistake which arose leading to registration of the transaction was that of the registered proprietors themselves. Rectification of the land-register was ordered to correct the mistake made. The case can also come under s 160(1)(b) of the LTA and it is arguable that rectification can similarly be ordered under s 160(2).

<sup>90</sup> The mistake will not come within s 46(2)(b) of the LTA which would have rendered the second defendant's registered title defeasible. The effect of the mistake will involve the setting aside (and not the enforcement) of the contract to provide for the gift. See also, Chan, *supra* note 16 at [42]. *Cf Bebe*, *supra* note 5 at [53].

<sup>91</sup> See subheading "F" below.

<sup>92</sup> *Bebe*, *supra* note 5 at [47].

It is respectfully submitted that this need not necessarily be the outcome. Even if s 160(1)(b) applies to fraud committed by a third party who is not the registered proprietor, the latter will still be protected under s 160(2) if he can show, *inter alia*, that he is in possession and is not privy or party to the dishonesty of the third party or has not substantially contributed to the dishonesty by his act, neglect or default. Further, on the question whether the mistake of the land registry staff can come within s 160(1)(b), the court in *Bebe* answered in the negative. As the court said: “Clearly, the registration went through as a result of the mistake of the registry staff. In our view, s 160(1)(b) does not apply to such a case.”<sup>93</sup> For consistency with the approach in *Ho Dat Khoon*, there is no good reason why s 160(1)(b) is inapplicable. In *Ho Dat Khoon*, notwithstanding that it was the mistake of the plaintiff (who is not the registered proprietor), the court applied s 160(1)(b). To do otherwise and not further consider s 160(2) thereafter (applying *Bebe’s* approach) can lead to a miscarriage of justice in *Ho Dat Khoon* as argued above. With due respect, the mistake of the land registry staff in *Bebe* should similarly come within the ambit of s 160(1)(b) (notwithstanding that it is not the mistake of the registered proprietor, *ie*, United Overseas Bank (“UOB”)) given that this is similar to the position of the plaintiff in *Ho Dat Khoon* who was not the registered proprietor and who made the mistake. Whether rectification can be ordered will depend on a further consideration of s 160(2) as mandated by the opening words of s 160(1) seen in the light of the court’s power of rectification having the status of an overriding interest in s 46(1)(g) of the LTA, the effect of which is discussed further below. It is telling that Parliament has yet to see it fit to make substantive changes to s 46(1)(g) and ss 160(1)(b) and 160(2) since *Bebe’s* approach was laid down way back in 2006.

#### D. Relationship Between Sections 46(2) and 160 of the LTA

On the question of which of the two sections, *ie*, s 46(2) or s 160, should apply in a given situation, it is submitted that the approach should be that as outlined below. The following approach is based on guidance which can be gathered from decided local case law. At the outset, it is to be noted that there is no difficulty with the meaning of the word “fraud” found in the respective sections. It must be taken to refer to actual fraud, including wilful blindness, as understood in the Singapore Torrens system, not constructive or equitable fraud.<sup>94</sup> The main contention in regard to s 46(2) and s 160(1)(b), as discussed above, is whether the fraud or mistake must refer to only that of a registered proprietor which resulted in registration and not that of a third party as well (which is the case in s 46(2)) before the court can exercise its power of rectification.<sup>95</sup> As noted above, to adopt such a position, which *Ho Dat Khoon* did not, will render s 160(2) redundant or otiose which is against the intention of Parliament and will be inconsistent with the status of s 160 as an overriding interest provision.

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<sup>93</sup> *Ibid* at [54].

<sup>94</sup> See *ibid* at [22] and [30]–[31], citing *Assets*, *supra* note 20 at [210] and *Waimiha (PC)*, *supra* note 25 at 106.

<sup>95</sup> See further below the discussion on the relationship between the two provisions.

In *Ho Dat Khoon*, s 160 was considered as the plaintiff (previous proprietor) applied to the High Court seeking, *inter alia*, rectification of the land-register under s 160 of the LTA on the ground of, *inter alia*, mistake on her part which resulted in registration of the second defendant as the registered proprietor of the land.<sup>96</sup> In the circumstances, the court did not consider any of the provisions in s 46(2). In contrast, in *Mahidon Nichiar v Dawood*,<sup>97</sup> the appellants did not seek rectification under s 160 of the LTA which they could have as one of their pleaded grounds to defeat the title of the registered proprietor (respondent) was based on the mistake of *non est factum* on their part. This ground was held by the Court of Appeal to have been made out.<sup>98</sup> The court did not rule on s 46(2)(a) of the LTA which counsel for the respondent mentioned in passing as it was not part of the appellants' case.<sup>99</sup> In allowing the appeal, the court ordered rectification of the land-register to reflect the interests of the parties in the property. This is presumably pursuant to the inherent jurisdiction of the court.<sup>100</sup>

Considering the outcome reached in the two cases above on rectification, it will appear that the court's power to order rectification under s 160 is not a default position. Parties must expressly apply for the court to exercise its power thereunder. Otherwise, the court can in appropriate cases, nevertheless, order rectification pursuant to its inherent jurisdiction. Hence, it is for the parties to decide how best to proceed on the merits of the case and the court will consider the respective provisions, either s 46(2) or s 160, that is pleaded, or both provisions (an "and/or" situation) if pleaded, as the case maybe. In the latter situation, the registered proprietor will ultimately be exonerated under both provisions where he has acted in good faith and for value. Otherwise, where he has not acted as such, the registered proprietor will fail under both as well. In the situation where fraud is pleaded, s 46(2)(a) will render the title or interest defeasible and the court, for the purpose of giving effect to the overriding interest in s 160, will exercise its power to rectify the land-register thereunder where the registered proprietor will ultimately not be protected under s 160(2). As can be seen, the outcome is the same under s 46(2)(a) and s 160(2) as the words "party or privy to" or "colluded" in the fraud, which provide to the same effect and which qualify the protection to be accorded to the registered proprietor, are employed in the respective provisions. For s 160(1)(b), it matters not that it was not the fraud of the registered proprietor that resulted in registration so long as he is, *inter alia*, a party or privy to the fraud or substantially contributed to it by his act,

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<sup>96</sup> *Ho Dat Khoon*, *supra* note 83 at [14].

<sup>97</sup> [2015] 5 SLR 62 (CA) [*Mahidon*].

<sup>98</sup> *Ibid* at [118]–[124].

<sup>99</sup> *Ibid* at [131]. Further, s 46(2)(b) of the LTA will not apply as the effect of mistake is to set aside the deed and not to enforce it, which is the opposite effect. See also, Chan, *supra* note 16 at [42]. Cf *Bebe*, *supra* note 5 at [53].

<sup>100</sup> *Mahidon*, *supra* note 97 at [136]. See also s 18 of the Supreme Court of Judicature Act 1969 (2020 Rev Ed) read with para 14 of the First Schedule thereto and the CLA, *supra* note 11, s 3(a). In *Victor Sakayamary*, *supra* note 54 at [100], the court did not order rectification under s 160 even though it agreed with the defendants' contention that the failure to obtain the sanction of the court as required under s 35(2) of the Conveyancing and Law of Property Act (Cap 161, 1994 Rev Ed) was an omission and, in the opinion of the court, a mistake as well, thereunder. The case proceeded more on the basis of fraud which rendered the transfer and mortgage void, resulting in the court ordering rectification of the land-register pursuant to its inherent powers (see [163]).

neglect or default under s 160(2). The same outcome will be reached as well in the case of mistake where it is successfully pleaded.<sup>101</sup>

### E. Section 160: Background, Scope and Effect

It cannot be denied that s 160(2) is a difficult provision seen in the context of the scheme of registration under the LTA. This is indeed so as it appears to be the case that this provision is borrowed from a non-Torrens system of registration found in the equivalent s 82(3)(a) of the then UK Land Registration Act 1925 (“English 1925 Act”)<sup>102</sup> which is similar in many respects to the wordings in s 160(2) of the LTA.<sup>103</sup> On the meaning of the words “in possession” in s 160(2), it has been held by the Privy Council in *Quinto v Santiago Castillo Limited*,<sup>104</sup> a case on appeal from the Torrens jurisdiction of Belize, that these words in the equivalent s 143(2) of the Belize Registered Land Act 1974 (Cap 194) refer to actual physical possession and not the fact of the proprietor having the registered title or interest as such.<sup>105</sup> Accordingly, this will refer to a registered proprietor who is in physical occupation of the land and in the case of a registered lessee, his physical possession of the property.<sup>106</sup> However, there are difficulties involved in the case of a registered mortgagee who has a registered interest in the land by way of a mortgage under the LTA. This is discussed below. The scope and meaning of the phrase “... substantially contributed [to the fraud or mistake] by the [registered] proprietor’s act, neglect or default” in s 82(3)(a) of the English 1925 Act can be seen in the following case law. *Re 139 High Street Deptford, ex p British Transport Commission*,<sup>107</sup> in considering the meaning of the phrase, held that the mistake of the proprietor in describing the property to include the land belonging to the British Transport Commission, in respect of which he was seeking to purchase and to obtain registration, was one that was substantially contributed to by him. A mistake in a document lodged for registration by a proprietor, even though innocently made by him, can also be considered to be one substantially contributed by the proprietor.<sup>108</sup>

<sup>101</sup> With due respect, as noted earlier, s 46(2)(b) of the LTA will not apply in the case of mistake as it will involve the setting aside (and not the enforcement) of a contract. *Cf Bebe*, *supra* note 5 at [53].

<sup>102</sup> c 21.

<sup>103</sup> Section 82(3)(a) reads: “The register shall not be rectified ... so as to affect the title of the proprietor who is in possession – (a) unless such proprietor is a party or privy or has caused or substantially contributed, by his act, neglect or default, to the fraud, mistake or omission in consequence of which such rectification is sought;”. See also Barry Crown, “Back to Basics: Indefeasibility of Title” [2007] Sing JLS 117.

<sup>104</sup> *Quinto*, *supra* note 88.

<sup>105</sup> *Ibid* at [30] and [40].

<sup>106</sup> Under ss 131(1)–(2) of the current Land Registration Act 2002 (c 9) (UK) [Land Registration Act 2002], a proprietor is considered to be “in possession” if, *inter alia*, the land is physically in his possession or in the possession of his tenant, mortgagee or licensee or of a beneficiary of a trust of which he is trustee.

<sup>107</sup> [1951] Ch 884 at 890–891.

<sup>108</sup> See *Claridge v Tingey, Re Sea View Gardens* [1967] 1 WLR 134 at 140H–141A. However, the Land Registration Act 2002, *supra* note 105, which has a more limited definition of rectification (see Gray & Gray, *supra* note 57, at para 2.2.63), will not justify a wide construction as that applied in the case law decided under the English 1925 Act.

Given that the original version of s 160(2) has not seen any substantive changes since its enactment in 1970,<sup>109</sup> the above case law on some of the requirements to be fulfilled in s 160(2) will be of assistance in their interpretation. As the registered proprietor has *prima facie* indefeasibility by virtue of registration,<sup>110</sup> the burden is on the party seeking to defeat the registered title or interest to prove the requirements in s 160(2). Some of these requirements, while not perfectly aligned with the Torrens system, nevertheless, have the status of an overriding interest which reflect Parliament's intention and policy that they should continue to be adhered to. Thus, the conduct expected of a registered proprietor who is seeking registration goes beyond not being a party or privy to the fraud or mistake as provided in s 160(2). He is also required to act prudently and exercise due diligence in the matter. There is no room for negligent conduct or lack of due diligence which substantially contributed to the fraud or mistake.<sup>111</sup> This will, hopefully, provide for a more robust system of land dealings in Singapore. Thus, if the framework on rectification in *Ho Dat Khoon* is applied to the facts in *Bebe*, the outcome is as follows (subject to what is discussed in sub-heading "F" below): the court will have the power to rectify the land-register in regard to the registered mortgage of UOB pursuant to s 160(1)(b) as the mistake of the land registry staff resulted in its registration. Considering further the provision of s 160(2), *and assuming the mortgagee is in possession*, it is arguable that UOB did substantially contribute to the mistake of the land registry staff given that the conduct of their solicitors amounted to negligence or lack of due diligence in finding out the true state of affairs.<sup>112</sup> Rectification can, thus, be ordered against them under s 160 (an overriding interest provision)<sup>113</sup> which would have avoided *Bebe* losing her land.

#### F. Position of Mortgages

An interesting question which arises for consideration is whether *Bebe's* interpretation on the court's power of rectification under s 160 is of general application or should be more appropriately limited to the facts of the case? Other than a situation involving a mortgage, there is no difficulty in applying s 160 to, say, a transfer or a lease procured by fraud or mistake, as seen above. An exception may have to be made under s 160 where a registered mortgage is concerned as difficulties can otherwise arise. This has to do with the "in possession" requirement in s 160(2)

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<sup>109</sup> See Land Titles (Amendment) Act, *supra* note 80.

<sup>110</sup> See *Tay Jui Chuan*, *supra* note 23, at [24] and *Loo Chay Sit*, *supra* note 23 at [14].

<sup>111</sup> A registered proprietor of an estate or interest who comes within the vitiating circumstances in s 160(2) will not be a person who acts in good faith within the meaning of the word "purchaser" as defined in s 4(1) of the LTA with the result that the estate or interest concerned is liable to be set aside by the court's exercise of its power of rectification in s 160. See, for example, the case of *Ho Dat Khoon*, *supra* note 83. It has been said the Torrens system "... aids the diligent and not the indolent." (see *United Overseas Finance Ltd v Mutu Jeras* [1989] 1 SLR(R) 446 at [12]).

<sup>112</sup> *Bebe*, *supra* note 5 at [22].

<sup>113</sup> See also LTA, *supra* note 1, s 46(1)(g) where it is expressly provided that the indefeasible title or interest of a registered proprietor is subject to the power to rectify the land-register conferred upon the court by s 160. It is respectfully submitted that, being an overriding interest in the LTA and to render it effective as such, the exercise by the court of its power under s 160, in an appropriate case, should be the default position whenever title to or an interest in land is decided in favour of the claimant.

which must be satisfied if protection is to be conferred on a registered mortgagee. Under the Singapore Torrens system, a registered mortgagee is not given ownership of the land as security for the loan granted unlike in the case of a common law mortgage.<sup>114</sup> The registered mortgagee is merely given a security interest over the land in the form of a registered mortgage which does not operate to transfer the mortgaged land to the mortgagee.<sup>115</sup> Nonetheless, under the registered mortgage, the mortgagee can exercise the power of sale<sup>116</sup> in respect of the land upon default by the mortgagor, *ie*, registered proprietor.

However, the LTA permits the registered mortgagee to take possession of the mortgaged land. This is where default is made by the mortgagor in payment of the interest, principal or other money, secured by the mortgage.<sup>117</sup> This power of entry into possession cannot be exercised by the registered mortgagee until one month's notice has been given to the mortgagor.<sup>118</sup> Thus, in *Bebe*, the court commented as follows:

Under the LTA, a 'proprietor' includes a mortgagee and whilst a mortgagee is normally not in possession of the mortgaged property, he can be in possession of the property if he exercises the powers of a mortgagee to take possession under the LTA. Thus, if he does exercise the power and takes possession, he would fall within the terms of s 46(2), but not otherwise. We are unable to find any basis on which to give s 160(2) an ambulatory effect so that its interaction with s 46(2) is a matter of chance. If a mortgage is not tainted by fraud, the mortgagee's title should be indefeasible as provided by s 46(2).<sup>119</sup>

Given the differences between a Torrens mortgage and one under common law, where the conveyance of ownership of the land in the latter automatically confers a right to possession, an exception to the court's power of rectification under s 160 ought to be made for situations involving a registered mortgage under the LTA. Otherwise, a registered mortgagee, who acted in good faith and who does not fall foul of the vitiating circumstances in s 160(2), will not be able to get the protection thereunder as he is normally not in possession of the mortgaged property where the mortgagor is not in default. Seen in this light, *Bebe's* interpretation on, and its approach to, rectification under s 160 should rightfully be restricted to a situation involving an LTA mortgage. Otherwise, to regard *Bebe* as laying down an interpretation of general application is to, among others as discussed above, run foul of the

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<sup>114</sup> Since a common law mortgage gives the mortgagee an estate in possession by way of security, the mortgagee is entitled to take possession of the mortgaged property as soon as the mortgage is made even if there is no default on the part of the mortgagor. However, because of the liability to account in equity placed on the mortgagee, such as where there is wilful default, deliberate or negligent damage to property, the mortgagor is normally allowed to retain possession of the mortgaged property where there is no default on his part. See also, Lindley MR in *Santley v Wilde* [1899] 2 Ch 474 (CA): "A mortgage is a conveyance of land ... as a security for the payment of a debt" and Wayne Clark (Ed), *Fisher and Lightwood's Law of Mortgage*, 15th Ed (London: LexisNexis, 2019) at paras 1.7 and 1.8.

<sup>115</sup> LTA, *supra* note 1, s 68(3).

<sup>116</sup> *Ibid*, s 69(1) and Conveyancing and Law of Property Act 1886 (2020 Rev Ed), ss 24(1)(a) and (3).

<sup>117</sup> LTA, *supra* note 1, s 75(1).

<sup>118</sup> *Ibid*, s 75(2).

<sup>119</sup> *Bebe*, *supra* note 5 at [52].

canons of statutory interpretation and in the process rendering s 160(2) otiose, as well as to ignore Parliament's intention to confer on s 160 the status of an overriding interest which has policy implications for land dealings in the Singapore Torrens system.

Alternatively, it is suggested that an amendment be made to s 160(2) to remove the "in possession" requirement therein so that protection under this provision can also be accorded to a registered mortgagee who is not in possession under the LTA and who does not fall foul of the vitiating circumstances specified in the provision. This will similarly apply to situations involving other dealings in land, for example, a transfer and a lease. However, until that is done, *Bebe's* approach should apply, and be confined, only to an LTA mortgage for the reasons ventilated above.

## V. CONCLUSION

The discussion above takes a principled approach in resolving the issues arising from the three loose ends on indefeasibility of title and interests under the LTA. The common thread which runs through the discussion is that the intention of Parliament as reflected in the statutory framework in the LTA must be respected and upheld unless the situation truly calls for an exception to be made. This will instil confidence and certainty in land dealings under the LTA. Failure to do so can lead to confusion in the law and cause injustice which should be avoided. It is not for the courts to do as they think fit unless this is made clear in the specific provision or statute. It is for Parliament to change the law, and until that is done, it is for the courts to interpret and apply correctly the law as it stands.