Taking it Personally: Ebb and Flow in the Torrens System's In Personam Exception to Indefeasibility

Lyria Bennett Moses[*] and Brendan Edgeworth[**]

Abstract

The so-called 'in personam exception to indefeasibility' continues to defy neat definition or conceptual precision, as evidenced by a wide range of judicial and academic formulations currently in play. This article seeks to retrace the debates with three principles in mind. First, a close understanding of the origins of the legislation indicates an inescapable 'traditionality': the legislation was always assumed to operate alongside traditional common law and equitable doctrines, wherever they were not explicitly proscribed. Second, focus on the 'exceptional' nature of in personam rights has the unfortunate tendency to circumscribe unnecessarily the operation of these doctrines. Third, a more defensible approach is to examine the measure of protection the Torrens statutes expressly and impliedly provide, and then to allow other legal and equitable principles to operate as normal. Finally, the article will briefly examine the emergence in the case law since the High Court's decision in *Hillpalm v Heaven's Door* of the category of in personam rights to address the issue of overriding statutes.

What hierarchy did Latin shore up, and what liberation comes or is coming in the wake of its seeming desuetude?[1]

I Introduction

Of all the categories of exception to indefeasibility under the Torrens system, the most conceptually imprecise and historically variable is surely the so-called 'in personam' exception. The very use of this Latin expression is wont to set off alarm

[*] Senior Lecturer, School of Law, University of New South Wales.

[**] Professor , School of Law, University of New South Wales. The authors would like to express their gratitude for the suggestions of the anonymous reviewers, delegates at the 10th Australasian Property Law Teachers Conference in Perth, September 2010, and colleagues at the University of New South Wales, and to acknowledge the research assistance of Lana Bank and Samuel Sathiakumar.

[1] Peter Goodrich, 'Distrust Quotations in Latin', (2003) 29 *Critical Inquiry* 193, 196. For a similar sentiment, but in another field of property law, see Sir Percy Winfield, *Winfield on Tort* (Sweet & Maxwell, 1st ed , 1937) 339, referring to the maxim '*cuius est solum*' as 'an unfortunate scrap of Latin'.

signals. Even in discussions of its long-established place in equity, leading commentators have bemoaned its capacity to confuse.[2] When transposed to the very different legal domain of land registration, this little phrase has greater potential to impede clarity, perhaps demonstrating 'more gravity of expression than profundity of analysis'.[3] And it gets worse with time: now, among the legal profession, where some grasp of Latin was once essential, even superficial knowledge of the long-dead language is fast disappearing.

It is far too late to go back to the conceptual drawing board. Established in what is now a long line of legal authority, the in personam exception has become a familiar part of the legal vernacular. That should not mean that we walk away from the attempt at clarification, and legal academics show few signs of doing so. One way to deal with the definitional problem has been to rename the in personam exception to indefeasibility. This approach has not yet provided a solution, since all such terms have been criticised as inappropriate. In the alternative expression 'personal equities', the term 'equities' ignores the possibility that actions at law will fall within the category. Further, the term personal, like the term 'in personam', ignores the extent to which the exception has proprietary implications. More recently, and radically, the notion that the in personam exception is an exception at all has been called into doubt.[4] This has led to another proposed change of name to the 'inter se rule'.[5]

One difficulty with the use of *any* name to describe the category of 'in personam claims' lies in its immanently negative focus. It encourages an examination of what Torrens statutes do not do, rather than focusing on the limits of what they actually do. The problem is deepened by the use of terminology such as 'indefeasibility' which, while useful in some contexts, can be misleading in others. In particular, the term 'indefeasibility' suggests a focus on the 'protection' afforded registered proprietors (suggesting some kind of impenetrable armour) rather than a careful examination of what precise range of rights are conferred on them.

Despite the many objections, the in personam exception, by whatever name, has remained a category that judges and academics have felt necessary both to define and to deploy. It remains a prominent section in most textbooks and casebooks, a module for law students, a topic for articles, and a keyword in many judgments. The aim of this article is to clarify the ambit of protection that a registered proprietor has and what types of action are maintainable against a registered proprietor. The *result* will be to map the general coordinates of the in personam exception, being whatever is outside the protection afforded a registered proprietor by Torrens legislation. The article focuses on three critical areas of

---

2 For one eloquent lament, see R P Meagher, J D Heydon, M J Leeming, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (Butterworths LexisNexis, 4th ed, 2002) 116–21.

3 Ibid 117.

4 Matthew Harding, '*Barnes v Addy* Claims and the Indefeasibility of Torrens Title' (2007) 31 *Melbourne University Law Review* 343; Robert Chambers, 'Indefeasible Title as a Bar to a Claim for Restitution' (1998) 6 *Restitution Law Review* 126; Tang Hang Wu, 'Beyond the Torrens Mirror: A Framework of the In Personam Exception to Indefeasibility' (2008) 32 *Melbourne University Law Review* 672, 679–81, 696–7; Kelvin F K Low, 'The Nature of Torrens Indefeasibility: Understanding the Limits of Personal Equities' (2009) 33 *Melbourne University Law Review* 205, 210.

5 Low, above n 4, 210.

contention: the confusion over what is 'personal' about in personam claims; the applicability of the in personam exception to legal claims; and finally the recent, growing use of the in personam exception in the context of other statutes (such as planning legislation). It further points to the key principles for clarifying some of the uncertainties in the unfolding case law. This exercise is intended to offer a better balance between the very *modern* concept of indefeasibility by registration, on the one hand, with the objectives of a highly *traditional* yet diverse range of legal and equitable doctrines on the other. The general conclusion that emerges is that the historic tendency to reify the in personam exception has generated many conceptual problems, and that a more nuanced description is necessary. As a preliminary step, it will be necessary to trace the category's historical lineage.

II In Personam Exception — A Brief Historical Account

The most fundamental problem surrounding the in personam exception is to be found in its juristic pedigree. For it has emerged not in the various legislative regimes establishing the Torrens system, which typically detail with great precision a finite list of exceptions to the indefeasible title conferred on the registered proprietor, but paradoxically, from the very body of common law and equitable doctrines that the relevant statutes are, in express terms, designed to sweep away. So, s 41(1) of the *Real Property Act 1900* (NSW) appears to render as nullities transactions, valid and enforceable under the general law, that fall short of registration. It provides that:

> No dealing, until registered in the manner provided by this Act, shall be effectual to pass any estate or interest in any land under the provisions of this Act, or to render such land liable as security for the payment of money …

Section 42(1) is expressed in complementary terms:

> Notwithstanding the existence in any other person of any estate or interest which but for this Act might be held to be paramount or to have priority, the registered proprietor for the time being of any estate or interest in land recorded in a folio of the Register shall, except in case of fraud, hold the same, subject to such other estates and interests and such entries, if any, as are recorded in that folio, but absolutely free from all other estates and interests that are not so recorded …

Taken together, the sections not only remain silent about the in personam exception to indefeasibility, but also appear to countenance the disappearance of estates and interests under the general law entirely. A similarly unqualified signal of radical rupture with the past is evident in the legislation of other states.[6] It is as if, in their zeal to bid farewell to the general law, legislatures failed to address how,

---

[6] In comparison with *Real Property Act 1900* (NSW) s 41, see *Land Title Act 1994* (Qld) s 181; *Real Property Act 1886* (SA) s 67; *Land Titles Act 1980* (Tas) s 49(1); *Transfer of Land Act 1958* (Vic) s 40(1); *Transfer of Land Act 1893* (WA) s 58; *Land Titles Act 1925* (ACT) s 57; *Land Title Act* (NT) s 184. In comparison with *Real Property Act 1900* (NSW), see *Land Title Act 1994* (Qld) s 184; *Real Property Act 1886* (SA) s 69 (but see 69 (b)); *Land Titles Act 1980* (Tas) s 40; *Transfer of Land Act 1958* (Vic) s 42(1); *Transfer of Land Act 1893* (WA) s 68; *Land Titles Act 1925* (ACT) s 58; *Land Title Act* (NT) s 188(1).

if at all, and to what extent, past doctrines might continue to have relevance under the new registration-based model.[7] To be sure, the legislation goes on to list a small number of precise exceptions to these general principles. But the meagre content of the list further confirms the intent of the first parts of the provisions: general law doctrines have but a minimal role to play in the new dispensation.

It has therefore been left to the judiciary to try to reconcile common law and equitable doctrines with the Torrens system, to attempt to allow a form of cohabitation of the past and future. But despite the bleak prospect for survival evident in the above provisions, the judges have succeeded, as a substantial body of case law reveals, to unearth a wide array of legal and equitable rules that qualify to cut down the protection that registration would otherwise confer. One way of understanding this exercise in judicial reasoning is by reference to the idea of the 'traditionality' of statutes. This expression captures the way in which statutes, even though expressed frequently, as the Torrens legislation is, as breaking with the past and introducing an entirely new conceptual and practical regime, cannot do so but by reference to that past. In doing so, they deploy terms, concepts and language that derive from and therefore continue to evoke the past. In this way, they are irreversibly embedded in deep, longstanding and stubbornly resistant traditions. So, Martin Krygier concludes that statutes:

> are situated in and deeply affected by contexts which they presuppose, from which they cannot escape, and which make it possible for them to have such effects as they do. Those contexts are highly traditional.[8]

The relevant 'tradition' is the vast corpus of legal and equitable principles and doctrines that preceded the enactment of Torrens legislation. It is this body of traditional legal material that courts have had to integrate, or more accurately, dovetail into a statutory regime that clearly presupposes it, without expressly recognising it.[9] The general interpretive exercise of the courts has had two dimensions: first, identification of which principles survive the transition to the new registration system; then mapping the sphere of enforceability of these rights against registered proprietors.

In doing so, courts have not in any way embarked on an exercise of judicial legislation. This is because the legislation itself, despite its formal language, contains frequent references to rights existing beyond the register. At many points, Torrens statutes make explicit acknowledgment of the existence of those rights. For example, the provisions relating to caveats and trusts would make no sense at all if the legal and equitable interests and the doctrines they derive from had ceased to exist. Insofar as the legislation at the very least implies or presupposes the common law and equitable doctrines to generate the broad spectrum of rights which the caveat system is devised to protect, the system can be properly described

---

7 Contrast the position in Queensland and South Australia where statutory provisions specifically address this lacuna. The Queensland provision is the most straightforward, excepting 'an equity arising from the act of a registered proprietor': *Land Title Act 1994* (Qld) s 185(1)(a). See also *Land Title Act 1994* (NT) s 189(1)(a), expressed in similar terms. South Australia has a cluster of provisions to the same effect: *Real Property Act 1886* (SA), ss 71(d)–(e); 249(1).

8 Martin Krygier, 'The Traditionality of Statutes' (1988) 1 *Ratio Juris* 20, 27.

9 As noted above, the Queensland and South Australian legislation is exceptional in this respect.

as an example of what Pamela O'Connor perceptively calls 'bijuralism'.[10] This term refers to the two different sources of legal norms that provide the sum of rules constituting the system as a whole. It has been the task, and a substantial task, for the judiciary to fit these two systems into a coherent and interlocking whole. This body of private law principles is not simply a cluster of rules unsuited to a registration system. On the contrary, it expresses the fundamental elements of justice and fair dealing in relation to interpersonal transactions between citizens.[11] Legislation, even the Torrens system, should not be interpreted to exclude them in the absence of a clear intention to do so, but rather to align the two sets of policies in an optimal manner. Put another way, judges should seek to find comity between the systems, rather than the replacement of one with another.

The leading authority on the first aspect of this exercise is *Barry v Heider*.[12] The case concerned the enforceability of an unregistered unpaid vendor's lien. No such equitable right is to be found recognised in the interstices of the *Real Property Act 1900* (NSW). Nonetheless, the High Court held that references to general law principles are peppered throughout the Act, as evidenced in provisions relating to contracts, trusts and interests to be protected by caveats. It would simply make no sense, and indeed no statutory sense, for the legislation to be read as consigning such rights to history. In the words of Griffith CJ, analysing the *Real Property Act 1900*: 'Part IX of the Act deals with trusts … This is, in my opinion, an express recognition of the equitable rights or interests declared'. He added that:

> Section 72 provides that any person 'claiming any estate or interest' in land under the Act 'under any registered instrument' may be caveat forbid the registration of any interest affecting such land, estate or interest. This provision expressly recognizes that an unregistered instrument may create a 'claim' cognizable by a court of justice …[13]

The second interpretive task for the judges in the face of this lack of legislative clarity has been to trace the enforceability of those legal and equitable rights originating in one antecedent jural order — common law title — on its Torrens successor. This exercise has involved delineating the extent to which the former rights pare back the indefeasibility that the registered proprietor would otherwise enjoy. Descriptions of their scope have evolved over time. Early cases often set out lists of circumstances in which a plaintiff could succeed against a registered proprietor. For example, *Boyd v Mayor etc of Wellington* referred to:

> [t]he power of the court to enforce trusts, express or implied, and performance of contracts upon which title has been obtained, or to rectify mistakes in carrying the contract into effect as between the parties to it...[14]

Importantly, this list clearly acknowledges both equitable and common law rights over land. This broad approach was echoed in the most widely recognised

---

10 Pamela O'Connor, 'Deferred and Immediate Indefeasibility: Bijuralism in Registered Land Systems' (2009) 13 *Edinburgh Law Review* 194, 196.

11 See generally, Ernest J Weinrib, *The Idea of Private Law* (Harvard University Press, 1995); James Gordley, *Foundations of Private Law* (Oxford University Press, 2006).

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

13 Ibid 206.

14 *Boyd v Mayor etc of Wellington* [1924] NZLR 1174, 1223.

early authority for the expression 'in personam' in the leading case of *Frazer v Walker*, where the list of exceptions to indefeasibility included 'the right of a plaintiff to bring against a registered proprietor a claim in personam, founded in law or in equity, for such relief as a court acting in personam may grant.'[15] Later, in *Breskvar v Wall*, Barwick CJ recognised the same category, but significantly referred to it as the 'personal equities' exception, thus directing further elaboration down a somewhat narrower path.[16] In particular, defined in exclusively equitable terms, it glosses over the class of common law rights such as those originating in contracts. The scope of the exception evokes all of the problems that have beset the maxim that 'equity acts in personam', described in one authoritative work as 'historically of the greatest importance, theoretically the most elusive and practically of the most dubious significance, [and] is variously employed'.[17]

There have been many different proposals advanced by commentators for what constitutes an in personam claim, personal equity or whatever term is used, derived from the voluminous case law in which in personam rights have been found to exist. For example, Diane Skapinker offered the following summary:

> (a) The mere fact that the instrument by which a person becomes registered was forged does not of itself give rise to a personal equity ...
>
> (b) It must be shown that the conduct of the registered proprietor of land (or of an interest in land) in becoming registered or after registration makes it unconscionable for that person's title to prevail over a prior equitable interest or equity.
>
> (c) The unconscionable conduct must be engaged in by the registered prioprietor or an agent on behalf of the registered proprietor ...
>
> (d) In the absence of unconscionable conduct, mere neglect or absence of inquiry by the registered proprietor in becoming registered is not sufficient to constitute a personal equity against the registered proprietor.
>
> (e) The person with the prior equity or equitable interest must have a known legal or equitable cause of action against the registered proprietor (including the right to have the contract set aside for mistake, 'non est factum', breach of trust, under a statute or in tort.[18]

Since Skapinker's article, many of these criteria have been challenged. The requirement of 'conduct of the registered proprietor' would prevent resulting trusts operating over Torrens land, as no conduct by the registered proprietor is necessary to generate them.[19] The requirement of 'unconscionable conduct' has been criticised on several fronts.[20] Where it is an element of a cause of action, its proof is clearly essential. Otherwise, it is difficult to justify as an additional requirement.

---

15 *Frazer v Walker* [1967] 1 AC 569, 585.

16 *Breskvar v Wall* (1971) 126 CLR 376, 385 (Barwick CJ).

17 Meagher, Heydon and Leeming, above n 2, 116. The difficult relationship between the in personam exception and the adjective 'personal' is discussed in the following section.

18 Diane Skapinker, 'Equitable Interests, Mere Equities, "Personal" Equities and "Personal Equities" – Distinctions with a Difference' (1994) 68 *Australian Law Journal* 593, 597–8.

19 *Loo Chay Sit v Estate of Loo Chay Loo* [2009] SGCA 47, [14].

20 See Peter Butt, *Land Law* (Thomson Reuters, 6th ed, 2010) 822.

Judges and commentators who treat unconscionability as necessary for an in personam claim generally use it in a way that means it operates effectively as a conclusion: the court or commentator simply decides that it would be unconscionable to retain an interest despite the existence of a legal or equitable rule under which it ought to be lost or diminished.[21] In particular, a requirement of unconscionability would be an additional, and completely foreign, requirement for *legal* causes of action that are recognised as falling within the in personam exception, and which will be examined in detail below. The view that an additional requirement for unconscionability is unnecessary is supported by a growing body of cases.[22] While specific requirements, such as whether the claim need involve an act by a registered proprietor[23] or unconscionability by the registered proprietor,[24] are disputed, it is often assumed that some description of what constitutes an in personam claim will be possible.

Two recent analyses of the in personam exception, by Tang Hang Wu and Kelvin Low, depart from Skapinker's list. Tang would limit the in personam category to causes of action consistent with the principle of indefeasibility as well as causes of action based on a policy rationale of overriding importance. Like Skapinker, he would also limit the exception to known claims in law or equity (and novel causes of action supported by precedent) arising from personal conduct of the registered proprietor.[25] However, he would abandon the unconscionability requirement.

Kelvin Low criticises Tang's analysis for treating Torrens statutes as if they were judge-made law, with judges able to decide whether the statute or a judge-made rule is of greater import.[26] Instead, he argues that the inter se rule (in his terminology) allows for claims not based on prior title to be brought against the registered proprietor. He argues that, in a Torrens context, indefeasibility does not protect a registered proprietor from categories of remedies but rather from a category of claims.[27]

Low's article contains many penetrating insights, but there remain many points which are open to question, and from which the analysis here departs. While we agree with Low that the in personam exception is not truly an exception, we disagree with how he defines those claims that fall outside Torrens protections. In

---

21 Chambers, above n 4.

22 *McGrath v Campbell* (2006) 68 NSWLR 229, 249 [98]; *Grosvenor Mortgage Management Pty Ltd v Younan* (Unreported, Supreme Court of New South Wales, Young J, 23 August 1990); *Harris v Smith* [2008] NSWSC 545 (6 June 2008) [55]; *White v Tomasel* [2004] QCA 89 (2 April 2004) [74] (McMurdo J,with whom Williams JA agreed: [60]).

23 For: Mary-Anne Hughson, Marcia Neave and Pamela O'Connor, 'Reflections on the Mirror of Title: Resolving the Conflict between Purchasers and Prior Interest Holders' (1997) 21 *Melbourne University Law Review* 460; Against: Low, above n 4. This requirement is also evident from *Bahr v Nicolay (No 2)* (1988) 164 CLR 604, 613, 638. See also B A Helmore, *The Law of Real Property in NSW* (Law Book, 2nd ed, 1966) 364.

24 See below, pp 123–4.

25 Tang, above n 4, 680–1, 696–7.

26 Low, above n 4, 223.

27 This point is reiterated in Kelvin F K Low, 'Of Horses and Carts: Theories of Indefeasibility and Category Errors in the Torrens System' in Elise Bant and Matthew Harding (eds), *Exploring Private Law* (Cambridge University Press, 2010) 446, 455–6.

particular, we find the concept of 'indefeasibility' less helpful than the words of the various statutes (which Low concedes are important) in defining what claims fall outside Torrens protections. As a result, while we agree that a registered proprietor is protected from types of claims rather than types of remedies, we offer a different 'test' for defining the types of claims against which a registered proprietor is protected. Also, it is far from clear what it means for a claim to be 'based on' prior title. Low suggests that it includes all claims where prior title is protected (directly or indirectly). On this basis, Low argues that knowing receipt is excluded from the inter se rule but that mistake falls within it. However, since both 'involve' prior title, the phrase 'based on' prior title is unhelpful. In line with Low's argument, perhaps he means to exclude claims whose rationale is the protection of prior title, whether direct or oblique. But even this formula seems incapable of covering all forms of in personam rights. For instance, it is not clear how a prescriptive easement fits in those jurisdictions that still allow them to apply. Also, it is difficult to read into provisions, such as the *Real Property Act 1900* (NSW) s 42, the word 'prior', given that the statute itself contains no such language. This is an acute problem for an analysis that seeks to give primacy to parliamentary sovereignty in any analysis of the ambit of in personam rights. By contrast, we would argue that the entirely legitimate and commendable respect for parliamentary sovereignty is far better achieved by means of balancing the legislative scheme with the traditional common law and equitable doctrines it was assumed would continue to apply under the Torrens system, and taking seriously the words of the statutes themselves.

There are two notable themes in the literature from which we depart. First, most commentators attempt to describe the in personam exception itself (by whatever name) rather than focussing their description on what protection is offered by Torrens statutes. The description is thus framed negatively, being of claims outside the protection of statute. We focus instead on the protection provided by the statute. Second, there is a tendency to assume that the in personam exception should be confined within narrow limits.[28] This tendency is accentuated by the reference to concepts such as 'indefeasibility' (which implicitly needs to be enhanced) and 'in personam exception' (which implicitly needs to be constrained). From the beginnings of the jurisprudence around the in personam exception, there has been a tendency to constrict its development, both within and beyond Australia's borders. For example, the Singapore Court of Appeal has recently stated that 'courts should be slow to engraft onto the LTA personal equities that are not referable directly or indirectly to the exceptions in [the Singapore legislation].'[29] In contrast to both trends, we argue below that Torrens statutes should be interpreted according to the language used and that, accordingly, registered proprietors are only protected from *some* types of claim that are expressly or impliedly excluded by the wording of the legislation. Registered proprietors are protected from some claims as a result of the wording in *Real*

---

[28] For example, Lynden Griggs, 'In Personam, *Garcia v NAB* and the Torrens System — Are they Reconcilable?' (2001) 1 *Queensland University of Technology Law and Justice Journal* 76.

[29] *United Overseas Bank v Bebe bte Mohammad* [2006] 4 SLR 884, [91].

Property Act 1900 (NSW) s 42 (interpreted in light of s 43) as well as s 45,[30] and their equivalents in other jurisdictions. In particular, s 43 and equivalents ensure that receipt with notice of an unregistered interest does not render a registered proprietor liable for equitable fraud. In all other respects, equitable *and common law* doctrines should be enforced fully against registered proprietors whose conduct or other circumstances bring them within those doctrines. To balance the bijural origins of the legal principles in this way would be consistent with the legislative intent (and therefore parliamentary sovereignty), but it would also preserve the important policies which those doctrines advance: the imposing of broad standards of fair dealing in interpersonal and commercial affairs.

III Personal versus Proprietary

Due to expressions such as the 'in personam exception' and 'personal equity', the focus in the literature has not been on the wording of Torrens statutes but rather on the exercise of trying to find the essential nature of the exception. In turn, the tendency has been to restrict analysis to cases involving 'personal' conduct, actions, claims and remedies. As we explain below, an understanding of what is 'personal' about 'personal equities' is revealed by looking not to the exception, but to the words of the statute.

Since it was declared in *Frazer v Walker* that a plaintiff could bring 'against a registered proprietor a claim in personam, founded in law or in equity, for such relief as a court acting in personam may grant',[31] the meaning of the term 'in personam' has been subject to different interpretations. Similar difficulties are encountered with the alternative phrase 'personal equities'.[32] The link between the category (with either name) and the term 'personal' has been subject to vastly different interpretations. At different extremes, the category has been described by some as 'non-proprietary in nature',[33] while others have suggested that the category includes only claims that result in an entry in the register.[34] Most recent articles suggest that the category includes claims with both personal and proprietary effects.[35]

No doubt, confusion stems from the many possible meanings of 'personal', including:

1. 'personal' in the sense of 'based on personal conduct';[36]

---

30 The interpretation of *Real Property Act 1900* (NSW) s 45 and its equivalents is beyond the scope of this article, but a worthy topic for analysis.

31 *Frazer v Walker* [1967] 1 AC 569, 585.

32 *Breskvar v Wall* (1971) 126 CLR 376, 385 (Barwick CJ).

33 *CN & NA Davies Ltd v Laughton* [1997] 3 NZLR 705, 712; Peter Butt, *Land Law* (Law Book, 2nd ed 1988) 528 (repeated in the 3rd and 4th eds; the current (6th) edition similarly refers to 'personal claims').

34 S Robinson, *Transfer of Land in Victoria* (Law Book, 1979) ch 3; Barry Crown, 'Whither Torrens Title in Singapore' (2010) 22 *Singapore Academy of Law Journal* 9, 30.

35 Tang, above n 4; Low, above n 4; Robert Chambers, *An Introduction to Property Law in Australia* (2nd ed, 2008) 465; Elizabeth Cooke and Pamela O'Connor, 'Purchaser Liability to Third Parties in the English Land Registration System: a Comparative Perspective' (2004) 120 *Law Quarterly Review* 640, 649.

36 Helmore, above n 234, 364.

2. 'personal' in the sense of 'arises out of interaction between the plaintiff and the registered proprietor';[37]

3. 'personal' remedies (such as damages) as opposed to remedies with proprietary effect (including orders for specific performance, injunctions and remedial constructive trusts);

4. 'personal' rights as opposed to rights operating in rem.[38] Kelvin Low makes the point that rights can be in personam (operating against one individual) and result in remedies with proprietary effect.[39]

To decide whether (and in what sense) the in personam category is 'personal', it is helpful to look at the Torrens statutes themselves. Taking New South Wales as an example, the introductory words in the *Real Property Act 1900* (NSW) s 42, transcribed above, identify who owns an estate or interest in land and subject to which estates or interests in land. In other words, it is about property *rights*. That does not mean that s 42 has nothing to say about awards of damages. As Low points out, the ownership (or lack thereof) of an interest or estate in land is relevant to many damages claims, including trespass.[40] A person who had previously had registered title, but lost it due to registration of a forged instrument, cannot seek damages for trespass against the subsequent non-fraudulent registered proprietor. This is because Australian Torrens statutes have been interpreted as providing for so-called 'immediate indefeasibility': the new registered proprietor is not trespassing when entering the land because the new registered proprietor has a fee simple in the land.[41]

The difficult relationship between the in personam exception and the concept of 'personal' stems from the fact that different commentators exclude certain types of claims from the in personam exception for different reasons. In a sense, the in personam exception is an 'in between' category. Some causes of action are outside the in personam category because they cannot be brought against a registered proprietor. Other causes of action are assumed to be outside the in personam category even though they can be brought against a registered proprietor. For example, a registered proprietor can be sued as a result of occupier's liability or for intentional harm, such as battery. No-one would describe such claims as exceptions to indefeasibility — Torrens statutes have nothing whatsoever to say about them. Torrens legislation creates a register that sets out who has what estate or interest in land. While that might be a relevant consideration for some causes of action (trespass, for instance), it is not relevant for others. Being a registered proprietor does not protect a person from legal or equitable claims generally and it is never suggested this has something to do with the in personam exception.

---

37 Low, above n 4, 208.

38 Robinson, above n 34, 33. See generally Wesley Newcomb Hohfeld, 'Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1916–17) 26 *Yale Law Journal* 710, 718.

39 See also Low, above n 278, 457–8.

40 Low, above n 4.

41 *Frazer v Walker* [1967] 1 AC 569; *Breskvar v Wall* (1971) 126 CLR 376. This accords with the interpretation in Crown, above n 34, 31.

The in personam exception is thus usually defined in a way that suggests there are three categories of causes of action: those prevented by indefeasibility; those within the in personam exception; and those that are completely independent of Torrens. Discussion of indefeasibility and in personam claims tends to arise in the context of remedies that operate in rem or ad rem, meaning that they involve an order that a registered proprietor deal with their interest in land in a particular way.[42] On occasion, the in personam exception is considered relevant to situations where the remedy is personal but operates on a restitutionary principle, so that a registered proprietor is left with no 'net' benefit from their registered estate or interest.

There is, however, no practical reason for differentiating between claims permissible because of the in personam exception and claims permissible because they are independent of Torrens. Certainly, *Frazer v Walker*[43] (which never suggested it was creating a new category) can be treated as referring to claims that, because they involved personal rights rather than interests in land, were beyond the scope of Torrens legislation. If it is helpful to create a category around such exceptions, that category should include *all* causes of action against a registered proprietor beyond the scope of indefeasibility, not merely those that have made a narrow escape. It is argued here that the *Real Property Act 1900* (NSW) s 42 and its equivalents elsewhere simply prevent the pleading, against a registered proprietor, of an estate or interest in land except in cases of fraud and except in cases within the express exceptions (short-term leases, for instance). Section 42 does this whether the plaintiff seeks a personal or proprietary remedy. It does not, however, prevent the assertion of *personal rights* against a registered proprietor, whether those personal rights do or do not involve Torrens land. It will also be contended that, in light of this understanding, cases falling within the in personam exception are precisely those that fall outside the scope of s 42. In other words, if one were to define an in personam category (being those claims that cannot be made against a registered proprietor), they would be personal in the fourth sense above, although not all personal claims would fall within the category as some are expressly excluded in other provisions.

This approach, while consistent with the outcome of most in personam cases (as demonstrated below) is inconsistent with some judicial rhetoric. For example, the decision of Needham J in *State Bank of New South Wales v Berowra Waters Holdings Pty Ltd* suggests that there are some 'personal equities' that fall within prohibitions in *Real Property Act 1900* (NSW) s 42 and thus cannot be maintained, creating a blurring of categories.[44] It is also inconsistent with some judicial and academic descriptions of the in personam category as described in the

---

42 Roy Goode, 'Property and Unjust Enrichment' in Andrew Burrows (ed), *Essays on the Law of Restitution* (Clarendon, 1991) 215, 223. Birks denies the existence of rights *ad rem*, although he does not specifically address the Torrens context: Peter Birks, *Unjust Enrichment* (Oxford University Press, 2nd ed, 2005).

43 [1967] 1 AC 569.

44 See *State Bank of New South Wales v Berowra Waters Holdings Pty Ltd* [1986] 4 NSWLR 398, 403: 'But, assuming the existence of a personal equity against the second defendant arising out of the mortgage and its discharge, the reasons given in *Frazer v Walker* show that no action on a personal equity which falls within the prohibitions of ss 42 and 124 may be maintained.'

previous section. However, it is consistent with the outcome of cases concerning trusts, contract, tort, knowing receipt and unconscionable transactions, as will be demonstrated below. It is also consistent with the various common law sources of rights against the registered proprietor to be examined in the following section.

Trusts and Contracts

The recognition of express trusts and contracts demonstrates courts' willingness to grant remedies with proprietary effect for land under the Torrens system. A registered proprietor that declares in writing that it holds its interest on trust for another holds subject to the equitable interest of the beneficiary and the terms of the trust. Similarly, a registered proprietor who enters into a contract of sale can be made subject to an order for specific performance, requiring execution of a transfer to a purchaser on receipt of payment of the purchase price.

Yet, while express trusts and contracts provide examples of direct proprietary effects, the beneficiary or purchaser does not need to rely on any proprietary right in a claim against the registered proprietor. A person who enters into a contract of sale with a registered proprietor has rights in contract. The purchaser can sue a vendor in default for damages for breach of contract. The purchaser can also seek an order for specific performance that, if granted, will require the vendor to sign a transfer and hand over the certificate of title, which will in turn allow the purchaser to be registered as proprietor of what had previously been the vendor's interest in land. It has thus been observed that the purchaser's rights under a contract of sale have proprietary effects. But a purchaser bringing proceedings for damages or specific performance need not plead a proprietary interest in land, only the contract. Importantly, the rights of the purchaser under the contract are common law rights, although equitable remedies may be available in equity's concurrent jurisdiction. The common law dimension of the in personam category will be examined further below.[45]

As is the case for a purchaser under a contract of sale, a beneficiary of an express trust does not need to plead a proprietary interest in trust property. A registered proprietor who declares a trust in writing is bound by the terms of that trust. The beneficiary can obtain remedies against a trustee registered proprietor who breaches the trust. The rights of a beneficiary of a trust against third parties operate in rem and 'compete' in priority disputes. But, in proceedings between a beneficiary and an express trustee for breach of trust, the beneficiary's rights generally operate in personam.[46] The in rem rights of a beneficiary, including rights under *Saunders v Vautier*,[47] are the *result* of the fact that a beneficiary has personal rights against a trustee; they are not elements of a claim that the trust exists.

Thus, in the case of express trusts and contracts for sale, the purchaser/beneficiary does not need to rely directly on an interest in land.

---

45 See below, pp 124–30.

46 R C Nolan, 'Equitable Property' (2006) 122 *Law Quarterly Review* 232; Low, above n 4, 214. See also *Ciaglia v Ciaglia* [2010] NSWSC 341 (28 April 2010) [114].

47 *Saunders v Vautier* (1841) 41 ER 482. See also *CPT Custodian Pty Ltd v Commissioner of State Revenue (Vic)* (2005) 224 CLR 98.

Ownership of an equitable interest in land may be a consequence of each claim,[48] but it is not an element of either claim.[49] The plaintiff need only prove the existence of a contract or trust respectively. As recently recognised in relation to options,[50] these give rise to personal as well as proprietary rights.

Beneficiaries of resulting and constructive trusts are entitled to call for transfer of Torrens title to them against the original resulting or constructive trustee. This is because those trusts are imposed by operation of law based on proof of facts *other than* an existing proprietary interest in the land.[51] For example, purchase money resulting trusts rely on proof that the purchase of the property was funded by a person other than the registered proprietor in the absence of an intention (actual or presumed) to benefit the registered proprietor. A constructive trust may arise on the basis of common intention to grant an interest in land[52] or on failure of a joint endeavour where one party made contributions without the intention of benefiting the other on failure of the endeavour.[53] However, resulting and constructive trusts would not ordinarily be enforceable against a registered transferee from the original resulting or constructive trustee. This is because, unless the new registered proprietor becomes bound by its own conduct,[54] the enforcement of the trust against that subsequent registered proprietor necessarily involves reliance on the plaintiff's in rem rights. That is, it requires a plaintiff to assert directly that it had an interest in the land which survived the transfer, contrary to *Real Property Act 1900* (NSW) s 42.

The law of contract and trust thus survives the enactment of Torrens statutes. A registered proprietor is entitled to hold its estate or interest in land without having an unregistered estate or interest asserted against it. But a registered proprietor is subject to the law — a registered proprietor can be sued for breach of contract and for breach of trust provided that the elements of such claims are made out. Where appropriate, proprietary remedies may be awarded. However, a subsequent registered proprietor is protected against claims in contract or trust that could have been made against an earlier registered proprietor, as a plaintiff could only succeed in such a claim by relying on proprietary rather than personal rights, contrary to s 42.

Tort

Tort has been described as an in personam claim.[55] This is true in the sense that Torrens legislation has nothing to say about most actions in tort for damages, as can be seen from comments in *Pyramid Building Society (in liq) v Scorpion Hotels*

---

48 In the case of a contract for sale, see *Bunny Industries Ltd v FSW Enterprises Pty Ltd* [1982] Qd R 712.
49 Nolan, above n 466; Low, above n 4, 214–15.
50 *Bondi Beach Astra Retirement Village Pty Ltd v Gora* [2011] NSWCA 396 (15 December 2011) [253] (Campbell JA).
51 Robert Chambers, *Resulting Trusts* (Clarendon, 1997) 3.
52 *Oglivie v Ryan* [1976] 2 NSWLR 504.
53 *Baumgartner v Baumgartner* (1987) 164 CLR 137
54 As in *Bahr v Nicolay (No 2)* (1988) 164 CLR 604.
55 Skapinker, above n 188, 598.

Pty Ltd.[56] In that case, it was submitted that Scorpion had a claim in negligence against Pyramid and that this gave rise to a personal equity to set aside a mortgage. As Hayne JA pointed out,[57] an action in negligence (if successful) will generally yield damages rather than a right to set aside a mortgage.[58] Given that negligence generally involves an assertion that a defendant is *personally* liable for damages, it is difficult to see the relevance of Torrens statutes at all. Negligence does not equate to statutory fraud,[59] so a negligent registered proprietor will obtain an indefeasible interest or estate in land. However, provided the elements of negligence are made out, and it may be difficult to prove the existence of a duty of care,[60] damages should follow.

This is arguably contrary to some judicial statements. For example, it has been said that 'neglect' (without unconscionability) does not give rise to an in personam claim against a registered proprietor.[61] However, it is difficult to see why, if such 'neglect' were to involve breach of a duty of care, negligence law should be excluded. Section 42 bars assertions of unregistered estates and interests in land, but does not protect a registered proprietor from the consequences of breaching its personal obligations to others.

Of course, some torts do involve an assertion that the plaintiff has an estate or interest in land and/or that the defendant does not have such an interest. Trespass is an obvious example. As explained above, a former registered proprietor having lost registration due to forgery cannot sue the incoming registered proprietor in trespass. This is best understood not as a limitation of the in personam category, but as a straightforward application of *Real Property Act 1900* (NSW) s 42. An action in trespass against a registered proprietor implicitly requires an assertion that the registered proprietor does not have a fee simple in the land; s 42 (as interpreted by the courts) makes such an assertion impossible.

The tort most commonly referred to in the context of the in personam category is deceit. Deceit is often offered as an example of a legal cause of action within the in personam category.[62] But ownership of property (past or present) is not an element of the tort of deceit, although past ownership may be a relevant fact in a particular claim. An action in deceit is based on the making of statements known by their maker to be false or with recklessness as to their truth or falsity.[63] It is thus difficult to see how s 42 can have anything to say about an action in deceit. As argued above, s 42 only prevents assertions of an estate or interest in land against a registered proprietor, not necessarily claims involving proprietary remedies. The notion of restitution for a tort such as deceit, sometimes

---

56 [1998] 1 VR 188.

57 Ibid 195.

58 See also *Reading v Commonwealth Bank of Australia* [2003] NSWSC 686 (29 July 2003) [44].

59 *Russo v Bendigo Bank* [1999] 3 VR 376; *Clarey v Thomson* [2000] VSC 400 (4 October 2000).

60 See, eg, *Grgic v Australian and New Zealand Banking Group Ltd* (1994) 33 NSWLR 202, 223–4 ('*Grgic*').

61 *Vassos v State Bank of South Australia* [1993] 2 VR 316, 333; *Vella v Permanent Mortgages Pty Ltd* (2008) 13 BPR 25,343, 25,384 (citing *Woodman & Nettle, the Torrens System in New South Wales*); *Grgic* (1994) 33 NSWLR 202, 217–18.

62 See, eg, *Garofano v Reliance Finance Corporation Pty Ltd* (1992) 5 BPR 11,941.

63 Rosalie Balkin and Jim Davis, *The Law of Torts* (LexisNexis Butterworths, 3rd ed, 2004) 723–9.

(problematically)[64] described as 'waiver of tort', is controversial.[65] Leaving aside whether restitution would be granted, and whether proprietary restitution would be granted, the question remains whether s 42 would have anything to say about such a remedy. According to the above analysis, we believe the answer is 'no', since deceit does not require the plaintiff to allege a current proprietary interest in the land (or the defendant's lack of such interest) contrary to s 42.

Knowing Receipt

Another recent example of courts reading down common law and equitable obligations in the context of the Torrens system is in the case of 'knowing receipt'. A common starting point for the liability of a person who receives property transferred in breach of trust is the statement in *Barnes v Addy*[66] that agents receiving trust property may become constructive trustees where:

> those agents receive and become chargeable with some part of the trust property [first limb/knowing receipt], or …they assist with knowledge in a dishonest and fraudulent design on the part of the trustees [second limb/knowing assistance].[67]

Under the first limb in *Barnes v Addy*, a person receiving property for their own use and benefit, transferred in breach of trust (or probably fiduciary duty),[68] with 'knowledge' of the breach, is liable to the beneficiaries. Although there is debate on this, knowledge likely corresponds to the first four limbs of the *Baden*[69] test.[70] Liability for knowing receipt is personal and need not involve a proprietary remedy (although a remedial constructive charge or trust may be available in some circumstances).[71]

Following *Farah Constructions Pty Ltd v Say-Dee Pty Ltd*,[72] knowing receipt in Australia is not based on unjust enrichment but rather operates as an equitable wrong. Historically, knowing receipt was generally alleged by a plaintiff wishing to recover from a recipient who had parted with or dissipated the trust

---

64 Ibid 841.

65 Andrew Burrows, *Remedies for Torts and Breach of Contract* (Oxford University Press, 3rd ed 2004) 393–4.

66 (1874) LR 9 Ch App 244.

67 Ibid 251–2.

68 The High Court did not express an opinion on this extension of the rule in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, 151 [113], although it has been suggested that the High Court's ambivalence was limited to cases involving a fiduciary *other than* a director of a company: *Kalls Enterprises Pty Ltd (in liq) v Baloglow* (2007) 63 ACSR 557.

69 *Baden, Delvaux and Leuit v Societe General pour Favouriser le Developpement du Commerce et de l'Industrie en France SA* [1983] BCLC 325.

70 *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89; *Kalls Enterprise Pty Ltd (in liq) v Baloglow* [2007] NSWCA 191; *Grimaldi v Chameleon Mining NL* (2012) 200 FCR 296, [268]–[270]. See also C E P Val Haynes, 'The Stranger as Constructive Trustee — Recent Developments in Knowing Assistance and Knowing Receipt Liability' in W D Duncan (ed), *Commercial and Property Law* (Federation Press, 1991) 72, 74–5; Charles Harpum, 'The Stranger as Constructive Trustee (Part I)' (1986) 102 *Law Quarterly Review* 114, 122.

71 *Robins v Incentive Dynamics Pty Ltd (in liq)* (2003) 21 ACLC 1030 [71]–[78]; Harding, above n 4.

72 (2007) 230 CLR 89.

property. Where trust property remained in the hands of the defendant recipient, the plaintiff did not need (absent Torrens) to establish the relatively high degree of knowledge for knowing receipt; provided the defendant had actual or constructive notice, it would take subject to the plaintiff's equitable claim. Knowing receipt ensured that a recipient who knew of the plaintiff beneficiary's interest, and nevertheless dissipated the trust property, would be personally liable.[73] Given this context, it is possible to characterise the wrong, not as the receipt (over which the defendant may have had no control), but rather as the inconsistent dealing.[74] Where a defendant's receipt involved some conduct by the defendant, then the receipt may itself be an inconsistent dealing, and hence a wrong.

It has been held by the High Court in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd*[75] that an action in knowing receipt is not available against a registered proprietor who becomes registered as a result of breach of trust or fiduciary duty. In this, the Court followed the reasoning of Tadgell JA in *Macquarie Bank Ltd v Sixty-Fourth Throne Pty Ltd*.[76] Tadgell JA held that a person could not 'receive trust property' by becoming the registered proprietor of a mortgage over Torrens land. Thus his argument was primarily not that knowing receipt cannot be an in personam exception to indefeasibility, but that the elements of knowing receipt can never be satisfied in a Torrens context. His conclusion was based on the fact that, except in the case of fraud, a registered proprietor gains title from the act of registration, free from pre-existing unregistered interests.[77] At the moment of registration, the interest acquired by the registered proprietor cannot be described as 'trust property.' In *Macquarie Bank*, a mortgage over Torrens land held in trust was forged by a person with no authority to deal with the land. The mortgagee received nothing when the forged mortgage was handed to it, but gained an interest in the land on registration of the forged mortgage by virtue of the principle of immediate indefeasibility.[78] At the same moment, as registered mortgagee, it was protected from all outstanding equitable interests in the property. At no point, therefore, did the mortgagee have an interest in the land that could be described as 'trust property'. The defrauded beneficiaries retained an equitable interest in the fee simple, but held this interest subject to the mortgage.

Low suggests that this analysis is based on the assumption that registration involves a surrender of title and re-grant. But Tadgell JA's logic does not require such an assumption. If, as suggested above, knowing receipt is really about inconsistent dealing with trust property, it is the fact that a new registered proprietor holds free from unregistered estates and interests that prevents a claim in

---

73 *Re Montagu's Settlement Trusts* [1987] Ch 264; Craig Rotherham, *Proprietary Remedies in Context* (Hart, 2002) 23; J D Heydon and M J Leeming, *Jacobs' Law of Trusts in Australia* (LexisNexis Butterworths, 7th ed, 2006) 259 [1304].

74 Susan Barkehall Thomas, 'Knowing Receipt and Knowing Assistance: Where Do We Stand?' (1997) *University of New South Wales Law Journal* 1, 2. Cf Harpum, above n 70, 290; M Cope, *Constructive Trusts* (Law Book, 1992) 386, 389, 406, 409.

75 (2007) 230 CLR 89.

76 [1998] 3 VR 133.

77 See generally *Mayer v Coe* [1968] 2 NSWR 747, 754 (Street J); *Commonwealth v State of New South Wales* (1918) 25 CLR 325, 342 (Isaacs and Rich JJ); *Hemmes Hermitage v Abdurahman* (1991) 22 NSWLR 343, 344–5 (Kirby P).

78 *Macquarie Bank Ltd v Sixty-Fourth Throne Pty Ltd* [1998] 3 VR 133, 156–7.

knowing receipt. This fact does not rely on there being a surrender of title and re-grant but rather arises from the language of *Real Property Act 1900* (NSW) s 42. When all land was old system, any recipient that was not a bona fide purchaser for value without notice was a trustee of the property. A claim in knowing receipt was made where the property had dissipated (or lost value) as a result of the recipient's conduct after 'knowledge' of facts making them a trustee. In a Torrens context, it would be inappropriate to apply a rule that effectively assumes that the registered proprietor holds subject to a prior equitable interest. Thus, knowing receipt based on the act of registration as 'receipt' is not possible because it would require the plaintiff to prove that the plaintiff retains an equitable interest after registration, something s 42 specifically prevents. As one of us has argued elsewhere,[79] this ought not to mean that a registered proprietor is protected (under s 42) from liability for knowing receipt based on 'receipt' other than the act of registration (for example, receipt of an interest pursuant to a valid contract of sale or a valid transfer and certificate of title). If receipt with knowledge occurs prior to registration, the registration itself could be an inconsistent dealing generating liability in knowing receipt. Such a possibility was discussed in the Privy Council case of *Arthur v Attorney General of the Turks & Caicos Islands*, although the Court did not need to reach a final conclusion.[80] Its viability remains an open question.[81]

Unconscionable Transactions and Related Doctrines

There are several equitable doctrines whereby one party seeks to avoid a transaction based on the conduct of the other party. One example is unconscionable dealing, where an equity will arise where one party to a bargain was at a special disadvantage and the other party unconscientiously takes advantage of that disadvantage.[82] An equity may also arise where a transaction is tainted by 'undue influence', whether actual or presumed, as a result of a special relationship of influence.[83] There are also narrowly crafted doctrines, such as that stemming from *Garcia v National Bank of Australia*,[84] where a volunteer surety[85] is the wife[86] of the debtor and is mistaken about the purport and effect of a transaction and where the creditor can be taken to

---

79 Lyria Bennett Moses, 'Recipient Liability and Torrens Title' (2006) 1 *Journal of Equity* 135.

80 [2012] UKPC 30.

81 Matthew Conaglen and Amy Goymour, 'Knowing Receipt and Registered Land' in Charles Mitchell (ed), *Constructive and Resulting Trusts* (Hart, 2010) 159.

82 *Blomley v Ryan* (1956) 99 CLR 362; *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447.

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

84 (1998) 194 CLR 395 ('*Garcia*'). Cf *Barclays Bank v O'Brien* [1994] 1 AC 180; *Royal Bank of Scotland v Etridge (No 2)* [2002] 2 AC 773.

85 On whether the doctrine extends beyond the case of a surety, see *Elkofairi v Permanent Trustee Co Ltd* (2003) 11 BPR 20,841; *Australian Regional Credit Pty Ltd v Mula* [2009] NSWSC 325 (30 April 2009).

86 Some cases have raised the possibility of extension to other categories of relationship: *Kranz v National Australia Bank Ltd* (2003) 8 VR 310 (special leave refused: [2004] HCATrans 211 (18 June 2004)*); ANZ Banking Group v Alirezai* [2004] QCA 6 (6 February 2004); cf *Permanent Mortgages Pty Ltd v Vandenbergh* [2010] WASC 10 (29 January 2010); *Australian Regional Credit Pty Ltd v Mula* [2009] NSWSC 325 (30 April 2009).

realise that, because of the trust and confidence between surety and debtor, the debtor may not have explained the transaction to the surety.

Where one of these doctrines applies to a registered proprietor, that proprietor ought not be able to rely on indefeasibility to defeat the claim. This is consistent with decided cases in these areas.[87] None of these equitable doctrines requires the plaintiff to assert a current estate or interest in land; all recognise that a transfer has taken place. The result thus ought to be similar to where a rescission is granted as a result of mistake, discussed below. This is so even in *Garcia*,[88] where the creditor's fault was one of omission (to ensure the transaction was explained to the surety) in light of the circumstances, although it should be noted that this case did not involve an indefeasibility claim. Some commentary has suggested that these doctrines have the potential to undermine indefeasibility, particularly in light of extensions of the *Garcia* doctrine to other classes of relationship.[89] This relates back to the general concern that the in personam exception might become too broad. But insofar as they are confined to instances of unconscionable and other inequitable dealing of the registered proprietor, and their effect is merely to prevent a registered proprietor benefiting from unconscionable behaviour, they do not adversely affect the register or its efficient functioning in any way. If any of these doctrines is to be criticised as being overbroad or inappropriate, it should be criticised on its own terms rather than indirectly confined through a misunderstanding of operation of *Real Property Act 1900* (NSW) s 42 and its equivalents.

IV In Personam Rights — Equitable *and* Legal?

It is often said that the Torrens system deals poorly with equitable interests.[90] As we have noted above, this weakness is traceable directly to the unqualified wording of the indefeasibility provisions. In some ways, it has even more difficulty with unregistered legal interests. One difficulty with the recognition of legal causes of action as in personam claims is the tendency to use equitable terminology. Consider the examples, noted above, of the statutory provision for the in personam exception in the Northern Territory, Queensland and South Australian Torrens legislation. The term 'equities' abounds, with no reference at all to actions at law. The case law is very much in the same mould. For example, some judges and commentators writers use the term 'personal equity' in place of 'in personam claim' or 'right in personam'.[91] There are many cases suggesting a link between in personam claims and the conscience of the registered proprietor.[92] The existence of

---

87 *Permanent Mortgages Pty Ltd v Vandenbergh* [2010] WASC 10 (29 January 2010), [366]–[379]; *Spina v Conran Associates Pty Ltd* (2008) 13 BPR 25 435.

88 (1998) 194 CLR 395.

89 See, eg, Griggs, above n 288.

90 Chambers, above n 355.

91 *Bahr v Nicolay (No 2)* (1988) 164 CLR 604, 638 (per Wilson and Toohey JJ); *Breskvar v Wall* (1971) 126 CLR 376, 385.

92 *Hiam v Tham Kong* (1980) 2 BPR 9451, 9454; *Barry v Heider* (1914) 19 CLR 197, 213; *Vassos v State Bank of South Australia* [1993] 2 VR 316, 333; *Story v Advance Bank Australia Ltd* (1993) 31 NSWLR 722, 736–7 (Gleeson CJ), 739–40 (Mahoney J)*; Macquarie Bank v Sixty-Fourth Throne Pty Ltd* [1998] 3 VR 133, 162 (Ashley AJA); *LHK Nominees Pty Ltd v Kenworthy* (2002) 26 WAR 517, 552 cf 558–9; *Grgic* (1994) 33 NSWLR 202, 217–18; *Duncan v McDonald* [1997] 3 NZLR

unconscionable or unconscientious conduct is often stated as one of the requirements for an in personam claim.[93] However, as noted above, it is now increasingly recognised that in personam claims need not involve unconscientious or unconscionable conduct on the part of the registered proprietor,[94] unless that is the basis for the cause of action itself.[95]

There are repeated reminders throughout the cases that legal causes of action can fall within the in personam category.[96] As early as *Frazer v Walker*, the Privy Council referred to the 'right of a plaintiff to bring against a registered proprietor a claim in personam, founded in law or in equity, for such relief as a court acting in personam may grant.'[97] The inclusion of legal claims is also recognised by commentators.[98]

Yet, searching through the cases, it is hard to find examples of legal causes of action openly admitted within the in personam exception. Common law 'defences', such as non est factum, have been said not to constitute an in personam claim nor to be maintainable following a transfer under the *Real Property Act 1900* (NSW).[99] The usual example of a legal cause of action given is deceit.[100] But, as noted above, ownership of property (past or present) is not an element of the tort, although past ownership may be a relevant fact in a particular claim. One leading commentator, Robinson, gives two examples of legal causes of action within the in personam category.[101] These are the right to discharge a mortgage after repaying the debt but prior to the contractual redemption date, and an infant's right to set aside a transaction. The latter has been held not to constitute an in personam exception.[102] The former represents a contractual right, enforceable against a registered mortgagee, where there is no need to plead any denial of the mortgagee's registered interest. The fact that the courts have struggled with legal causes of action within the in personam exception is evident from the controversies surrounding implied and prescriptive easements and mistake.

Easements

A number of unregistered, but nonetheless legal, easements are clear candidates for inclusion in the in personam exception. Implied easements under the rule in

669, 683–4; *Pyramid Building Society (in liq) v Scorpion Hotels Pty Ltd* [1998] 1 VR 188, 196; *Perpetual Trustees Victoria Ltd v Cipri* [2008] NSWSC 1128 (29 October 2008) [100].

93 See Skapinker, above n 188, 597.

94 See above n 22. See also Butt, above n 20.

95 *McGrath v Campbell* [2006] NSWCA 180 (7 July 2006) [98]; *Grosvenor Mortgage Management Pty Ltd v Younan* (Unreported, Supreme Court of New South Wales, Young J, 23 August 1990).

96 See, eg, *Grgic* (1994) 33 NSWLR 202, 222; *Garofano v Reliance Finance Corporation Pty Ltd* (1992) 5 BPR 11,941.

97 *Frazer v Walker* [1967] 1 AC 569, 585.

98 See, eg, Skapinker, above n 188; Tang above n 4.

99 *Grosvenor Mortgage Management Pty Ltd v Younan* (Unreported, Supreme Court of New South Wales, Young J, 23 August 1990). Compare *Lissa v Cianci* (1993) NSW ConvR 55-667 in which it was suggested that non est factum could be used to avoid a registered mortgage without relying on the in personam exception.

100 See, eg, *Garofano v Reliance Finance Corporation Pty Ltd* (1992) 5 BPR 11,941.

101 Robinson, above n 34, 38.

102 *Horvath v Commonwealth Bank of Australia* [1999] 1 VR 643.

Wheeldon v Burrows,[103] easements of necessity, and prescriptive easements all qualify. And they have to varying degrees been recognised by the courts as coming within the exception, but not consistently so, at least in New South Wales. The difficulty faced by courts in New South Wales is based in part on a misunderstanding of the relationship between Torrens statutes and legal rights existing under the general law.[104] For instance, in the case of implied easements, the well-known common law rule in *Wheeldon v Burrows*[105] implies easements in certain cases where land is subdivided, yet the developer fails to create express easements. This common law rule raises the question as to whether *Wheeldon v Burrows* easements are enforceable under the Torrens system. In some jurisdictions (Victoria, Tasmania and Western Australia), there are broad statutory exceptions to indefeasibility for easements. However, in New South Wales, implied easements fall outside the exception in *Real Property Act 1900* (NSW) s 42(1)(a1). Implied easements have, however, been treated as being enforceable between the parties to the original transaction as a result of the in personam exception. In *Australian Hi-Fi v Gehl*,[106] Mahoney JA stated: 'As between the parties actually involved in the *Wheeldon v Burrows* circumstances, rights will be created.' This is because enforcing *Wheeldon v Burrows* easements against the grantor prevents the grantor from derogating from his grant and thus is a 'rule of common honesty.'[107] However, such rights are not enforceable against a subsequent registered proprietor of the servient tenement not involved in the transaction (as was the case in *Australian Hi-Fi v Gehl*).[108]

From the perspective of the argument above, Mahoney JA's analysis achieves an appropriate balance between Torrens principles emphasising the primacy of the register, on the one hand, and common law and equitable doctrines requiring transactional probity, on the other. When proceedings are brought against the granting registered proprietor, the property right (being the easement) is a consequence of the grantor's conduct. The grantee need not assert any in rem right — only that the grantor made a certain grant which (implicitly) includes rights in the nature of an easement. As was the case in the contract and trust cases, Torrens legislation prevents property rights being alleged against a registered proprietor, not proprietary effects. However, a new registered proprietor (a transferee from the original grantor) is not bound by their transferor's conduct because *Real Property Act 1900* (NSW) s 42 prevents it. Thus an implied easement cannot be asserted against a transferee from the original grantor.

In *Wilcox v Richardson*[109] the New South Wales Court of Appeal decided that *Wheeldon v Burrows* easements apply under the Torrens system and come within the in personam exception so as to bind the registered proprietor on assignment of a sublease. The Court did not offer any analysis of exactly how they

---

103 (1879) LR 12 Ch D 31.

104 See generally Lyria Bennett Moses and Cathy Sherry, 'Unregistered Access: Wheeldon v Burrows Easements and Easements by Prescription over Torrens Land' (2007) 81 *Australian Law Journal* 491.

105 *Wheeldon v Burrows* (1879) LR 12 Ch D 31, 49.

106 *Australian Hi-Fi v Gehl* [1979] 2 NSWLR 618, 623–4; *Kebewar v Harkin* (1987) 9 NSWLR 738, 743.

107 *Harmer v Jumbil (Nigeria) Tin Areas Ltd* [1921] 1 Ch 200.

108 See also *Tarrant v Zandstra* (1973) 1 BPR 9381; *Kebewar v Harkin* (1987) 9 NSWLR 738, 743.

109 *Wilcox v Richardson* (1997) 9 NSWLR 4.

fit within the Torrens system, but by assuming that they are enforceable against registered proprietors it implied that they are legal in personam rights. This is consistent with the conclusion in *Australian Hi-Fi v Gehl*.[110] By contrast, in *McGrath v Campbell*[111] Tobias JA suggested that implied easements could only operate as equitable easements under the Torrens system. This reasoning would appear to assume that even though the doctrinal basis for creation of the easement lies in the common law, for the purposes of the Torrens system, it is treated as equitable. But there is no compelling reason to engage in this exercise of reclassification. As *Frazer v Walker*[112] indicates, the key question is that the right is enforceable in personam, not that the right is equitable. This is an example of how the reification of the in personam exception leads to an artificial reclassification of the rights in question, and in ways that ultimately confuse the doctrinal basis for those rights. For, once the rights are considered 'equitable', the search for some principle of equity, such as unconscionability, is triggered. Just as contracts are enforceable despite the provisions of Torrens legislation, so are *Wheeldon v Burrows* easements, which essentially form an implied term in a grant.

But a cloud of uncertainty has settled over the question of the enforceability of implied easements under the Torrens system in New South Wales. In the case of *Williams v State Transit Authority*[113] one question for the New South Wales Court of Appeal to decide was whether a prescriptive easement could exist as an in personam right under the Torrens system. Without referring to *Wilcox v Richardson*,[114] it held unanimously that this doctrine had no place within the registration system. The Court reasoned that the detailed provisions of the *Real Property Act 1900* (NSW) governing the creation and registration of easements indicated that easements could not be created by operation of law, as prescriptive easements are. In particular, Mason P (with whom Sheller and Tobias JJA concurred) concluded that to allow the doctrine of the lost modern grant to operate would run directly counter to a land title system underpinned 'the basal concept of title by registration'.[115]

Yet some questions remain about the reasoning in this case. First, the heavy reliance on the primary requirement of registration under the Torrens system seems to place undue emphasis on that principle. It operates to trump the legitimate recognition of interests created by the registered proprietor in accordance with general equitable and legal doctrines. It appears to assume that the in personam exception operates in the same way that the express exceptions to indefeasibility do: to impair the registered title for the duration of the unregistered interest, and against each and every proprietor. As we have seen, the so-called in personam exception essentially permits actions to be brought only against a particular

---

110 [1979] 2 NSWLR 618.

111 *McGrath v Campbell* (2006) 68 NSWLR 229, 245.

112 [1967] 1 AC 569.

113 *Williams v State Transit Authority* (2004) 60 NSWLR 286. See also earlier authority to this effect: *Kostis v Devitt* (1979) 1 BPR 9231; *Dewhirst v Edwards* [1983] 1 NSWLR 34; *Bebonis v Angelos* (2003) 56 NSWLR 127, 134. Compare the South Australian position, where such easements are recognised as in personam rights: *Golding v Tanner* (1991) 56 SASR 482.

114 (1997) 9 NSWLR 4.

115 *Williams v State Transit Authority* (2004) 60 NSWLR 286, 300 [133].

registered proprietor based on ordinary legal and equitable principles. In this instance, there is nothing in the wording of *Real Property Act 1900* (NSW) s 42 to prevent the enforcement of a prescriptive easement against the person who is deemed to have created it according to the doctrine of lost modern grant. Such easements would not be enforceable against a person who was not deemed to have created them, namely the successors in title to the servient tenement. Accordingly, recognition of prescriptive easements would not offend the central aim of a registered system of protecting purchasers from registered proprietors against other interests, legal and equitable, not noted on the register. A separate question — whether the doctrine of lost modern grant ought to be applied in a modern context at all — is legitimate and beyond the scope of this article. But any judicial repeal of that doctrine should be justified explicitly, not by reference to a supposed conflict with Torrens legislation.

In part, it is the reification of the in personam category that has caused the more restrictive approach in *Williams v State Transport Authority*.[116] Had the Court simply adopted the *Frazer v Walker*[117] formula of 'legal and equitable causes of action' against the registered proprietor, it would have been a straightforward exercise to acknowledge them. Raising these miscellaneous causes of action to the status of an 'exception to indefeasibility' has tended to engender warning signals to judges who are then induced to read them down to preserve the sanctity of the register.

Mistake

Another example of legal rights originating at common law is mistake. This is perhaps the most difficult and controversial 'in personam exception'.[118] On one level, it seems bizarre that a registered proprietor can lose title where a registered dealing had been forged but can recover title where he or she mistakenly signed an instrument that was registered.[119] Yet courts have allowed mistake to undo registered transactions through the in personam category; for instance, in *Lukacs v Wood*,[120] where the plaintiff mistakenly transferred the wrong lot to the defendant. The parties were ordered to transfer to each other lots, so as to recreate the intended position as a result of common mistake and (in practical terms) total failure of consideration. Similarly, in *Tutt v Doyle*[121] a mistake in the transfer meant Tutt (knowingly) received a larger block than intended. The Court held it was unconscionable for Tutt knowingly to take advantage of Doyle's mistake and ordered that Tutt transfer back to Doyle the additional land. *We Are Here Pty Ltd v Zandata Pty Ltd*[122] involved a mistaken inclusion of an option to purchase in a renewed lease between the original lessor and lessee, followed by a registered assignment of the lease. The Court pointed out that while the original lessee would

116 (2004) 60 NSWLR 286.
117 [1967] 1 AC 569.
118 Chambers, above n 4.
119 Ibid.
120 (1978) 19 SASR 520.
121 (1997) 42 NSWLR 10.
122 [2010] NSWSC 262.

not have been able to obtain specific performance of the right to purchase due to the lessor's in personam right of rectification, the assignee was able to do. There was no in personam claim against the assignee, in particular where the assignee had no knowledge of the mistake (and even if it had, mere notice would have been insufficient).[123]

The relevant point about these cases is that, like the express trust and contracts cases, they are consistent with *Real Property Act 1900* (NSW) s 42. When courts order rescission as a result of mistake, they effectively undo a transaction. But a plaintiff does not plead that it has a current estate or interest in land contrary to the register. Instead, the plaintiff asserts that due to the circumstances in which a mistake was made, taking account of the state of knowledge of a defendant, the court ought to order rescission. Rescission may include an order that the defendant transfer to the plaintiff an estate or interest in land, and the plaintiff may have previously held an identical estate or interest in land. Nevertheless, the plaintiff can seek rescission for unilateral or common mistake without asserting an existing estate or interest in land contrary to s 42. It is therefore possible to provide a clear answer to Chambers' puzzlement about how forgeries do not in general impair a registered title, while mistakes have been held to do so: the statute, as interpreted in *Breskvar v Wall*[124] and later authorities, specifically provides for forgeries to secure an effective title in favour of the non-fraudulent transferee from the act of registration. By contrast, in the case of mistake, it is possible to recognise the fact of transfer (and the new registered proprietor's title) and yet still bring a claim. In some ways, this is an artefact of history as there was no need prior to Torrens legislation for cause of action to protect those whose signatures were forged, since the transactions were automatically void. There is no reason why the law of mistake and the right to rescission should not operate in the case of Torrens land. Section 42 and its equivalents simply have nothing to say about this situation.

In general, the common law doctrines above that have been held to create in personam rights are consistent with the definition of in personam rights in *Barry v Heider*[125] and *Frazer v Walker*.[126] It also accords with Brennan J's conclusion in *Bahr v Nicolay (No 2)* concerning the alignment of in personam rights with the indefeasibility provisions: there is no reason to prevent the full exercise of rights with which the registered proprietor has burdened his or her own title, as they do not in any way impair the concept of indefeasibility.[127] This particular solution represents the optimal comity between the two jural systems. One case, however, that appears to extend common law rights too far, is *Mercantile Mutual Life*

---

123 See also *Minister for Education and Training v Canham* [2004] NSWSC 274 (16 April 2004) (solicitor mistakenly included land not intended to be included on a transfer; plaintiff had a personal equity); *Harris v Smith* [2008] NSWSC 545 (6 June 2008) (contract and transfer included a portion of land by mistake: rectification ordered). See also *Randi Wixs Pty Ltd v Kennedy* [2009] NSWSC 933 (9 September 2009); *Re St George Bank* [2011] NSWSC 730 (15 July 2011).

124 (1971) 126 CLR 376.

125 (1914) 19 CLR 197.

126 [1967] 1 AC 569, 585.

127 *Bahr v Nicolay (No 2)* (1988) 164 CLR 604, 653.

Insurance Ltd v Gosper.[128] In that case, where a husband forged his wife's signature to a variation of mortgage document, a majority of the New South Wales Court of Appeal held that the bank was subject to an in personam claim on behalf of the wife. The Court reasoned that the bank owed a duty to her because it held her Certificate of Title and was given no authority to produce it. But the remedy for breach of bailment is not the grant of an interest in land. Mrs Gosper may have had a claim for damages for conversion of her Certificate of Title, subject to specific provisions in Torrens legislation,[129] but that is where her rights end.

V The Emergence of Statute-Based In Personam Rights

Another development under the umbrella term of in personam rights is evident in relation to 'overriding statutes'. In recent years, some courts have started to deal with overriding statutes in a novel way, appearing to interpret them more restrictively than in the past. In doing so, they have begun, in incremental fashion, to find statutes grant in personam rights to specific individuals, rather than create in rem rights over land that have the effect of nullifying the operation of the Torrens system in respect of those statutes. This approach made its first appearance in the High Court's decision in *Hillpalm Pty Ltd v Heaven's Door Pty Ltd*.[130]

Hillpalm concerned the enforceability of a condition of development consent, imposed by a council on a developer's application to subdivide land under the *Environmental Planning and Assessment Act 1979* (NSW). The developer was obliged to create a right of way over one parcel for the benefit of another. The Act provided mechanisms for enforcement of these conditions against developers who breached consent conditions. A unanimous New South Wales Court of Appeal held that this was an overriding statute, and that a successor in title to the developer was subject to same obligation even though it was not registered.[131] The Court, relying on the authority of *South-Eastern Drainage Board (SA) v Savings Bank of South Australia*,[132] held that the *Environmental Planning and Assessment Act 1979* (NSW) had repealed the *Real Property Act 1900* (NSW) to the extent of the inconsistency. Meagher, Handley and Hodgson JJA agreed that the regime of obligations on developers imposed by councils pursuant to the provisions of the Act operated to create rights that took priority over the Torrens register. Relevantly, the Latin dualism of in personam and in rem rights formed the key for Meagher JA to explain how overriding statutes worked. He held that the council's consent to the subdivision operated to create a right in rem, binding the owner of the land for the time being, and capable of being relied on by any transferee having the benefit of the condition. It followed that the obligation was an obligation in rem and therefore applied to every successor in title to the original purchaser.[133]

---

128 *Mercantile Mutual Life Insurance Co Ltd v Gosper* (1991) 25 NSWLR 32 (Kirby P and Mahoney; Meagher JJA dissenting).

129 Eg, *Real Property Act 1900* (NSW) s 45.

130 (2004) 220 CLR 472 ('*Hillpalm*').

131 *Hillpalm Pty Ltd v Heaven's Door Pty Ltd* (2002) 55 NSWLR 446.

132 *South-Eastern Drainage Board (SA) v Savings Bank of South Australia* (1937) 62 CLR 603. See also *Pratten v Warringah Shire Council* [1969] 2 NSWR 161.

133 *Hillpalm Pty Ltd v Heaven's Door Pty Ltd* (2002) 55 NSWLR 446, 447 [13], [14].

On appeal[134] a slender majority of the Court (McHugh ACJ, Hayne and Heydon JJ) held on the rather narrow ground that the proposed right of way may have indicated a plan to construct such a road in the future, but did not impose an in rem obligation tied to the land requiring any owner of it to create an easement. It followed that on this view of the facts, there was no formal condition imposed on the developer, and therefore no liability. However, the wider significance of the decision lies in the fact that the majority went on to hold, though obiter, that even if a condition had been imposed, no subsequent owner of the land could be in breach of the *Environmental Planning and Assessment Act 1979* (NSW). This was because s 76A, when read alongside ss 123 and 124, provided that orders could be made against developers who failed to comply with consent conditions, *but not their successors in title.* Any failure of compliance on the part of a developer is in the nature of a once-and-for-all breach, in the nature of an in personam right, the majority concluding that any right of the respondent against the appellant must be 'a personal right, not a right in rem, and that personal right must be found, if at all, in the relevant statutory provisions.'[135]

This decision reflects a more restrictive approach to interpreting later planning law statutes. More particularly, insofar as the majority focus was on the provisions that identified the precise mechanisms for invalidating transfers, rather than the broader purposes of the legislation, it has paved the way for other courts to deploy the in personam exception to similarly restrict the operation of planning laws. So, in *Kogarah Municipal Council v Golden Paradise Corporation*,[136] the argument centred on the *Local Government Act 1993* (NSW) s 45(1), which provided that a council had no power to sell, exchange or otherwise dispose of community land. This was followed by *City of Canada Bay v Bonaccorso Pty Ltd*.[137] This case also involved a breach of the *Local Government Act 1993* (NSW) s 45(1) with a similar result, the courts finding in both cases that an affected person might be able to bring a personal action against the immediate transferee in the case of a proscribed transfer, but not their successor in title. The case was followed by *Koompahtoo Local Aboriginal Land Council v KLALC Property Investment Pty Ltd*,[138] where a transaction was in breach of the formal requirements imposed by the *Aboriginal Land Rights Act 1983* (NSW). But, in principle, the object of land planning statutes has never been limited to imposing a personal obligation on a particular registered proprietor in the manner of general in personam rights. The goal is to establish sound, durable planning practices in the public interest, rather than for the span of one person's ownership, so this line of interpretation has the potential to present many problems. A fair reading of how planning statutes are best read with Torrens legislation needs to take account of the goals, and proper sphere, of each.

---

134 *Hillpalm* (2004) 220 CLR 472.

135 Ibid 491 [54].

136 (2005) 12 BPR 23,651.

137 (2007) 71 NSWLR 424.

138 [2008] NSWCA 6 (18 February 2008). See also *Refina v Binnie* [2010] NSWCA 192 (11 August 2010); *Marcolongo v Chen* [2011] HCA 3 (9 March 2011) (s 37A of the *Conveyancing Act 1919* (NSW) setting aside transfers intended to defraud creditors), *Perpetual Trustees Victoria Pty Ltd v Van den Heuvel* [2009] NSWSC 57 (20 February 2009) (*Contracts Review Act 1980* (NSW); *Consumer Credit (New South Wales) Act 1995* (NSW) (setting aside unfair transactions).

VI Conclusion

Statutory interpretation is inherently embedded in a social and historical context. In the case of Torrens statutes, they inevitably both emerge from, and are situated in, a rich context of pre-existing, essentially *traditional* legal and equitable doctrines and principles. It is the argument of this article that the interpretation of Torrens statutes should readily embrace that traditionality. When integrating these bijural sources of land law, the provisions of Torrens legislation should be applied in a balanced way, without unnecessarily limiting the scope of pre-existing common law and equitable doctrines. The *Real Property Act 1900* (NSW) s 42 prevents the assertion of current estates or interests in land directly against a registered proprietor; but it has nothing to say about personal rights, whether or not they have proprietary effects. For this reason, there is no reason to fear the in personam category, which is merely the class of claims that fall outside the provisions in Torrens legislation.

The in personam exception is ultimately a recognition that behind the 'black' zone taken from the text of Torrens statutes is white space. Torrens statutes (and, in particular, provisions such as the *Real Property Act 1900* (NSW) ss 42, 43 and 45) prevent *some* actions against registered proprietors, but say nothing about a vast array of legal and equitable claims which largely pre-dated the legislation, and alongside which the legislation was intended to operate. In other words, the in personam exception is simply another name for the white space; the claims against which registered proprietors are not protected.

In determining the claims against which registered proprietors are protected (or, inversely, claims within the in personam exception), the following principles should be kept in mind. First, it is not always helpful to determine the scope of Torrens statutes by reference to the broad concept of indefeasibility. What is more important is the precise form of words used in the statutes themselves. Second, there is no need to fear a broad in personam category, defined simply as the set of legal and equitable claims against a registered proprietor that do not directly rely on the plaintiff having title to an interest in land. Rather, Torrens statutes should be confined to their proper sphere. Third, there is no need for legal doctrines to metamorphose into 'equities' in order to recognise that they fall outside the scope of Torrens statutes. Fourth, neither the judicial authorities nor the legislation provides reason for requiring an additional requirement of 'unconscionability' for the purposes of determining the existence of an in personam right. Fifth, legislation post-dating Torrens statutes may, in limited circumstances, establish an in personam right. But, in general, statutes directed to regulate the use of or to define the nature of land, even if by means of statutory limitations on its disposition, would confer rights in rem rather than rights in personam. They would then operate to override the rights of all relevant registered proprietors, rather than merely as in personam claims against particular registered proprietors. Finally, if Latin does indeed have a term of value to offer in the context of analyses of this particular exception to indefeasibility it is, we would argue, a word familiar to all those who have had occasion to examine the Torrens system: *caveat.*