United Overseas Bank Ltd v Bebe bte Mohammad
[2006] SGCA 30

Case Number : CA 81/2005

Decision Date : 25 September 2006

Tribunal/Court : Court of Appeal

Coram : Chan Sek Keong CJ; Andrew Phang Boon Leong JA; Woo Bih Li J

Counsel Name(s) : Sim Bock Eng and Sannie Sng (Wong Partnership) for the appellant; George Pereira and Tee Lee Lian (Pereira & Tan LLC) for the respondent

Parties : United Overseas Bank Ltd — Bebe bte Mohammad

Land – Registration of title – Land titles act – Mortgagee's indefeasible title – Circumstances amounting to wilful blindness akin to fraud as exception to indefeasibility of title under s 46(2) Land Titles Act – Whether grounds for rectification of land-register under s 160(1) for fraud, omission or mistake existing – Whether action in personam against registered proprietor sustainable in absence of fraud – Sections 46, 160 Land Titles Act (Cap 157, 1994 Rev Ed)

25 September 2006 *Judgment reserved.*

Chan Sek Keong CJ (delivering the judgment of the court):

1 This is an appeal by the appellant, United Overseas Bank Limited ("UOB"), as registered mortgagee against the decision of the trial judge ("the Judge"), *inter alia*, declaring null and void and setting aside the mortgage dated 3 November 2000 ("the Mortgage") registered against the respondent's property comprised in Certificate of Title ("CT") Volume 495 Folio 160 ("the property") and ordering the Registrar of Titles ("the Registrar") to rectify the land register by cancelling the Mortgage. The Judge's grounds of decision ("GD") are reported in [2005] 3 SLR 501.

Background

2 The salient facts may be summarised as follows:

(a) The respondent had two adopted daughters, Suzanah bte Hassan ("Suzanah") and Hajjah Aisah bte Haji ("Hajjah"). In October 1999, the respondent executed a *hibah* (an Islamic instrument of gift) where she vowed to give the property to Hajjah upon death. She executed a *nazar* (the vow) on 20 March 2000 giving the property to Hajjah upon death. On 21 March 2000, she executed a will appointing Hajjah the executrix, and in which she declared that she had made a *nazar* on 20 March 2000.

(b) In early 2000, after the original CT of the property ("the original CT") was found missing, Hajjah, on behalf of the respondent, obtained a replacement CT dated 6 July 2000 ("the replacement CT").

(c) On 19 July 2000, Suzanah lodged a caveat against the property claiming an interest under an agreement dated 18 July 2000 between the respondent and herself whereby the respondent agreed to transfer the property to her in consideration of love and affection. On 11 August 2000, Hajjah lodged a caveat against the property claiming an interest in the property by virtue of the will and *nazar* made by the respondent. On 29 August 2000, Suzanah withdrew her caveat.

(d) By a letter dated 29 September 2000, UOB offered JSN Enterprises, whose partners ("the borrowers") were Suzanah and her husband, Junaidi, credit facilities of $1m to be secured by a legal mortgage of the property. UOB appointed M/s Mohan Das & Partners ("MDP") as their solicitors to process and complete the transaction. Mr Mohan Das Naidu ("MDN") was the solicitor in charge of the matter, but the Judge found as a fact that it was actually the conveyancing clerk, Ms Loo, who did all the work. MDP conducted the usual searches in respect of the property, in the course of which they discovered that a replacement CT had been applied for. They reported the results of their searches to UOB.

(e) The solicitors for the borrowers and the respondent were M/s Junaini and Jailani ("J&J"). The respondent executed the Mortgage on 19 October 2000 before Junaini bin Manin ("Junaini"). Hajjah withdrew her caveat on 23 October 2000 supposedly as a result of a misrepresentation by Suzanah. Hajjah had no knowledge of Suzanah's plan to use the property as security. On 24 October 2000, one Rajan Pillay, an agent of Junaini, handed the original CT to MDP, who, on the same day, wrote to J&J seeking their confirmation that Rajan Pillay was acting with the authority of the borrowers and the respondent. No confirmation was received from J&J.

(f) The replacement CT was, at all material times, in the possession of Hajjah and was not used in the registration of the Mortgage.

(g) The Mortgage, together with the original CT, was presented by a freelance registration clerk to the Land Titles Registry for registration and was registered on 3 November 2000. On 7 November 2000, MDP advised UOB that the credit line for the borrowers could be activated.

(h) The borrowers defaulted in repaying the borrowings on 20 March 2002. UOB issued a letter of demand for payment. A similar letter was issued to the respondent on 16 August 2003. On 12 January 2004, UOB commenced legal proceedings to enforce the Mortgage.

(i) At the trial, the parties tendered the following agreed facts:

(i) the Mortgage was executed by the respondent who affixed her thumbprint to it;

(ii) at the time the Mortgage was executed, the respondent was not asleep nor was there any misrepresentation made to her;

(iii) the respondent would not be relying on the defence of *non est factum*;

(iv) the solicitors acting for the respondent and the borrowers were J&J;

(v) UOB was not a party to and had no actual knowledge of fraud (if any) by the borrowers;

(vi) UOB and its solicitors had no knowledge that the respondent was of unsound mind (if that were the case) when she executed the Mortgage;

(vii) The Singapore Land Registry was unable to confirm whether the replacement CT was presented for registration, and had no record as to which CT was presented with the Mortgage for registration.

The Judge's findings

3 At the conclusion of the trial, the Judge held that the respondent was of unsound mind when she executed the Mortgage but that her condition did not affect the validity of the Mortgage. However, the Judge declared the Mortgage null and void and set it aside on three alternative grounds as follows:

(a) there was wilful blindness akin to fraud on the part of UOB's solicitors, through Ms Loo;

(b) there was a mistake or omission in the registration of the Mortgage arising from UOB's solicitors' use of the original CT, which had been cancelled, to register the Mortgage; and

(c) the respondent had a personal equity to set aside the Mortgage arising from UOB's solicitors' unlawful use of the cancelled original CT to register the Mortgage.

The appeal

4 UOB has appealed against the Judge's decision with respect to all the three grounds and also against the related findings of fact and law.

The court's decision on finding that respondent was of unsound mind

5 UOB has appealed against the Judge's finding that the respondent was of unsound mind when she executed the Mortgage in November 2000. The Judge made this finding after hearing several witnesses, including Hajjah, Jailani and two psychiatrists, and also taking into account a series of documents signed by the respondent after the date of execution of the Mortgage. These documents, which were relevant to her medical condition, included the following:

(a) an agreement dated 15 October 2001 between the respondent and Hajjah in which the respondent agreed to repay Hajjah a total sum of $486,716.98 for cash advances and other expenses that Hajjah had made to her or for her benefit;

(b) a letter dated 23 March 2001 from the respondent to UOB contesting the validity of the Mortgage on the ground that she had no knowledge of it;

(c) the respondent's affidavit dated 20 June 2002 in these proceedings; and

(d) the documents mentioned earlier in [2(a)].

6 The Judge's finding on the medical condition of the respondent at the material time is set out in [28] of his GD. It should be noted that the respondent was only certified on 23 August 2002 as being of unsound mind whereas she executed the Mortgage on 19 October 2000. However, the Judge further found that as a matter of law the respondent's legal disability did not affect the validity of the Mortgage in terms of s 46(1), read with s 46(2)(*a*), of the Land Titles Act (Cap 157, 1994 Rev Ed) ("LTA"), as neither UOB nor its solicitors had knowledge of it. Given the evidence on record of the respondent's medical condition and the fact that she executed a number of important documents after 19 October 2000 relating to her property, we have a deep sense of unease about the finding that the respondent was of unsound mind. However, given our other findings that are dispositive of the main issue in this case, *ie*, whether the Mortgage should be set aside, we will let the Judge's finding remain in the record.

Preliminary observations

7 Before we consider the merits of the parties' cases in this appeal, we should mention that the Judge appeared to have been very much troubled by what he believed was the *very* unconscionable conduct of UOB's solicitors in obtaining the registration of the mortgage. The three alternative findings of law made against UOB were based essentially on the finding that UOB's solicitors had used the original CT to register the Mortgage with full knowledge that it had been cancelled and that it was "illegal" to do so. The Judge expressed his sentiments on unconscionable conduct, on three separate occasions in the GD, as follows:

(a) that UOB "should not derive any benefit arising from the registration because of the wrongful and illegal use of the [original CT]": see GD at [39];

(b) that "the use of the [original CT] to register the Mortgage was … unconscionable": see GD at [42]; and

(c) that "the sanctity of the land-register under the LTA under the doctrine of indefeasibility should not be used to allow unconscionable behaviour": see GD at [43].

8 These statements show that the Judge was fully aware that the doctrine of indefeasibility of title is central to land registration and dealings under the LTA. But the generality and open-ended nature of the Judge's statements make it necessary for us to caution against undue reliance on the concept of unconscionability to erode the principle of indefeasibility under the LTA. This might lead to unwelcome uncertainty in land dealings under the LTA and could even undermine its primary objective. We need to emphasise this at the outset, and to reiterate the point because, even though land title registration has been with us for more than a century, its central doctrine, the indefeasibility of the registered title, appears to be still fighting a rearguard battle against the incursions of equity and conscience into the inner sanctum of the land register. As long ago as 1917, the Privy Council in *Haji Abdul Rahman v Mahomed Hassan* [1917] AC 209, in relation to the Registration of Titles Regulation 1891 (Selangor), said at 216:

> It seems to their Lordships that the learned judge, in these observations [on the equity of redemption], have been too much swayed by the doctrines of English equity, and not paid sufficient attention to the fact that they were here dealing with a totally different land law, namely, a system of registration of title contained in a codifying enactment.

Similarly, in *Assets Company, Limited v Mere Roihi* [1905] AC 176 ("*Assets*") at 212, the Privy Council said:

> Their Lordships cannot help thinking that the equitable doctrines of constructive fraud have weighed too much with the Court of Appeal and have induced it to impute fraud to the Assets Company, although no dishonesty by the company or its agents … was really established.

9 The Torrens system of land registration was introduced into Singapore as a result of the Land Title Ordinance of 1956. Since then, our courts have in many decisions given effect to the doctrine of indefeasibility of title but, as Assoc Prof Barry Crown ("Assoc Prof Crown") has reminded us in his article "Equity Trumps the Torrens System" [2002] Sing JLS 409 ("'Equity Trumps'") at 409, "hard cases will reach the courts, and it is very tempting to make inroads into the concept of indefeasibility of title to do justice in the case at hand". Given the facts of this case, involving a 90-year-old woman from a poor background who was suffering from Alzheimer's disease, and who was taken advantage of by her daughter to execute a mortgage over her home in favour of a bank to secure credit facilities to the daughter and her husband, we cannot help but think that this would be of the sort of "hard cases" that Assoc Prof Crown had in mind.

10 Our last preliminary comment is that UOB, whose security has been set aside, was wholly innocent of any kind of wrongdoing or negligence in the transaction. UOB had granted credit facilities to the borrowers in the normal course of business and obtained the security of the Mortgage using the services of their solicitors. The borrowers and the respondent also had their own solicitors. Both UOB and the respondent were victims of the fraud of the borrowers. UOB could even be said to be the greater victim since it disbursed the loans to the borrowers on the strength of the Mortgage certified as properly executed by the respondent's solicitors. This relativity on the scale of victimhood should be borne in mind if unconscionable conduct is to be the determinative factor in this case. The case law in Singapore and other Torrens systems shows that the courts are constantly struggling to find the right balance between the competing considerations of certainty and fairness. This case presents a timely opportunity to this court to clarify the legal position in Singapore.

The court's decision on the three alternative findings

11 We first summarise below the Judge's findings of fact and law in relation to each of the three grounds. We will then evaluate the merits of the respective cases of the parties in this appeal.

A Fraud – wilful blindness

12 The Judge's findings of fact are set out in [24]–[38] of the GD. He found that UOB's solicitors were handed the original CT and not the replacement CT as claimed by MDN. The Judge did not appear to have found that MDN had been "wilfully blind" or that he had acted dishonestly or with any kind of moral turpitude as, in the Judge's view, MDN "left the file very much to Ms Loo and his secretary [and] did not strike [the Judge] as knowing very much about the file": see GD at [38].

13 Ms Loo did not testify. Neither did the freelance registration clerk who presented the Mortgage and the original CT to the Registry staff for registration. However, on the basis of MDN's testimony, the Judge made certain findings against Ms Loo as follows:

> 37 … Ms Loo had handled the searches and the drafting of the Mortgage. She wrote the letter stating that [the original CT]] was handed to [MDN] She was the one who must have read the Registry title searches and found that [the replacement CT] had been issued. She must have known that [the original CT] had been cancelled … [and] must also be deemed to know that it was an offence to be in possession of that certificate, which should have been surrendered to the SLA [(Singapore Land Authority)] …
>
> 38 … She knew or deliberately turned a blind eye to the fact that the firm had received a document which was cancelled and of which it was illegal for the firm to be in possession. Yet Ms Loo proceeded with the registration of the Mortgage, by instructing the freelance registration clerk to do so. As a result, the Mortgage was registered on the strength of an erroneous document. In the case of wilful blindness, I rely on what was stated by Tadgell JA in *Macquarie Bank Ltd v Sixty-Fourth Throne Pty Ltd* [1998] 3 VR 133, where it was pointed out that wilful blindness could in certain circumstances be "akin to fraud". In my view, this was the situation in the instant case, *if Ms Loo's conduct was not fraudulent in the first place.* On either basis, the [respondent] is entitled to defeat the Mortgage registered pursuant to s 46(2) of the LTA on the ground of fraud.

Wilful blindness amounting to fraud

14 As to the kind of conduct that constituted "wilful blindness", the Judge referred to two well-known judicial statements, first from the New Zealand Court of Appeal decision in *Waimiha Sawmilling*

Co Ltd v Waione Timber Co Ltd [1923] NZLR 1137 ("*Waimiha (NZ CA)*"), and then from *Assets* ([8] *supra*). In *Waimiha (NZ CA)* at 1175, Salmond J said:

> [F]raud is not limited to cases of actual and certain knowledge. The true test of fraud is not whether the purchaser actually knew for a certainty of the existence of the adverse right, but whether he knew enough 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, or to purchase subject to the claimant's rights rather than in defiance of them. If, knowing as much as this, he proceeds without further inquiry or delay to purchase an unencumbered title with intent to disregard the claimant's rights, if they exist, he is guilty of that wilful blindness or voluntary ignorance which, according to the authorities, is equivalent to actual knowledge, and therefore amounts to fraud.

15 In *Assets* (at 210), Lord Lindley said:

> Fraud by persons from whom [the person whose registered title is impeached] claims does not affect him unless knowledge of it is brought home to him or his agents. The mere fact that he might have found out fraud if he had been more vigilant, and had made further inquiries which he omitted to make, does not of itself prove fraud on his part. But if it be shewn that his 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.

16 It is important to note that in the present case the Judge did not find that Ms Loo, in the words of Salmond J, "actually knew for a certainty of the existence of the [respondent's] adverse right", but that she knew or deliberately turned a blind eye to the fact that her firm had received a document which was cancelled and of which it was illegal for the firm to be in possession, and yet she proceeded with the registration of the Mortgage, by instructing the freelance registration clerk to do so. Implicit in this finding was that Ms Loo ought to have inquired further about the missing replacement CT and that she had refrained from doing so for fear of finding out the truth (that a fraud was being perpetrated against the respondent). The Judge held that wilful blindness in these circumstances was "akin to fraud", citing *dicta* from *Macquarie Bank Ltd v Sixty-Fourth Throne Pty Ltd* [1998] 3 VR 133 ("*64th Throne*").

17 In the lower court's decision, *Sixty-Fourth Throne Pty Ltd v Macquarie Bank Ltd* (1996) 130 FLR 411 at 470, the trial judge had said:

> I view part of the conduct of the Bank officers as being reckless (for example, accepting Kandy's claim of control of Sixty-Fourth Throne at face value) and careless (for example, failing to obtain details from Kandy or from their own sources as to what constituted such control, particularly when he had admitted he was not the owner), or wilfully blind (for example, failing to make inquiries as to the control of the trust and the interest of the beneficiaries, although they had the trust deed and failing to give weight to the company's annual accounts and income tax returns for 1988 and 1989, which disclosed who the directors were).

Despite all that, the trial judge held at 470:

> I am not satisfied that there was any dishonesty or moral turpitude, within the meaning of the concept of fraud that this section requires, in this case … Notwithstanding these acts and omissions, I am unable to conclude that they amount to fraud within the meaning of the authorities.

18 On appeal, in *64th Throne* ([16] *supra*), in relation to these findings of the trial judge,

Tadgell JA said at 143–144:

> It is not altogether clear whether, in so expressing himself, [the trial judge] simply declined to equate recklessness, carelessness and wilful blindness (or any of them) with dishonesty, or whether he regarded the degree or extent of these elements that in his opinion the evidence disclosed to be insufficient to prove, individually or together, the requisite dishonesty. The appellant's case was that, at most, its solicitors were careless, and that mere carelessness cannot amount to fraud. As a general or sweeping statement this may be true enough, but it is too general and too sweeping to be of much utility. A negligently-made false representation, if made with reckless indifference to its truth or falsity may very well be fraudulent. Similarly, to abstain deliberately from reasonable enquiry for fear of what the enquiry will reveal, to choose to shut one's eyes to the obvious – to assume a state of "wilful blindness" – or otherwise to generate a state of contrived ignorance, may of course be dishonest. It has been well said that wilful blindness – deliberately turning a blind eye to obvious or obviously ascertainable facts – is akin to fraud: e.g. *Lego Australia Pty. Ltd. v. Paraggio* (1993) 44 F.C.R. 151 at 171.

19 At 159, Ashley AJA said:

> Although [the trial judge] categorised that conduct as wilful blindness, it appears to me that he did not make a finding that the appellant or those for whom it was responsible had their suspicions aroused and abstained from enquiry for fear of learning the truth. If his Honour had made such a finding, and if that finding had been supportable (whether from direct evidence or as a matter of inference) then a finding of statutory fraud on Macquarie's part should have been made.

Was Ms Loo guilty of wilful blindness akin to fraud?

20 Counsel for UOB contended that even if Ms Loo's wilful blindness was, as found by the Judge, akin to fraud, that would not be sufficient to satisfy s 46(2)(*a*) of the LTA which requires the registered proprietor or his agent to have been a party to the fraud or to have colluded in the fraud. There was no finding of fraud or collusion against her. The short answer to this contention is that if Ms Loo were guilty of wilful blindness akin to fraud, then she herself was fraudulent, and therefore must be a party to the fraud. However, in this case, the fraud that was pleaded in the defence by the respondent was not that of UOB or its agents, but that of Suzanah who "stole the Original CT from the [respondent] for the purpose of effecting a mortgage of the [respondent's] Property to secure the Facilities granted by [UOB] to the [borrowers]".

21 The fraud that was pleaded against UOB (at para 6 of the defence) was this:

> [UOB] through [MDP] had knowledge that the Replacement CT had been issued for the [respondent's] Property because of the search [MDP] made when acting for [UOB] in the Mortgage. Accordingly, when Mr Rajan Pillay handed [MDP] the Original CT, [MDP] were put on inquiry and had they just inquired where the Replacement CT was, it would have been discovered that the same was being held by Hajjah and the [b]orrowers would have been prevented from arranging the fraudulent mortgage of the [respondent's] Property. The [respondent] therefore contends that [UOB], through their solicitors, failed to make further inquiries which were clearly necessary and by failing to do so, [UOB] are guilty of fraud.

In our view, the allegation that MDP or Ms Loo had knowledge that the replacement CT had been issued for the respondent's property, cannot be established from the registry search that MDP had made showing that a replacement CT had been applied for. There was no evidence that MDP knew

that the replacement CT had been issued. Indeed, the subsequent delivery of the original CT by the respondent's solicitors' agent to MDP could easily have lulled them into thinking that the original CT had been found.

22 Accordingly, we agree with the submission of counsel for UOB that in these circumstances the mere failure to make further inquiries could not amount to wilful blindness akin to fraud as there was no dishonesty, moral turpitude, want of probity, or intent on the part of UOB's solicitors to disregard the respondent's rights. At worst, as counsel contended, Ms Loo was guilty of negligence or a failure to exercise due diligence. Counsel referred to the statement of the Privy Council in *Assets* to support the contention that a mere failure of UOB's solicitors to be more vigilant and to make further inquiries would not *of itself* prove fraud on their part unless their suspicions that a fraud was being perpetrated had been aroused and they abstained from doing so for fear of finding out the truth. Counsel for UOB also referred to a passage from the judgment of Ormiston JA in *Russo v Bendigo Bank and Reichman* [1999] VSCA 108, at [42] which she considered an apt description of the conduct of Ms Loo. The passage reads:

> In my view it would be a curious consequence that her behaviour should be characterised for this purpose as fraud, for the very essence of that concept is to relieve people from the consequences of indefeasibility only where their behaviour, or the behaviour of those for whom they are responsible, has that element of dishonesty, or conscious moral turpitude or wickedness such as would justify the intervention of a court to set aside the mortgage or other registered estate.

We accept counsel's submission that the evidence showed that the conduct of UOB's solicitors amounted to no more than negligence or lack of due diligence in finding out the true state of affairs. Since we disagree with the Judge's finding on this issue, it is incumbent on us to explain our finding, which we will now proceed to do.

23 The Judge's findings against Ms Loo are set out in [13] above. The first finding was that Ms Loo "must have known that the [original CT] had been cancelled" (GD at [37]) and that she "deliberately turned a blind eye to the fact that the firm had received a document which was cancelled" (GD at [38]). This specific finding of knowledge on the part of Ms Loo was based on the earlier inferential findings of the Judge (see GD at [35]) as follows: (a) that she was a fairly experienced conveyancing clerk, and had drafted the letter to J&J referring to the original CT; (b) that the original CT, which was printed on yellow-beige paper, looked very different from the replacement CT which was blue in colour and had security features; and (c) that she could not have mistaken the original CT for the replacement CT because of the obvious differences on the face of the documents.

24 In our view, this finding is not supported by the evidence. First, Ms Loo only knew from the registry search that a replacement CT had been applied for, and not that it had been issued. Second, the original CT in the possession of Ms Loo would not show that it had been cancelled. Third, there was no evidence that she had seen a replacement CT before, and the fact that she was a conveyancing clerk, even one who was regarded by the Judge as "fairly experienced" could not, *ipso facto*, lead to such a conclusion. Even if she had seen a replacement CT previously, this fact would not be relevant if she did not know that the original CT had been cancelled. Clearly, Ms Loo wrote the 20 October 2000 letter to J&J in the belief that the replacement CT had not yet been issued. Indeed, the fact that J&J, through Rajan Pillay, had delivered the original CT to MDP could easily have lulled her into believing that the original CT had been found.

25 The second finding was that Ms Loo "must … be deemed to know that it was an offence to

be in possession of [the cancelled original CT], which should have been surrendered to the SLA" but that, instead, she "knew or deliberately turned a blind eye to the fact [and] proceeded with the registration of the Mortgage": see GD at [37] and [38]. The Judge did not explain why Ms Loo must be deemed to know that it was an offence for her to be in possession of the original CT, *even if she had known that it had been cancelled*. It would seem that the conclusion was based on the principle that ignorance of the law is not an excuse.

26 But, with respect to the Judge, we are unable to agree that Ms Loo could properly be deemed to have knowledge of the illegality or that she had deliberately acted on it. In our view, a conveyancing clerk of Ms Loo's experience would have known that (because of s 42(1) of the LTA), she would not have been able to register the Mortgage if she had merely produced a cancelled CT. It would have been foolish for her to have proceeded thus as the registration process was not within her control. To obtain registration of the Mortgage, she would have had to collude with the registry staff to overlook the non-production of the replacement CT. This circumstance alone would suggest that Ms Loo did not know or suspect that anything wrong was going on. It also shows that she could not have acted out of dishonesty or a desire to deprive the respondent of her rights in proceeding with the registration of the Mortgage.

27 For the above reasons, we are of the view that the trial judge erred in finding that Ms Loo's actions were akin to fraud. Accordingly, we set aside this finding.

28 Before we move to the next ground of appeal, we would like to reiterate that courts should exercise caution as well as vigilance in scrutinising allegations of fraud in land dealings, especially with respect to security transactions in the commercial sector. The LTA confers an indefeasible title on the mortgagee, subject only to certain overriding interests, which include the powers of the Registrar and the court to rectify the land-register under s 159 and s 160 respectively, and the exceptions specified in s 46(2) of the LTA. Fraud to which the registered proprietor is a party defeats his title, but even then it does not defeat the title of the *bona fide* purchaser without notice of the fraud who then registers his title.

Meaning of "fraud" in the LTA

29 John Baalman, the draftsman of the original Land Titles Act, has said, in his commentary on the Land Titles Ordinance 1956 called *The Singapore Torrens System* (Government of the State of Singapore, 1961) ("*Baalman*") at 83–84:

> Fraud is not defined by the Ordinance, for the reason that it would be no more practicable to attempt a definition now than it has been at any other period in the history of the Torrens System. [In *Stuart v Kingston* (1923) 32 CLR 309 at 359, Starke J said: "No definition of fraud can be attempted, so various are its forms and methods."] The general meaning has been left at large, to be determined by the Court in the particular circumstances of each case.

30 In *Assets* ([8] *supra*), in respect of the Land Transfer Act 1870 (NZ) and Land Transfer Act 1885 (NZ), the Privy Council said, at 210:

> [F]raud in these Acts is meant actual fraud, i.e., dishonesty of some sort, *not what is called constructive or equitable fraud* – an unfortunate expression and one very apt to mislead, but often used, for want of a better term, to denote transactions having consequences in equity similar to those which flow from fraud. Further … the fraud which must be proved in order to invalidate the title of a registered purchaser for value … must be brought home to the person whose registered title is impeached or to his agents. Fraud by persons from whom he claims does

not affect him *unless knowledge of it is brought home to him or his agents.* The mere fact that he might have found out fraud if he had been more vigilant, and had made further inquiries which he omitted to make, does not *of itself* prove fraud on his part. But if it be shewn that his 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 be ascribed to him. [emphasis added]

31 This passage was cited with approval by Lord Buckmaster in the Privy Council when hearing the appeal from *Waimiha (NZ CA)*: see [1926] AC 101 ("*Waimiha*"). His Lordship, at 106, added the following rider:

If the designed object of a transfer be to cheat a man of a known existing right, that is fraudulent, and so also fraud may be established by a deliberate and dishonest trick causing an interest not to be registered and thus fraudulently keeping the register clear. It is not, however, necessary or wise to give abstract illustrations of what may constitute fraud in hypothetical conditions, for each case must depend upon its own circumstances. The act must be dishonest, and dishonesty must not be assumed solely by reason of knowledge of an unregistered interest.

32 In *Bahr v Nicolay (No 2)* (1988) 164 CLR 604 ("*Bahr v Nicolay*"), Mason CJ and Dawson J, in a minority judgment, held that "fraud" in s 68 of the Transfer of Land Act 1893 (WA) included certain species of equitable fraud where there were dishonesty. At 614, they said:

These comments [of Lord Buckmaster in *Waimiha*] did not mean all species of equitable fraud stand outside the statutory concept of fraud. Far from it. In *Latec Investments Ltd. v. Hotel Terrigal Pty. Ltd. (In liq.)* (1965) 113 C.L.R. 265, at pp. 273–274, Kitto J. held that a collusive and colourable sale by a mortgage company to its subsidiary was a plain case of fraud. According to his Honour, "[t]here was pretence and collusion in the conscious misuse of a power", this being a "dishonest course".

At 615, their Honours also held that fraud in s 68 was not confined to fraud in the obtaining of a transfer or in securing registration. They referred to the case of *Loke Yew v Port Swettenham Rubber Co Ltd* [1913] AC 491 ("*Loke Yew*") and said:

In the context of s. 68 there is no difference between the false undertaking which induced the execution of the transfer in *Loke Yew* and an undertaking honestly given which induces the execution of a transfer and is subsequently repudiated for the purpose of defeating the prior interest. The repudiation is fraudulent because it has as its object the destruction of the unregistered interest notwithstanding that the preservation of the unregistered interest was the foundation or assumption underlying the execution of the transfer. For the same reason the subsequent repudiation by a transferee of property of a limited beneficial interest in that property is fraudulent, when the transferee took the property on terms that the limited beneficial interest would be retained by the transferor.

33 In *Grgic v Australian and New Zealand Banking Group Ltd* (1994) 33 NSWLR 202 ("*Grgic*"), the Court of Appeal of New South Wales also approved the views of Mason CJ and Dawson J in these words, at 221:

[F]or the purposes of s 42 of the Act, "fraud" comprehends actual fraud, personal dishonesty or moral turpitude on the part of the registered proprietor of the subject estate or interest or of that registered proprietor's agents: see *Bahr v Nicolay [No 2]* (at 614) per Mason CJ and Davison J … Although it is now accepted that not all species of equitable fraud stand outside the concept of "fraud'" which has been adopted for the purposes of s 42 of the Act (see, eg, *Latec*

Investments Ltd v Hotel Terrigal Pty Ltd (In Liq) (1965) 113 CLR 265 [("*Latec*")] at 273–274 *per Kitto J; Bahr v Nicolay [No 2])* those species of "equitable fraud" which are regarded as falling within the concept of "fraud" for the purposes of s 42 are those – as for example, a collusive and colourable sale by a mortgagee company to its subsidiary ([*Latec*] at 273–274) – in which there has been an element of dishonesty or moral turpitude on the part of the registered proprietor of the subject interest or on the part of his or its agent.

34 The hallmark of fraud is dishonesty or moral turpitude, which usually stems from greed, and greed simply means taking something of value which does not belong to you. However, when a financial institution, such as UOB, 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 or to seek to defraud the customer of his property in the security. There may be the rare occasion where a bank might be tempted to claim a larger security than that to which it is entitled (as in the case of *Ho Kon Kim v Lim Gek Kim Betsy* [2001] 4 SLR 340 ("*Betsy*")), but this would normally occur when a shortfall in recovery is evident. When fraud occurs in connection with bank mortgages, it usually involves employees or agents acting fraudulently or dishonestly in their own personal interest, contrary to their obligations to the bank. Except for such cases, court actions against lending banks on the ground of fraud have little chance of success. The case of *United Overseas Finance Ltd v Yew Siew Kien* [1993] 3 SLR 207 ("*UOF*") may be contrasted with *Grgic*. In the former case, involving United Overseas Finance Ltd ("UOF"), UOF's solicitor forged the signature of the mortgagor to the mortgage and obtained a loan from UOF, the proceeds of which he then misappropriated. In the latter case, the bank officer merely witnessed the (forged) signature to the mortgage and certified that the dealing was correct for the purposes of the Real Property Act 1900. The registered proprietor in *UOF* succeeded in defeating UOF's mortgage on the ground of fraud, but the proprietor in *Grgic* failed to defeat the bank's mortgage on a similar ground.

35 The same comments apply to solicitors. When they act for clients, they are acting in the ordinary course of their profession, for which they are remunerated accordingly. Unlike their clients, they normally have no personal interest in the outcome of the transaction, and accordingly there is no reason for them to act dishonestly. Unless there is evidence that they have received payment well beyond their normal professional fees for the transaction, it would be difficult to impute a fraudulent intent in any act or omission in which they have been involved in relation to the taking of the security. They might be careless, negligent, indifferent or reckless, but they are not, in the ordinary circumstances, very likely to be dishonest or fraudulent. Furthermore, any allegation that they had turned a blind eye in order to assist a fraudster would be difficult to prove without evidence of dishonesty on their part. The present case is a good example.

36 We need to point this out because loan transactions involving banks are ordinarily of a different character from sale or gift transactions between private individuals or entities. It is these latter types of dealings that are more vulnerable to dishonest and fraudulent behaviour as the parties involved might want to extract the greatest financial advantage or benefit from such dealings.

B Section 160 of the LTA – rectification for fraud, omission or mistake

37 The Judge's finding that the Mortgage should be set aside on the ground of mistake or omission under s 160(1) of the LTA is set out in [39] of the GD as follows:

> Alternatively, in view of the facts as found, I accept the submission of counsel for the [respondent] that I should rectify the land-register by cancelling the registration of the Mortgage under s 160(1)(*b*) of the LTA on the ground that it was obtained through an omission or mistake.

> In accepting the [original CT] at the Registry, the staff concerned (who was not identified) must have made a mistake. The plaintiff should not derive any benefit arising from the registration because of the wrongful and illegal use of the [original CT].

38 There are two separate findings in this passage: (a) the land-register should be rectified because the registry staff made a mistake in registering the Mortgage, and (b) UOB should not be allowed to benefit from acquiring an indefeasible mortgage because of the wrongful and illegal use of the original CT. There is no logical connection between the two findings. The Judge seems to have conflated the benefit UOB derived from the mistake of the registry staff with the unconscionable benefit that UOB was considered to have derived from the wrongful and illegal act of Ms Loo. In so far as the second finding is concerned, we have earlier at [20]–[27] found that there was no evidence that Ms Loo knew that the original CT had been cancelled or a replacement CT issued, or that she knew it was an offence for her to be in possession of the original CT. It follows that finding (b) cannot stand and we accordingly set it aside.

39 We turn now to consider whether the mistake of the registry staff is a sufficient basis for the Judge to rectify the land-register. Under s 46(1) of the LTA, the estate of a proprietor is paramount, but subject to the overriding power of the court to rectify the land-register under s 160. Section 160(1) provides, subject to sub-s (2) (which does not apply here):

> 160.—(1) … the court *may* order rectification of the land-register by directing that any registration be cancelled or amended …
>
> > (*b*) where the court is satisfied that any registration or notification of an instrument has been obtained through fraud, omission or mistake …
>
> …

The power of rectification is discretionary and is exercisable only where the court is satisfied that the underlying condition has been fulfilled. However, apart from its internal structure, there are no extrinsic legislative materials to give guidance on the ambit of this power, such as, for example, the kind of, or whose, fraud, omission or mistake would satisfy the court. Prof Tan Sook Yee ("Prof Tan") has suggested in *Principles of Singapore Land Law* (Butterworths Asia, 2nd Ed, 2001) ("*Principles*") at p 220 that the courts should look for guidance from equity, for example, in its approach to setting aside transactions or contracts, or allowing recovery of money or other assets paid over on the ground of mistake. She has also suggested that a good starting point would be the case of *Oh Hiam v Tham Kong* [1980] 2 MLJ 159 (PC) ("*Oh Hiam*") at 164 where reference was made to "[equity's] ability to exercise its jurisdiction *in personam* on grounds of conscience." We have earlier highlighted the fact that the Judge ordered rectification of the register on the basis of the unconscionable conduct of MDP or Ms Loo. We have also pointed out that in doing so the Judge had to relate it to the wrongful and illegal use by MDP of the original CT to register the Mortgage, and not the mistake of the registry staff, which was the *causa causans* of the registration of the Mortgage: see GD at [42].

Object of section 160 of the LTA

40 The published legislative materials relating to the LTA do not contain an explicit statement on the objectives of s 160. The Explanatory Statement to the Land Titles (Amendment) Bill 1970 (Bill 32 of 1970) is also not exactly helpful in this regard. In his speech at the Second Reading of the Bill in Parliament, the Minister for Law and National Development said (see *Singapore Parliamentary Debates, Official Report* (2 September 1970) vol 30 at col 193):

> Clause 18 confers power upon the court to rectify the land-register in certain circumstances, that is to say, where two or more persons have by mistake been registered as proprietor of the same registered estate or interest in the land that is registered, or where the court is satisfied that any registration or notification has been obtained through fraud, omission or mistake. At present there is a provision under section 131 of the Ordinance for rectification only by the Registrar where errors have occurred in the land-register.

41 In our view, the Minister's speech, in contrasting the Registrar's existing powers under s 131 of the Ordinance (now s 159 of the LTA), suggests that the new provision was intended to supplement the limited powers of the Registrar to correct errors and omissions under s 131 of the Ordinance. Baalman has pointed out in *Baalman* that the Registrar had limited powers to rectify errors and omissions in the land-register. He wrote (see *Baalman* ([29] *supra*) at p 268):

> The land-register consists of not only of the folia on which title is certified, but also of the instruments of mortgage, lease, etc. which come under the heading of "dealings". The Registrar's power of correction does not extend to these instruments – at least, not to those parts of them which do not amount to "entries or endorsements"; subsec. (1) (*b*). For example, if an error is made in the memorial of registration of a transfer of lease, that subsection would give the Registrar power to correct it; but he has no power to alter provisions in the instrument itself, e.g. relating to the incidence of rent, or to the interest payable under a mortgage, even though all parties request him to do so. In other words, the Registrar's power is concerned with departmental mistakes rather than contractual mistakes.
>
> Where an instrument *inter partes* is found before registration to be erroneous, there is nothing to prevent the parties from altering it; and, provided the alterations are properly authenticated, it can then proceed to registration. But a registered instrument is in a different position. Some Australian Registrars have adopted a practice of permitting alteration of instruments after registration, by annexure signed by the parties to be bound. That is no doubt an effective way of binding assigns of the interest concerned, but only with regard to the purely contractual provisions. Where A has transferred Lot 6 to B, the parties would not be allowed to indicate by annexure after registration, that they had intended to transfer Lot 7. They should correct their mistake by re-transferring.

42 The enactment of s 160 has enabled the court to correct the kind of mistake referred to in the quoted passage. Similarly, prior to its enactment, the court had the power to declare the registered proprietor's title null and void for fraud or mistake, or on the basis that the land registered in his name was in excess of his entitlement, but there was no express machinery to rectify the land-register. Section 160 has provided the means to do so.

43 Although neither the Explanatory Statement to the Bill, nor the Minister's speech nor the text of s 160 makes explicit the object of the new provision, we can draw a number of useful conclusions from what there is. First, the court's power is not intended to override the Registrar's power. This is an important limitation, as we shall see later, in relation to any rectification based on mistake. A second limitation is that the court must be satisfied that the power should be exercised only where justified by the circumstances of the case. In exercising discretionary power, courts of law are expected to act on a just and equitable basis, taking into account all relevant considerations and omitting all irrelevant considerations, and not simply as the court thinks fit. There must be some objective evidence on which the court could be satisfied. One consideration might be whether damages would be a sufficient remedy. Another might be whether there is some other recourse, such as to the assurance fund. The third limitation is that the registration of the instrument must be *obtained* through fraud, omission or mistake. This brings us to the heart of s 160(1)(*b*). The crucial

questions in connection with the words "where … any registration or notification of instrument has been obtained through fraud, omission or mistake" would be: (a) *obtained by whom,* and (b) through *whose* fraud, omission or mistake?

Meaning of "registration … has been obtained" in section 160(1)(b)

44 In our view, two interpretative approaches may be adopted to answer the two questions. The first is to consider the grammatical structure of the provision. The second is to consider the ordinary meaning of the relevant words in the context of existing conveyancing practice in Singapore. The first will at least give us the ordinary meaning, whereas the contextual approach will either confirm or contradict that meaning.

45 On the first approach, the natural way to read s 160(1)(*b*), which provides that "the court may order rectification of the land register by directing that any registration be cancelled … where the court is satisfied that any registration or notification of any instrument has been obtained through fraud, omission or mistake", would be that the words "through the fraud, omission or mistake" refer to the person through whose fraud, omission 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 or omission at a less proximate point of time. The relevant fraud, omission 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.

46 In our view, the contextual approach also supports this interpretation. From time immemorial, conveyancing practice in Singapore has imposed on the transferee or the mortgagee the burden of obtaining the registration of the transfer or the mortgage, as the case may be. Indeed, it would be in his interest to undertake this burden. This was the established practice with respect to registration of deeds and instruments under both the regime of the Registration of Deeds Act and of the LTA. As far as the vendor is concerned, his part in the transaction is completed when he delivers the deed of conveyance or transfer duly executed, together with the title deeds or the CT, to the purchaser. Likewise, in a mortgage transaction as regards the mortgagor *vis-à-vis* the mortgagee. But, for the purchaser or the mortgagee, completion 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. The remainder of the registration process is in hands of the registry staff.

Rectification of the land-register for fraud, omission or mistake

47 With this contextual background in mind, the meaning of the words "*registration of any instrument has been obtained*" in s 160(1) is plain: they refer to the fraud, omission or mistake of the party who presents the instrument to the registry for registration. 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 omission or mistake, this interpretation provides the linkage to ss 46(2)(*b*)–46(2)(*e*) as it should only be the mistake or omission of the registered proprietor that is capable of prejudicing the rights of other parties in relation to the properties in question. This interpretation also reconciles the overlapping effect of s 46(2)(*a*) and s 160(1)(*b*) of the LTA in relation to fraud, omission and mistake, without having to resort to policy considerations. It further avoids the incongruence of Parliament conferring indefeasibility upon the registered proprietor in terms of s 46(1), while 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.

48 It is only just if as a result of his fraud, mistake or omission, a registered proprietor thereby obtains title to the property that the court should have the power to set the matter right by exercising its power of rectification under s 160(1)(*b*). When and how the court should order rectification would depend on the circumstances of the case. The order of rectification must reflect what is appropriate for the justice of the case.

49 Support for this interpretation may be found in the case of *Vassos v State Bank of South Australia* [1993] 2 VR 316 ("*Vassos*"). In that case, the court had to construe the meaning of s 44(1) of the Transfer of Land Act 1958 which read:

> Any folio of the Register or amendment to the Register procured or made by fraud shall be void as against any person defrauded or sought to be defrauded thereby and no party or privy to the fraud shall take any benefit therefrom.

The question of construction that arose was whether the words "procured or made by fraud" referred to the fraud of any party or the party whose title had been registered. Hayne J held at 326:

> [T]he words of s. 44(1) suggest that there must be established fraud by or on behalf of the party who seeks and obtains registration; otherwise how is it that the folio or the amendment is procured or made by fraud?

And at 327:

> [A]pproaching the matter by reference only to the terms of the sections, I consider that the better construction of s. 44(1) is one that reads the section not as qualifying s. 42(1) [the estate of the registered proprietor is paramount] but as stating the consequences that are to flow upon the occurrence of the exceptional case contemplated by that latter section.

50 Applying this approach in the present case, we should read s 160(1)(*b*) as stating the consequences that are to flow from any fraud, omission or mistake of the party who obtained the registration of the instrument. Section 160(1)(*b*) provides the means to rectify the land-register on the ground of fraud, omission or mistake that may be referable to the acts of the registered proprietor coming within the exceptions to s 46(2) of the LTA.

51 The construction we have given to s 160(1)(*b*) disposes of the argument of counsel for the respondent, one probably inspired by the hypothetical posed in *Principles* ([39] *supra*) at p 218, as to whether the fraud contemplated by s 160(1)(*b*) could refer to the fraud of any person. Counsel has argued that it could, and that in this case it refers to the fraud of the borrowers against the respondent. The argument is based on the difference in wording between s 160(1) and s 160(2). The latter provides that as against a proprietor in possession, the court shall not rectify the land-register *unless that proprietor is a party or privy to the omission, fraud or mistake in consequence of which the rectification is sought*, whereas the former does not have those qualifying words. It must follow that s 160(1)(*b*) does not require that the proprietor be a party or privy to the omission, fraud or mistake in consequence of which the rectification of which is sought.

52 If counsel's argument were accepted, it would mean that whether or not s 160(2) is referable to s 46(2) in terms of fraud, omission or mistake would depend on the contingency of whether or not the mortgagee happens to be in possession of the mortgaged property at the relevant point of time. 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).

Mistake

53 We have now established that s 160(1)(*b*) applies only to the mistake of the proprietor in obtaining registration of an instrument which has adversely affected the interest of another party. Such mistakes may fall within ss 46(2)(*b*)–46(2)(*e*), and may be corrected at the instance of the affected party, resorting to the machinery provided in s 160(1)(*b*). An illustration of how the court may be required to exercise its power in s 160(1)(*b*) would be the factual situation in the Malaysian case of *Oh Hiam* ([39] *supra*). There, a purchaser was registered (by a common mistake of both the vendor and the purchaser) as proprietor of a greater part of the land than should have been the case. The vendor asked for rectification on the ground of common mistake, and the Privy Council ordered the register to be rectified even though the Land Code (Cap 138) (M'sia) did not provide mistake as a ground to defeat a registered proprietor's title. In our view, if *Oh Hiam* had been a case under the LTA, it would have been a case of one party enforcing his contractual rights against the registered proprietor to correct a common mistake under s 46(2)(*b*) of the LTA.

54 We can now examine whether s 160(1)(*b*) applies in the present case. The material question is whether the registration of the Mortgage was obtained through the mistake of UOB's solicitors, and the answer is clear beyond doubt. The registration of the Mortgage was not obtained through any mistake on their part. The freelance registration clerk employed by UOB's solicitors was instructed to present the relevant documents to the registry staff for registration, which he did. As the Judge said, the registration went through, in spite of the non-production of the replacement CT. 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. If indeed there was a case for rectification at all under s 160(1)(*b*), it would have been on the ground of fraud under s 46(2), since the Judge had found that Ms Loo's wilful blindness was akin to fraud. But the Judge, inexplicably, proceeded on the basis of mistake and not of fraud.

5 5 For the above reasons, we are of the view that the Judge's decision to order rectification of the land-register on the ground of mistake was wrong in law.

56 Before we conclude this section, we wish to make two observations on a question which, although it is not an issue in this appeal, has a bearing on the power of the court to rectify the land-register. The first is the potential risk of the Registrar being sued by UOB should the Mortgage be cancelled by the court. By registering the Mortgage contrary to the requirements of s 42(1) of the LTA, the Registrar has caused UOB to change its position to its detriment by allowing the borrowers to draw on the credit facility. If the court were to cancel the Mortgage because of the Registrar's mistake, UOB might well have a claim against the Registrar for negligence, *if* the Registrar owed UOB a duty of care. The second is that if the Registrar has made a mistake in registering the Mortgage, then the respondent may well have a claim against the assurance fund under s 151 of the LTA for compensation for her loss. In the first case, rectifying the land-register may impose a personal liability on the Registrar (or effectively the public purse), whilst in the second case, the loss would be shifted to the assurance fund. If either situation is applicable to the facts of this case, then it might not be a proper exercise of a discretionary power for the court to order rectification of the land-register against UOB. A discretionary power must be exercised reasonably and fairly, taking into account all the circumstances of the case.

Omission

57 The facts of this case do not bring into play the element of omission as a reason to invoke s 160(1)(*b*). However, it is convenient at this point to examine the decision in *United Overseas Finance v Victor Sakayamary* [1997] 3 SLR 211 ("*Sakayamary*"), where the High Court considered an omission in the context of s 160(1)(*b*) of the LTA. The facts of that case were extremely complicated. In brief, the registered proprietors ("first proprietors") were personal representatives of the deceased. They purportedly sold and transferred to the first defendant ("the second proprietor") a property belonging to the estate of the deceased 17 years after his death without obtaining the approval of court as required by s 35(2) of the Conveyancing and Law of Property Act (Cap 61, 1994 Rev Ed) ("CLPA"). The second proprietor then mortgaged the property to the plaintiffs, UOF. When UOF took action upon the mortgagor's default, the first proprietors intervened and contended that all the transactions were fraudulent and that, in relation to the mortgage, UOF was a party to the fraud as the solicitor who acted for UOF in the mortgage was also involved in the fraud of the mortgagor. There were two serial frauds in that case: fraud in the transfer of the property, followed by fraud in the execution of the mortgage. The same solicitor acted for all the parties in both transactions.

58 The court made the following findings:

(a) both the transfer and mortgage were fraudulent;

(b) the second proprietor was not a *bona fide* purchaser for value and his title was not indefeasible;

(c) in relation to the mortgage, UOF's solicitor was privy to the fraud;

(d) the failure of the first proprietors to obtain the sanction of the court under s 35(2) of the CLPA was an omission, "or perhaps a mistake", under s 160 of the LTA;

(e) the lack of sanction made the transfer and mortgage null and void; and

(f) indefeasibility of title by registration does not afford the first proprietors a defence in this case.

The court also referred to *UOF* ([34]) *supra*) as a parallel case. On the basis of these findings, the court declared both the transfer and the mortgage fraudulent, null and void and of no effect, and ordered that the land-register be rectified by cancelling the registration of both the instruments.

59 It seems clear from the terms of the court's orders that they were made on the basis of fraud in the registration of both the transfer and the mortgage. The court did not make the rectification order based on an omission by UOF in obtaining the registration of the mortgage. Instead, the court used the failure to comply with s 35(2) of the CLPA as the basis of fraud on the part of the transferee/mortgagor and of UOF. In this respect, the court took the view that an administrator who transferred the deceased's estate's property for his own benefit, with or without the sanction of the court, would be committing a fraud on the beneficiaries. Similarly, the court was also of the view that it would also be a fraud against the beneficiaries if such a transfer were made without the sanction of the court, as required by s 35(2) of the CLPA, more than six years after the death of the deceased.

60 We consider next the failure to obtain the sanction of the court as required by s 35(2) of the CLPA. The court said that such failure was an omission, or perhaps a mistake, under s 160(1)(*b*).

However, the court did not go beyond describing the non-compliance as an omission. There was no determination as to the effect of the omission. In our view, even if the court had decided that the omission would be sufficient to warrant a rectification order under s 160(1)(*b*), it would still be consistent with our construction of s 160(1)(*b*) because, on the facts of that case, the registration of the mortgage was obtained by UOF's solicitor.

61 In our view, however, s 35(2) of the CLPA has the effect of imposing a legal disability on an administrator six years after the death of the deceased with respect to the property of the estate. The administrator is under a legal disability in terms of s 46(2)(*d*) of the LTA because he has no power to dispose of the property of the estate without the sanction of the court. The expression "legal disability" in s 46(2)(*d*) of the LTA is not defined, but it simply means "disabled by law". It is an apt expression to apply to an administrator who is so disabled by operation of law. Furthermore, because the legal disability of the administrator arises by operation of law, a purchaser who gets his title from such an administrator may not be permitted to disclaim knowledge of the existence of his legal disability, as ignorance of the law is not an excuse. For this purpose, and in this special situation, the purchaser could be deemed to know the legal disability in the limited sense that he might not be able to excuse himself from not knowing the law.

C Personal Equities

62 The Judge found that the respondent had a personal equity to set aside the Mortgage. The reasons for this finding are set out in [40] and [41] of the GD as follows:

> 40 … I also accept the submission of counsel for the [respondent] that the [respondent] has a personal right recognised by equity to set aside the transaction on the ground that [UOB's] agents had unlawfully used the cancelled [original CT] to get on to the land-register as a mortgagee to the [respondent's] detriment and when they were not entitled to do so … The case of *Mercantile Mutual Life Insurance Co Ltd v Gosper* (1991) 25 NSWLR 32 (["*Gosper*"]) is relevant. It was held by a majority of the Court of Appeal[,] with Meagher JA dissenting[,] that registration under the Australian Real Property Act 1990 (which is broadly similar to the LTA) might be set aside when there was a personal equity enforceable under the general law. It was also held that such an enforceable personal equity arose in respect of a forged variation of mortgage where the mortgagee produced the certificate of title without the authority of the registered proprietor and in breach of its obligations in relation to the possession and custody of the certificate of title.
>
> 41 … In [*Gosper*], Mrs Gosper [("G")] mortgaged the property to the mortgagee for a certain sum. The mortgage was registered. Later, Mr Gosper, without the knowledge or consent of [G], increased the amount of the loan and forged [G's] signature to the Variation of Mortgage. [G] argued that the Variation was not binding on her. The mortgagee was not found to be fraudulent. It relied on the indefeasibility of its title. The court held that although the mortgagee had title under the Variation of Mortgage (despite the forgery of [G's] signature), nevertheless as no interest had been acquired by a third party on the faith of the register, [G] could enforce a personal equity against the mortgagee. This personal equity sprang from the mortgagee using [G's] certificate of title to register the Variation of Mortgage without her consent. The court held in favour of [G] even though the mortgagee was neither privy to the fraud nor was it even put on enquiry as to the [perpetration] of the fraud.

63 Counsel for UOB has contended that *Gosper* has no application to the facts of the present case, citing several Australian cases which have also distinguished *Gosper* on the facts, such as *Vassos* ([49] *supra*) and *Story v Advance Bank Australia Ltd* (1993) 31 NSWLR 722 ("*Story v Advance*

Bank"). It is not necessary for us to discuss these cases. In arguing against the application of *Gosper* to the facts of the case under appeal, counsel for UOB accepted that the indefeasibility principle does not deny the right of the respondent to bring an *in personam* action against UOB, but he contended that the right must be grounded in a cause of action recognised in law or equity, citing *Grgic* ([39] *supra*); *Pyramid Building Society (In liquidation) v Scorpion Hotels Pty Ltd* [1998] 1 VR 188; *64th Throne* ([16] *supra*); *Teo Siew Peng v Neo Hock Pheng* [1999] 1 SLR 293 ("*Teo Siew Peng*"); and *Betsy* ([34] *supra*). Counsel contended that *Gosper* is distinguishable on the ground that the mortgagee there had allowed the certificate of title, which was in its custody, to be unlawfully used; whereas in the present case the original CT was given by the respondent's solicitors to MDP for the specific purpose of using it to register the Mortgage.

64 In our view, *Gosper* has no application in the present case for two reasons. First, there was no pre-existing relationship between UOB and the respondent that could have given rise to any obligation or responsibility on the part of UOB with respect to the custody or use of the original CT. Second, the finding of the Judge that Ms Loo had unlawfully used the original CT, on the basis of which *Gosper* was applied, is not supported by the evidence since Ms Loo had no knowledge that the original CT had been cancelled. Ms Loo did not facilitate the registration of the Mortgage in the same way that the bank in *Gosper* did, with respect to the second mortgage. We find that the respondent had no personal equity against UOB on this ground.

65 Accordingly, we set aside the Judge's order setting aside the Mortgage based on this ground.

Are personal equities outside section 46 inconsistent with the LTA?

66 Counsel for the parties have referred to various Australian and New Zealand decisions on the Torrens statutes of those jurisdictions which have recognised that the principle of indefeasibility does not preclude a claim to an estate or an interest in land against a registered proprietor arising out of his own conduct: see *Bahr v Nicolay* ([32] *supra*) at 613. In the present case, the Judge's reliance on *Gosper* illustrates the strong influence of Australian case law on *in personam* claims or personal equities in our jurisprudence. In *Principles* ([39] *supra*) at p 248, Prof Tan has written:

> In short, where a person has an action at general law to set aside a transaction, he can be said to have a personal equity. In Australia, this action is said to be available as the relevant legislation does not exclude it. The same can be said for the position under the Land Titles Act. At the general level, there is much to recommend in this non-exclusive attitude. But the personal equity should be seen in the context of the whole Torrens system so that as it develops, it does not defeat the essence of the principle.

Prof Tan has commented that the facts in *Gosper* show how slippery the slope of personal equity can be, and has warned that the indefeasibility of the registered title would be severely compromised if personal equity ranged too wide. Assoc Prof Crown has also expressed a similar view in "Equity Trumps" ([9] *supra*) at 415 as follows:

> There are cases where constructive trusts are imposed to prevent unconscionable conduct….There is a danger, however, in the use of vague language such as "unconscionability", because if such a broad concept is not limited to specific and defined cases it promotes uncertainty in the law. It would be most unfortunate, therefore, if [*Betsy*] were understood as laying down a wider proposition for the imposition of a constructive trust on a more generalised basis. The notion of an "*in personam* claim" or a "personal equity" is inherently vague. Its general adoption in Singapore would pose a threat to one of the central planks of the Torrens system.

Assoc Prof Crown has argued that a generalised *in personam* exception has no place in the Singapore Torrens system. Prof Tan (in *Principles* at p 246) adopts the view that "*personal equity as part of equity forms part of the law, unless it is inconsistent with the provisions of the Land Titles Act*". Given the uncertain state of the law in Singapore, it is desirable that we give our views on whether or to what extent personal equities are consistent with the principle of indefeasibility as recognised by the LTA.

Frazer v Walker in Singapore

67 The modern *locus classicus* on the existence of personal equities in the Torrens system of land registration is the statement of Lord Wilberforce in *Frazer v Walker* [1967] 1 AC 569 at 585, as follows:

> [Their Lordships] wish to make clear that this principle [that is the principle of indefeasibility] in no way denies 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. That this is so has frequently, and rightly, been recognised in the courts of New Zealand and of Australia: see, for example, *Boyd v. Mayor, Etc., of Wellington* [[1924] NZLR 1174 ("*Boyd v Mayor of Wellington*") at 1223] and *Tataurangi Tairuakena v. Mua Carr* [[1927] NZLR 688 ("*Tataurangi*") at 702].
>
> Their Lordships refer to these cases by way of illustration only without intending to limit or define the various situations in which actions of a personal character against registered proprietors may be admitted. The principle must always remain paramount that those actions which fall within the prohibition of sections 62 and 63 may not be maintained.

This passage has been cited with approval in several Singapore decisions, such as *Sakayamary* and *Betsy*. As *Betsy* was the first time this court recognised an *in personam* claim under the LTA, this is a convenient point to examine the implications of *Betsy* for the Singapore Torrens system.

What this court decided in Betsy

68 In *Betsy* ([34] *supra*), RHB (the lending bank) had obtained a mortgage of a property from Betsy who had earlier sold (and collected the sale price of) a proposed sub-divided plot to Mdm Ho. RHB knew of Mdm Ho's equitable interest in the plot of land and that the interest was an unregistered interest. In the course of negotiating the terms of the loan with Betsy, RHB not only acknowledged and recognised Mdm Ho's interest by inserting a cl 6(2) in the regulating agreement, but as the court said (at [34]), "*they did more*". RHB informed Betsy that it would respect her obligations to Mdm Ho so that Mdm Ho would receive her bungalow unit free from encumbrances. The court (at [35]) accepted Mdm Ho's evidence that *if RHB had not inserted cl 6(2) in the regulating agreement, she would not have taken the loan from RHB*. Furthermore, RHB, in valuing the land as security, discounted the value of Mdm Ho's interest. In other words, the loan was given on the security of Betsy's property at a valuation which excluded the value of Mdm Ho's interest.

69 On these facts, this court decided (*Betsy* at [49]) that RHB's conduct in repudiating the uncaveated equitable interest of Mdm Ho was unconscionable, but not dishonest or fraudulent as to amount to actual fraud as defined in *Assets* ([8] *supra*) and *Waimiha* ([31] *supra*). The court next considered whether Mdm Ho had a personal equity against RHB and, after analysing the decision in *Bahr v Nicolay* ([32] *supra*) and finding the facts in that case "not distinguishable" from the facts in *Betsy,* held that RHB was a constructive trustee of Mdm Ho's land, following the majority decision in *Bahr v Nicolay* (see *Betsy* at [50]).

The facts and findings in Bahr v Nicolay

70 In *Bahr v Nicolay,* the Bahrs, in order to raise funds to develop their land, sold and transferred it to Nicolay who leased it back to them for three years. The contract provided that on the expiry of the lease, the Bahrs would repurchase the land at a fixed price. Later, Nicolay sold and transferred the land to the Thompsons under a contract which contained a provision acknowledging the existence of the repurchase provision. *After becoming the registered proprietors, the Thompsons told the Bahrs that they "recognized" the repurchase clause and would agree to sell the land back to them at the fixed price.* The Bahrs were willing to pay the price, but the Thompsons refused to sell the land.

71 The High Court of Australia decided that the Bahrs were entitled to specific performance against the Thompsons. The majority judges, Wilson, Brennan and Toohey JJ, held that by taking a transfer knowing of and accepting an obligation to resell, the Thompsons were bound by a constructive trust in favour of the Bahrs. Wilson and Toohey JJ held that the Thompsons were not fraudulent because they had merely acknowledged the existence of the repurchase provision and they did not intend to deprive the Bahrs of their rights but had hoped that they would not repurchase or have the means to repurchase the property. All the three judges held that Thompsons' conduct did not amount to actual fraud in terms of the *Waimiha* formulation.

72 The minority judges, Mason CJ and Dawson J, held that the Thompsons' acknowledgement had created an express trust to the effect that they held the land subject to rights created in favour of the Bahrs by the first contract, and also that the Thompsons' subsequent repudiation of the Bahrs' equitable interest was "fraud" for the purpose of ss 68 and 134 of the Transfer of Land Act 1893 (WA). The minority judges, after referring to *Assets* and *Waimiha,* found nothing in the language or purpose of s 68 which warranted such a restrictive interpretation. They agreed with Higgins J in *Stuart v Kingston* (1923) 32 CLR 309 at 345, that the section should be construed "strictly" and the exception "liberally": see *Bahr v Nicolay* at 615.

73 In *Betsy*, the court followed the majority view in *Bahr v Nicolay* and held that RHB's conduct was unconscionable but not dishonest, and imposed a constructive trust on RHB to release Mdm Ho's land back to her without payment. The court could have decided, but did not, that RHB was holding Mdm Ho's land on an express trust or that RHB was guilty of equitable fraud (as was found by the minority judges in *Bahr v Nicolay*). In our view, the facts in *Betsy* as found by the court would have allowed it to find that there was actual fraud on the part of RHB. The facts showed that RHB had induced Betsy to accept the mortgage on the promise that they would release Mdm Ho's plot of land back to her without payment, thus bringing the case within s 46(2)(*b*) of the LTA. In our view, the facts in *Betsy* are on all fours with those in *Loke Yew* which Mason CJ and Dawson had examined in arriving at their decision. Let us now take a look at the facts in *Loke Yew.*

The findings of the Privy Council in Loke Yew

74 In *Loke Yew* ([32] *supra*), the land was held under the Registration of Titles Regulation, 1891 (Selangor), s 7 of which provided that the title of a registered proprietor "shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party". Section 86 of the Regulation also provided: "Nothing contained in this regulation shall take away or affect the jurisdiction of the Court on the ground of actual fraud." The facts were as follows. HME, the registered proprietor of 322 acres of land, had sold 58 acres to LY under an unregistered documentary title which LY had omitted to protect by lodging a caveat. PSR, through G, negotiated with HME to purchase the land. HME was not prepared to transfer the entire 322 acres to PSR. To overcome HME's objection to signing the transfer of the whole of the land, G gave him a written

assurance that PSR would purchase LY's interest in these words: "*As regards [LY's] interest, I shall make my own arrangements*." PSR, having registered the transfer in its name, later started court action to eject LY from his 58 acres. LY counterclaimed for rectification of the register.

75 Among the critical findings of the Privy Council in *Loke Yew* were the following:

(a) At 502–503:

> It is important … to note that the purchase price inserted in the conveyance is $417,000 shewing a difference of $67,000 when compared with the sum actually paid after allowing for the $14,000 for the land of Sz Woh Kongsi [another sub-purchaser from HME]. This corresponds closely with [PSR's] own estimate of $70,000 as the value of [LY's] land … It is clear, therefore, from the amount actually paid that *[LY's] lands were not included in the sale*. [emphasis added]

(b) At 503–504:

> *Their Lordships therefore find that the formal transfer of all the rights under the original grant was obtained by the deliberate fraud of [G].* He was aware that he could not obtain the execution of a transfer in that form otherwise than by fraudulently representing that there was no intention to use it until [PSR] were able so to do honestly by having acquired [LY's] sub-grants by purchase, and he therefore fraudulently made such representation, and thereby obtained the execution of the transfer. [emphasis added]

The Privy Council held that: (a) on the facts, PSR had obtained the transfer by fraud and misrepresentation; (b) apart from s 7, as the rights of third parties had not intervened, PSR could not better its position by obtaining registration under circumstances which made it dishonest to do so, and that it was the duty of the court to order rectification; and (c) under s 3 of the Specific Relief Enactment, 1903 (Enactment 9 of 1903), the respondents having bought with notice of LY's rights were trustees for him in respect thereof.

76 In our view, the material facts in *Betsy* were indistinguishable from those in *Loke* Yew, but distinguishable from those in *Bahr v Nicolay.* In *Loke Yew,* it was a condition of the sale to PSR that PSR would not claim ownership of LY's land without paying for it; similarly, in *Betsy*, it was also a condition of the acceptance by Betsy of RHB's loan that RHB would not claim Mdm Ho's interest as part of the mortgage. Furthermore, in *Loke Yew,* PSR did not pay for the value of LY's land; similarly, in *Betsy,* RHB did not take into account the value of Mdm Ho's interest when valuing the security for the purpose of the loan to Betsy. In contrast, in *Bahr v Nicolay,* the Thompsons had merely acknowledged the existence of Bahrs' repurchase rights and had made no promise to recognise it as a condition of the bargain with Nicolay. It was not necessary for the court to follow the decision of the majority judges in *Bahr v Nicolay* to impose a constructive trust. If the court in *Betsy* had found fraud under s 46(2)(*a*) of the LTA, or alternatively, a breach of an express trust, either decision would have been unexceptionable as it would have fallen within ss 46(2)(*a*) and 46(2)(*c*) of the LTA.

77 In our view, given that the facts in *Betsy* could have justified a finding that there was actual fraud (following *Loke Yew*) or that there was an express trust (following the minority judges in *Bahr v Nicolay*), it is unfortunate that the court chose to impose a constructive trust on RHB, and thereby introduced an *in personam* claim under the LTA, when it could have brought it under either s 46(2)(*a*) or s 46(2)(*c*) of the LTA. Should a dispute on similar facts come before this court in future, the decision in *Betsy* would have to be reconsidered for consistency with the policy of the LTA.

Conscionability and personal equities

78 Apart from Lord Wilberforce's statement in*Frazer v Walker*, the Privy Council in *Oh Hiam* also said that "the ability of the court, exercising its jurisdiction in personam [is] to insist upon proper conduct in accordance with conscience". This statement was made in the context of the Land Code of Malaysia which does not give the court or the registrar the power to correct the land-register on the ground of mistake. We have pointed out earlier (at [53]) that on the facts in *Oh Hiam,* the case would have come under s 46(2)(*b*) read with s 160(1)(*b*) of the LTA. It would not be necessary to rely on the amorphous concept of conscience to remedy a mistake of this kind. It is necessary to reiterate that whilst the core principles of the Torrens system, *viz*, the "mirror" principle which, in turn, reinforces the principle of indefeasibility, are the underlying basis of all Torrens statutes, it by no means follows that these core principles have been given statutory protection in the same way in all Torrens statutes. General statements such as those in *Frazer v Walker* and *Oh Hiam* should be read and understood in the context of the Torrens statutes in which they were made. They do not necessarily apply to the LTA. When the LTA was drafted, the draftsman was fully aware of the decisions of Australian and New Zealand courts on personal equities. Baalman himself has stated in *Baalman* at p 84 that

> The principle which in other Torrens jurisdictions thus rested on case-law, is made statutory by s. 28 (2) (*b*) of [the] Ordinance [now s 46(2)(*b*) of the LTA].

On the subject of the exception for trusts contained in what is now s 46(2)(*c*) of the LTA, Baalman wrote at p 85:

> This right is a personal one corresponding in some respects to that of subsec. 2 (*b*) [now s 46(2) (*b*) of the LTA].

Statutory exceptions under the LTA – section 46(2)

79 It is useful to take a closer look at the list of exceptions to the principle of indefeasibility set out in s 46(2). The first exception, s 46(2)(*a*), concerns "fraud" or "forgery" to which the registered proprietor or his agent is a party or in which he or his agent colluded. This exception gives legislative effect to the Privy Council statements on the reach of fraud in *Assets* (1905), *Loke Yew* (1913), *Barry v Heider* (1914) 19 CLR 197 and *Waimiha* (1926), and, in relation to collusive dealings, anticipates *Latec* (1965).

80 The second exception, in s 46(2)(*b*), enables any person to enforce against a proprietor any contract to which he was party. This exception would capture most, if not all, *in personam* actions or personal equities on a breach of a contractual term by the registered proprietor, giving rise to a direct claim by the other party to the contract. Baalman has provided a simple illustration at p 84 of *Baalman*: "For example, if *A,* the proprietor of registered land, sold it on contract to *B, A* could not repudiate his obligations on the ground that a folium of the land-register which bears his name as proprietor, is conclusive of the ownership of the land." There could also be an indirect claim by a third person who may not be a party to the contract, as in the cases of *Betsy*, *Bahr v Nicolay,* and *Loke Yew.*

81 The third exception, in s 46(2)(*c*), enables any person to enforce against a proprietor who is a trustee, the provisions of the trust. The language of this subsection seems to apply only to express trusts and not constructive trusts. Although Assoc Prof Crown argues that *Betsy w*as a case of a constructive trust falling within s 46(2)(*c*), in our view, the decision in *Betsy* is better based on the ground of actual fraud to which RHB was a party.

82 The fourth exception, in s 46(2)(*d*), enables a person to recover from a proprietor land

acquired by him from a person under a disability which was known to the proprietor at the time of dealing. This exception would be relevant to cases such as the present case, or *Sakayamary* where there was non-compliance with requirements of s 35(2) of the CLPA. Another example referred to in *Sakayamary* is the case of *Tataurangi* ([67] *supra*). It is useful to note that in that case, Skerret CJ said at 702:

> The provisions of the … [New Zealand Torrens] Act as to indefeasibility of title have no reference either to contracts entered into by the registered proprietor himself or to obligations under trusts created by him or arising out of fiduciary relations which spring from his own acts contemporaneously with or subsequent to the registration of his interest.

These omissions in the New Zealand Act had obviously been noted by Baalman as they have been enacted as ss 46(2)(*b*) and 46(2)(*c*) of the LTA.

83 The fifth exception, in s 46(2)(*e*), applies to *ultra vires* transactions. This exception gives statutory recognition to the principle that was rejected in the case of *Boyd v Mayor of Wellington* ([67] *supra*), but which was accepted in *Caldwell v Rural Bank of New South Wales* (1951) 53 SR 415.

Overriding interests under the LTA – section 46(1)

84 In addition to the list of exceptions to the principle of indefeasibility set out in s 46(2), s 46(1) of the LTA also lists out the overriding interests and powers that can prevail against the principle of indefeasibility. The most important powers are, in theory, the power of the Registrar under s 157 to correct errors in the land-register and the power of the court under s 160 to rectify the land register on the ground of fraud, omission and mistake. Even though it has been said that "[a]n unqualified power to cancel or correct the Register could strike at the very roots of the indefeasibility of title" (see *Ferguson v Registrar of Land Titles (Saskatchewan)* [1953] 1 DLR 36 at 41, quoted in *Baalman* at p 82), we have used the words "in theory" advisedly in relation to the power of the Registrar to correct errors in the land-register, because in practice the power does not appear to have caused any major difficulties for the principle of indefeasibility under the LTA. Similarly, the power of the court has also caused no difficulty to the principle of indefeasibility, until in the present case. Fortunately, this court is able to remedy it.

Are the overriding interests and exceptions in section 46 exhaustive?

85 Following *Frazer v Walker,* the Australian and New Zealand courts have fully endorsed the principle that the indefeasibility provisions of the Torrens statutes do not prevent the enforcement against registered proprietors of "personal equities"*:* see *Breskvar v Wall* (1971) 126 CLR 376. In *Gosper* ([62] *supra*) at 45, Mahoney JA pointed out that there has been no comprehensive definition of "personal" equity for the purpose of defeating a registered proprietor's title, but that the content of "personal equity" must not be *inconsistent* with the terms or policy of the legislation. In *Story v Advance Bank* ([63] *supra*) at 739, Mahoney JA said that the law is in the process of defining what interests are or are not personal equities for this purpose, but clearly not all interests, statutory or equitable, which under the general law a person has or would have against a registered proprietor are "personal equities" within this principle.

86 In *64th Throne* ([16] *supra*), Tadgell JA opined that there is ample room in the Torrens system for the application of equitable principles, but not, for example, the doctrine of constructive trust which applies under the general law to determine priorities between legal and equitable interests. (Such a principle would of course be contrary to s 47 of the LTA.) In the same case, Ashley AJA said:

> That simple proposition [in *Frazer v Walker*] (the principle existed, in substance, long before *Frazer*) has given rise to a torrent of judicial and text writing. Some things, at least, are clear. A right enforceable in personam is not a right upon the property the subject of registration per se. It is a personal right against the registered proprietor, even though it may require that person to deal with the property in a particular way. The principle extends to known legal and equitable causes of action. It focuses upon the conduct of the registered proprietor and also those for whose conduct he is responsible. That conduct might ante date or post date registration of the pertinent dealing. Further, it can probably be said that the conduct must be such that as should be described as unconscionable or unconscientious, as those words are now understood in the law. But that is not to say that conduct which merits such a description will give rise to an in personam right in the absence of a known legal or equitable cause of action. There is substantial authority to the contrary.
>
> …
>
> Moreover, insofar as unconscionable or unconscientious conduct is characteristic of circumstances in which an in personam remedy will lie, it appears to me unnecessary to travel outside known legal and equitable causes of action in order to provide a remedy against such conduct.
>
> To say that there must be a known legal or equitable cause of action to found an in personam remedy should not, in my opinion, be used in a de facto way to obliterate the existence of the exception. The indefeasibility principle is deeply, and understandably, entrenched in the law. But I consider that it would be wrong to obliterate the exception in order to leave the principle, in substance if not in legal theory, wholly unscathed. The necessary balance is in my respectful opinion disclosed by the judgment of Wilson and Toohey, JJ. in *Bahr v Nicolay* … the judgment of Mason C.J. and Dawson J. [and] the judgment of Brennan J., in the latter of which his Honour set out concisely and clearly the footing upon which he considered that the intervention of equity – by the erection of a constructive trust as a response to unconscionable conduct – was required.

87 Ashley AJA's observations, whilst reflecting the current Australian approach to personal equities under Australian Torrens statutes, should alert us to the dangers of an indiscriminate application of *Frazer v Walker* in Singapore. The provisions of our LTA are not the same as those in the Australian statutes. We have examined the decisions in *Sakayamary* and *Betsy* and found that the former was a case of actual fraud and the latter should have been decided on the basis of actual fraud. We have also found that *Gosper* has no relevance to the facts in the present case. Moreover, if the facts in *Gosper* had occurred here, the *in personam* claim might well be covered by the exception in s 46(2)(*b*) of the LTA, in that the mortgagee had breached an implied term of the security agreement that it would not misuse the certificate of title in its custody. In our view, all the Singapore decisions to date that have accepted or purported to accept, following *Frazer v Walker,* that there existed *in personam* claims against the registered proprietor could have been brought under the relevant exceptions in s 46(2) of the LTA, or the powers of the court under s 160 of the LTA.

88 Baalman was familiar with the concept of personal equities (see Lord Moulton's speech in *Loke Yew* which Baalman referred to when commenting on s 29 of the Ordinance (now s 47 of the LTA)). At p 84 of *Baalman,* he explained that s 28(2)(*b*) of the Ordinance, which is now s 46(2)(*b*) of the LTA, had made statutory the principle which in other Torrens jurisdictions rested on case law. At p 77 of *Baalman,* he also wrote:

> The broad scheme of the section [s 28 of the Ordinance, now s 46 of the LTA] is to declare the

> title of every registered proprietor to be conclusive and indefeasible against all unregistered interests, but subject to a list of exceptions. Although the number of items in this list will seem unduly large, there are still fewer exceptions from indefeasibility in this Ordinance than in most other Torrens statutes. What makes the list seem a long one is the fact that here *practically all* of the exceptions have been expressed, whereas in other Torrens statutes some of them have been left to implication. For example, in the New South Wales Real Property Act only four exceptions are expressly listed, but at least eight others are left to necessary implication. It is regrettable, of course, that there should have to be any exceptions; but a glance at the list will show that the cost of extreme conclusiveness would not only be prohibitive, but it would be out of all proportion to its administrative value.
>
> In the comment immediately following, it will be seen that the draftsman of this Ordinance has endeavoured to surmount the controversies which inspired the various sub-titles, and *to minimise* implied exceptions from, or qualifications on, the measure of indefeasibility. The extent of his success is still to be decided by experience; but the net result of his endeavours will at least be less uncertainty.
>
> [emphasis added]

89 The commentary that followed deals with whether indefeasibility under the LTA is immediate or deferred, failure to observe procedural requirements, dealings with a proprietor (including the problem of a fictitious transferor in *Gibbs v Messer* [1891] AC 248, the *mala fide* transferor, the overriding interests in s 28(1) (now s 46(1)) and the express exceptions in s 28(2) (now s 46(2)), volunteers and implied exceptions to indefeasibility.

90 In our view, Baalman's comments are an invaluable source of the draftsman's original intent in enacting a long list of overriding interests and exceptions to the principle of indefeasibility. The central idea is the paramountcy of the registered title. The second central idea is that the land-register mirrors what a purchaser is or is not subjected to, save for the overriding and express exceptions. Baalman was not in favour of personal equities being developed by case law as that would only lead to uncertainty in the inviolability of the land-register. As was said in *Baalman* at pp 93–94:

> [A] prospective purchaser who finds the land-register free from caveats, can safely enter into his contract on the basis that the relevant folium discloses the true state of the title. And if in fact an earlier equity was in existence it will be overreached by his contract. But he could lose this favoured position by failure to take some positive step to protect it, by lodging either a caveat or an instrument giving effect to his contract; for as between competing equities, s. 31 [now s 49 of the LTA] gives priority to that one which is first protected by a caveat, or by an instrument lodged for registration. Like Equity, the Torrens System rewards the diligent.

9 1 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 the LTA was exhaustive of all claims, including personal equities, that could be made against a registered proprietor. But the inclusion of the exception of fraud 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. The minority judgment in *Bahr v Nicolay* has extended the meaning of "fraud" to include equitable fraud where there is present dishonesty or moral turpitude. However, this court, in *Betsy,* did not adopt the view of the minority judgment in *Bahr v Nicolay*. So, whether the minority decision is consistent with the fraud exception in s 46(2)(*a*) of the LTA is an open question in Singapore. As for the personal equity in *Bahr v Nicolay*

giving rise to a constructive trust, which this court accepted in *Betsy*, its consistency with s 47(2)(*a*) of the LTA is doubtful and may have to be reconsidered at an appropriate time. 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. 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.

Principle of indefeasibility and doctrine of immediate indefeasibility

92 Prior to the enactment of the LTA, there existed in Singapore a system of deeds registration under the Registration of Deeds Act. The object of the deeds registration system was to reduce uncertainty in land dealings by making registration of deeds the basis of determining the priority of interests in land, in the absence of actual fraud. The LTA in introducing the Torrens system was designed to simplify land dealings and to give finality to the title of the registered proprietor. Section 46(1) gives him an indefeasible statutory title upon registration of the instrument of transfer or mortgage, subject only to the overriding interests in s 46(1) and the exceptions to indefeasibility in s 46(2).

93 Section 47(1) reinforces the concept of immediate indefeasibility by excusing the purchaser from the effect of personal equities arising from notice of any trust or other unregistered interest whatsoever, any rule of law or equity to the contrary notwithstanding, while s 47(2) provides that knowledge that any unregistered interest is in existence shall not of itself be imputed as fraud. Section 47(3) goes further in providing that the protection afforded by s 46(1) *commences at the date of the contract* or other instrument evidencing such dealing, subject only to the proprietor's title being defeasible by overriding interests in s 46(1) itself and the exceptions in ss 46(2)(*a*)–46(2)(*e*). By implication, and logic, any such 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. Given that the purchaser may lodge a caveat to protect his interest before the completion of the purchase, the lodging of which gives his interest in the land priority over all subsequent claims, the purchaser is able to secure his title even before it becomes indefeasible upon registration.

94 This being the statutory framework provided by ss 46 and 47 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* the contract is entered into or at the time of registration of the instrument. Any 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. On this basis, the decision in *Betsy,* in so far as it purports to follow *Bahr v Nicolay* in imposing a constructive trust by reason of a promise made *after* the contract was entered into and after registration of the mortgage, was inconsistent with ss 46(1) and 47(3) of the LTA.

95 Prof Tan, in *Principles* at pp 249 and 250, has suggested the enactment of ss 46(1)(*e*) and 160 (the power of the court to rectify the land-register on the ground of fraud, omission or mistake) gave effect to the principle of deferred defeasibility and that it changed the uncompromising stance of the 1956 Ordinance and made the LTA schizophrenic. We are unable to agree. We have explained earlier that s 160 is intended to apply to cases that fall within the exceptions in ss 46(2)(*a*)–46(2)(*e*), and that such exceptions will have effect only if they existed before or at the time the contract relating to the dealing is entered into or the instrument of dealing is registered. For this reason, s 160

does not affect the principle of immediate indefeasibility. The effect of the doctrine of immediate indefeasibility under ss 46(1) and 47(3) is to limit all personal equity claims to those existing at the time the relevant contract relating to the dealing was entered into or before or at the time of the registration of the instrument relating to the dealing, and to exclude all those which come into existence after.

96 We do not think that a strict approach to the acceptance of personal equities or *in personam* claims under the LTA will be inequitable to persons holding unregistered interests in registered land. The LTA provides a statutory framework to enable such owners to protect their interests by lodging caveats against the registered title. If they fail to do so, as a result of which their interests are overridden by that of the registered proprietor, they have only themselves to blame.

Summary of conclusions

97 We summarise our conclusions on the three grounds of appeal as follows:

(a) There was no wilful blindness akin to fraud on the part of UOB's solicitors, *viz*, MDP, through Ms Loo;

(b) There was no fraud, omission or mistake by UOB in obtaining the registration of the Mortgage under s 160(1) of the LTA; and

(c) The respondent had no personal equity on the facts to set aside the Mortgage arising from the use of the original CT to register the Mortgage.

98 Before we conclude our judgment, we wish to make some comments on the plight of the respondent. She has been defrauded by the borrowers. We have found that she has no recourse against UOB. But there may be a silver lining for her. The Judge has found that the registry staff made a mistake in registering the Mortgage. We have found that it was this mistake that was the proximate cause of the registration of the Mortgage. In these circumstances, the respondent should be entitled to make a claim against the assurance fund under s 151 of the LTA to recover whatever loss she has suffered resulting from that mistake. As the Registrar is not a party to these proceedings, the finding in this case that the registry staff made a mistake in registering the Mortgage is not, technically, binding on him. We need to say no more than that if the Registrar has no defence to any such claim, he will do what is right by the respondent and required of him by law.

99 The appeal is allowed with costs and the usual consequential orders.

Addendum to judgment

23 October 2006

Chan Sek Keong CJ:

100 After we allowed this appeal on 25 September 2006 ([2006] SGCA 30) with costs, we were informed by counsel for the respondent that the respondent was legally aided and as such was not liable for costs by virtue of the Legal Aid and Advice Act (Cap 160, 1996 Rev Ed). Accordingly, we hereby rescind the order for costs against the respondent.

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