# *Reconciling Equitable Claims with Torrens Title*

**Rohan Havelock***

***Abstract***

Under the Torrens system of land registration, the act of registration confers what is commonly regarded as immediate 'indefeasibility' of title, meaning the relevant estate or interest is held free from unregistered estates or interests. Nevertheless, the courts have always permitted so-called 'in personam claims' against registered proprietors based on legal or equitable obligations, and which may result in the title being defeated. Although it has been more than 130 years since the first Torrens statute was enacted, the relationship between the statutory protection and equitable claims arising out of receipt of property by third parties remains an uneasy one. This has been an enduring source of uncertainty for those using or administering the Torrens system. This article argues in favour of a more systematic approach to delineation of the legitimate scope of 'receipt-based' equitable claims. The key question is whether the claim involves the assertion of an interest or estate incompatible with the protection conferred by the wording of the Torrens statutes.

## I Introduction

Under the Torrens system of land registration, the act of registration confers what is commonly regarded as immediate 'indefeasibility' of title to the relevant estate or interest. Although the language of the various statutes is not uniform,[1] this generally means that the estate or interest in land is held free from all other estates or interests whatsoever. Nevertheless, it has been maintained ever since the establishment of the Torrens system that the registered proprietor is still exposed to so-called 'in personam claims' arising from certain legal or equitable obligations.[2] Such claims

* Senior Lecturer, Faculty of Law, University of Auckland, New Zealand; Barrister & Solicitor of the High Court of New Zealand. Email: r.havelock@auckland.ac.nz. I am very grateful to Peter Butt, Peter Devonshire, David Grinlinton, Charles Rickett and two anonymous referees for comments on an earlier version. Any errors are mine alone.

1 See *Land Titles Act 1925* (ACT) s 58; *Real Property Act 1900* (NSW) s 42(1); *Land Title Act 2000* (NT) ss 188–9; *Land Title Act 1994* (Qld) ss 184–5; *Real Property Act 1886* (SA) ss 69–70; *Land Titles Act 1980* (Tas) s 40; *Transfer of Land Act 1958* (Vic) s 42(1); *Transfer of Land Act 1893* (WA) s 68. In New Zealand, the *Land Transfer Act 2017* (NZ) s 51(1) provides that on registration of a person as the owner of an estate or interest in land, 'the person obtains a title to the estate or interest that cannot be set aside'.

2 See *Barry v Heider* (1914) 19 CLR 197, 208 (Griffiths CJ), 213 (Isaacs J); *Great West Permanent Loan Co v Friesen* [1925] AC 208 (Privy Council); *Frazer v Walker* [1967] 1 AC 569, 585 (Privy Council); *Breskvar v Wall* (1971) 126 CLR 376, 384–5 ('*Breskvar v Wall*'); *Oh Hiam v Tham Kong* (1980) 2 BPR 9451, 9454 (Privy Council) ('*Oh Hiam*'); *Bahr v Nicolay (No 2)* (1988) 164 CLR 604, 653; *Regal Castings Ltd v Lightbody* [2009] 2 NZLR 433, 484–5 [155]–[156] (Supreme Court of New Zealand) ('*Regal Castings*').

may ultimately result in the title of the registered proprietor being divested. Perhaps the most controversial category of claims is those arising out of receipt by third parties of property subject to trust or fiduciary obligations.

The Torrens system was first established in South Australia over 130 years ago,[3] and it is therefore surprising that the identification of in personam claims has recently been described as 'judicial work in progress'.[4] This question has also divided academics, with what may be described as 'wide,'[5] 'narrow'[6] and 'middle ground'[7] views emerging. There are several possible reasons for this state of affairs. The immediate reason is that most of the relevant statutes do not define the relationship such claims have with their regimes, let alone specify which claims and remedies are available.[8] Those statutes that expressly exempt in personam claims from their central 'indefeasibility' provision do so either in general terms[9] or by singling out certain rights,[10] and are silent as to available remedies.

Second, this area of law has been blighted by the longstanding use of confusing terminology. The description of title as 'indefeasible' is a misnomer, for the act of registration affords protection only against unregistered estates or interests, and is subject to a host of exceptions and limitations.[11] Further, the phrase 'in personam claims' is itself vague and ambiguous,[12] and misleading in that it implies that such claims are invariably equitable, or that they do not, or cannot, have proprietary consequences.

---

3 *Real Property Act 1858* (SA); now the *Real Property Act 1886* (SA).

4 William Gummow, 'The In Personam Exception to Torrens Indefeasibility' (2017) 91 ALJ 549, 560. See also *Story v Advance Bank of Australia Ltd* (1993) 31 NSWLR 722, 739 (Court of Appeal) ('*Story*').

5 See Lyria Bennett Moses and Brendan Edgeworth, 'Taking it Personally: Ebb and Flow in the Torrens System's In Personam Exception to Indefeasibility' (2013) 35(1) *Sydney Law Review* 107; Matthew Harding, '*Barnes v Addy* Claims and the Indefeasibility of Torrens Title' (2007) 31(2) *Melbourne University Law Review* 343; Lynden Griggs, 'The Tectonic Plate of Equity — Establishing a Fault Line in Our Torrens Landscape' (2003) 10(1) *Australian Property Law Journal* 78; Barry C Crown, 'Equity Trumps the Torrens System: *Ho Kon Kim v Lim Gek Kim Betsy*' [2002] *Singapore Journal of Legal Studies* 409.

6 See Mary-Anne Hughson, Marcia Neave and Pamela O'Connor, 'Reflections on the Mirror of Title: Resolving the Conflict between Purchasers and Prior Interest Holders' (1997) 21(2) *Melbourne University Law Review* 460, 490; Kelvin FK Low, 'The Nature of Torrens Indefeasibility: Understanding the Limits of Personal Equities' (2009) 33(1) *Melbourne University Law Review* 205.

7 See Tang Hang Wu, 'Beyond the Torrens Mirror: a Framework of the In Personam Exception to Indefeasibility' (2008) 32(2) *Melbourne University Law Review* 672.

8 This omission left the early courts guessing as to how the statutes should be interpreted, leading to inconsistency in decisions: see Les A McCrimmon, 'Protection of Equitable Interests under the Torrens System: Polishing the Mirror of Title' (1994) 20(2) *Monash University Law Review* 300, 301.

9 See *Land Title Act 1994* (Qld) s 185(1)(a); *Land Title Act 2000* (NT) s 189(1)(a). Both refer to 'an equity arising from the act of the registered proprietor'. In New Zealand, *Land Transfer Act 2017* (NZ) s 51(5) states that '[n]othing in this section affects the in personam jurisdiction of the court.'

10 See *Real Property Act 1886* (SA) ss 71(d)–(e), preserving the rights of a person with whom a registered proprietor has made a contract for the sale of land, and the rights of a beneficiary where the registered proprietor is a trustee.

11 For a summary of these, see Peter Butt, *Land Law* (Lawbook, 6th ed, 2010) 796–831; LexisNexis, *Hinde, McMorland & Sim Land Law in New Zealand* (online at 25 November 2019) [9.015]–[9.077].

12 As others have observed, the term 'personal' has at least four distinct meanings: see Moses and Edgeworth (n 5) 115–16.

This article argues that a systematic yet nuanced approach to the scope of equitable 'receipt-based' claims is necessary.[13] It will be argued that the key question is whether the nature of the claim is compatible with the protection which the statutes confer on registered title.[14] Based on the common wording of representative statutes, this turns on whether the claim involves asserting an 'estate' or 'interest' adverse to that protection.

## II 'Indefeasibility'

Before questions of compatibility can be addressed, it is necessary briefly to outline the precise nature and extent of the protection that Torrens title provides to the registered proprietor. As one commentator has aptly observed, the 'in personam exception' is poorly understood because the concept of 'indefeasibility' itself is poorly understood.[15]

### A *Meaning and Effect*

The nature of Torrens title can only be properly understood by reference to the system that Sir Robert Torrens is credited as reforming:[16] a system of conveyancing by deeds.[17] Title was created or transferred by the execution and delivery of a valid deed of conveyance, not by the registration of the deed.[18] Registration of instruments was advisable, but was not compulsory. Importantly, registration did not confer security of title against all interests, or cure defects in instruments.

Sir Robert Torrens was convinced that the defects of the current systems all had a common source: 'The dependent nature of titles.'[19] First, the system depended upon the execution and preservation of original valid instruments creating the

---

13 Some attempts at categorisation have been made. See, eg, Bryan distinguishing between classes of: (1) legal or equitable interests created by the registered proprietor with the intention that they should be enforceable against the registered title; and (2) equitable interests imposed by court order in response to conduct on the part of the registered proprietor (which he labels 'unconscientious denial of title' cases): Michael Bryan, 'Recipient Liability under the Torrens System: Some Category Errors' in Charles Rickett and Ross Grantham (eds) *Structure and Justification in Private Law: Essays for Peter Birks* (Hart, 2008) 339, 356–7. See also Hughson, Neave and O'Connor (n 6) 492–3.

14 This protection will be referred to throughout using the neutral description, 'the statutory protection'. But see Douglas J Whalan, *The Torrens System in Australia* (Lawbook, 1982) 297, preferring 'state-guaranteed title'.

15 Low (n 6) 233.

16 There is some controversy as to whom the authorship of the Torrens system should be attributed: see P Moerlin Fox, 'The Story behind the Torrens System' (1950) 23(9) *Australian Law Journal* 489; Douglas Pike, 'Introduction of the Real Property Act in South Australia' (1961) 1(2) *Adelaide Law Review* 169; Horst K Lücke, 'Ulrich Hübbe and the Torrens System' (2009) 30(2) *Adelaide Law Review* 213.

17 See generally Whalan (n 14) ch 2; RTJ Stein and MA Stone, *Torrens Title* (Butterworths, 1991) 4–10.

18 See *Perpetual Executors and Trustees Association of Australia Ltd v Hosken* (1912) 14 CLR 286, 289 (Griffith CJ): 'The substance of the scheme of the *Transfer of Land Act* was to substitute conveyance by registration for conveyance by deed.'

19 Robert Torrens, *The South Australian System of Conveyancing by Registration of Title* (Register and Observer General Printing Office, 1859) 8.

interest.[20] If the instrument was invalid for any reason, no transfer was effected. A purchaser therefore depended on his or her solicitor to investigate the validity of the chain title, which had to be repeated afresh on every dealing, with associated expense, delay and inconvenience.[21] Second, pre-existing legal and equitable interests might affect the estate and give rise to possible claims against the purchaser. Competing interests in the same parcel of land were resolved by the rules of priority.[22] In the case of a competition between a prior equitable interest and a subsequent legal interest, notice of the prior interest was fatal to the latter, and would prevent the purchaser from acquiring free of the prior interest, even if there was registration.

Against the background of a series of reform attempts in England,[23] Sir Robert Torrens sought to eradicate these problems in South Australia by nothing short of replacement of the existing system.[24] Security and simplicity to dealings in land was primarily achieved by making the title created by registration *independent* of any non-registered estates or interests. The change necessarily removed the need for retrospective investigation of the chain of title.[25]

## B *'Indefeasibility' — A Misnomer*

The terms 'indefeasible' or 'indefeasibility' are in common parlance in land law and practice, despite the fact they are not featured in all the relevant statutes, or defined where they are featured.[26] In reality, a 'mosaic of sections'[27] in the statutes — relating to paramountcy, ejectment, notice and protection of purchasers — defines the meaning and extent of so-called 'indefeasibility'.

Even as a 'convenient description'[28] of the effect of registration, the term 'indefeasible' is a patent misnomer.[29] Most obviously, the title is instantly defeated

---

20 With the complications that: (1) some transactions did not operate by conveyance, such as succession by will, powers of attorney, and special/general appointments; and (2) the register did not include interests which arose without a document, such as mortgages by deposit, leases by parol, and liens. See Stein and Stone (n 17) 4–5.

21 *Gibbs v Messer* [1891] AC 248, 254 (Lord Watson). See also *British American Cattle Co v Caribe Farm Industries Ltd* [1998] 1 WLR 1529, 1533 (Privy Council); Stein and Stone (n 17) 6–8.

22 See Butt (n 11) [19-4]–[19-86].

23 Stein and Stone (n 17) 10–16.

24 The law of real property 'could not be patched or mended: the very foundation was rotten, therefore the entire fabric must be razed to the ground and a new super-structure substituted': Torrens' printed speeches, cited in Stanley Robinson, *Transfer of Land in Victoria* (Law Book, 1979) 2.

25 For other advantages, see Whalan (n 14) 14–17.

26 See *Real Property Act 1886* (SA) s 69, referring to the title of every registered proprietor as 'absolute and indefeasible', and also *Real Property (Registration of Titles) Act* 1945 (SA) s 15; *Land Title Act 2000* (NT) (heading to pt 9, div 2, sub-div 2 is 'Indefeasibility'); *Land Title Act 1994* (Qld) (heading to pt 9, div 2, sub-div B is 'Indefeasibility'); *Land Titles Act 1980* (Tas) s 40(2), providing that the title of a registered proprietor of land is 'indefeasible'. Torrens did use the terms in his speeches and writings: see those referenced in Robinson (n 24) 4–5.

27 Whalan (n 14) 293.

28 *Frazer v Walker* (n 2) 580 (Lord Wilberforce).

29 See Whalan (n 14) 296–7; GW Hinde, 'Indefeasibility of Title' in GW Hinde (ed) *The New Zealand Torrens System Centennial Essays* (Butterworths, 1971) 36; *CN and NA Davies Ltd v Laughton* [1997] 3 NZLR 705, 712 ('*Davies*').

by a successive title conferred by registration.[30] The title is also encumbered by any interests recorded on the register at the time of registration. Further, the title is subject to numerous exceptions and limitations both within and outside the statutes.[31]

Importantly, Torrens title does not confer *immunity* from legal or equitable liability that the registered proprietor has incurred to others (usually by his or her own acts), and that may result in a remedy which divests title.[32] Such liability exists in parallel with the statutory protection,[33] although it can be incompatible with it, as will be discussed shortly.

## C *Statutory Wording*

With three exceptions, the introductory words of the central paramountcy sections are materially identical in each Australian legal jurisdiction.[34] The principle they have in common is that the registered proprietor shall, except in the case of fraud, hold the relevant estate or interest subject to prior registered interests, but absolutely free from all other encumbrances, estates, or interests whatsoever. This protection concerns the *status* of title: the title is paramount (in the sense of prevailing) over all unregistered estates or interests.[35]

The exceptions to this common wording are found in the statutes of:

- Victoria,[36] referring only to 'all other encumbrances' — defined as 'any estate interest mortgage charge right claim or demand which is or may be had made or set up in to upon or in respect of the land'[37];
- South Australia,[38] providing that the title of every registered proprietor shall be 'absolute and indefeasible' — without any definition given; and
- Tasmania[39] simply providing that the title of a registered proprietor is 'indefeasible' — defined as meaning 'subject only to such estates and interests as are recorded on the folio of the Register or registered dealing'.

Based on their wording, it is arguable that the statutes in the latter two jurisdictions have the effect of excluding *any* in personam claim whatsoever,[40] and not simply those that involve assertion of an 'estate' or 'interest' adverse to the statutory

---

30 Whalan (n 14) 297.

31 For overviews, see Butt (n 11) 796–831; *Hinde, McMorland & Sim* (n 11) [9.015]–[9.077].

32 For a clear statement to this effect, see *Breskvar v Wall* (n 2) 384–5 (Barwick CJ).

33 As the majority observed in *Hillpalm Pty Ltd v Heaven's Door Pty Ltd* (2004) 220 CLR 472, 491 [54] (McHugh A-CJ, Hayne and Heydon JJ): 'The availability of rights in personam is entirely consistent with the Torrens system of title.'

34 The relevant sections are cited in n 1 above.

35 Unlike the term 'indefeasible', 'paramount' does not imply that the title can *never* be defeated.

36 *Transfer of Land Act* 1958 (Vic) s 42(1).

37 Ibid s 4(1).

38 *Real Property Act 1886* (SA) s 69.

39 *Land Titles Act 1980* (Tas) s 40.

40 Conversely, the opposite argument can be made in respect of those statutes which expressly preserve equitable claims. Both the *Land Title Act 1994* (Qld) s 185(1)(a) and *Land Title Act 2000* (NT) s 189(1)(a) except 'an equity arising from the act of the registered proprietor'. In New Zealand, *Land Transfer Act 2017* (NZ) s 51(5) states that '[n]othing in this section affects the in personam jurisdiction of the court.'

protection. However, this interpretation would be a radical one in the sense that it is inconsistent with the longstanding assumption by courts in these jurisdictions that in personam claims remain available.[41]

## III Compatibility with the Statutory Protection

Some commentators have emphasised that the compatibility of equitable claims with the statutory protection depends on the basis of the claim,[42] whereas others have emphasised that this question depends instead on the nature of the remedy.[43] This has generated a conundrum as to whether an in personam claim may ever be proprietary.[44] Preoccupation with such questions averts focus from the all-important wording of the statutory protection.[45] This is the touchstone against which compatibility must be assessed.

Based on the common wording of the statutes as identified above, the overriding question is whether the relevant claim necessarily involves assertion of an unregistered 'estate' or 'interest' against the statutory protection, guaranteeing that the registered proprietor holds the land (or estate or interest in land) 'free' or 'absolutely free' from such estates or interests.[46] This will be referred to throughout as an *estate or interest adverse to the statutory protection*.[47] In order to make this assessment, it is necessary to understand the essential features of equitable liability, and then to categorise the main types of equitable claim.

### A *Equitable Liability*

It is trite that a proprietary claim involves direct assertion of an equitable interest in an asset in the hands of the defendant.[48] Liability is strict, subject to the defence of a bona fide purchaser for value of the legal estate without notice. Conversely, a

---

41 For recent examples, see (in South Australia) *Perebo Pty Ltd v Wayville Residential Investments Pty Ltd* [2019] SASC 35, [46], *Permanent Mortgages Pty Ltd v Pastro* [2018] SASC 5, [89] and (in Tasmania) *Nightingale v Recorder of Titles* [2018] TASSC 56, [62].

42 Low (n 6) 219–20; Kelvin FK Low, 'Of Horses and Carts: Theories of Indefeasibility and Category Errors in the Torrens System' in Elise Bant and Matthew Harding (eds) *Exploring Private Law* (Cambridge University Press, 2010) 457–8 ('*Exploring Private Law*'); Moses and Edgeworth (n 5) 113–14.

43 Barry C Crown, 'Indefeasibility of Title: Developments in Singapore' (2007) 15(1) *Australian Property Law Journal* 91, 103–4; (in relation to knowing receipt) Harding (n 5) 346, 350–65.

44 Tang (n 7) 679–80; Low in *Exploring Private Law* (n 42) 457–8.

45 See *Cassegrain v Gerard Cassegrain & Co Pty Ltd* (2015) 254 CLR 425, 433 [16].

46 The same applies to the notice provisions, typically referring to 'any trust or unregistered interest'; see *Land Titles Act* 1925 (ACT) s 59; *Real Property Act* 1900 (NSW) s 43; *Land Title Act* 1994 (Qld) s 184(2)(a) (referring simply to an 'unregistered interest'); *Real Property Act* 1886 (SA) ss 186–7; *Land Titles Act* 1980 (Tas) s 41; *Transfer of Land Act* 1958 (Vic) s 43; *Transfer of Land Act* 1893 (WA) s 134; *Land Title Act* 2000 (NT) s 188(2)(a) (referring simply to an 'unregistered interest'). The *Land Transfer Act* 2017 (NZ) s 51(2) provides that the title of the registered owner is 'free from estates and interests in the land' that are not registered or are not capable of being registered.

47 Cf *Green Growth No 2 Ltd v Queen Elizabeth the Second National Trust*, 'the protection afforded to a registered proprietor by [the central paramountcy section] is only against claims which are adverse to the interests of the proprietor': [2016] 3 NZLR 726, 749 [89] (Court of Appeal). See also Low (n 6) 212, 215.

48 *Foskett v McKeown* [2001] 1 AC 102, 108 (Lord Browne-Wilkinson), 129 (Lord Millett).

personal claim generally involves asserting that the defendant has breached an equitable duty owed to the plaintiff, or is (personally) accountable to the plaintiff in equity. Importantly, a personal claim is not strict, but depends on there being a reason for equitable intervention, typically on grounds of 'conscience'.[49] This distinction between proprietary and personal equitable liability is fundamental,[50] although can become somewhat blurred where a remedy in respect of a personal liability has a proprietary effect (such as an order requiring transfer or discharge of an estate or interest).

Entirely consistent with the central role of conscience within equity in general, it has been said that equitable in personam claims in the context of Torrens title are based on grounds or considerations of 'conscience' or 'conscientiousness'.[51] Thus, in *Barry v Heider*,[52] Isaacs J referred to the 'fundamental doctrines by which Courts of Equity have enforced, as against registered proprietors, conscientious obligations entered into by them'. However, the mere characterisation of conduct as 'unconscionable' or 'unconscientious' has generally been rejected as insufficient to ground a claim.[53] Thus, in *Grgic v Australian & New Zealand Banking Group Ltd* the Court of Appeal of New South Wales ('NSW') concluded that the expressions 'personal equity' and 'right in personam' encompass only 'known legal causes of action or equitable causes of action'.[54] The same position was taken in three important cases examined in this article, *Koorootang Nominees Pty Ltd v Australian & New Zealand Banking Group Ltd*,[55] *Macquarie Bank Ltd v Sixty-Fourth Throne*

---

[49] This hallmark notion is ambiguous and complex, but for present purposes may be regarded as a normative standard against which the conduct of the parties is judged: see *Kakavas v Crown Melbourne Ltd* (2013) 250 CLR 392, 400 [16]. See also *Australian Financial Services and Leasing Pty Ltd v Hills Industries Ltd* (2014) 253 CLR 560, 576 [16] (French CJ), 596 [76] (Hayne, Crennan, Kiefel, Bell and Keane JJ) ('*Hills*').

[50] The distinction was explicitly recognised in *Grimaldi v Chameleon Mining NL (No 2)*, '[w]hile [the proprietary] claim is, potentially, available to be made in *Barnes v Addy* "knowing receipt" cases, it is a separate and distinct liability. It is, in essence, a claim to priority.': (2012) 287 ALR 22, 81 [251] ('*Grimaldi*'). See also *Fistar v Riverwood Legion and Community Club Ltd* (2016) 91 NSWLR 732, 742 [44] ('*Fistar*'). It is important to appreciate that where the recipient still holds the property, the personal claim is irrelevant: see Bryan (n 13) 339, 353–5.

[51] See, eg, *Oh Hiam* (n 2) 9453; *Regal Castings* (n 2) 484–5 [155]–[156].

[52] *Barry v Heider* (n 2) 213. See also *Oh Hiam* (n 2) 9453, 9454. The emphasis on conscience is also evident in leading New Zealand decisions: *Duncan v McDonald* [1997] 3 NZLR 669, 683–4 (Court of Appeal) ('*Duncan*'); *Davies* (n 29) 714–15. See also *Regal Castings* (n 2) 483 [148], 485 [156].

[53] See, eg, *Heggies Bulkhaul Ltd v Global Minerals Australia Pty Ltd* (2003) 59 NSWLR 312, 339 [103], 'if the registered proprietor subsequently engages in unconscionable conduct intended to deny or defeat the unregistered interest, the holder of the unregistered interest may obtain relief against the registered proprietor ...'. There are competing views as to whether 'unconscionability' is a requirement additional to a relevant cause of action: see Butt (n 11) [20-104.1]. The better view seems to be that it is a requirement only where such conduct is an element of the relevant cause of action, as explained in *Harris v Smith* (2008) 14 BPR 26,223, 26,237–8 [66]–[67].

[54] (1994) 33 NSWLR 202, 222. See generally Butt (n 11) [20-104].

[55] [1998] 3 VR 16, 125 ('*Koorootang Nominees*'). Justice Hansen dismissed 'the notion that a person can defeat a registered proprietor's interest merely by persuading the court that, viewing the circumstances of the case as a whole, the registered proprietor has been guilty of unconscionable conduct.'

*Pty Ltd*,[56] and *LHK Nominees Pty Ltd v Kenworthy*.[57] Despite recent disquiet as to the aptness of the phrase 'cause of action',[58] this at least has the merit of turning the focus from mere 'unconscionability' or 'unconscientiousness' towards the need for articulation of a specific category of jurisdiction within equity.

General descriptions of the basis of in personam claims — whether by reference to 'conscience' or 'unconscionability' — imply that in personam claims (or 'in personam exceptions' or 'personal equities exceptions') are homogenous. This is not only false, but tends to stultify analysis of their compatibility with the statutory protection. This is also true in respect of general propositions in the case law to the effect that in personam claims are usually[59] created by, or arise out of, 'acts' or 'conduct' by the registered proprietor,[60] whether occurring before or after registration.[61]

To the extent that the case law has emphasised that an in personam claim must be based on a known 'cause of action', this is constructive in shifting focus away from these general descriptions.[62] Such emphasis alone, however, does not delineate the scope of those in personam claims or exceptions compatible with the statutory protection. It is suggested that such delineation is most constructively achieved with the aid of a basic categorisation of claims, followed by detailed analysis of their compatibility with the statutory protection.

## B *Categorisation*

Equity recognises a variety of rights, obligations and interests that may ground in personam claims, and dispenses a range of possible remedies in respect of these. The accumulated case law involving claims made in connection with Torrens land reflects these factors. These claims can be broadly categorised according to shared rationales of equitable intervention. The focus of this article is the category of claims based on receipt by a third party of property that is subject to a trust or other fiduciary obligation, to which equity ordinarily responds by declaration of a constructive trust

---

[56] [1998] 3 VR 133, 162 (Ashley AJA) ('*Sixty-Fourth Throne*'):

> the conduct must be such 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.

See also at 146 (Tadgell JA).

[57] (2002) 26 WAR 517, 556 [216] (Anderson and Steytler JJ) ('*LHK Nominees*'): 'The expressions "personal equity" and "right in personam" do not supply a blank canvas on which a plaintiff can paint any picture.'

[58] Gummow (n 4) 552–3. First, the phrase suggests that the requisite claim is akin to an action for damages in tort or contract, whereas with equitable claims it is necessary to articulate the circumstances which should elicit a response from equity. Second, the phrase is unsatisfactory because it underplays the scope of the declaratory remedy in private and public law.

[59] But not exclusively: see *Mercantile Mutual Life Insurance Co Ltd v Gosper* (1991) 25 NSWLR 32, 46 (Mahoney JA) ('*Mercantile Mutual v Gosper*').

[60] See *Frazer v Walker* (n 2) 585; *Breskvar v Wall* (n 2) 384–5; *Bahr v Nicolay (No 2)* (n 2) 613; *Davies* (n 29) 712; *Duncan* (n 52) 683.

[61] See authorities in Butt (n 11) [20-102] n 709.

[62] See Jonathon P Moore, 'Equity, Restitution and In Personam Claims under the Torrens System' (1998) 72(4) *Australian Law Journal* 258, 260.

over the property (and related orders) or an order that the third party make personal restitution. These claims are to be distinguished from the two other main[63] categories of claims reflected in the case law, which are briefly outlined next.

### 1 *Consensual or Quasi-Consensual Obligations*

This category of claims involves non-compliance by the registered proprietor with obligations he or she has agreed to or undertaken in respect of the claimant.[64] The prime example is a vendor who refuses or fails to perform a sale and purchase agreement in respect of real property.[65] Although the purchaser has an equitable interest (of an ill-defined sort)[66] pending the conveyance[67] and the extent of this is typically measured by the protection that equity gives the purchaser,[68] the purchaser need not assert this interest in order to obtain a decree of specific performance. Instead, success depends on proof of a valid and binding contract, and on damages being an inadequate remedy.[69] In other words, it is a personal claim, albeit that the implementation of specific performance has a proprietary consequence.[70] This consequence can be reconciled with the statutory protection on the basis that the vendor has *agreed* to convey title under the contract, subject to fulfilment of conditions. This is an application of the maxim that '[e]quity regards as done that which ought to be done'.[71]

---

63 This article cannot exhaustively identify and analyse the nature and effect of each and every equitable claim. It is acknowledged that certain in personam claims of an equitable nature do not neatly fit within these categories: examples are the successful claims in *Davies* (n 29) (terms of obligation that an executed mortgage secured altered without the knowledge or authority of mortgagor) and *Duncan* (n 52) (mortgagor and mortgagee shared knowledge that the mortgage was furthering an illegal venture). The former claim would likely be unsuccessful in Australia: see *Paradise Constructors & Co Pty Ltd v Poyser* (2007) 20 VR 294, 301–2 [30]–[31] (Court of Appeal).

64 See the summary by Skerrett CJ in *Tataurangi Tairuakena v Mua Carr* [1927] NZLR 688, 702 (Court of Appeal):

> The provisions of the *Land Transfer 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.

See also *Presbyterian Church (NSW) Property Trust v Scots Church Development Ltd* (2007) 13 BPR 24,969, 24,979 [114] ('*Presbyterian Church*').

65 See authorities collated in Elizabeth Toomey (ed) *New Zealand Land Law* (Thomson Reuters, 3rd ed, 2017) 118 nn 382, 385.

66 Such an interest is less than an entire beneficial interest, since the vendor is entitled to possession and use of the land, and retains a contingent interest in the equitable estate pending payment of the purchase price. As Lord Walker observed in *Jerome v Kelly (Inspector of Taxes)*, '[b]eneficial ownership of the land is in a sense split between the seller and buyer': [2004] 1 WLR 1409, 1419 [32].

67 *Lysaght v Edwards* (1876) 2 Ch D 499, 506 (Jessel MR). This interest depends on specific performance being available as a remedy to enforce either an executory or partly executed contract.

68 See *Hewett v Court* (1983) 149 CLR 639, 665–6 (Deane J).

69 JD Heydon, MJ Leeming and PG Turner, *Meagher, Gummow and Lehane's Equity Doctrines and Remedies* (LexisNexis, 5th ed, 2015) [20-025]–[20-050] ('*MGL*'). A breach of contract, or even an anticipatory breach, is not technically required: *Hasham v Zenab* [1960] AC 316.

70 See also Moses and Edgeworth (n 5) 118–19.

71 As Lord Macclesfield observed in *Frederick v Frederick*, '[w]here one for valuable consideration agrees to do a thing, such executory contract is taken as done; and … the man who made the agreement shall not be in a better case, than if he had fairly and honestly performed what he had agreed to.': (1721) 24 ER 582, 583. See also *Re Anstis* (1886) 31 Ch D 596, 605.

A further example is an unregistered agreement to re-sell land,[72] of the type featured in *Bahr v Nicolay (No 2)*.[73] It has been noted that the majority's imposition of a constructive trust sufficed to preserve the defendant's liability,[74] but this does not reveal the *basis* of liability. Notwithstanding the differences among them, it is clear from all three judgments that the relevant event triggering a proprietary consequence was the acknowledgement of the antecedent agreement given by the second respondents, and enforceable[75] by the plaintiff against them directly.[76]

The idea of voluntary undertaking[77] also explains the rationale of claims to compel performance of the obligations of an express trustee who is a registered proprietor.[78] Since it is not possible to impose express trusteeship on a person without his or her consent, the office must be accepted voluntarily. As Lord Browne-Wilkinson recognised in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council*, a person becomes an express trustee because his *conscience* is affected by the facts that give rise to the trust.[79] From that point, the express trustee holds the land subject to the equitable interest of the beneficiary, and owes a core of obligations to the beneficiary. In making a claim concerning a trustee registered proprietor, the beneficiary need not necessarily assert an equitable proprietary interest in the property,[80] but merely that the trustee is personally liable to perform his or her obligations as trustee.[81]

In the above instances, the plaintiff does not assert a proprietary interest adverse to the statutory protection, but a personal obligation owed by the registered proprietor.[82] An order with the effect of divesting registered title does not contravene the statutory protection because equity is simply compelling the defendant to do what he has agreed or undertaken to do in relation to her or his title,[83] provided the

---

72 Further examples of unregistered interests are collated in Butt (n 11) 821 n 727.

73 *Bahr v Nicolay (No 2)* (n 2).

74 Low (n 6) 221.

75 As to enforceability, see *Bahr v Nicolay (No 2)* (n 2) 656 (Brennan J).

76 Ibid 616 (Mason CJ and Dawson J), 638–9 (Wilson and Toohey JJ), 653 (Brennan J).

77 For the centrality of voluntary undertakings to fiduciary duties in general, see James Edelman, 'When Do Fiduciary Duties Arise?' (2010) 126 (April) *Law Quarterly Review* 302.

78 *Oh Hiam* (n 2) 9454; *Sistrom v Urh* (1992) 40 FCR 550; *Coulton v Coulton* [2008] NSWSC 910. This article does not address the treatment of trusts arising by operation of law, including resulting trusts. On resulting trusts, see Moses and Edgeworth (n 5) 119.

79 [1996] AC 669, 705 (House of Lords).

80 In some contexts, including discretionary trusts, the 'interest' may be no more than an 'interest' in the duties owed by the trustees: see *MGL* (n 69) [4-020]–[4-085].

81 See RC Nolan, 'Equitable Property' (2006) 122 (April) *Law Quarterly Review* 232, demonstrating that while the beneficiary's primary right to exclude others from access to trust assets is properly regarded as a 'proprietary' interest because it is enforceable against an infinite class, the beneficiary's positive claims to benefit from the assets are enforceable against only a limited class, so cannot be regarded in general terms as 'proprietary'.

82 This category might be expanded to include cases of proprietary estoppel binding the defendant to recognise the interest in land (see *Presbyterian Church* (n 64) as well as unconscionable or unconscientious assertions or denials by the registered proprietor: see *Muschinski v Dodds* (1985) 160 CLR 583 (unconscionable for registered proprietor to assert strict legal entitlement after failure of joint property development); *Baumgartner v Baumgartner* (1987) 164 CLR 137 (unconscionable denial of the fact that relationship property had been financed in part through pooled earnings).

83 The same conclusion has been supported on the ground that this claim is not one based on notice of an unregistered interest, but on 'notice of wrongdoing or other facts that may give rise to legal liability': Low (n 5) 220. This is not an easy distinction to draw, since the 'wrongdoing' by a vendor

agreement or undertaking is an objectively serious one.[84] The consent on the part of the defendant — a feature not present in receipt-based claims – therefore makes a normative difference.[85]

### 2 *Defective Decisions*

This category of equitable claims involves transfers by a plaintiff in circumstances where the integrity of the plaintiff's decision has been vitiated or impaired, sometimes as a result of conduct by the defendant. The basic response is reversal, either by rescission of the transaction or restitution of the value transferred. Mistake is the hallmark example, although the nature of relief available is less straightforward.[86] Another prominent example is conduct encompassed by the equitable doctrine respecting fraud that falls short of 'fraud' within the meaning of the exceptions in the Torrens statutes.[87] Other examples[88] are cases of misrepresentation, undue influence,[89] unconscionable bargain, and registration as a result of transfers in breach of trust or fiduciary duty. Such transfers are sometimes treated as part of the law of unjust enrichment on the grounds of 'ignorance'[90] or 'fiduciary lack of authority'.[91] Where the transfer is pursuant to an agreement, recovery by the transferor will depend on whether the contract is binding on it (where the transferor is a company, this will depend on principles of agency and company law).[92] It is therefore important to distinguish such cases from those of knowing receipt, falling within the third category of claims below.[93]

---

who refuses to perform an agreement for sale and purchase necessarily involves denial of the purchaser's equitable interest with actual notice.

84 Thus, the acquiescence by a registered proprietor in use of the land by a neighbour 'only in the spirit of neighbourliness' does not suffice: *McGrath v Campbell* (2006) 68 NSWLR 229, 236 [32].

85 For the significance of consent as a justifying reason in private law, see Deryck Beyleveld and Roger Brownsword, *Consent in the Law* (Hart, 2007) chs 2, 3.

86 See Lynden Griggs, 'Indefeasibility and Mistake — The Utilitarianism of Torrens' (2003) 10(2) *Australian Property Law Journal* 108. But see Low (n 5) 225–8.

87 See, eg, *Lissa v Cianci* [1993] NSW ConvR 55-667; *Balani Pty Ltd v Gunns Ltd* [2011] FCAFC 153.

88 See Gummow (n 4) 551–2.

89 At least in New Zealand: see *Nathan v Dollars & Sense Finance Ltd* [2007] 2 NZLR 747, 780 [147]–[148] (Court of Appeal). Contrast, however, the opinion of the majority in *Sixty-Fourth Throne* (n 56) 146–54 on the concept of 'notice' on which undue influence is premised.

90 See James Edelman and Elise Bant, *Unjust Enrichment* (Hart, 2nd ed, 2016) 287–91.

91 See Andrew Burrows, *A Restatement of the English Law of Unjust Enrichment* (Oxford University Press, 2012) 93–8.

92 See *Criterion Properties plc v Stratford UK Properties LLC* [2004] 1 WLR 1846 (House of Lords), 1848 [4], referred to in *Great Investments Ltd v Warner* (2016) 243 FCR 516, 531 [59].

93 For an example, see *Thanakharn Kasikorn Thai Chamkat (Mahachon) v Akai Holdings Ltd (No 2)* (2010) 13 HKCFAR 479. A director of the respondent had, without authority, pledged its shares in favour of the appellant bank to secure a loan. After the respondent defaulted on the loan, the bank sold part of the pledged shares. Delivering the unanimous judgment of the Court, Lord Neuberger NPJ held that the bank was concurrently liable in conversion and knowing receipt, in the same amount. The application of knowing receipt to the facts is criticised by Rebecca Lee and Lusina Ho in "Reluctant Bedfellows: Want of Authority and Knowing Receipt" (2012) 75(1) *Modern Law Review* 91.

In two-party cases[94] involving transfers from plaintiff to defendant in the context of an agreement or transaction, an in personam claim may be regarded as compatible with the statutory protection on the basis that the defect affecting the decision to transfer does not prevent the transferee from acquiring title by registration.[95] As a result, the plaintiff will ordinarily lack any 'estate' or 'interest' adverse to the statutory protection, and will instead challenge the *underlying* agreement or transaction, seeking rescission or reversal (with restoration of property rights, including re-vesting of registered title, being an ancillary consequence).[96] On this view, claims challenging defective decisions are not 'exceptions' to the statutory protection, but simply situations which that protection does not reach.[97]

## C *Receipt-based Claims*

As already noted, the most controversial category of claims involves property subject to a trust or fiduciary obligation that is received by a third party.[98] Such claims may be proprietary or personal, and are to be distinguished from claims in the preceding two categories (Part IIIB(1)–(2) above).

Equitable proprietary claims vindicate equitable ownership,[99] and are necessarily based on assertion of a prior equitable 'interest' of some kind.[100] Such claims directly contradict both the central paramountcy provisions (generally meaning the registered proprietor takes free of unregistered 'interests') and the 'notice' provisions (generally meaning that third parties dealing with the registered proprietor are not to be affected by notice of any 'trust' or unregistered 'interest').[101]

---

94 In personam claims against third parties who become registered proprietors, whether innocently or with constructive notice of an equitable interest, are widely regarded as incompatible with the statutory protection. In the context of fraudulent dealings, see *Garafano v Reliance Finance Corporation Pty Ltd* (1992) NSW ConvR 55-640, 59-661; *Vassos v State Bank of South Australia* [1993] 2 VR 316, 332 ('*Vassos*'); *Story* (n 4); *Pyramid Building Society v Scorpion Hotels Pty Ltd* [1998] 1 VR 188 (Court of Appeal). Contrast *Mercantile Mutual v Gosper* (n 59).

95 Compare the argument by Robert Chambers, 'Indefeasible Title as a Bar to a Claim for Restitution' [1998] 6 *Restitution Law Review* 126. This is based on the plaintiff having a restitutionary right arising in response to the unjust enrichment of the defendant, with the defendant having notice of the facts giving rise to the claim. The argument was subsequently modified in Robert Chambers, *An Introduction to Property Law in Australia* (Thomson Reuters, 2nd ed, 2008) 468–70.

96 Cf Moses and Edgeworth (n 5) 123–4 (unconscionable transactions), 128–30 (mistake).

97 Contrast Edelman and Bant (n 90) 162–3, and Low (n 6) 223–5.

98 As Millett J explained in *Agip (Africa) Ltd v Jackson*, receipt-based claims may be divided into two main classes of case: knowing receipt, and lawful receipt (usually by an agent) followed by misappropriation or inconsistent dealing: [1990] Ch 265, 291 ('*Agip v Jackson*'). This article deals only with knowing receipt, and the separate case of receipt by volunteers.

99 It is important to appreciate that equitable property has different origins to common law property, and is (arguably) fundamentally different in rationale, operation and effects. In respect of the 'propertisation' of the institution of the trust, see Lionel Smith, 'Transfers' in Peter Birks and Arianna Pretto (eds), *Breach of Trust* (Hart, 2002) ch 5; Lionel D Smith, 'Trust and Patrimony' (2008) 38(2) *Revue Generale de Droit* 379.

100 The concept of 'interest' has several senses and may not always amount to a strict proprietary right: see *MGL* (n 69) [4–060]; *Burns Philp Trustee Co Ltd v Viney* [1981] 2 NSWLR 216, 223–4.

101 See n 46. Quite apart from these statutory provisions, the third party will have a good defence where he or she is a bona fide purchaser for value without notice. For an illustration, involving acquisition of an equitable interest over land, see *Latec Investments Ltd v Hotel Terrigal Pty Ltd (in liq)* (1965) 113 CLR 265.

Further, a successful equitable proprietary claim will ordinarily result in an order having a proprietary consequence. This is commonly by way of declaration of constructive trust coupled with an order to transfer. The effect will be to divest title in favour of the plaintiff.

On the other hand, personal claims are not so self-evidently incompatible. In the following sections, two types of recipient claims are examined. The status of the first — involving knowing recipients of trust property under the first limb of *Barnes v Addy*[102] — has been strongly contested among courts and commentators alike. The second — involving receipt by volunteers without notice at the time of receipt — is less common and its relationship with the statutory protection has not yet been considered closely.

## IV Knowing Receipt

In both Australia and New Zealand, courts have rejected claims of knowing receipt against a registered proprietor as incompatible with the nature and purpose of the Torrens system. This is also the dominant, although not universal, view among academic commentators.[103] The position taken herein is that this rejection is justified if knowing receipt is regarded as a form of accountability that protects equitable ownership.[104] The claim is therefore predicated on the assertion of an interest adverse to the statutory protection. However, this rejection is not necessarily justified if knowing receipt is regarded as an equitable wrong responding to third party conduct.

### A *Rationales of Liability*

In broad terms, knowing receipt is a liability affecting third parties to a trust or fiduciary relationship who receive or become chargeable with trust property.[105] The issue of the legitimacy of knowing receipt as an in personam claim against a registered proprietor is complicated by the long-standing controversy as to the rationale of such liability.[106] It is beyond the scope of this article to revisit this debate in any detail. Instead, the main conceptions of the rationale of liability for knowing receipt will be summarily outlined, and their compatibility with the statutory

---

[102] *Barnes v Addy* (1874) LR 9 Ch App 244, 252 (Lord Selborne LC). The second limb of *Barnes v Addy* — knowing assistance — is not examined herein, for the simple reason that the dishonest assistant will not usually have received property, and if he or she has, then the fraud exception will apply.

[103] See Butt (n 11) [20-105]; Moore (n 62) 263–5; Tang (n 7) 690–92; Low (n 6) 228–32; Moses and Edgeworth (n 5) 121–3. Contrast Harding (n 5) 352–8.

[104] *Grimaldi* (n 50) 82 [254]: 'Distinctly while the proprietary liability referred to depends upon the existence of trust property in the strict sense, "trust property" for *Barnes v Addy* purposes extends beyond it to property held or controlled subject to a fiduciary obligation.' But see *Farah Constructions Pty Ltd v Say-Dee Pty Ltd*, where the High Court of Australia left the point open: (2007) 230 CLR 89, 141 [113] ('*Farah*').

[105] *Barnes v Addy* (n 102) 252.

[106] For an overview, see Rohan Havelock, 'The Battle over Knowing Receipt' (2015) 26(3) *New Zealand Universities Law Review* 587.

protection assessed. Leaving aside the unjust enrichment model,[107] these conceptions are as follows:[108]

1. Knowing receipt is an equitable accountability functioning to protect trust property,[109] albeit indirectly. More specifically, it may be regarded as the equitable analogue of conversion at common law[110] or of money had and received,[111] or as a custodial liability closely resembling the liability of an express trustee to account for trust property.[112]
2. Knowing receipt is an equitable wrong protecting equitable property interests from interference, and takes the form of a breach of trust management obligations that the third party has assumed.[113] A stronger version of this conception is that liability for knowing receipt is no different from ordinary liability for breach of trust.[114]
3. Knowing receipt is a form of wrongful participation in a breach of another's equitable duty, which should be grouped conceptually with accessory liability, with liability depending on the defendant's conduct and not simply on his or her knowledge.[115]

On the first two conceptions, the claim functions to protect trust property and is an affront to the statutory protection, regardless of whether the remedy is proprietary or personal. It might be objected that the claim in knowing receipt does not involve direct assertion of an equitable estate or interest in the way that an equitable

---

[107] This model, involving strict liability, will not be examined here given its outright rejection by the High Court in the context of knowing receipt (*Farah* (n 104) 152–9 [140]–[158]) and more widely (*Equuscorp Pty Ltd v Haxton* (2012) 246 CLR 498, 516 [30]; *Hills* (n 49) 596–7 [78]). See Lord Nicholls, 'Knowing Receipt: The Need for a New Landmark' in WR Cornish et al (eds) *Restitution: Past, Present and Future* (Hart, 1998) 231.

[108] There are several accounts with subtle distinctions among them. For convenience, similar views have been grouped together according to their basic premise.

[109] As Stephen J observed in *Consul Development Pty Ltd v DPC Estates Pty Ltd*, recipient liability is based upon 'equity's concern for the protection of equitable estates and interests in property': (1975) 132 CLR 373, 410. In *Zhu v Treasurer (NSW)*, the High Court explained that '[i]ntervention against a third party who obtains trust property from a trustee in breach of trust is based on the need to protect the proprietary interests of the beneficiaries.': (2004) 218 CLR 530, 571 [121]. In the United Kingdom ('UK'), it has been observed that 'receipt of trust property is the gist of the action': *Novoship (UK) Ltd v Mikhaylyuk* [2015] QB 499, 528 [89] (Court of Appeal).

[110] See Lionel Smith, 'Unjust Enrichment, Property and the Structure of Trusts' (2000) 116 (July) *Law Quarterly Review* 412; Ross Grantham and Charles EF Rickett, *Enrichment and Restitution in New Zealand* (Hart, 2000) 281–2.

[111] See Graham Virgo, *The Principles of the Law of Restitution* (Oxford University Press, 3rd ed, 2015) 645.

[112] See Charles Mitchell and Stephen Watterson, 'Remedies for Knowing Receipt' in Charles Mitchell (ed) *Constructive and Resulting Trusts* (Hart, 2010) 115, 129.

[113] See Sarah Worthington, *Equity* (Oxford University Press, 2nd ed, 2006) 187–8; Simon Gardner, 'Moment of Truth for Knowing Receipt?' (2009) 125 (January) *Law Quarterly Review* 20, 23.

[114] See Robert Chambers, 'The End of Knowing Receipt' (2016) 2(1) *Canadian Journal of Comparative and Contemporary Law* 1, 4–8.

[115] See Joachim Dietrich and Pauline Ridge, ''The Receipt of What?': Questions Concerning Third Party Recipient Liability in Equity and Unjust Enrichment' (2007) 31(1) *Melbourne University Law Review* 47, 57–62 and the revised account given in Joachim Dietrich and Pauline Ridge, *Accessories in Private Law* (Cambridge University Press, 2015) 208–16, 252–69. See also PD Finn, 'The Liability of Third Parties for Knowing Receipt or Assistance' in Donovan WM Waters (ed), *Equity, Fiduciaries and Trusts 1993* (Carswell, 1993) 195, 203–6, 208–9, 212–17.

proprietary claim does.[116] Nevertheless, an implicit requirement of the claim is that there is property subject to a trust or fiduciary obligation.[117] In substance, the plaintiff (whether beneficiary or trustee) is indirectly asserting a proprietary 'interest' (if not an 'encumbrance' or 'estate', where the statutes use such terms) adverse to the registered title of the recipient.

This conclusion arguably does not hold if, alternatively, knowing receipt is regarded as wrongdoing by participation or interference in breach of trust or fiduciary duty. On this view, there is liability where the conduct of the defendant amounts to wrongdoing, taking into account the defendant's cognisance of the breach, the nature of the defendant's participation and the degree of the defendant's involvement.[118] This conception is supported by obiter dicta of the Full Court of the Federal Court of Australia in *Grimaldi*:

> We do not consider that a property protection rationale for recipient liability (beyond a proprietary claim to a subsisting equitable interest in property, or its proceeds, in the third party's hands) of itself provides a sufficient justification for imposing a personal liability to account. That liability arises as a matter of conscience not of property. As with assistance liability, recipient liability should be seen as fault based and as making the same knowledge/ notice demands as in assistance cases.[119]

This implies that a plaintiff need not squarely base his or her claim on an 'estate' or 'interest' adverse to the statutory protection.[120] This is because the focus on participatory or accessorial conduct means the action is about more than the vindication of an equitable property interest in the relevant asset.[121] Before this conclusion can be affirmed, however, it is necessary to address the main reason why the courts have rejected knowing receipt as an in personam claim.

## B *The Legacy of* Sixty-Fourth Throne

The reasoning adopted in *Sixty-Fourth Throne*[122] has undoubtedly been the most influential in the case law. The facts may be summarised briefly. A debtor used real

---

[116] This requirement is not one of the three elements of liability articulated in *El Ajou v Dollar Holdings plc* [1994] 2 All ER 685, 700 (Hoffmann LJ), but is included in the expanded version comprising six elements given in *Independent Trustee Services Ltd v GP Noble Trustees Ltd* [2010] EWHC 1653 (Ch) [48].

[117] Lynton Tucker et al, *Lewin on Trusts* (Sweet & Maxwell, 2015) [42-023] and see especially [42-034]: 'The establishment of the trust over property is a necessary preliminary to the establishment of liability.' See also *Re Loftus* [2005] 1 WLR 1890, 1922; *Fraser v Oystertec* [2003] EWHC 2787, [35]; *Gold v Rosenberg* [1997] 3 SCR 767, 783; *Selangor United Rubber Estates Ltd v Cradock (No 3)* [1968] 3 WLR 1555, 1582 ('*Selangor (No 3)*'). In Australia, see *Grimaldi* (n 50) 82 [254].

[118] Dietrich and Ridge, 'The Receipt of What?' (n 115) 60–61; Dietrich and Ridge, *Accessories in Private Law* (n 115) 234–68.

[119] *Grimaldi* (n 50) 85 [267]. See also the general comments on participatory liability at 80 [247].

[120] But see Tang (n 7) 691; Hughson, Neave and O'Connor (n 6) 494. In respect of the UK, see Matthew Conaglen and Amy Goymour, 'Knowing Receipt and Registered Land' in in Charles Mitchell (ed) *Constructive and Resulting Trusts* (Hart, 2010) 159, 174–7.

[121] See Havelock (n 106) 592–3.

[122] *Sixty-Fourth Throne* (n 56). In an earlier Victorian case, *Koorootang Nominees* (n 55), Hansen J found (at 105–107) that the plaintiff had established an in personam claim against a bank holding a registered mortgage on the basis of the first limb of *Barnes v Addy*. His Honour did not consider the

property owned by the respondent trustee company to secure a guarantee and mortgage in favour of the appellant bank. The instruments facilitating this were forgeries. The bank registered the mortgage and thereby obtained an indefeasible interest in the property.[123] The respondent brought proceedings to set aside the guarantee and the mortgage. There was found to be no fraud by the bank, whether by actual knowledge of the forgery or by wilful blindness. In the alternative, a *Barnes v Addy* claim was made, alleging the bank was a 'constructive trustee' and liable to account to the respondent for the mortgage of the property.

Justice Tadgell (with whom Winneke P agreed)[124] held that the bank was not a 'recipient' of trust property for the purposes of knowing receipt. In a passage worth quoting in full, His Honour explained that

> [t]o recognise a claim in personam against the holder of a mortgage registered under the *Transfer of Land Act*, dubbing the holder a constructive trustee by application of a doctrine akin to 'knowing receipt' when registration of the mortgage was honestly achieved, would introduce by the back door a means of undermining the doctrine of indefeasibility which the Torrens system establishes. It is to be distinctly understood that, until a forged instrument of mortgage is registered, the mortgagee receives nothing: before registration the instrument is a nullity. As Street J pointed out in *Mayer v Coe* at 754, the proprietary rights of a registered mortgagee of Torrens title land derive 'from the fact of registration and not from an event antecedent thereto'. In truth, I think it is not possible, consistently with the received principle of indefeasibility as it has been understood since *Frazer v Walker* and *Breskvar v Wall*, to treat the holder of a registered mortgage over property that is subject to a trust, registration having been honestly obtained, as having received trust property.[125]

The conclusion is undoubtedly correct on the facts of the case, although it is suggested that this is not for the reasons given. It should first be noted that Tadgell JA referred to the 'application of a doctrine *akin to* "knowing receipt"'.[126] On the facts, there could be no knowing receipt of trust property, since there had been no transfer of any land[127] to the bank, let alone any transfer in breach of trust or other fiduciary duty (since the debtor was not the trustee). Instead, the bank had

compatibility of such a claim with statutorily protected title, perhaps because the fraud exception applied (at 125–6).

123 *Transfer of Land Act* 1958 (Vic) s 42(1).

124 In his dissent, Ashley AJA (n 56, 166) criticised the approach of the majority as emasculating the full range of operation of a remedy by way of constructive trust. This judgment was influential in *Tara Shire Council v Garner*, with the Court of Appeal majority stating that it more effectively balances 'the protection afforded to trust property against its knowing receipt by a third party and the protection afforded to the title of registered proprietors': [2002] 1 Qd R 556, 585 [89] (Atkinson J, with whom McMurdo P agreed). This preference may be explained by the fact Queensland's statute expressly provides that 'an equity arising from the act of the registered proprietor' overrides indefeasibility: *Land Title Act 1994* (Qld) s 185(1).

125 *Sixty-Fourth Throne* (n 56) 157.

126 Ibid 157 (emphasis added).

127 'Land' being defined in *Transfer of Land Act* 1958 (Vic) s 4(1) as including 'any estate or interest in land'.

simply registered a mortgage instrument, and thereby created a mortgage interest in its favour.[128]

When applied to actual cases where there has been a disposition of land in breach of trust or other fiduciary duty, the reasoning is narrow and artificial. The proposition that proprietary rights derive from the act of registration and not from an antecedent event is technically correct, but does not say anything about whether the registered proprietor has *received* a benefit for the purposes of knowing receipt.[129] In order for the third party to become the registered proprietor, the third party must be specified as transferee on the relevant instrument of transfer (or authority and instruction form in the case of electronic transactions) to be executed. The result of registration of that instrument is that the third party becomes the new registered proprietor and is benefited accordingly.

Ultimately, the majority in *Sixty-Fourth Throne* fixated upon the requirement of 'beneficial receipt' and did not explain why an in personam remedy in response to knowing receipt is, in substance, incompatible with the statutory protection. Nevertheless, in the course of its judgment in *Farah*,[130] the High Court approved, in obiter dicta, the majority approaches in *Sixty-Fourth Throne*, as in turn adopted by a majority of the Supreme Court of Western Australia in *LHK Nominees*.[131] The High Court did not examine the scope of the in personam exception, or the reasoning in those cases, in any detail. *Sixty-Fourth Throne* therefore represents the law on this issue in Australia,[132] and has routinely been adopted or followed by lower courts,[133] with one notable exception.

In *Super 1000 Pty Ltd v Pacific General Securities Ltd*,[134] White J questioned the correctness of two aspects of the reasoning in *LHK Nominees*, despite its being approved by the High Court in *Farah.* First, his Honour referred to the proposition of Anderson and Steytler JJ to the effect that where a registration of title was not dishonestly obtained, it is not possible to treat the holder of the registered title that was subject to a trust as having received trust property.[135] Justice White did not consider that this explained why neither limb of *Barnes v Addy* is available.[136] Second, his Honour referred to the statement by Pullin J in *LHK Nominees* that the

---

128 The fact it was forged is not sufficient to ground an in personam claim: see *Vassos* (n 94) 332–3; *Eade v Vogiazopoulos* [1999] 3 VR 89; *Kukutai v Dyer* (2008) 9 NZCPR 803, 816–18 [61]–[62].

129 See also Low (n 6) 230–31.

130 *Farah* (n 104) 169–71 [193]–[196].

131 (n 57) 549 [185]–[186] (Murray J), 555–6 [210]–[213] (Anderson and Steytler JJ), 568–72 [273]–[292] (Pullin J).

132 And in New Zealand: see *JEB Management Ltd v Grubz United Whanau Trust* (2015) 15 NZCPR 705, 714–17 [37]–[46] in which *Sixty-Fourth Throne* was cited in support. Cf *Smith v Hugh Watt Society Inc* in which the respondent was transferee of real property with knowledge that the property was trust property transferred in breach of trust: [2004] 1 NZLR 537. A 'constructive trust' was imposed on the basis that the respondent had been unjustly enriched at the expense of the plaintiffs: [2004] 1 NZLR 537, 553–4 [66]–[73].

133 See *Bli Bli No 1 Pty Ltd v Kimlin Investments Pty Ltd* [2008] QSC 289, [36]; *Fletcher v George (No 6)* [2009] FMCA 69, [175]; *Merrell Associates Ltd v HL (Qld) Nominees Pty Ltd* (2010) 241 FLR 49, 55 [13]; *Sze Tu v Lowe* (2014) 89 NSWLR 317, 361 [240] ('*Sze Tu*').

134 (2008) 221 FLR 427, 477 [229]–[230] ('*Super 1000*').

135 Ibid 476–7 [228] citing *LHK Nominees* (n 57) 555 [210].

136 *Super 1000* (n 134) 477 [229].

cases relied on by Ashley AJA in *Sixty-Fourth Throne* were distinguishable.[137] Justice White did not regard this as explaining why either limb of *Barnes v Addy* is not within the in personam exception.[138] For the reasons above, it is suggested that White J was justified in raising these doubts, despite being bound to follow *LHK Nominees*.[139]

In sum, the reasoning of the majority in *Sixty-Fourth Throne* in relation to the requirement of beneficial receipt is not convincing, and does not rule out the compatibility of knowing receipt with the statutory protection, assuming the liability is regarded in substance as a form of wrongdoing.

## V Volunteer Recipients

Where a party has obtained registered proprietorship as a volunteer, the dominant view is that he or she enjoys the benefits of the statutory protection.[140] The volunteer is, however, vulnerable to three personal claims. The first is a traditional ground of equitable liability. The second, and recently recognised claim, is a common law claim functioning to protect equitable ownership. It is discussed herein, given this function. The third, which will not be discussed, is a strict liability claim in unjust enrichment for restitution of value.[141]

### A *The Traditional Equitable Claim*

Where a volunteer innocently receives funds or property subject to an equitable interest, but subsequently acquires notice of the equitable interest, he or she then comes under a personal obligation to restore such funds or property (or their traceable proceeds) to the extent they have been retained. This liability was recognised from at least the 19th century,[142] and has been reaffirmed recently.[143] It is

---

137 Ibid 477 [230].

138 Ibid.

139 Ibid 478 [234].

140 In NSW, see *Bogdanovich v Koteff* (1988) 12 NSWLR 472; *Gerard Cassegrain & Co Pty Ltd v Cassegrain* (2013) 87 NSWLR 284, 302–3 [81]–[83] (Court of Appeal); *Sze Tu* (n 133) 361 [241]. The High Court of Australia also assumed this in *Farah* (n 104) 166 [188], 172 [198]. In Western Australia, see *Conlan v Registrar of Titles* (2001) 24 WAR 299; *Gadsdon v Gadsdon* [2003] WASC 48, [43]. The position in Victoria differs: see Butt (n 11) [20-119]. New Zealand has adopted the NSW position: see *Regal Castings* (n 2) 478–80 [130]–[136]. In some jurisdictions, volunteers are expressly deprived of the protection: see *Land Titles Act* (Singapore, cap 157, 2004 rev ed) s 46(3), but contrast *Land Titles Ordinance* (Hong Kong) cap 585, s 27(1).

141 But see Chambers (n 95).

142 *Sheridan v Joyce* (1844) 7 Ir Rep Eq 115; *Andrews v Bousfield* (1847) 10 Beav 511; 50 ER 678; *Locke v Prescott* (1863) 32 Beav 261; 55 ER 103; *Hennessey v Bray* (1863) 33 Beav 96; 102–3, 55 ER 302, 305. In Australia, the foundational case is *Black v S Freedman & Co* (1910) 12 CLR 105, 109 (wife liable to repay money received from her husband once she acquired notice that he had stolen this from his employer and was accordingly a constructive trustee). Although no trust was imposed over money in the hands of the wife, it was suggested in *Sze Tu* (n 133) 348 [157]–[158] that proprietary relief against a volunteer recipient is available if 'appropriate.'

143 See *Heperu Pty Ltd v Belle* (2009) 76 NSWLR 230, 266 [154] ('*Heperu*'):

> To call the volunteer recipient a constructive trustee and to call upon him or her to account as a constructive trustee (because he or she upon discovery of the fund or asset belonging to another

distinct from liability in knowing receipt since: (a) the touchstone of liability is notice, not knowledge; and (b) the volunteer is not personally liable to pay the full value of the funds or property received.

It has been assumed in at least two cases in Australia that the statutory protection is a defence to the traditional equitable claim. In *Break Fast Investments Pty Ltd v Giannopoulos (No 5)*,[144] Black J referred to the line of authorities holding that knowing receipt does not constitute an in personam exception and then concluded:

> In my view, that the same result [i.e. the non-availability of an in personam exception] must follow in respect of a claim [against a volunteer] under *Black v S Freedman & Co* which arises from the fact that a person is placed on notice of an unauthorised receipt of funds, which does not amount to an allegation of fraud in the sense of dishonesty, as distinct from an allegation that that person is bound in conscience to recognise the claimant's rights once they are placed on notice of them.[145]

Shortly after, in *Sze Tu*, the NSW Court of Appeal described this as a 'correct application of principle'[146] without elaboration. Nevertheless, a different bench of the same Court expressed the opposite view in *Fistar*.[147] Justice Leeming stated:

> It makes no difference whether a third party recipient of trust property (say, money) buys shares or Torrens title land or a motor vehicle: his or her personal liability is unaffected. To be clear, I do not understand the passage in *Farah Constructions* at [190]–[198] about the inapplicability of principles governing the receipt of trust property to title derived from registration under Torrens legislation to qualify the principles governing tracing in equity, or the personal liability of a volunteer to account for the value of the traceable proceeds of trust property retained by him or her.[148]

Whether the traditional equitable claim against a volunteer is incompatible with the statutory protection turns on whether that claim indirectly protects trust property. The two leading Australian cases differ as to the basis of liability. In *Heperu*, Allsop P viewed the obligation of the volunteer as grounded on the touching of his or her conscience upon acquiring notice:

> *Black v S Freedman* is clear authority for the equitable obligation upon the innocent volunteer to restore to the plaintiff the fund identified and remaining (whether in original form or traceable product) in his or her hands. The equitable obligation arises from the later discovered position, not from wrongful conduct. Therefore, the extent of the personal equity involved, created by the circumstance in question, is the touching of the conscience of

---

has become one) does not mean the volunteer comes under personal liabilities, independently of, or beyond, the obligation to restore the fund or asset and any attendant obligation.

See also *Independent Trustee Services Ltd v GP Noble Trustees Ltd* [2013] Ch 91, 123 [81] (Court of Appeal); *Metall und Rohstoff AG v Donaldson Lufkin & Jenrette Inc* [1990] 1 QB 391, 474 (Court of Appeal); *Agip v Jackson* (n 98) 291.

144 [2011] NSWSC 1508.

145 Ibid [102].

146 *Sze Tu* (n 133) 361 [243] Gleeson JA (with whom Meagher JA and Barrett JA agreed).

147 *Fistar* (n 50).

148 Ibid 749 [82] (Leeming JA, with whom Bathurst CJ and Sackville AJA agreed).

> the volunteer recipient to deal with the property of another conformably with the interests of the owner, now discovered.[149]

By contrast, in *Fistar*, Leeming JA emphasised the conduct of the volunteer: 'Although this is similar to first limb *Barnes v Addy* liability, it is conceptually distinct, because it is the *subsequent dealing*, rather than the *receipt of property*, that founds liability'.[150]

It is respectfully suggested that the view of Allsop P is to be preferred. Pending notice, a volunteer recipient is able to deal with the property freely.[151] Once he or she has notice, the volunteer is obliged to restore the property to or for the benefit of the beneficiaries, and not to part with it otherwise. Subsequent dealing is therefore a breach of a duty which has already arisen. Like knowing receipt, this personal liability protects equitable ownership, and is incompatible with the statutory protection.

## B *The* Heperu *Common Law Claim*

In *Heperu*,[152] the NSW Court of Appeal recognised the aforementioned equitable claim,[153] but also found that the volunteer could be personally liable at common law, without the need for notice. This was on the basis of an obligation to restore, in monetary terms, the value of the *retained* proprietary benefit derived from the receipt of funds traceable in equity from misappropriated funds[154] or the value of the remaining interest in land held by the volunteer.[155] The Court found support for the availability of such a claim in *Banque Belge pour l'Etranger v Hambrouck*[156] and in the judgment of Lord Templeman in *Lipkin Gorman v Karpnale Ltd.*[157] The claim may be regarded as an example of common law recognition of equitable ownership.[158]

> The *Heperu* claim has been praised by one commentator as
>
> a common law ancillary liability that protects equitable rights: the claim is to the value of the equitable property, identified through equitable means, but enforced by the common law. It represents an integration of the common law and equity par excellence in which the common law/equitable appellation becomes unhelpful as a description of the cause of action.[159]

---

149 *Heperu* (n 143) 265 [154].

150 *Fistar* (n 50) 742 [45] (emphasis in original), citing *Accessories in Private Law* (n 116) 203. No authority is cited in that work in support of this proposition. See also *Fistar* (n 50) 742–3 [47].

151 See *Independent Trustee Services Ltd* (n 143) 124 [84]: 'the volunteer is (for the time being) able to mix the trust assets with his own, with impunity, and to dispose of them freely, despite the beneficiaries' continuing beneficial interest'.

152 (n 143). Notably, no proprietary relief was sought (at 260 [126]). Such a claim was made in *Fistar*, but failed as the recipient was found not to be a volunteer: *Fistar* (n 50) 746–9 [65]–[81].

153 *Heperu* (n 143) 265 [154].

154 Ibid 263 [144], 265 [153].

155 Ibid 263 [144].

156 [1921] 1 KB 321.

157 [1991] 2 AC 549 (House of Lords).

158 See, eg, JD Heydon and MJ Leeming, *Jacobs' Law of Trusts in Australia* (LexisNexis, 7th ed, 2006) 670; *MGL* (n 69) [1-205].

159 Pauline Ridge, 'Modern Equity: Revolution or Renewal from Within?' in Sarah Worthington, Andrew Robertson and Graham Virgo (eds) *Revolution and Evolution in Private Law* (Hart, 2018)

While the claim is not a proprietary one, equitable ownership of the relevant interest is a prerequisite to making the claim. It therefore functions to protect equitable ownership indirectly. As a result, it falls to be treated in the same way as knowing receipt: it is incompatible with the statutory protection.

# VI Remedies: Receipt-based Claims

## A *Knowing Receipt*

The appropriate remedy in respect of knowing receipt has proved controversial. This is largely because the expressions 'constructive trustee' and 'accountable as a constructive trustee' — implying that remedies may go beyond personal orders — are frequently used in the case law in connection with this liability.[160] Such language is notoriously ambiguous[161] and has long been criticised.[162] Lord Sumption has observed that, 'there are few areas in which the law has been so completely obscured by confused categorisation and terminology as the law relating to constructive trustees'.[163]

Nevertheless, this language does reveal something crucial about the nature of personal liability in knowing receipt: it resembles the liability of the express trustee to account for trust property he or she holds.[164] As Ungoed-Thomas J observed in *Selangor (No 3)*:

> ['constructive trusteeship' as applied to those whom a court of equity will treat as trustees by reason of their action] is nothing more than a formula for equitable relief. The court of equity says that the defendant shall be liable in equity, as though he were a trustee. He is made liable in equity as trustee by the imposition or construction of the court of equity. This is done because in

---

251, 260. It is beyond the scope of this article to address whether recognition of this claim was necessary or desirable, but two problems may briefly be mentioned. First, where the volunteer retains property (other than Torrens land), an equitable proprietary claim will be available, even if the volunteer is innocent: *Foskett v McKeown* (n 48) 132A–B, 132F–133B, 133D, 139H–140A. A personal claim will usually be unnecessary. Second, the claim mirrors the restitutionary claim articulated by Lord Templeman in *Lipkin Gorman v Karpnale Ltd* (n 157) 563. On this approach, restitution is limited to the net amount of the funds retained. By contrast, the claim articulated by Lord Goff involves a prima facie obligation to make restitution of all funds received, subject to a change of position defence (at 578–82). It is this latter claim which has long been orthodox in England and other common law jurisdictions.

160 See *Morgan v Stephens* (1861) 3 Giff 226, 237; 66 ER 392, 397; *Sheridan v Joyce* (1844) 7 Ir Rep Eq 115, 119; *Jesse v Bennett* (1856) 6 De G M & G 609, 612; 43 ER 1370, 1371; *Re Blundell* (1888) 40 Ch D 370, 381; *John v Dodwell & Co Ltd* [1918] AC 563 (Privy Council) 569.

161 See *Grimaldi* (n 50) 161 [667], distinguishing the 'strictest sense' and a 'more general sense'.

162 See *Paragon Finance plc v DB Thakerar & Co (a firm)* [1999] 1 All ER 400, 409 (Court of Appeal) ('*Paragon*'). The expression 'accountable in equity' is preferred: see *Dubai Aluminium Co Ltd v Salaam* [2003] 2 AC 366, 404 [142] (Lord Millett); *Giumelli v Giumelli* (1999) 196 CLR 101, 112 [4] (Gleeson CJ, McHugh, Gummow and Callinan JJ); *Farrow Finance Co Ltd (in liq) v Farrow Properties Pty Ltd (in liq)* [1999] 1 VR 584, 636–7.

163 *Williams v Central Bank of Nigeria* [2014] AC 1189, 1197 [7] ('*Williams*'). For an example of such confusion in the context of an in personam claim, see *Super 1000* (n 134) 471 [209], 472 [213].

164 Mitchell and Watterson (n 112) 120, 128–31.

> accordance with equitable principles applied by the court of equity it is equitable that he should be held liable as though he were a trustee.[165]

Importantly, the recipient, although not an express trustee, is treated *as if he or she was one*, with equivalent duties.[166] As with an express trustee, the core duty of the knowing recipient is to restore the trust property immediately. Ordinarily, the recipient will no longer hold the property, so will be ordered instead to pay the current monetary value of the property.[167] Consistent with the argument made above, the award of such a remedy is not inconsistent with the statutory protection if knowing recipient is regarded as a wrong.[168] The recipient may of course *choose* to satisfy the personal liability by transferring the property to the plaintiff; but he cannot be compelled to transfer without the statutory protection necessarily being contravened.

## B *(Remedial) Constructive Trust?*

Given the rejection of a knowing receipt claim as an in personam claim in Australia, it is difficult to find an instance of a court imposing a constructive trust (whether institutional or remedial)[169] over real property in response to a knowing receipt claim. There are two cases touching on the availability of a remedial constructive trust which warrant brief examination.

First, in *LHK Nominees*,[170] Murray J suggested that the appellant could seek a declaration of remedial constructive trust of the type in *Muschinski v Dodds*[171] based on 'fraudulent conduct in the equitable sense'. His Honour explained:

> It can be seen that ... a declaration of trust, involves no detraction from the principle of indefeasibility of title of Torrens system land and the equitable remedies might be available in an appropriate case, and in an appropriate form, where property is to be traced or followed into the hands of a third party. The remedy of the Court, in whatever form is judged appropriate, will be applied to give effect to the personal equity established by the plaintiff and will proceed upon the basis that the defendant has, to the point of judgment, title to the property *which may be qualified where necessary by the exercise of curial power in the form of a declaration of trust.*[172]

The making of a mere declaration may seem innocuous, but a declaration is rarely sought for its own sake. If granted the declaration sought, the plaintiff may make a

---

165 *Selangor (No 3)* (n 117) 1582. See also *Paragon* (n 161) 413.

166 Mitchell and Watterson (n 112) 157–8. See also *Williams* (n 164) 1197–8 [9] (Lord Sumption).

167 Ibid 135.

168 It has been objected that 'it is a hollow victory for the registered proprietor to retain the land if they have to pay a sum equivalent to the value of the land': see Tang (n 7) 691. This seems to presume that the registered proprietor must 'win' as against a plaintiff with an equitable claim. In any event, this is the unavoidable effect of the legislation on the approach proposed herein.

169 It is beyond the scope of this article to examine the variety of circumstances in which 'remedial' constructive trusts have been imposed, or their legitimacy. It seems clear, however, that such trusts are to an extent discretionary, or only to be granted 'if appropriate': see *Grimaldi* (n 50) 82 [255], 125–7 [504]–[511], *Sze Tu* (n 133) 346–8 [151]–[158], and the classic statement by Deane J in *Muschinski v Dodds* (n 82) 612–17.

170 *LHK Nominees* (n 57) 551–2 [194]–[200].

171 *Muschinski v Dodds* (n 82).

172 *LHK Nominees* (n 57) 551–2 [196] (emphasis added). To similar effect, see Harding (n 5) 363–4.

legitimate demand that the title or interest be transferred, or that an equitable lien be imposed over it. Alternatively, the plaintiff may use the declaration to extract a settlement having either of these consequences. As a result, a title that is qualified by a declaration of trust is susceptible to loss of the statutory protection.

Second, in *Robins v Incentive Dynamics Pty Ltd*[173] the NSW Court of Appeal had no qualms about imposing a remedial constructive trust for knowing receipt. The directors of the respondent company, in breach of fiduciary duty, had unilaterally transferred funds to a company ('Coldwick') that the respondent used as a property investment vehicle.[174] This transaction conferred no benefit on the respondent. Coldwick used the funds towards the purchase of two properties. After it went into liquidation, the respondent alleged that Coldwick was in knowing receipt of the funds and sought a declaration of remedial constructive trust over these properties.

Delivering the judgment of the Court,[175] Mason P accepted the submission that there was knowing receipt by Coldwick.[176] In relation to the form of remedy, his Honour stated:

> The recipient cause of action [under the first limb of *Barnes v Addy*] may generate a personal obligation to make restitution with interest of moneys received. In a proper case the unjustified receipt can also be made the springboard for a proprietary claim such as a (remedial constructive) charge or trust …[177]

The authority cited for the latter proposition was *Bathurst City Council v PWC Properties Pty Ltd*.[178] This, however, was not a knowing receipt case,[179] and did not support the availability of a proprietary remedy in respect of that action. Subsequently, the case of *Belmont Finance Corporation v Williams Furniture Ltd (No 2)*[180] was cited and characterised as demonstrating that

> the (remedial) constructive trust capable of being imposed by the court as the springboard for a personal or proprietary remedy is not precluded merely because the recipient took the money under a transaction having a particular form such as a gift, loan or purchase.[181]

A perusal of the judgments in *Belmont Finance* reveals that no proprietary remedy was contemplated, let alone ordered. Instead, Buckley LJ held that the

---

173 (2003) 175 FLR 286, 301–2 [71]–[79] ('*Robins*'). Although not a knowing receipt case, in *Regal Castings* the trustees were ordered to transfer their half-share in the property to the Official Assignee: *Regal Castings* (n 2) 450 [23] (Elias CJ) 465 [78]–[79] (Blanchard J, Wilson J agreeing), 486 [162]–[163] (Tipping J). This pragmatic imposition of a remedial constructive trust created a proprietary interest for the benefit of unsecured creditors.

174 Two of the directors were also directors and shareholders of Coldwick at the time.

175 Justice Giles disagreed on a narrow point as to whether the requirement of rescission stood in the way of proprietary relief: see 302–303 [81]–[85].

176 *Robins* (n 173) 297 [50]–[51].

177 Ibid 297 [45].

178 (1998) 195 CLR 566, 585 [42].

179 The issue was whether land vested in the council was 'land subject to a trust for a public purpose' under the *Local Government Act 1993* (NSW) and dealt with beyond the council powers. The High Court characterised this as a 'statutory trust', not a private trust: ibid 592 [67].

180 [1980] 1 All ER 393 ('*Belmont Finance*').

181 *Robins* (n 173) 300 [65].

recipient of the misapplied money was 'accountable to Belmont as a constructive trustee'.[182] Similarly, Goff LJ held the recipient 'liable in damages as constructive trustees'.[183] The order ultimately made was that the recipient was 'accountable for the whole of the £489,000', being the amount that had been received.[184] This was personal relief only.

President Mason concluded that a remedial constructive trust was appropriate on the facts, on the basis that this remedy was designed to 'stop unconscionable conduct that would result in unjust enrichment'.[185] Although Coldwick did not advance any defence based on the statutory protection,[186] it is difficult to reconcile the imposition or declaration of a remedial constructive trust with this protection. The imposition or declaration is premised on the notion that the property ought to belong beneficially to the plaintiff. The typical means by which the new trust is implemented is by way of an order that the defendant transfer the relevant title or interest, divesting the title or interest.

## C *A Contrary Argument*

Where any receipt-based claim has as its 'terminal point'[187] orders that require the registered proprietor to divest the title or interest in whole or part, this necessarily contravenes the statutory protection. As a result, it is not plausible to maintain that the in personam claim concerns only personal obligations in conscience and not sanctity of title.[188]

It has nevertheless been argued[189] that an order in response to a successful *Barnes v Addy* claim, which requires the defendant to execute and register a discharge of mortgage, represents 'no unusual or special threat to the principle of indefeasibility of title'.[190] This is because:

> such an order cannot be distinguished from other uncontroversial in personam orders with proprietary consequences for the registered proprietor of an interest in Torrens land. Orders requiring acts of specific performance of contracts for the sale and purchase of interests in Torrens land are the best example. Moreover, a case where a court orders the defendant to execute and lodge a form of discharge of a mortgage, but where the defendant refuses to do so, may not be distinguished sensibly from a case where a court orders the defendant to pay to the plaintiff a sum of money, but where the defendant refuses to do so.[191]

The comparisons to 'other uncontroversial in personam orders' made here are not apt. Taking the first, an order for specific performance requires the defendant to

---

182 *Belmont Finance* (n 180) 405.
183 Ibid 412.
184 Ibid 419 (Buckley LJ for the Court).
185 *Robins* (n 173) 302 [76]. See also 297 [50]–[51].
186 By the time of judgment, Coldwick had sold the properties (*Robins* (n 173) 296 [43], 302 [79]), and the competing claims were over the proceeds of sale.
187 To use the expression of Barwick CJ in *Breskvar* (n 2) 385.
188 Justice Tipping in *Regal Castings* (n 2) 483 [148]. See also *Davies* (n 29) 712.
189 Contrast Harding (n 5) 359–60.
190 Ibid 360.
191 Ibid.

do no more than what he or she has *agreed or undertaken* to do in relation to his or her title; here equity simply compels performance. Such agreement or undertaking is absent in the case of a *Barnes v Addy* claim. If the defendant still holds the title or other interest, an order that he or she transfer this is *imposed* on him or her regardless of intentions, with the effect of divesting the title or interest.

The second comparison made does not detract from the point that an order that the defendant discharge a mortgage requires him or her to divest himself or herself of an interest in land, as opposed to merely pay a sum of money. Unless a prescribed statutory exception applies, this is not only a threat to the statutory protection but the negation of it.

## VII Conclusion

Whenever legislation is enacted that affects or interferes with existing rights or interests recognised by private law, the courts are left with the difficult task of determining the overall impact of the legislation on such rights or interests, in a necessarily incremental manner. Although the Torrens system statutes have never been interpreted by the courts as ousting all equitable claims adverse to registered titles,[192] their relationship with receipt-based equitable claims or exceptions remains an uneasy one. This has been an enduring source of uncertainty for those using or administering the Torrens system, as reflected in the level of litigation in this area (with many cases reaching the highest appellate courts), and the pattern of inconsistency in the case law.

This article has made two suggestions in an effort to overcome this uncertainty. The first relates to the importance of precise terminology. It is not helpful to regard the title created by registration as 'indefeasible' because this falsely implies that such title can never be divested from the registered proprietor. Registration in accordance with the statute creates a title protected against unregistered estates and interests, but the fact of registration does not oust the in personam jurisdiction, which exists in parallel with it. It is therefore not helpful to regard in personam claims as an 'exception' to 'indefeasibility'.[193] The existing terminology may be engrained, but its continued (and uncritical) use impedes constructive analysis.

The second argument made relates to the necessity of a systematic, yet nuanced, approach to delineating the legitimate scope of equitable in personam claims. Such claims are not homogenous, and it is necessary to determine whether the nature of each is incompatible as a matter of justificatory principle with the statutory protection, or falls outside it altogether. For this purpose, it is of fundamental importance to categorise the main claims by their underlying rationale. Applying this approach, it may be concluded that any receipt-based equitable claim

---

[192] In *Cuthbertson v Swan*, Stow J observed of the original Torrens legislation in South Australia, 'we should not expect that the Legislature even in so great an alteration in the law as that contained in the Real Property Acts would interfere with the existing law as regards trusts and equities, except so far as is necessary to give full effect to the new system': (1877) 11 SALR 102, 110. This sentiment was echoed by Isaacs J in *Barry v Heider* (n 2) 213.

[193] The simple and unqualified phrase 'compatible legal or equitable claim' might be preferable.

(whether a proprietary claim or a personal claim) resulting in a proprietary remedy is incompatible with the statutory protection. If knowing receipt is regarded as a participatory wrong, a personal remedy (payment of value) is arguably compatible with the statutory protection. In relation to volunteers, the traditional equitable liability and the *Heperu* common law claim are equally incompatible with the statutory protection.

The category of receipt-based equitable claims is to be distinguished from those based on consensual or quasi-consensual obligations, and those arising from defective decisions. This proposed division of claims might seem complicated and even convoluted, but it reflects the analytic travails necessary to rationalise the effects of the Torrens system on equitable claims and interests.