

## WHY REVISIT *SUTTON V O'KANE*? THE TRICKY TRIO: SUPERVENING FRAUD; THE IN PERSONAM CLAIM; AND LANDLOCKED LAND

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### I. INTRODUCTION

In 1975 Professor Brookfield,<sup>1</sup> criticised the majority ruling of the Court of Appeal in *Sutton v O'Kane*.<sup>2</sup> He preferred the reasoning of the dissenting judge Turner P who considered that the time for testing fraud should not be limited to the time that a registered proprietor obtains registration. In the same year, the *Property Law Amendment Act 1975* was passed, under which s 129B of the *Property Law Act 1952* ('Reasonable access may be granted in cases of landlocked land') was introduced. This provision is now embodied in ss 326 — 331 of the *Property Law Act 2007*.<sup>3</sup> There appears to be no connection between the Court of Appeal's decision and the introduction of the statutory provision.<sup>4</sup> For Mr O'Kane, the former resulted in a denial of access over a well-used equitable easement. However, under the latter, the courts would have granted him the relief he needed, perhaps at the expense of some compensation to Mr Sutton.<sup>5</sup> This piece of overriding legislation has quelled, but not extinguished, debate over the status of supervening fraud in New Zealand. As this paper addresses access to land, there is a third player in the mix — the in personam claim to which, incidentally, Brookfield paid homage.<sup>6</sup>

This paper analyses two decisions: one from New Zealand, well-known and still controversial; the other a 2006 ruling from the New South Wales Court of Appeal. In a loose sense their facts, facts that remind us of the ordinary 'give and take' of our daily lives, are analogous. What can I do if my neighbour cuts off my previously-enjoyed equitable access?

In both cases, the registered proprietor relied on his indefeasible title to deny that access. The decisions are significant because they were argued on discrete principles, yet the outcomes were the same. The disaffected neighbours were unsuccessful: Mr Sutton's actions did not constitute land transfer fraud; and in *McGrath v Campbell*<sup>7</sup> the registered proprietor was not bound by an in personam claim.

This paper shuffles the principles in a contemporary context, and makes a case for the parties. How might the Suttons fare under an in personam claim, or the McGraths under supervening fraud? If all parties owned their land in New Zealand, would Mr O'Kane and the Campbells be successful applicants under ss 326-331 of the new 2007 Act?

## II. *SUTTON V O'KANE: SUPERVENING FRAUD*

The Court of Appeal's ruling in *Sutton v O'Kane* remains controversial. It attracted significant comment from leading academics and judges at an international conference in 2003.<sup>8</sup> Some deemed the decision robust; others disagreed.

The decision succeeded familiar judgments that supported the latter group.<sup>9</sup> Two decisions are cited consistently. In *Merrie v McKay*<sup>10</sup> Prendergast CJ suggested that dishonest conduct after registration could be considered fraud for the purposes of the *Land Transfer Act*. Years later, that principle was approved in *Webb v Hooper*.<sup>11</sup> The Court of Appeal in *Sutton v O'Kane* re-evaluated what might have been seen as a settled principle.

### ***Sutton v O'Kane — The Facts***

As this paper is fact-specific, it is necessary to recap briefly the neighbours' dispute.

The Suttons (the appellants) owned Lot 2, over which ran a right of way in favour of Lot 1, owned by Mr O'Kane (the respondent). There was a memorial on the title to Lot 2, noting that the land was subject to the local council's conditions of consent to the grant or reserving of a right of way over it as endorsed on the relevant plan. When the original subdivider sold Lot 2 to a Mr and Mrs Dalton in 1967, this right of way was not created, although the transfer referred to its existence on the deposited plan and to the council's conditions of consent. The O'Kanes purchased Lot 1 from the original subdivider, but that transfer did not refer to any appurtenant right of way. Subsequently, the Suttons purchased Lot 2 but again the transfer made no mention of the right of way, except for a reference to the council's conditions. However, on the ground, a formed drive existed over the part of Lot 2 defined as a right of way on the plan. This was the only convenient access to Lot 1. No trouble occurred in connection with the access when the Daltons owned their property. When the Suttons purchased Lot 2, for some time they, too, acquiesced in its use. However, after some months the Suttons became dissatisfied with its use by the O'Kanes. When Mr O'Kane decided to sell his property the Suttons, on being informed that no legal right of way existed, relied on their registered title and fenced off their boundary.

### ***Sutton v O'Kane — The Result***

As s 62(b) of the *Land Transfer Act 1952* does not apply to equitable easements, the appeal judges were faced with the concept of supervening fraud. Wild CJ did not address it. His Honour considered the Suttons' behaviour unneighbourly but not fraudulent:

I do not think it is fraudulent repudiation simply to disavow obligations that are found not to exist.<sup>12</sup>

Richmond J and Turner P took opposing views on the issue. Richmond J considered that a registered proprietor may be guilty of fraud at some time after registration if, for example, he dishonestly prevents the registration of an interest created by himself. However this case involved an equitable easement created by a predecessor in title of the Suttons. In his Honour's view, the Suttons, although accepting the position at registration, were able to change their minds later and set up their registered title to defeat the interest.

In his dissenting judgment, Turner P, approving the decision in *Webb v Hooper*, concluded that the Suttons had been guilty of fraud.<sup>13</sup> His Honour held that it was no less culpable to change one's mind after registration and do a dishonest act, than to resolve to do that act before registration.

The Suttons were successful, and Mr O'Kane lost his access right.

The concept that supervening fraud is not fraud for the purposes of s 62 of the *Land Transfer Act 1952* became fertile ground for academic debate,<sup>14</sup> and the position remains unsettled. While, in New Zealand, the advent of our landlocked land legislation has subdued its use, it has nonetheless received some judicial attention.

### ***Supervening Fraud After Sutton v O'Kane***

Brookfield's nod to the relationship between supervening fraud and the in personam claim was reinforced by comments by the Rt Hon Justice Blanchard in 2003:

It must, one would think, be a rare event that something occurring after registration which could properly be described as fraudulent, or even unconscionable (as opposed to unneighbourly or inconsiderate), would not give rise to a recognised cause of action against the registered proprietor. The notion of supervening fraud may have seemed attractive as a counter to dishonest conduct when perhaps the in personam jurisdiction was not as well developed as it is now, but it is questionable whether it is either necessary or consistent with the statute.<sup>15</sup>

It therefore comes as no surprise that a discussion of supervening fraud is often made alongside an analysis of the in personam claim. *Bahr v Nicolay (No 2)*<sup>16</sup> is a useful example. In a minority view, Mason CJ and Dawson J held that certain conduct of a registered proprietor was fraud within the statutory exception to indefeasibility. While Brennan J also acknowledged the possibility of this approach, his Honour favoured the imposition by equity of a constructive trust to prevent the fraud.<sup>17</sup>

In New Zealand, a few cases highlight contrasting judicial opinion.

In an obiter statement in *Auckland City Council v Man O'War Station Ltd*<sup>18</sup> Anderson J, in his fifth criteria for a definition of fraud, noted:

If a purchaser acquires title intending to carry out an agreement with the holder of an unregistered interest there is no fraud at that time, but relevant fraud may exist in later repudiating the agreement and in endeavouring to make use of the position the purchaser has obtained to deprive a plaintiff of rights.<sup>19</sup>

This view was affirmed by Chisholm J in *Tuscany v Gill*.<sup>20</sup> Before registration, the purchaser first knew about a demolition clause in a lease but not of its inapplicability for the first six years; and later, when he did find out about the proviso, he assured the lessee (who by then had spent considerable money on renovations) that he would not invoke the demolition right for that six-year period. His post-registration attempt to do so was considered fraudulent.

A similar stance was taken by Associate Judge Christianson in *Centillion Investments Ltd v Hillpine Investments Ltd*.<sup>21</sup> His Honour considered it arguable that a mortgagee who, before registration, knew of existing sale agreements but later purported to exercise its power of sale to sell the sections to a third party was guilty of fraud.

However, a different interpretation was taken by Miller J in *Potts v Anderson*.<sup>22</sup> The defendants refused Mr Potts access through their adjoining property to pump water from a reservoir to a storage tank on his property for reticulation to stock water troughs. The Andersons were sued as parties to an agreement for sale and purchase with Mr Potts in 1991 under which he sold them their land on terms that they were to grant an easement to take water from the reservoir if called upon. In 2003 trespass notices were issued following a conflict over use of the reservoir's water. The Andersons and a company were also sued as registered proprietors following a 1999 transfer under which they, the Andersons, transferred the land to themselves and the company as trustees of their family trust. The easement remained unregistered and Mr Potts was never told of the transfer.

The defendants argued that on the transfer in 1999 the Andersons and the company took title indefeasibly, such that under ss 62 and 182 of the Land Transfer Act 1952, they were 'absolutely free' of the equitable easement. Miller J had no problem establishing an in personam claim,<sup>23</sup> but in fairness to the parties, offered his views on supervening fraud. Miller J noted that the defendants took with notice of the equitable interest and intended to honour it. Only later did they resolve to defeat it — a classic *Sutton v O'Kane* scenario. Following the majority approach in both *Bunt v Hallinan*<sup>24</sup> (a purchaser is not fraudulent if he takes title knowing of an equitable interest but in reliance on legal advice that he will take title free of it) and *Sutton v O'Kane*, Miller J found no fraud. The defendants asserted their indefeasibility of title on legal advice to the effect that a registered interest prevails over an equitable one and, as his Honour noted:

Can it be said that such a defendant was dishonest because she asserted in litigation what she had been told were her rights in law?<sup>25</sup>

### ***The Suttons in 2008 - Supervening Fraud?***

Whether Mr O'Kane would be more successful in 2008 pursuing a claim of fraud against the Suttons remains uncertain. Divergent views still exist. However, the maturing of the in personam claim may eventually render the concept obsolete. Chisholm J's decision in *Tuscany v Gil* has attracted criticism. It seems unlikely that a registered proprietor who fails to honour an assurance given voluntarily, where no action has been taken in reliance of that assurance, can be guilty of dishonest behaviour.<sup>26</sup>

Of course, Mr O'Kane would now seek relief successfully under ss 326-331 of the *Property Law Act 2007*. He is the traditional 'landlocked' owner needing relief and the courts would exercise their discretion under s 329 to reinstate his access.

## **III. MCGRATH V CAMPBELL: THE IN PERSONAM CLAIM**

Lord Russell of Killowen, in delivering the judgment of the Privy Council in *Oh Hiam v Tham Kong*<sup>27</sup> observed:

The Torrens system is designed to provide simplicity and certitude in transfers of land, which is amply achieved without depriving equity of the ability to exercise its jurisdiction in personam on grounds of conscience.<sup>28</sup>

The extent of this claim, not necessarily a true exception to indefeasibility,<sup>29</sup> has attracted considerable academic comment. Guidelines for its use are now well-established but judicial flexibility remains. In many of the more recent cases, the spotlight has been on the personal obligations of a mortgagee. However, in *McGrath v Campbell*<sup>30</sup> a registered proprietor, in much the same position as the Sutttons in *Sutton v O'Kane*, faced a court action based on personal obligations to his neighbour.

### ***McGrath v Campbell — The Facts***

Two adjoining lots were owned by a single registered proprietor, C. The northern lot (Lot 6) faced a main road (The Boulevard), while the southern lot (Lot 12) was bounded by a street (Brighton Avenue). A registered easement had been created over both lots in favour of a third adjoining property (Lot 20). This easement permitted access to Lot 20 from Brighton Avenue. It had been used for some time as an access point for Lot 12, although this use had never been noted on the register.

There was a commercial building on Lot 6, and a single storey building on Lot 12 behind which existed a relatively large bitumen carpark. Where the registered easement met Brighton Avenue there were approximately five metres of bitumen, but the balance comprised a gravel track, referred to in the judgment as 'the driveway'. The driveway remained within the boundaries of the registered easement to a point approximating the northern boundary of the bitumen carpark. During C's ownership of Lots 6 and 12, the tenants of Lot 6 and their employees, customers and suppliers had used the driveway to access Lot 6. For some years up to 1979, the main building on Lot 6 had been used as a supermarket, and vehicles supplying the supermarket, as well as its employees and some customers, regularly used the driveway over Lot 12 to access the supermarket. When the lease on the supermarket expired, C decided to sell both lots.

On the same day in 1980, Lot 6 was sold to the Campbells and Lot 12 to the McGraths. The only prior encumbrance referred to in each transfer was the registered easement that benefited only Lot 20. At the time the parties entered into their respective contracts and transfers with C, they were familiar with Lots 6 and 12 because of the proximity of their homes and business premises to those properties.

Proposed special conditions attaching to each transfer were designed to formalise a right of way over the driveway on Lot 12 in favour of Lot 6. However, the draft special conditions were not included in either contract. The Campbells were aware of these draft conditions but the McGraths were not. This arose because the Campbells had been advised (erroneously) by their solicitors that Lot 6 already had the benefit of the registered easement and thus no further grant was necessary. The McGraths had no knowledge of this advice, or that it had been given to the Campbells.

The Campbells continued to use the easement over Lot 12 to access Lot 6 until a dispute arose in 1995.

The Campbells argued that the circumstances of the sale gave rise to an implied easement over Lot 12 for the benefit of Lot 6, and that the simultaneous transfers of the two lots gave rise to an equity or an in personam right enforceable against the McGraths. The McGraths argued that the indefeasibility provisions of the *Real Property Act 1900*, and the circumstances of the transfers, prevented the recognition of any such equity.

## ***McGrath v Campbell -The Result***

Before the primary judge, the Campbells conceded that any use by them of the driveway over Lot 12 for access to and egress from Lot 6 resulted from their independent belief (unknown to the McGraths) that Lot 6 had the benefit of a right of way over Lot 12. As noted by the Court of Appeal, it was clear that between 1981 and 1995 the McGraths acquiesced in the use of the driveway to access Lot 6 'only in the spirit of neighbourliness'<sup>31</sup> and did not agree or represent in any way that the Campbells had any legal rights with respect to its use.

The Court of Appeal overturned Barret J's conclusion that the implied easement was enforceable against the McGraths. The circumstances in which the land was acquired by the McGraths would have been sufficient at general law to give rise to a *Wheeldon v Burrows*<sup>32</sup> easement (as extended by the decision in *Aldridge v Wright*).<sup>33</sup> However, any such easement can be no more than an equitable easement, and its enforcement against the McGraths depended on whether it also created rights in personam. The Court of Appeal held that it did not.

Citing a number of well-known Australian authorities,<sup>34</sup> Tobias JA (with whom Giles and Hodgson JJA agreed) held that the simultaneous transfers alone could not give rise to a personal equity binding on the McGraths as the registered proprietors of Lot 12 in circumstances where they had not, in any way, contributed to the creation of the implied easement or conducted themselves in any way that could be regarded as unconscionable.

In particular, their reliance on their strict legal rights — that is, the indefeasibility of their title to Lot 12 effected by s 42(1) of the RP Act — was in no way unconscionable.<sup>35</sup>

There must have been some conduct on the part of the McGraths or those for whom they were responsible which would make it unconscionable for them to retain the benefit of the putative servient land free from the burden of the claimed right of way. Tobias J found no such conduct. His Honour made it clear that the simultaneous transfers were not sufficient, and it did not matter that the McGraths were generally aware that the driveway over Lot 12 had been used in the past to gain access to the rear of Lot 6. Similarly, the McGraths' knowledge that both tenements were to be transferred by a common vendor simultaneously did not involve the necessary conduct.

The McGraths did not create the easement and they were not a party to the transfer to the Campbells over which they had no control. There was no suggestion that the simultaneous transfers were due to any request or conduct on the part of the McGraths. In short, there was no conduct on the part of the McGraths to which any equity could attach to bind them personally.<sup>36</sup>

The Campbells were denied their equitable access.

## ***The Limits of the In Personam Claim***

The development of the in personam claim from its traditional parameters of a contract or trustee type case to a wider context has been well canvassed.<sup>37</sup> Uncertainty remains as to its true breadth, and judicial reasoning is always shadowed by the continuous possibility that the 'the pendulum of personal equitable claims has swung too far'.<sup>38</sup>

Following the oft-cited comments of Lord Wilberforce in *Frazerv Walker*,<sup>39</sup> the courts have attempted to find a blueprint for this equitable jurisdiction and, as noted by Thomas J in *CN & NA Davies Ltd v Laughton*:

[a]ny numbers of cases, particularly in New Zealand and Australia, provide ample illustration of the wide circumstances in which claims in personam have been recognised ...<sup>40</sup>

However, the courts in Australia and New Zealand have established certain guidelines:<sup>41</sup>

- i. claims in personam encompass only known legal or equitable causes of action;<sup>42</sup>
- ii. the remedy cannot be used to undermine the fundamental concepts of the Torrens system;<sup>43</sup>
- iii. the conduct giving rise to an in personam claim can arise before or after registration;<sup>44</sup> and
- iv. it must involve unconscionable conduct on the part of the current registered proprietor.<sup>45</sup>

Mere unconscionability will not be enough to enforce an in personam claim. It is 'a necessary, but not sufficient, criterion',<sup>46</sup> and

[t]he expressions 'personal equity' and 'right in personam' do not supply a blank canvas on which a plaintiff can paint any picture.<sup>47</sup>

### ***The Enforceability of the Claim Against a Registered Owner***

Registered proprietors and registered mortgagees are the targets for an in personam claim. This paper focuses solely on the former group and, through some selected decisions, analyses what causes of action may, or may not, underpin the unconscionability of a current landowner. From this, conclusions can be drawn concerning the enforceability of the claim against a sub-set of that group — the access-blocking landowner.

#### **A contract**

It is well established that a registered proprietor who has entered into a contract for the sale of his land cannot rely on his indefeasible title to defeat the purchaser's interest.<sup>48</sup> In this instance, the courts will exercise their equitable jurisdiction to order specific performance of the contract.

The equitable obligation assumed by the defendants in *Potts v Anderson* was sufficient to give rise to an in personam claim. They had agreed to grant the water easement if called upon. The defendants contended that the enforceability of the easement in equity was affected by the change in their capacity from beneficial owners to trustees. Miller J was not so persuaded. There was no evidence of competing equities in the form of conflicting obligations to beneficiaries of the family. Moreover, the defendants transferred the land to the trustees with knowledge of Mr Potts' interest and the intention of honouring it. The original easement survived the transfer in 1999, and the defendants were bound by it.

#### **A trust**

The second traditional category where an in personam claim may exist against the registered proprietor comprises the trustee type of case where there must

either be an express trust or an agreement between the parties on which a constructive trust can be based or

from which a fiduciary relationship can be inferred.<sup>49</sup>

The setting up of the fiction of a trust or the application of principles of equitable or constructive notice is unacceptable as either of these actions would undermine the principle of indefeasibility.<sup>50</sup>

The blurred boundary between an actual and a constructive trust is well illustrated in *Bahr v Nicolay (No 2)*.<sup>51</sup> In this decision, the High Court of Australia held that a purchaser who had undertaken to hold the title subject to a third party's right to repurchase remained bound by the undertaking after the registration of the transfer. In the absence of any contractual relationship, the Court turned to the notion of a trust and confirmed an in personam obligation. In the first of the three judgments delivered, Mason CJ and Dawson J held that this trust was express,<sup>52</sup> not constructive. The other three Justices, in two judgments, found that it was a constructive trust.

A constructive trust should not be imposed 'on the basis of some vague idea of what might seem fair'.<sup>53</sup> In *Disher v Farnworth*<sup>54</sup> the proximity of the parties as beneficiaries under the same will, and the appellant's awareness of differences in the will and unit plan as being to her advantage and the respondent's disadvantage, were not enough to create a fiduciary duty in the absence of legal or equitable obligations. However, in *Bevin v Smith*,<sup>55</sup> the Court of Appeal held that, pursuant to a particular conditional contract, a vendor held land as a constructive trustee for an incoming purchaser. Similarly, in *Smith v The Hugh Watt Society*<sup>56</sup> the knowledge and acts of the defendant as registered proprietor gave rise to an in personam claim against it by virtue of a constructive trust or by a breach of fiduciary duty, or by a combination of both.

In *Logue v Shoalhaven Shire Council*,<sup>57</sup> the local council decided to sell a number of lots for overdue rates. Its notices of sale were defective. Despite this, it purchased the land at the subsequent sale. The executor of an original proprietor commenced proceedings for a declaration of an invalid sale and for an order for the retransfer of the land to him. The Court held that no personal equity had arisen.

Equally unsuccessful were the defendants in *Son v Ko*.<sup>58</sup> A motel complex was purchased at a mortgagee sale, and the sale agreement contained a clause stating that the property was sold subject to existing tenancies or occupancies. The defendants claimed that they were entitled to retain possession under an unregistered 19 and a half year lease originally granted to the first and second defendants 'on behalf of a company to be formed' by their predecessors in title.<sup>59</sup> They argued that a constructive trust had arisen as the purchaser, Mr Son, had acquired knowledge of the property from the defendants, knew it was occupied and sold subject to tenancy rights, knew the defendants' position and knew the property was to be sold at an undervalue. The Court found no basis for such an imposition. The only connection between the parties was the fact that Mr Son had previously assisted the Kos with finding an appropriate site for their intended business. His position was effectively no different from any other member of the public, and members of the public were of course entitled to purchase at a mortgagee sale on whatever terms they could achieve.

### **Unconscionability and the Necessary Causes of Action**

Mere unconscionable conduct on the part of the new registered proprietor is not enough to establish a claim in personam.<sup>60</sup> There must be a recognised legal or equitable cause of action,<sup>61</sup> but the relief is equitable.<sup>62</sup>



### ***Promises or the 'spirit of neighbourliness' not enough***

Mere neighbourly actions are not enough. Tobias JA in *McGrath v Campbell* made it clear that the McGraths' actions did not give rise to an in personam claim. They had acquiesced in the use of the right of way 'only in the spirit of neighbourliness'<sup>63</sup> and had not agreed or represented in anyway that the Campbells had any legal rights with respect to its use.

### ***Estoppel***

Much has been written on the principles of estoppel. Tipping J discussed the development of the doctrine in *Westland Savings Bank v Hancock*<sup>64</sup> and, after a careful examination of the relevant authorities,<sup>65</sup> concluded:

I consider the question comes down to whether in the particular circumstances it would be inequitable for a party to be allowed to deny what he knowingly or unknowingly had allowed or encouraged the other party to assume to his detriment.<sup>66</sup>

This paper adopts that approach.

If Mr Potts in *Potts v Anderson* had been forced to rely on an estoppel argument<sup>67</sup> he would have failed. His counsel argued that the necessary representation arose from the original agreement for sale and purchase and a solicitor's memorandum in which it was suggested that Mr Potts did not need to register the easement and the Andersons did not need to join the water scheme. Miller J observed that the agreement did not represent that the Andersons would give Mr Potts notice before doing anything that might affect the equitable easement. It was simply an agreement to grant a legal easement if called upon. Significantly, it contained no provision requiring notice in the event that the Andersons proposed to transfer the property to a new registered proprietor.

However, had it been necessary, Chisholm J in *Tuscany v Gill* would have applied the principle. The assurance by the purchaser's director (in both words and actions) that the purchaser would not invoke the demolition clause within the six-year period was relied on by the first defendant. This meant that the defendant acted to his detriment by taking no further steps to protect his situation before the purchaser was registered on the title.

An in personam claim based on estoppel was the crux of the decision in *Smith v Corlett*.<sup>68</sup> The defendant purchased one of two flats in a cross-lease development. Both garages were included in the lease of the other flat. The original owner of the other flat (the builder) entered into a lease with the defendant of one of the garages (intended for the use of the owner of the defendant's flat) for a term of 999 years at a nominal rent. That lease was never registered. The builder later sold to the plaintiff. The plaintiff was estopped from denying the defendant's claim. According to Jeffries J, the plaintiff's conduct had all the necessary attributes to raise an equity bringing about an estoppel by acquiescence.

His Honour cited with approval the conclusion in *Re Basham (Dec'd)*<sup>69</sup> that 'proprietary estoppel really gives rise to a species of constructive trust ..'

### ***Mistake, rectification and restitution***

In *McGrath v Campbell* Tobias J noted that the equitable basis of the remedy of rectification of a contract is that in its executed form the contract does not represent or embody the actual intention

of the parties.<sup>70</sup> In this case there was no actual common intention of all three parties that Lot 6 should have the benefit, and that Lot 12 should be subject to the burden, of a right of way over the driveway.

If, by chance, the easement had been registered pursuant to the primary judge's court order and prior to the appeal, the Campbells would not have been able to rely on their new indefeasible right. This was made clear by the majority of the Queensland Court of Appeal in *White v Tomasel*.<sup>71</sup> The appellant was the registered proprietor of land sold at auction to the respondents. Before that occurred, he had left the auction premises, believing that the bidding had not reached the reserve price and the land had not been sold. However, the auctioneer executed the sale on his behalf. When called upon to complete the transaction, he refused to do so. The respondents sued him and the lower court ordered him to proceed to settlement and execute a transfer, alternatively granting the Registrar of the Court power to execute the necessary documents. On appeal, it was held that those orders should be set aside, depriving the respondents of their status as registered proprietors and restoring the appellant to that position. The restitutionary obligation on the respondents did not derive from any knowledge or notice of another person's unregistered interest in the land. Rather, it derived from the respondents' actions in acquiring their title by orders of a court that should not have been made. Their refusal to comply with that obligation provided an element of unconscionability.<sup>72</sup> The question of whether unjust enrichment claims should form part of the in personam exception remains controversial.<sup>73</sup>

Nor could the second defendants in *Doubtless Bay Water Supply Co Ltd v Robinson*<sup>74</sup> rely on their court-ordered registration. They claimed, inter alia, indefeasibility of title to override the plaintiff's right to rectification of a water supply easement. Citing with approval Barker J's observations in *Child v Dynes*<sup>75</sup> Salmon J confirmed that, at least in the context of land transfer, a right to rectification was closer to an equitable interest than a mere equity. The plaintiff's right was both a caveatable interest and an equitable interest to which the presumption of priorities applied. The second defendants could not rely on their indefeasible title to override these competing equities. The registration order had been made with this qualification.<sup>76</sup>

Right in personam is a personal right against the registered proprietor,<sup>77</sup> and any right to rectification involves the original parties. In *Tanzone Pty Ltd v Westpac Banking Corp*<sup>78</sup> a bank, as lessee, signed a lease containing a rent review clause which neither the bank nor the lessor owner appreciated would result in the amount of the rent escalating greatly over the term of the lease. As the agreement did not reflect the true intent of the parties, a right to rectification would normally have been available. However the lessor sold and transferred the reversion to a purchaser who had notice of the mistake. The purchaser relied on his indefeasible title and the equity of rectification was extinguished. As the purchaser had not agreed to recognise or honour the bank's right to rectification, no personal equity could be imposed.<sup>79</sup>

### ***What about knowing receipt of trust property?***

The two principles derived from Lord Selbourne's judgment in *Barnes v Addy*<sup>80</sup> are well-known.

Under the first limb, a person who receives a transfer of trust property knowing that the transfer is in breach of trust, holds the property subject to the trust. Under the second limb, the 'accessory limb', a transfer in breach of trust can be set aside where the transferee participates in, or is treated as participating in, the breach of trust.

Can 'knowing receipt' of trust property give rise to an in personam claim? Two cases involving a registered owner illustrate contrasting views.<sup>81</sup>

The scenario in the interlocutory proceedings in *Tara Shire Council v Garner*<sup>82</sup> has been explained aptly.<sup>83</sup> A registered proprietor (A) sells his land to B. B pays the full purchase price and receives a transfer from A. Before B is registered on the title, A sells the same land to C. Before C purchased from A, A told C that the land had already been sold to B and that the land belonged to B, not A.

The majority of the Queensland Court of Appeal held that there was an arguable case that C's receipt of the trust property in these circumstances gave rise to a personal equity. In the view of the majority, the case fell within the first limb of *Barnes v Addy*. In his dissenting judgment, Davies JA considered that, without the presence of fraud, in these circumstances C should not be so targeted.

This latter view was adopted by the Western Australia Full Court in *LHK Nominees Pty Ltd v Kenworthy*.<sup>84</sup> The registered proprietor of a piece of land was a family company in a trustee capacity. The company transferred the property to a purchaser at about half the market value. The purchaser was registered. The majority of the Court held that the purchaser could take the property free of any claim by the trustee company or by the beneficiaries. In short, indefeasibility of title trumped the 'knowing receipt' principle. Subsequent academic comment heralds this as the better view:

... [It] hopefully puts to rest once and for all the argument that 'knowing receipt' of trust property is an in personam exception to indefeasibility.<sup>85</sup>

To suggest otherwise upsets the fundamental Torrens principle that registration confers an indefeasible title even where the transferee takes with notice of an unregistered interest. It is untenable to create a distinction between the unregistered interests of trust beneficiaries and those of any other unregistered interests.<sup>86</sup> With respect to the 'accessory limb', a finding of dishonesty is required<sup>87</sup> and three members of the Court in *LHK Nominees Pty Ltd v Kenworthy* considered that dishonesty<sup>88</sup> would be fraud for the purposes of the Torrens statutes.

### ***The Suttons in 2008 — An In Personam Obligation?***

Given the above developments of the in personam claim, would the Suttons' actions give rise to an in personam claim?

#### **A contract**

The Suttons did not enter into a contract with Mr O'Kane about his use of the right of way. Had they agreed to formalise the easement if called upon, this might have formed the necessary contractual commitment (*Potts v Anderson*). However, as both parties believed that this had already happened, there was no reason to make any such agreement even if the Suttons had been so inclined.

#### **A trust**

If the Suttons had knowingly and intentionally agreed to purchase their land subject to Mr O'Kane's interest, counsel may have argued that this was sufficient to give rise to either an express or (more probably) a constructive trust (*Bahr v Nicolay (No 2)*). Cases are always distinguishable on their facts but, as noted by Rt Hon Justice P Blanchard, the factual finding in both *Merrie v McKay* and *Webb v Hooper* was that there was an intention to take the land subject to the unregistered interest which,

certainly in the former case and arguably in the latter, may have been sufficient to give rise to a trust (express or constructive).<sup>89</sup>

In their judgments, both Wild CJ<sup>90</sup> and Richmond J<sup>91</sup> observed that there was nothing to suggest that the Suttons were ever asked for or gave any undertaking as to the easement's use being assured to Mr O'Kane. Turner P was less sympathetic and, embracing the knowledge, notice and fraud debate, held that the Suttons had more than mere knowledge of the existence of an unregistered easement. They knew

[n]ot only of its existence but its nature and extent, and the fact that it was actually being actively enjoyed by the grantee, with the full recognition of the vendors of the property of his right to use it, and the fact that in reliance of the continuance of such enjoyment the grantee had expended very substantial sums of money erecting a garage accessible only from the way, which must be completely wasted should that way not continue to receive recognition.<sup>92</sup>

This, of course, was fraud but, in the alternative, Turner P would undoubtedly have imposed an in personam obligation on the Suttons.

## **Unconscionability and the necessary causes of action**

### **Promises or the 'spirit of neighbourliness'**

The McGraths in *McGrath v Campbell*, unlike the Campbells, did not believe that the right of way over Lot 12 was legal. They acquiesced in its use as a friendly neighbour. The Suttons, like Mr O'Kane, assumed that their easement was registered. The Suttons agreed to the use of the easement under a mistaken belief rather than in the 'spirit of neighbourliness' but, once again, at least according to the majority of the Court of Appeal, they made no promises to Mr O'Kane.

The McGraths' and the Suttons' general awareness that a right of way had been used in the past was not sufficient conduct to which any personal equity could attach.

### **Estoppel**

To meet the test of estoppel, the Suttons must have knowingly or unknowingly allowed or encouraged Mr O'Kane to use the right of way to his detriment.

At least in the traditional sense, there is no suggestion they did that. The expensive garage on Lot 1, the only access to which was over the right of way, had been built by their predecessors in title, for whom such a claim would have been relevant.

However, Jeffries J in *Smith v Corlett*, addressing the detriment element of the five traditional probanda for estoppel, stated:

Secondly, the defendant must have expended money or done some act on the faith of the mistaken belief. From the first encounter on defendant's evidence he was led to believe his position was secure and the garage lease unchallenged. He remained in possession of the garage as the owner conducting himself as an owner would normally do with his property. That would usually involve expenditure of some money and commission of acts which usually accompany a belief in ownership.<sup>93</sup>

This test for detriment is very wide.<sup>94</sup> If applied to Mr O'Kane, any money he spent on his access-dependent property (not just his garage) or any other actions undertaken in his 'normal' course of ownership might meet the test.

A similarly expansive view of the detriment element is found in *Tuscany v Gill*. The relevant detrimental actions of the defendant were not the expensive restaurant alterations. These had been

completed before the purchaser's director orally assured the defendant that he would not action the demolition clause within the six year period because he was a friend. According to Chisholm J, the detriment was the defendant's reliance on the assurance and the subsequent lack of action to protect his situation before the purchaser was registered on the title (for example the lodging of a caveat).

If a difference needs to be found between the 'words and conduct' of the purchaser in *Tuscany v Gill* upon which the defendant acted to his detriment and the conduct of the Suttons, it has already been established that the latter gave Mr O'Kane no overt undertaking or assurance as to the use of the right of way.

### **Mistake, rectification and restitution**

The equitable basis of a remedy of rectification of a contract is that the executed contract does not represent the common intention of the parties. In *McGrath v Campbell* none of the parties had any common intention that Lot 12 be a servient tenement or Lot 6 a dominant one. In *Sutton v O'Kane* all parties — the Daltons, the Suttons and Mr O'Kane -assumed that the right of way was legal and its registration would have represented this belief. However, a mistake and the right to rectify do not survive beyond the original parties (*Tanzone Pty Ltd v Westpac Banking Corp*). A right in personam is a personal right against the registered proprietor and the Suttons, like the McGraths, did not create the easement and did not make the mistake of failing to register it. Nor did the Suttons have any control over the sale between the Daltons and the O'Kanes. Mr O'Kane could have claimed a right of rectification against the Daltons, but not against the Suttons.

In *O'Kane v Sutton*<sup>95</sup> White J ordered that the right of way in favour of Lot 1 be registered, and granted an injunction restraining the Suttons from interfering or obstructing Mr O'Kane's proper use and enjoyment of it.<sup>96</sup> If Mr O'Kane had acted on this order before the appeal, he could not have then relied on the indefeasibility of his newly registered easement. (*White v Tomasel*, and slightly more obliquely, *Doubtless Bay Water Supply Co Ltd v Robinson*.) Mr O'Kane, (as with the Campbells) would have gained his legal right by a court order that should not have been made. His refusal to comply with a restitutionary obligation to correct the position would have been unconscionable.

### **The Suttons — safe again!**

Had the Suttons been subjected to these 'in personam tests' (for want of a better phrase), it is likely that the courts would not have found anything in their conduct to which an equity could bind them personally. The 'knowing receipt of trust property' action was not applicable. Their access-blocking action was undoubtedly 'inconsiderate to an extreme degree and highly unreasonable and selfish'<sup>97</sup> but a registered owner's reliance on strict legal rights is neither fraudulent<sup>98</sup> nor unconscionable.<sup>99</sup>

### **The McGraths - Supervening Fraud**

A claim of fraud against the McGraths would be unlikely to succeed. The McGraths acted solely in the 'spirit of neighbourliness' and did not agree or represent in any way that the Campbells had any legal rights with respect to the use of the right of way.

Had the parties resided in New Zealand, it is very unlikely that the Campbells would have succeeded under our landlocked land legislation.<sup>100</sup>

## IV. LANDLOCKED LAND

Sections 326-331 of the *Property Law Act 2007* enable the owner or occupier of any piece of landlocked land to apply to the High Court for an order granting reasonable access to that land.

These statutory provisions override a registered owner's indefeasible title. In a stinging criticism of the decision of the New South Wales Court of Appeal in *Hillpalm Pty Ltd v Heaven's Door Pty Ltd*<sup>101</sup> prior to its further appeal,<sup>102</sup> Butt and Friedman warned that any infringement on indefeasibility of title by an overriding statute must not be 'inimical to the philosophy behind the Torrens system'.<sup>103</sup> It is beyond the scope of this paper to explore whether our landlocked land provisions are assuming an overarching role but a number of decisions demonstrate the courts' insistence on their very broad remedial purpose.<sup>104</sup>

The statutory provisions relevant to this discussion are attached as an appendix. Generally, they reflect the repealed s 129B of the *Property Law Act 1952*. There are, however, two notable changes: the definition of an 'owner' or 'occupier';<sup>105</sup> and a discretionary power of the court to waive the requirement that every owner of land adjoining the landlocked land be joined as a party.<sup>106</sup>

### ***Mr O'Kane in 2008 - Relief Under Landlocked Land?***

In order to persuade the court that he is worthy of access relief at the expense of his defendant neighbours, Mr O'Kane must meet three criteria.

#### **The land must be landlocked — s 326**

A piece of land is landlocked if there is no reasonable access to it. This is a subjective matter to be decided on the facts of the particular case<sup>107</sup> and, in 2008, would almost invariably mean vehicular access. The only convenient access to Mr O'Kane's Lot 1 was via the equitable right of way over the Suttons' land. In view of the authorities on this criteria,<sup>108</sup> Mr O'Kane's property would have no reasonable access if relief were denied.

#### **Discretionary Power of Court to Grant Relief -s 329**

Once the court has found that a piece of land is landlocked, it must then decide whether access should be granted. Section 329 of the 2007 Act provides a series of guidelines for this discretionary exercise.

#### ***Nature and quality of the access when purchased: s 329(a)***

The O'Kanes did not 'carelessly [purchase] a piece of land without having due regard to the question of access'.<sup>109</sup> They assumed that their appurtenant right would be registered. If this attitude was considered a risk, the court would consider it was a reasonable one to take.<sup>110</sup>

#### ***Circumstances of the landlocking: s 329(b)***

Once the Suttons ascertained that no legal right of way existed over their land, they proceeded to block the access. An act of sudden deliberate landlocking by way of a permanent barrier across an already used equitable easement generally gains a court's sympathy.<sup>111</sup> The Suttons gave the O'Kanes one week's notice to enable them to remove their vehicles and then they erected a fence. Given the time frame, it seems probable that such action would be considered sudden and deliberate.

### ***Conduct of the applicant and other parties: s 329(c)***

The courts will look at the conduct of all the parties involved in relation to the particular circumstances of the case and will assess whether avenues of negotiation have been exhausted. In the light of recent decisions on this point, the Suttons' behaviour would be poorly regarded.<sup>112</sup>

### ***Hardship to the parties: s 329(d)***

In Mr O'Kane's situation, where the applicant is seeking a reinstatement of an equitable easement, the courts are likely to favour the applicant's hardship.<sup>113</sup>

### ***Such other matters as the court considers relevant: s 329 (e)***

The above criteria 'are not exhaustive and a court may step outside them to what it might think relevant'.<sup>114</sup> However, by this stage, it could be quite safely assumed that the court would exercise its discretion and grant relief to Mr O'Kane.

### **Compensation — s 330**

Section 330 makes provision for compensation should the land be considered landlocked and relief deemed appropriate. It is well established that the threshold test is that of the 'willing seller, willing buyer' (*Jacobsen Holdings Ltd v Drexel*).<sup>115</sup> However, the courts may consider that neither party suffers any detriment or benefit as an order reinstating the easement would return the parties to their original positions.<sup>116</sup>

Mr O'Kane would succeed under the landlocked land provisions and the court would order an reinstatement of the equitable right of way.

### **New Zealand-based Campbells in 2008 — Relief Under Landlocked Land?**

If the Campbells and the McGraths owned their neighbouring plots of land in some urban area in New Zealand, it is highly unlikely that the Campbells would succeed under our landlocked land legislation. The Campbells' Lot 6 faces a main road. Simply, the lot is not landlocked, as reasonable access exists. The commercial building comprised two storeys at the front and one storey at the rear. It abutted the eastern boundary of Lot 6 but stood 1.15 metres clear of its western boundary. Any submission from the Campbells that the building blocks the street access would fall on deaf ears. Any obstruction of road access by artificial means — for example a building — does not fit the criterion of 'no reasonable access': *Mowat v Federated Farmers of NZ (Waikato Provincial District) Inc.*<sup>11</sup>

## **V. CONCLUSION**

The focus of this paper is on the maturing of the in personam claim, and its relationship with the concepts of supervening fraud and landlocked land. The paper concentrates solely on the enforcement of the claim against the class of registered owners and uses two decisions concerning a sub-set of that class — the access-blocking owner — to tease out the principles. The claim will supersede supervening fraud, a principle that may be neither 'necessary [nor] consistent with the statute'.<sup>118</sup> The circumstances in which claims in personam are, and will be, recognised are wide. This paper highlights well-established known legal or equitable causes of action to which the

unconscionability of a registered owner may attach. The claim's relationship with ss 326-331 of the *Property Law Act 2007* adds a further dimension to the debate.

So how do the parties fare under the three concepts?

Both the Suttons and the McGraths clear the hurdles of supervening fraud and the in personam claim. Had they resided in New Zealand, the McGraths would probably have successfully defended a landlocked land application from the Campbells. However, Mr O'Kane would have dealt his winning card and, pursuant to ss 326-330 of the *Property Law Act 2007*, his access would have been reinstated.

A tricky trio indeed!



- 1 F M Brookfield, 'The Land Transfer System: Problems and Developments Since *Frazer v Walker*' [1975] New Zealand Law Journal 473, 480-484.  
2 [1973] 2 NZLR 304.
- 3 This Act comes into force on 1 January 2008.
- 4 Parliamentary debate on the passage of the 1974 Bill concentrated on landlord and tenant provisions and, to a lesser extent, provisions relating to trees and structures (the latter now ss 332 -337 of the Property Law Act 2007). See 393 NZPD 3768 et seq (16 August 1974, First Reading); 399 NZPD 3189 ( 22 July 1975, Second Reading ).
- 5 In one of the earliest decisions under s 129B (a classic access-blocking action) the court considered compensation inappropriate: *Wilson v Rush* [1980] 2 NZLR 57.
- 6 Brookfield, above n 1, 482 -483.
- 7 [2006] NSWCA 180.
- 8 These papers have been published in D Grinlinton (ed), *Torrens in the Twenty-first Century* (2003).
- 9 See *Sutton v O'Kane* [1973] 2 NZLR 304, 336-351, for discussion.
- 10 (1897) 16 NZLR 124.
- 11 [1953] NZLR 111.
- 12 [1973] 2 NZLR 304, 314.
- 13 His Honour also relied on the judgment of Salmond J in *Wellington City Corporation v Public Trustee* [1921] NZLR 423, 433, in which *Merrie v McKay* [1897] 16 NZLR 124 was cited with approval.
- 14 See, for example, Brookfield, above n 1; Rt Hon Justice P Blanchard 'Indefeasibility under the Torrens System in New Zealand' in D Grinlinton (ed) *Torrens in the Twenty-first Century* (2003) 29, 46-47; D McMorland, 'Notice, Knowledge and Fraud' in D Grinlinton (ed) *Torrens in the Twenty-first Century* (2003) 67, 95-96.
- 15 Rt Hon Justice P Blanchard, 'Indefeasibility under the Torrens System in New Zealand', in D Grinlinton (ed) *Torrens in the Twenty-first Century* (2003), 47. His Honour notes that *Merrie v McKay* (1897) 16NZLR 124(SC) and *Webb v Hooper* [1953]NZLR 111(SC) could each have been determined on the basis of an in personam claim.
- 16 (1988) 164 CLR 604.
- 17 *Ibid* 655. See discussion under Part III below.
- 18 (1997) 3NZConvC 192,598 (digest); HCAucklandCP1355/83, 19 August 1997, Anderson J. This case proceeded to the higher courts on the substantial issue of implied dedication: see *Man O'War Station Ltd v Auckland City Council* [2000] 1 NZLR 267 (CA) and *Man O'War Station Ltd v Auckland City Council (No 2)* [2002] 3 NZLR 577 (PC). Neither Court attempted a further definition of fraud.
- 19 (unreported, HC Auckland, CP1355/83, 19 August 1997, Anderson J), 41.
- 20 (2001) 4 NZ ConvC 193,446 (extracts from judgment).
- 21 (unreported, HC Auckland, CIV 2006-404-006965, 6 December 2006, Christianson AJ).
- 22 (unreported, HC Wanganui, CIV 2003-483-304, 5 April 2005, Miller J).
- 23 See Part III below.
- 24 [1985] 1 NZLR 450 (Richardson and McMullin JJ; Eichelbaum J dissenting).
- 25 (unreported, HC Wanganui, CIV 2003-483-304, 5 April 2005, Miller J), [77].
- 26 Blanchard, above n 15, 45. In this case, the saving feature was Mr Gill's reliance on the representation. See discussion on estoppel below.

- 27 [1980] 2 BPR 9451.
- 28 Ibid 9453.
- 29 RtHonJusticeTipping, 'Commentary on Sir Anthony Mason's Address' in D Grinlinton (ed) *Torrens in the Twenty-first Century* (2003) 21, 23. See also comments of R Chalmers, *Introduction to Property Law in Australia* (2001), 475-476; A J Bradbrook, S V McCallum and A P Moore, *Australian Real Property Law* (3rd ed, 2002) [4.20-4.32],
- 30 [2006] NSWCA 180.
- 31 Ibid[32].
- 32 [1879]12ChD31.
- 33 [1929] 2 KB 117. Much of the decision discusses and confirms the existence of a *Wheeldon v Burrows* easement. This analysis, cited with approval in *Howlin v Brinckman* [2007] TASSC 59, is beyond the parameters of this paper.
- 34 *Mercantile Mutual Life Insurance Co Ltd v Gosper* (1991) 25 NSWLR 32 (but see comment at n 42 below); *Story v Advance Bank of Australia* (1993) 31 NSWLR 722; *Grigg v Australian & New Zealand Banking Group Ltd* (1994) 33 NSWLR 202.
- 35 [2006] NSWCA 180, [108].
- 36 Special leave to appeal was sought from the High Court but was refused: *Campbell v McGrath* [2007] HCA Trans 67 (9 February 2007).
- 37 See, for example, the following articles in D Grinlinton (ed) *Torrens in the Twenty-first Century* (2003): Sir Anthony Mason, 'Indefeasibility — Logic or Legend', 3, 23-24; Rt Hon Justice P Blanchard, 'Indefeasibility under the Torrens System in New Zealand', 29, 41, 46-7; D W McMorland, 'Notice, Knowledge and Fraud' 67, 91; L Stevens and K O'Donnell, 'Indefeasibility in decline: The in personam remedies' 141, 141-156. See also articles such as S Robinson, 'Claims In Personam in the Torrens System: Some General Principles' (1993) 67 *Australian Law Journal* 355; J G Tooher 'Muddying the Torrens Waters with the Chancellor's Foot?'; *Bahr v Nicolay* (1993) *Australian Property Law Journal* 1; M Hughson, M Neave, P O'Connor, 'Reflections on the Mirror of Title: Resolving the Conflict Between Purchasers and Prior Interest Holders' (1997) 21 *Melbourne University Law Review* 460, 491-2; R Chambers, 'Indefeasible Title as a Bar to a Claim for Restitution' [1998] *Restitution Law Review* 126,130; E Toomey, 'Certainty of Title in the Torrens System: Shifting Sands' (2000) 4 *Flinders Journal of Law Reform* 235-249; L Griggs 'In personam, *Garcia v NAB and the Torrens System - Are They Reconcilable?*' (2001) 1(1) *QUT Law and Justice Journal* 76, 87; L Griggs, 'The Tectonic Plate of Equity — Establishing a Fault Line in our Torrens Landscape' (2003) 10 *Australian Property Law Journal* 78; E Cooke and P O'Connor, 'Purchaser Liability to Third Parties in the English Land Registration System: A Comparative Perspective' (2004) 120 *Law Quarterly Review* 640, 645-650. See also R Chambers, *An Introduction to Property Law in Australia* (2001), Pt IV.
- 38 Stevens and O'Donnell, 'Indefeasibility in decline: The in personam remedies' in D Grinlinton (ed) *Torrens in the Twenty-first Century* (2003) 141, 155.
- 39 [1967] NZLR 1069.
- 40 [1997] 3 NZLR 705, 712.
- 41 For a useful discussion, see L Griggs, 'Indefeasibility and mistake: The utilitarianism of Torrens' (2003) 10 *Australian Property Law Journal* 108, 110-111. See also an expansion of this discussion in Brookers *New Zealand Land Law* (2005), [2.6.03], and Hinde, McMorland & Sim *Land Law in New Zealand* (2004), [9.040-9.056].
- 42 *Garafano v Reliance Finance Corp Pty Ltd* (1992) NSW ConvR 59,659, 59,662-59,663; *Grgic v ANZ Banking Group Ltd* (1994) 33 NSWLR 202, 222-223; *Duncan v McDonald* [1997] 3 NZLR 669, 683; *CN & CA Davies Ltd v Laughton* [1997] 3 NZLR 705,712; *Macquarie Bank Ltd v Sixty-Fourth Throne Pty Ltd* [1998] 3 VR 133,162; *Pyramid Building Soc ( in liq) v Scorpion Hotels Pty Ltd* [1998] 1 VR 188, 195-196; *Tanzone v Westpac* [1999] NSWSC 478, 489; *Conlan v Registrar of Titles* [2001] WASC 201,[172]; *White v Tomasel* [2004] QCA 89, [72]. The decision in *Mercantile Mutual Life Insurance Co Ltd v Gosper* (1991) 25 NSWLR 32 stands outside this criteria but has been described as 'somewhat extreme' (*Tanzone v Westpac* [1999] NSWSC 478,488, (Windeyer J)).
- 43 *Frazer v Walker* [1967] NZLR 1069, 1078-1079. Numerous decisions apply this criteria: see, for example, *Congregational Christian Church of Samoa Henderson Trust Board v Broadlands Finance Ltd* [1984] 2 NZLR 704,717;

- Bahr v Nicolay (No 2)* (1988) 164 CLR 604, 613, 637-638, 652-653; *Housing Corp of NZ v Maori Trustee* [1988] 2 NZLR 662; *Bank of South Australia Ltd v Ferguson* (1998) 192 CLR 248, [9]; *Mercantile Mutual Life Insurance Co Ltd v Gosper* (1991) 25 NSWLR 32,45; *CN&CA Davies Ltd v Laughton* [1997] 3 NZLR 705,711; *Duncan v McDonald* [1997] 3 NZLR 669, 683; *Smith v The Hugh Watt Soc Inc* [2004] 1 NZLR 537.
- 44 *Bahr v Nicolay (No 2)* (1988) 164 CLR 604; *Bank of South Australia Ltd v Ferguson* (1998) 192 CLR 248; *Logue v Shoalhaven Shire Council* [1979] 1 NSWLR 537, 563.
- 45 *CN and NA Davies Ltd v Laughton* [1997] 3 NZLR 705,712; *Smith v The Hugh Watt Society Inc* [2004] 1 NZLR 537, [85]; *Unwin v Kennard* (unreported, HC, Christchurch, CIV 2004-409-1097, 17 June 2005, Chisholm J), [103]-[105]; *White v Tomasel* [2004] QCA 89, [30]
- 46 J P Moore 'Equity, Restitution and in personam claims under the Torrens system' (1998) 72 *Australian Law Journal* 258, 260, as cited by Griggs 'Indefeasibility and mistake: The utilitarianism of Torrens' above n 41, 110-111.
- 47 *LHK Nominees Pty Ltd v Kenworthy (as administrator of the Estate of Lionel Kenworthy)* [2002] WASCA291, [216] (Anderson and Stetytler JJ).
- 48 Decisions upholding this principle include *Tataurangi Tairuakena v Mua Carr* [1927] NZLR 688, 702; *Frazer v Walker* [1967] NZLR 1069, 1078-1079; *Oh Hiam v Tham Kong* (1980) 2 BPR 9451 (PC); *Congregational Christian Church of Samoa Henderson Trust Board v Broadlands Finance Ltd* [1984] 2 NZLR 704; *Secureland Mortgage Investment Nominees Ltd v Harman & Co Solicitor Nominee Co Ltd* [1991] 2 NZLR 399; *Bevin v Smith* [1994] 3 NZLR 648,649; *Doubtless Bay Water Supply Co Ltd v Robinson* (1997) 3 NZConvC 192,579, 192,585-192,586; *Tuscany v Gill* (2001) 4 NZ ConvC 193,446, [71].
- 49 *Congregational Christian Church of Samoa Henderson Trust Board v Broadlands Finance Ltd* [1984] 2 NZLR 704,717.
- 50 Ibid. See also n 43 above.
- 51 (1988) 164 CLR 604.
- 52 D McMorland, in (1989) 5 *Butterworths Conveyancing Bulletin* 105, 106, favoured the concept of an express trust as the purchasers had knowingly and intentionally agreed to purchase the land subject to the third party's interest. He noted that 'there would be no need for equity to impose a trust on a party who had not known or intended to undertake the obligation and in order to right a wrong'.
- 53 *Disher v Farnworth* [1993] 3 NZLR 390, 399, (McKay J, delivering the judgment).
- 54 Ibid.
- 55 [1994] 3 NZLR 648.
- 56 [2004] 1 NZLR 537.
- 57 [1979] 1 NSWLR 537 (Mahoney J dissenting).
- 58 (2007) 7 NZCPR 649. See T Gibbons (2007) 12 *Butterworths Conveyancing Bulletin* 144.
- 59 Baragwanath J held that, pursuant to s 105 of the *Land Transfer Act 1952*, the mortgagee sale extinguished any business that could only be operated on the premises that were the subject of the sale. No fraud on the part of the purchaser or mortgagee was established.
- 60 See n 46 above.
- 61 See n 42 above.
- 62 *Duncan v McDonald* [1997] 3 NZLR 669, 683.

- 63 [2006] NSWCA 180, [32].
- 64 [1987]2NZLR21.
- 65 See, for example, the traditional five probanda test in *Wilmott v Barber* (1880) 15 ChD 96; and the more modern approach in *Shaw v Applegate* [1978] 1 All ER 123; *Amalgamated Investment & Property Co Ltd v Texas Commercial International Bank Ltd* [1981] 3 All ER 577; *Taylor Fashions Ltd v Liverpool Victoria Trustees Co Ltd* [1981] 1 All ER 897; *Andrews v Colonial Mutual Life Assurance Society Ltd* [1982] 2 NZLR 556; *Wham-O MFG Co v Lincoln Industries Ltd* [1984] 1 NZLR 641; *Attorney-General of Hong Kong v Humphreys Estate (Queens Gardens) Ltd* [1987] 2 WLR 343. Subsequent decisions that discuss the doctrine include *Burberry Mortgage Finance & Savings Ltd v Hindsbank Holdings Ltd* [1989] 1 NZLR 356; *National Westminster v National Bank* [1996] 1 NZLR 548 (CA); *Gold Star Insurance v Gaunt* [1998] 3 NZLR 80 (CA); *Tram Lease v Croad* [2003] 1 NZLR 73.
- 66 [1987] 2 NZLR 21, 32-37.
- 67 As discussed above, Miller J found that the original easement survived the transfer in 1999. The allegation that a fresh easement arose following registration, when the defendants continued to allow Mr Potts to take water, assumed that the first easement had been defeated by registration. So did the alternative allegation of estoppel.
- 68 (unreported, HC, Wellington, CP 372/86, 9 October 1987, Jeffries J); (1988) ANZ ConvR 167 (extracts).
- 69 (1987) 1 All ER405, 410b.
- 70 *Maralinga Pty Ltd v Major Enterprises Pty Ltd* (1973) 128 CLR 336, 350; *Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337, 346.
- 71 [2004]QCA 89.
- 72 This majority decision was cited with approval in *Ardrey v Bartlett* [2004] WASCA 256.
- 73 For discussion, see J Moore, 'Equity, Restitution and In Personam Claims under the Torrens System: Part Two' (1999) 73 *Australian Law Journal* 712, 713; RS Chambers, 'Indefeasible Title as a Bar to a Claim for Restitution' [1998] 6 *Restitution Law Review* 126, 130; Stevens and O'Donnell, 'Indefeasibility in Decline: the In Personam Remedies' above n 38, 152-155.
- 74 The New Zealand Court of Appeal in *Dollars & Sense Finance Limited v Nathan* [2007] 2 NZLR 747, at least in the circumstances of that case, considered that it was compatible. See also discussion in *Smith v The Hugh Watt Society* [2004] 1 NZLR 537, [66]-[88]. 74 (1997) 3 NZ ConvC 192,579.
- 75 [1985] 2 NZLR 554.
- 76 The case proceeded on the issue of two competing equities, and the plaintiffs right had priority.
- 77 *Macquarie Bank Ltd v Sixty-Fourth Throne Pty Ltd* [1998] VR 133, 162.
- 78 (1999) NSW ConvR 55-908 (Windeyer J). See discussion in Griggs, 'Indefeasibility and mistake — the utilitarianism of Torrens', above n 41.
- 79 On appeal (*Westpac Banking Corp v Tanzone Pty Ltd* [2000] NSWCA 25) the Court bypassed the need for rectification by holding that the rent review provision produced an 'absurd' result, thus enabling the court to avoid that absurdity by inserting words into the provision to correct the mistake.
- 80 (1874) LR 9 CH App 244.
- 81 Seealsodiscussionin*SmithvTheHughWattSociety*[2004]1NZLR537,[66]-[88].
- 82 [2003] IQdR556.
- 83 SeePButt,'Indefeasibilityandknowingreceiptoftrustproperty'"(2002)76*AustralianLaw Journal* 606.
- 84 (2 002) 26 WAR 517. This latter approach had also been taken by the majority of the Victorian Court of Appeal in *Macquarie Bank Ltd v Sixty-Fourth Throne Pty Ltd* [1998] 3 VR 133.

- 85 Butt, 'Rights in personam and the knowing receipt of trust property' (2003) 77 *Australian Law Journal* 280.
- 86 Ibid. 87 *LHK Nominees Pty Ltd v Kenworthy* [2002] WASCA 291, [214] (Anderson and Steytler JJ); [272] (PullinJ).
- 88 The Court relied on the definition of dishonesty set by the Privy Council in *Royal Brunei Airlines Sdn bhd v Tan* [1995] 2 AC 378, 389-91; and by the House of Lords in *Twinsectra Ltd v Yardley* [2002] 2 All ER 377.
- 89 Blanchard, 'Indefeasibility under the Torrens System in New Zealand' above n15, n80.
- 90 *Sutton v O'Kane* [1973] 2 NZLR 304, 314.
- 91 Ibid 341.
- 92 Ibid 333.
- 93 (1998) ANZ ConvR 167 (extracts), 169.
- 94 For a discussion on this wide approach to detriment, see Brookers *New Zealand Land Law* (2005), [7.7.02]; and see decisions such as *Gillett v Holt* [2001] Ch 210; *Campbell v Griffin* [2001] EWCA Civ 2001, 27 June 2001; *Jennings v Rice* [2002] EWCA Civ 159, 22 February 2002.
- 95 (unreported, SC, Dunedin, 22 March 1972, White J).
- 96 White J held there was no fraud; but, although the memorandum of transfer did not create a registrable right of way, there was an equitable easement of right of way that was protected by s 62 (b) of the *Land Transfer Act 1952*. The Court of Appeal reversed the judgment on this latter ground.
- 97 *Sutton v O'Kane* [1973] 2 NZLR 304, 347 (Richmond J).
- 98 Ibid, 314 (Wild CJ).
- 99 *McGrath v Campbell* [2006] NSWCA 180, [108] (Tobias JA).
- 100 See Part IV below.
- 101 (2002) 55 NSWLR 446. See P Butt and S Freidman, 'Indefeasibility Overridden - Significantly' (2003) 77 *Australian Law Journal* 88-9.
- 102 *Hillpalm Pty Ltd v Heaven's Door Pty Ltd* (2004-05) 220 CLR 472.
- 103 Butt and Freidman, 'Indefeasibility Overridden — Significantly' above n 101, 89.
- 104 See, for example, *Cleveland v Roberts* [1993] 2 NZLR 17; *Kingfish Lodge (1993) Ltd v Archer* [2000] 3 NZLR 364; *Brankin v Maclean* [2003] 2 NZLR 687; *B A Trustees Limited v Druskovich* [2007] 3 NZLR 279 (CA). A forthcoming discrete article by the author discusses whether our landlocked land provisions are assuming a public, rather than a private, law complexion.
- 105 In s 4 of the *Property Law Act 2007* ('Interpretation') the definitions of both 'owner' and 'occupier' include the landlocked provisions. They replace the definition in s 129B(1)(b) of the repealed Act. The essential difference is that a person in occupation of the land under a lease (or a licence to occupy the land in consideration of rent) for a term of not less than 10 years, has jurisdiction to apply. The repealed provision specified a term of not less than 21 years.
- 106 *Property Law Act 2007*, s 327.
- 107 *Evison v Johnson* (1985) 2 NZCPR 181.
- 108 Examples include *White v Bevan* (1985) 2 NZCPR 270; *Cleveland v Roberts* [1993] 2 NZLR 17 (CA); *Wentworth v Sayes* (1994) 2 NZ ConvC 191,859; *Benham v Cameron* (1999) 4 NZ ConvC 193,013; *Brankin v Maclean* [2003] 2 NZLR687; *Yullundri Pastoral and Development Co Ltd v Smith* (unreported, HC Christchurch, CIV-2002-409-769); *Hexton Holdings Ltd v MacLaurin* (unreported, HC Gisborne, CIV-2005-416-275, Andrews J); *BA Trustees v Druskovich* [2007] 3 NZLR279 (CA).

- 109 *McNeilly v Hoessly*, (unreported, HC Whangarei M 33/01, 16 April 2003, Laurenson J), [33].
- 110 *Wilson v Rush* [1980] 2 NZLR 577. See also *White v Bevan* (1985) 2 NZCPR 270; *Cleveland v Roberts* [1993] 2 NZLR 17 (CA).
- 111 *Wilson v Rush* [1980] 2 NZLR 577; *Jacobsen Holdings Ltd v Drexel* [1986] 1 NZLR 324; *Cleveland v Roberts* [1993] 2 NZLR 17 (CA).
- 112 See, for example, *Brankin v Maclean* [2003] 3 NZLR 687; *Yullundri Pastoral and Development Co Ltd v Smith* (unreported, HC Christchurch, CIV-2002-409-769); and *Hexton Holdings Ltd v MacLaurin* (unreported, HC Gisborne, CIV-2005-416-275, Andrews J).
- 113 See, for example, *Wilson v Rush* [1980] 2 NZLR 577; *BA Trustees v Druskovich* [2007] 3 NZLR 279 (CA); *cf Asmussen v Hajnal* (unreported, HC Nelson, CIV-2004-442-148, 15 February 2005, Wild J).
- 114 *Wilson v Rush* [1980] 2 NZLR 577, 584 (Jeffries J).
- 115 *Jacobsen Holdings Ltd v Drexel* [1986] 1 NZLR 324. It must be noted that two recent High Court decisions have failed to apply this criteria correctly: *Brankin v MacLean* [2003] 3 NZLR 687 (overturned on the point in *Lowe v Brankin* (2005) 6 NZCPR 607); and *Hexton Holdings Ltd v MacLaurin* (unreported, HC Gisborne, CIV-2005-416-275, Andrews J). In the latter case, Andrews J followed Hansen J's incorrect test in the former, despite the successful appeal on the point.
- 116 *Wilson v Rush* [1980] 2 NZLR 577, but note that this case was decided before the threshold test was set.
- 117 [1980] 2 NZLR 585. See, however, *BA Trustees v Druskovich* [2007] 3 NZLR 279 (CA) in which the Court of Appeal held that an upstairs apartment of a two-storey building fronting a road was landlocked. Its only reasonable access was down a flight of stairs leading to a back lane fenced off by the neighbouring owner.
- 118 Blanchard, above n 15, 47.

# Appendix

## The Property Law Act 2007

### Part 4 Subpart 3 Landlocked Land

(\* The corresponding provisions of s 129B of the Property Law Act 1952 are identified in square brackets).

#### **326 interpretation**

In this sub-part [Subpart 3 of Part VI of the Act]

**landlocked land** means a piece of land to which there is no reasonable access [s129B(1)(a)]

**reasonable access**, in relation to land, means physical access for persons or services of a nature or quality that is reasonably necessary to enable the owner or occupier of the land to use and enjoy the land for any purpose for which it may be used in accordance with the provisions of any right, permission, authority, consent, approval, or dispensation enjoyed or granted under the provisions of the Resource Management Act 1991 [s129B(1)(c)].

#### **327 owner or occupier of landlocked land may apply to court**

(1) An owner or occupier of landlocked land may apply to a court for an order under s 328(1) granting reasonable access to any such land. ... [s129B(2)]

#### **328 court may grant reasonable access to landlocked land**

(1) A court, on application under section 327, may

(a) make an order granting reasonable access to the landlocked land; and

(b) for that purpose, specify in the order that —

(i) any other piece of land (whether or not adjoining the landlocked land) must be vested in the owner of the landlocked land; or (ii) an easement over that other piece of land must be granted for the benefit of the landlocked land [s129B(7)]

#### **329 matters court must consider in determining application for order for reasonable access**

In determining an application for an order under s 328, the court must have regard to—

(a) the nature and quality of the access (if any) to the landlocked land at the time when the applicant purchased or otherwise acquired the land;

(b) the circumstances under which the land became landlocked;

(c) the conduct of the parties, including any attempts they have made to negotiate reasonable access to the landlocked land;

(d) the hardship that would be caused to the applicant by the refusal of an order, in comparison with the hardship that would be caused to any other person by the making of an order;

(e) any other relevant matters [s129B(6)].

**330 court may impose conditions in making order for reasonable access**

(1) In making an order under section 328, a court may impose any conditions it thinks fit, including conditions relating to the following:

- (a) the payment of reasonable compensation by the applicant to any other person:
- (b) the exchange of any land between the applicant and any other person;
- (c) the fencing of any land and the upkeep and maintenance of any fence;
- (d) the upkeep and maintenance of any land over which an easement is to be granted:
- (e) the carrying out of a survey of any land:
- (f) the time within which any work necessary to give effect to the order is to be carried out:
- (g) the execution of any instrument or the doing of any other thing necessary to give effect to the order:
- (h) any other matters that the court considers relevant, including any question arising under section 331

[ ss1 above generally reflects s 129B(8)].