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Recovering misdirected trust assets in the face of torrens indefeasibility

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Where misdirected trust asset consists of, or becomes invested in, registered land, whether the beneficiary could recover it from the recipient is doubtful given that the Torrens system, through the principle of indefeasibility, effects a substantial reversal of the priority rules under the general law. The key to unravelling the seemingly inconsistent cases on this topic is to be sensitive to the diversity in drafting and interpretation of the different Torrens legislations, with particular focus on whether the principle of indefeasibility also protects registered volunteers. Through a comparative study of the Torrens jurisdictions in Australia and Singapore, this article highlights how the position differs from jurisdiction to jurisdiction and makes suggestions on how the interests of the competing parties may be best balanced.

I Introduction

As many important areas of the law become increasingly regulated by statutes, the interplay between law and statute has become a popular research topic.[1] One aspect of this is how equitable doctrines operate within the context of Torrens land registration.[2] At the heart of the study of equity is the concept of trust, a defining characteristic of which is the proprietary character of the beneficiary's interest. Where a trustee (T) holds a book on trust for a beneficiary (B), the latter acquires an equitable title in the book. If T delivers the book to a third-party recipient (R) in breach of the trust, B's equitable title will bind R unless R is a bona fide purchaser for value without notice of the trust. Would the position be any different if the relevant trust asset is a Torrens registered land (Greenacre) instead? The hallmark of the Torrens system being the indefeasibility of registered title, would the registration of Greenacre in R's name confer upon R immunity from B's claim?

Curiously, this simple yet important question finds no consistent answer in the existing case law. A number of older cases suggest that B could claim from R whereas more recent ones have mostly sidestepped the question, preferring instead to approach the issue as concerning the doctrine of knowing receipt.[3] The prevailing view is that R is not liable for knowing receipt

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[1] See, eg, Elise Bant, 'Statute and Common Law: Interaction and Influence in Light of the Principle of Coherence' (2015) 38 UNSWLJ 367; J D Heydon, 'Equity and Statute' in P G Turner (ed), *Equity and Administration* (CUP 2016) 211.

[2] 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 Syd LR 107, 109–11.

[3] This is also the manner in which most academic literature have addressed the issue: see, eg, Brendan Edgeworth, *Butt's Land Law* (7th edn, Lawbook 2017) 879–80; Brendan Edgeworth and others, *Sackville & Neave: Australian*

even if R acquired Greenacre with knowledge of T's breach of trust, as such a claim will be inconsistent with the principle of indefeasibility. The need to argue on the basis of knowing receipt suggests that an equitable ownership claim based on B's equitable title, which would have been more straightforward, would also fail for the same reason. That the question has to be answered indirectly by way of inference is somewhat surprising not only because Australia is the birthplace of the Torrens system but also in light of the special place of equitable doctrines in Australian jurisprudence.[4] But, more importantly, does that inference accurately reflect the law? Does it understate the strength of B's equitable title and overstate R's registered title?

The dilemma of whether B should be allowed to recover Greenacre from R arises from the fact that the Torrens system, through the principle of indefeasibility, effects a substantial reversal of the priority rules under the general law. Under the Torrens system, emphasis is placed on title by registration, and the principle of indefeasibility confers on a registered owner significant immunity from adverse title claims. While it is true that Torrens indefeasibility is not absolute, as clearly evidenced by the express exceptions in the Torrens statutes, the fact that fraud is the principal exception suggests that the threshold for defeating a registered title is set very high. The challenge is to identify a solution to B's predicament which does not directly undermine this threshold. In this article, two methods of allowing B's claim against R are explored: first, by implying an independent trust exception; and second, by subsuming a (partial) trust exception within a volunteer exception. The first method, it is argued, would result in inconsistent treatments of the different kinds of equitable interests and offend key statutory provisions that uphold the principle of indefeasibility. These difficulties can be avoided if the said statutory provisions are purposively interpreted so as to apply only to purchasers, thus lending support to the second method, which is preferred in this article. The central argument of this article is that a volunteer exception to the principle of indefeasibility should be recognised, and this would serve as a springboard for allowing B's claim against R in the appropriate situations.

While the question of whether a volunteer exception should be recognised has generated a great deal of debate, the impact of that debate on B's claim against R, although seemingly obvious, has not received the same degree of attention by the courts and in the academic literature. This article draws attention to the connection between the two issues in the attempt to identify the place of equitable ownership claims within the Torrens framework. In fleshing out the details of the preferred method, particularly how the competing interests of B and R are best balanced, this article draws on the experience of Singapore law. The Torrens legislation in Singapore, although modelled after the New South Wales legislation, has unique features of its own. Notably, while retaining most of the indefeasibility provisions found in its

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Property Law (10th edn, LexisNexis Butterworths 2016) 501–02; Anthony P Moore, Scott Grattan and Lynden Griggs, *Bradbook, MacCallum and Moore's Australian Real Property Law* (6th edn, Lawbook 2016) 261–63.

[4] *Harris v Digital Pulse Pty Ltd* [2003] NSWCA 10, (2003) 56 NSWLR 298 [15] (Spigelman CJ). See also J D Heydon, M J Leeming and P G Turner, *Meagher, Gummow & Lehane's Equity: Doctrines & Remedies* (5th edn, LexisNexis Butterworths 2014); Justice Michael Kirby, 'Equity's Australian Isolationism' (2008) 8 QUTLJJ 444; Paul Finn, 'Common Law Divergences' (2013) 37 MULR 509, 515–18; Paul Finn, 'Unity, Then Divergence: The Privy Council, the Common Law of England and the Common Laws of Canada, Australia and New Zealand' in Andrew Robertson and Michael Tilbury (eds), *The Common Law of Obligations: Divergence and Unity* (Hart Publishing 2016) 37.

Australian counterparts, it also explicitly sets out exceptions relating to trusts and volunteers. The discussion will focus on how the seemingly inconsistent provisions can be reconciled and how a narrower version of the volunteer exception may be crafted to better preserve certain features of Torrens indefeasibility. Such a comparative study also serves to highlight differences between the many Torrens systems despite their common origin. Since the volunteer exception is not recognised in every Torrens jurisdiction, it would be a mistake to make any pronouncement on the prospect of B's claim against R without considering the specific Torrens legislation that applies to Greenacre.

II Recovering misapplied trust assets under the general law

Outside the Torrens context, under the general law, B is allowed to follow Greenacre into the hands of R except where the latter is a bona fide purchaser for value without notice of B's interest. Where B's claim succeeds, R is sometimes described as a constructive trustee or as holding the asset on a constructive trust.[5] On one view, the trust is entirely new. B acquires a new equitable title under the constructive trust. The more widely accepted view, however, is that B could recover Greenacre from R because B's equitable title under the original trust[6] runs with and binds the legal title of the land.[7] Since B is essentially saying that he is *all along* the true owner of Greenacre,[8] the claim may be conveniently referred to as an equitable ownership claim, which is governed by 'the principles of equitable title'.[9]

The view that equitable title persists to bind the legal title of R finds support in the judgments of Lord Browne-Wilkinson and Lord Millett in *Foskett v McKeown*.[10] In that case, the claimants entrusted money to one Murphy for the purchase of real property. Murphy used some of the trust money to pay two annual premiums on a life insurance policy for the benefit of his children. Later, he committed suicide and a death benefit of £1 million was paid out by

[5] *Independent Trustee Services Ltd v GP Noble Trustees Ltd* [2012] EWCA Civ 195, [2012] 3 All ER 210 [80]. See also John McGhee (ed), *Snell's Equity* (33rd edn, Sweet & Maxwell 2018) 785; Charles Harpum, 'The Stranger as Constructive Trustee: Part 1' (1986) 102 LQR 114. See generally 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 Publishing 2008) 339, 344–45; Lionel Smith, 'Transfers' in Peter Birks and Arianna Pretto (eds), *Breach of Trust* (Hart Publishing 2002) 111.

[6] The trust is usually express, but can also be resulting or constructive.

[7] J D Heydon and M J Leeming, *Jacobs' Law of Trusts in Australia* (8th edn, LexisNexis Butterworths 2016) 570; Jamie Glister and James Lee, *Hanbury & Martin: Modern Equity* (21st edn, Sweet & Maxwell 2018) 729 ('the beneficiary's equitable interest still encumbers the property'); Lynton Tucker, Nicholas Le Poidevin and James Brightwell, *Lewin on Trusts* (19th edn, Sweet & Maxwell 2015) 1973 ('continuing beneficial interests in trust assets'); J E Penner, *The Law of Trusts* (10th edn, OUP 2016) 38 ('the beneficiaries' interest 'runs' with the trust property'); David Hayton, Paul Matthews and Charles Mitchell, *Underhill and Hayton Law of Trusts and Trustees* (19th edn, LexisNexis 2016) 1314 ('the beneficiaries' subsisting equitable interests in the property'); Charles Mitchell and Stephen Watterson, 'Remedies for Knowing Receipt' in Charles Mitchell (ed), *Constructive and Resulting Trusts* (Hart Publishing 2010) 115, 115–18; Smith (n 5).

[8] On the nature of the beneficiary's interest, see R C Nolan, 'Equitable property' (2006) 122 LQR 232; Ben McFarlane and Robert Stevens, 'The nature of equitable property' (2010) 4 J Eq 1; Peter Jaffey, 'Explaining the Trust' (2015) 131 LQR 377; Jessica Hudson, 'Equitable ownership and restitution of misapplied trust property' (2017) 11 J Eq 245.

[9] Bryan (n 5) 341. See also *Fistar v Riverwood Legion and Community Club Ltd* [2016] NSWCA 81, (2016) 91 NSWLR 732 [46] (referring to 'proprietary claims in equity based on a better equitable title').

[10] [2001] 1 AC 102 (HL).

the insurance company. The claimants brought an equitable ownership claim to trace the trust money through the premiums into death benefit. In allowing the claim, Lord Browne-Wilkinson said:

> This case does not involve any question of resulting or constructive trusts. The only trusts at issue are the express trusts of the purchasers trust deed. Under those express trusts the purchasers were entitled to equitable interests in the original moneys paid ... by the purchasers. Like any other equitable proprietary interest, those equitable proprietary interests under the purchasers trust deed which originally existed in the moneys ... now exist in any other property which, in law, now represents the original trust assets.[11]

Similarly, Lord Millett said '[a] beneficiary of a trust is entitled to a *continuing beneficial interest* not merely in the trust property but in its traceable proceeds'.[12] On this view, the occasional description of R as a constructive trustee is merely to avoid the potential confusion that R owes the same duties as T. This is especially so where T is an express trustee with duties beyond holding the trust asset for B. If one insists on using the language of constructive trust, R may be described as a constructive trustee of an equitable title under the earlier express trust, whose only duty is to restore Greenacre to B upon demand.[13] In reality, there is only one equitable title throughout.

From B's perspective, the idea that equitable title persists offers important advantages over claiming by way of a new constructive trust. In the first place, the few authorities in support of the constructive trust analysis tend to require R to have knowledge that Greenacre has been disposed of by T in breach of trust.[14] Evidential burden aside, this would also place B in a precarious position where R, before acquiring the requisite knowledge, passes away, becomes insolvent, or transfers Greenacre to somebody else. Since no prior trust existed, B's claim does not gain priority over those of R's beneficiaries, creditors or transferees. None of these obstacles arise if B could rely on the persistence of a pre-existing equitable title, in which case the constructive trust argument becomes redundant. Ironically, however, the very idea that equitable title persists appears to offend the principle of indefeasibility, as will be elaborated in the next section.

III Trusts within the Torrens system

The defining characteristic of the Torrens system is the principle of indefeasibility, which protects a registered title from adverse claims save in exceptional circumstances. The principle is statutorily enshrined in what is commonly known as the 'paramountcy' provision. Section 42(1) of the Real Property Act 1900 (NSW), which is sufficiently representative of the equivalents in other Australian states, provides that a registered proprietor 'shall, except in case

[11] ibid 108.
[12] ibid 127 (emphasis added). See also *Re Diplock* [1948] Ch 465 (CA) 522 ('specific order for restoration of what in the eyes of equity never ceased to belong in equity to the estate'), affirmed in *Ministry of Health v Simpson* [1951] AC 251 (HL) (*Diplock's Case*).
[13] Penner (n 7) 112. See also *Independent Trustee Services Ltd* (n 5) [80].
[14] See, eg, *Robins v Incentive Dynamics Pty Ltd (in liq)* [2003] NSWCA 71, (2003) 45 ACSR 244; *Heperu Pty Ltd v Belle* [2009] NSWCA 252, (2009) 76 NSWLR 230. See also Smith (n 5); Ben McFarlane, 'Trusts and Knowledge: Lessons from Australia' in Jamie Glister and Pauline Ridge (eds), *Fault Lines in Equity* (Hart Publishing 2012) 169.

of fraud, hold the [title], subject to such other estates and interests and such entries, if any, as are recorded in that folio, but absolutely free from all other estates and interests that are not so recorded'.[15] In other words, a registered title cannot be defeated by claims premised on a prior title, whether legal or equitable.[16]

Against this background, it is easy to see why there is no straightforward answer to how trusts are to be accommodated within the Torrens system. In determining whether B's equitable ownership claim offends the principle of indefeasibility, it is necessary to ask if B is relying on a *prior* equitable title. Suppose S transfers Greenacre to T to be held on trust for B. As the trust becomes fully constituted only when title to the land is registered in T's name, B's equitable title cannot be said to have arisen prior to T's registered title. The equitable title arises simultaneously with registration.[17] Similarly, trusts imposed by law usually arise at the time of the transfer/registration. This is true for resulting trusts and most forms of constructive trusts.[18] Therefore, in so far as B's claim against T is concerned, no meaningful distinction is to be made between the different types of trusts.

When we turn to consider B's attempt to recover Greenacre from R, however, the nature an equitable ownership claim becomes important. In theory, the principle of indefeasibility is offended only if B is seeking to enforce a pre-existing equitable title but not if B is claiming an entirely new equitable title under a constructive trust. In reality, however, the issue is not so straightforward. As the two claims may be viewed as different means towards achieving (essentially) the same result, courts are understandably sceptical of rejecting one but allowing the other.[19] It is for the same reason that the courts have viewed a proprietary claim on the basis of knowing receipt[20] as a backdoor attempt to circumvent the principle of indefeasibility.[21] They are, in essence, oblique methods of protecting B's equitable title.[22]

Ultimately, the dilemma stems from the fact that the general law and the Torrens system operate on very different ideas of title security. The priority rules under the general law largely reflect a system of static title security. Since priority is given to an earlier owner, there is a

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[15] The paramountcy provision also sets out a list of overriding interests, which is irrelevant for our present purposes.

[16] Kelvin F K Low, 'The Nature of Torrens Indefeasibility: Understanding the Limits of Personal Equities' (2009) 33 MULR 205; Moses and Edgeworth (n 2) 117.

[17] This is equally true in a situation where the *Re Rose* principle ([1952] Ch 499 (CA)) applies. If S dies before title to the land is registered in T's name but S has done everything that can be expected of him/her to transfer title to T, then pending registration T would acquire an equitable title which he/she in turn holds on trust for B. At this point, no issue of indefeasibility of title arises as between B and T. When T is eventually registered as the owner of Whiteacre, the express trust becomes fully constituted and B acquires a new equitable title to Whiteacre.

[18] A constructive trust may even arise independently of, and after, registration. A simple example is the case of proprietary estoppel.

[19] On whether a knowing receipt claim should be recognised as falling within the category of in personam exceptions, see Moses and Edgeworth (n 2) 121–23; Bryan (n 5); Low, 'The Nature of Torrens Indefeasibility' (n 16) 228–32; Matthew Harding, '*Barnes v Addy* Claims and the Indefeasibility of Torrens Title' (2007) 31 MULR 343; Tang Hang Wu, 'Beyond the Torrens Mirror: A Framework of the In Personam Exception to Indefeasibility' (2008) 32 MULR 672, 687–92; Lyria Bennett Moses, 'Recipient liability and Torrens Title' (2006) 1 J Eq 135; Elise Bant, 'Registration as a defence to claims in unjust enrichment: Australia and England compared' [2011] Conv 309, 316–18.

[20] The knowing receipt claim and the constructive trust claim share the same requirements: McFarlane (n 14).

[21] *Macquarie Bank Ltd v Sixty-Fourth Throne Pty Ltd* [1998] 3 VR 133 (CA) 157 (Tadgell JA) (*Sixty-Fourth Throne*).

[22] Low, 'The Nature of Torrens Indefeasibility' (n 16) 231–32.

strong normative justification for an equitable ownership claim with a proprietary base.[23] However, it is also precisely because of this proprietary base that the claim comes into direct conflict with the principle of indefeasibility, which emphasises dynamic title security. Allowing an equitable title to persist as it would under the general law would lead to a conflict with a subsequent owner's security of receipt. The perception of conflict, however, must be moderated against the concession that indefeasibility is not an absolute concept. With this in mind, the following parts of this article attempt to reconcile the seemingly contradictory cases, unpack the relationship between the principle of indefeasibility and its exceptions, and examine possible ways in which a trust exception may be introduced.

IV The assumption that equitable title does not persist

In Australia, B's claim against R has mostly been characterised as an issue of knowing receipt, often known as the first limb of *Barnes v Addy*.[24] Under the general law, the claim succeeds if it can be shown that R receives Greenacre with knowledge of circumstances which would indicate a breach of trust by T.[25] In the Torrens context, however, the prevailing view is that such a claim would fail for being inconsistent with the principle of indefeasibility. In *LHK Nominees Pty Ltd v Kenworthy*, the Western Australian Full Court said they were unaware of any authority 'for the proposition that the registered interest of a purchaser of Torrens system land is defeasible simply because he became registered with knowledge that the transfer was in breach of trust'.[26] This view has since been confirmed by the High Court of Australia in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd*, albeit obiter and without in-depth consideration.[27] The allegation of inconsistency presupposes that a successful knowing receipt claim would entitle B to a proprietary remedy, allowing the recovery of Greenacre from R. But a knowing receipt claim traditionally entitles B only to a personal remedy. Moreover, the personal remedy may go beyond compensating B for the monetary value of the trust asset.[28] For example, if the trust asset is income-generating, B is also entitled to recover any lost income. Thus, the courts have been accused of incorrectly superimposing the natural remedy for an equitable ownership claim onto a knowing receipt claim.[29] While this is not the debate this article is directly concerned with, it is argued that the knowing receipt cases provide important clues on the availability of an equitable ownership claim as the typical set of facts would, under the general law, have given rise to both claims.

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[23] See Elise Bant and Michael Bryan, 'A Model of Proprietary Restitution' in Elise Bant and Matthew Harding (eds), *Principles of Proprietary Remedies* (Lawbook 2013) 211.
[24] (1874) LR 9 Ch App 244.
[25] See, eg, *Grimaldi v Chameleon Mining NL (No 2)* [2012] FCAFC 6, (2012) 200 FCR 296 [268]–[270]; *Westpac Banking Corporation v Bell Group Ltd (in liq) (No 3)* [2012] WASCA 157, (2012) 44 WAR 1 [2127]–[2130].
[26] (2002) 26 WAR 517 [213] (Anderson and Steyler JJ), [185] (Murray J) (*LHK Nominees*); following *Sixty-Fourth Throne* (n 21).
[27] [2007] HCA 22; (2007) 230 CLR 89 [193]–[196] (*Farah*) (appealed from the New South Wales Court of Appeal).
[28] *Great Investments Ltd v Warner* (2016) 243 FCR 516. See also Jamie Glister, 'Accounts of Profits and Third Parties' in Simone Degeling and Jason N E Varuhas (eds), *Equitable Compensation and Disgorgement of Profit* (OUP 2017) 175.
[29] See Bryan (n 5); Kelvin F K Low, 'Of horses and carts: theories of indefeasibility and category errors in the Torrens system' in Elise Bant and Matthew Harding (eds), *Exploring Private Law* (CUP 2010) 446.

In *Macquarie Bank Ltd v Sixty-Fourth Throne Pty Ltd* the Victorian Court of Appeal rejected a knowing receipt claim on the basis that to hold otherwise would 'introduce by the back door a means of undermining the doctrine of indefeasibility which the Torrens system establishes'.[30] While the Court did not elaborate, the statement could be interpreted as presupposing the existence of a locked front door: an equitable ownership claim. Indeed, had an equitable ownership claim been available, it would have been entirely unnecessary for the case to proceed on the basis of knowing receipt especially given its more stringent requirements.

Interestingly, even in spite of conflicting opinions on whether a knowing receipt claim should be allowed, there is a consistent assumption that an equitable ownership claim is unavailable. This is best illustrated by the case of *Tara Shire Council v Garner* where, contrary to the prevailing authorities, the majority in the Queensland Court of Appeal was receptive to the idea that a knowing receipt claim can be accommodated within the Torrens system.[31] The Garners were the registered proprietors of a piece of land on which stood a hotel and a water bore. The Council offered to buy, and the Garners agreed to sell, that part of the land on which the water bore was located. The Council paid the purchase price but before the conveyance occurred the Garners sold the entire piece of land to Arcape. The Council argued that the Garners held the disputed part of the land on a bare trust for the Council.[32] However, the attempt to recover that parcel of land from Arcape was argued on the basis of knowing receipt instead. In granting the Council leave to appeal against the interlocutory decision of the District Court, the Court of Appeal held that there was an arguable case for allowing the knowing receipt claim. This was impliedly rejected by the High Court in *Farah*. For our present purpose, however, it is only important to observe that the Court of Appeal was completely silent about the possibility of a more direct equitable ownership claim, which would have made it completely unnecessary to decide on the difficult issue of knowing receipt. This might be due to how the Council had pleaded its case but even so, it reflects a shared assumption that an equitable ownership claim is not allowed or that its existence is subject to serious doubts.

While indeed there are older cases supporting the contrary view that B's equitable ownership claim could succeed,[33] these were mostly outshadowed (but not explicitly overruled) by the more recent ones on knowing receipt, especially after *Farah*. However, as the latter group of cases did not directly address the question of equitable ownership claim, one could perhaps say that the matter remains an unsettled one. Moving forward, it is important to determine whether the two isolated strands of authorities are truly contradictory or are reconcilable in some way. As shall be observed, the more recent cases all concerned claims against registered purchasers, who obviously attract the protection of the principle of indefeasibility to the fullest extent. The holdings on these cases can perhaps be confined to their specific facts. Even so, the case for treating registered volunteers differently, while finding support in some of the older cases, has to be carefully established. This would require, through

[30] *Sixty-Fourth Throne* (n 21) 157 (Tadgell JA).
[31] [2002] QCA 232, [2003] 1 Qd R 556 (McMurdo P and Atkinson J; Davies JA dissenting) (*Tara*); noted in Lynden Griggs, 'The Tectonic Plate of Equity — establishing a fault line in our Torrens landscape' (2003) 10 APLJ 78.
[32] Presumably a vendor–purchaser constructive trust.
[33] *Rasmussen v Rasmussen* [1995] 1 VR 613 (SC); *Hagan v Waterhouse* (1991) 34 NSWLR 308 (SC).

the process of statutory interpretation, the identification of both the meaning and scope of Torrens indefeasibility. The latter depends on the degree of divergence that the Torrens system is prepared to tolerate, which is by no means a straightforward inquiry owing to vague and seemingly inconsistent statutory provisions compounded by the absence of clear legislative intent. As will be argued, however, it is possible to interpret a key indefeasibility provision, which appears on its face to preclude B's claim against R, to apply only where R is a purchaser, thus providing support to the volunteer–purchaser distinction.

V An independent trust exception?

The Real Property Act 1886 (SA) of South Australia is exceptional for being the only one among the Australian Torrens statutes to set out a trust exception. Section 71(f) provides that indefeasibility of title does not affect 'the rights of a *cestui que trust* where the registered proprietor is a trustee, whether the trust shall be express, implied, or constructive'. Despite its broad wording, however, it has been suggested that this merely allows the enforcement of a trust obligation which is created or assumed by the registered proprietor.[34] But the reference to implied and constructive trusts suggests that the section is intended to apply to a wider range of situations. Obvious examples include constructive trusts imposed in response to the landowner's unconscionable conduct and even resulting trusts, which may arise independently of the landowner's conduct. In any case, allowing such claims, which are simply variations of a claim by B against T, does not point to the recognition of a true trust exception. As these are not claims based on prior title, they are never in conflict with the principle of indefeasibility to begin with. B's claim against T should be allowed even in the absence of a statutory exception.[35]

The litmus test of a true trust exception is in allowing B to claim from R, whether by a broad reading of section 71(f) or, in the case of other Torrens statutes, by implying a true trust exception. This solution is not inconceivable considering that the principle of indefeasibility was never intended to be absolute. Even as originally conceived, the principle of indefeasibility was subject to a fraud exception.[36] There are, however, at least two objections to introducing an independent trust exception, both drawing on the slippery slope argument.

First, on consistency, it would be difficult to see why such special treatment is not also afforded to other kinds of equitable interests such as equitable leases and mortgages.[37] Like an equitable title, both equitable leases and mortgages can be understood as property rights carved out of the legal (registered) title.

Second, recognising a true trust exception would disturb the conventionally high threshold for departing from the principle of indefeasibility. Fraud is often the sole (or main) express exception whereas, except for the Real Property Act 1886 (SA), no trust exception is expressly provided for.[38] The prominent role of the fraud exception is most apparent in what is

[34] Brian Hunter, 'Equity and the Torrens System' (1964) 2 Adel L Rev 208, 210–11.
[35] See, eg, *Bahr v Nicholay (No 2)* (1988) 164 CLR 604 (HC) 618–19 (Mason CJ and Dawson J).
[36] Real Property Act 1858 (SA), s 33.
[37] Edgeworth, *Butt's Land Law* (n 3) 879–80.
[38] While the relevant legislations in Queensland and Northern Territory additionally state that a registered title may be defeated by 'an equity arising from the act of the registered proprietor' (Land Title Act 2000 (NT), s

commonly known as the 'notice' provision, which complements the paramountcy provision. Since *Farah* was an appeal from New South Wales, it would be useful to refer again to the Real Property Act 1900 (NSW), which sets out a notice provision in section 43:

> Except in the case of fraud no person contracting or dealing with or taking or proposing to take a transfer from the registered proprietor of any registered estate or interest … shall be affected by notice direct or constructive of any trust or unregistered interest, any rule of law or equity to the contrary notwithstanding; and the knowledge that any such trust or unregistered interest is in existence shall not of itself be imputed as fraud.[39]

The purpose of the notice provision is clearly to abolish equitable fraud, which is founded on actual or constructive notice of a prior equitable interest.[40] Thus, mere receipt of trust property by R, even with notice of the trust, does not constitute fraud. The High Court in *Farah* went even further to suggest that even if R was aware of T's breach of trust, it would constitute fraud only if T's breach amounts to fraud.[41] Thus, if T's breach of trust is due to mere carelessness or mistake, R's knowledge of that breach does not constitute fraud.

Applying the maxim *expressio unius est exclusio alterius* in interpreting the paramountcy and notice provisions, and taking into account how fraud is strictly defined, the picture that emerges appears to be that courts ought to be slow in implying exceptions involving a lesser degree of culpability than fraud.[42] In other words, B has no recourse against R unless the latter's conduct amounts to fraud. To allow otherwise would upset the high threshold for defeating a registered title set by the fraud exception.

VI Limiting the scope of Torrens indefeasibility

An alternative method to introducing a trust exception is by narrowing the scope of the notice provision by way of purposive interpretation. Apart from abolishing equitable fraud, the notice provision has been understood to have the effect of abolishing the doctrine of notice in general.[43] But it is important to identify the role of notice under the general law, particularly in relation to the persistence of equitable title. As B's equitable title binds R even if the latter has no notice of the trust, it would be inaccurate, as a general statement, to say that because the

189(1)(a)), this 'personal equity' exception is arguably not invoked where all that R did was to receive Whiteacre by registration (Land Title Act 1994 (Qld), s 185(1)(a)). Absent some unconscionable conduct by R, there is no recognised cause of action under which B could claim from R. For the view that a knowing receipt claim falls within this exception, see *Tara* (n 31).

[39] See also Land Titles Act 1925 (ACT), s 59; Land Title Act 2000 (NT), s 188(2)(a); Land Title Act 1994 (Qld), s 184(2)(a); Real Property Act 1886 (SA), ss 72, 186–87; Land Titles Act 1980 (Tas), s 41; Transfer of Land Act 1958 (Vic), s 43; Transfer of Land Act 1893 (WA), s 134.

[40] *Waimiha Sawmilling Co Ltd v Waione Timber Co Ltd* [1926] AC 101 (PC). See also Peter Butt, 'Notice and Fraud in the Torrens System: A Comparative Analysis' (1978) 13 UWAL Rev 354.

[41] *Farah* (n 27) [192]. See also *LHK Nominees* (n 26) [185] (Murray J). For criticism, see Rob Chambers, 'Knowing receipt: Frozen in Australia' (2007) 2 J Eq 40, 51–52.

[42] See, eg, *United Overseas Bank Ltd v Bebe bte Mohammad* [2006] SGCA 30, [2006] 4 SLR 884 (*Bebe*): '[T]he inclusion of the exception of fraud to which the registered proprietor or his agent is a party would, by implication, also exclude from such exception all conduct which in law or equity has a lesser degree of moral turpitude than actual fraud': at [91].

[43] Harding (n 19) 356.

doctrine of notice is abolished, B is completely barred from recovering Greenacre from R.[44] A clearer picture emerges if we consider the relevance of notice from R's perspective, ie, as a defence.[45] As Professor Michael Bryan explains:

> The doctrine of notice, which is the primary though not the only determinant of recovery of equitable property, was developed over 500 years ago in order to identify the circumstances in which beneficial interests under a trust will be destroyed by the trustee's unauthorised conveyance of the trust property to a third party. It only assumed its final form after several centuries of Chancery litigation involving various categories of recipients of trust property – heirs and creditors, as well as purchasers with notice of the breach and donees.[46]

Today the doctrine of notice is best recognised as an element of the defence of bona fide purchase.[47] If R is a bona fide purchaser having no notice of the trust, he takes free of B's equitable title. Against this background, Professor Peter Butt rightly asked: 'What possible purpose can the [notice] provision have, if not to protect a purchaser with notice against the consequence of his notice?'[48] Unsurprisingly, the case of *Mills v Stokman*,[49] which has been cited as 'a striking illustration of the effect of the abolition of the doctrine of notice',[50] was in fact concerned with a purchaser having notice of a prior interest. The effect of abolishing the doctrine of notice, therefore, is to remove a hurdle to R's pleading of the bona fide purchase defence. In other words, the defence of bona fide purchase is given enhanced scope under the Torrens system: a purchaser for value, whether or not having notice of the trust, is protected by the principle of indefeasibility and hence takes free of any pre-existing equitable title. On the flip side, since notice has always been irrelevant to an equitable ownership claim against a volunteer, the abolition of the doctrine of notice, it may be argued, does not affect the applicable general law. The notice provision reinforces the paramountcy provision only in so far as it relates to a registered purchaser.

A contrary view is that the notice provision prevents absolutely the persistence of equitable title, protecting any 'registered proprietor'[51] or 'third party'.[52] Although the heading of section 43 of the Real Property Act 1900 (NSW) reads 'Purchaser from registered proprietor not to be affected by notice',[53] the section also refers to a person taking a 'transfer'. Section 3

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[44] cf ibid 357, who refers to equitable ownership claims as 'proprietary claims based on notice'.
[45] See *Pilcher v Rawlins* (1872) LR 7 Ch App 259.
[46] Bryan (n 5) 348.
[47] It was in this context that the doctrine was originally developed: see David Fox, 'Purchase for Value Without Notice' in Paul S Davies, Simon Douglas and James Goudkamp (eds), *Defences in Equity* (Hart Publishing 2018) 53. See also Heydon, Leeming and Turner (n 4) 352–60; McGhee (n 5) 63–74; Kevin Gray and Susan Francis Gray, *Elements of Land Law* (5th edn, OUP 2009) 1150–56; Charles Harpum, Stuart Bridge and Martin Dixon, *Megarry & Wade: The Law of Real Property* (8th edn, Sweet & Maxwell 2012) 259–71.
[48] Butt, 'Notice and Fraud in the Torrens System' (n 40) 375; Heydon, Leeming and Turner (n 4) 359; Bernard O'Brien, 'Understanding Indefeasibility under the Victorian Transfer of Land Act' (1980) 12 MULR 390, 398–401. cf Peter Radan, 'Volunteers and Indefeasibility' (1999) 7 APLJ 197.
[49] (1967) 116 CLR 61 (HC).
[50] Harding (n 19) 356 n 80.
[51] ibid.
[52] Low, 'The Nature of Torrens Indefeasibility' (n 16) 217.
[53] See Real Property Act 1860 (SA), s 118. See also Land Titles Act 1925 (ACT), s 59; Real Property Act 1886 (SA), s 186; Land Titles Act 1980 (Tas), s 41; Transfer of Land Act 1958 (Vic), s 43; Transfer of Land Act 1893 (WA), s 134.

defines 'transfer' to mean 'the passing of any estate or interest in land under this Act, whether for valuable consideration or otherwise'.[54] Both sections were borrowed from the Real Property Act 1860 (SA), where they first appeared. There the position seems even clearer as the shoulder note to the notice provision reads 'Transferee not affected by notice'.[55]

Even so, the relevant parliamentary debate suggests that this was inconclusive,[56] especially following the introduction of other provisions that specifically refer to 'a transferee bona fide for valuable consideration'.[57] More importantly, a literal reading of the notice provision would obscure the relationship between the doctrine of notice (which the notice provision seeks to abolish) and the defence of bona fide purchase (which can be invoked only by a true purchaser). In the same vein, since an equitable ownership claim against a volunteer does not depend on notice, it would be odd to suggest that the notice provision is intended to cover such a situation. As the doctrine of notice was never relevant to volunteers to begin with, there is no meaningful sense in saying that it was abolished by the notice provision.

A purposive interpretation, on the other hand, accords with the idea of traditionality of statutes,[58] which posits that statutes do not introduce new concepts in the abstract but does so by reference to previous laws.[59] The specific purpose of the notice provision is to strengthen the position of registered purchasers, from which we may further infer that volunteers are to be excluded from the benefit of title indefeasibility. If R is a volunteer, then, applying the general law, B is entitled to recover Greenacre from R regardless of notice.

On this preferred view, the trust exception is subsumed within a volunteer exception, and this fits neatly within a Torrens system that emphasises the protection of registered purchasers. Importantly, the trust exception will not be a full-fledged version in that it does not apply to purchasers. In contrast, an independent trust exception will subject even purchasers to the usual rules: bona fide purchasers will be bound only if they had *no notice* of the trust. Given the objections to implying an independent trust exception, the best case for B's attempt to claim from R is to first argue the existence of a volunteer exception.

VII Trust and volunteer exceptions intertwined

In his detailed analysis of Torrens indefeasibility, Professor W N Harrison suggested:

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[54] One might also argue that it is used in the old common law sense to mean a person who receives the legal title by grant (as opposed to operation of law) such that it includes a volunteer: see *Powell v Cleland* [1948] 1 KB 262, 272. See also Gray and Gray (n 47) 1152; Harpum, Bridge and Dixon (n 47) 47, 260.

[55] Real Property Act 1860 (SA), s 104. See also Land Title Act 2000 (NT), s 188(2)(a) ('quality of registered interests'); Land Title Act 1994 (Qld), s 184(2)(a); Transfer of Land Act 1958 (Vic), s 43 ('Persons dealing with registered proprietor not affected by notice'). Interestingly, the heading of the notice provision in the Real Property Act 1886 (SA), which superseded the Real Property Act 1860 (SA), now refers to 'purchasers' instead of 'transferees' (s 186).

[56] See Rosalind F Atherton, 'Donees, Devisees and Torrens Title: The Problem of the Volunteer under the Real Property Acts' (1998) 4 Aust J Leg Hist 121, 150–56.

[57] See, eg, Land Titles Act 1925 (ACT), s 152; Real Property Act 1900 (NSW), s 118; Real Property Act 1886 (SA), ss 67, 71; Land Titles Act 1980 (Tas), s 149; Transfer of Land Act 1958 (Vic), s 69; Transfer of Land Act 1893 (WA), s 199. See also Peter Butt, 'Volunteers and indefeasibility' (1996) 70 ALJ 285, 285–86; Robert Chambers, *An Introduction to Property Law in Australia* (3rd edn, Lawbook 2013) 571–72.

[58] See Martin Krygier, 'The Traditionality of Statutes' (1988) 1 Ratio Juris 20.

[59] Moses and Edgeworth (n 2) 110.

> (a) A voluntary transferee is bound by all equities enforceable against the transferor.
> (b) A purchaser for value is not bound by an equity enforceable against the transferor, whether he had notice of it or not, unless his conduct in securing a transfer involved actual fraud against the holder of the equity.[60]

This assumes that volunteers are excluded from the protection of Torrens indefeasibility. But the truth is that the issue is far from settled. With the exception of Queensland and Northern Territory,[61] the Torrens statutes in other states do not clearly distinguish between purchasers and volunteers in so far as the principle of indefeasibility is concerned. The issue is left to statutory interpretation, which is by no means straightforward as the earlier discussion on the notice provision illustrates.[62] While what is the 'correct' position is certainty open to debate, the point is simply that, in answering whether B should be allowed to claim from R, one cannot ignore the divergence between the different Torrens jurisdictions on the treatment of registered volunteers.

While parts of the High Court's judgment in *Farah* seemed to have touched on this issue, it certainly wasn't clear enough to lay the debate to rest. On the one hand, the Court explained that a tracing claim would have failed against the defendants who received trust property because they were purchasers.[63] This suggests that the status of the defendants as purchasers was significant in attracting the protection of indefeasibility. On the other hand, further down the judgment, the Court said cursorily that the claim would fail against the defendants 'even if they are volunteers'.[64] But no reasons were given, and no authorities were cited, for this proposition. In any case, since the defendants were purchasers, the proposition was strictly obiter and has been given little weight in the debate.[65] In his analysis of *Farah*, Professor Bryan came to the conclusion that the plaintiff's attempt to recover the land was rightly denied, for even if the claim were characterised as an equitable ownership claim (instead of a knowing receipt claim) it would have been barred by the principle of indefeasibility.[66] However, despite the apparent generality of his comment, his regular references to the bona fide purchase defence throughout his chapter suggests that he meant only to comment on the specific facts of *Farah*.

Curiously, the High Court did not specifically turn its mind to the position in New South Wales despite the origin of the appeal and the existence of authoritative support for extending the protection of indefeasibility to registered volunteers. The main authority is *Bogdanovic v*

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[60] W N Harrison, 'Indefeasibility of Torrens Title' (1954) 2 UQLJ 206, 244.
[61] Where the principle of indefeasibility applies to purchasers and volunteers alike: Land Title Act 2000 (NT), s 183; Land Title Act 1994 (Qld), s 180.
[62] For the view that legislative intent is inconclusive, see Rosalind F Croucher, 'Inspired law reform or quick fix? or, "well, Mr Torrens what so you reckon now?": a reflection on voluntary transactions and forgeries in the Torrens system' (2009) 30 Adel L Rev 291; Atherton (n 56).
[63] *Farah* (n 27) [187]–[189].
[64] ibid [198].
[65] See Edgeworth, *Butt's Land Law* (n 3) 845; Edgeworth and others (n 3) 470; Moore, Grattan and Griggs (n 3) 250; Lynden Griggs, 'In personam: *Barnes v Addy* and the High Court's deliberations in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd*' (2008) 15 APLJ 268, 274. cf Bant, 'Statute and Common Law' (n 1) 375.
[66] Bryan (n 5) 356.

Koteff,[67] which was not considered by the High Court in *Farah*.[68] Interestingly, when the matter was revisited in *Arambasic v Veza (No 4)*, Sackville AJA did not cite *Farah* but instead regarded himself to be bound by *Bogdanovic*.[69] Having said this, in so far as New South Wales is concerned, the rejection of the volunteer exception is consistent with the assumption in *Farah* that an equitable ownership claim should be denied. Against this established trend, Kearney J's suggestion in *Hagan v Waterhouse* that an equitable owner could recover misappropriated trust asset from an innocent volunteer by 'a direct claim'[70] can no longer be regarded as good law.[71]

Since *Farah* has limited influence on this topic, and is unlikely to have the effect of unifying the divergent positions across the different states, it would be useful to investigate the connection between the treatment of registered volunteers and the persistence of equitable title in the other states. In Western Australia, the assumption in *LHK Nominees*[72] that equitable title does not persist is consistent with the rejection of a volunteer exception in a number of other cases.[73] Similarly, in Queensland, where the benefits of registration apply 'whether or not valuable consideration has been given',[74] it must have been right for the Court in *Tara*[75] to assume that an equitable ownership claim is unavailable.[76] In the absence of a trust exception, even a partial one, equitable titles are to be protected primarily by the system of caveats.[77] Had B been prompt in lodging a caveat over Greenacre, T would have been prevented from transferring the registered title to R, and the question of persistence of B's equitable title does not even arise.

In contrast, the solution proposed in this article finds support in jurisdictions where a volunteer exception is recognised. In Victoria, for example, the Supreme Court in *King v Smail* held that since volunteers acquire no protection from the notice provision, then 'by parity of reasoning they should be held to fall outside the indefeasibility provisions'.[78] The later case of *Sixty-Fourth Throne*, which denied a proprietary claim for knowing receipt on the assumption

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[67] (1988) 12 NSWLR 472 (CA). Followed in *Arambasic v Veza (No 4)* [2014] NSWSC 1109, (2014) 17 BPR 33,101 [164]; *Penrith RSL Club Ltd v Cameron* [2001] NSWSC 413, (2001) 10 BPR 18,621 [23].

[68] However, *Bogdanovic* (n 67) was cited in the decision of the New South Wales Court of Appeal: *Say-Dee Pty Ltd v Farah Constructions Pty Ltd* [2005] NSWCA 309 [238].

[69] *Arambasic* (n 67) [164]. Instead, *Farah* (n 27) was cited for an unrelated proposition (at [162]).

[70] *Hagan* (n 33) 369–70. *Bogdanovic* (n 67) was not cited.

[71] However, a limited volunteer exception is provided for in the Real Property Act 1900 (NSW), s 118(1)(d)(ii) (ejectment provision). Suppose T transfers Whiteacre to R1, who in turn transfers it to R2. If R1 is fraudulent in acquiring the title, then a claim to recover Whiteacre can be brought against R2 if he is not a bona fide purchaser for valuable consideration. See *Cassegrain v Gerard Cassegrain & Co Pty Ltd* [2015] HCA 2, (2015) 254 CLR 425; noted in Penny Carruthers and Natalie Skead, 'Confirming Torrens orthodoxy: The High Court decision in *Cassegrain v Gerard Cassegrain & Co Pty Ltd*' (2015) 24 APLJ 211.

[72] *LHK Nominees* (n 26).

[73] *Conlan v Registrar of Titles* [2001] WASC 201, (2001) 24 WAR 299; *Gadsdon v Gadsdon* [2003] WASC 48.

[74] Land Title Act (Qld), s 180.

[75] *Tara* (n 31).

[76] The position should be the same in the Northern Territory: Land Title Act 2000 (NT), s 183.

[77] This appeared to be original intent of Sir Robert Torrens: see Robert R Torrens, *A Handy Book on the Real Property Act of South Australia, Containing a Succinct Account of That Measure, Compiled from Authentic Documents, with Full Information and Examples for the Guidance of Persons Dealing; also, an Index to the Act* (Advertiser and Chronicle Offices 1862) 9. See also 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 MULR 460, 462.

[78] [1958] VR 273 (SC) 277 (Adam J).

that equitable title does not persist, can be distinguished on the ground that it concerned a bona fide purchaser for value.[79] That this distinction is rightly drawn finds support in the earlier case of *Rasmussen v Rasmussen*.[80] The plaintiff was the beneficiary of a block of land under a common intention constructive trust. When the constructive trustee died, the block of land became registered in the defendant's name under the former's will. Applying *King*, Coldrey J held that the plaintiff could recover the block of land from the defendant as the latter was a volunteer. Despite perfectly illustrating the approach suggested in this article,[81] it is unfortunate that the case, often appearing only in footnotes,[82] has not been accorded the attention it deserves.[83] The position ought to be the same in South Australia where the volunteer exception is also recognised.[84] Applying the approach suggested in this article, section 71(f) of the Real Property Act 1886 (SA) can be more broadly construed to allow the persistence of equitable title where the recipient is a volunteer. An overly cautious reading of the section, as suggested by some scholars, does not sufficiently account for the implication of the volunteer exception on the beneficiary's claim.[85] If this analysis is correct, then in these jurisdictions, B's attempt to recover the misdirected trust asset from a volunteer R can be achieved without having to argue knowing receipt, which is more difficult to establish than simply claiming on the strength of B's equitable title.

By comparing the two isolated groups of cases — one concerning the volunteer exception and the other concerning knowing receipt — based on where Greenacre is registered, the picture that emerges is one of consistency between the assumption that equitable title persists and the recognition of a volunteer exception. However, as the two groups of cases do not refer to each other, the degree of consistency might be purely coincidental. Nonetheless, by highlighting the correlation, it is hoped that the relationship between the two groups of cases will receive more attention in both case law and academic literature.

Although this article takes the view that the notice provision impliedly recognises a volunteer exception, and that the notice provisions in the different states ought to be consistently interpreted due to their common origin, the reality of the matter is that too much water has flowed under the bridge to insist on a uniform approach.[86] This is particularly so in jurisdictions where the legislature has intervened to reject a volunteer exception. Thus, instead of insisting on any correct answer, the more realistic approach would be to embrace the divergence and stress only the need for consistency in answering the questions of whether a volunteer acquires indefeasible title and whether equitable title persists. Such consistency is clearly observed in several states with the exception of New South Wales, where the ambiguity can be attributed to the failure of the High Court to provide a reasoned pronouncement on this

[79] *Sixty-Fourth Throne* (n 21).
[80] *Rasmussen* (n 33).
[81] See also O'Brien (n 48) 398–401.
[82] See Edgeworth, *Butt's Land Law* (n 3) 844; Moore, Grattan and Griggs (n 3) 249; Chambers, *An Introduction to Property Law in Australia* (n 57) 570; M W Bryan, V J Vann and S Barkehall Thomas, *Equity & Trusts in Australia* (2nd edn, CUP 2017) 350. The case was not even cited in Heydon, Leeming and Turner (n 4); Heydon and Leeming (n 7).
[83] While a more detailed summary of the case was set out in Edgeworth and others (n 3) 467–69, its significance on the question of persistence of equitable title was not specifically stressed.
[84] *Biggs v McEllister* (1880) 14 SALR 86 (SC); *Peck v Peck* [2010] SASC 258.
[85] See, eg, Hunter (n 34) 210–11.
[86] cf Douglas J Whalan, *The Torrens System in Australia* (Lawbook 1982) 336; Radan (n 48).

issue. But if one accepts that either position — to recognise or not to recognise a volunteer exception — can be justified, then in light of the divergent positions across the different states, it is natural to also expect the question of whether equitable title persists to generate no uniform answer.[87] Professor Harrison's statement is therefore as much an over-generalisation as the general assumption that equitable title does not persist.

Even in jurisdictions that recognise a trust exception, the question remains as to whether the registered title of every volunteer is defeasible. In this regard, the Torrens system in Singapore adopts an interesting approach from which interesting insights might be drawn for the development of Australian law.

VIII Baalman's Torrens system in Singapore

Almost a century after its inception, the Torrens system of land titles registration was introduced into Singapore in 1956.[88] The Land Titles Ordinance 1956 (Singapore) was modelled after the Real Property Act 1900 (NSW). Its drafter, John Baalman, was a barrister and Examiner of Titles in the Office of the Registrar General in New South Wales. He was also a keen writer on land law.[89] Drawing on the wealth of Antipodean experience, particularly from New South Wales, Baalman took the opportunity to dispel uncertainties which arose from diverging interpretations of earlier Torrens statutes. Given Baalman's personal opinions and vision of the Torrens system, which did not always align with the then prevailing judicial opinions, it is interesting to see how the original Australian position compares to the modified Singaporean position, particularly in accommodating B's claim against R.

The legislation in force today is the Land Titles Act 1993 (Singapore),[90] which is materially identical to its predecessor, the Land Titles Ordinance 1956 (Singapore). The paramountcy provision, which is to be found in section 46(1), is worded in much the same way as the New South Wales equivalent.[91] But an interesting feature of the Land Titles Act 1993 (Singapore) is that a trust exception is expressly provided for. Section 46(2)(c) states that, notwithstanding the principle of indefeasibility, a plaintiff is allowed 'to enforce against a proprietor who is a trustee the provisions of the trust'.[92] Thus, while recent Singapore cases have expressed caution over the admissibility of in personam exceptions, in so far the enforcement of trust is concerned the issue turns mainly on the interpretation of section 46(2)(c). To date, however, the only discussion relating to section 46(2)(c) has been whether it applies only to express trusts or extends also to trusts imposed by law.[93] With respect, this is

[87] Bryan, Vann and Barkehall Thomas (n 82) 350; Moses (n 19) 143–44.
[88] Land Titles Ordinance 1956 (Singapore) (Ordinance 21 of 1956).
[89] See John Baalman, *The Torrens System in New South Wales* (Lawbook 1951); John Baalman, 'Approach to the Torrens System' (1956) 2 Syd LR 87.
[90] (Singapore, cap 157, 2004 rev ed) (originally No 27 of 1993).
[91] On the interpretation of the paramountcy provision, see Kelvin F K Low, 'The Story of "Personal Equities" in Singapore: Thus Far and Beyond' [2009] Sing JLS 161, 167–69.
[92] The trust exception had been included from the very beginning: Land Titles Ordinance 1956 (Singapore), s 28(2)(c).
[93] In *Bebe* (n 42) [81], the Singapore Court of Appeal expressed the observation that its language appears to refer only to express trusts and not constructive trusts. However, in *Loo Chay Sit v Estate of Loo Chay Loo* [2010] SGCA 47, [2010] 1 SLR 286 [14]–[15], the same Court suggested that the resulting trust fell within section 46(2)(c), thus contradicting the earlier case on the scope of the section. On this debate, see Teo Keang Sood, 'The

to frame the issue too narrowly. Even if section 46(2)(c) is reworded to make explicit reference to trusts imposed by law,[94] all this does is to confirm that B may enforce the trust against T regardless of the type of trust in issue. Such a claim, not being based on prior title, does not offend the principle of indefeasibility.

Whether B may recover Greenacre from R is a separate and more difficult question. Interestingly, despite expressly providing for a trust exception, the Land Titles Act 1993 (Singapore) continues to retain a notice provision in section 47, which is *in pari materia* with section 43(1) of the Real Property Act 1900 (NSW). As suggested earlier, however, the apparent inconsistency can be ironed out if the notice provision is interpreted purposively such that its application is limited to registered purchasers. By focusing on the connection between the doctrine of notice, which the notice provision seeks to abolish, and the bona fide purchase defence, it can be deduced that the provision applies only to enhance the protection of registered purchasers. From this it may also be inferred that registered volunteers are not afforded the same degree of protection. In this regard, it is interesting to note that Baalman was well known for his opinion that registered volunteers do not always acquire indefeasible title as registered purchasers do.[95] This view was codified by the inclusion in the Land Titles Ordinance 1956 (Singapore) of a volunteer exception to indefeasibility of registered title.[96] The equivalent provision in the Land Titles Act 1993 (Singapore), section 46(3), reads: 'Nothing in this section shall confer on a proprietor claiming otherwise than as a purchaser any better title than was held by his immediate predecessor'. In his commentary of the Land Titles Ordinance 1956 (Singapore), Baalman explained that this legal framework was premised on the idea that the Torrens system is 'predominantly a purchaser's system' primarily aimed at facilitating land transactions by removing associated risks faced by purchasers.[97] A volunteer who provides no value is not exposed to the same risks. Importantly, from its prefacing words, it is clear that section 46(3) does not operate to *exclude* registered volunteers from the full protection of the principle of indefeasibility. Instead, the rule is stated in negative terms to *clarify* that nothing in the Land Titles Act 1993 (Singapore), including sections 46(1) and 47, has the effect of extending the full protection of indefeasibility to registered volunteers. This presupposes that the Real Property Act 1900 (NSW), after which the Land Titles Act 1993 (Singapore) was modelled, is not on its terms sufficiently broad to confer indefeasible title on a registered volunteer.[98] Also relevant is the definition of a purchaser in section 4(1): 'a person who, in good faith and for valuable consideration, acquires an estate or interest in land'. That absence of notice is omitted from the definition is consistent with the notice provision in section 47, which in turn supports the view that the latter applies only if a registered purchaser is concerned.

Trust Statutory Exception to Indefeasibility in the Singapore Torrens System' [2017] Sing JLS 151; Barry C Crown, 'Back to Basics: Indefeasibility of Title under the Torrens System: *United Overseas Bank Ltd v Bebe bte Mohammad*' [2007] Sing JLS 117, 124–26; Tang Hang Wu, 'The Constructive Trust in Singapore: Five Persistent Puzzles' (2010) 22 SAcLJ 136, 162–64.

[94] cf Real Property Act 1886 (SA), s 71(f) (discussed above).

[95] Baalman, *The Torrens System in New South Wales* (n 89) 149–50.

[96] Land Titles Ordinance 1956 (Singapore), s 28(3).

[97] John Baalman, *The Singapore Torrens System: being a commentary on the Land Titles Ordinance 1956 of the State of Singapore* (Lee Kim Hang 1961) 86. See also Douglas Pike, 'Introduction of the Real Property Act in South Australia' (1961) 1 Adel L Rev 169.

[98] cf *Bogdanovic* (n 67).

Importantly, Baalman already had a clear idea of how the volunteer exception would interact with the trust exception. In his commentary, he said that the trust exception may be invoked 'against a proprietor who is their trustee; or against a volunteer claiming through him'.[99] The first part of the statement refers to B's claim against T, whereas the second part refers to a claim by B against R. But even if the trust exception were omitted, it is clear that B's claim against a volunteer R would succeed by invoking the volunteer exception. While this issue has not arisen for consideration by the Singapore courts, a careful reading of the existing body of case law reveals consistency with Baalman's framework.

The facts of *Ho Kon Kim v Lim Gek Kim Betsy*[100] are particularly helpful in illustrating the difference between B's claim against T and B's claim against R. Ho entered into an agreement to sell her land to Betsy for redevelopment. Under the agreement, Betsy was to pay Ho S$4.2 million, obtain subdivision of the land into three lots and retransfer an earmarked lot with a completed house to Ho.[101] After the land was transferred to Betsy, it was mortgaged to Overseas Chinese Banking Corp (OCBC) for securing an overdraft facility to finance the construction work. In recognition of Ho's interest, OCBC agreed to grant an unconditional discharge of the mortgage over earmarked lot upon successful subdivision of the land. The dispute arose when Betsy, without Ho's knowledge, remortgaged the land to RHB Bank Bhd (RHB). Although RHB agreed to take the mortgage on essentially the same terms as the OCBC mortgage, it later sought to exercise its power of sale free of Ho's interest when Betsy defaulted on repayments. The Singapore Court of Appeal accepted that, at the point the sale was completed, Betsy held a one-third share in the land on trust for Ho.[102] The trust was enforceable by virtue of the trust exception in section 46(2)(c) of the Land Titles Act 1993 (Singapore).[103] Although the Court did not elaborate, this is clearly a straightforward example of a claim by B against T. As Ho's equitable title arose simultaneously with the registration of Betsy as the new owner, Ho's claim was not premised on the existence of a prior title which the principle of indefeasibility abhors. Interestingly, this was the only reference to the trust exception in the entire judgment. The Court rejected Ho's claim against RHB on the ground that RHB's repudiation of its promise to preserve Ho's interest was not dishonest and hence did not constitute fraud.[104] However, the Court held that RHB's conduct was unconscionable and this gave rise to a constructive trust of the kind recognised in *Bahr v Nicholay (No 2)*.[105] This was justified not by invoking the trust exception but by recognising the claim as an in personam exception.[106]

Later, in the landmark case of *United Overseas Bank Ltd v Bebe bte Mohammad*, the Singapore Court of Appeal expressed disagreement with the finding of a constructive trust in *Betsy*,[107] even going as far as to suggest that 'the decision in *Betsy* would have to be

[99] Baalman, *The Singapore Torrens System* (n 97) 85.
[100] [2001] SGCA 62, [2001] 3 SLR(R) 220 (*Betsy*).
[101] ibid; noted in Barry C Crown, 'Equity Trumps the Torrens System: *Ho Kon Kim v Lim Gek Kim Betsy*' [2002] Sing JLS 409.
[102] Although the Court did not specify, this is like an express trust.
[103] *Betsy* (n 100) [25]–[29].
[104] ibid [49].
[105] *Bahr* (n 35).
[106] *Betsy* (n 100) [47]–[48].
[107] The question of whether the Torrens system could accommodate in personam exceptions is beyond the scope of this article.

reconsidered for consistency with the policy of the [Land Titles Act 1993 (Singapore)]'.[108] However, the Court regarded the outcome in *Betsy* to be correct either because RHB's conduct was fraudulent or because RHB had undertaken to hold one-third of the land on an express trust for Ho.[109] But neither solution is particularly convincing.[110] The fraud solution is doubtful not only because the Court in *Betsy* did not make a finding of dishonesty but also because it sidestepped the question of whether the fraud exception applies only to fraud in obtaining registration.[111] The trust analysis is also unpersuasive as the facts did not reveal any clear intention on the part of RHB to create a trust for Ho and, even if there were, the formality requirements were not satisfied.[112] But even in light of the disagreement, both decisions share the assumption that Ho's equitable title under the earlier express trust (of which Betsy was the original trustee) did not bind RHB. Had it been otherwise, it would have been unnecessary to argue that RHB was fraudulent, that RHB had declared an express trust in Ho's favour, or that a constructive trust arose from RHB's unconscionable conduct.[113] Although both decisions were silent on this point, the simple explanation is that RHB, being a registered purchaser, was donned with the full armour of indefeasibility. Therefore, even though the Land Titles Act 1993 (Singapore) expressly provides for a trust exception, compliance with Baalman's framework demands that it should not be invoked to allow an equitable ownership claim against the registered purchaser.

In contrast, registered volunteers are not afforded the same degree of protection. In *Mahidon Nichiar bte Mohd Ali v Dawood Sultan Kamaldin*, a rare instance where section 46(3) of the Land Titles Act 1993 (Singapore) was invoked, the Singapore Court of Appeal held that, on account of the fact that the defendant was a volunteer, he was not allowed to assert indefeasibility of title by relying on section 46(1)[114] nor to argue that that the beneficiaries' claim could only succeed by proving fraud.[115] The high threshold for defeating a registered title set by the fraud exception simply does not apply to registered volunteers. This is true even if the volunteer is completely without fault. However, it is important to observe that section 46(3) does not say that the title of a volunteer is never indefeasible. Instead, applying something akin to the *nemo dat quod non habet* rule, the volunteer's title is only as good as that of his predecessor in title. Assuming that R is a volunteer, the reason why B could recover Greenacre from R is because R's title is only as good as T's, and T's title is defeasible under the trust exception. Suppose R then sells Greenacre to R2, a bona fide purchaser. The registration of R2 as owner would have validating effect, which clears away the imperfection in R's title. Thus, if R2 later donates Greenacre to R3, a volunteer, R3 acquires the same indefeasible title that R2 had. As the slate has already been wiped clean, whether R3 has notice of T's breach of trust is irrelevant. This is to be contrasted with the position in South Australia where a trust exception

[108] *Bebe* (n 42) [77]. As *Bebe* concerned an entirely different set of facts, what the Court said was strictly obiter dicta. However, *Bebe* has been subsequently regarded to be the more authoritative decision: see, eg, *Sim Lian (Newton) Pte Ltd v Gan Beng Chye Raynes* [2007] SGHC 84.
[109] *Bebe* (n 42) [73], [76]–[77], [81].
[110] See Low, 'The Story of "Personal Equities" in Singapore' (n 91) 176–77.
[111] See *Bahr* (n 35), where Wilson and Toohey JJ defined fraud narrowly (at 636–37) while Mason CJ and Dawson J preferred a broader definition (at 615–16).
[112] Low, 'The Story of "Personal Equities" in Singapore' (n 91) 176–77.
[113] See also discussion of *Tara* (n 31) (Part IV above).
[114] [2015] SGCA 36, [2015] 5 SLR 62 [131]–[135].
[115] ibid [131].

is also expressly provided for and a volunteer exception judicially recognised. Since the volunteer exception has been stated in unqualified terms, it is likely that the only relevant question is whether R3 is a volunteer. If R3 is a volunteer, his or her title is defeasible by B. Under this model, the fact that R2 is a bona fide purchaser does not have the effect of wiping the slate clean for R3.[116]

This conveniently leads to us to the question of how Baalman's Torrens system departs from the priority rules under the general law. We have seen that while an equitable ownership claim will surely fail if the recipient is a registered purchaser, it does not follow that the claim will succeed against every registered volunteer. A registered volunteer who acquires title from a registered purchaser similarly obtains the indefeasible title. In contrast, under the general law, a volunteer R is automatically bound by B's equitable title since the bona fide purchase defence does not apply. Thus, Baalman's Torrens system goes further than the general law in protecting the volunteer's security of receipt. Turning to the position of purchasers, it has been explained earlier that the defence of bona fide purchase is given enhanced scope under the Torrens system, thus availing the benefit of indefeasibility to a wider group of registered purchasers. For consistency with the fraud exception, which sets a high threshold for defeating a registered title, the term 'good faith' in section 4(1) has to be broadly interpreted so as to mean absence of fraud.[117] In other words, a purchaser is to be regarded as having acted in good faith unless he or she has committed fraud.[118] Since mere notice of an existing trust is not fraud, a purchaser having such notice can still be regarded as having acted in good faith, and is therefore donned with the armour of indefeasibility. In contrast, under the general law, notice of the trust may indicate lack of good faith, thus denying the purchaser of a defence.[119]

From these discussions, it is clear that a viable solution to B's predicament is more than just expressly providing for a trust exception. Were it so straightforward, one would expect the trust exceptions in South Australia and Singapore to be more widely applied instead of being subjected to cautious treatment. The worry is that, in the absence of any straightforward way of reconciling the trust exception and the notice provision, a broad interpretation of the former wound unduly undermine the principle of indefeasibility. In this regard, the explicit inclusion of a volunteer exception by Baalman provided the crucial impetus for extending the trust exception to allow a claim against R in the appropriate circumstances. The examination of Singapore law also draws attention to the different forms a volunteer exception can take. The obvious attraction of Baalman's variant of the volunteer exception is that it is less intrusive on the principle of indefeasibility, allowing even registered volunteers to acquire indefeasible title in certain situations.

IX Conclusion

[116] cf *Wilkes v Spooner* [1911] 2 KB 473 (CA).
[117] Tan Sook Yee, Tang Hang Wu and Kelvin F K Low*, Tan Sook Yee's Principles of Singapore Land Law* (3rd edn, LexisNexis 2009) 307.
[118] See also *United Overseas Finance Ltd v Sakayamary* [1996] SGHC 98, [1996] 2 SLR(R) 20 (where absence of good faith was equated with fraud).
[119] For the view that good faith and lack of notice are closely linked, see McGhee (n 5) 65; Harpum, Bridge and Dixon (n 47) 260.

The right of a beneficiary to assert his equitable title against the recipient of a misdirected trust asset, which is well established in equity, has important and far-reaching implications. In so far as the recovery of the trust asset is concerned, the claim succeeds against all recipients except where he or she is a bona fide purchaser for value without notice of the trust. Importantly, the right is premised on the strength of the equitable title alone; there is no additional requirement that the recipient be shown to be have acted dishonestly or fraudulently. Beyond recovery of trust assets, the beneficiary's right also serves as a springboard for claiming compensation or account of profits on the ground of knowing receipt.[120]

However, where the trust asset consists of, or becomes invested in, registered land, whether such claims could succeed has been put to doubt on the basis that they would undermine the indefeasibility of registered title. This article observes that the alleged conflict between the beneficiary's claim and the principle of indefeasibility is often overstated. Recent cases which suggest that the beneficiary's claim would fail all involved registered *purchasers* of misdirected trust assets, who are unquestionably protected by the principle of indefeasibility. These cases do not directly address the question of whether the recipient will be equally protected if he or she is a registered *volunteer*. Interestingly, there are older cases where the beneficiary was allowed to recover misdirected trust asset from a volunteer recipient, thus suggesting that volunteers are not protected in the same way as purchasers are.

The chief obstacle to reconciling the cases on the basis of the volunteer–purchaser distinction is undoubtedly the notice provision, which is commonly understood to forbid the beneficiary's claim absolutely. But this overlooks the relationship between the doctrine of notice (which the notice provision seeks to abolish) and the defence of bona fide purchase (which can only be invoked by a purchaser). If the purpose of the notice provision is only to enhance the bona fide purchase defence, which is irrelevant to a volunteer, then it is easy to see why it does not have the effect of preventing the beneficiary from claiming against a volunteer. The Torrens legislation in Singapore, which explicitly sets out both trust and volunteer exceptions, provides a clear illustration of how the two issues are tied to one another. The limitation of this preferred analysis, however, is that it is premised on the recognition of a volunteer exception. Although the different Torrens legislations share a common origin, the volunteer exception has not received uniform recognition across the different Torrens jurisdictions. The divergence is conveniently summarised in the table below:

Jurisdiction	Trust exception	Volunteer exception
Australian Capital Territory	—	—
New South Wales	—	No
Northern Territory	—	No
Queensland	—	No
South Australia	Yes	Yes
Tasmania	—	—
Victoria	—	Yes
Western Australia	—	No

[120] Moses (n 19) 146: '"Knowing receipt" cannot ... be extended to a situation where the plaintiff retains no equitable interest or where the defendant's interest has priority.'

Singapore	Yes	Yes

The result of this incoherence is that there is an element of luck in the beneficiary’s claim. The success of the claim will depend largely on where the disputed property is located, or more specifically, on the applicable Torrens legislation. In failing to pay sufficient attention to the divergence between the different Torrens legislations, existing case law and academic literature give the misleading impression that there is only one answer to whether a beneficiary’s equitable title persists to bind a third-party recipient of misdirected trust asset. This would be to fall into the trap of over-generalisation.