SUPREME COURT OF QUEENSLAND

CITATION:	*White v Tomasel & Anor* [2004] QCA 89
PARTIES:	**PAUL WILLIAM WHITE** (applicant/appellant) **v** **RICKY BRUNO TOMASEL** **HEIDI RENEE TOMASEL** (respondents/respondents)
FILE NO/S:	Appeal No 4281 of 2003 DC No 125 of 2003
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	District Court at Southport
DELIVERED ON:	2 April 2004
DELIVERED AT:	Brisbane
HEARING DATE:	3 March 2004
JUDGES:	Davies and Williams JJA and McMurdo J Separate reasons for judgment of each member of the Court, Williams JA and McMurdo J concurring as to the orders made, Davies JA dissenting
ORDERS:	**1. Appeal allowed to the extent of setting aside the orders of 31 March 2003 and 12 May 2003** **2. Respondents are to pay the costs of the applications heard on 31 March 2003 and 12 May 2003 and also the costs of the appeal** **3. The making of further consequential orders by this court is adjourned until after a trial determining the agent's authority to sell the property on 16 January 2003 for $182,000** **4. The application filed 19 March 2003 is to be treated as a claim brought by the respondents seeking orders establishing the existence of the contract on which they rely and specific performance of it** **5. The respondents are to file and serve a statement of claim in that proceeding within 28 days of the order of this court and thereafter steps are to be taken in accordance with the *Uniform Civil Procedure Rules* 1999 (Qld)**
CATCHWORDS:	CONVEYANCING – RELATIONSHIP OF VENDOR AND PURCHASER – VENDOR AND PURCHASER SUMMONS: SUMMARY PROCEDURE – where auctioneer

signed contract of sale of land as agent for appellant – where appellant denies he gave authority to auctioneer to sell land at that price – where respondents applied for orders directing appellant to comply with obligations under contract – where learned primary judge made order under s 70 *Property Law Act* 1974 (Qld) – whether issue was a question affecting existence or validity of contract – whether learned primary judge was entitled to make orders that he did

CONVEYANCING – LAND TITLES UNDER THE TORRENS SYSTEM – INDEFEASIBILITY OF TITLE: CERTIFICATE AS EVIDENCE – EXCEPTIONS – GENERALLY – where contract was ordered to be executed by Registrar on behalf of appellant – where respondents have registered title of land – whether indefeasibility of title prevents a court from ordering reconveyance of land to appellant

Land Title Act 1994 (Qld), s 184, s 185
Property Law Act 1974 (Qld), s 70
Uniform Civil Procedure Rules 1999 (Qld), r 296

Bahr v Nicolay [No 2] (1988) 164 CLR 604, considered
*Barnes v Addy (*1874) LR 9 Ch App 244, considered
Barry v Heider (1914) 19 CLR 197, considered
Boulas v Angelopoulos (1991) 5 BPR 11,477, cited
Breskvar v Wall (1971) 126 CLR 376, considered
C N and N A Davies Ltd v Laughton [1997] 3 NZLR 705, considered
Commissioner for Railways (New South Wales) v Cavanough (1935) 53 CLR 220, cited
Duncan v McDonald [1997] 3 NZLR 669, considered
Frazer v Walker [1967] 1 AC 569, considered
Garofano v Reliance Finance Corporation Pty Ltd [1992] NSW ConvR ¶ 55-560, cited
Gibbs v Messer [1891] AC 248, cited
Grgic v Australian and New Zealand Banking Group Ltd (1994) 33 NSWLR 202, cited
LHK Nominees Pty Ltd v Kenworthy (as administratrix of the Estate of Lionel Kenworthy) & Another (2002) 26 WAR 517, considered
Macquarie Bank Ltd v Sixty-Fourth Throne Pty Ltd [1998] 3 VR 133, considered
Mercantile Mutual Life Insurance Co Ltd v Gosper (1991) 25 NSWLR 32, considered
National Australia Bank Ltd v Bond Brewing Holdings Ltd [1991] 1 VR 386, cited
Pyramid Building Society (in liquidation) v Scorpion Hotels Pty Ltd [1998] 1 VR 188, cited
Roxburgh v Rothmans of Pall Mall (2001) 208 CLR 516, cited
Story v Advance Bank Australia (1993) 31 NSWLR 722, considered

Taylor v Taylor (1979) 143 CLR 1, cited
The Commonwealth v McCormack (1984) 155 CLR 273, cited
Vassos v State Bank of South Australia [1993] 2 VR 316, considered
Wright v Madden [1992] 1 Qd R 343, cited

COUNSEL: The appellant appeared on his own behalf
J J G Hitchcock (sol) for the respondents

SOLICITORS: The appellant appeared on his own behalf
Primrose Couper Cronin Rudkin (Southport) for the respondents

[1] **DAVIES JA:** For the purpose of these reasons I accept the statement of the relevant facts set out in the reasons of Williams JA. However I shall say something further about facts or inferences which may be drawn from facts relevant to the defence by the respondents that their title to the subject land is indefeasible as against the appellant.

[2] Like Williams JA, I am of the view that the orders made by Judge Hall were orders which his Honour had no power to make and that, subject to the respondents' claim to indefeasibility, this Court could set aside those orders. Whether it would do so, at this stage, again subject to that claim, would depend, in my opinion amongst other things, upon the appellant's prospects of proving that the auctioneer had neither actual nor ostensible authority to sell the land to the respondents. But there is no point in considering those matters further if, as seems to me to be the case, the respondents now have indefeasible title.

[3] There are, I think, some inferences which should be drawn from the known facts. First, at the end of the auction at which the subject land was knocked down to them as the highest bidders, the respondents believed that they had purchased that land unconditionally. That much may be inferred from the apparent regularity of the sale and their subsequent conduct. Even if I were wrong in thinking that, there is no reason to conclude that they had any other belief. Nor do I think that such a belief was other than reasonable.

[4] Secondly, though they subsequently heard that the appellant contended that the auctioneer had no authority to sell at the price at which he knocked it down to the respondents, they appeared to maintain that belief. Again that may be inferred from their subsequent conduct. And again, even if I were wrong in thinking that, there is no reason to conclude that they had any other belief. They may well have thought that the appellant's contention was a matter between him and the auctioneer.

[5] There was a finding by Judge Wilson in his judgment of 12 May 2003 that there was no fraud or unconscionable conduct by the respondents in doing what they had done to that date.

[6] Thirdly, having obtained in their favour the orders of Judge Hall on 31 March 2003 and 2 June 2003 and the orders of Judge Wilson of 12 May 2003 and 7 July 2003, they plainly assumed that they were entitled to become registered as owners of the subject land. There is no reason to think that anything said in his reasons for judgment by Judge Wilson or any other facts persuaded them, or even should have

persuaded them to the contrary. It was in those circumstances that they became registered.

[7] It follows that, not only was there no fraud on the part of the respondents in becoming registered, but there was also no unconscionability on their part in doing so. Nor was there any other act of the respondents which made it unconscionable of them to procure registration in their names or to remain as registered proprietors.

[8] If the appellant's agent had no authority to sell to the respondents at the price at which he did, the contract of sale was voidable at the option of the appellant. And if that were so, and the appellant had brought proceedings against the agent and the respondents before registration, the appellant would have been entitled to avoid the contract and to obtain orders consequential upon that avoidance including restraining the respondents from becoming registered. Moreover, until that question of the agent's authority had been determined, the appellant would have been entitled to an interlocutory injunction restraining such registration. However these rights would have rested, not on the fact that judicial power was exercised erroneously, but on the voidability of a contract entered into by an agent without authority. There would have been no point in making such orders, and consequently such orders would not have been made, on the basis of erroneous exercise of judicial power if, contrary to the appellant's contention, the agent had authority to sell to the respondents and the respondents were therefore entitled to specific performance of the contract.

[9] As I shall endeavour to show a little later, the rights and remedies of the appellant before registration would in all relevant respects have been similar to the rights of a vendor whose transfer had been procured by fraud of a third party or had been forged by a third party. In the first of those cases the transfer would have been voidable. In the second it would have been void. In both cases the original proprietor, before registration, would have been entitled, on prima facie proof of fraud or forgery, as the case may be, to restrain an innocent purchaser from registering the transfer and, after proof of fraud or forgery, to have the transfer set aside or, in the latter case, declared to be a nullity.

[10] Section 184(3)(b) of the *Land Title Act* 1994 provides for an exception to indefeasibility in the case of fraud by the registered proprietor. Fraud in this section means actual dishonesty[1] and there is no hint of dishonesty by the respondents in this appeal. It is therefore unnecessary to consider that exception further. Section 185(1)(a) then provides:

> "(1) A registered proprietor of a lot does not obtain the benefit of section 184 for the following interests in relation to the lot −
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> (a) an equity arising from the act of the registered proprietor;
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> … "

The benefit of s 184, referred to in that provision is the benefit which a registered proprietor has of holding his interest subject to registered interests affecting the lot but free from all other interests: s 184(1).

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1 *Bahr v Nicolay [No 2]* (1988) 164 CLR 604 at 613 - 614, 630, 632.

[11] Section 185(1)(a) was not intended to do more than state the existing law.[2] Accordingly it is appropriate to look at the previous law with respect to the meaning of this exception. In doing so, it should be noted that this exception had been implied on the basis that the enforcement of such an equity involved no conflict with the indefeasibility provisions of the relevant legislation.

[12] I start with the much quoted passage from the judgment of Isaacs J in *Barry v Heider*.[3] His Honour there said of land transfer Acts:

> "They have long, and in every State, been regarded as in the main conveyancing enactments, and as giving greater certainty to titles of registered proprietors, but not in any way destroying the fundamental doctrines by which Courts of Equity have enforced, as against registered proprietors, conscientious obligations entered into by them."

I emphasize that his Honour appeared to restrict the exception to the enforcement of conscientious obligations entered into by the registered proprietor.

[13] The principle was put in more general terms by the Privy Council in *Frazer v Walker*[4] but in *Breskvar v Wall*[5] Barwick CJ, who was a member of the judicial committee in *Frazer*, said:

> "Proceedings may of course be brought against the registered proprietor by the persons and for the causes described in the quoted sections of the Act or by persons setting up matters depending upon the acts of the registered proprietor himself."

Here his Honour limited the exception to matters which depend on some act of the registered proprietor.[6]

[14] *Bahr v Nicolay [No 2]*[7] is by far the most authoritative decision on this question being the only decision of the High Court based on this exception. Its relevant facts may be briefly stated.

[15] The Bahrs were the registered proprietors of land which, in order to raise funds for its development, they sold to Nicolay. The contract provided that Nicolay would lease the land back to the Bahrs for three years and that, upon the expiration of that lease, he would re-sell the land to the Bahrs for $45,000. Nicolay then sold the land to the Thompsons upon terms which included a provision by which the Thompsons acknowledged the existence of the re-purchase provision. After the Thompsons had become registered they told the Bahrs that they recognized the re-purchase clause and would agree to sell to them according to its terms. They later refused to sell.

[16] Mason CJ and Dawson J in their joint judgment held that the Thompsons' conduct came within the fraud exception. In doing so they concluded that fraud included fraud after as well as before registration, a conclusion which, it may be argued, was inconsistent with previous authority. However it is unnecessary to consider that question further.

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2 *Land Title Act* 1994 s 3; Law Reform Commission Report No 40, "Consolidation of the Real Property Acts", March 1991, Commentary to section 115.

3 (1914) 19 CLR 197 at 213.

4 [1967] 1 AC 569 at 585.

5 (1971) 126 CLR 376 at 384 - 385.

6 As s 185(1)(a) does expressly.

7 (1988) 164 CLR 604.

[17] Wilson and Toohey JJ, in a joint judgment and Brennan J in a separate judgment decided that the Thompsons were obliged to reconvey to the Bahrs because the Thompsons' conduct, in acknowledging in the contract under which they purchased the land the Bahrs' right to repurchase, and in undertaking, after they became registered, to sell to the Bahrs in accordance with the re-purchase agreement, made it unconscionable of them to retain the land freed of that right.

[18] Wilson and Toohey JJ said:[8]

> "By taking a transfer of lot 340 on that basis, and the appellants' interest under cl. 6 constituting an equitable interest in the land, the second respondents became subject to a constructive trust in favour of the appellants: *Lyus v. Prowsa Developments Ltd*. …; *Binions v. Evans* … . If it be the position that the appellants' interest under cl. 6 fell short of an equitable estate, they none the less had a personal equity enforceable against the second respondents. In either case ss. 68 and 134 of the Act would not preclude the enforcement of the estate or equity because both arise, not by virtue of notice of them by the second respondents, but because of their acceptance of a transfer on terms that they would be bound by the interest the appellants had in the land by reason of their contract with the first respondent."

Their Honours implicitly made the point that mere notice of the appellants' interest would not have bound the second respondents, the Thompsons. That is in accordance with orthodox principle.

[19] Brennan J said:[9]

> "A registered proprietor who has undertaken that his transfer should be subject to an unregistered interest and who repudiates the unregistered interest when his transfer is registered is, in equity's eye, acting fraudulently and he may be compelled to honour the unregistered interest. A means by which equity prevents the fraud is by imposing a constructive trust on the purchaser when he repudiates the unregistered interest. That is not to say that the registration of the transfer to such a proprietor is affected by such fraud as may defeat the registered title: the fraud which attracts the intervention of equity consists in the unconscionable attempt by the registered proprietor to deny the unregistered interest to which he has undertaken to subject his registered title."

[20] Thus in both judgments it was the unconscionable denial by the Thompsons of the Bahrs' right, after they had acknowledged its existence and undertaken to honour it, which attracted this exception. They were "in equity's eye, acting fraudulently". And where s 185(1)(a) speaks of "an equity arising from the act of the registered proprietor" it is speaking of an act of the registered proprietor which makes it unconscionable of that registered proprietor to deny an unregistered, or in this case no longer registered, right or interest. That is also the way in which this exception has been subsequently construed in decisions of intermediate appellate courts in Australia and in decisions of the New Zealand Court of Appeal.

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8 At 638 - 639.

9 At 654.

[21] In *Vassos v State Bank of South Australia*[10] in which a claim for a personal equity under the implied exception was refused, Hayne J made some remarks which were subsequently quoted with approval in a number of cases.[11] His Honour said:[12]

> "As Mahoney J.A. points out in *Gosper's Case* there has been no comprehensive definition of 'personal' equity for these purposes: at p. 45. Again as his Honour points out it may be possible to discern in the authorities two suggestions about the content of the expression 'personal equity' in this context: that the interest must not be inconsistent with the terms or policy of the legislation and that 'personal' equities arise only from acts of the new owner: at p. 45; *Breskvar v. Wall*, at pp. 384 - 5. **However whatever the limits may be on such 'personal' equities the very language used to describe the right and the reference to the remedies being '*in personam* remedies' is a clear reference to the remedies being available in circumstances where equity would act, i.e., in cases which equity would classify as unconscionable or unconscientious.** In the present case, for reasons to which I will refer later, it may well be that the bank did not act without neglect but there is [sic] my view no material which would show that the bank acted unconscionably. There was no misrepresentation by it, no misuse of power, no improper attempt to rely upon its legal rights, no knowledge of wrongdoing by any other party."

[22] In *Story v Advance Bank Australia*[13] the New South Wales Court of Appeal rejected a contention that a registered proprietor's indefeasibility was defeated by the implied exception. Gleeson CJ[14] quoted with approval and applied a passage from the judgment of Hayne J in *Vassos* which included the above passage. His Honour then concluded:[15]

> "Even if the … [registered proprietor] had been shown to have failed to make adequate investigation of what was going on within the company, **that does not produce the result that it is against [the] conscience for the Bank to rely upon its statutory rights.**"

[23] Mahoney JA said:[16]

> "In *Mercantile Mutual Life Insurance Co Ltd v Gosper*, I considered the significance for this purpose of the fact that the registered proprietor became registered by reason of a forged instrument. There are, of course, some cases in which this will result in the old registered proprietor having a personal equity against the new registered proprietor. Thus, if the new registered proprietor is the person who forged the document and caused a transfer of the title to himself, that will ordinarily mean that the old registered proprietor acquired a personal equity to restore the status quo. **That will, it would appear, arise because what would be involved in such a**

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10 [1993] 2 VR 316.
11 In particular, *Story* fn 13, *Pyramid Building Society* fn 21, *Macquarie Bank Ltd* fn 22.
12 At 333.
13 (1993) 31 NSWLR 722.
14 At 736.
15 At 737.
16 At 739 - 740.

> **situation would constitute unconscientious behaviour on the part of the new registered proprietor.** …
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> …
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> The new registered proprietor is not the person who has, in the relevant sense, brought about the transaction [which was in fact a forgery] and whose conduct is, for that reason, unconscientious. In *Mercantile Mutual Life Insurance Co Ltd v Gosper*, and in this case the new registered proprietor is a person prima facie an innocent third party."

[24] In *Grgic v Australian and New Zealand Banking Group Ltd*[17] Powell J, in a judgment with which Meagher JA and Handley JA agreed, referred to *Vassos* for the proposition that unconscionable conduct on the part of the registered proprietor is necessary for the personal equity to arise.[18] He also expressed the view that the expressions "personal equity" and "right in personam" encompassed only known legal causes of action or equitable causes of action, albeit that the relevant conduct which must be relied upon to establish a personal equity extends to include conduct not only of the registered proprietor but also of those for whose conduct he is responsible.[19] That view had been earlier expressed by Meagher JA, with whom Priestley JA had agreed, in *Garofano v Reliance Finance Corporation Pty Ltd*.[20] Indeed his Honour said that he could not see what the expression was meant to cover except known legal causes of action (for example, deceit) and known equitable causes of action (for example, undue influence).

[25] The Victorian Court of Appeal in *Pyramid Building Society (In liquidation) v Scorpion Hotels Pty Ltd*,[21] in a judgment delivered by Hayne JA, also followed *Vassos* and *Grgic* in these respects. A differently constituted Court of Appeal also accepted these principles in *Macquarie Bank Ltd v Sixty-Fourth Throne Pty Ltd*.[22] In the course of his reasons in that case Ashley AJA said:[23]

> "The principle extends to known legal and equitable causes of action. It focuses upon the conduct of the registered proprietor and also those for whose conduct he is responsible. That conduct might ante date or post date registration of the pertinent dealing. Further, it can probably be said that the conduct must be such as should be described as unconscionable or unconscientious, as those words are now understood in the law. But that is not to say that conduct which merits such a description will give rise to an in personam right in the absence of a known legal or equitable cause of action. There is substantial authority to the contrary."

[26] The most recent appellate decision in this country on this question is the decision of a five member Full Court of Western Australia in *LHK Nominees Pty Ltd v Kenworthy (as administratrix of the Estate of Lionel Kenworthy) & Another*.[24] On this question Murray J said:

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17 (1994) 33 NSWLR 202.
18 At 217.
19 At 222 - 223.
20 [1992] NSW ConvR ¶55-640.
21 [1998] 1 VR 188 at 195 - 196.
22 [1998] 3 VR 133.
23 At 162. See also Tadgell JA at 146 - 147 and Winneke P at 136.
24 (2002) 26 WAR 517.

> "It is necessary to identify a guiding principle and the matter is not to be decided merely by the application of judicial discretion and subjective views of fairness and justice. Nonetheless, **unconscionability is the term which has been used to describe the guiding principle involved and the content of the notion may vary according to the individual circumstances of particular cases**.
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> In my opinion, in a case such as this, the court would look for fraudulent conduct in the equitable sense so as to make it unconscientious that Lionel and those who take through him should enjoy the entirety of the proprietary rights in the … property. The ultimate impediment to the appellant succeeding was the failure to prove that, when Lionel took the transfer of the property, he knew it was at an undervalue of which the appellant, through its directors, was ignorant, so that he was taking unconscientious advantage of them."[25]

[27] Similarly Anderson and Steytler JJ said:

> "It consequently seems to us that the appellant is left in the situation in which it can only succeed in overcoming the indefeasibility of title obtained on registration of the conveyance to Mr Kenworthy if it proves the allegation in par 9.1 of the statement of claim that ' … Lionel Kenworthy … dishonestly procured … a breach of trust … ' or, perhaps, if it can make out some lesser form of unconscionability sufficient to give rise to a restitutionary claim."[26]

At little later their Honours said:

> "There remains only the question whether these circumstances were sufficient, in all of the other circumstances of the case, to amount to dishonesty or unconscionability on Mr Kenworthy's part."[27]

[28] Statements of principle in two New Zealand decisions should also be mentioned. In *C N and N A Davies Ltd v Laughton*[28] Thomas J in delivering the judgment of the Court of Appeal said:[29]

> "**The key element is the involvement in or knowledge of the registered proprietor in the unconscionable or illegal act or omission in issue.** It is such involvement or knowledge which gives rise to the equity or legal right in the innocent party as against the registered proprietor in person."

[29] And in *Duncan v McDonald*,[30] also a decision of the Court of Appeal, Blanchard J said, in delivering the judgment of the court:[31]

> "**Before a registered proprietor is susceptible to an in personam claim it must be shown that he or she has acted or is acting unconscionably in obtaining or taking advantage of the registered interest**, but the registered proprietor's conduct need not

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25 At 552.
26 At 557.
27 At 558 - 559.
28 [1997] 3 NZLR 705.
29 At 712.
30 [1997] 3 NZLR 669.
31 At 683 - 684.

> have involved actual dishonesty towards the in personam claimant. An attempt by the registered proprietor to enforce an interest knowingly obtained by his or her unlawful behaviour may be found to be unconscionable."

The emphasis in the above passages is mine.

[30] This brief survey of the cases demonstrates, in my opinion clearly, that, for an equity to arise from the act of the registered proprietor within the meaning of s 185(1)(a), some act of the registered proprietor must make it unconscionable of him or her to obtain or retain the registered interest free of the interest contended for.[32] It follows from what I said earlier that the respondents were, in every respect, innocent purchasers; or at least it cannot be said on the evidence, or even on the appellant's contentions, that they were not. To adopt the language of Hayne J[33] in *Vassos*, there was no misrepresentation by them, no misuse of power, no improper attempt to rely upon their legal rights and no knowledge of wrongdoing by any other party.

[31] It has long been held that the registered interest of a transferee or mortgagee cannot be defeated merely because the transfer or mortgage was procured by fraud or was forged, provided that the transferee or mortgagee was innocent of the fraud.[34] On the other hand, it seems plain that if, prior to registration, the original proprietor had learnt of the fraud he or she would have been entitled to have the transfer or mortgage set aside even though the transferee or mortgagee was innocent of the fraud.[35] Yet notwithstanding that, prior to registration, the original proprietor would have had that right, it is defeated by registration.

[32] The position with respect to transfers or mortgages forged or procured by fraud of a third party is in all respects analogous to that in this case. Before registration the appellant had a right, arising from a voidable contract, to set aside the transfer notwithstanding the innocence of the respondents. But it is defeated by registration because there is no fraud or act making it unconscionable of the respondents to have obtained registration.

[33] To say, as McMurdo J says in this appeal, that the obligation of the respondents to retransfer does not depend upon any unconscionability in the acquisition of a registered interest free of the interest contended for is, with great respect, to ignore the consistent authoritative statements which I have set out. And to say, as his Honour also says, apparently in the alternative, that the respondents' refusal to comply with their restitutionary obligation provides the necessary element of unconscionability is, with great respect, plainly wrong.

[34] In the first place, before or after registration, the respondents could hardly have unconscionably refused to comply with an obligation of which they were innocently unaware. Moreover, as to the position after registration, the very question in issue is whether any right or remedy of the appellant's, and correlative obligations of the

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32 See also Skapinker D, *Equitable interests, mere equities, "personal" equities and "personal equities" - distinctions with a difference* (1994) 68 ALJ 593 at 597 column 2, paras (b), (c) and (d).

33 Supra [21].

34 *Frazer v Walker* supra; *Garofano v Reliance Finance Corp Pty Ltd* [1992] NSWConvR ¶55-640; *Vassos* supra; *Story* supra; *Grgic* supra; *Pyramid Building Society* supra; *Macquarie Bank Ltd* supra; *Bank of South Australia v Ferguson* (1998) 192 CLR 248.

35 *Mayer v Coe* [1968] 2 NSWR 747 at 754; *Macquarie Bank Ltd* supra at 153, 173; *Mercantile Mutual Life Insurance Co Ltd v Gosper* (1991) 25 NSWLR 32 at 51.

respondents, which may have existed before registration, survived that act. It is therefore wrong to commence by assuming the existence of such right and obligation after registration.

[35] And secondly, if his Honour's statement were correct, it would follow that, for the same reason, it would be unconscionable to become registered under a forged transfer in circumstances in which the transferee was unaware of the forgery. That is because, before registration, the obligations of the proposed innocent transferee would have been the same as those of the respondents here. If the original proprietor, before registration, had discovered the fraud or forgery he or she would have been entitled to restrain registration of the transfer and to have it set aside or, in the case of forgery, declared void.

[36] Indeed the forged transfer situation is an even stronger example of indefeasibility than this case. In this case the circumstance which, before registration, would have entitled the original proprietor to set aside the transfer, would have been that the contract was voidable at the option of the original proprietor because of the agent's lack of authority.[36] In the forged transfer situation the reason why, before registration, the original proprietor would have been entitled to a declaration that the transfer was void and, if it were thought necessary, to an injunction restraining its registration, would have been that the transfer was a nullity.

[37] In this case there was no act of the respondents which gave rise to an equity in the appellant within the meaning of s 185(1)(a). The effect of the majority judgments in this case, in my respectful opinion, will be to create an inexplicable exception to the indefeasibility principle. For the reasons which I have given I would dismiss this appeal.

[38] **WILLIAMS JA:** Prior to 16 January 2003 the appellant, Paul William White, was the registered proprietor of Lot 15 on Group Titles Plan 493, County of Ward, Parish of Nerang. On that date, on instructions from the appellant, an auction sale with respect to the property was conducted. The appellant had signed a document fixing a reserve price of $190,000. After bidding reached $180,000 there is a factual dispute as to whether or not the appellant gave oral instructions to the auctioneer that the property was "on the market" and could be sold to the highest bidder. If in fact the reserve was not varied the auctioneer may not have had authority to sell for a price below $190,000: *Boulas v Angelopoulos* (1991) 5 BPR 11,477.

[39] A bid of $182,000 was made on behalf of the respondents, R B and H R Tomasel, and the auctioneer knocked down the property to them on that bid. The appellant, believing the property had not been sold, left the premises. Thereafter the auctioneer executed a contract of sale on behalf of the appellant-vendor: *Wright v Madden* [1992] 1 Qd R 343.

[40] When called upon by the solicitors for the respondents to complete the transaction the appellant refused to do so, contending that there was no binding contract to sell at $182,000. Purporting to rely on s 70 of the *Property Law Act* 1974, the solicitors

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[36] As mentioned earlier, a court would be most unlikely to have set it aside merely because the order for specific performance was wrongly made if, as it turned out, the respondents were entitled to such an order. However it does not matter for the purpose of this analogy which of these would have been the proper basis. The point is that the contract and consequential transfer would have been voidable at the option of the appellant.

for the respondents brought an application filed 19 March 2003 in the District Court at Southport seeking the following relief:

> "1. That the respondent comply with his obligations to the applicants pursuant to a contract for sale of real estate dated the 16th January, 2003 and proceed to settlement in accordance with the specific conditions of the contract within 30 days.
>
> 2. In the alternative, that the respondent refund the applicants' deposit and pay damages to be assessed.
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> 3. Such further or other orders that the court may deem meet.
>
> 4. That the respondent pay the applicants' costs of the application."

[41] That application was heard before Hall DCJ on 31 March 2003. For reasons set out later there was no appearance on behalf of the appellant. The order made on that day was as follows:

> "1. That the Respondent comply with his obligations to the Applicants pursuant to contract of sale of real estate dated the 16th January 2003 and proceed to settlement in accordance with the specific conditions of the contract within 30 days.
>
> 2. In the alternative that the Respondent refund the Applicants' deposit and pay damages to be assessed.
>
> 3. That in the event that the Respondent fails to carry out the terms of Order 1 then the Registrar be authorised to sign all documents for that purpose.
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> 4. The Respondent pay the Applicants' costs of and incidental to the application."

[42] The appellant, by this time conducting his own case, filed an application on 30 April 2003 which sought a variety of orders. It is sufficient for present purposes to say that the relief sought included the following:

> "1) That the originating application and order is put aside because 8 business days were not allowed before service on 22nd March and hearing on 31st March 2003. R 296(1)
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> OR
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> 2) In the alternative the judgments are put aside and or varied because I was unable to be present through no fault of my own. R 302 and R. 667(2)(a)."

[43] That application came on before Wilson DCJ on 12 May 2003. After hearing argument, and delivering reasons, he ordered that the application be dismissed and that the appellant pay the costs of and incidental to that application.

[44] For present purposes it is sufficient to say that Judge Wilson had concerns about the orders made by Judge Hall but declined to set them aside, or otherwise vary them, because he was persuaded that the respondents were entitled to assume that the agent had authority to sell and were not otherwise guilty of any fraud or unconscionable conduct.

[45] It is from that decision that the appellant appeals to this court; the appellant applied to Judge Wilson for a stay pending hearing of the appeal but that was refused. In the Notice of Appeal the appellant seeks a variety of orders, but it is sufficient to concentrate on the appeal against the refusal to set aside the order of Hall DCJ of 31 March 2003.

[46] There are, in my respectful view, a number of serious defects associated with the order of 31 March.

[47] Section 70 of the *Property Law Act* provides for what traditionally was called a "vendor-purchaser summons" whereby parties to a contract of sale of land could ask the court to determine questions arising out of or connected with that contract. But, as the section expressly makes clear, the question asked of the court must not be "a question affecting the existence or validity of the contract". The issue raised by the respondents' application here was as to the existence or validity of the contract of sale. It was therefore not appropriate to ask that question on such an application. It seems to have been treated by the judge as an application for specific performance, because it would only be on such an application that the court would have power to make an order authorising the Registrar to sign transfer documents.

[48] It should also be noted that there is an inherent absurdity in the order. Paragraph 2 thereof provides that in the alternative to completing the sale the vendor could refund the deposit and pay damages. How can that be reconciled with an order authorising the Registrar to sign documents to complete the transfer if the appellant did not sign.

[49] As the application was really treated as one for summary judgment pursuant to Rule 296 of the UCPR "at least 8 business days" notice was required. That was not given; it follows the appellant was not given due notice.

[50] Finally, before Judge Wilson the appellant explained his non-appearance before Judge Hall on 31 March 2003. The appellant has consistently maintained that documents were given to a barrister with instructions to appear on that date, but the barrister failed to do so without any explanation to his client. Judge Wilson properly noted that the material presented to the court in support of that was not in proper form, but nevertheless it does seem clear that the appellant offered a reasonable excuse for not appearing on the day in question. Given that there was inadequate notice given of the hearing date he should have been allowed some latitude with respect to the formality with which he placed material before the court.

[51] The court has in those circumstances an inherent power to set aside the order: *Taylor v Taylor* (1979) 143 CLR 1. Given all of the matters to which reference has been made the order of Hall DCJ of 31 March 2003 ought be set aside.

[52] But that is not the end of the matter. The Notice of Appeal from the order of 12 May 2003 was filed on 16 May 2003. On 15 May 2003 the solicitors for the respondents lodged a transfer and release of mortgage with the Registrar of the

District Court at Southport for execution by him pursuant to the order of 31 March 2003. There does not appear to have been any material placed before the Registrar establishing that the appellant had not elected to adopt the course referred to in paragraph 2 of that order. The Registrar signed the documents in question on 15 May. The subject property was mortgaged to First Mortgage Investments Pty Ltd, and that company, through its solicitor, raised a concern about executing the Release without instructions from the appellant. In consequence the solicitors for the respondents sought further orders from Judge Hall with respect to the release of the mortgage. That application came on on 2 June 2003, and the appellant again applied for a stay pending the hearing of the appeal. On that day, 2 June 2003, Judge Hall adjourned the appellant's application for a stay to 30 June 2003, and made the following orders:

> "2. First Mortgage Investments Pty Ltd as the mortgagee for the Applicant, Paul William White, provide forthwith on receipt of a written request from the solicitors for the Respondents a duly executed Release of Mortgage and Certificate of Title 705984520 to the Respondents' solicitors in exchange for payment of the balance of monies owing by the Respondents to the Applicant pursuant to the contract in the sum of $163,800.00 subject to outgoings.
>
> 3. That the Applicant, Paul William White, authorise Raine & Horne Surfers Paradise to account to the First Mortgage Investments Pty Ltd for the balance of deposit after commission following settlement.
>
> 4. That in the event that the Applicant the said Paul William White fails to carry out the terms of Order 3 then the Registrar be authorised to sign all documents for that purpose.
>
> 5. That the costs of this application be reserved."

[53] The appellant's application for a stay was apparently dismissed by Wilson DCJ on 7 July 2003.

[54] Pursuant to the court orders settlement was effected on 11 June 2003 and the transfer registered on 12 June 2003. The respondents are now the registered proprietors of an estate in fee simple which is unencumbered. The purchase moneys were paid to the mortgagee and the appellant's mortgage discharged.

[55] As a broad, general principle it can be said that a party to legal proceedings has a "right to recover money or other benefits transferred in obedience to a court order that is later set aside". (See Ch 7 Mason & Carter, *Restitution Law in Australia* (1995)). As the authors of that text say at 225: "The corollary of the obligation to obey an unstayed judgment or order is the right to be restored if it is reversed." That principle is more frequently applied where money has been paid over pursuant to a judgment later set aside; in such cases an order will, if necessary, be made for repayment: *The Commonwealth v McCormack* (1984) 155 CLR 273 at 276-7 and *National Australia Bank v Bond Brewing Holdings Ltd* [1991] 1 VR 386 at 591-2 and 597-8. The principle is of wide application; when a conviction is set aside "all former proceedings become thereby absolutely null and void" and the person "will

be entitled to be restored to all things which he may have lost by such erroneous judgment and proceedings, and shall stand in every respect as if he had never been charged with the offence in respect of which judgment was pronounced against him": *Commissioner for Railways (New South Wales) v Cavanough* (1935) 53 CLR 220 at 225. Though most of the reported cases deal with restoration by ordering the repayment of money paid pursuant to the original judgment, there is no reason why the principle would not apply to other items of property. On a number of occasions Carter & Mason in the Chapter previously referred to speak of "the payment of money or transfer of property" to achieve restitutio in integrum when a judgment is set aside. Unless the concept of indefeasibility of title inherent in the Torrens system of title by registration precludes the making of such an order for restoration of property rights this would be an appropriate case for the court to order that the property in question be reconveyed to the appellant on the order of 31 March being set aside. Of course the appellant would have to pay to the respondents the amount they paid out as the purchase price.

[56] Section 184 of the *Land Title Act* 1994 now provides for the indefeasibility of title pursuant to registration of land in Queensland and s 185 sets out the circumstances in which a registered proprietor does not have the benefit of indefeasibility.

[57] The Privy Council in giving judgment in *Frazer v Walker* [1967] 1 AC 569 at 585 said that the principle of indefeasibility of title "in no way denies the right of a plaintiff to bring against a registered proprietor a claim in personam, founded in law or in equity, for such relief as a court acting in personam may grant". The High Court has subsequently recognised that orders made in personam may in practical terms overcome the rights of a registered proprietor. Barwick CJ in *Breskvar v Wall* (1971) 126 CLR 376 at 384-5 said:

> "Proceedings may of course be brought against the registered proprietor by the persons and for the causes described in the quoted sections of the Act or by persons setting up matters depending upon the acts of the registered proprietor himself. These may have as their terminal point orders binding the registered proprietor to divest himself wholly or partly of the estate or interest vested in him by registration and endorsement of the certificate of title."

[58] To similar effect was the observation of Brennan J in *Bahr v Nicolay [No 2]* (1988) 164 CLR 604 at 653 that the indefeasibility provisions of the legislation do not free a registered proprietor "from interests with which he has burdened his own title".

[59] Here, the respondents could not become registered proprietors without the assistance of the court; they needed an order from the court empowering the Registrar to sign the transfer before they could become registered. By seeking the assistance of the court, the respondents, in my view, submitted to the jurisdiction of the court and that meant that their rights and obligations were subject to any order made by the court, including an order on appeal. By securing registration through the aid of a court order the respondents impliedly accepted that their rights were conditional upon the validity of that order. It followed that if that order were to be set aside, the court could order the respondents to restore the appellant's rights to the property in question. The obligation which the court would enforce by making an order for restoration of property rights would be one made in personam. That would, in my view, not infringe the doctrine of indefeasibility of title recognised by s 184 of the Act. The statements quoted above from *Frazer v Walker*, *Breskvar v*

Wall, and *Bahr v Nicolay* indicate that the type of claim which might defeat the indefeasibility of the registered proprietor's title is not necessarily limited to claims of an equity in the strictest sense. Here, as I have said, the circumstances were unusual. The respondents' title was dependent upon the court making an order in favour of the respondents, an order without which they could not have become registered. A consequence of that is that the respondents were burdened with the validity of that court order; once that order was set aside the very foundation of their claim to registration was lost. Having submitted to the jurisdiction of the court, the court had power to make necessary orders to achieve restitutio in integram on setting aside the original order though that involved ordering a registered proprietor to convey land. Indefeasibility of title does not prevent a court from ordering the registered proprietor to deal with the land in a particular way if, as a result of litigation, it is established that the register should be altered or varied in some way.

[60] Since writing the foregoing I have had the advantage of reading the reasons for judgment of McMurdo J wherein the rights of a successful appellant to restitution where there is an assertion of indefeasibility of title are analysed in more detail. I respectfully adopt all that is said therein.

[61] On setting aside the order of 31 March 2003 the respondents could be ordered by way of restitution to reconvey the property in question to the appellant, subject as already noted to the appellant refunding the purchase price.

[62] But the respondents have been in possession of the property for some time, and until the factual dispute as to the authority of the agent to sell is resolved one cannot say for certain whether or not the respondents have a valid claim to the property. If it was subsequently held that the appellant did authorise a sale at any price above $180,000 then the respondents (on the material now available) would be entitled to specific performance of the contract of sale signed on the appellant's behalf by the agent.

[63] In those circumstances it is not appropriate at this point of time to order that the respondents reconvey the property to the appellant. There should be an expeditious determination of the issue as to the agent's authority to sell and once that is determined in the District Court it will be open to this court to make such further orders as are then appropriate. In the meantime, of course, the respondents should be restrained from disposing of or otherwise dealing with the property in question.

[64] At this stage the appeal should be allowed to the extent of setting aside the orders of 31 March and 12 May 2003 and the respondents should be ordered to pay the costs of the applications heard on 31 March 2003 and 12 May 2003 and also the costs of the appeal. The making of further consequential orders by this court should be adjourned until after a trial determining the agent's authority to sell the property on 16 January 2003 for $182,000. The application filed 19 March 2003 should be treated as a claim brought by the respondents seeking orders establishing the existence of the contract on which they rely and specific performance of it. The respondents should in that proceeding file and serve a statement of claim within 28 days of the order of this court and thereafter steps should be taken in accordance with the *Uniform Civil Procedure Rules*.

[65] **McMURDO J:** I agree for the reasons given by Williams JA that the orders made by Hall DCJ on 31 March 2003 were wrongly made. This is an appeal from the order of Wilson DCJ made on 12 May 2003, in which the appellant's application to

set aside the orders of Hall DCJ was dismissed. His Honour's reasons indicate that he would have been prepared to set aside those orders but for his conclusion that the appellant's defence was unarguable, because the respondents were entitled to assume that the agent had the appellant's authority to contract on his behalf. However, the existence of the necessary authority, whether an actual authority or an authority by an estoppel, depended upon an assessment of the dealings between the appellant and his auctioneer, about which there was a difference between their respective versions. That involved an issue to be tried, as it was no answer to the appellant's claim that the auctioneer lacked authority, for the respondents to say that they were entitled to assume that he was authorised because the auctioneer himself had said so: see *Boulas v Angelopoulos* (1991) 5 BPR 11,477. It follows that Wilson DCJ erred in the exercise of his discretion, and it is thereby open to this Court to make a different order. Had the circumstances of the parties remained as they were on 12 May 2003, the appropriate order would have been to have set aside the orders made by Hall DCJ on 31 March 2003, because the respondents' claim to enforce the alleged contract is one which would have required a trial.

[66] The complication is that the respondents have become the registered proprietors. They argue that no order can be made within this appeal or subsequently by which their legal ownership would be affected, on the basis that their registered title is indefeasible.

[67] A successful appellant has a restitutionary right[37] in relation to any money paid or property transferred which is still in the respondent's possession under the judgment which is reversed. The respondent's obligation to make restitution can be enforced by orders on the pronouncement of judgment on the appeal, subsequently upon a motion in the appeal itself or in separate proceedings at first instance.[38] If such orders are made within the appeal itself, they are orders made pursuant to this Court's power to make such orders as the nature of the case requires.[39] Apart from the potential impact of the indefeasibility provisions of the *Land Title Act* 1994, the effect of allowing this appeal and setting aside the orders of Hall DCJ would be to oblige the respondents to restore the property to the appellant, subject of course to the repayment of the purchase price. The obligation of the respondents would come from the setting aside of the orders by which the respondents became the owners of the property; it would not depend upon proof of some unconscientious conduct of the respondents in obtaining the orders which are set aside or in procuring a transfer of property in reliance upon those orders. A successful appellant's right is a personal one in the sense that restitution can be ordered only against a party to the judgment. The risk that money paid or property transferred pursuant to a judgment will have been paid or transferred away by the respondent by the conclusion of the appeal often provides a basis for staying a judgment under appeal. But whether a stay is sought, or if sought is granted, does not affect an unsuccessful respondent's obligation to restore to the appellant what was the appellant's property prior to the judgment.

[68] The right to restitution in this context, as in many others, has been explained by the concept of unjust enrichment; Mason & Carter describe the basis for the appellant's

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37 *Lissenden v CAV Bosch Ltd* [1940] AC 412, 430 per Lord Atkin; *National Australia Bank Ltd v Bond Brewing Holdings* [1991] 1 VR 386, 593 per Brooking J; Mason & Carter, *Restitution Law in Australia*, (1995) at [706]; Goff & Jones, *The Law of Restitution*, (5th ed, 1998), p 457.

38 Mason & Carter, at [711] and the cases there cited.

39 UCPR r 766(1)(b).

right to restitution as being a convergence of "public policy in encouraging submission to law and the unjust enrichment principle".[40] However, as Gummow J explained in *Roxborough v Rothmans of Pall Mall* (2001) 208 CLR 516 at 543-545, in some contexts restitutionary remedies are available against persons who, on any sensible understanding of the term, have not been enriched, and there should be "caution in judicial acceptance of any all-embracing theory of restitutionary rights and remedies founded upon a notion of 'unjust enrichment'". So whilst the concept "explains why the law recognises an obligation to make restitution in particular contexts",[41] in certain types of case the existence of the restitutionary obligation is so well recognised that a focus upon unjust enrichment is both unnecessary and unhelpful. The right to restitution in the present context has its basis in the court's concern to restore to the appellant the property of which he was involuntarily divested by the erroneous exercise of judicial power. It is unnecessary for the appellant to establish an unjust enrichment, at least in the sense that the property transferred is worth more than the consideration paid by the respondents. And to the extent that enrichment is relevant, the respondents have what should be still the appellant's property.

[69] The question then is whether the respondents are exempt from this obligation because of the so-called indefeasibility of the title of a registered proprietor. Section 184 of the *Land Title Act* 1994 provides that a registered proprietor of an interest, who has not been fraudulent, holds the interest free of all interests save for registered interests or an interest mentioned in s 185. One such interest is "an equity arising from the act of the registered proprietor". As Davies JA observes, s 185 was not intended to do more than state the existing law.

[70] In *Frazer v Walker* [1967] 1 AC 569, at 585, it was said that the principle of indefeasibility of title "…in no way denies the right of a plaintiff to bring against a registered proprietor a claim in personam, founded in law or in equity, for such relief as a court acting in personam may grant". But what is within the description "claim in personam" has proved difficult to define. The "right in personam" or the "the personal equity" must be a known legal or equitable cause of action: *Grgic v Australian and New Zealand Banking Group Ltd* (1994) 33 NSWLR 202 at 222-223; *Pyramid Building Society (In liq) v Scorpion Hotels Pty Ltd* [1998] 1 VR 188 at 196; *Macquarie Bank Ltd v Sixty-Fourth Throne Pty Ltd* [1998] 3 VR 133. Yet in many cases, an obligation which the general law, and in particular a doctrine of equity, would have imposed upon the registered proprietor has had to give way to the indefeasibility of the registered interest.

[71] Those rights of action which are not defeated by the registration of the defendant's title are cases where there is no inconsistency between the enforceability of the right of action and the policy and proper purposes of the Torrens system of title. The protection which comes from a system of title by registration is that the registered proprietor need not be concerned to investigate the history of the title and satisfy himself of its validity: *Gibbs v Messer* [1891] AC 248 at 254. The title certified by the register is not historical or derivative but is the title which registration itself has vested in the proprietor: *Breskvar v Wall* (1971) 126 CLR 376 at 385-386. Under the general law, the holder of the prior interest has a prima facie entitlement to enforce it against the subsequent legal owner (unless the owner purchased for value

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40 At [701].

41 Gummow J at 543 citing Finn "Equitable Doctrine and Discretion in Remedies", in Cornish et al (eds), *Restitution: Past, Present and Future,* (1998) 251.

without notice), not because of any act of the legal owner, but because the title which the legal owner has acquired is burdened with the interests created by the acts of others. Under the Torrens system, the registered proprietor is neither obliged to enquire as to the history of the title nor bound by an antecedent unregistered interest of which the registered proprietor was aware or would have been aware had such an enquiry been made: *Bahr v Nicolay [No 2]* (1988) 164 CLR 604, 613, 652-653. Accordingly it has been recognised that the objects of the Torrens system permit the enforcement of a right in relation to land in this context only when the right derives from the acts of the registered proprietor against whom it is claimed. Although that limitation was not expressed in *Frazer v Walker*, in *Breskvar v Wall* Barwick CJ limited this relevant category of claims to causes "setting up matters depending upon the acts of the registered proprietor himself",[42] and the same limitation was expressed in *Bahr v Nicolay [No 2]* at 613 (Mason CJ and Dawson J), 638 (Wilson and Toohey JJ) and 653 (Brennan J). By limiting this so-called exception to indefeasibility to obligations resulting from the actions of the registered proprietor, much of the tension between the operation of the general law and the Torrens statutes was avoided. It became possible to say, as Brennan J said in *Bahr v Nicolay [No 2]* at 653, that there was no inconsistency between indefeasibility provisions of Torrens statutes and the existence of causes of action which "may have as their terminal point orders binding the registered proprietor to divest himself wholly or partly of the estate or interest vested in him by registration and endorsement of the certificate of title", citing Barwick CJ in *Breskvar v Wall* at 384-385. Similarly, in *Vassos v State Bank of South Australia* [1993] 2 VR 316 at 329, Hayne J said that the "vulnerability to *in personam* proceedings is not inconsistent with indefeasibility". The limitation is now expressed in s 185(1)(a) which requires the "equity" to be one "arising from the act of the registered proprietor".

[72] Accordingly, to constitute an "equity" within s 185(1)(a), the interest must derive from a recognised right of action, at law or in equity, which arises from the acts of the registered proprietor and which is not inconsistent with the policy of a Torrens system of title. In some cases, fine questions can arise as to whether a proprietary right, which would be recognised under the general law and which arises at least partly from the registered proprietor's acts, can be enforced against a registered interest consistently with the policy of Torrens title. An example is a claim to an interest in land by the imposition of a constructive trust under the "recipient liability" or so-called "first limb" of the propositions stated in *Barnes v Addy (*1874) LR 9 Ch App 244 at 251, upon which Davies JA and Atkinson J reached different conclusions in *Tara Shire Council v Garner* [2003] 1 QdR 556,[43] and which led to divergent views in *Macquarie Bank Ltd v Sixty-Fourth Throne Pty Ltd* [1998] 3 VR 133 and *LHK Nominees Pty Ltd v Kenworthy* (2002) 26 WAR 517. As the defendant's liability under the first limb of *Barnes v Addy* comes from the receipt of property in circumstances of knowledge or notice of a breach of trust or fiduciary duty, the imposition of a constructive trust would seem difficult to reconcile with the policy of the Torrens system, at least when the registered owner is sought to be made liable on the basis of constructive notice.

[73] But in the present case, the restitutionary obligation on the respondents does not derive from any knowledge or notice of another person's unregistered interest in the land. Instead, it derives from the respondents' actions in acquiring their title by the

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42 At 384-385.

43 McMurdo P finding it unnecessary to decide the point.

orders of a court which should not have been made. There is no tension here between the enforcement of the restitutionary obligation and the policy and objectives of a Torrens system of title. To exempt the respondents from the performance of their obligations simply because they have reached the high ground of a registered interest would not advance the purposes of the Torrens system, but it would undermine the administration of justice by significantly limiting the powers of courts to correct erroneous judgments and to reverse their consequences. To hold that the registered interest of a proprietor in these circumstances is the subject of an obligation enforceable against the proprietor is not to derogate from that interest; it is simply to say that the interest itself, like other property, can be the subject of rights as a result of circumstances of the proprietor's making.

[74] Many of the recent cases in this area have involved an attempt to impose obligations on a registered mortgagee where, unknown to the mortgagee, the instrument of mortgage was a forgery or was otherwise an invalid instrument. Examples are *Vassos v State Bank of South Australia*; *Story v Advance Bank Australia* (1993) 31 NSWLR 722; *Grgic v Australian and New Zealand Banking Group Ltd* and *Pyramid Building Society (In liq) v Scorpion Hotels Pty Ltd*. In each of these cases, because the mortgagee's title was derived from its registration and not from the mortgage instrument itself, a personal obligation was sought to be established by reference to what was known or should have been known by the mortgagee, and which was said to affect its conscience when seeking to enforce its mortgage. Each of those claims failed, not because a recognised cause of action under the general law was defeated by the registration of the mortgage, but because the facts did not give rise to any recognised cause of action. In the circumstances of those cases, the establishment of the cause of action depended upon proof of some knowledge of the forgery or other invalidity of the instrument which would have made it unconscientious or unconscionable to have enforced the mortgage. A mere failure to make careful inquiries as to the validity of the mortgage instrument was not sufficient to provide an obligation under the general law, irrespective of the impact of registration. The alleged cause of action in each case was equitable, and the claim was rejected because the established facts should not have affected the mortgagee's conscience. Thus in *Vassos,* Hayne J said that "it may well be that the bank did not act without neglect but there is [in] my view no material which would show that the bank acted unconscionably". In *Mercantile Mutual Life Insurance Co Ltd v Gosper* (1991) 25 NSWLR 32, the mortgagee was held to be subject to an equity enforceable under the general law, because it facilitated the registration of a forged mortgage by its own breach of certain obligations to the registered proprietor relating to possession and custody of the certificate of title. In my view, the use of the criterion of unconscionability in these cases should not be understood as meaning that, in every case, the registered proprietor's interest is susceptible to the performance of obligations arising from his own actions only where there is some element of unconscientious or unconscionable conduct. When Hayne J remarked in *Vassos* that there was no misrepresentation, misuse of power, improper attempt to rely upon legal rights or knowledge of wrong-doing by the other party, his Honour was excluding the grounds for the obligation sought to be imposed upon that registered proprietor in the facts and circumstances of that case, rather than attempting to comprehensively list the circumstances in which a registered proprietor might be bound by his own actions in relation to his registered interest. Otherwise, for example, the rights of a purchaser under an uncompleted contract for the sale of a registered interest would not be enforceable. In such a case, the obligation does not depend upon any unconscionability in the acquisition of a

registered interest. Any unconscionability comes from failing to perform a recognised contractual obligation in relation to the registered interest, which derives from the registered proprietor's own action in contracting to sell. In the present case, it is unnecessary to consider whether the acquisition of the registered title was itself unconscionable; it is sufficient to say that the respondents' refusal to comply with their restitutionary obligation provides an element of unconscionability, if any be required.

[75] For these reasons, I agree with the conclusions of Williams JA that the fact that the respondents have become registered does not require this appeal to be dismissed. But, as Williams JA has explained, that is not to say that a re-conveyance should *now* be ordered, because the case between these parties must be tried, and it may transpire that the present respondents are correct in their contention that they were entitled to this land. In these circumstances, I agree that the appeal should be allowed and that there should be orders as proposed by Williams JA.