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MR FRAZER VERSUS MR WALKER: WHO WOULD WIN NOW?

Abstract

Frazer v Walker may have established the primacy of immediate indefeasibility of title, but it is hard not to feel sorry for Mr Frazer, who because of his wife's 'irregularities' lost ownership of his farm to Mr Walker. The occasionally harsh operation of immediate indefeasibility has sat uneasily with many ever since. Recently, New Zealand has legislated for a judicial discretion to alter the land transfer register in cases of manifest injustice with the desire to provide a route for people in Mr Frazer's position to get their property back, unencumbered. This article considers what might have happened for Mr Frazer had these provisions existed at the time he brought his case. There are considerable ambiguities in the statutory drafting, and it is unclear how the statutory guidelines informing the exercise of the discretion will be applied. It seems very unlikely, however, that the courts would have exercised the discretion to remove the forged mortgage. There is a strong argument that Mr Walker is not within the jurisdiction of the court's discretion. Ultimately, the courts appear likely to take a conservative approach that upholds immediate indefeasibility wherever possible. Mr Walker is still likely to win his argument with Mr Frazer. However, this is likely to be very expensive for Mr Walker and our sympathies in relation to the case may become more balanced as a result. Whether this increased uncertainty is worth it remains to be seen, but it will make the policy choices underpinning our land transfer system even more explicit.

I Introduction

It is hard not to feel sorry for Mr Frazer. Busy working on his farm, he apparently did not know that his wife had arranged to borrow money from the Radomskis. He did not know that she had forged his signature on a subsequently registered mortgage. He did not know that she had failed to pay any of this loan back. He also did not know that Mr Walker had purchased the farm through a mortgagee sale from the Radomskis. It was not until a bailiff arrived at the farm with a warrant for

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possession that Mr Frazer had any inkling of a problem.[1] At this stage it is unlikely that he thought he would eventually lose his farm completely.

It is facts like these that make teaching indefeasibility of title hard. For most students, not yet inured to the bright line choices made by property law, the result in *Frazer v Walker*[2] feels unfair and, because of this, it is confusing. However, once aware of the fact that neither the Radomskis nor Mr Walker had any knowledge of Mrs Frazer's irregularities,[3] and had each acted in good faith, better students will begin to see the outlines of a policy choice and the reasons for it. Ultimately, they will come to understand that in *Frazer v Walker*, the Privy Council opted for 'transactional certainty' over 'individual justice'.[4] However, this choice might not ever sit comfortably with them, and it is unsurprising that the debates over whether indefeasibility should be 'immediate' or 'deferred' have continued,[5] notwithstanding that *Frazer v Walker* has apparently determined the issue.[6]

New Zealand has recently attempted to soften the sting of immediate indefeasibility, not by opting for deferred indefeasibility, but by legislating for a judicial discretion to alter the land transfer register in cases of manifest injustice.[7] This was driven by a desire to provide a route for people in Mr Frazer's position to get their property back, unencumbered. It is unclear, however, whether the legislation will operate in the way intended or help people in the same circumstances as Mr Frazer.[8] This is the result of considerable ambiguities in the statutory drafting. It is also unclear how the statutory guidelines informing the exercise of the discretion will be applied.

This article considers what might have happened for Mr Frazer had these provisions existed at the time he brought his case. It seems very unlikely that the courts would have exercised the discretion to remove the Radomskis' mortgage. There is a strong argument that Mr Walker is not within the jurisdiction of the court's discretion. Whether the court would have favoured Mr Frazer over Mr Walker is also uncertain.

Ultimately, it is likely that judges will take a conservative approach that upholds immediate indefeasibility wherever possible. Mr Walker is still likely to win his

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1 Rod Thomas, 'Reduced Torrens Protection: The New Zealand Law Commission Proposal for a New Land Transfer Act' [2011] (4) *New Zealand Law Review* 715, 741 ('Reduced Torrens Protection').

2 [1967] 1 AC 569 ('*Frazer v Walker*').

3 Ibid 578.

4 Jayden Houghton, 'Immediate Indefeasibility with Transactional Uncertainty' [2018] (28) *New Zealand Universities Law Review* 261, 264; New Zealand Law Commission, *Review of the Land Transfer Act 1952* (Issues Paper No 10, October 2008) 39 [2.74] ('*Review of the Land Transfer Act 1952*').

5 *Review of the Land Transfer Act 1952* (n 4) ch 2.

6 *Frazer v Walker* (n 2) was adopted in Australia in *Breskvar v Wall* (1971) 126 CLR 376.

7 *Land Transfer Act 2017* (NZ) s 55(1) ('*Land Transfer Act*').

8 See, e.g., New Zealand Law Commission, *A New Land Transfer Act 1952* (Report No 116, June 2010) 14 [2.11] ('*A New Land Transfer Act 1952*').

argument with Mr Frazer. However, this is likely to be very expensive for Mr Walker and our sympathies in relation to the case may become more balanced as a result. Whether this increased uncertainty is worth it remains to be seen. It will, however, make the policy choices underpinning our land transfer system even more explicit. Perhaps students will now gain a deeper understanding of the tensions at the heart of property law and our ongoing attempts to reconcile them, or, of course, perhaps not.

II Alteration of the Register in Cases of Manifest Injustice

Led by New Zealand's Law Commission, there was an extensive process of law reform leading up to the enactment of the *Land Transfer Act 2017* (NZ) ('*Land Transfer Act*'). This Act replaced the *Land Transfer Act 1952* (NZ), under which *Frazer v Walker* was decided. Both Acts were continuations of Torrens legislation that has been present in New Zealand since 1870.[9] Of the many issues considered during this process, the role of indefeasibility of title under any new legislation was a key question.[10]

The Law Commission considered that, although indefeasibility of title in an absolute sense is something of a misnomer, it is central to the aims of the Torrens system and ought to be retained in some form. It explored several options for change.[11] In particular, it considered whether indefeasibility should remain 'immediate'[12] or change to 'deferred'.[13] Retaining the status quo on indefeasibility was seen as unattractive as there was a perception by some that it could be unfair for the previous registered owner,[14] who may have lost out to fraud.[15] Conversely, a shift to deferred indefeasibility was seen as unappealing. The concept has been applied inconsistently in different jurisdictions and suffers from complexity and a corresponding lack of clarity.[16]

Instead, the Law Commission recommended a compromise: immediate indefeasibility would be retained, but with limited judicial discretion to direct that the register be altered in favour of a previous owner where it would be manifestly unjust not to

9 *Land Transfer Act 1870* (NZ).

10 *A New Land Transfer Act 1952* (n 8) ch 2.

11 *Review of the Land Transfer Act 1952* (n 4) ch 2.

12 This gives a purchaser title immediately on registration, regardless of whether the transfer may have been void, or voidable, at common law and equity: see *A New Land Transfer Act 1952* (n 8) 11–13 [2.4]–[2.8].

13 Ibid 11–12 [2.4]. This allows the original owner to defeat the registered title of a subsequent purchaser or mortgagee through a forged or invalid instrument (at least until the property is subsequently transferred to a third party).

14 The terminology has also changed under the *Land Transfer Act* (n 7). Rather than registered 'proprietors', the Act now speaks of registered 'owners' (of the fee simple or of a mortgage or easement etc).

15 *A New Land Transfer Act* (n 8) 12 [2.6].

16 Ibid 13 [2.9].

rectify the situation.[17] The intention was to provide for improved security in favour of previously registered owners, 'who had no intention to transfer or mortgage their property, and to improve fairness where a transfer would be void or voidable but for the operation of the Act'.[18] The hope was also that it would reduce lengthy litigation in cases of fraud and avoid the temptation to push the boundaries of the in personam exception.[19]

Ultimately, this recommendation was adopted and set out in ss 54 and 55 of the *Land Transfer Act*. Section 54 states:

> **54 Application to court for order for alteration of register**
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> (1) This section and sections 55 to 57 apply to a person (**person A**) who —
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> (a) has been deprived of an estate or interest in land by the registration under a void or voidable instrument of another person (**person B**) as the owner of the estate or interest in the land; or
>
> (b) being the owner of an estate or interest in land, suffers loss or damage by the registration under a void or voidable instrument of another person (person B) as the owner of an estate or interest in the land.
>
> (2) **Person A** may apply to the court for an order under section 55.

Section 55 empowers the court to make an order cancelling the registration of person B only if it is satisfied that it would be manifestly unjust for person B to remain the registered owner of the estate or interest.[20] Manifest injustice is not defined, however, s 55 notes that 'the existence of forgery or other dishonest conduct does not, of itself, constitute manifest injustice'.[21] The section also provides that no order can be made if compensation or damages would 'properly address' the injustice.[22]

Section 55 also provides a list of 11 non-exclusive guidelines the court may consider in making its decision.[23] Examples of factors to be taken into account include: (1) the circumstances of the acquisition by person B of the estate or interest; (2) the length

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17 Ibid 15.

18 Ibid 15 [2.14].

19 Ibid.

20 *Land Transfer Act* (n 7) s 55(1).

21 Ibid s 55(2).

22 Ibid s 55(3). It has been suggested that this section, viewed objectively, suggests that a court should explore every possibility before it gives the estate or interest back to person A. This might also support the analysis in this article. See Elizabeth Toomey, 'Knocking at the Compensation Door: What Might a Deprived Owner Expect Under the *Land Transfer Act 2017*' in David Grinlinton and Rod Thomas (eds), *Land Registration and Title Security in the Digital Age: New Horizons for Torrens* (Routledge, 2020) 142 ('Knocking at the Compensation Door').

23 *Land Transfer Act* (n 7) ss 55(4)(a)–(k).

of time person A and person B have owned or occupied the land; and (3) the conduct of person A and person B in relation to the acquisition of the estate or interest.

Section 56 is also relevant as it significantly limits the class of people who might be caught by the provisions. It states that the 'court must not make an order under section 55 if person B has transferred the estate or interest to a third person, that third person acting in good faith'.[24] Finally, any application must be made within six months of when person A ought to have, or did, become aware of the acquisition of the estate or interest by person B.[25]

Importantly, the provisions can only apply where person B has acted in good faith. The fraudster themselves cannot take advantage of the sections.[26] If the fraudster has become registered, then their title is automatically void under the 'fraud exception' to indefeasibility.[27] However, where person B has acted in good faith, they may be deprived of their registered interest in favour of person A by order of the court. For example, where a fraudster manages to transfer the fee simple title of person A into the name of an innocent person B, the court appears to have the power to alter the register and transfer the fee simple back into the name of person A. Likewise, if a fraudster manages to register a fraudulent mortgage against the title, person A could apply to have an otherwise innocent mortgagee (person B) removed from the title. In both circumstances, person B can now bring proceedings against the Crown for compensation.[28]

On the face of it, Mr Frazer might now have significantly more confidence that he would get the farm back from Mr Walker. Mr Frazer may well be able to convince a court that it would be manifestly unjust for Mr Walker to remain as the new registered owner of the property. Had the Radomskis still owned the mortgage over the property perhaps they could be removed too. However, as with all matters of statutory interpretation, the answer requires a close assessment of the wording of the legislation itself. The consequences of the fact that Mr Walker took title as a result of the Radomskis exercising their power of sale also need to be considered. This means that it is necessary to consider whether the Radomski mortgage would have been removed before considering the position of Mr Walker.

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24 Ibid s 56.

25 Ibid s 54(3).

26 Ibid s 56; Toomey, 'Knocking at the Compensation Door' (n 22) 142.

27 For the New Zealand position in relation to indefeasibility and fraud, see *Land Transfer Act* (n 7) ss 6, 51. Technically, the current fraudulently registered owner would hold the property on constructive trust for the true owner (person A) with orders accordingly. See *Waller v Davies* [2005] 3 NZLR 814 (HC).

28 *Land Transfer Act* (n 7) s 59. For a discussion of how compensation might work in these circumstances, see Toomey, 'Knocking at the Compensation Door' (n 22).

III The Radomskis

It appears that s 54(b) of the *Land Transfer Act* would cast the Radomskis in the role of 'person B'. Mr Frazer is likely to have suffered 'loss or damage' by the registration of the forged, and therefore 'void or voidable',[29] mortgage owned by the Radomskis. The question then becomes: would the court exercise its discretion to remove the mortgage from the register? Elizabeth Toomey argues that in exercising its jurisdiction the courts should — and are likely to — take a very conservative approach and set a very high threshold for any successful manifest injustice claim.[30]

In considering the guidelines provided in s 55(4), Toomey notes s 55(4)(e), which directs the court's attention to the 'nature of the estate or interest, for example, whether it is an estate in fee simple or a mortgage'.[31] Drawing on *Frazer v Walker* and *Nathan v Dollars and Sense Financing Ltd*,[32] she suggests that in interpreting the section it is critical that the courts do not end up creating inconsistencies or rankings between mortgagees and fee simple owners.[33] Indefeasibility applies equally to both species of interest in land and that to

> declare the interest of a registered mortgagee defeasible merely because the mortgage documents were void, through no fault of the mortgagee, would 'destroy the benefit of immediate indefeasibility and would be inconsistent with the Torren system'.[34]

It follows that the fact that the Radomskis owned a mortgage, and Mr Frazer previously owned the fee simple, should both be irrelevant factors, notwithstanding the statutory language. To find otherwise would create a two-tier system of registered interests and devalue the security afforded by a mortgage. This cannot have been the framer's intent.

Section 55(4)(j) provides that the court may consider 'the conduct of person A and person B in relation to the acquisition of the estate or interest'.[35] Toomey suggests that the preserved ability to defeat immediate indefeasibility by a claim in personam[36] under the *Land Transfer Act* must inform how this section is interpreted and the level of conduct necessary to reverse immediate indefeasibility. If person B has

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29 *Land Transfer Act* (n 7) s 54(1)(b). Precisely what makes an instrument 'void or voidable' has not yet been considered. However, it seems clear from first principles that a mortgage entered using a forged signature would meet the requirements. See Thomas (n 1) 729–40.

30 Elizabeth Toomey, 'Reverberations in the Torrens System: A New Land Transfer Act in New Zealand' (2019) 11(2) *Journal of Property Planning and Environmental Law* 87, 96 ('Reverberations in the Torrens System').

31 Ibid 96–7.

32 [2008] NZSC 20 ('*Nathan*').

33 Toomey, 'Reverberations in the Torrens System' (n 30) 97.

34 Ibid 87, citing *Nathan* (n 32) [138].

35 *Land Transfer Act* (n 7) s 55(4)(j).

36 Ibid s 51(5); Toomey, 'Reverberations in the Torrens System' (n 30) 99.

not acted in a way that would support a claim in personam, they also should not be taken to have behaved in a way that would support a finding of manifest injustice.

In particular, as an in personam claim requires unconscionability on the part of the registered owner,[37] in the absence of unconscionability, it might be very difficult to establish that person B's behaviour has resulted in manifest injustice.[38] Examining an Australian case involving a forged mortgage, *Vassos v State Bank of South Australia* ('*Vassos*'), Toomey notes that no unconscionability was found in circumstances where there had been 'no misrepresentation by the bank, no misuse of power, no improper attempt by the bank to rely on its legal right, and no knowledge of wrongdoing by the other party'.[39] Moreover, even if the bank could have undertaken enquiries and discovered the forgery, that did not, on its own, make the conduct unconscionable.[40] The Court made it clear that more than the mere fact of forgery is needed to establish a claim of unconscionability and with it a claim in personam.[41]

In a similar vein, s 55(2) makes it clear that something more than forgery or other dishonest conduct is needed to constitute manifest injustice.[42] It follows that it is very unlikely that the bank in *Vassos* would have met the test for manifest injustice. Applying this to the Radomskis results in a similar outcome. As Wilberforce LJ made clear they 'acted throughout in good faith and without any knowledge of the irregularity on the part of Mrs Frazer'.[43] If the bank in *Vassos* would be safe, it seems the Radomskis would be too. This would accord with the intention of the legislation which was to set a 'very high' threshold which would see the manifest injustice provisions apply 'only for exceptional cases'.[44]

This also raises a question about how the courts will apply the guidelines in s 55(4). There is a possibility that they may take inspiration from, or indeed return to, the common law approach to competing equitable interests.[45] The first step might be to

37 Toomey, 'Reverberations in the Torrens System' (n 30) 98, citing *Regal Castings v Lightbody* [2008] NZSC 177, [78].

38 Toomey, 'Reverberations in the Torrens System' (n 30) 98.

39 Ibid, citing *Vassos v State Bank of South Australia* [1993] 2 VR 336.

40 Toomey, 'Reverberations in the Torrens System' (n 30) 98.

41 Ibid.

42 *Land Transfer Act* (n 7) s 55(2). For the purpose of sub-s (1), the existence of forgery or other dishonest conduct does not, of itself, constitute manifest injustice.

43 *Frazer v Walker* (n 2) 578.

44 Government Administration Committee, Parliament of New Zealand, *Land Transfer Bill* (Report No 118–2, 2016) 4 ('*Land Transfer Bill*').

45 See Neil Campbell and Rod Thomas, 'The New Fraud Test and Manifest Injustice' in David Grinlinton and Rod Thomas (eds), *Land Registration and Title Security in the Digital Age: New Horizons for Torrens* (Routledge, 2020) ('The New Fraud Test and Manifest Injustice'). Campbell and Thomas suggest that consideration of the law of competing equities will be required in any discussion of s 54(1)(b) in order to deal with the issue of whether an interest is 'void' or 'voidable', but for, the *Land Transfer Act* (n 7).

ask whether person B has behaved in a way that would indicate manifest injustice has been caused to person A by person B's conduct. If yes, then there is no need for a further inquiry. If no, it might be necessary to continue to consider the position of person A and assess whether the result to them amounts to manifest injustice, notwithstanding the lack of any disqualifying behaviour on the part of person B. In this context it would be necessary to balance any discussion of person B with those guidelines that look to the position of person A.[46]

Certainly, the fact that Mr Frazer and Mrs Frazer had purchased the land some four years before the mortgagee sale would be a relevant factor (although perhaps this is too short a period for a farm, as a piece of commercial property, to garner great sentimental value).[47] However, some pointed questions would also have to be asked of Mr Frazer as to precisely why he was unaware of the mortgage and subsequent mortgagee sale (perhaps he never checked the mail?).[48] Likewise, the fact that Mr Frazer was in 'actual occupation' of the land,[49] the nature of the improvements made to the land by him,[50] the use to which he had put the land[51] and any 'special characteristics' the land may have to him,[52] could all be relevant. Indeed, it is these factors that make one sorry for Mr Frazer and wonder if the outcome in *Frazer v Walker* could have been different.

However, all other things being equal and given the Radomskis acted in good faith throughout, if the threshold for manifest injustice is to be 'very high',[53] and given forgery without something more is not manifest injustice, Mr Frazer's connection to the land may, and perhaps should, not be enough to amount to manifest injustice. It would be a very stark policy choice for a court. Mr Frazer's connection to the land versus the Radomskis' otherwise immediately indefeasible mortgage. Perhaps the fact that Mr Frazer may well be entitled to compensation (with which he could discharge the mortgage) might also be persuasive.[54]

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46 *Land Transfer Act* (n 7) s 55(4). For example, the 'identity of the person in actual occupation of the land' (s 55(4)(d)), 'the length of time person A and person B have owned or occupied the land' (s 55(4)(f)) and 'the nature of any improvements made to the land by either person A or person B' (s 55(4)(i)).

47 The Frazers purchased the land in 1957, with the mortgagee sale to Mr Walker occurring in 1962. See Thomas (n 1) 739–40.

48 This is relevant to the interpretation of *Land Transfer Act* (n 7) s 55(4)(j): 'the conduct of person A and person B in relation to the acquisition of the estate or interest'.

49 Ibid s 55(4)(d).

50 Ibid s 55(4)(g).

51 Ibid s 55(4)(h).

52 Ibid s 55(4)(i).

53 *Land Transfer Bill* (n 44) 4.

54 *Land Transfer Act* (n 7) s 55(3). See also Toomey, 'Knocking at the Compensation Door' (n 22).

It is also important to note that there is an argument that if the Radomskis are person B then Mr Walker could, or perhaps should, be viewed as a third party and protected from any claim by Mr Fraser:

> **56 Court must not make order if estate or interest transferred to third person**
>
> The court must not make an order under section 55 if person B has transferred the estate or interest to a third person, that third person acting in good faith.

However, this is complicated by the fact that '*the* estate or interest' here might be read as only referring to the mortgage held by the Radomskis.[55] As Mr Walker did not take a transfer of the mortgage, he cannot be a third party. As a result, it is possible that rather than being safe as a bona fide purchaser under the mortgagee's power of sale, Mr Walker could be person B for the purpose of s 54(1)(a) of the *Land Transfer Act* and at risk of a claim from Mr Frazer.[56]

IV Mr Walker

By the time the bailiff knocked on Mr Frazer's door, the Radomski mortgage had been discharged. As a result, the person against whom Mr Frazer would have been most likely to bring a claim for manifest injustice would be Mr Walker. Mr Frazer would argue that he had 'been deprived of an estate or interest in land by the registration under a void or voidable instrument of [Mr Walker] as the owner of the estate' in the land.[57]

However, it is not clear that the Act provides jurisdiction to give relief following a mortgagee sale, where the mortgage has been procured by fraud.[58] The strongest argument is that Mr Walker would be caught as the transfer was enabled by a power of sale contained in a forged (and therefore voidable) mortgage.[59] The notion that this might be enough to bring Mr Walker within jurisdiction to be granted relief was first floated during the law reform process, where the Law Commission's draft Bill used the words deprivation '*through* the registration under a voidable instrument'.[60] This contrasted with the language in what is now s 54(1)(b) which used the words '*by* the registration under a void or voidable instrument'.[61] Rod Thomas suggested

55 *Land Transfer Act* (n 7) s 55(1) (emphasis added).

56 Ibid s 54(1)(a).

57 Ibid.

58 Katherine Sanders, 'Land Law' [2012] (3) *New Zealand Law Review* 545, 567, citing Thomas (n 1) 741–2.

59 Thomas (n 1) 744.

60 *A New Land Transfer Act 1952* (n 8) 216 (emphasis added).

61 *Land Transfer Act* (n 7) s 54(1)(b) (emphasis added).

that use of the word 'by' indicated a more conservative test and that there is a distinction between a registration effected *through* a void or voidable instrument (for example a registration effected *through* the use of a power of sale contained in a forged mortgage) and getting registered *by* a void or voidable instrument.[62] Mr Walker was not registered *by* the forged *mortgage* document, as he would have been if he had become registered as the result of (i.e. *by*) a forged *transfer* document.

This reasoning is compelling and given s 55(1)(a) as enacted uses the word 'by' it may well be that a conservative approach is justified.[63] It would strain a strict interpretation of the statutory language to say that Mr Walker was registered as owner of the land *by* a voidable instrument. He was not registered *by* the forged mortgage, rather he would have been registered by 'a transfer instrument executed by a mortgagee for the purpose of exercising a power of sale under a mortgage'.[64]

Moreover, if 'through' has a potentially longer reach, it follows that 'by' requires the void or voidable instrument to be the instrument of registration. This would allow for a more holistic view where there are a series of transactions, potentially ensuring that the effect of ss 54 and 55 are limited to those transactions that arise as a direct result of the fraudster's actions and not as a later and indirect consequence of them. This would limit the reach of the discretion and accord with the intention to keep immediate indefeasibility as the fundamental rule.

Further supporting an interpretation that would exclude Mr Walker from jurisdiction under s 54(1)(a) is the fact that at the time the Radomskis exercised their power of sale, the mortgage was indefeasible.[65] It could only become defeasible at the time a court made an order under s 55 altering the register.[66] Therefore, even if Mr Walker's interest was registered as a result of the power of sale of the mortgage being exercised, it could not be said that he acquired the property under a void or voidable mortgage. The mortgage itself was neither void nor voidable until such time as the Court made an order, which in *Frazer v Walker* was after the sale was undertaken and Mr Walker had been registered as the new owner.[67] Indeed, this was the very point that was settled in *Frazer v Walker* and reiterated in related cases.[68] Declaring a registered mortgage defeasible because of fraudulent documents would destroy the benefit of immediate indefeasibility.[69]

It has been suggested that the words 'void or voidable' can only have meaning in this context if the Torrens system is ignored completely because the purpose of

62 Thomas (n 1) 727–9.

63 *Land Transfer Act* (n 7) s 55(1)(a).

64 Ibid s 103(1).

65 *Frazer v Walker* (n 2) 586.

66 *Land Transfer Act* (n 7) s 55(1).

67 *Frazer v Walker* (n 2) 584.

68 See, e.g.: *Nathan* (n 32); *Regal Castings v Lightbody* [2008] NZSC 177.

69 Toomey, 'Reverberations in the Torrens System' (n 30) 97, citing *Nathan* (n 32) [138].

indefeasibility is to cure such defects.[70] To a certain extent this must be correct and it certainly seems to have been the intention that in most cases the legislation should be read as saying an instrument would be 'void or voidable *but for the Land Transfer Act*'.[71]

However, while this logic makes sense where 'person B' is registered as a result of a forged transfer instrument, it would be a serious challenge to the principle of immediate indefeasibility if it also applied to those who acquire an estate in the land through the exercise of a power of sale in a forged (but at that moment indefeasible) mortgage.

If, as suggested above, the courts would not remove the Radomskis' mortgage on the basis of manifest injustice, then the mortgage would always remain indefeasible. Remember the purpose of the provisions is to create a system of 'immediate indefeasibility with limited judication discretion'[72] which allows for *alteration* of the register *after* the requirements of ss 54 and 55 have been met *and* an order has been made.[73] 'Immediate indefeasibility remains the normal rule',[74] and as a result Mr Walker would have taken under a mortgage that was valid and indefeasible.

It is also difficult to see why Mr Walker should end up in a different position from a third party who received a transfer of the Radomski mortgage in good faith. That person would be safe by virtue of s 56. As noted by Jayden Houghton, if a bona fide owner of a registered mortgage (such as the Radomskis) transferred that mortgage to a new mortgagee, the new mortgagee would be protected by s 56.[75] Mr Walker should not be in a different position merely because he took ownership of the fee simple, rather than a transfer of the mortgage.

There is an argument that Mr Frazer would be in a better position if the interest transferred remained a mortgage because he could: (1) apply for compensation;[76] (2) use that to discharge the mortgage; and (3) retain his fee simple unencumbered. However, if third parties are not to be caught by the section there seems no distinction (beyond the benefit to Mr Frazer) between the transferee of the mortgage itself, or the transferee of the fee simple as a result of the operation of the same mortgage. If Mr Frazer's rights are to be balanced against Mr Walker's, it should be because of a clear statement that Mr Walker is within jurisdiction and not as the result of what appears to be poor statutory drafting. Section 56 would be better to read 'the court must not make an order … if person B has transferred *an* estate or interest *referred*

70 Campbell and Thomas (n 45) 120.

71 *A New Land Transfer Act 1952* (n 8) 15 [2.14] (emphasis added).

72 Ibid 14 [2.11]

73 The court is empowered to 'make an order cancelling the registration of person B': *Land Transfer Act* (n 7) s 55(1).

74 *A New Land Transfer Act 1952* (n 8) 14 [2.11].

75 Houghton (n 4) 277.

76 *Land Transfer Act* (n 7) s 58(2).

to in s 54 to a third person, that third person acting in good faith'. If this was the case, Mr Walker would certainly be safe.

In any event, it would be perverse if the courts were to undertake an inquiry in relation to Mr Walker that was separate from consideration of the position of the Radomskis. This suggests that if s 54(1)(a) of the *Land Transfer Act* is to apply in cases involving a mortgagee's power of sale, there will need to be a twofold enquiry: (1) to assess whether the mortgagee's interest could have been removed from the register for manifest injustice; and (2) to see whether it is manifestly unjust for the new registered owner to remain on the title. If the first inquiry results in a 'no', then the second must always be a 'no', because the mortgage would have always been indefeasible. If the first is a 'yes', there is still the problem that when the power of sale was exercised indefeasibility applied and it was, at that time, a valid exercise of the power of sale. Moreover, it would be necessary to conduct a completely new assessment of the guidelines to determine whether manifest injustice was still present given the different characteristics and behaviour of the new bona fide registered owner. This would become extremely convoluted and expensive for all involved.

Coupled with the question of whether Mr Walker is, or should be, a bona fide third party, this suggests that there is a lot of strength in an argument that s 54(1)(a) should not apply in the case of a new registered owner who has obtained title by way of a mortgagee sale.[77] Indeed, this situation appears to be outside what the Law Commission seemed primarily concerned with:

> In cases of void transfer instruments (particularly fraudulent transfers), immediate indefeasibility is not always fair on previously registered owners (especially those in occupation) who, as innocent victims of fraud for example, did not wish or intend to transfer their property.[78]

Mr Walker did not take title because of a void transfer instrument, but rather by the exercise of a mortgagee's power of sale. Moreover, and remembering that 'the existence of forgery or other dishonest conduct does not, of itself, constitute manifest injustice',[79] and that Mr Walker was acting with no knowledge and in good faith, it seems unlikely that the courts would find manifest injustice in any event. Unless, of course, feeling sorry for Mr Frazer is sufficient to persuade a court to unpick the principle of immediate indefeasibility.

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77 Thomas (n 1) 742.

78 *A New Land Transfer Act 1952* (n 8) 12 [2.6].

79 *Land Transfer Act* (n 7) s 55(2).

V Judicial Reception

It is still early days for these provisions with only a few cases having considered them.[80] Somewhat oddly, the only case in which the provisions have been used to correct the register involved an error by the Registrar-General of Land, who had mistakenly registered a consolidation order which had the effect of registering new people as owners of the land.[81] For reasons that are unclear,[82] rather than using the Registrar's powers of correction conferred by the Act,[83] an application was instead made under ss 54 and 55. The Court had no problem concluding that while the consolidation order itself was not void, its registration was 'void or voidable' because it was a mistake.[84] This meant that it was capable of rectification by the Court.[85] The Court also quickly concluded, largely because of: (1) the applicant's decades-long connection with the land; and (2) the fact that the incorrectly registered owners did not oppose the application, that it would have been manifestly unjust not to correct the register.[86] The result in this case is unobjectionable, although the use of ss 54 and 55 in this context seems an uneasy fit. However, it does not give us much insight into how the sections will be interpreted in future.

In *Mau Whenua Inc v Shelly Bay Investments*,[87] there is a strong indication that the courts are likely to take the conservative line predicted by Toomey. The case involved an application that a caveat not lapse in the context of an allegation that a breach of trust by the trustee owners had resulted in the transfer of land to a new registered owner.[88] One of the caveator's arguments was that ss 54 to 57 of the *Land Transfer Act* were intended 'to provide a fairer and more flexible approach to

80 See also *Kaimai Properties Ltd v Queen Elizabeth the Second National Trust* (2023) 24 NZCPR 885, where the High Court noted any application under ss 54 and 55 would have been well out of time. In any event, there was no injustice in circumstances where the registered owner had taken title with knowledge of a conservation covenant. They had taken a chance that the covenant would either let them do what they wished, or could be changed to allow for this. It was not now unfair that they had discovered they could not. The Court of Appeal did not remark on this aspect of the case at first instance: *Kaimai Properties Ltd v Queen Elizabeth the Second National Trust* [2024] NZCA 616.

81 *Scott v Rawenata* [2022] NZHC 563 ('*Scott*').

82 Ostensibly this was because of a lack of clarity in the legislation regarding service requirements where the Registrar-General is going to use their powers. Perhaps the unsaid reason is that the Registrar-General will be as unwilling to use these powers under the 2017 Act as they were under the 1952 legislation. See the discussion in Houghton (n 4) 265.

83 *Land Transfer Act* (n 7) s 21(1).

84 *Scott* (n 81) [19].

85 Ibid.

86 Ibid [25].

87 [2019] NZHC 3222.

88 Ibid [18]–[19].

immediate indefeasibility than that which existed under the 1952 Act',[89] and that while indefeasibility remains important it was no longer as prescriptive as under the earlier legislation.[90] However, Associate Judge Johnston noted:

> Whilst I am prepared to accept that the exceptions to indefeasibility under the 2017 legislation are marginally wider than they were previously — essentially by reason of the introduction of ss 54 to 57 — I do not see force in the argument that this reflects a wholesale move to a flexible view of indefeasibility. The Law Commission emphasised that immediate indefeasibility would continue to be the bedrock of the legislation and apply in the vast majority of cases.[91]

His Honour stressed that the threshold for establishing manifest injustice is high, but more importantly, the common thread is the registration under a void or voidable instrument.[92] In the absence of such an instrument the provisions simply cannot apply.[93] It followed that an allegation of breach of trust leading to a change of ownership could never be caught by the sections.[94]

This reasoning is uncontroversial and does suggest that the courts will take a conservative approach to interpreting the legislation. They are unlikely to be swayed by arguments that the new provisions insert a degree of flexibility into the concept of immediate indefeasibility itself. Perhaps, it also suggests that in cases of ambiguity, such as whether the provisions apply to a registered owner who has taken by way of a mortgagee power of sale, the courts will err on the side of immediate indefeasibility. This would certainly introduce the least degree of transactional uncertainty possible into the conveyancing system.[95]

VI Overarching Practical Problems: A Reversal of Sympathy in Mr Walker's Favour?

Even if the courts take a conservative line, there remain problems, which might make us begin to feel sorry for Mr Walker, rather than Mr Frazer. Chief amongst these is the cost of all this litigation. Defending himself against Mr Frazer has now become considerably more complex, and as a result, more expensive. Mr Walker would need to establish that, notwithstanding Mrs Frazer's fraud: (1) he is either a third party for the purpose of s 56; (2) the Radomski mortgage would not have been removed from the title for manifest injustice; (3) even if the mortgage was removed it was nonetheless indefeasible at the time the power of sale was exercised;

89 Ibid [56].

90 Ibid [58]–[60].

91 Ibid [60].

92 Ibid [64], [67].

93 Ibid [64].

94 Ibid [69].

95 Houghton (n 4) 25.

or (4) even if the mortgage was not indefeasible, there is no manifest injustice in allowing him to keep his title.

If he wins, he might be able to look to Mr Frazer for costs, but he will probably remain significantly out of pocket. If he loses, he would, presumably, need to pay Mr Frazer's costs. He might find some consolation in the fact he would be able to bring further proceedings against the Crown for compensation.[96] This is, however, calculated on the value of the land,[97] and would not include the costs of defending his — but for the court's exercise of its discretion — indefeasible title. Nor would it include the costs of pursuing proceedings for compensation (with the risk of an adverse costs order again if he loses). As noted by Neil Campbell and Rod Thomas

> [i]t is arguable that a party may be better off losing title as result of a finding of manifest injustice, rather than retaining the title and having to bear all of that party's litigation costs, subject to any costs award made by the court.[98]

VII Conclusion

These provisions are supposed to provide an avenue for justice for those parties who find themselves caught out by immediate indefeasibility, however, they function to inject a high degree of uncertainty into what was a settled area of the law. Although the position of Mr Frazer remains unfortunate, it is hard not to feel sorry for Mr Walker who would now suffer considerable stress and uncertainty defending his otherwise indefeasible title. One of the reasons the Law Commission advocated the new approach was the fact that such cases were likely to be litigated in any event.[99] However, we do not know how many cases have been, or would have been, settled on the basis that they had similar facts to *Frazer v Walker*. Indeed, that is the purpose of the doctrine of precedent. It allows for an assessment of the result of a case based on what has been decided previously and for litigation risk to be balanced against perceived injustice. It seems inevitable that the lack of clarity in the operation of the new provisions will invite considerable litigation in the coming decades.

This means that students need to understand it, but teaching the principle of indefeasibility — and its exceptions — has become more challenging in New Zealand. It is now necessary to get over one's sympathy for Mr Frazer, to understand why the brightline rule adopted in *Frazer v Walker* is the starting point, while also considering when the new discretion might be exercised. It also requires accepting that we do not know how these provisions will operate, or if they will operate in the way the Law Commission intended.

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96 *Land Transfer Act* (n 7) s 59(2)(c).

97 Ibid ss 64–5.

98 Campbell and Thomas (n 45) 129.

99 *A New Land Transfer Act 1952* (n 8) 15 [2.16].

The benefit is that the policy choice underpinning this area of the law is much clearer. Perhaps students will feel sorry for both Mr Frazer and Mr Walker. In turn, this may allow for a discussion of the dichotomy of 'crystals and mud' that lies at the heart of many property law rules.[100] For every hard-edged rule there is a tendency to craft a soft-edged exception. Discussing why this might be so, and why it matters, is an important aspect of learning to think about property. Due to Mrs Frazer's behaviour, someone who did nothing wrong has to lose. Who should it be? Perhaps my view is clear, but what do you think?

100 Carol M Rose, 'Crystals and Mud in Property Law' (1988) 40(3) *Stanford Law Review* 577.