

BARNES v ADDY CLAIMS AND THE INDEFEASIBILITY OF TORRENS TITLE

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[This article considers the proper relationship between Barnes v Addy claims and the indefeasibility of Torrens title. In some recent Australian cases, including Farah Constructions Pty Ltd v Say-Dee Pty Ltd, courts have regarded this question as an important one to be resolved by balancing competing fundamental philosophies. Yet in other recent Australian cases, the question has been all but ignored. This article argues that, although the Torrens system may be underpinned by competing fundamental philosophies, these are no more apparent, nor any more difficult to reconcile, in cases involving Barnes v Addy claims than in cases involving claims of other types. The key to the argument is a correct understanding of the remedies that are available in response to a successful Barnes v Addy claim. This article concentrates on those remedies.]

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I INTRODUCTION

Lord Selborne’s judgment in *Barnes v Addy*¹ has been described as a ‘display of Victorian self-confidence’.² Indeed, the judgment set out foundations for the whole law relating to the liability of an accessory to a breach of fiduciary obligation in only a few pages and without reference to authority.³ Well over a century later, the observation may be made that the numerous progeny of *Barnes v Addy* lack the self-confidence of their illustrious ancestor and that the law relating to accessory liability is confused and confusing. This is true with

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¹ (1874) LR 9 Ch App 244.

² Michael Bryan, ‘The Liability of the Recipient: Restitution at Common Law or Wrongdoing in Equity?’ in Simone Degeling and James Edelman (eds), *Equity in Commercial Law* (2005) 327, 327.

³ *Barnes v Addy* itself was a case involving a breach of trust, but accessory liability also arises with respect to breaches of obligation by fiduciaries other than trustees.

respect to the law on the first and the second ‘limbs’ of accessory liability under *Barnes v Addy*: the liability of those who receive property as a consequence of someone else’s breach of fiduciary obligation; and the liability of those who assist a breach of fiduciary obligation.⁴ Even the High Court of Australia’s recent decision in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (‘*Farah Constructions*’),⁵ while clearing up some doubts about *Barnes v Addy*, raises a number of questions, the answers to which will have to wait for another day.

The debate has been conducted, and the subsequent confusion has arisen, with respect to the grounds of accessory liability. When it comes to recipient liability, the dispute is between those who think that such liability ought to be fault-based and those who think that it ought to be based on unjust enrichment.⁶ When it comes to the liability of assistants, the dispute is between those who think that liability is triggered by knowledge and those who think that it is triggered by dishonesty.⁷ Cutting across these divisions are further divisions regarding, for example, what types of knowledge suffice to ground liability (assuming that knowledge is the basis of liability),⁸ whether an enquiry into dishonesty is really

⁴ With regard to terminology, in order to remain neutral with respect to the debates to which I allude in the following paragraph in the text, I refer to ‘*Barnes v Addy* claims’ of ‘accessory liability’, which can be broken down into claims of ‘recipient liability’ and claims of ‘assistant liability’. I take no position on whether recipient liability is triggered by fault or by unjust enrichment. Nor do I take a position on whether assistant liability is triggered by knowledge or by dishonesty, or on whether assistant liability may be broken down into liability for inducing a breach of fiduciary obligation and liability for participating in a breach of fiduciary obligation. With regard to classification, as I make clear in Part IV(B) below, *Barnes v Addy* claims are distinct from proprietary claims supported by equitable tracing, even though both types of claim may arise from the same facts.

⁵ [2007] HCA 22 (Unreported, Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ, 24 May 2007).

⁶ For a discussion of the cases which establish a fault requirement and an argument for a basis in unjust enrichment: see Lord Nicholls, ‘Knowing Receipt: The Need for a New Landmark’ in W R Cornish et al (eds), *Restitution: Past, Present and Future: Essays in Honour of Gareth Jones* (1998) 231. In *Farah Constructions* [2007] HCA 22 (Unreported, Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ, 24 May 2007) [130]–[158] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ), the High Court decisively rejected any basis in unjust enrichment.

⁷ For the view that assistant liability is triggered by knowledge: see, eg, *Consul Developments Pty Ltd v DPC Estates Pty Ltd* (1975) 132 CLR 373 (‘*Consul*’); *Farah Constructions* [2007] HCA 22 (Unreported, Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ, 24 May 2007). For the view that assistant liability is triggered by dishonesty: see, eg, *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378 (‘*Royal Brunei*’); *Twinsectra Ltd v Yardley* [2002] 2 AC 164 (‘*Twinsectra*’); *Barlowe Clowes International Ltd (in liq) v Eurotrust International Ltd* [2006] 1 All ER 333.

⁸ This division is often manifested in arguments about the utility of the infamous classification of knowledge first introduced into the law in *Baden v Société Générale pour Favoriser le Développement du Commerce et de l’Industrie en France SA* [1992] 4 All ER 161. For masterly accounts of the issues: see Charles Harpum, ‘The Stranger as Constructive Trustee’ (1986) 102 *Law Quarterly Review* 114, 120–7; Simon Gardner, ‘Knowing Assistance and Knowing Receipt: Taking Stock’ (1996) 112 *Law Quarterly Review* 56, 57–64. For a brief survey of responses to the so-called ‘*Baden* scale’ of knowledge: see Lord Robert Walker, ‘Dishonesty and Unconscionable Conduct in Commercial Life — Some Reflections on Accessory Liability and Knowing Receipt’ (2005) 27 *Sydney Law Review* 187, 194. In *Farah Constructions* [2007] HCA 22 (Unreported, Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ, 24 May 2007) [171]–[178] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ), the High Court appears to have provided clear guidance as to what types of knowledge will suffice to ground assistant liability (at least where a defendant participates in a fiduciary’s dishonest breach of obligation). However, the Court appears to have provided only limited guidance as to what types of knowl-

just an enquiry into knowledge by another name,⁹ and whether, at least in cases of assistance, the fiduciary's breach of obligation must itself be dishonest.¹⁰ And informing the debate, at least for some, is a concern to place accessory liability, along with other forms of liability, in a rational account of private law.¹¹

While such matters have been thrashed out in the courts and the academy, other interesting topics bearing on accessory liability have received less attention. The remedies that are available in response to a successful *Barnes v Addy* claim constitute one such topic.¹² Indeed, in *Farah Constructions*, the High Court dealt with issues relating to remedies for accessory liability in just two paragraphs.¹³ Another topic, which is connected with the question of remedies, is the subject of this article — namely, the proper relationship between *Barnes v Addy* claims and the indefeasibility of Torrens title. This issue arises in cases where a plaintiff brings a *Barnes v Addy* claim with the aim of compelling the defendant to divest a registered interest in Torrens land. It is sometimes said that such cases reveal a clash between, on the one hand, equity's requirements of conscience and, on the other hand, the principle of indefeasibility which characterises the Torrens system.¹⁴

A review of recent Australian cases reveals that some courts regard this clash as serious and profound, whereas other courts barely regard it at all. In *Macquarie Bank Ltd v Sixty-Fourth Throne Pty Ltd* ('*Sixty-Fourth Throne*'),¹⁵ *Tara Shire Council v Garner* ('*Tara*'),¹⁶ *LHK Nominees Pty Ltd v Kenworthy* ('*LHK Nominees*')¹⁷ and *Farah Constructions*,¹⁸ the question of the proper relationship between *Barnes v Addy* claims and the indefeasibility of Torrens title was regarded as an important one to be resolved by balancing competing fundamental philosophies. Indeed, in *Tara*, Atkinson J went so far as to say that '[t]his case brings into sharp relief the great tectonic plates of law and equity as they grind against each other and struggle to settle into a stable position in the substratum of Australia's legal landscape.'¹⁹

edge will suffice to ground recipient liability: at [112], [121], [134] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ).

⁹ See, eg, *Twinsectra* [2002] 2 AC 164, 180 (Lord Millett).

¹⁰ On this point: cf *Royal Brunei* [1995] 2 AC 378 with *Farah Constructions* [2007] HCA 22 (Unreported, Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ, 24 May 2007).

¹¹ See, eg, Peter Birks, 'Misdirected Funds: Restitution from the Recipient' [1989] *Lloyd's Maritime and Commercial Law Quarterly* 296.

¹² But see Steven B Elliot and Charles Mitchell, 'Remedies for Dishonest Assistance' (2004) 67 *Modern Law Review* 16.

¹³ [2007] HCA 22 (Unreported, Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ, 24 May 2007) [200]–[201] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ).

¹⁴ See, eg, Lynden Griggs, 'The Tectonic Plate of Equity — Establishing a Fault Line in Our Torrens Landscape' (2003) 10 *Australian Property Law Journal* 78; Peter Butt, 'Rights in Personam and the Knowing Receipt of Trust Property' (2003) 77 *Australian Law Journal* 280.

¹⁵ [1998] 3 VR 133.

¹⁶ [2003] 1 Qd R 556.

¹⁷ (2002) 26 WAR 517.

¹⁸ [2007] HCA 22 (Unreported, Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ, 24 May 2007).

¹⁹ [2003] 1 Qd R 556, 582.

Yet in *Koorootang Nominees Pty Ltd v ANZ Banking Group Ltd* ('*Koorootang*')²⁰ and the decision of the New South Wales Court of Appeal in *Say-Dee Pty Ltd v Farah Constructions Pty Ltd* ('*Say-Dee*'),²¹ the question of the proper relationship between *Barnes v Addy* claims and the indefeasibility of Torrens title went almost unmentioned. In *Koorootang*, the parties did not argue the point²² and, in *Say-Dee*, the NSW Court of Appeal dealt with the question in just three paragraphs.²³

When an issue is regarded as fundamental in some courts but handled with brisk indifference by other courts in analogous cases, it is likely that somewhere the issue has been misunderstood. That is my argument in this article. In what follows, I contend that, although the Torrens system may be underpinned by competing fundamental philosophies, those competing philosophies are no more apparent nor any more difficult to reconcile in cases involving *Barnes v Addy* claims than in cases involving claims of other types. Therefore, the remarks of Atkinson J in *Tara*²⁴ overstate the significance of cases in which *Barnes v Addy* claims are made with a view to divesting a registered proprietor of an interest in Torrens land.

The key to my argument is a correct understanding of the remedies that are available in response to a successful *Barnes v Addy* claim. Therefore, an examination of such remedies dominates what follows. In Part II, I discuss the meaning of the indefeasibility of Torrens title. In Part III, I consider the doctrinal basis on which it is said that a *Barnes v Addy* claim may bring about the defeat of a registered title — namely, the in personam exception to indefeasibility. I note that an in personam claim may present a threat to a registered title where, as Barwick CJ put it in *Breskvar v Wall*, its 'terminal point' entails orders requiring the registered proprietor to divest the interest acquired by registration.²⁵ In Part IV, I turn to remedies in response to a successful *Barnes v Addy* claim. I make two arguments. First, because accessory liability is personal, the terminal point of a *Barnes v Addy* claim need never take the form of orders requiring the defendant to divest a registered interest in Torrens land. Secondly, a *Barnes v Addy* claim the terminal point of which does take the form of orders requiring the defendant to divest a registered interest in Torrens land, presents no unusual or special threat to the principle of indefeasibility.

II INDEFEASIBILITY

In *Frazer v Walker*, the Privy Council considered the meaning of 'indefeasibility of title': 'The expression ... is a convenient description of the immunity from attack by adverse claim to the land or interest in respect of which he is regis-

²⁰ [1998] 3 VR 16.

²¹ [2005] NSWCA 309 (Unreported, Mason P, Giles and Tobias JJA, 15 September 2005).

²² [1998] 3 VR 16, 75 (Hansen J).

²³ [2005] NSWCA 309 (Unreported, Mason P, Giles and Tobias JJA, 15 September 2005) [236]–[238] (Tobias JA).

²⁴ [2003] 1 Qd R 556, 582.

²⁵ (1971) 126 CLR 376, 385.

tered, which a registered proprietor enjoys.²⁶ In the Torrens system, such an immunity arises upon and because of registration. It is a true immunity in the sense that individuals who are able to assert interests in land under general law principles are disabled from asserting those interests against the holder of an inconsistent title acquired by registration, and they are disabled from doing so from the moment of registration.²⁷

The principle of indefeasibility has been fundamental to the Torrens system from the time of that system's conception. In his second reading speech on the Bill that was to be enacted as the first Torrens legislation in Australia, Sir Robert Torrens himself, as a member of the South Australian Parliament, identified as one of the central principles of the system that the Bill was designed to introduce, 'that registered titles, except in cases where registration [is] procured by fraud, should be absolutely indefeasible.'²⁸ Indeed, today the principle of indefeasibility may be identified in the Torrens legislation of every Australian jurisdiction.²⁹ Moreover, despite the fact that some courts in the past applied the principle of indefeasibility subject to a qualification (the inspiration for which appears to have been the general law doctrine of notice),³⁰ other courts applied it rigorously, and it is that rigorous application which currently prevails.³¹ Nevertheless, it is arguable that the principle is not applied as rigorously as Torrens might have desired, for it is often said that there are non-statutory exceptions to indefeasibility.³² One of these is usually referred to as the 'in personam' exception.

²⁶ [1967] 1 AC 569, 580 (Lord Wilberforce for the Board).

²⁷ On the correlation between immunity and disability: see Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (1919) 36, 60–3.

²⁸ The speech, which Torrens delivered on 11 November 1857, is quoted and discussed in Stanley Robinson, *Transfer of Land in Victoria* (1979) 4–5.

²⁹ *Land Titles Act 1925* (ACT) s 58; *Real Property Act 1900* (NSW) s 42; *Land Title Act 2000* (NT) s 188; *Land Title Act 1994* (Qld) s 184; *Real Property Act 1886* (SA) s 69; *Land Titles Act 1980* (Tas) s 40; *Transfer of Land Act 1958* (Vic) s 42; *Transfer of Land Act 1893* (WA) s 68.

³⁰ The principle of indefeasibility was applied by the Privy Council subject to such a qualification in *Gibbs v Messer* [1891] AC 248, and by Dixon and McTiernan JJ in *Clements v Ellis* (1934) 51 CLR 217. In *Clements v Ellis*, the High Court was divided evenly, with Rich and Evatt JJ applying the principle of indefeasibility rigorously. The decision of the trial judge — with which Dixon and McTiernan JJ had agreed — thus prevailed. Nonetheless, as Sir Anthony Mason has pointed out, '[s]uch was the influence of Sir Owen Dixon that his judgment was taken as reflecting Australian law on the point', at least prior to the High Court's decision in *Breskvar v Wall* (1971) 126 CLR 376: see Sir Anthony Mason, 'Indefeasibility: Logic or Legend?' in David Grinlinton (ed), *Torrens in the Twenty-First Century* (2003) 3, 6.

³¹ *Assets Co Ltd v Mere Roihi* [1905] AC 176; *Boyd v Mayor of Wellington* [1924] NZLR 1174; *Frazer v Walker* [1967] 1 AC 569; *Breskvar v Wall* (1971) 126 CLR 376. In *Chasfild Pty Ltd v Taranto* [1991] 1 VR 225, 228–9, 234–5, Gray J reintroduced a conception of qualified indefeasibility into Victorian law through a broad reading of s 44(1) of the *Transfer of Land Act 1958* (Vic). However, this flirtation with what is usually called 'deferred indefeasibility' was quickly corrected by Hayne J (then of the Supreme Court of Victoria) in *Vassos v State Bank of South Australia* [1993] 2 VR 316 and (as a member of the Victorian Court of Appeal) in *Pyramid Building Society (in liq) v Scorpion Hotels Pty Ltd* [1998] 1 VR 188. In the latter case, *Chasfild Pty Ltd v Taranto* [1991] 1 VR 225 was formally overruled: at 191 (Hayne JA).

³² In Victoria, a non-statutory exception to the indefeasibility of title appears to exist where a registered proprietor has acquired title as a volunteer: *King v Smail* [1958] VR 273; *Rasmussen v Rasmussen* [1995] 1 VR 613. In NSW, no such exception exists: *Bogdanovic v Koteff* (1988) 12 NSWLR 472. Another exception to indefeasibility may exist, depending on the circumstances, where a registered proprietor fails to comply with the provisions of legislation other than the Torrens statute: *Hillpalm Pty Ltd v Heaven's Door Pty Ltd* (2002) 55 NSWLR 446; cf

III THE IN PERSONAM EXCEPTION

Having identified and described the principle of the indefeasibility of Torrens title, the Privy Council in *Frazer v Walker* stated that the principle ‘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.’³³ This oft-repeated passage describes the circumstances in which what is commonly called the in personam exception to indefeasibility may arise. The basis of an in personam claim lies in the conduct of the registered proprietor. For example, think of a beneficiary’s claim for the performance of a valid trust of an interest in Torrens land that has been declared by the registered proprietor of that interest; or think of a purchaser’s claim for the specific performance of a binding and unconditional contract for the sale and purchase of a registered interest in Torrens land. The basis of both claims is the fact that a registered proprietor has, by their conduct — declaring a trust in the first example; entering into a contract in the second example — created legally enforceable rights in another person.³⁴

The justification for permitting an in personam claim to be brought against a registered proprietor, and for disallowing the registered proprietor simply to assert indefeasible title to avoid the claim, was set out neatly by Brennan J in *Bahr v Nicolay [No 2]*: ‘the indefeasibility provisions ... are designed to protect a transferee from defects in the title of the transferor, not to free him from interests with which he has burdened his own title.’³⁵ However, the title of a registered proprietor is not burdened by interests that are supportable only by invoking vague standards of fairness and justice. Rather, an in personam claim may bring about the defeat of a registered title only where it is brought within an established legal or equitable cause of action.³⁶ Moreover, courts have exhibited caution when invited by plaintiffs to permit an in personam claim to bring about the defeat of a registered title even in cases where plaintiffs have pleaded established causes of action.³⁷ The boundaries of the so-called in personam exception are carefully circumscribed and monitored by the courts, and nowhere has this been more evident than in cases such as *Sixty-Fourth Throne*³⁸ and *LHK*

Hillpalm Pty Ltd v Heaven’s Door Pty Ltd (2004) 220 CLR 472. Of course, statutory exceptions to indefeasibility other than fraud exist in every jurisdiction and these are uncontroversial: see *Transfer of Land Act 1958* (Vic) s 42(2) for a typical list.

³³ [1967] AC 569, 585 (Lord Wilberforce).

³⁴ Peter Butt, *Land Law* (5th ed, 2006) 788–9. However, emphasis on the *conduct* of the defendant has been questioned by Robert Chambers, ‘Indefeasible Title as a Bar to a Claim for Restitution’ [1998] *Restitution Law Review* 126, 130–1.

³⁵ (1988) 164 CLR 604, 653.

³⁶ *Garofano v Reliance Finance Corporation Pty Ltd* (1992) NSW ConvR ¶55-640, 59 662–3 (Meagher JA); *Grgic v Australian & New Zealand Banking Group Ltd* (1994) 33 NSWLR 202, 222–3 (Powell JA). Arguably, the judgments of Mahoney JA and Kirby P in *Mercantile Mutual Life Insurance Co Ltd v Gosper* (1991) 25 NSWLR 32 represent a relaxation of this requirement, but note the strident dissent of Meagher JA in that case.

³⁷ *Vassos v State Bank of South Australia* [1993] 2 VR 316; *Grgic v Australian & New Zealand Banking Group Ltd* (1994) 33 NSWLR 202; *Pyramid Building Society (in liq) v Scorpion Hotels Pty Ltd* [1998] 1 VR 188.

³⁸ [1998] 3 VR 133, 146–54 (Tadgell JA). Cf at 162–70 (Ashley AJA).

Nominees,³⁹ where *Barnes v Addy* claims were refused because it was thought that their acceptance would extend those boundaries impermissibly.

To describe an in personam claim as an exception to the indefeasibility of title is misleading. Where a title that would otherwise be indefeasible is, owing to the existence of some fact or facts, not indefeasible, an exception to indefeasibility is in operation. So, for example, an exception to indefeasibility exists with respect to titles that are encumbered by interests recorded on the register itself. The presence of a record of such an interest on the register is sufficient, by itself, to defeat an otherwise indefeasible title. However, it may not be said that an exception to indefeasibility exists with respect to registered titles held by those who must defend an in personam claim, nor even with respect to registered titles held by those who defend such a claim unsuccessfully. The fact that I have unsuccessfully defended an in personam claim against me is not, by itself, sufficient to defeat a registered title that I hold. True, it is sufficient to give rise to a judgment against me, which may entail orders requiring me to perform certain acts, and the performance of those acts might cause the defeat of a registered title that I hold. However, in that chain of events, the causal link between the in personam claim and the defeat of my registered title is too indirect to warrant describing the success of the claim as generating an exception to the indefeasibility of that title.

It has been suggested that, to the extent that a registered title may be affected by the creation of a new in personam right, it is possible to speak in a loose sense of an 'exception' to the indefeasibility of that title.⁴⁰ However, caution must be exercised even with such a tentative suggestion. A registered title may be affected by the creation of a new right in the sense that its proprietor is obligated to perform certain acts with respect to that title as a result of the existence of the new right. For example, when a registered proprietor declares a trust of the registered interest in question, it may be said that the registered proprietor's title is affected in that sense. However, the indefeasibility of such a title cannot be affected by the new right. Insofar as it is indefeasible, the title can be affected only by a change to the details which record it on the register, because the register is conclusive evidence of the title. As Barwick CJ put it in *Breskvar v Wall*, '[s]o long as the certificate [of title] is unamended it is conclusive and of course when amended it is conclusive of the new particulars it contains.'⁴¹ Until the details on the register are changed, it is misleading to speak, even in a loose sense, of an 'exception' to indefeasibility.

Nevertheless, despite the fact that an in personam claim is not really an exception to the indefeasibility of title, it makes sense to say that an in personam claim may present a threat to a registered title. This is because, in response to a successful in personam claim, a court may order a registered proprietor to perform acts that, if they are carried out, will cause details recorded on the register to be changed. Moreover, if the registered proprietor refuses to perform those acts, the court may make further orders that will bring about the rectifica-

³⁹ (2002) 26 WAR 517, 547 (Murray J).

⁴⁰ Robert Chambers, *An Introduction to Property Law in Australia* (2001) 475–6.

⁴¹ (1971) 126 CLR 376, 385.

tion of details recorded on the register, and those further orders will have the effect of defeating the registered title in question. These points were made cogently by Barwick CJ in *Breskvar v Wall* in a well-known passage that bears repeating in full:⁴²

[In personam claims] may have as their terminal point orders binding the [defendant] to divest himself wholly or partly of the estate or interest vested in him by registration and endorsement of the certificate of title: or in default of his compliance with such an order on his part, perhaps vesting orders may be made to effect the proper interest of the [plaintiff] in the land.

The threat that an in personam claim presents to a registered title is entailed in the potential for a court to respond to such a claim by making orders like those described by Barwick CJ. Whether such orders, when made in response to a successful *Barnes v Addy* claim, constitute an unusual or special threat to the principle of indefeasibility itself is another matter, which I take up below.⁴³

IV *BARNES V ADDY* CLAIMS: REMEDIES

The remedies that are available in response to a successful *Barnes v Addy* claim may be broken down into two groups: first, those *without* proprietary consequences and, secondly, those *with* proprietary consequences.⁴⁴ Within this second group of remedies, a further distinction may be drawn. On the one hand, there are in personam orders which have proprietary consequences. On the other hand, there are declarations that a plaintiff has an interest in specific property.⁴⁵ In this Part, I argue that none of these remedies, properly understood, presents any unusual or special threat to the principle of indefeasibility of Torrens title.

A *Remedies without Proprietary Consequences*

In an ordinary case, a court's orders in response to a successful in personam claim operate, as the label 'in personam' suggests, on the person of the defendant. Because accessory liability is personal, arising out of the conduct of the defendant, a *Barnes v Addy* claim is an in personam claim.⁴⁶ It follows that a court's orders in response to a successful *Barnes v Addy* claim operate on the person of the defendant. Accordingly, there is nothing in the logic of a *Bar-*

⁴² Ibid.

⁴³ See below Part IV(B).

⁴⁴ By 'remedies with proprietary consequences' I mean remedies that, according to their terms, protect, create or destroy specific property.

⁴⁵ As Tadgell JA noted in *Sixty-Fourth Throne* [1998] 3 VR 133, 138, the trial judge ordered rectification of the register on the basis of a finding of in personam liability. That order should not have been made. Because it does not operate on the person of the defendant, an order that the register be rectified is an inappropriate response to an in personam claim. Consequently, I do not address such orders in what follows. For a discussion of the operation of the remedy of rectification of the register in a case of statutory fraud: see *Loke Yew v Port Swettenham Rubber Co Ltd* [1913] AC 491, 504–5 (Lord Moulton for the Board).

⁴⁶ For timely reminders that accessory liability is personal: see Lord Nicholls, above n 6, 231; Lionel Smith, 'Constructive Trusts and Constructive Trustees' (1999) 58 *Cambridge Law Journal* 294. In his short but important article, Lionel Smith explains how an accessory, although personally liable, may be said sensibly to have to account to the plaintiff as a constructive trustee.

nes v Addy claim that requires such orders to have proprietary consequences; orders may be made against the person of the defendant that require them to perform acts having nothing to do with specific property. To put this in the terms employed by Barwick CJ in *Breskvar v Wall*,⁴⁷ it is never the case that the terminal point of a *Barnes v Addy* claim must entail orders requiring the defendant to divest property, whether that property be a registered interest in Torrens land or something else. Importantly, this is just as true of cases where the claim is one of recipient liability as it is of cases where the claim is one of assistant liability. I will consider the simpler case of assistant liability first and then take up the more complicated case of recipient liability.

1 *Assistant Liability*

In many cases of assistant liability, the breach of fiduciary obligation that the defendant assists does not bring about the receipt of an interest in Torrens land — or, indeed, the receipt of a proprietary interest of any type — by the defendant. The remedies available in such cases reflect that fact. They usually take the form of an order requiring the defendant to pay to the plaintiff a sum of money. The justification for such an order may be found in the need to ensure the performance of a trust that the defendant helped to breach, or in the need to repair loss sustained by the plaintiff, or even in the disgorgement of the defendant's wrongful gain or the deterrence of future breaches.⁴⁸ Nevertheless, whatever the justification happens to be, and whatever precise form the order takes, it will not require the defendant to divest an interest in land, registered or otherwise, because the defendant's possession of any such interest is merely coincidental to their breach of obligation.

However, in some cases of assistant liability the breach of fiduciary obligation that the defendant assists *does* bring about the receipt of an interest in Torrens land by the defendant. These cases more commonly give rise to claims of recipient liability. However, there is no reason why they might not also give rise to claims of assistant liability.⁴⁹ In such a case, assuming that the plaintiff makes a claim of assistant liability, the plaintiff may seek a remedy with proprietary consequences.⁵⁰ However, the plaintiff may also seek an in personam order that the defendant pay to the plaintiff a sum of money, most likely a sum that is equal to the value of the interest that the defendant has received.⁵¹ That order will not

⁴⁷ (1971) 126 CLR 376, 385. See also above n 41 and accompanying text.

⁴⁸ See the comprehensive treatment in Elliot and Mitchell, above n 12, 36–45.

⁴⁹ For a discussion of this point: see Charles Mitchell, 'Assistance' in Peter Birks and Arianna Pretto (eds), *Breach of Trust* (2002) 139, 182–7.

⁵⁰ Such a remedy was sought in the two leading Australian cases on assistant liability: *Consul* (1975) 132 CLR 373; *Farah Constructions* [2007] HCA 22 (Unreported, Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ, 24 May 2007). In *Consul*, the High Court denied the remedy sought, as the majority thought that the defendant was not liable as an assistant: at 366–7 (Barwick CJ), 399–401 (Gibbs J), 413 (Stephen J). In *Farah Constructions*, no remedy was awarded because the High Court did not think that there had been a breach of fiduciary obligation for the defendants to assist: at [106]–[109] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ).

⁵¹ The plaintiff may also argue for a remedy requiring the defendant to disgorge a gain made by the fiduciary, based on the premise that liability of a defaulting fiduciary and liability of an assistant is joint and several. Elliot and Mitchell, above n 12, 40–1, approve of the premise but are sceptical of the argument.

require the defendant to divest the interest. Thus, even in cases where assistant liability arises because an assistant has received an interest in Torrens land through inducing or participating in a breach of fiduciary obligation, the logic of the *Barnes v Addy* claim does not require that a remedy with proprietary consequences be awarded.

2 Recipient Liability

Cases of recipient liability are more complicated because recipient liability presupposes the receipt of property by the defendant.⁵² Therefore, by their very nature, cases of recipient liability are more likely than cases of assistant liability to entail a plaintiff seeking to divest a defendant of property. Where the property in question is a registered interest in Torrens land, this may create a threat to an indefeasible title. However, recipient liability, just like assistant liability, is personal. Therefore, there is nothing in the logic of a *Barnes v Addy* claim against a recipient that requires the award of a remedy with proprietary consequences should the claim be successful. This is true in the two types of case that give rise to recipient liability: where the defendant has received property as a consequence of someone else's breach of fiduciary obligation and no longer has that property; and where the defendant has received property as a consequence of someone else's breach of fiduciary obligation and retains that property.⁵³

First, take a case in which a defendant received a registered interest in Torrens land as a consequence of someone else's breach of fiduciary obligation but no longer has that interest. Because recipient liability is personal, it does not matter that the defendant no longer has that interest. If the facts reveal liability, the court may order the defendant to pay to the plaintiff a sum of money equal to the value of the interest (calculated either at the moment of receipt or at some other moment), even though the defendant no longer retains the interest.⁵⁴ In such a case, the success of the plaintiff's *Barnes v Addy* claim presents no threat to an indefeasible title — let alone an unusual or special threat to the principle of indefeasibility of title itself — even though what the defendant received was a registered interest in Torrens land. The terminal point of the case simply cannot take the form of orders requiring the defendant to divest the interest, because they have already done so.

Now take a case in which a defendant received a registered interest in Torrens land as a consequence of someone else's breach of fiduciary obligation and retains that interest. All the recent Australian cases raising the question of the relationship between *Barnes v Addy* claims and the principle of indefeasibility are of this type. In *Koorootang*⁵⁵ and *Sixty-Fourth Throne*,⁵⁶ the relevant

⁵² I lay to one side cases of 'ministerial' receipt, which do not give rise to recipient liability but may, depending on the circumstances, give rise to assistant liability: see, eg, *Twinsectra* [2002] 2 AC 164.

⁵³ In drawing this distinction, I follow Lord Nicholls, above n 6, 232–9.

⁵⁴ This is so whether recipient liability is fault-based or based on unjust enrichment. For a summary of the seminal views of Peter Birks on the question of whether such a defendant is enriched for the purposes of a claim based on unjust enrichment: see Lionel Smith, 'Tracing' in Andrew Burrows and Lord Rodger (eds), *Mapping the Law: Essays in Memory of Peter Birks* (2006) 119, 129–30.

⁵⁵ [1998] 3 VR 16.

interests were registered mortgages which the defendants held at the time of trial. In *Tara*,⁵⁷ *LHK Nominees*⁵⁸ and *Farah Constructions*,⁵⁹ they were registered estates in fee simple which the defendants held at the time of trial.⁶⁰ In each of the five cases, the plaintiff sought to divest the defendant of the interest in question. In other words, in all these cases, remedies with proprietary consequences were sought. However, as I argue below, they need not have been.

In *LHK Nominees*,⁶¹ the trustee of a family trust transferred title to the family home to a family member, who subsequently became the registered proprietor of the estate in fee simple. The family member paid less than half of the market value of the property to the trust. In the Western Australian Court of Appeal, the trust failed in its attempt to recover the property from the estate of the now-deceased family member. The trust sought either a declaration that the estate held the property on constructive trust (and consequential orders), or an equitable lien over the property to secure the payment of a sum equal to the difference between the market value of the property and the amount paid for it by the family member.⁶² The Court of Appeal refused to provide the relief sought because to do so would have interfered impermissibly with the principle of the indefeasibility of Torrens title.⁶³ As Anderson and Steyler JJ put it: 'we are unaware of any ... authority ... for the proposition that the registered interest of a purchaser of Torrens system land is defeasible simply because he became registered with knowledge that the transfer was in breach of trust'.⁶⁴

In this case, the trust could have sought a remedy in the form of an order requiring the estate to pay to it a sum equal to the difference between the market value of the property and the amount paid for it by the family member, but not secured by an equitable lien. This remedy would have been without proprietary consequences. If the trust had sought it, the Court would not have had to consider the relationship between *Barnes v Addy* claims and the indefeasibility of Torrens title. Furthermore, the remedy would have been entirely appropriate, given the logic of a *Barnes v Addy* claim as a personal claim. The fact that the estate may have had to sell the property in order to satisfy a money judgment would have been irrelevant so far as the indefeasibility of title was concerned. Any judgment debtor may be compelled as a matter of practical necessity to divest an interest in Torrens land to satisfy the judgment. But it would be strange to suggest that the award of a money judgment, because it may have this

⁵⁶ [1998] 3 VR 133.

⁵⁷ [2003] 1 Qd R 556.

⁵⁸ (2002) 26 WAR 517.

⁵⁹ [2007] HCA 22 (Unreported, Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ, 24 May 2007).

⁶⁰ In *LHK Nominees* (2002) 26 WAR 517, the recipient had died but the *Barnes v Addy* claim was brought against his estate. In *Farah Constructions* [2007] HCA 22 (Unreported, Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ, 24 May 2007) [116]–[122] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ), the High Court found that there had been no receipt for the purposes of recipient liability. However, that does not affect the point that I make in the text.

⁶¹ (2002) 26 WAR 517.

⁶² *Ibid* 547 (Murray J).

⁶³ *Ibid* 549 (Murray J), 554–6 (Anderson and Steyler JJ), 566–72 (Pullin J). Wallwork J dissented: at 536.

⁶⁴ *Ibid* 556 (Anderson and Steyler JJ).

consequence, presents an impermissible interference with the principle of indefeasibility.

In *Koorootang*,⁶⁵ Torrens land was held by a company on trust for members of a family. As a consequence of the fraud of the controller of the trustee company, a bank acquired a registered mortgage over that land. A *Barnes v Addy* claim was brought against the bank. The trust argued for a range of remedies, including a declaration that the bank's interest as mortgagee was held on constructive trust for it and an order requiring the bank to execute and lodge for registration a form of discharge of the mortgage.⁶⁶ Such remedies have proprietary consequences. In the Supreme Court of Victoria, Hansen J upheld the *Barnes v Addy* claim, finding that the bank was liable as a recipient.⁶⁷ As a result, his Honour indicated that he was prepared to make orders 'responsive to [his] reasons' which, presumably, would have included the declaration of constructive trust sought, or an order that the mortgage be discharged, or both.⁶⁸

However, the trust sought another remedy that did not have proprietary consequences. The trust argued for an injunction to restrain the bank from exercising its powers as mortgagee, or damages in lieu under Lord Cairns' Act.⁶⁹ The award of the injunction would have had proprietary consequences, as it would have protected the trust's registered interest as the holder of the estate in fee simple against the mortgage. However, damages in lieu would not have offered such protection: the bank would have been able to exercise its mortgagee's power of sale, but it would have had to pay a sum of money to the trust, most likely the sum secured. Of course, if the bank had exercised its mortgagee's power of sale, damages in lieu would have stripped from the bank the benefit of the sale, making it pointless to exercise the power. However, damages in lieu under Lord Cairns' Act would have constituted a remedy without proprietary consequences. Indeed, the very premise for their award would have been the enforceability of the bank's registered mortgage.

It would be a mistake to conclude from the availability of remedies without proprietary consequences in cases like *LHK Nominees*⁷⁰ and *Koorootang*⁷¹ that plaintiffs in such cases ought to be confined to pursuing them. Whether or not plaintiffs ought to be permitted to pursue remedies with proprietary consequences when making *Barnes v Addy* claims depends on whether or not the

⁶⁵ [1998] 3 VR 16.

⁶⁶ *Ibid* 23–4 (Hansen J). The trust also sought a declaration that the mortgage was void, a declaration that its interest in the mortgaged land was held in priority to the interest of the mortgagee, delivery up of the mortgage for cancellation and an indemnity under the then s 234(7) of the *Corporations Law* for any loss it might suffer by reason of the provision of the mortgage to the bank.

⁶⁷ *Koorootang* [1998] 3 VR 16, 105–8. Prior to making this finding, Hansen J undertook an extensive review of the law and the literature on recipient liability and expressed his view that recipient liability ought to be based on unjust enrichment: at 78–105. However, his Honour felt constrained by precedent to find liability on the basis of the bank's wilful blindness to the fraud.

⁶⁸ *Ibid* 131.

⁶⁹ *Ibid* 24. On damages under s 2 of the *Chancery Amendment Act 1858* (UK) c 27, commonly known as Lord Cairns' Act: see generally R P Meagher, J D Heydon and M J Leeming, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (4th ed, 2002) 842–55.

⁷⁰ [1998] 3 VR 16.

⁷¹ (2002) 26 WAR 517.

award of such remedies, in response to accessory liability, is justified. Only one conclusion may be drawn from the fact that the terminal point of a *Barnes v Addy* claim need never entail orders requiring the defendant to divest a registered title. Plaintiffs may, by seeking remedies without proprietary consequences, pursue their *Barnes v Addy* claims free from the risk that courts will refuse relief owing to the principle of indefeasibility of title. And in cases like *LHK Nominees*⁷² and *Koorootang*,⁷³ that might prove a decisive advantage.⁷⁴ This conclusion is an important one, but too much should not be made of it. In some cases — for example, where the defendant is insolvent — the option of pursuing remedies without proprietary consequences will be, in a practical sense, unavailable.⁷⁵ In such cases, plaintiffs will wish to pursue remedies with proprietary consequences and, where the property in question is a registered interest in Torrens land, the pursuit of such remedies will constitute a threat to an indefeasible title. Whether it will also amount to an unusual or special threat to the principle of indefeasibility itself is another matter, to which I now turn.

B Remedies with Proprietary Consequences

As I have argued above,⁷⁶ there is nothing in the logic of a *Barnes v Addy* claim that requires the terminal point of such a claim to amount to a remedy with proprietary consequences. However, it is a fact that many plaintiffs bringing *Barnes v Addy* claims seek just such remedies. The reasons for this are well-known and include, as I have noted, protection against the insolvency of the defendant.

Remedies with proprietary consequences in response to a successful *Barnes v Addy* claim may take the form of in personam orders or declarations. In this Part, I argue that neither type of remedy may be said to present an unusual or special threat to the principle of indefeasibility once the nature of each is properly understood.

To begin with, a distraction must be identified and set aside. The distraction arises because proprietary claims may arise from the same facts as give rise to *Barnes v Addy* claims. Where a trustee transfers trust property to a person who receives and retains that property with notice of the trust, the recipient holds the property on constructive trust for the aggrieved beneficiary from the moment of receipt. The beneficiary may trace the property into the hands of the recipient and claim it, or its traceable substitute, and the mechanism by which the claim is

⁷² [1998] 3 VR 16.

⁷³ (2002) 26 WAR 517.

⁷⁴ Cf Lord Nicholls, above n 6, 239:

the existence of a proprietary remedy is not in itself a compelling reason for declining to impose concurrent personal liability covering the same ground. There are good practical reasons why a judgment for payment of the value of property may be preferable to an order for the return of the property.

⁷⁵ Such cases are unlikely to be numerous given that plaintiffs often pursue *Barnes v Addy* claims precisely because the defendant is solvent.

⁷⁶ See above Part IV(A).

upheld may be the enforcement of the constructive trust in question.⁷⁷ Such a claim is to the property itself, rather than against the person of the defendant. That is why it may not be resisted except by a person who, in good faith, has purchased the property from the defaulting trustee without notice — actual or constructive — of the trust.⁷⁸

A proprietary claim may not be made over a registered interest in Torrens land where that claim is based on the fact that the registered proprietor acquired title with notice of a prior equitable interest in the land.⁷⁹ In other words, the registered proprietor of an interest in Torrens land acquires that interest free from any prior equitable interest in that land, whether they have notice of it or not.⁸⁰ That is the most important sense in which it may be said that a registered proprietor's title is indefeasible. Because the doctrine of notice has been abolished with respect to Torrens land, a registered title is indefeasible when it comes to a proprietary claim based on the principle that a person who receives trust property with notice of the trust holds that property on constructive trust from the moment of receipt. That is uncontroversial.

In some cases in which a *Barnes v Addy* claim is made, a person may be liable as a recipient even though that person does not have knowledge of the fact that there has been a breach of fiduciary obligation.⁸¹ The liability of such a recipient may be triggered by a failure to draw the inferences that a reasonable person would have drawn in the circumstances.⁸² As a consequence, where the breach of

⁷⁷ The claim may also be upheld by the declaration of an equitable lien over the property to secure the restoration of the value of what was misappropriated from the trust: *Foskett v McKeown* [2001] 1 AC 102 ('*Foskett*'). A similar claim may be made against a person who receives without notice of the trust, but as a volunteer: *Re Diplock* [1948] 1 Ch 465; *Foskett* [2001] 1 AC 102. In *Foskett* itself, although all the judges agreed that an equitable lien was available, only a minority would have declared one: at 113 (Lord Steyn), 119 (Lord Hope). The majority upheld the plaintiffs' claim by declaring a constructive trust: at 111 (Lord Browne-Wilkinson), 115 (Lord Hoffmann), 131, 145 (Lord Millett).

⁷⁸ Cf *Foskett* [2001] 1 AC 102, 109 (Lord Browne-Wilkinson): 'This case does not depend on whether it is fair, just and reasonable to give the [plaintiffs] an interest as a result of which the court in its discretion provides a remedy. It is a case of hard-nosed property rights.'

⁷⁹ *Property Act 1900* (NSW) s 43; *Land Title Act 1994* (Qld) s 184(2)(a); *Real Property Act 1886* (SA) ss 72, 186–7; *Land Titles Act 1980* (Tas) s 41; *Real Transfer of Land Act 1958* (Vic) s 43; *Transfer of Land Act 1893* (WA) s 134; *Land Titles Act 1925* (ACT) s 59; *Land Title Act 2000* (NT) s 188(2)(a).

⁸⁰ For a striking illustration of the effect of the abolition of the doctrine of notice: see *Mills v Stokman* (1967) 116 CLR 61.

⁸¹ The same appears to be true of liability as an assistant: *Farah Constructions* [2007] HCA 22 (Unreported, Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ, 24 May 2007) [177] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ); possibly also *Royal Brunei* [1995] 2 AC 378, 389 (Lord Nicholls). However, because cases of assistance do not presuppose the receipt of property — even though they sometimes entail a receipt — the likelihood of a proprietary claim based on notice arising from their facts is small. I therefore refer in the text only to cases of receipt.

⁸² This seems to be the case irrespective of whether recipient liability is fault-based or based on unjust enrichment. If recipient liability is fault-based, the recipient appears to be liable if they have knowledge of facts that would indicate a breach of fiduciary obligation to an honest and reasonable person: *Koorootang* [1998] 3 VR 16, 105 (Hansen J). The origin of this formulation is the *Baden* scale: see above n 8. And it may not have survived *Farah Constructions* [2007] HCA 22 (Unreported, Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ, 24 May 2007) [112], [121], [134] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ). If recipient liability is based on unjust enrichment, liability is strict, subject to defences. One available defence is that of good faith purchase for value without notice: James Edelman and Elise Bant,

fiduciary obligation has taken the form of a misappropriation of trust property which has been transferred by the defaulting fiduciary to the recipient, recipient liability may arise in circumstances that also attract liability to a proprietary claim based on notice. In particular, such cases may attract liability to a proprietary claim based on *constructive* notice of the prior equitable interest arising under the trust.⁸³ If the property in question is an interest in Torrens land, the abolition of the doctrine of notice by statute means that any claim based on notice must fail.

What about a *Barnes v Addy* claim? Such a claim is different from a proprietary claim based on notice. One is against the person of the defendant; the other is to property in the defendant's hands. The fact that the registered proprietor of an interest in Torrens land acquires title free from any prior equitable interest in that land is neither here nor there so far as a *Barnes v Addy* claim is concerned. Accessory liability — at least recipient liability — may be triggered in circumstances where a proprietary claim based on notice might be available, but accessory liability is personal and implies no necessary proprietary consequences whatsoever. The proprietary claim, although it may be possible given the facts of the case, is simply irrelevant. This, I think, is what Ashley JJA was trying to express in his Honour's dissenting judgment in *Sixty-Fourth Throne*:⁸⁴

It is one thing to say ... that, absent fraud, a potential transferee is not to be affected by notice, actual or constructive, of any trust. It is a quite separate matter to say that such a person is to be unaffected by notice, actual or constructive, of a *breach* of trust.

In the setting of *Barnes v Addy* claims, proprietary claims based on notice are an irrelevant distraction. Therefore if *Barnes v Addy* claims present a threat to the principle of indefeasibility, that threat is not unusual or special because such claims somehow undermine the abolition of the doctrine of notice by the various Torrens statutes.

It might be argued that a *Barnes v Addy* claim, at least for receipt, depends on notice in a different way. According to the prevailing view, in Australia at least, a plaintiff who argues for recipient liability must demonstrate that the defendant received the property in question with notice of certain facts, including at minimum that the plaintiff had a prior equitable interest in the property at the time of receipt.⁸⁵ Receipt with notice is thus a constituent element of the claim.

Unjust Enrichment in Australia (2006) 350–2. Because notice includes constructive notice, it is clear that a person may be liable as a recipient, based on unjust enrichment, in circumstances where the reasonable purchaser would have drawn the inference that the property received was encumbered by the plaintiff's interest: Meagher, Heydon and Leeming, above n 69, 342–3.

⁸³ A recipient of trust property with *actual* notice of the trust is likely to be liable for statutory fraud, which means that the plaintiff in such a case is unlikely to rely on a proprietary claim based on notice.

⁸⁴ [1998] 3 VR 133, 166 (emphasis added).

⁸⁵ *Farah Constructions* [2007] HCA 22 (Unreported, Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ, 24 May 2007) [112] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ). As I have pointed out already, the High Court in *Farah Constructions* did not spell out clearly what other facts, if any, a defendant must have had notice of, or what facts a defendant must have had knowledge of, before they may be made liable as a recipient: see above nn 8, 82 and accompanying text.

Even according to the view that recipient liability is based on unjust enrichment, whether or not there has been receipt with notice is relevant, in this case, when it comes to defences.⁸⁶ Because recipient liability depends on notice in at least one of these ways, an argument could be made that, by finding a recipient liable with respect to the receipt of a registered interest in Torrens land, a court allows a claim to succeed which is based — if only in part — on the existence of a prior equitable interest in the land in question. This, the argument continues, undermines the statutory abolition of the doctrine of notice just as much as a straightforward proprietary claim based on notice.⁸⁷

There are two replies to this argument. First, the argument does not account for a case where a court allows a *Barnes v Addy* claim based on the receipt of a registered interest in Torrens land to succeed, but awards a remedy without proprietary consequences. In such a case, notice of a prior equitable interest in the land in question is taken into account in establishing liability, but that fact does not threaten the indefeasible title of the defendant except to the extent that the defendant may, as a matter of practical necessity, have to sell the registered title in order to satisfy judgment. And, as I argued above,⁸⁸ the threat to a registered title that is presented by the possibility of having to sell an interest in Torrens land to satisfy a judgment debt is clearly not an impermissible threat.

Secondly, by emphasising the fact that a *Barnes v Addy* claim based on receipt and a proprietary claim both depend on receipt with notice, the argument loses sight of what distinguishes the two claims. One is personal, and the other is proprietary. It makes sense to assert indefeasibility against a proprietary claim because, in such a claim, the prior equitable interest *itself* clashes with a registered title. Given the provisions of the Torrens statutes, the prior equitable interest can only lose this battle. By contrast, a claim of recipient liability does not entail a clash between a prior equitable interest and a subsequent registered title. It entails a clash between a claim to personal liability, founded in part on notice of a prior equitable interest, and a registered title. Of course, there is no reason to suppose that in such a clash, the personal claim must triumph; indeed, for policy reasons, it might be thought appropriate to permit an assertion of indefeasible title against such a claim. However, nor is there any reason to suppose the opposite — that the registered title must prevail. Those who argue that *Barnes v Addy* claims based on receipt somehow undermine the statutory abolition of the doctrine of notice bear the burden of supplying such a reason, and the fact that notice of a prior equitable interest is a constituent element of recipient liability does not, by itself, constitute such a reason.⁸⁹

⁸⁶ Specifically, when it comes to whether or not the defendant is able to establish the defence of good faith purchase for value without notice.

⁸⁷ I am grateful to one of the anonymous referees of this article for a powerful statement of the argument.

⁸⁸ See above Part IV(A)(2).

⁸⁹ Of course, this makes it all the more important to know precisely whether recipient liability is fault-based or unjust enrichment-based, and, if it is fault-based, to know precisely what types of notice and knowledge are sufficient to trigger liability. On the first of these questions, the High Court has spoken clearly in *Farah Constructions* [2007] HCA 22 (Unreported, Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ, 24 May 2007): see above n 6 and accompanying text. On the second, it has not: see above nn 8, 82, 85 and accompanying text.

1 *In Personam Orders*

With this distraction set aside, I now turn to remedies with proprietary consequences, beginning with in personam orders. Consider a typical order in response to a successful *Barnes v Addy* claim. Imagine that, in response to such a claim, a court orders a defendant to execute and lodge for registration a form of discharge of a mortgage.⁹⁰ Such an order operates on the person of the defendant. However, it has proprietary consequences. First, if the defendant does what they are ordered to do, and the record of the mortgage on the register is subsequently changed to reflect the discharge, the defendant will cease to have the benefit of the mortgage. The plaintiff's proprietary interest, previously encumbered by the mortgage, will no longer be so encumbered. Secondly, if the defendant does not do what they are ordered to do, the court may order that someone other than the defendant execute and lodge a form of discharge of the mortgage.⁹¹ Again, as a result, the plaintiff's proprietary interest will cease to be encumbered by the mortgage. Thirdly, if the defendant does not do what they are ordered to do, the plaintiff may request the Registrar of Titles to change the details recorded on the register to reflect the discharge of the mortgage.⁹² The defendant's title will be defeated as a result.

There can be no doubt that an order of the type just described constitutes a threat to the indefeasibility of the defendant's title as mortgagee. Indeed, whether or not the defendant does what they are ordered to do, such an order causes the defendant's title to be defeated. But does the order present an unusual or special threat to the principle of indefeasibility itself? The answer is this: no more so than any other similar order in response to an in personam claim. To illustrate, consider a case in which a defendant is ordered to execute and give to the plaintiff a form of transfer of an interest in Torrens land that the defendant has promised under a binding and unconditional contract to transfer to the plaintiff. Such an order is uncontroversial. Indeed, if orders like it could not be made, courts would not be able to require the specific performance of contracts for the sale and purchase of interests in Torrens land, and it has long been recognised that courts are able to require just that.⁹³ The uncontroversial orders entailed in the remedy of specific performance may not be sensibly distinguished from similar orders made in response to successful *Barnes v Addy* claims. If the first class of orders presents no unusual or special threat to the indefeasibility of Torrens title, then the latter class presents no such threat either.

Now consider a standard civil case in which an unsuccessful defendant, say to a tort claim, is ordered to pay damages to the plaintiff. If the defendant does not do what they are ordered to do, the court may order the seizure and sale of the defendant's property, including interests that the defendant has in Torrens land,

⁹⁰ This was one of the remedies sought in: *Sixty-Fourth Throne* [1998] 3 VR 133; *Koorootang* [1998] 3 VR 16.

⁹¹ See, eg, *Supreme Court Act 1986* (Vic) s 22. The court may also seek to enforce its order by the committal of the defendant or the sequestration of their property: see, eg, *Supreme Court (General Civil Procedure) Rules 2005* (Vic) r 66.05(2).

⁹² See, eg, *Transfer of Land Act 1958* (Vic) s 59.

⁹³ *Barry v Heider* (1914) 19 CLR 197.

so as to generate a fund out of which the plaintiff's damages may be paid.⁹⁴ Such an order has proprietary consequences: if directed against interests in Torrens land of which the defendant is the registered proprietor, it causes the defeat of the defendant's title. However, an order of seizure and sale is not an impermissible threat to the principle of indefeasibility. The administration of justice requires that courts be able to enforce their judgments, even if that entails the defeat of registered titles. If it is permissible to enforce money judgments in ways that bring about the defeat of registered titles, then a fortiori it is permissible to enforce judgments requiring defendants to divest themselves of registered titles in ways that bring about the defeat of those titles.

Finally, the fact that, when a defendant fails to comply with an in personam order with proprietary consequences, a plaintiff may request the Registrar of Titles to change the details recorded on the register does not present an unusual or special threat to the registered title which stands to be defeated once the register is altered. The reason for this is simple: the threat is contemplated and, indeed, made possible by the Torrens statute itself. For example, s 59 of the *Transfer of Land Act 1958* (Vic) explicitly spells out the plaintiff's right to request an alteration of the register. A threat to registered titles that the Torrens statute makes possible cannot at the same time be considered unusual or special so as to require its rejection.

In summary, a typical in personam order in response to a successful *Barnes v Addy* claim, such as one requiring a defendant to execute and lodge for registration a form of discharge of a mortgage, represents no unusual or special threat to the principle of indefeasibility of title. This is because such an order cannot be distinguished from other uncontroversial in personam orders with proprietary consequences for the registered proprietor of an interest in Torrens land. Orders requiring acts of specific performance of contracts for the sale and purchase of interests in Torrens land are the best example. Moreover, a case where a court orders the defendant to execute and lodge a form of discharge of a mortgage, but where the defendant refuses to do so, may not be distinguished sensibly from a case where a court orders the defendant to pay to the plaintiff a sum of money, but where the defendant refuses to do so. In each case, the court may properly enforce its judgment by making orders with proprietary consequences. And finally, the threat to registered titles that is presented by a plaintiff's right to sidestep an intransigent defendant and request that the Registrar of Titles alter the register is perfectly legitimate as it is explicitly permitted by the Torrens statute itself.

2 Declarations

The terminal point of a successful *Barnes v Addy* claim may entail a declaration that the defendant holds a registered interest in Torrens land on constructive trust for the plaintiff, or a declaration that a registered interest in Torrens land is subject to an equitable lien in favour of the plaintiff. Do such declarations

⁹⁴ For the procedure relating to the seizure and sale of interests in Torrens land in Victoria: see *Supreme Court (General Civil Procedure) Rules 2005* (Vic) r 66.02(1), O 69; *Transfer of Land Act 1958* (Vic) s 52.

present a threat to the principle of indefeasibility? If they do, and the threat is an impermissible one, then they should not be made. However, no conclusions can be drawn without first considering the nature of the constructive trust and the equitable lien that a court may declare in response to a successful *Barnes v Addy* claim.

(a) *Constructive Trust*

Because *Barnes v Addy* claims are personal claims, not (as discussed above)⁹⁵ proprietary claims based on notice, the constructive trust which a court may declare in response to a successful *Barnes v Addy* claim does not arise because the plaintiff had a pre-existing proprietary interest in property in the defendant's hands. Instead, the trust is remedial in nature. In general terms, necessary and sufficient conditions for the existence of a remedial constructive trust are not to be found in events that occurred prior to the parties taking their dispute to court. There is only one necessary and sufficient condition for the existence of a remedial constructive trust: that a court, at the conclusion of a dispute, has made a declaration that a constructive trust exists.⁹⁶ The remedial nature of the constructive trust which a court may declare in response to a successful *Barnes v Addy* claim is clear enough. It does not arise because, at the time when the defendant received property from the defaulting fiduciary, the plaintiff had an interest in that property. And this is so even if the plaintiff had such an interest. Nor does it arise because of the occurrence of any other events prior to the *Barnes v Addy* claim being brought.⁹⁷ Rather, it arises because the court, having found the defendant personally liable as an accessory, decides that it is appropriate that a constructive trust come into existence.

To reinforce the point, consider a case in which the defendants to a *Barnes v Addy* claim based on receipt, received the property in question not from the defaulting fiduciary, but from a third party.⁹⁸ Such was the situation in *Farah Constructions*.⁹⁹ In that case, a joint venture partner procured the acquisition by his wife and two daughters of registered interests in Torrens land. It was argued that this constituted a breach of fiduciary obligation on the part of the joint venture partner. The interests of the wife and the daughters were acquired from a

⁹⁵ See above Part IV(A).

⁹⁶ It must be acknowledged that this narrow sense is not the only sense in which the phrase 'remedial constructive trust' has been used. For instance, Donovan Waters writes, 'I understand the remedial constructive trust as a name for the redress that takes the form of awarding specific assets to the successful claimant': Donovan Waters, 'The Nature of the Remedial Constructive Trust' in Peter Birks (ed), *The Frontiers of Liability* (1994) vol 2, 165, 174. In the text, when I refer to the 'remedial constructive trust', I intend the narrow sense.

⁹⁷ Of course, qua remedy, it arises because of the occurrence of events prior to the *Barnes v Addy* claim being brought, evidence of which has satisfied the court that the claim ought to succeed. But qua constructive trust, it arises because the court chooses it as the most appropriate remedy. As Michael Bryan has pointed out to me, those who think that recipient liability is based on unjust enrichment may not agree with this view, and may find reasons for their disagreement in Peter Birks, 'Property and Unjust Enrichment: Categorical Truths' [1997] *New Zealand Law Review* 623; Chambers, above n 34, 475–81.

⁹⁸ Such a person may also be liable as an assistant: see Mitchell, above n 49 and accompanying text. I intend my remarks in the text to apply in either case.

⁹⁹ [2007] HCA 22 (Unreported, Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ, 24 May 2007).

third party. At trial, the claim failed because Palmer J thought there had been no breach of fiduciary obligation.¹⁰⁰ In the NSW Court of Appeal, an appeal from Palmer J's decision was allowed and the plaintiff obtained a declaration that the interests in question were held by the wife and daughters on constructive trust, as well as consequential orders.¹⁰¹ That declaration could not have been fully justified by any events that occurred prior to the conclusion of the trial. The property in question had never been held on trust by the defaulting fiduciary — or, presumably, anyone else — at the time when it was received. Indeed, the Court of Appeal recognised this implicitly when it said that the defendants held their interests on constructive trust because of their liability to account to the plaintiff for their gain.¹⁰² In the High Court, the decision of Palmer J was restored. The High Court disagreed with almost every point of the Court of Appeal's reasoning but, importantly, did not suggest that the constructive trust that the Court of Appeal declared was unavailable as a response to a successful *Barnes v Addy* claim and, moreover, identified that constructive trust as remedial.¹⁰³

This is not the place to weigh into arguments about whether courts should declare remedial constructive trusts.¹⁰⁴ Nor, assuming that to declare a remedial constructive trust is appropriate in certain circumstances, is it the place to consider what those circumstances are.¹⁰⁵ In what follows, I assume that to declare a remedial constructive trust in response to a successful *Barnes v Addy* claim is appropriate in every case in which such a declaration is sought, and I concentrate instead on whether or not such declarations present an unusual or special threat to the principle of indefeasibility of Torrens title.

A remedial constructive trust creates property where there was none before because, as a consequence of the declaration of such a trust, a plaintiff acquires an equitable proprietary interest that they never previously had.¹⁰⁶ This is so irrespective of whether the trust is deemed to have come into existence at a moment prior to its declaration, at the moment of declaration itself, or at a moment after its declaration.¹⁰⁷ In all three types of case, it is the fact that the

¹⁰⁰ *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2004] NSWSC 800 (Unreported, Palmer J, 19 August 2004) [74]–[77].

¹⁰¹ *Say-Dee* [2005] NSWCA 309 (Unreported, Mason P, Giles and Tobias JJA, 15 September 2005) [235], [238], [244] (Tobias JA).

¹⁰² *Ibid* [235] (Tobias JA).

¹⁰³ *Farah Constructions* [2007] HCA 22 (Unreported, Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ, 24 May 2007) [200] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ).

¹⁰⁴ For a sense of that debate: see Peter Birks, 'Rights, Wrongs and Remedies' (2000) 20 *Oxford Journal of Legal Studies* 1; Simon Evans, 'Defending Discretionary Remedialism' (2001) 23 *Sydney Law Review* 463.

¹⁰⁵ For a discussion of the issue: see *Giumelli v Giumelli* (1999) 196 CLR 101, 111–13 (Gleeson CJ, McHugh, Gummow and Callinan JJ), 127–8 (Kirby J), where the High Court held that a constructive trust should not be declared if, in all the circumstances of the case, there is an appropriate remedy which falls short of the declaration of a trust.

¹⁰⁶ Peter Birks, 'Proprietary Rights as Remedies' in Peter Birks (ed), *The Frontiers of Liability* (1994) vol 2, 214, 217: 'a remedial constructive trust ... necessarily implies, indeed is, a discretion to vary property rights.'

¹⁰⁷ For a discussion of when a remedial constructive trust comes into existence: see Simon Gardner, 'The Element of Discretion' in Peter Birks (ed), *The Frontiers of Liability* (1994) vol 2, 186, 189–92.

court declares a constructive trust that causes the equitable proprietary interest entailed in such a trust to come into being. Imagine that a court declares a remedial constructive trust of a registered interest in Torrens land. From the moment when the trust is declared, there is a threat to an indefeasible title. That is because, once the trust is in existence, it may be enforced, and its enforcement may entail the constructive trustee being divested of a registered title. Indeed, the whole point of declaring a remedial constructive trust is usually to grant the plaintiff a proprietary interest on the back of which enforcement orders may be made.

The declaration of a remedial constructive trust of an interest in Torrens land, per se, has proprietary consequences. For example, it affords its beneficiary priority over the holder of a subsequently acquired equitable interest in the land in question, an advantage of special importance where the trust is deemed to have come into existence at a moment prior to its declaration.¹⁰⁸ However, the declaration of a remedial constructive trust, per se, has no proprietary consequences when it comes to the indefeasibility of Torrens title. A constructive trustee of a registered interest in Torrens land is bound by the obligation of trusteeship and, to that extent, may be compelled to transfer the interest to the beneficiary.¹⁰⁹ However, until that happens, the title of the constructive trustee remains indefeasible. If, for example, it is transferred to a non-fraudulent purchaser who has notice of the constructive trust, that purchaser will hold it free of the trust.¹¹⁰ The declaration of a remedial constructive trust establishes a basis on which a demand may legitimately be made that a title be transferred, and such a demand presents a threat to the indefeasibility of the title in question. However, the fact that a remedial constructive trust has been declared constitutes no threat of its own to the indefeasibility of that title. For that reason, the declaration of a remedial constructive trust per se, whether in response to a successful *Barnes v Addy* claim or any other claim, may not be impugned as an impermissible interference with the principle of indefeasibility.

Consequently, the question of whether the declaration of a remedial constructive trust of an interest in Torrens land constitutes a special or unusual threat to the principle of indefeasibility resolves itself into the question of whether the orders by which a court enforces a remedial constructive trust constitute such a threat. The enforcement of a remedial constructive trust usually takes the form of an in personam order requiring the constructive trustee to divest the registered interest that is held on constructive trust. For instance, a court may order a constructive trustee to execute and give to the beneficiary a form of transfer of the registered interest.¹¹¹ Such an order is undoubtedly a threat to an indefeasible

¹⁰⁸ It affords such priority only when all else is equal: *Rice v Rice* (1854) 2 Drew 73; 61 ER 646; *Heid v Reliance Finance Corporation Pty Ltd* (1983) 154 CLR 326.

¹⁰⁹ On the obligation of trusteeship: see *Armitage v Nurse* [1998] Ch 241, 253–4 (Millet LJ).

¹¹⁰ Although, of course, the purchaser may be personally liable under *Barnes v Addy*. That, in essence, was the situation in *Tara* [2003] 1 Qd R 556, although, in that case, the constructive trust was not remedial but arose because of the existence of a specifically enforceable contract for the sale and purchase of an interest in Torrens land. See generally *Bunny Industries Ltd v FSW Enterprises Pty Ltd* [1982] Qd R 712.

¹¹¹ A court may also order a constructive trustee to sell and transfer the interest to a third party and pay all or some of the proceeds of the sale to the beneficiary. The court may even order the sale

title. However, it may not be distinguished from any other in personam order requiring a defendant to divest a registered interest in Torrens land. The fact that its basis is the existence of a remedial constructive trust does not suffice to ground a distinction; this fact simply constitutes a reason for making the order and does not affect the character of the order itself. There being no distinction, the analysis of in personam orders with proprietary consequences set out above,¹¹² applies also to enforcement orders following the declaration of a remedial constructive trust.

In summary, once the distraction generated by the availability of proprietary claims based on notice is identified and set aside,¹¹³ and once it is recognised that the declaration of a remedial constructive trust per se constitutes no threat to an indefeasible title, it must be concluded that the declaration of remedial constructive trusts in response to successful *Barnes v Addy* claims presents no unusual or special threat to the principle of indefeasibility. Their enforcement is by way of orders that may not be distinguished meaningfully from other in personam orders with proprietary consequences which, as I have argued above,¹¹⁴ are legitimate interferences with the principle of indefeasibility. Consequently, courts ought not to resist declaring, and enforcing, remedial constructive trusts in response to successful *Barnes v Addy* claims solely because to do so will bring about the defeat of an otherwise indefeasible title to an interest in Torrens land.¹¹⁵

(b) *Equitable Lien*

In response to a successful *Barnes v Addy* claim, a court may order the defendant to pay to the plaintiff a sum of money and may declare that specific property in the defendant's hands is subject to an equitable lien, so as to secure the payment of that money.¹¹⁶ When a court declares that specific property is subject to an equitable lien, the lienor acquires a proprietary interest in that property.¹¹⁷ The proprietary interest arises to the extent that the lienor has a right to compel the sale of the property and payment, from the sale proceeds, of the money owed by the lienee.¹¹⁸ It may also be asserted against a purchaser of the property who has notice of the lien.¹¹⁹ However, the proprietary interest so acquired is of an unusual character. Because an equitable lien is a species of

prior to the conclusion of the trial 'where it is necessary or expedient for the purposes of the proceeding': *Supreme Court (General Civil Procedure) Rules 2005* (Vic) r 55.02.

¹¹² See above Part IV(B).

¹¹³ *Ibid.*

¹¹⁴ See above Part IV(B)(1).

¹¹⁵ As I stated above, whether courts ought to resist declaring remedial constructive trusts because such trusts are not justified — either in response to successful *Barnes v Addy* claims, or more generally — is a separate question which I do not address here.

¹¹⁶ This was one of the remedies sought in *LHK Nominees* (2002) 26 WAR 517. On the equitable lien generally: see Edward I Sykes and Sally Walker, *The Law of Securities* (5th ed, 1993) 199–206; Fiona R Burns, 'The Equitable Lien Rediscovered: A Remedy for the 21st Century' (2002) 25 *University of New South Wales Law Journal* 1.

¹¹⁷ Sykes and Walker, above n 116, 199.

¹¹⁸ *Ibid.* Note that an equitable lien also entails the right to the appointment of a receiver.

¹¹⁹ Although not, of course, where the property is a registered interest in Torrens land: see the discussion of the doctrine of notice at above Part IV(B).

hypothecation, the lienor only acquires a right to compel a sale of the property after the lienee defaults.¹²⁰ If the lienee does not default, the lienor does not acquire that right. As Sir John Salmond puts it, until the moment of default, the equitable lien is ‘merely the shadow, so to speak, cast by the debt upon the property of the debtor.’¹²¹

It follows that the declaration of an equitable lien over an interest in Torrens land, even though it creates a proprietary interest, does not in itself present a threat to the title of the lienee. If the lienee does what they have been ordered to do — pay a sum of money to the lienor — their title is secure. It is only if the lienee does not do what they have been ordered to do that their title may come under threat. That threat arises because the court, at the lienor’s instigation, may order the sale of the lienee’s property. Once the sale and the accompanying transfer of title have been achieved, the lienee’s title will be defeated. Yet this is not an unusual or special threat to the principle of indefeasibility. It is a threat similar to that constituted by the enforcement of a money judgment through an order of seizure and sale of an interest in Torrens land. As I have argued above, an order of seizure and sale directed against an interest in Torrens land is a legitimate interference with the principle of indefeasibility.¹²² It follows that the enforcement of an equitable lien is also a legitimate interference with that principle. Indeed, it could be argued that the enforcement of an equitable lien following a successful *Barnes v Addy* claim is a lesser threat to the principle of indefeasibility than an order of seizure and sale, because the equitable lien may be enforced only against specific property that has been received wrongfully, whereas the order of seizure and sale may be enforced against any property in the defendant’s hands, whether received wrongfully or not.¹²³

V CONCLUSION

So far, I have ignored two large questions that may arise when a plaintiff brings a *Barnes v Addy* claim with a view to divesting the defendant of a registered interest in Torrens land. First, is it ever permissible to divest a person of property when that person received it without actual knowledge of the fact that it was transferred in breach of trust? Secondly, to what extent should in personam claims be permitted to bring about the defeat of registered titles? The first question is one of principle, turning on whether accessory liability may be imposed for failing to meet a standard, most likely set with reference to the reasonable purchaser. The second question is one of policy, and its answer depends on the correct balance between the values of equity, often described in the language of conscience, and the values — such as security of title and certainty in transactions entailing interests in land — underpinning the Torrens

¹²⁰ On the nature of the hypothecation: see Sykes and Walker, above n 116, 17–20.

¹²¹ This quotation, from Sir John Salmond’s *Jurisprudence* (11th ed, 1957) 469, appears at *ibid* 18.

¹²² See above Part IV(B)(1).

¹²³ I leave to one side questions about whether a plaintiff must demonstrate a pre-existing proprietary ‘base’ in property over which the declaration of an equitable lien is sought, as well as questions about whether a general equitable lien, operating over all of the property in the defendant’s hands, is ever acceptable. On these matters: see Burns, above n 116, 24–31.

system. The first question relates to *Barnes v Addy* claims in general, not only those that threaten indefeasible titles. It may be asked with equal force whether a case entails the receipt of a registered title or the receipt of another type of property. The second question has to do with the aims of equity and those of the Torrens system generally speaking, and is not specifically concerned with *Barnes v Addy* claims.

The proper relationship between *Barnes v Addy* claims and the principle of indefeasibility depends on the answers to those two questions. But answering those questions does not require that *Barnes v Addy* claims be treated as an unusual or special threat to the principle of indefeasibility. And, as I hope to have shown here, there is no other reason why *Barnes v Addy* claims should be so treated. It might be thought that my approach is overly formalistic, concentrating, as it does, on the mechanics of the remedies by which courts respond to successful *Barnes v Addy* claims.¹²⁴ However, I believe that such a formalistic approach is necessary in order to clear the ground for a debate about the questions of principle and policy that I have identified. Once it is recognised that there is nothing unusual or special about the threat to registered titles that *Barnes v Addy* claims present, the more important questions — about the limits of accessory liability and about how the law might best reflect the values that underpin it — may be faced squarely.

¹²⁴ Such a criticism is made by Mary-Anne Hughson, Marcia Neave and Pamela O'Connor, 'Reflections on the Mirror of Title: Resolving the Conflict between Purchasers and Prior Interest Holders' (1997) 21 *Melbourne University Law Review* 460, 490.