

Judicial assault on the citadel of indefeasibility of title under the Papua New Guinean Torrens System of conveyance

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The principle of indefeasibility of title is one of the main features and attributes of the Torrens System of conveyance. It involves the proposition that once a person is registered as proprietor of a certain estate or interest in land he or she acquires a title that cannot be vitiated except as prescribed in the legislation establishing the system.^[i] The indefeasibility principle was designed not only to protect title of the registered proprietor from unregistered interests, but also to save persons dealing with registered land from the trouble and expense of going behind the Register Book in order to investigate the validity of title or possible rival claims to the land.^[ii] The aim was to simplify and expedite the process of transfer of title to land. Yet, almost thirty years ago one William Kaputin, then a recent law graduate of the University of Papua New Guinea, made a scathing attack against the operation of the principle of indefeasibility of title in his country.^[iii] He claimed that the Tolai people of New Britain's Gazelle Peninsula viewed the principle of indefeasibility with contempt because it frustrated all their attempts to recover land they lost at the hands of the colonial administration. Kaputin charged that the doctrine of indefeasibility was deliberately introduced in PNG by the Australian colonial administration in order to protect foreigners' land titles, which both the administration and the courts knew were acquired by dubious means. He demanded that in the interest of justice for the indigenous people it was necessary to review the operation of this doctrine in Papua New Guinea.

Kaputin's demand for reconsideration of the application of the principle of indefeasibility in PNG fell on deaf ears. Indeed, as we shall presently see, the principle became further entrenched through case law. It was not until the early 1990s, in *Emas Estate development Ltd v John Mea*,^[iv] that Amet J (as he then was) and Salika J mounted an assault on the citadel of indefeasibility of title in PNG. In a strongly worded judgment, Amet J said that the principle of indefeasibility of title was not appropriate in circumstances where an ordinary Papua New Guinean landowner was deprived of his or her land. Justice Amet accused his predecessors of applying the principle of indefeasibility blindly without examination of its appropriateness and applicability to the development of the country's underlying law. Recent National Court of Justice decisions have used similar reasoning in denouncing the principle of indefeasibility in PNG and asserting wider judicial powers to preclude its operation. The main object of this paper is to examine the judicial reasoning in this regard and its ramifications. It takes issue with some of the legal arguments used by the courts to limit the scope of the principle of indefeasibility. The paper proposes that the problem of conflict between the principle of indefeasibility and other statutory provisions should be resolved by applying ordinary rules of statutory interpretation rather than by a revision of the principle itself.

Background to the Torrens System in PNG

The *Real Property Ordinance 1889* introduced the Torrens System of conveyance into the Territory of Papua.^[v] This Ordinance adopted almost verbatim the Real Property Acts of 1861 and 1877 that were in force in the Colony of Queensland. Thereafter, all Crown grants in fee simple and leases were

automatically deemed to be subject to the Act.^[vi] By virtue of the Land Registration Ordinance of 1924, the Torrens System was extended to the Territory of New Guinea, after Australia assumed administration of the territory under the mandate of the League of Nations. The New Guinean Ordinance was similar to the Papuan Torrens statute except for two important differences. Firstly, the New Guinean Ordinance, unlike its Papuan counterpart, made provision for the registration of Crown land. Secondly, under the New Guinean Ordinance any land allegedly acquired during the German administration of the territory had to be scrutinised before registration.

The Ordinance provided that where an application was made to register such land, the Director of Native Affairs had to certify to the Registrar of Titles that he was satisfied that there were no native claimants to the land. If the Director was of the opinion that there might be natives or native communities having rights over the land, he was bound to refer the matter to the Central Court to inquire and determine the nature and extent of their claim. Where natives other than employees occupied the subject land or were in possession or using adjacent land, it was mandatory for the Director to refer the matter to the Central Court for inquiry and determination of their right.^[vii]

Evidently, the object of the pre-registration investigation was to protect native land rights, if any, and ensure that the natives were not deprived of those rights when the land was registered under the Ordinance.^[viii] Today we can only speculate on the Australian administration's possible motive for not imposing a similar requirement in the Papuan Ordinance. A possible explanation could be that they distrusted the manner land had been acquired when the territory was under Germany administration, though perhaps critics might point out that the manner of acquisition of land in Papua was not necessarily any fairer. Another possible explanation is that since New Guinea was a mandated territory the Australian administrators might have felt that they had to exert greater care in dealing with native land rights there than in Papua. In the event, the requirements for investigation prior to registration of titles later played a significant role in the land dispute cases in the country.

Indefeasibility and native land right claims

One of the cases that led to Kaputin's outbursts against the principle of indefeasibility is *The Custodian of Expropriated Property and another v Tedep and others*.^[ix] The facts of the case were as follows: in 1962, the respondents, representatives of the Tolai people, instituted proceedings in the Supreme Court for a declaration that they were the traditional owners of certain land since time immemorial and that neither they nor their ancestors had ever legally alienated the land. The land, which measured approximately 466 hectares, was situated in the Gazelle Peninsula in the then Territory of New Guinea. The Custodian of Expropriated Property (the appellant) claimed that a German national lawfully acquired the subject land from its native owners in 1904. Following the capitulation of the German Administration, by law the land vested in the Custodian. In 1928, the Custodian was registered under the *Land Registration Ordinance* as proprietor of the land in freehold. The only encumbrance noted on the Custodian's certificate of title was certain minerals in favour of the Administration. This was the state of the Register Book when in 1942 it was destroyed during the Japanese occupation of the territory. Also destroyed was the duplicate certificate of title held by the Custodian. In 1960, a fresh certificate of title was issued to the Custodian under the *Land Restoration Ordinance 1951*. Later the Custodian assigned the land to a third party (the second appellant), who was the registered proprietor of the land at the time of the proceedings.

The appellants in their defence pleaded that under s 68 of *Land Registration Ordinance*, their title was indefeasible against any rival claims except encumbrances noted on the certificate or the Register Book. In this case, the only encumbrance noted was that in favour of the Administration with respect to mining rights. They also relied on s 57, which stated that a certificate of title should be received in all courts as conclusive evidence of title specified therein. The trial judge held that the Land Registration Ordinance was not meant to override prior native rights, if any, which existed on the land. On the contrary, those

rights remained and continued to exist as encumbrances against a registered title even if not noted on the certificate. His Honour partly based his judgment on s 41 of the Ordinance, which read, in part:

1. Nothing contained in this Ordinance and no registration made thereunder shall affect any system or custom of land tenure or of succession to land in use amongst natives.

2. Notwithstanding anything contained in this Ordinance, no certificate of title or entry in the Register Book shall be of any force or validity as evidence in any dispute between native and native as to ownership of land or of any interest in or affecting land.

His Honour held that the above provisions operated to make title of a registered proprietor subject to any claim of native customary right that might be adversely asserted and established against any registered land.

On appeal to the High Court of Australia, it was held that the effect of s 57 and 68 of the Ordinance was to confer an indefeasible legal title upon a registered proprietor. The High Court said:

The indefeasibility of title of a registered proprietor under systems of title such as that erected by the Land Registration Ordinance ... depends, ... upon the provisions of the Ordinance itself, and particularly s. 68, ... by virtue of which, at the moment of and by the act of registration the registered proprietor became absolutely free from any prior asserted legal interest not noted on the register.^[x]

The Court dismissed as erroneous the trial judge's argument based on s 41 of the Ordinance. In the Court's view, s 41 concerned land disputes between natives where one or both had registered their interests under the Ordinance. The effect of the provision was that in such cases possession of a certificate of title was not conclusive. According to the High Court, s 41 did not apply where one of the parties to the dispute was a non-native. In such cases, the production of a clean certificate of title was conclusive evidence that there were no native customary land rights.

The trial judge had also held that the destruction of the registers and certificate of title did not only mean destruction of the appellant's evidence of title but also the whole concept of a statutory title. In his Honour's view the object of the *Restoration Ordinance* was to re-open the matter in order to give everyone, including the respondents, an opportunity to re-assert their claim uninhibited by the principle of indefeasibility of title. Once again, the High Court dismissed the trial judge's interpretation of the Ordinance as misconceived. The Court held that indefeasibility of a registered title did not depend upon the ability to produce the register or duplicate certificate of title, but rather upon the provisions of the Land Registration Ordinance, especially, s 68, which declared a registered title to be free from any unregistered prior claims. Hence, the destruction of the registers did not destroy title accorded to the appellant.^[xi]

The High Court's decision was followed and taken a step further by the Supreme Court of Papua New Guinea in *The Administration of the Territory of Papua and New Guinea v Blasius Tirupia and others (In re Vunapaladig and Japalik Land)*.^[xii] The facts of the two cases were identical except that in the instant case the Administration was the registered proprietor having purchased the land from the Custodian of Expropriated Property, the previous registered proprietor. The traditional landowners sought to argue that the Administration owed them a fiduciary duty, which it failed to fulfil and, therefore, could not take advantage of rights arising from its registration in derogation of their rights. The fiduciary duty obligation was based on two grounds. Firstly, that by virtue of the Administration's mandate under the League of Nations, it had an obligation to protect the indigenous people's land rights, which it failed to do. Secondly, that the fiduciary duty arose by virtue of the statutory obligation imposed upon the Director of Native Affairs to investigate native land rights prior to registration of title. They claimed that the Director of Native Affairs, an agent of the Administration, had through negligence allowed the land to be brought under the Act without proper investigation of their rights as was required under the Land Registration

Ordinance. It was further submitted on their behalf that if the Director of Native Affairs had carried out his statutory duties, registration could not have been effected in light of the obvious native rights which existed in and over the land.

The Supreme Court was not persuaded by any of the above arguments. It denied that the Administration owed customary landowners any fiduciary obligation either on the ground of its mandate or on the basis of the statutory duty imposed on the Director of Native Affairs. The Court said that even if it did, in the absence of fraud, which was not alleged:

... whatever breach there may have been by the Director or vicariously by the Administration could not avail the [traditional landowners] against the clear and conclusive provisions of ss 57 and 68 of the Land Registration Ordinance, the effect of which is to confer an indefeasible legal title to land on the registered proprietor.^[xiii]

The Supreme Court also dismissed the argument on behalf of the traditional landowners that they had an equitable interest based on their long and well-known possession, which amounted to notice and an interest of such a nature that called for recognition as an exception to indefeasibility of title. Just as the High Court, the Supreme Court was emphatic that except in the case of fraud, upon registration native title land rights survive against the registered proprietor only to the extent that they were recognised on the title, which was not the case in this instance. Section 69 of the Ordinance protected the registered proprietor from being affected by actual or constructive notice of any claim, right, title or interest other than such as appear in the Register Book.^[xiv]

The foregoing cases appeared to exclude any hope the indigenous peoples might have had of re-opening their land rights claims through the courts. To the indigenous communities the principle of indefeasibility of title was like an impenetrable wall, which they had to go through to recover their land. Kaputin said that it was a wedge between the customary landowners and justice. In the circumstances, Kaputin's assertion that the principle of indefeasibility was part of the Australian colonial administration conspiracy to protect dubious land titles held by foreigners is understandable.^[xv]

The fact that the principle of indefeasibility had no application to land disputes involving only natives, even where one or both parties had a registered title,^[xvi] seem to add credence to Kaputin's conspiracy theory. Apologists of the Administration would no doubt deny the existence of any such conspiracy. They would argue that the underlying policy of the principle of indefeasibility of title was to provide secure titles for both natives and non-natives, which was necessary for investment in land and good governance of the country. They would point to the elaborate statutory procedure prior to registration of title set up to safeguard native rights.

Nevertheless, in my view there is no doubt that the principle of indefeasibility largely worked to the benefit of the expatriate landowners and the Administration and to the detriment of the indigenous landowners. Although registration was supposed to take place after thorough investigation of possible native claim in respect of the subject land, there was no guarantee that this was done. Moreover, even where the Director of Native Affairs in good faith attempted to follow the rules to the letter it was impossible to identify all possible native title claims, especially, given the administration's level of knowledge of what constituted a legitimate customary claim. If customary landowners were aware of the investigation, which is doubtful, certainly they were not aware of the drastic legal consequences of registration of title. By the time they woke up to assert their claims it was too late even to claim for compensation from the Assurance Fund under the *Land Registration Ordinance*.^[xvii]

Post Independence – indefeasibility affirmed

The *New Guinea Land Registration Ordinance* and the *Papua Real Property Act* were both repealed and replaced by the *Land Registration Act* (Ch No 191). The Act, which is the current law, maintains the Torrens System of registration of titles. It enacts verbatim what Whalan calls a “mosaic of sections” that constitutes the principle of indefeasibility.^[xviii] These are: s 11 which states that a certificate of title is conclusive evidence of the particulars it specifies and that the person named therein is the proprietor of the particular estate or interest.

Section 33 protects title of a registered proprietor against any rival claims to the land except as indicated in the section. By section 45, it is declared that except in the case of fraud, title of a registered proprietor is not affected even if prior to registration he or she had actual or constructive notice of unregistered claims to the land. All alienated land, including State leases upon registration,^[xix] and dealings affecting such land, is deemed to be subject to the Act. Customary land converted into freeholds under the Land Tenure Conversion Act, 1964, may also be registered under the Act.^[xx] However, there is no provision for registration of Government land.^[xxi]

Mudge and Mudge v Secretary of State for Lands and others

The issue of indefeasibility of title under the Land Registration Act first arose in the National Court in the famous case of *Mudge and Mudge v Secretary of State for Lands and others*,^[xxii] which subsequently went on appeal to the Supreme Court. In that case, Mr and Mrs Mudge (“appellants”) wished to lease certain land from the Government. They informed the relevant authorities and left the matter with them to proceed in accordance with the law. Meanwhile, unknown to them, the second respondent, D Ltd, wanted to lease the same land.

Without informing the appellants, the Land Board leased the land to D Ltd, and the lease was registered under the Land Registration Act. The appellants brought these proceedings claiming that the lease was granted contrary to sections 9(2) and 29(3) of *Land Act* (Ch No 185). Under the former provision, if there was an application for a State lease, the Chairman of the Land Board was required to inform all interested persons of the date of the hearing of the application. Section 29(3) prohibited the Board to make a grant of a State lease for a purpose that was in contravention of the Town Planning Act (Ch No 204). In this case, the appellants sought a declaration that the lease granted to D Ltd was void. For D Ltd, it was submitted that the lease was indefeasible under s 33 of the Land Registration Act. In response, counsel for the appellants argued that s 33 had to be read subject to the Land Act and that any breach of the latter Act rendered registration of any estate or interest in land invalid. He submitted that since the lease was granted contrary to the provisions of the *Land Act* it was void ab initio and, therefore, the principle of indefeasibility did not apply. The issue was whether, apart from the exceptions set out in s 33 of the *Land Registration Act*, registration of title attracts the principle of indefeasibility.^[xxiii]

The Supreme Court unanimously held that even though the lease might have been issued irregularly and in breach of the provisions of the *Land Act*, registration under the *Land Registration Act* conferred on the proprietor an indefeasible title subject only to the exceptions enumerated in s 33. In his judgment, Kidu CJ observed:^[xxiv]

Under legislation based on the ... [Torrens] system (in Australia and New Zealand) it is now settled law that, apart from the exceptions mentioned in the relevant legislation, once land is registered under the Torrens system the owner acquires an indefeasibility of title.

His Honour rejected the appellant’s argument that the provisions of the Land Registration Act had to be read subject to the Land Act. He said that the provisions of the Land Act “in no way affect the indefeasibility of title of a State lease once it is registered. Section 33 is too clear to have its effect eroded by the provisions relied upon by the appellants’ counsel”.

Pratt J expressed similar views. After citing several Australian and New Zealand cases, his Honour concluded:^[xxv]

The end result of all this is that even if I were to find in the appellants' favour that the lease was void because of serious irregularities concerning the way in which it was issued prior to registration, such registration, in the absence of fraud, achieves an immediate indefeasible title. I agree with the learned trial judge that “whilst the Court could have been of assistance to the plaintiff prior to the day of registration because of failure in issuing a lease to observe the provisions ... under the Land Act, but time had moved on”.

Justice Pratt observed that the existence of indefeasibility was essential to a sound land holding system. He said:

Unsoundness of title is a major problem throughout Papua New Guinea. Disputes as to title are notoriously at the bottom of many tribal battles and commercial investment difficulties. I am firmly of the view that the development and enunciation of the law in other common law countries which have similar legislation to our own is most apt to the circumstances of Papua New Guinea and should certainly be followed in the present case. The question of indefeasibility ... is clearly so paramount that the appellant ... must lose the appeal.^[xxvi]

Justice Wood was equally emphatic that once the lease was registered the principle of indefeasibility of title precluded the Court to intervene unless the case fell within the exceptions listed in section 33 of the Land Registration Act. His Honour commented that the principle of indefeasibility had been accepted as part of the law of PNG and he saw no reason for changing it.^[xxvii]

The Supreme Court decision in *Mudge*, was followed in several cases. For example, the Supreme Court in *Mamun Investments v Ponda*, upheld an appeal against a judgment which held that a State lease was void because it was granted contrary to the *Land Act*. Kapi Dep CJ and Injia J, in their joint judgment held, on the basis of *Mudge*, that it was established law that “even when a State lease issued under the *Land Act* may have been issued irregularly and in breach of the provisions of that Act, registration under the Land Registration Act will confer an indefeasible title”.^[xxviii] Their Honours stressed that a registered title could be set-aside only on the grounds stipulated in s 33 of the Act.

In passing, it should be pointed out that the statement that the principle of indefeasibility is only subject to exceptions stipulated in section 33, is not quite correct. Courts in Australia and other Torrens system jurisdictions have not been deterred by the Torrens statutes from making additional inroads on the principle of indefeasibility on the basis of their inherent equitable jurisdiction. The judicial power to intervene without statutory sanction was espoused by the Privy Council in *Frazer v Walker*. Lord Wilberforce, speaking for the Privy Council, said:

Their lordships have accepted the general principle that registration under the ... [Torrens statutes] confers upon a registered proprietor a title to the interest in respect of which he is registered which is also immune from adverse claims, other than those specifically excepted. In doing so they wish to make it clear that this 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.^[xxix]

Thus, for example, in *Bahr and another v Nicolay and others*,^[xxx] the High Court of Australia held that the registered proprietors (defendants) were bound by their undertaking to re-sell the land to the previous owners, notwithstanding that they had a clean certificate of title.

Assault on the citadel of indefeasibility

The scope of the principle of indefeasibility enunciated in Mudge's case was for the first time cast in some doubt by the Supreme Court in *Emas Estate Development Pty Ltd v Mea* and another.^[xxxix] In that case, the respondent, John Mea, was the registered proprietor of a State lease. The Minister forfeited the lease, allegedly, because Mea had breached certain covenants in the lease. Subsequently, the appellant, Emas Estate Development Pty Ltd and someone called Leo submitted rival applications for the subject land. The Lands Board recommended the land to be allocated to Emas Estate. Leo appealed to the Minister against the Board's decision. While the appeal was still pending the land was formally leased to Emas Estate, and the latter had the lease registered under the *Land Registration Act*.

Mea challenged Emas Estate's lease on mainly two grounds. Firstly, that the Minister did not follow the requisite statutory procedure before ordering forfeiture of his lease. Secondly, in any case he denied that at the time of forfeiture he was in breach of the lease agreement. Mea's counsel submitted that since his client's lease was unlawfully terminated the purported lease of the same land to Emas Estate was null and void. The trial judge agreed with Mea's counsel that the Minister did not follow the correct procedure for termination of a State lease and that in any case there was no evidence that Mea was in breach of the lease agreement. Accordingly, he held that the purported forfeiture of Mea's lease was unlawful. The trial judge ordered the Registrar to cancel Emas Estate's lease and reinstate Mea's lease. Emas Estate appealed to the Supreme Court on the ground, inter alia, that by virtue of registration it acquired an indefeasible title regardless of whether Mea's lease was irregularly forfeited. The Court by split decision (Amet and Salika JJ; Brown J dissenting) dismissed the appeal.

In delivering his judgment, Amet J expressed the view that the principle of indefeasibility is not necessarily appropriate in circumstances, such as in the current case, where an individual landowner is deprived of his land by irregular procedure on part of Government officials to the advantage of a private corporation.^[xxxix] His Honour rejected the notion that a title granted through such "clear" irregularities and breaches of statutory provisions could remain indefeasible:

I believe that, although those irregularities and illegalities might not amount strictly to fraud, they should, nevertheless, still be good grounds for invalidating subsequent registration, which should not be allowed to stand. To not do so would be harsh and oppressive against the innocent individual leaseholder, such as the first respondent.

His Honour continued:

I have concluded also that the doctrine of indefeasibility of title under the Torrens system of land registration is one that does not necessarily apply, nor is it necessarily appropriate in the circumstances such as this that will continue to be experienced by ordinary Papua New Guinean landowners against the might of the State and private corporations. For this fundamental reason, I am of the view that this doctrine, which has hitherto been applied without any examination as to its appropriateness and applicability in the development of the underlying law for this country, should not be applied to this case.^[xxxix]

Justice Amet rejected the appellant's suggestion that the respondent would be adequately compensated by the award of damages against the State for wrongful forfeiture of his lease. His Honour reasoned that it was not easy to pursue a damages action against the State and, in any event, it was a costly exercise for an individual to institute legal proceedings. Amet J also dismissed a claim by the appellant that if the lease was nullified it (the appellant) was bound to suffer a greater loss and inconvenience than the respondent because it had already commenced improvements on the disputed land. He held that in his view the "balance of convenience, equity, justice and fairness" between the individual respondent and the appellant corporation clearly favoured restoration of the respondent's lease.^[xxxix]

In a separate judgment, Salika J said that he agreed "in principle" that upon registration a proprietor acquires an indefeasible title except in case of fraud. However, his Honour felt that the principle of indefeasibility did not apply where in a particular case its application was not suitable for the circumstances of Papua New Guinea. He listed several such circumstances. These included: where title was registered while a court or tribunal was deliberating the subject land; where title was registered "under the influence of position of power and money"; where there was a possible breach of natural justice. [xxxv] Salika J held that in the instant case the principle of indefeasibility did not protect Emas Estate's registered lease because the initial lease (Mea's lease) was illegally forfeited. Moreover, the lease was issued while the appeal to the Minister was still pending against the grant.

Brown J in his dissenting judgment held (citing Mudge) that upon registration Emas Estate acquired a lease that was indefeasible subject only to the exceptions stated in section 33 of the *Land Registrations Act*. [xxxvi] Since none of the exceptions applied in this case, he upheld the appeal.

It is submitted that there are at least two broad legal propositions that may be extracted from the majority judgment. The first one is that the principle of indefeasibility does not protect a proprietor where the original grant was irregularly made by Government officers in breach of the provisions of the Land Act. Presumably, the irregularities must be fundamental breaches of the Act. As there was no finding, let alone pleading that Emas Estate was a party to or had notice of the irregularities, it would seem that innocence on the part of the registered proprietor is immaterial. [xxxvii] The second proposition seems to be that the courts have the power to disregard the principle of indefeasibility if they are of the view that its application in a particular case is not suitable in the circumstances of PNG. [xxxviii] It is noted that neither Judge cited any authorities to support their views. Nor, and rather surprisingly, did they mention Mudge's case or other earlier PNG cases dealing with the principle of indefeasibility. However, the tones of their judgments clearly indicate that their Honours had these cases in their minds.

If this analysis of the Court's judgment is right, then this case substantially narrows the scope of operation of the principle of indefeasibility in Papua New Guinea. There is no doubt that there was something "fishy" surrounding the termination and forfeiture of Mea's lease and the subsequent registration of Emas Estate as proprietor of the land. In the circumstances, it is difficult to contemplate why the Government officials concerned would have acted so irregularly for the benefit of the appellant without the latter being somehow involved at all. However, fraud was neither pleaded nor found against Emas Estate. If the Court had followed Mudge the appellants' title would have been indefeasible as the dissenting judge held. Clearly, the assault upon the citadel of the principle of indefeasibility had begun and wide cracks had been exposed. Interestingly, however, until recently, subsequent cases continued to follow the precedent of Mudge. [xxxix]

Steamship Trading Company Ltd case

The National Court in two recent decisions has re-opened the judicial attack on the principle of indefeasibility in PNG. The first case is *Steamship Trading Company Ltd v Minister of Lands and Physical Planning and Garamut Enterprises Ltd and others*. [xl] In that case, it appears that Garamut (the second defendant) were interested in acquiring a State lease over certain open Government land. It applied to the NCD Physical Planning Board for the land to be re-zoned commercial. When the application was declined, an appeal was made on its behalf to the National Physical Planning Appeal Tribunal. The latter recommended to the Minister to dismiss the appeal. However, the Minister "having considered all issues" upheld the appeal and the land was re-zoned commercial. Soon thereafter Garamut applied for a commercial lease over the subject land. The land was gazetted for public tender pursuant to s 68 of the *Land Act*. Before the tenders closed the Minister, purporting to act under s 69(2) of the *Land Act*, exempted the land from public tender. As a result, a State lease was issued to Garamut and subsequently registered in its name under the *Land Registration Act*.

The plaintiffs, who are business rivals of Garamut, brought these proceedings. They sought a judicial review of the re-zoning of the land and the granting of the lease to Garamut and an order for both to be set aside. Their main ground of argument was that both the re-zoning and issuing of the lease were made in breach of the statutory procedures, including failure to offer the land by tender as required under s 68 of the *Land Act*. It was submitted for the plaintiffs that the Minister's reasons for exempting the land from public tender did not fall within any of the grounds stipulated in s 69.

Accordingly, the withdrawal of the land from public tender was invalid. Secondly, that the Land Board meeting, which supposedly considered the application, was not gazetted as required by s 58 and its minutes did not list members who attended. Thirdly, that according to the dates of the alleged meeting, it appears that it took place before the Minister granted the order to exempt the land from public tender and before the order was gazetted. Counsel submitted that if that were the case the Board at the time had no power to consider the application; therefore its decision was invalid.

Counsel for Garamut contended that there was substantial compliance with the prescribed procedure. Moreover, that notwithstanding any errors or breaches of procedure that might have occurred, Garamut's lease was indefeasible by virtue of s 33 of *Land Registration Act*. He submitted, citing Mudge, that registration is final on all issues and that only the exceptions provided under the Act could be invoked to overturn a registered title. In this case, he argued that only fraud might have availed the plaintiffs but it was neither specifically pleaded nor proved. The plaintiffs' counsel, in response, averred that registration did not protect a proprietor where a lease was granted in breach of the statutory procedure. Predictably, he cited *Emas Estate* as authority for the proposition.

Sheehan J, presiding, found that the Minister's decision to reverse the Tribunal's recommendation against re-zoning the land for commercial exploitation was unreasonable and amounted to abuse of ministerial powers. Accordingly, his Honour held that the Minister's decision was invalid. Sheehan J also found that there was almost a total failure to follow the prescribed procedure under the Land Act, which amounted to a flagrant disregard of the law. In his Honour's view, effectively the Minister purported to make a grant of public land in a manner that was contrary to the scope and object of the Act. In the circumstances, he held that the purported grant was a nullity and, consequently, no lease or title was issued under the Act. Sheehan J dismissed Garamut's argument that registration of the lease rendered it immune from attack. His Honour said that before indefeasibility can arise there must first be a title to register. He found that in the instant case no title issued to Garamut because Parliament prohibits the alienation of Government land other than through the processes of the *Land Act* or other law.

Sheehan J said that he was not bound by the conflicting Supreme Court judgments in *Mudge* and *Emas Estate*, because, apparently, he felt that they were inconclusive on the issue before him. He said that in neither case did the Supreme Court have before it or consider a situation where the breach of procedure was so fundamental that resulted in a total nullity "such that no lease issued under the Land Act at all; that therefore there was no title to register". Secondly, that in neither case did the Supreme Court consider or attempt to resolve the conflicting legislative policies underlying the Land Act and the Land Registration Act. The former policy requires that public land must not be granted except as provided under the Act. The latter policy validates a title regardless of how it was acquired once registered under the Act. Sheehan J concluded that he was satisfied that Parliament did not intend that in circumstances such as in the case before him where there was not just a minor irregularity but rather a subversion of the whole statutory process, registration should give an indefeasible title.

Sheehan J seems to say that registration under the Land Registration Act avails a proprietor only if he or she had a valid grant of title prior to registration. Arguably this view is at variance with one of the established features of the Torrens System of conveyance namely, that it does not purport to register a proprietor's existing title but rather upon registration the proprietor obtains title specified in the

instrument.^[xli] In *Breskvar v Wall*:^[xlii] the Chief Justice of Australia, Sir Garfield Barwick, eloquently espoused this rule as follows:

The Torrens System of registered title ... is not a system of registration of title but a system of title by registration. That which the certificate of title describes is not the title which the registered proprietor had, or which but for registration would have had. It is title which registration itself has vested in the proprietor. Consequently, a registration from a void instrument is effective according to the terms of the registration. It matters not what the cause or reasons for which the instrument is void. [Emphasis added].

In that case, it was held that once registered the proprietor obtained title specified in the instrument notwithstanding that the instrument by which he became registered was void and ineffective. Similarly, in *Travinto Nominees Pty Ltd v Vlattas*,^[xliii] a certain statute made illegal and void any contract of lease of premises for hairdressing entered into without prior consent of the relevant authority. The respondents granted the appellant a lease without the requisite consent and the lease was registered under the *Real Property Act* (NSW). Barwick CJ (with the concurrence of McTiernan and Stephen JJ) held that upon registration the appellant obtained a secure title notwithstanding that the contract, which purported to create the lease, was not only illegal but also void.^[xliv]

On the basis of the foregoing principle (which was also the basis of the Supreme Court decision in *Mudge*), the fact that in *Steamship* “there was no lease” to register because of fundamental procedural irregularities, as Sheehan J found, should not by itself have precluded Garamut from claiming indefeasibility of title conferred by registration. However, as we shall presently argue, for different reasons we agree with his Honour’s decision that Garamut’s title was not indefeasible.

Sheehan J said that even if he were to follow *Mudge*, on the evidence before him he was satisfied that fraud had been committed. His Honour dismissed Garamut's argument, relying on the Privy Council's judgment in *Assets Co Ltd v Meri Roihi*,^[xlv] that fraud required to defeat a registered title meant actual fraud not equitable or constructive fraud, and that the registered proprietor whose title it is desired to impeach must be implicated in the fraud. Sheehan J sought to distinguish *Assets* on the ground that in that case the Privy Council based its decision on its interpretation of the New Zealand *Transfer of Land 1885*.^[xlvi] His Honour asserted that, “Our own Land Registration Act only speaks of fraud and does not limit its meaning nor does it require that fraud be shown in a particular party”.

It should be pointed out that the *Land Registration Act*, as other Torrens statutes in Australia and New Zealand, does not provide any definition of the expression “fraud”. In all jurisdictions, the meaning of fraud in this context is based on case law. Several cases in various jurisdictions have cited with approval the Privy Council’s interpretation of this term. Indeed, that interpretation is regarded as well established.^[xlvii] A comparison of the relevant provisions of the *Land Registration Act* with those of the New Zealand *Transfer of Land Act* referred to in the *Assets* case, does not, in our view, reveal any material difference as to support Sheehan J’s argument. For example, s 33 of the *Land Registration Act*, which is generally regarded as the paramount provision, states that a registered proprietor of an estate or interest holds it absolutely free from all encumbrances except, inter alia, “in case of fraud”. Section 55 of the New Zealand Act was similarly worded.^[xlviii]

Fraud is also mentioned in section 146 of the *Land Registration Act*. The section protects a registered proprietor from action for ejectment except, inter alia, by a person deprived of land by fraud against a person registered as proprietor “through fraud”^[xlix] or a person “deriving from or through a person registered as proprietor through fraud”.^[l] These provisions deal with the outcome in respect to the Register where a person defrauded sues for ejectment of a proprietor registered through fraud.^[li] Section 146(3) precludes an action for ejectment against a proprietor who is a bona fide purchaser for valuable

consideration. Clearly, the latter provision was designed to except from ejectment an innocent purchaser from a person who procured his or her registration through fraud. The exception would serve no useful purpose if the term “fraud” were construed to include a bona fide purchaser for value.

Moreover, if it is accepted that the expression “fraud” in s 33 of the *Land Registration Act*, is directed at fraud perpetrated by or on behalf of the registered proprietor, it is most unlikely that the legislature intended to give the term a different meaning in other sections of the Act. As a general rule of construction, terms in a statute are presumed to bear the same meaning throughout unless there is a good reason to the contrary.^[lii] In this case there appears to be none.

Section 56 of the *Land Transfer Act 1885* (NZ), was materially similar to the foregoing provision of the *Land Registration Act*. The New Zealand Act, in addition, stated in s 189 that “except in case of fraud” a potential purchaser from a registered proprietor was not required to inquire or ascertain the circumstances in which the proprietor was registered or acquired the land. The section provided further that such a person “shall not be affected by notice direct or constructive of any trust or unregistered interest any rule of law or equity to the contrary notwithstanding and the knowledge that such trust or unregistered interest is in existence shall not of itself be imputed as fraud.”^[liii] This provision reinforced the interpretation in *Assets* case that fraud meant actual fraud and not equitable fraud. There is no such provision in the *Land Registration Act*, however, s 45(1) of the Act provides that “notwithstanding any rule of law or equity to the contrary, a transferee ... of land is not, except in case of fraud, affected by actual or constructive notice [of unregistered interest]”. The *Real Property Act 1861* of Queensland contained a similar provision.^[liv] In the case of *Friedman v Barrett Ex P Friedman*,^[lv] Gibbs J, said that the latter provision was inconsistent with the proposition that where there was notice of an unregistered interest and nothing more “it was fraud to take a transfer that will defeat the interest”. His Honour expressed the opinion that fraud in the Act meant “actual dishonesty” and not “constructive fraud”.

Judicial authorities from other Torrens System jurisdictions clearly show that the expression “fraud” means actual fraud in which the registered proprietor is involved. Although these authorities are merely of persuasive value, it is submitted that in view of the fact that this limited meaning of the term “fraud” is well established in virtually all Torrens System jurisdictions, the Supreme Court should not depart from it without compelling reasons. With due respect, in my opinion, the reason Sheehan J gave in his judgment that the PNG Torrens statute was different from that of other jurisdictions is not convincing. Admittedly, in the case before his Honour there were serious irregularities and, possibly, fraud on the part of some of the Government officials involved. If there was fraud the chances are that the “beneficiary”, Garamut, must have been involved or had notice of it, otherwise why would those officers act fraudulently for the benefit of a total stranger?

However, the onus was on the plaintiff to prove not only that there was fraud but also that Garamut was involved. It is suggested that Sheehan J rejected the Privy Council's interpretation of the expression “fraud” because he was convinced on the facts that the Government officers committed fraud. Amazingly, the plaintiffs’ lawyers did not even plead fraud against Garamut.^[lvi] Sheehan J attempted to come to their rescue by holding that it was not necessary to assert fraud because the Statement filed in Court was a prayer for relief and not the pleading of a cause of action. It is unnecessary for present purposes to take issue with the learned Judge on that point. Suffice to say that in any event, allegation of fraud against another is a serious charge and normally a heavy onus of proof lies upon the party alleging it.^[lvii] In the instant case, the plaintiffs did not discharge that onus.

Hi Lift Company Pty Ltd case

The judicial attack on the principle of indefeasibility is maintained in a recent National Court decision in *Hi Lift Company Pty Ltd v Miri Sata, MBE, Secretary For Agriculture and the State of Papua New*

Guinea.^[lviii] The facts of the case were as follows. In 1985 the Department of Agriculture and Livestock (DAL), first defendant, took possession of the disputed land known as “Portion 2413”. In 1998, the Department of Lands granted the plaintiff a “Business (Light Industry)” Lease over the said land even though the land was zoned “Public Institution”. The lease was registered under the *Land Registration Act*. The DAL, which had made infrastructure improvements over the land in excess of half a million kina, refused to vacate the land, whereupon the plaintiffs brought ejection proceedings. In its defence, the DAL claimed that the lease was improperly obtained. The plaintiff on the other hand argued that its title was indefeasible except in case of fraud, which it denied.

Justice Sevua found that there were irregularities in issuing the lease. For example, there was no evidence that the land had been advertised or exempted from this requirement pursuant to sections 68 and 69(2), respectively, of the *Land Act, 1996*. His Honour observed that failure to advertise the land was a very serious breach, especially, as it might have deprived the DAL an opportunity to intervene to protect its interest in the land. Secondly, the grant of a Business (Light Industrial) Lease over land zoned Public Institution, contravened s 67 of the *Land Act*. Thirdly, Sevua J found that whilst there was no fraud, in his view the circumstances of the case warranted its presumption “because it must seem quite an irregular and suspicious dealing for the Department of Lands to grant a lease over Portion 2413 to a private company when the public interest held by the Department of Agriculture and Livestock existed”.

Referring to the two Supreme Court judgments in *Emas* and *Mudge*, Sevua J expressed his preference for the former. He observed that in *Emas* while the Supreme Court acknowledged the principle of indefeasibility espoused in *Mudge*, “the majority concluded that irregularities tantamount to fraud was sufficient to overturn a registered title”. Accordingly, his Honour concluded that the irregularities in the case before him were “sufficient to invalidate or nullify the registration of the plaintiff’s title because they are tantamount to fraud”.

With due respect, Sevua J seems to confuse “irregularity” with “fraud”. The fact that Government officials acted irregularly when they granted the plaintiff the lease does not necessarily mean that they acted fraudulently. Fraud entails personal dishonesty or a moral turpitude on the part of the performer.^[lix] In this case, the officers might have simply been negligent or incompetent in leasing the land to the plaintiff. Nevertheless, the circumstances of the case raise a strong suspicion of fraud on their part. As has been argued above, fraud does not affect title of a registered proprietor unless they were somehow involved in the fraud. As in *Steamship’s* case, it would be strange that Government officers would fraudulently give preferential treatment to the plaintiff without the plaintiff being involved or aware of the fraudulent scheme. However, the defendants had the onus of proving fraud against the plaintiff. It would seem from the facts of the case that they did not. Certainly, his Honour did not make any positive findings of fraud against them.^[lx] Accordingly, it is submitted that the plaintiff’s title was not defeasible on ground of fraud.

Does the Land Act Override the *Land Registration Act*?

Justice Sevua also based his judgment on the ground of fundamental irregularities and “lack of transparency” in the grant of the lease to the plaintiff. He said that whilst these irregularities might not have amounted to fraud they were “sufficient to overturn the principle of indefeasibility title of the plaintiff”. His Honour was emphatic that registration of title under the *Land Registration Act* could not avail a proprietor if title was granted in breach of the *Land Act*.^[lxi] This line of reasoning mirrors that of Sheehan J in *Steamship*.

As may be recalled, it has been argued in this regard that under the Torrens System of conveyance a proprietor (bar fraud) obtains an indefeasible title upon registration irrespective of the history of the original grant. However, the argument is based on the premise that the indefeasibility provisions of the

Land Registration Act prevail over the *Land Act* and other relevant laws. It is submitted that whether or not it does has to be resolved not by attacking established principles of the Torrens System but rather by applying general rules of statutory interpretation, which we shall proceed to consider.

Leges posteriores priores contrarias abrogant

It is established rule of statutory interpretation that where there is inconsistency between two statutes, the later statute prevails over the earlier.^[lxii] This rule is summed up in the maxim: *leges posteriores priores contrarias abrogant*. In the High Court of Australia judgment in *Goodwin v Phillips*, Griffith CJ stated the rule thus:^[lxiii]

[W]here the provisions of a particular Act of Parliament dealing with a particular subject matter are wholly inconsistent with the provisions of an earlier Act dealing with the same subject matter, then the earlier Act is repealed by implication. ... Another branch of the same proposition is this, that if the provisions are not wholly inconsistent, but may become inconsistent in their application to particular cases, then to that extent the provisions of the former Act are excepted or their operation is excluded with respect to cases falling within the provisions of the later Act.

The rule is based on the presumption that the legislature in the later enactment impliedly intended to repeal inconsistent provisions in the earlier statute. It is noteworthy that the presumption only applies where the two enactments are so inconsistent that they are incapable of standing side by side.^[lxiv] For example, if the retention of the earlier statute would defeat the purpose of the later, it is presumed that the earlier statute was abrogated.^[lxv] It is further emphasised that the rule is just a presumption. For example, it will not apply if the earlier statute specifically deals with the particular topic whilst the later statute only deals with the topic in general terms.^[lxvi]

Applying the foregoing rule to the *Land Act* and the *Land Registration Act*, the former was enacted in 1996 whilst the latter came into effect in 1981. Hence, the *Land Act* is the later enactment. It may be argued that the *Land Act* is largely a consolidation of the 1962 *Land Act* and the various amendments thereof, in which case its date of enactment should be backdated to 1963 when the original Act came into effect.^[lxvii] However, the weight of judicial authority is against such argument. The view generally accepted is that the relevant date for applying the *leges posteriores* maxim is the date the consolidating Act took effect and not that of the original statute. This is so even if it results in reversing the order of the conflicting statutes.^[lxviii]

The next question is whether the indefeasibility provisions of the *Land Registration Act* are so inconsistent with the *Land Act* that the two cannot stand side by side. Part IX of the *Land Act* deals with alienation of Government land. Section 64(1) provides that “Government land shall not be alienated otherwise than under this Act or another law”. In *Steamship*, Sheehan J held that this provision clearly indicates Parliamentary intention to prohibit the alienation of Government land other than through the process of the *Land Act* or another law.^[lxix] His Honour noted that it was obvious that the *Land Registration Act* was not “another law” because it has nothing to do with alienation of Government land, but rather deals with registration of titles. This writer, with due respect, agrees with Justice Sheehan’s interpretation of the provision. The use of the term “shall” suggests that the procedural requirements are mandatory.

Several other provisions of the *Land Act* reinforce this view. For example, s 65 empowers the Minister to grant State leases of Government land as provided by the Act. Section 67 provides that a State lease “shall not” be granted for a purpose inconsistent with zoning, physical planning law or any other law relating to land use. Sections 69 provides that a State lease “shall not be granted without first being advertised in accordance with section 68”. The latter section prescribes the procedure for advertising available Government land for leasing.

Clearly, in our opinion, the *Land Registration Act* is inconsistent with the above provisions in that (bar fraud) it confers an indefeasible title upon a registered proprietor notwithstanding that the grant might be void under the *Land Act*. As Sheehan J observes in *Steamship*, it would seem odd that “Parliament having stipulated in one Act the only mode of granting of state leases, should by another Act grant an indefeasible title by way of lease without any need to follow that process ...”. The underlying policies of the two statutes appear to cancel each other out. Since the *Land Act* is the later statute, it impliedly overrides the indefeasibility provisions of the *Land Registration Act* to the extent of inconsistency.

What remains of the citadel of indefeasibility?

It is submitted that where a State lease is granted in breach of the *Land Act*, the principle of indefeasibility is not only inapplicable to the original grant, but also to subsequent transactions affecting such land. For example, suppose in *Hi Lift’s* case before the case went to Court the plaintiff had mortgaged the land to an innocent third person and the latter registered the mortgage under the *Land Registration Act*, the principle of indefeasibility would not avail the mortgagee. The reason is since registration of a void grant does not give the grantee an indefeasible title, registration of a purported dealing in a non-existent lease cannot change the legal situation; otherwise, the object of the *Land Act* would be compromised. In practice, this means that a grantee of a State lease and persons seeking to deal in such land, for example as purchaser or mortgagee, should investigate carefully and at their peril determine the validity of the original grant. This responsibility is likely to weigh heavily, especially, on financial institutions. Many might either be discouraged to lend money on security of State leases or charge high establishment fees and/or interest rate to compensate for the risk of the title subsequently being found to be defective.

However, it is submitted that the principle of indefeasibility applies to State leases in situations where, for example, the same block of land is by error leased to two or more persons,^[lxx] as long as the grant otherwise complies with the requirements of the *Land Act*. In addition, it applies to subsequent dealings over valid State leases.^[lxxi] For example, where a third party fraudulently mortgages a State lease to a bank and the mortgage is registered under the *Land Registration Act*, the bank would acquire an indefeasible title as long as it was neither a party to such fraud nor had notice of it.^[lxxii] In this regard, I respectfully reiterate my disagreement with the interpretation of the term “fraud” professed in the judgments of Justices Sheehan and Sevu, respectively.

It is also suggested that that the principle of indefeasibility would apply to a grant of a private lease^[lxxiii] registered under the *Land Registration Act* and all dealings affecting the land. This is because the provisions of the *Land Act* discussed above only apply to alienation of Government land.^[lxxiv]

CONCLUSION

Quite clearly judicial inroads on the principle of indefeasibility have exposed large cracks in what hitherto was regarded as an impenetrable fortress. The courts have decided that this principle is not necessarily more fundamental than other policy considerations. Evidently, they have been forced to intervene because of irregular grants of Government land and the apparent abuse of the system by some Government officials, possibly, in collaboration with some people in the private sector. The question, which is not clear, is the extent to which the courts would go to create further inroads into the principle of indefeasibility of title. Some of the judicial statements suggest that the courts have very broad powers to intervene. With respect to individual cases, one could applaud the judicial role in this regard, without which some dubious land grants might have succeeded under the safe haven of the principle of indefeasibility.

On the other hand, looked at from a broader perspective, judicial intervention has the potential of creating uncertainty in land transactions. As was stated in the opening paragraph of this paper, one of the main attributes of the principle of indefeasibility of title is that title is certain. From the viewpoint of any dealer

in land, be it a multinational corporation wishing to invest in land in PNG or a public servant who takes out a loan to buy a modest house in Gerehu, certainty of title is an indispensable requisite. This attribute distinguishes the Torrens System from other systems of conveyancing. By making further inroads into the principle of indefeasibility, the courts, unwittingly perhaps, undermine this attribute.

I agree that the principle of indefeasibility should not be construed as if it were an overriding constitutional provision. By applying ordinary rules of statutory interpretation, we have argued that Parliament intended (albeit implicitly) the Land Act to override the principle of indefeasibility with respect to grants of State leases. As indicated, this undermines the attributes of the Torrens System, but Parliament in its wisdom decided that the underlying policy of the Land Act is more fundamental than these concerns. It is respectfully submitted that the courts should not further weaken the operation of the principle of indefeasibility by creating additional exceptions or re-interpreting established terms, such as fraud, to justify their intervention. Further judicial assault on the citadel of the principle of indefeasibility will merely undermine confidence in the PNG Torrens System of conveyance without necessarily solving the problem of corrupt or incompetent land officers. In the event, it is advisable for Parliament to lay down guidelines that are more specific in order to iron out the current uncertainties.

ENDNOTES:

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[i] *The Custodian of Expropriated Property and another v Tedep and others* [1964] 113 CLR at 331-2.

[ii] *Gibbs v Messer* [1891] AC 248 at 254.

[iii] Kaputin W, "Indefeasibility and Justice", in Sack (ed), *Problem of Choice - Land in Papua New Guinea's Future*, 1974, Australian National University: Canberra, 159 - 163.

[iv] [1993] PNGLR 227.

[v] Subsequently replaced by the Real Property Ordinance 1913-1939.

[vi] Real Property Ordinance 1889, s (iii); and Land Ordinance 1899, Part V(c).

[vii] Land Ordinance, ss 22 and 24. In 1933, the Ordinance was later amended and the Director of Native Affairs was given a discretion to decide whether or not to refer a claim to the Court for determination.

[viii] *The Administrator of the Territory of Papua and New Guinea v Blasius Tirupia* [1971-72] PNGLR 229 at 238-239.

[ix] [1964] 113 CLR 318.

[x] [1964] 113 CLR at 331-2.

[xi] [1964] 113 CLR at 331-332.

[xii] [1971-72] PNGLR 229.

[xiii] [1971-72] PNGLR at 239.

[xiv] [1971-72] PNGLR at 244.

[xv] See also James' article "The role of courts in attempts to recover alienated land", (1974) 2(2) Melanesia Law Journal 270.

[xvi] See the High Court's interpretation of s 41(2), Land Registration Ordinance, in *The Custodian of Expropriated Property and another v Tedep and others*, above. Originally under s 40 natives could be registered as owners or part owners of any land or any interest affecting any registered land. However, this provision was repealed in 1925 and replaced by another section, which prohibited registration of any native as owner or part owner of any land.

[xvii] The limitation period for the recovery of compensation from the Assurance Fund was six years from the date of deprivation, see s 183 of the Land Registration Ordinance. Various other steps were taken to deal with customary land see generally Mugambwa JT, "Land Disputes in PNG: A Colonial Legacy and Post-Independence Solutions", (1987) 15 Melanesian Law Journal 94.

[xviii] Whalan D, *Torrens System in Australia*, 1982, LBC: Sydney, p 293.

[xix] Section 36(2), Land Registration Act.

[xx] Section 11(1)(a) and (b), Land Registration Act.

[xxi] Certain State land may be registered under the National Registration Act 1977. Land registered under the Act is conclusively deemed to be the property of the Government, see s 29.

[xxii] [1985] PNGLR 387.

[xxiii] [1985] PNGLR 387 at 390 per Kidu CJ.

[xxiv] [1985] PNGLR *The Custodian of Expropriated Property v Tedep* (1964) 113 CLR 317; *The Administrator of the Territory of Papua and New Guinea v Blasius Tirupia and others* (1971-72) PNGLR 229; *Keimbun Keindip v The Independent State of PNG and others* [1993] PNGLR 28. at 390-391.

[xxv] [1985] PNGLR 387 at 397.

[xxvi] *Ibid.*

[xxvii] *Id.*, at 400.

[xxviii] [1995] PNGLR 1 at 9. Brown J agreed, though dissented on other grounds. See also *Keindip v The State of Papua New Guinea* [1993] PNGLR 28; *Timano v Timano* [1993] PNGLR 334; *Maki v Minister For Lands et al* (unreported Judgment of the National Court of Justice OS No 149 of 1995 N1568; *Emas Estate Development Ltd v Mea* [1993] PNGLR 215 at 227-228 per Brown J (dissenting judgment).

[xxix] [1967] 1 AC 569 at 585.

[xxx] (1988) 164 CLR 604.

[xxxi] [1993] PNGLR 215.

[xxxii] [1993] PNGLR 215 at 219.

[xxxiii] [1993] PNGLR 215 at 219-220.

[xxxiv] [1993] PNGLR at 219.

[xxxv] [1993] PNGLR 215 at 228-229.

[xxxvi] [1993] PNGLR 215 at 227-228.

[xxxvii] Amet J stated above, that even if the irregularities do not strictly amount to fraud they could still constitute an exception to indefeasibility.

[xxxviii] Note, for example, Amet J's "fundamental reason" for not applying the principle of indefeasibility in this particular case. Also Salika J said that the circumstances in which the court may intervene, which he mentioned in his judgment, were just examples and not exhaustive.

[xxxix] See the cases cited in footnote 28, above

[xl] Unreported judgement of the National Court of Justice, No OS 552 of 1999. .The other case is Hi Lift Company Pty Ltd v Miri Sata, MBE, Secretary For Agriculture and the State of Papua New Guinea (unreported) N2004, 16 and 17 November 2000, see below.

[xli] Stein and Stone, Torrens Title, 1991, Butterworths: Sydney, p 31.

[xlii] (1972) 46 ALJR 68 at 70.

[xliii] (1973) 129 CLR 1.

[xliv] Id, at 16 - 1. See also Benmar Properties Pty Ltd v Makucha [1996] 1 Qd R 578.

[xlv] [1905] AC 176.

[xlvi] This Act was repealed and replaced by the Land Transfer Act 1952 (NZ).

[xlvii] See for example: Frazer v Walker [1967] 1 AC 569 at 580; Breskvar v Wall (1971) 126 CLR 376 at 384; Nahr v Nicolay [No 2] (1988) 164 CLR 604 at 633.

[xlviii] See also for example, s 68 Transfer of Land Act 1893 (WA); s.44 of the Real Property Act 1861 (Qld).

[xlix] Section 146(2)(d).

[l] Section 146(2)(e).

[li] Vassos v State Bank of South Australia [1993] 2 VR 316 at 327.

[lii] Registrar of Titles (WA) v Franzon (1975) 132 CLR 611 at 618.

[liii] A similar provision is found in all states Torrens statutes in Australia, except Queensland.

[liv] Section 109. The Queensland Act had no provision similar to s 189 of the New Zealand Act.

[lv] [1962] Qd R 498 at 512.

[lvi] Fraud is a serious allegation and the courts require strict adherence to requirements for pleading and proof in such cases, see *Maki v Pundia & PNG Motors Pty Ltd* [1993] PNGLR 337.

[lvii] *Ibid.*

[lviii] Unreported, N2004, 16 and 17 November 2000.

[lix] *Butler v Fairclough* (1917) 23 CLR 78 at 90, 97.

[lx] In the judgment, Sevua J states that there was no evidence of fraud though a “presumption of fraud existed”.

[lxi] See also *Emas’ case* and *Steamship’s cases*, above.

[lxii] *State v Bonga* [1988-89] PNGLR 360; *State v Tulong* [1995] PNGLR 329.

[lxiii] (1908) 7 CLR 1 at 7.

[lxiv] The courts do not readily accept that statutes conflict except where such conclusion is inevitable, see *State v Tulong* [1995] PNGLR 329 at 332.

[lxv] See *Pearce D C and Geddes R S, Statutory Interpretation in Australia* 3rd, 1988, Butterworths: Sydney, para 7.11.

[lxvi] *Goodwin v Phillips*, above, per Griffith CJ at p 14.

[lxvii] See s 1(1) Land Act 1962 (Ch No 185).

[lxviii] *Maybury v Plowman* (1913) 16 CLR 468. In any case, with respect to the Land Registration Act, it could also be argued that it is a consolidation of the Real Property Act of 1889 (P) and the Land registration Ordinance of 1924 (NG).

[lxix] See also *Sevua J in Hi Lift*, above.

[lxx] See eg *Keimbun Keindip v The Independent State of PNG and others* [1993] PNGLR 28.

[lxxi] Note that once a State lease is granted the land ceases to be “Government land”, and therefore Part XI of the Land Act, does not apply to its alienation, see the definition of Government land” in s 2(1)(e) of the Act.

[lxxii] See eg *Fraser v Walker*, above.

[lxxiii] “Private leases” are leases granted over alienated freehold land or converted freehold land.

[lxxiv] The definition of “Government land” excludes customary land not leased to the government, freehold and land that is subject to a State lease, see s 2(1)(e) and Part XI of the Land Act

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