IN THE SUPREME COURT OF NEW ZEALAND

SC 72/2007
[2008] NZSC 87

BETWEEN	REGAL CASTINGS LTD Appellant
AND	G M AND G N LIGHTBODY First Respondents
AND	A C HORROCKS, G M LIGHTBODY AND G N LIGHTBODY Second Respondents

Hearing: 10 April 2008

Court: Elias CJ, Blanchard, Tipping, McGrath and Wilson JJ

Counsel: J McCartney and G S Caro for Appellant
D K Wilson for Respondents

Judgment: 23 October 2008

JUDGMENT OF THE COURT

A The appeal is allowed.

B It is declared that the second respondents (the trustees) hold a one-half share of their interest in the property at 68 Salisbury Road, Birkdale (Lot 4 DP 46944, Certificate of Title 1852/71 North Auckland Registry) upon trust for the Official Assignee of the estate of Mr Lightbody, to be dealt with by the Assignee for the benefit of Mr Lightbody's creditors.

C The trustees are ordered to transfer a one-half share in the property to the Official Assignee subject to the mortgage to the ANZ National Bank Ltd.

D The appellant is awarded costs and reasonable disbursements which are to be paid by the second respondents. Costs in the High Court are to be fixed by that Court. Costs are fixed in relation to

the appeal to the Court of Appeal at $6,000 and in this Court at $15,000.

E Leave is reserved to the parties and the Official Assignee to apply to the High Court for any further orders or directions as may be necessary to enable the Assignee to realise the net value of the interest in the property or as otherwise may be necessary to implement the orders of this Court.

REASONS

ELIAS CJ

[1] In November 1998 Mr Lightbody and his wife transferred their home into the ownership of a family trust of which they and their solicitor, Mr Horrocks, were trustees. The consideration for the transfer was a debt of $230,000 to be repaid in one sum on 12 November 2005. Contemporaneously with the transfer, $54,000 of the debt was forgiven. Mr and Mrs Lightbody then progressively gifted sums to the trust under a programme which extinguished the debt by December 2002. At the time of the transfer of the property, Mr Lightbody was personally responsible for the debts owed by his jewellery business, Capro Three Limited, to its major supplier, Regal Castings Limited. Regal Castings had effectively been providing working capital to Capro for many years. In a restructuring agreement in 1995, by which interest on the debt was waived, Capro's then debt to Regal Castings of $356,358 was converted into a term loan repayable by monthly instalments and with the balance owing to be paid in 2000. By the date of the transfer in November 1998, the amount of the term loan was approximately $220,000 but the monthly instalment payments had risen to $4,000 per month. In addition, Regal Castings had continued to supply Capro on normal terms and its current account debt to Regal Castings stood at some $90,000, $65,000 of which was in arrears. Regal Castings was not told of the transfer of the house property, Mr Lightbody's only significant asset, or the programme of gifting which effectively stripped him of any compensation for it.

Capro was placed in liquidation in April 2003. Regal Castings was unable to recover in the liquidation the $15,358.57 it was owed on the term loan and $149,324 it was owed for further supplies. It obtained judgment against Mr Lightbody but failed to recover the judgment sum upon Mr Lightbody's bankruptcy. Regal Castings then brought the present claim under s 60 of the Property Law Act 1952, seeking an order setting aside the transfer of the house property as having been made with intent to defraud. It has been accepted by the parties that the outcome sought by Regal Castings would be to transfer 50% of the property (representing Mr Lightbody's half share after deducting the share acknowledged to belong to Mrs Lightbody) to the Official Assignee for the benefit of all Mr Lightbody's creditors.

[2] I agree with the conclusion reached by Blanchard J that the inference that the conveyance of the house was an alienation with intent to defeat creditors within the meaning of s 60 of the Property Law Act 1952 is overwhelming and that the appeal by Regal Castings ought to be allowed. Because Blanchard J has dealt fully with the facts and the decisions in the High Court and Court of Appeal, it is unnecessary for me to cover the same ground in any detail. And because I agree with Blanchard J's analysis of the factors which lead to the conclusion that the alienation was with intent to defeat creditors, I can summarise my own reasons. I write separately to explain my views on the manner of proof of "intent to defraud" in application of s 60 of the Property Law Act and on the application of s 60 to Land Transfer Act land. In summary, I am of the view that the question of intent to defraud is always one of fact to be determined on the evidence and is not imputed by law; and I do not think the application of s 60 of the Property Law Act is inconsistent with the indefeasibility provisions of the Land Transfer Act 1952. These questions are substantially overtaken by subsequent legislation. Section 346 of the Property Law Act 2007 now makes it clear that a disposition by gift by someone insolvent if made after 31 December 2007 can be set aside without the need to show intent to defeat creditors because the transferor has not received "reasonably equivalent value in exchange". And under s 350(4) of the same Act the court's powers to make remedial orders on setting aside dispositions of property are expressed to override the Land

Transfer Act, as has been provided in respect of avoidance under s 60 in favour of the Official Assignee since 1967.[1]

[3] I agree that the appeal must be allowed, with the consequence that the trustees are ordered to transfer a one-half share in the property to the Official Assignee and must pay the costs of the appellant.

Section 60 of the Property Law Act 1952

[4] Section 60 of the Property Law Act 1952 provides:

> **60 Alienation with intent to defraud creditors**
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> (1) Save as provided by this section, every alienation of property with intent to defraud creditors shall be voidable at the instance of the person thereby prejudiced.
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> (2) This section does not affect the law of bankruptcy for the time being in force.
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> (3) This section does not extend to any estate or interest in property alienated to a purchaser in good faith not having, at the time of the alienation, notice of the intention to defeat creditors.

Section 60 is derived from an Elizabethan model, 13 Eliz. c. 5 (1571), which applied in New Zealand until the Property Law Act came into effect. The cases decided under 13 Eliz. c. 5 have been held to apply to the modern re-enactments in New Zealand and in the United Kingdom and Australia.[2]

[5] The meaning of "intent to defraud" has been held to include the purpose of delaying as well as defeating creditors, as the Elizabethan statute had expressly provided.[3] The question of intent to defraud is one of fact.[4] It must be determined at the time of alienation,[5] but the intended prejudice may be to future creditors rather

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1 Insolvency Act 1967, s 58(7).

2 *Re Proudfoot* [1960] NZLR 577 at p 581 (SC) per Hutchison J, approved in *Re Hale (a bankrupt)* [1989] 2 NZLR 503n at p 506 (CA) per Wild CJ. In Australia, see *Cannane v J Cannane Pty (in liq)* (1998) 192 CLR 557 at pp 565–566 per Brennan CJ and McHugh J. In the United Kingdom, see *Re Eichholz* [1959] 1 Ch 708 at p 724 per Harman J.

3 *Re Hale (a bankrupt)* [1989] 2 NZLR 503n at p 509 (CA) per Wild CJ

4 *Re Keys* [1932] NZLR 1239 at p 1249 (SC) per Reed J.

5 *Freeman v Pope* (1870) LR 5 Ch App 538 (CA) and *Cannane v J Cannane Pty Ltd (in liq)* (1998) 192 CLR 557.

than creditors existing at the date of the alienation.[6] Absence of full value obtained for an asset transferred is evidence from which an inference of intent to defraud may be taken.[7] But full value of itself may not be sufficient to displace an intent to defraud, as is illustrated by *Lloyds Bank Ltd v Marcan*.[8] There, the grant of a lease for a term of 20 years was held to have been made with intent to defraud the mortgagee seeking to enforce the mortgage, despite the fact that the lease was granted for full market rental. If an alienation is voluntary (that is to say, not for valuable consideration) or is at a clear undervalue, so that the fund available to creditors is depleted,[9] it may be easy to infer an intent to defraud.[10] Some cases go further, suggesting that in the case of a voluntary alienation by an insolvent debtor it is not necessary for a creditor prejudiced to establish fraudulent intent and that such intent will be presumed as a matter of law, either rebuttably (through transfer of the onus of proof to the defendant) or conclusively (through imputing intent in such circumstances as a matter of law).[11] As indicated at para [9], I think the better view is that the question of intent remains one of fact on the evidence and that such intent is not properly imputed as a matter of law.

[6] If the debtor retains the benefit of the property, that may be evidence of fraudulent intent.[12] But a bona fide family arrangement is not evidence of intent to defraud.[13] Nor is an arrangement to prefer one set of creditors to others evidence from which intent to defraud can be inferred.[14] It is not determinative that a voluntary alienation may be in circumstances which contemplate what will happen

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6 *Cannane v J Cannane Pty Ltd (in liq)* (1998) 192 CLR 557 at p 566 per Brennan CJ and McHugh J and at p 574 per Gummow J.

7 *Lloyds Bank Ltd v Marcan* [1973] 1 WLR 1387 at p 1392 (CA) per Cairns LJ and *Cannane v J Cannane Pty Ltd (in liq)* (1998) 192 CLR 557 at pp 566 – 567 per Brennan CJ and McHugh J.

8 [1973] 1 WLR 1387 (CA).

9 *Cannane v J Cannane Pty Ltd (in liq)* (1998) 192 CLR 557 at p 567 per Brennan CJ and McHugh J.

10 *Lloyds Bank* at p 1392 per Cairns LJ. See also *Ideal Bedding Co v Holland* [1907] 2 Ch 157 and *Re Eicholz* [1959] 1 Ch 708.

11 *Freeman v Pope* (1870) LR 5 Ch App (CA). Some commentaries treat *Freeman v Pope* as authority for the imputation of intent to defraud (see, for example, *Kerr on the Law of Fraud and Mistake* (7th ed, 1952), p 309), others treat it as transferring the onus of proof to the defendant (see *Halsbury's Laws of England* (3rd ed) Fraudulent and Voidable Conveyances, 3, para [1268]).

12 *Lloyds Bank* at p 1392 per Cairns LJ.

13 *Lloyds Bank* at p 1392 per Cairns LJ.

14 *Re Fasey* [1923] 2 Ch 1 at p 11 (CA) per Lord Sterndale MR; *Re Hale (a bankrupt)* [1989] 2 NZLR 503n at p 509 (CA) per Richmond J; *Lloyds Bank* at p 1392 per Cairns LJ; *Glegg v Bromley* [1912] 3 KB 474 at p 484 (CA) per Vaughan Williams CJ, at pp 485 – 486 per Fletcher Moulton LJ and at p 492 per Parker LJ.

on future bankruptcy.[15] Nor does the section attach simply because a disposition proves in the end to have depleted the assets available to creditors, if it cannot be determined that it was made with that intent. Dixon CJ in *Hardie v Hanson* suggested that an "intent to defraud" is an intention to "cheat" the creditors of access to the assets alienated.[16] Gaudron J in *Cannane v J Cannane Pty Ltd (in liq)* thought that "fraud" involved "the notion of detrimentally affecting or risking the property of others, their rights or interests in property, or an opportunity or advantage which the law accords them with respect to property".[17] Such intention may arise even though the transferor hopes and expects that there will be no eventual shortfall.[18] It is necessary in each case to:[19]

> look at the whole of the circumstances surrounding the execution of the conveyance, and then ask yourself the question whether the conveyance was in fact executed with the intent to defeat and delay creditors… .

[7] The financial position of the transferor at the time of the alienation is always a key consideration. It is not determinative against intent to defraud if the transferor is solvent at the time, particularly if he is contemplating entering into a risky venture.[20] But where the transferor's financial position is precarious, it is objective evidence of an intention to defraud if he acts to put property beyond the reach of creditors.[21] Other indications of fraud commonly occurring are transfers to close relatives, particularly where the transfer is at an undervalue, alienations in which the transferor retains the use or benefit of the property,[22] and secrecy in the transfer or a misleading explanation for it.[23]

[8] In assessing the financial position and prospects of the transferor at the date of the alienation, the court is concerned with practical risk rather than with an exact balance sheet calculation. So, where the transferor is subject to a liability under a guarantee, the obligation is not properly treated as though wholly contingent. In *Re*

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15 See, for example, *Williams v Lloyd* (1934) 50 CLR 341.
16 (1960) 105 CLR 451 at p 457.
17 (1998) 192 CLR 557 at p 572.
18 *Swann v Secureland Mortgage Investment Nominees Ltd* [1992] 2 NZLR 144 at p 153 (CA) per Gault J.
19 *Re Holland* [1902] 2 Ch 360 at p 372 (CA) per Vaughan Williams LJ.
20 *Re McGrath* (1897) 17 NZLR 646 at p 664 (CA) per Edwards J.
21 *Freeman v Pope* (1870) LR 5 Ch App 538 (CA) at p 545 per Gifford LJ.
22 *Twyne's case* (1601) 3 Co Rep 80b at p 81a; 76 ER 809 at pp 812 – 813 (Star Chamber).
23 *Twyne's case* (1601) 3 Co Rep 80b at p 81a; 76 ER 809 at p 813 (Star Chamber).

Ridler a Court of Appeal comprising Selborne LC, Jessel MR and Cotton LJ held that the position of the principal debtor was not the focus when considering whether an alienation was with intent to defeat creditors:[24]

> We must look at the matter as if the event had already happened the possibility of which the parties must have had in contemplation when the guarantee was given of the debtor being unable to pay. I do not think that any close inquiry as to the supposed capacity of the person guaranteed to pay the debt ought to be entered into. I do not say that there might not be a state of things in which the liability of the guarantor might be so remote that it need not be regarded; but if he conveys away all his property by a voluntary settlement I think it doubtful whether the settlement could in any case be supported in the event of his ultimately being called on under his guarantee.

The approach of Cotton LJ in the same case, to similar effect, was applied by Perry J at first instance in *Re Hale (a bankrupt)*.[25]

[9] These general propositions, drawn in the most part from cases decided under 13 Eliz. c. 5 are affirmed by modern authority in New Zealand and Australia as applicable to the current statutory provisions which replaced the Elizabethan statute.[26] It is not necessary to go beyond these principles for present purposes. I consider that there is ample evidence upon which to conclude that an intent to defraud is properly to be inferred. I do not think it necessary to have recourse to any rule which would impute an intent to defraud. Indeed I think any such rule is not sufficiently supported by the authorities and runs counter to modern authority. I explain why briefly, because of the discussion of the point in the High Court and Court of Appeal.

[10] In *Re Hale*, Richmond J, with whom Wild CJ and Woodhouse J concurred, set out the principles of law which emerged from cases principally decided under 13 Eliz. c. 5 but which he thought were "equally applicable in relation to s 60".[27] The first two propositions were:[28]

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[24] (1883) 22 ChD 74 at p 80 (CA) per Selborne LC.

[25] [1974] 2 NZLR 1 at p 7 (SC), citing Cotton LJ at p 82.

[26] See, for instance, *Re Hale* [1989] 2 NZLR 503 at pp 508 – 509 (CA) per Richmond J; *Swann v Secureland Mortgage Investment Nominees Ltd* [1992] 2 NZLR 144 at p 152 (CA) per Gault J; *Cannane* at pp 565 – 567 per Brennan CJ and McHugh J, p 572 per Gaudron J, p 574 per Gummow J and pp 591 – 593 per Kirby J.

[27] At p 508.

[28] At p 508.

(1) No alienation of property can be caught by the section unless it is first shown to fall within subs (1) as being made "with intent to defraud creditors". With the possible exception of a voluntary alienation made by an insolvent debtor (*Freeman v Pope* (1870) LR 5 Ch App 538) the existence of an intention to defraud is a question of fact to be decided by a consideration of the alienation in the light of all the circumstances (*Re Holland* [1902] 2 Ch 360, 372; *Glegg v Bromley* [1912] 3 KB 474, 492). The onus of establishing intent to defraud rests on the party attacking the transaction.

(2) It is not necessary for the purposes of the present case to attempt any precise definition of "intent to defraud". If there is an intention to prejudice creditors by putting an asset wholly or partly beyond their reach then that will be an intent to defraud creditors provided that in the circumstances the debtor is acting in a fashion which is not honest in the context of the relationship of debtor and creditor. This in essence was the view taken by Russell LJ in *Lloyds Bank Ltd v Marcan* [1973] 3 All ER 754, 759.

[11] In *Re Hale*, the "vital question of fact" was put by Richmond J as being:[29]

> On the whole of the evidence before the Court is it affirmatively established that the real purpose of the bankrupt in the present case was to put the equity in his house, to the extent of $10,000, out of the reach of his creditors for his own benefit rather than to give a preference to his wife in relation to an existing debt? I think this question must be answered in a common sense way without reference to any artificial rules. In this context I would say with respect that I do not think that the principles adopted by the Supreme Court of Canada in *Koop v Smith* (1915) 25 DLR 355 should be adopted as part of the law of this country.

In *Koop v Smith*, a majority of the Supreme Court of Canada had taken the view that a transfer of property to a near relative "under suspicious circumstances" transferred the burden of proving the bona fides of the transaction to the defendant when it was impeached by creditors.[30] Duff J in the same case denied that there was any such rule of law, while allowing that the circumstances supported the inference as a matter of fact.[31]

[12] As the quote from the judgment of Richmond J makes clear, he was prepared to admit only as a "possible exception" to the requirement that intent to defraud be proved, the approach adopted in *Freeman v Pope*. In that case, Hatherley LC

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29 At p 509.
30 At p 356 per Davies J, in a decision with which Idington, Anglin and Brodeur JJ concurred.
31 At pp 358 – 359.

expressed concern that juries trying the question of fact might speculate "what was actually passing in the mind of the settlor", rather than concentrating on the objective indications, especially the "necessary consequences".[32] He thought the authorities established that, in the absence of direct proof of intention, it was the duty of the judge to direct the jury that:[33]

> if a person owing debts makes a settlement which subtracts from the property which is the proper fund for the payment of those debts, an amount without which the debts cannot be paid, then, since it is the necessary consequence of the settlement (supposing it effectual) that some creditors must remain unpaid, … the jury … must infer the intent of the settlor to … defeat or delay his creditors, and that the case is within the statute.

[13] In *ex p Mercer, Re Wise*, Lord Esher MR denied that there was any "proposition of law" that a court is bound to find that voluntary settlement which has the necessary effect of defeating or delaying creditors is made with intent to defraud.[34] The question of intent remains one of fact. In *Swann v Secureland Mortgage Investment Nominees Ltd* Gault J emphasised that the intent required by s 60 is an actual intent, even though it may be proved by inference from proved facts.[35] It is not an intent imputed by law from the result. Cooke P, in the same case, made the point that "real purpose" and "motive" are not the same.[36] He was prepared in the case to infer a fraudulent intent from the evidence and took the view that, following the merging of equity and common law, it did not matter whether the transaction was set aside "under s 60 of the Property Law Act or in the jurisdiction over 'equitable' fraud or common law fraud or all or any of them".[37] Decisions of the High Court of Australia have also emphasised that fraud is "not to be presumed".[38] The "real intention" is a question of fact, decided objectively.[39] It is not an intention "imputed by the law".[40] That is not to say, however, that its inference may not be relatively straightforward in cases where a person facing financial difficulty disposes of assets. In most cases the circumstance that an

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32 At p 540.
33 At p 541.
34 (1886) 17 QBD 290 at p 298 (CA).
35 [1992] 2 NZLR 144 at p 152 (CA).
36 At p 147.
37 At p 148.
38 *Williams v Lloyd* (1934) 50 CLR 341 at p 361 per Starke J.
39 *Cannane* at p 592 per Kirby J.
40 *Cannane* at p 592 per Kirby J.

insolvent debtor alienates property leaving himself unable to meet his debts will be strong evidence from which an inference of intent to defraud will be available. The intent is nevertheless an actual intent, to be established by evidence.

[14] The critical factors in the present case are:

- At the time of the transfer of the house property, it comprised Mr Lightbody's only substantial asset. His only other significant property was his shareholding in Capro, which had no real value, given the indebtedness of the company.

- Mr Lightbody with his family remained in occupation of the house.

- The transfer was for no effective consideration under the scheme of gifting which was integral to the arrangement.

- Irrespective of the programme of gifting which meant that the transfer was for no effective consideration, the seven year term for repayment of the advance for the purchase price was itself to the prejudice of Regal Castings. Its term loan was to determine two years after the transfer and its debt on current account was immediately payable on demand.

- The guarantee of the indebtedness of Capro was a substantial liability which Mr Lightbody had no ability to meet and which Capro itself was unable to meet from earnings, as its deteriorating current account liability demonstrated.

- Even if Capro and Mr Lightbody were not insolvent (a proposition I regard as doubtful despite suggestions that Capro could have realised its inventory and had the capacity to borrow from the bank), their financial circumstances were precarious and the position of Regal Castings was inevitably prejudiced by alienating Mr Lightbody's only substantial asset.

- The transfer was kept secret from Regal Castings, despite the earlier debt restructuring and the expected determination of the term loan in 2000 (later waived by Regal Castings in ignorance of the transfer).

- There is no adequate explanation for the transfer of the house property into the family trust apart from its protection from creditors.

In these circumstances, I agree with Blanchard J and William Young P in the Court of Appeal[41] that intent to defraud through defeating or delaying Regal Castings in recovery of the debt due to it is the only realistic conclusion to draw from the evidence. I am therefore of the view that, unless there is any impediment to its application, the transaction should be set aside under s 60(1) to the extent that it has prejudiced Mr Lightbody's creditors.

Section 60(3)

[15] Proof that the defence provided by s 60(3) is made out is on the transferee, here the Trust.[42] The section makes it clear that even where full value is paid, a transferee will not be able to bring himself within the exception if he had notice of the intention to defraud creditors. Kirby J in *Cannane* is of the view that good faith is to be purposively and objectively assessed.[43] I accept that approach. On any view, I agree with Blanchard J that there is no question of the Trust bringing itself within the section. The transfer was effectively voluntary. And the Trust is affected with the knowledge and intent of Mr Lightbody.[44]

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41 *Regal Castings Ltd v Lightbody* [2008] 2 NZLR 153 at para [120].

42 *Re Hale* at p 506 per Wild CJ and *Cannane* at p 596 per Kirby J. In *Dungey v McCallum* [1993] 3 NZLR 551 at p 556 (CA) Hardie Boys J accepted the view expressed by Wild CJ in *Re Hale* to be correct as a general statement, while considering that it had to be modified in its application to Land Transfer Act land because of the indefeasibility provisions under that Act.

43 At pp 596 – 597.

44 *Re Fasey* [1923] 2 Ch 1 (CA) is comparable. There, the transfer was to a company of which the transferor was managing director and the substantial shareholder. The Court of Appeal upheld the decision of Lawrence J that the company was fixed with knowledge.

Section 60 of the Property Law Act 1952 and the provisions of the Land Transfer Act 1952

[16] Section 3 of the Property Law Act provides that the Act is to be read and construed "so as not to conflict with the provisions of the Land Transfer Act 1952 as regards land under that Act". To same effect, s 244 of the Land Transfer Act provided that the Property Law Act, in its application, was to be "read and construed so as not to conflict with the provisions of this Act".[45]

[17] Does the application of s 60 of the Property Law Act conflict with the provisions of the Land Transfer Act? I do not think that it does, for reasons that turn on the nature and effect of an application by a creditor under s 60 to set aside a transaction. The only authority which seems to suggest a conflict is the decision of the Court of Appeal in *Dungey v McCallum*.[46] That appeal was from a summary determination on a strike-out application. It seems to have proceeded on the assumption that a claim under s 60(1) of the Property Law Act to set aside an alienation is a challenge to the indefeasiblity of title under the Land Transfer Act once a certificate of title has issued under the Act. For that reason, the Court held that the claim must be struck out because it did not allege actual fraud against the registered proprietor (the fraud exception to indefeasibility being the only one available).

[18] The brief reasons of the Court in *Dungey v McCallum* do not contain any analysis of the effect and nature of an application under s 60 of the Property Law Act. Although the Court had "no difficulty" with the "general statement" applied in *Re Hale* that whether the exception in s 60(3) of the Property Law Act was made out depended on "affirmative proof" of good faith and good value by the transferee, it considered that the view needed modification "in recognition of the particular status of a land transfer title".[47] The point had not been considered in *Re Hale*, although

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45 Section 244 has now been repealed by the Property Law Act 2007.
46 [1993] 3 NZLR 551.
47 At p 556.

the mortgage there in issue had been registered. In *Dungey v McCallum*, however, the Court seems to have been of the view that this had been an oversight:[48]

> In a case such as the present where the impugned transaction has resulted in the transferee obtaining a title under the Land Transfer Act, the challenge is as to the indefeasibility of that title. For the challenge to be successful, the Land Transfer Act requires that there be proof of fraud on the part of the registered proprietor. It must therefore be for the plaintiff, not the defendant, to show, in terms of s 60(3), that the latter did not take in good faith and had notice of the debtor's intention to defraud creditors by the alienation. That being so, it is for the plaintiff to make the appropriate allegations to this effect in his pleadings. As he has not done so, the question becomes whether Gallen J was right to assume that the necessary amendment could and should be made.

The Court took the view that after 17 years and inadequate pleadings it was time for the claim to be brought to an end, and it was struck out.[49]

[19] To opposite effect is the earlier decision of MacArthur J in the Supreme Court in *Murtagh v Murtagh*.[50] That case was concerned, not with s 60 of the Property Law Act, but with the avoidance provision under the Divorce and Matrimonial Causes Act 1928. MacArthur J referred to the fraudulent conveyance avoidance mechanism under s 60 of the Property Law Act as being comparable and on this topic quoted *Kerr on the Australian Land Titles (Torrens) System*:[51]

> It is the universal opinion that the Torrens Statutes do not prevent the operation of the Statute 13 Elizabeth, c5. If however the voluntary transferee has become registered as proprietor, it becomes necessary to obtain a vesting order from the Court and a rectification of the Register Book. This is achieved by the Court declaring in effect that the transferee is a trustee of the land. Of course, a volunteer registered proprietor can confer a good title on a purchaser for value without fraud.

Although this text was written before *Frazer v Walker*,[52] I do not think the correctness of the approach described by Kerr is affected. Upon that view, the application of the statutory remedies for conveyances with intent to defraud creditors is not precluded because the conveyance in issue is land under the Torrens system.

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48 At pp 556 – 557.
49 At p 557.
50 [1960] NZLR 890.
51 At p 900, quoting Kerr (1927) at para [435].
52 [1967] NZLR 1069 (PC).

[20] An alienation made with fraudulent intent is an effective alienation, notwithstanding the emphatic language of 13 Eliz. c. 5 that it is "void".[53] That consequence is made more explicit in modern statutory treatment such as s 60 by which such alienations are "voidable at the instance of the person thereby prejudiced". Only creditors or those claiming through them can attack such alienation under s 60. It remains effective until a creditor succeeds in having it set aside. The form of the consequential orders then to be made will depend on the circumstances. In many cases it will not be appropriate to obtain a reconveyance of the property. A usual form of order is that the transferee must do all things necessary to make the property available for satisfying the claims of the creditors, and only so far as the alienation is voidable under s 60 (the extent to which creditors are prejudiced).[54]

[21] An application under s 60 to set aside an alienation of property is not a claim in rem. It does not assert "encumbrances, liens, estates, or interests",[55] such as would amount to an attack on the title obtained through registration contrary to s 62 of the Land Transfer Act. It is not properly described as an "action for possession, or other action for the recovery of any land", such as would be in conflict with s 63(1). Nor is it an application to the Court attacking the registered title under the fraud exception contained in s 63(1)(c). An application for remedy under s 60 of the Property Law Act in respect of the conveyance of Land Transfer land with intent to defraud creditors does not assert defect in title. The principles of indefeasibility, in protection of the title created by registration, are not engaged by the statutory remedy under s 60 by which the registered proprietors can be compelled to provide satisfaction to the creditors, including by reconveyance of the property, declaration of trust in respect of it, or appointment of receivers for it. These remedies are granted against the registered proprietors personally. As the Court of Appeal explained in *C N and N A Davies v Laughton*:[56]

> indefeasibility of title does not interfere with the personal obligations of a registered proprietor, and the principle that contracts, or trusts, or any personal

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53 *Brady v Stapleton* (1952) 88 CLR 322 at p 333 per Dixon CJ and Fullager J and *Cannane* at p 566 per Brennan CJ and McHugh J and at p 574 per Gummow J.

54 *Ideal Bedding Co v Holland* [1907] 2 Ch 157 at pp 173 – 174 per Kekewich J and *Halifax Joint Stock Banking Co v Gledhill* [1891] 1 Ch 31 at p 40 per Kay J.

55 Land Transfer Act, s 62.

56 [1997] 3 NZLR 705 at p 715 (CA) per Thomas J for the Court.

> equity can be enforced against the registered proprietor merely serves to indicate the limits of the doctrine.

[22] In *Frazer v Walker*, the Privy Council made it clear that the principle that a registered proprietor is immune from adverse claims, except as specifically excepted, "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".[57] Section 60 of the Property Law Act provides foundation in law for such a claim. Recourse to it does not in my view conflict with the provisions of the Land Transfer Act.

Result

[23] The Court being unanimous, the appeal is allowed. There will be a declaration that the second respondents (the trustees) hold a one-half share of their interest in the property at 68 Salisbury Road, Birkdale (Lot 4 DP 46944, Certificate of Title 1852/71 North Auckland Registry) upon trust for the Official Assignee of the estate of Mr Lightbody, to be dealt with by the Assignee for the benefit of Mr Lightbody's creditors. The trustees are ordered to transfer a one-half share in the property to the Assignee subject to the mortgage to the bank. The second respondents must pay the appellant's costs and reasonable disbursements. Those costs in the High Court should be fixed by that Court. The costs in respect of the appeal to the Court of Appeal will be $6,000, and in this Court $15,000. Leave is reserved to the parties and the Official Assignee to apply to the High Court for any further orders or directions as may be necessary to enable the Assignee to realise the net value of the interest of Mr Lightbody in the property or as otherwise may be necessary to implement the orders of this Court.

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[57] At p 1078 (emphasis added).

BLANCHARD AND WILSON JJ

(Given by Blanchard J)

Introduction

[24] Mr Lightbody made himself personally liable for the debts of Capro Three Ltd to its major supplier, Regal Castings Ltd. Regal agreed to continue to make the supplies which Capro needed in order to continue its business. Without telling Regal, some three years later Mr and Mrs Lightbody transferred their house, which was their only substantial asset, to a family trust of which they and a solicitor were the trustees in exchange for an unsecured acknowledgement of indebtedness equal to the amount of the purchase price payable seven years later. The trustees became registered as proprietors of the property under the Land Transfer Act 1952. Over the next four years Mr and Mrs Lightbody gradually forgave the debt, beginning with a gift on the day of the transfer. During that time Capro continued to trade with Regal substantially reducing the amount of the original indebtedness. However, Capro eventually went into voluntary liquidation, still owing Regal a large sum of money.

[25] The general question on this appeal is whether the transfer of the house to the trustees should and can be set aside on an application by Regal under s 60 of the Property Law Act 1952, which reads:

> **60 Alienation with intent to defraud creditors**
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> (1) Save as provided by this section, every alienation of property with intent to defraud creditors shall be voidable at the instance of the person thereby prejudiced.
>
> (2) This section does not affect the law of bankruptcy for the time being in force.
>
> (3) This section does not extend to any estate or interest in property alienated to a purchaser in good faith not having, at the time of the alienation, notice of the intention to defraud creditors.

[26] Regal now seeks an order that the share of the property received by the trustees from Mr Lightbody be transferred to the Official Assignee acting in his bankruptcy. He was adjudicated bankrupt under the Insolvency Act 1967 only after

the High Court judgment had been given in this proceeding. No claim is now made by Regal in respect of the share in the property transferred by Mrs Lightbody who had no liability to Regal for Capro's debt.

[27] The issues are:

(a) Whether Mr Lightbody's transfer of his joint interest in the house property was, in terms of s 60(1), an alienation with intent to defraud his creditor, Regal;

(b) If so, whether that property interest was received by the trustees in good faith without knowledge at that time of any intent to defraud Regal; and

(c) Whether, in any event, the indefeasibility provisions of the Land Transfer Act preclude the making in the present proceeding of the order sought by Regal, in the absence of any application by the Official Assignee.

Facts

[28] Capro carried on business as a manufacturing jeweller from the Lightbodys' family home at Salisbury Road, Birkdale, Auckland which was subject to a mortgage to the National Bank of New Zealand Ltd securing both company and personal indebtedness. Capro had a share capital of only $1,000. All its shares were owned by Mr and Mrs Lightbody. Regal was by far the largest of its suppliers and it had become heavily indebted to Regal. As an accountant's report described the situation in 1993, Capro's entire working capital had been virtually provided by Regal. In 1995 an agreement was entered into by Regal and Capro under which Regal agreed to convert $356,358 of Capro's debt to a term loan repayable by instalments (originally $3,000 and later $4,000 per month) with the balance to be paid at the end of five years. Regal agreed to forgive the interest which had already accumulated of $94,322 provided Capro did not default on the term loan. Further supplies were to be

made by Regal on current account on normal monthly terms. Mr Lightbody accepted personal liability to Capro and acknowledged:

> the tremendous support [Regal] has provided [Capro] and agrees that if he should fail to maintain this repayment schedule he will cease trading and do everything possible to achieve a maximum return to creditors on realisation of the assets.

Later in the document Mr Lightbody's obligation is referred to as a guarantee. For present purposes, it makes no difference whether Capro and Mr Lightbody were concurrently liable to Regal or whether his liability was as a guarantor. Either way, if Capro could not pay, Mr Lightbody would be personally liable for its debt to Regal. His only substantial asset other than his shares in Capro was his joint tenancy with his wife in the house property.

[29] Capro duly made the monthly payments under the term loan but by November 1998, although the term loan had been reduced to about $220,000**,** an amount of $90,000 was owing on the current account, some $65,000 of that being in arrears.

[30] On 12 November 1998, having taken advice from a lawyer, Mr Horrocks, to whom they had been referred as an expert on trusts, Mr and Mrs Lightbody transferred the house property to themselves and Mr Horrocks, as trustees of a family trust, for a consideration of $230,000. At the same time they transferred all the shares in Capro to the trustees for $1,000.

[31] No payment was made by the trustees. Instead they executed an acknowledgement of liability in favour of Mr and Mrs Lightbody which stipulated that the indebtedness would be repaid in seven years' time, namely in one sum on 12 November 2005, with interest at 11% per annum payable meanwhile. In fact, however, on the same day in 1998 Mr and Mrs Lightbody together forgave $54,000

of the debt and they continued with a gifting programme which was completed by the end of 2002, by which time all of the indebtedness had been released.[58]

[32] Regal was apparently aware that Mr and Mrs Lightbody had owned their own home when it made the arrangements with them in 1995 but it had not stipulated for any security over the property. When the property was transferred to the family trust Mr and Mrs Lightbody took no steps either before or after the transfer to inform Regal that had occurred. From 1998 to 2002 Regal continued to supply Capro and Capro made the monthly payments under the term loan. Regal did not insist upon the payment of the balance at the end of the original five years. The current account continued to have substantial arrears.

[33] In 2002 Capro ceased obtaining its supplies from Regal and for some undisclosed reason went instead to another supplier whose terms were evidently not as favourable as those available from Regal. Apparently for this reason, and in part because Mr Lightbody suffered an accident and was also distracted by his son's drug problems, culminating in a criminal conviction and prison sentence, Capro's business failed. It went into liquidation on 11 April 2003, still owing Regal $15,358.57 under the term loan and $149,324 on current account. These amounts were not able to be paid by the liquidator.

[34] Regal obtained judgment against Mr Lightbody in 2004 but the judgment was not satisfied. Mr Lightbody was adjudicated bankrupt on 14 December 2005.

[35] In the meantime, Regal had applied to the High Court for an order that the transfer of the property to the trustees be set aside. However, as has already been mentioned, it is now accepted that the transfer of Mrs Lightbody's joint interest cannot be challenged; and, now that Mr Lightbody is bankrupt, what Regal is seeking

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[58] On the materials before the Court the manner in which the existing indebtedness of the company and of the Lightbodys personally was treated is unclear. The trustees executed a new mortgage in favour of the National Bank, replacing that previously given by the Lightbodys. It appears to have secured both forms of liability but the acknowledgement of debt by the trustees to the Lightbodys was for an amount of $231,000 and deeds of gift were signed for the full amount.

is an order that the share of the property (50%) received by the trustees from him should be transferred by the trustees to the Official Assignee in his bankruptcy.

The High Court judgment

[36] Ellen France J[59] reviewed the financial position of Capro in 1998 when the transfer of the house occurred. She noted, inter alia, that its sales had fallen in that year and that, after paying Mr and Mrs Lightbody salaries totalling $50,000, it had made a loss of $219. But she considered that at the time the Lightbodys consulted Mr Horrocks "there was nothing particularly new or significant in terms of the debt to Regal and/or the company's position at that point".[60] There was an absence of any particular difficulty or triggering event in late 1998. She referred also to the overall reduction in the debt by the monthly payments and the Lightbodys' commitments to that.

[37] The Judge then reviewed the evidence concerning how the Lightbodys came to consult Mr Horrocks and the advice he gave them. They had waived privilege and called Mr Horrocks as a witness. He had given evidence that the Lightbodys had not decided to go ahead with a trust when he saw them. He had to "sell them" the idea of a trust. Mrs Lightbody in particular was very hesitant. The major focus of the Lightbodys was on "family issues", although the idea of credit protection "in a general sense" would have been addressed, without being a focus. The Regal debt was not mentioned in his meetings with the Lightbodys until the end of 2001. Mr and Mrs Lightbody had spoken in their evidence of their concern to protect their children should they both die.

[38] Although the Judge considered there was "an element of defensiveness" in the evidence of the Lightbodys and Mr Horrocks and found that, at least by the time they had completed their meeting with Mr Horrocks, the Lightbodys knew that one of the effects of the trust arrangement was to protect assets, and although she thought

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59 *Regal Castings Ltd v Lightbody* (High Court, Auckland, CIV 2005-404-352, 29 September 2005, Ellen France J).

60 At para [31].

it surprising Mr Horrocks did not ask about the company's creditors, the Judge accepted Mr Horrocks's evidence. She saw nothing untoward in the terms of the trust deed. The house had been transferred "at value". The gifting programme was "normal". Repayment of the loans had continued for four and a half years after the transfer. There were factors other than business difficulties when it was decided to liquidate the company, this being a reference to Mr Lightbody's injury and the problems of his son.

[39] The Judge accepted the submission made for the trustees that, if questions had been asked at the time of the transfer, "it would have been taken that the company would have continued in the same way it had been".[61] Ellen France J concluded that Regal's case ultimately required "a level of calculation and sophistication" on the part of the Lightbodys which she did not believe they had. She considered it was a case "where the disponors were aware of the effect of the alienation but did not have the requisite intent to defraud".[62]

The Court of Appeal judgment

[40] The Court of Appeal, by majority,[63] upheld the High Court's dismissal of Regal's application under s 60. After discussing applicable legal principles, the majority said that the establishment of an intention to defraud is a matter of fact to be determined in the circumstances of particular cases.[64] They said that if in a particular case the facts established showed that, at the time it was made, an impugned transaction must inevitably result in loss to a creditor (loss was a "necessary

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61 At para [71].

62 At para [45].

63 *Regal Castings Ltd v Lightbody* [2008] 2 NZLR 153 (Glazebrook and Arnold JJ; William Young P dissenting).

64 At para [55]. The majority rejected the view that in circumstances of the kind which existed in *Freeman v Pope* (1870) LR 5 Ch App 538 (transfer by way of gift at the time the transferor/debtor is insolvent) there is an irrebuttable presumption that there was an intent to defraud.

incident"[65]) an inference of intention to defraud would readily be drawn.[66] But such an intention was not established merely by showing that an alienation had the effect of defeating a creditor. Inevitability of loss had to be apparent at the time of transfer. However, the majority said somewhat delphically, in cases where it could not be said that the loss to creditors was an inevitable consequence, the courts would still draw inferences of intention to defraud "if all the circumstances justify doing so".[67]

[41] The majority considered that the High Court was correct to hold that the Lightbodys had not had the requisite intention to defraud. In addition to the matters supporting this view referred to by Ellen France J, the majority placed some weight on Regal's continuing support of Capro's business until it changed to another supplier in November 2002. Regal must have considered Capro in 1998 to be "a viable business in the long term". From the Lightbodys' perspective, the business had "not become more risky".[68]

[42] The majority, differing from the High Court Judge in this respect, treated the transfer of the house property as a transfer at an under-value because it was accompanied by an immediate gift of $54,000 ($27,000 from Mr Lightbody). It took into account this factor, together with the arrears on the current account in November 1998, but weighed against them Capro's trading history, agreeing with Ellen France J that there was nothing in the operation of the company in 1998 to cause alarm or concern for the Lightbodys. "The company was continuing to operate with [Regal's] support, and its position in relation to its indebtedness to [Regal] was improving."[69] The majority also agreed with the High Court that the length of time until the liquidation told against an intention to defraud, supporting the view that at the time of the transfer the Lightbodys envisaged that Capro would continue in business in the long-term:[70]

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65 Quoting Cooke P in *Swann v Secureland Mortgage Investment Nominees Ltd* [1992] 2 NZLR 144 (CA) at p 147.
66 At para [56].
67 At para [58].
68 At para [73].
69 At para [75].
70 At para [79].

> It seems clear that, if Glen Lightbody had been called upon to meet all of Capro's liabilities to the appellant at the time of the transfer, he could not have done so. But it is also clear that all those involved envisaged that Capro would continue to meet its commitments under the term loan and the current account to the appellant's satisfaction, and so would continue in business, as in fact it did. This provides some support for Glen Lightbody's claim that he had every intention of ensuring that Capro met its commitments to the appellant.

[43] On the question of the Lightbodys' failure to inform Regal of the transfer of the house, the majority referred to Mr Lightbody's evidence that he did not see any need to tell Regal of the transfer as he regarded his personal business and Capro's business as being separate. The application to Regal for credit had asked only for a residential address and had not given any prominence to the personal guarantee. There was no evidence that Regal had sought any details of the assets available to Mr Lightbody to meet the guarantee nor of any discussions of his net worth when the agreement was negotiated in 1995.

[44] Concerning the evidence of Mr Horrocks, the majority said that it did not have a proper basis for saying that the Judge had been wrong to accept that evidence, the essence of which was that, as far as Mr Horrocks was concerned, the trust was a bona fide family arrangement. The majority considered that the Judge was entitled to accept that evidence.

[45] Overall the majority did not consider that the circumstances were sufficiently compelling to enable it to say that the Judge's conclusion that there was no intention to defraud was wrong and must be overturned.[71]

[46] Dissenting, William Young P considered that it was perfectly clear that Mr Lightbody must have had the debt to Regal in his mind at the time of the transfer to the trust. There was no finding of fact to the contrary. There was also what he took to be a finding of fact that Mr Lightbody knew that the trust would or might serve to protect assets from creditors. So the connection in the debtor's mind between the settlement and its possible effect on creditors was established.[72] The President considered that the High Court Judge had been looking for a fraudulent and targeted purpose involving the setting up of a trust for the purpose of enabling

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71 At para [84].
72 At para [94].

Mr Lightbody to put his assets on "high ground" before reneging on the payments he had promised to make to Regal. That approach put more of a burden on Regal than the authorities required. The President considered that what was required to be shown was that the debtor had disposed of an asset which would be available to his creditors with the knowledge that this would prejudice them by putting it (or its worth) beyond their reach. Knowledge of a consequence was equated with an intention to bring it about. The relevant prejudice was not to be equated with inevitable loss for the creditor at the time of the alienation. The prejudice consisted of being exposed, illegitimately, to the risk of loss. There was no requirement that the prejudice to the creditor be the purpose of the transaction.[73]

[47] William Young P considered that Mr Lightbody was insolvent at the time of the alienation; that he recognised that the transfer of the house prejudiced Regal as exposing Regal to a risk of loss which would crystallise if Capro defaulted; that the transfer was voluntary; and that the transfer was properly characterised as dishonest in the context of the relationship between a debtor and a creditor. He noted particularly that Capro's current account with Regal was some $65,000 in arrears. Regal would have been perfectly entitled to recover that from Mr Lightbody with the consequence that, sooner rather than later, everything else would have become payable. Mr Lightbody had no assets of any significance apart from his interest in the house. There was no value in Capro. That was indicated by the transfer value attributed to its shares of $1,000; it was simply a vehicle through which Mr Lightbody traded and as was made clear by what happened when he was not able to work. The company had made a loss in the 1998 financial year and Mr Lightbody's remuneration was only $50,000. "In this context, the requirement to make monthly payments of $4,000 for 56 months was of crushing significance."[74]

[48] William Young P pointed out that over time Mr Lightbody disposed of his entire interest in the house and was left with nothing to show for it. From the very start, he said, this was the consequence which Mr Lightbody intended to bring about. The fact that it took some time to achieve was irrelevant. With the deeds of gift

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[73] At paras [98] and [99].
[74] At para [104].

which accompanied it, the transfer must necessarily be regarded as made for inadequate consideration.

[49] The President agreed that Mr and Mrs Lightbody remained committed (at least during the period of the gifting programme) to make the agreed payments. But he said that, given the burden of the debt and the limited income-earning potential of Capro and Mr Lightbody, he concluded that Mr Lightbody's recognition of his insolvency and the likely consequences of the transfer on Regal was sufficient for his conduct to be categorised as fraudulent. That characterisation was supported by the consideration that in 1995 there had been a considerable indulgence from Regal which would otherwise presumably have wound up Capro and pursued Mr Lightbody on an existing guarantee. In this context Mr Lightbody had acted dishonestly when he made away with his assets during the period of the extension of time granted by Regal.

[50] Referring to the approach of the majority, William Young P said that the majority had been looking not for a fraudulent intention, but rather a fraudulent motive.

[51] Concerning the defences based on s 60(3) and indefeasibility of title, William Young P said that Mrs Lightbody was as well aware as Mr Lightbody of the circumstances which made it a fraudulent transaction. The Judge had found that Mr Horrocks was not aware of those circumstances. However, the President had no hesitation in attributing the state of mind of Mr and Mrs Lightbody to the trust, given that a contrary conclusion would be "a fraudster's charter"[75] (sanitising a fraudulent transaction by the simple expedient of keeping one of the trustees in the dark about the reasons for the transaction); Mr and Mrs Lightbody were the dominant trustees and Mr Horrocks can only have made the most desultory of inquiries about the commercial background to the setting up of the trust, with Mr Lightbody not seeing fit to explain to Mr Horrocks his difficult financial situation. The President would have allowed the appeal.

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[75] At para [122].

Intent to defraud

[52] The expression "intent to defraud" in s 60(1) of the Property Law Act was not happily chosen. But it has been regarded as shorthand for intent to hinder, delay or defeat a creditor in the exercise of any right of recourse of the creditor in respect of property of the debtor. That is how the concept is now expressed in s 345(1)(a) of the Property Law Act 2007. The existence of any such dishonest intent on the part of the debtor is a question of fact and the onus of proving it is upon the party attacking the transaction.[76]

[53] That much is clear. But what constitutes such an intent? To answer that question it is essential to distinguish between the debtor's purpose and his or her intention, as William Young P did in his dissenting judgment, and as, with some justification, he considered the majority's reasons did not. It is not necessary to show that the debtor wanted creditors to suffer a loss; that it was his purpose to cause loss. It is, however, necessary to show the existence of an intention to hinder, delay or defeat them and that the debtor has accordingly acted dishonestly. This distinction was adverted to by the Court of Appeal in *Swann v Secureland Mortgage Investment Nominees Ltd*.[77] Cooke P remarked:[78]

> In the great majority of cases of fraud the fraudulent parties plan to make a gain, and loss to the victim is an incidental consequence of carrying out their plan. The actuating motive is not usually to inflict loss for its own sake, but to achieve profit. Commonly the state of mind of those guilty of fraud is that they are prepared to act dishonestly at the expense of the person defrauded in order to serve their own ends. In other words, the risk of cheating someone else is something that cannot be avoided and is accepted, perhaps regretfully, as a necessary incident, the obverse, of pursuing their purpose. It is not the law, however, that fraud or dishonesty can only be found if the defendant's governing motive has been to cheat the victim. If it were the law, sharp practice would have a free rein.

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76 *Re Hale (a bankrupt)* [1989] 2 NZLR 503n at p 508 (CA) per Richmond J.
77 [1992] 2 NZLR 144.
78 At p 147.

And Gault J[79] cited with approval, as applicable to cases under s 60, a passage from Smith and Hogan[80] discussing the decision in *R v Cooke*[81] where the House of Lords had upheld a conviction for conspiracy to defraud British Rail by members of a restaurant and buffet-car crew who agreed to sell to passengers food and drink not the property of British Rail. Smith and Hogan approved the view that if it could properly be found that the defendants knew that their conduct would, inevitably, cause loss to British Rail, then it was right to hold that they intended to defraud British Rail and it should be immaterial that this was not their purpose.

[54] Whenever the circumstances are such that the debtor must have known that in alienating property, and thereby hindering, delaying or defeating creditors' recourse to that property, he or she was exposing them to a significantly enhanced risk of not recovering the amounts owing to them, then the debtor must be taken to have intended this consequence, even if it was not actually the debtor's wish to cause them loss. We respectfully agree with the opinion of Gaudron J in *Cannane v J Cannane Pty Ltd (In Liq)* that an intent to defraud:[82]

> involves the notion of detrimentally affecting *or risking* the property of others, their rights or interests in property, or an opportunity or advantage which the law accords them with respect to property.

[55] The most simple case is one in which an insolvent debtor has gifted a substantial asset to a relative or friend or to trustees of a family trust, thereby subtracting from an already insufficient quantum of assets. There may be room for argument over whether in that circumstance there is or is not a presumption, perhaps irrebuttable, of an intent to defraud. It would be a rare case in which a difference of view on that question would affect the outcome.[83] The consequence for the creditors is so obvious that it is really beyond argument that the debtor must be taken to have intended it. Someone who claims that he or she gave no thought to the position of creditors when making a gift in circumstances of insolvency is unlikely to be

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79 At p 153.

80 *Criminal Law* (6th ed, 1988), p 272. See new (11th ed, 2005), p 386.

81 [1986] AC 909.

82 (1998) 192 CLR 557 at p 572 [emphasis added].

83 The point is no longer open to doubt under the Property Law Act 2007, s 346, where a disposition by way of gift by an insolvent person is ipso facto a disposition which may be set aside, as is a disposition without receiving reasonably equivalent value in exchange.

believed. There has always been found to be the requisite dishonest intent where the debtor was insolvent and gifted away his or her property.

[56] It is not necessary to show that the debtor was actually insolvent. A transaction can expose creditors to risk in circumstances where the debtor remains presently able to pay his or her debts as they fall due but there is a high level of probability that this situation will not continue. A gift or a transfer of property at an under-value in these circumstances may be with the intention of hindering, delaying or defeating creditors.

[57] Of course, if property is disposed of by the debtor at full value at the time of the disposition, the creditors will have what Brennan CJ and McHugh J called in *Cannane* "an undepleted fund" against which to prove their debts. Such a transaction could not be characterised as involving a dishonest intent. But, as those Judges also said:[84]

> [I]f property is sold for an undervalue or is given away, that fact is relevant to the intent to be attributed to the disponor in disposing of the property.

We take the reference to a gift to be, in this connection, to a partial gift producing the equivalent of an under-value. The Judges considered a disposition at an under-value to be:

> only a fact from which, dependent on the surrounding circumstances, an inference of fraudulent intention may be drawn.

[58] R J Sutton[85] comments, and we respectfully agree, that the crucial question in all cases is one of intent, and that a debtor may have that intent even though he receives adequate consideration. He cited *Lloyds Bank Ltd v Marcan*[86] in which a long-term lease of the debtor's land to his wife for a fully adequate rent was set aside because it had been entered into in order to impede the process of execution against the land and not as a bona fide family arrangement. In circumstances of this kind the "fund" cannot be regarded as undepleted by the transaction.

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84 At p 567.
85 *The Law of Creditors' Remedies in New Zealand* (1978), para [5.20].
86 [1973] 1 WLR 1387 (CA).

[59] Before leaving this account of the relevant law, we should refer also to the decision of a very strong bench of the Court of Appeal in 1882 in *Re Ridler, Ridler v Ridler*[87] consisting of Lord Selborne LC, Jessel MR and Cotton LJ, lest it be thought that it might make a difference whether Mr Lightbody was concurrently liable to Regal along with Capro (as principal debtor) or only secondarily liable (as a guarantor). The case involved a father who had given a bank a guarantee and later, while the son still remained solvent, made a voluntary settlement of a valuable property. Some three years later the son "filed a petition for liquidation" and was found to be insolvent. The Court of Appeal held the settlement to be invalid as against the father's creditors because it was to be inferred that he had had an intention to defeat or delay creditors. Lord Selborne, with whom Jessel MR agreed, expressed the following opinion:[88]

> To hold that a guarantor can make a voluntary settlement of the whole of his property and support it by shewing that when he made it the person guaranteed had assets enough to pay the amount guaranteed, would go far to defeat the contract of suretyship. We must look at the matter as if the event had already happened the possibility of which the parties must have had in contemplation when the guarantee was given of the debtor being unable to pay. I do not think that any close inquiry as to the supposed capacity of the person guaranteed to pay the debt ought to be entered into. I do not say that there might not be a state of things in which the liability of the guarantor might be so remote that it need not be regarded; but if he conveys away all his property by a voluntary settlement I think it doubtful whether the settlement could in any case be supported in the event of his ultimately being called on under his guarantee.

Cotton LJ observed:[89]

> A man who makes a settlement without leaving himself enough property to pay his creditors must be considered to do it with an intent to defeat or delay them.
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> …
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> Then as to the point that the settlor was not indebted, but only subject to a liability which might never become a debt. A man is not at liberty to take a sanguine view, but is bound to act upon a reasonable view of what is likely to happen. In the circumstances of this case, any reasonable man must have looked upon this guarantee as one which would probably be enforced, and the settlement must be taken as made with intent to delay or hinder creditors.

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87 (1883) 22 ChD 74.
88 At p 80.
89 At p 82.

This case

[60] In our view, and with respect to those who have taken a different view, it is plain that in November 1998 Mr Lightbody had an intent to hinder, delay or defeat Regal's recourse to his interest in the house property should it ever prove necessary for Regal to have such recourse. His action in exchanging that interest for an unsecured debt not repayable for seven years and simultaneously gifting away $27,000 of the debt constituted, in our view, a disposition at an under-value.[90] The exchange was for a debt that did not have to be paid for seven years. That was bound to hinder or delay Regal's recourse to Mr Lightbody's only significant asset. If it is said that Regal could have realised upon the debt by assigning it for value – an argument not advanced for Mr Lightbody – the obvious response would be that it is highly unlikely that anyone would be found willing to purchase such an unsecured debt (indeed only an interest in a debt also owned by Mrs Lightbody), at least at any consideration approaching the face value. That factor, by itself, also demonstrates the element of under-value even if the immediate gift were to be treated as a separate transaction, which we do not think it should be.

[61] And this was done in circumstances of secrecy in regard to Regal – a well recognised badge of fraudulent intent[91] – and at a time when Capro's ability to trade and its future, if not its present, solvency depended upon Regal's willingness to continue to support Capro. Furthermore, it is another badge of fraudulent intent if the debtor remains in possession of the asset, as the Lightbodys did. They were also discretionary beneficiaries of the trust in respect of both capital and income.

[62] Mr Wilson, for the respondents, submitted that it is not open to this Court to conclude that either Capro or Mr Lightbody was insolvent when the transaction occurred on 12 November 1998 because that question was never directly addressed

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90 Regal has not sought to set aside the gifts separately from the transfer of the property and its case has not been directed towards establishing an intent to defraud at any point in time after November 1998.

91 *Twyne's Case* (1602) 3 Co Rep 80b at p 81a; 76 ER 809 at pp 812–813.

at the hearing in the High Court. (This was said to be because the Judge erroneously did not permit any argument based on *Freeman v Pope* because she considered that should have been the subject of a pleading.) We proceed on the basis that actual insolvency has not been proved, as we will explain. But it does not follow that there could be, and was, no intent to defraud on the part of Mr Lightbody.

[63] Capro was some $65,000 in arrears on its current account with Regal. As at 20 November 1998 a further $29,000 was due for payment.[92] It cannot be doubted that if, immediately after the transfer of the home, which is the time at which the matter must be judged, Regal had discovered what Mr and Mrs Lightbody had done, it would have regarded it as a gross breach of faith and would have demanded payment of the $65,000, in addition to the current debt due on 20 November. The unchallenged evidence of Mr Astley of Regal was that Regal would not have continued to prop up Capro if it had known of the transfer of the house.

[64] Mr Wilson submitted that Capro could have found all these moneys and met other accounts payable by 20 November by taking steps to obtain payment of its accounts receivable and selling down its inventory and also by diverting to Capro all or part of a borrowing of $70,000, being a further advance from the National Bank arranged on the security of a mortgage of the house by the trustees (replacing a mortgage given by the Lightbodys). We do not have the advantage of a balance sheet as at November 1998 but a picture of Capro's position is available as at 31 March 1999 with comparative figures for its previous balance date. Both sets of figures show a negative balance as between accounts receivable and accounts payable. Thus, even in the unlikely event that Capro received all the money owing to it by its customers on 20 November, it would also have needed to negotiate a substantial bulk sale of its inventory, for cash, by that date and/or find the shortfall out of the fresh advance by the bank. Such a sale of inventory, if it had to occur, would have been damaging to the business, which was already in a weak position.

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[92] The current account at that date was $90,276 and a $4,000 payment was due on the term loan. A figure of $113,000 is mentioned in the judgments below but that was the amount of the current account some two months later.

Indeed, even with the transfer of the house concealed and Regal continuing to support Capro, its accountant was reporting to Mr and Mrs Lightbody as early as June 1999 that the business was struggling and, if it continued to run as it had for the past two months, "business viability becomes doubtful".

[65] There may, however, have been some ability to meet part of a demand from Regal from the bank advance. The material before the Court includes a "File Note Lightbody Family Trust – 16 November 1998" which records that the amount of the family trust's loan from the bank was approximately $147,000, made up of the existing loan to the Lightbodys plus $70,000 requested by Mr Lightbody "to reduce the overdraft on the Company account and provide working capital". It was recorded that the $70,000 cleared the company's existing indebtedness to the bank. The note also recorded a request, apparently granted, for a continuing $20,000 overdraft for the company. The level of indebtedness which was to be reduced is not apparent but some part of the $70,000 appears to have been available for the trust to pay over to Capro. Accordingly, we have come to the view that it has not been demonstrated that Capro, and therefore Mr Lightbody, was necessarily insolvent as at November 1998 in the sense of being unable to meet its indebtedness as it fell due.

[66] But, whether or not we are justified in taking that benign view, the transaction undoubtedly imperilled Regal for the future. If it had known about it, Regal would certainly have declined to continue to be Capro's supplier. So Capro's business would have been disrupted by the need to find a new supplier immediately, and its subsequent history reveals that it was eventually unable to do so on satisfactory terms and its business then failed. Crucially, if Regal was no longer the supplier, it would definitely not have extended the time for payment of the balance of the term loan when it fell due in 2000. Capro had little or no prospect, as at 1998, of being able to make that payment. Its borrowing capacity, with a business with a net value of $1,000 – the transfer price of the shares based on a valuation by a chartered accountant – was extremely limited. The trust had already borrowed heavily on the house. It had been established, as a minute of a meeting of trustees on 14 November 2000 recorded, "for the acquisition and protection" of the house, and would have been unlikely to give any further support to the company. Financial failure of the

company in 2000 was highly probable and that would have meant the financial failure of Mr Lightbody himself. As Cotton LJ said in the passage from his judgment in *Re Ridler*, quoted at para [33] above, "a man is not at liberty to take a sanguine view, but is bound to act upon a reasonable view of what is likely to happen". On any reasonable view in November 1998, Capro was likely to collapse within two years if Regal came to know of the concealed transfer of the house. The risk of loss for Regal was very significant unless it chose to stay its hand despite discovering the concealed transfer. And why should it now be treated as if it had been legally obliged to do that?

[67] It beggars belief that Mr Lightbody acted without any appreciation of the risk being created for Capro by the transfer of the house. We have been unable to think of any plausible reason why someone in the position of the Lightbodys would go to the trouble and expense of setting up a family trust and transferring the house to it other than protection of that asset against the claims of creditors. Mr Horrocks in his evidence agreed that "in the general sense" the purpose of the transfer to the trust was to protect the house. He said that the idea of forming a trust was that if creditors should come along in the future it could be an advantage, but when asked about existing creditors of Mr and Mrs Lightbody, Mr Horrocks said that was not discussed. This is surprising, particularly since, as a trustee, he surely needed to inquire how the trust's mortgage over the house to the bank would be funded. He was also in the same capacity becoming a shareholder in the company. He said that he spoke to the Lightbodys' accountant about the value of the shares but, according to his evidence, when told that was only $1,000 apparently still made no enquiry about how the mortgage would be funded. Mr Lightbody himself claimed that the dominant reason for transferring the house was to protect it "so my kids would have somewhere to live". He was unable to explain who the protection was against. When asked whether he was protecting it from his creditors he claimed that they were being paid and it had never crossed his mind. "I didn't need to protect the house from anything, I was protecting it so my kids would have somewhere to live if anything happened to myself and my wife. My creditors were being paid. I had an agreement with Regal which I tried as hard as possible to honour". Mrs Lightbody's evidence was that the home was being put into trust "so it would not be sold underneath the children if they lost both parents at once. It was for stability".

[68] None of these witnesses gave any explanation of why it was necessary to transfer the house to a trust in order to create stability for the children in the event both parents died.[93] That could equally well have been done, if the debt to Regal was not the real concern, by appropriate provisions in the wills of Mr and Mrs Lightbody. Having considered their attempts at explanation and the extraordinary absence of any mention to Mr Horrocks that there was a major overdue debt owing to Regal, we have no doubt that the real reason for the transfer was to protect the house against a claim by Regal in the event that the company collapsed, however much they hoped that event would not occur. This was not a bona fide family arrangement. It was intended to protect the house against Regal – to hinder or defeat its right of recourse to the house – and created an inevitable and significant risk for Regal. Accordingly, the transfer must be characterised as having been made with fraudulent intent in terms of s 60.

The position of the trustees: s 60(3)

[69] Subsection (3) preserves the position of someone who acquires property from the debtor in good faith without notice of the debtor's intention to hinder, delay or defeat a creditor or creditors. Where the alienee is aware of that dishonest intent, subs (3) provides no protection against the claim of the creditor to recover the property even where the purchaser has given valuable consideration. As Kerr puts it, all inquiry into consideration is overridden.[94] The principle is of ancient origin[95] and was well established in the time of Lord Mansfield CJ who said in *Cadogan v Kennett* that "if the transaction be not bona fide, the circumstance of its being done for a valuable consideration, will not alone take it out of the statute".[96]

[70] It is contended for the trustees that the trust acted in good faith in receiving the transfer of the property as the trustees collectively did not have, at that time, notice of Mr Lightbody's intention to defraud any creditor. That is no doubt true in respect of Mr Horrocks who was not aware of the Regal debt until some years later.

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93 The house was not at risk if Mr Lightbody died as it would have passed by survivorship to Mrs Lightbody who had no liability to Regal.

94 *Kerr on the Law of Fraud and Mistake* (7th ed, 1952), p 343.

95 *Twyne's Case* at p 80b; p 809.

96 (1776) 2 Cowp 433 at p 434; 98 ER 1171 at p 1172.

But his unawareness of the intent of Mr Lightbody cannot immunise the trust when Mr Lightbody himself was also a trustee and, of course, was the very person who was alienating the property with that intent. Mr Lightbody's knowledge taints the receipt by the trustees of the property. They received it as a unity. They did not have separate interests in it. Taking as joint tenants, they must be treated as one purchaser who has knowledge of the fraudulent intent. We find persuasive the analysis of Windeyer J in *Diemasters Pty Ltd v Meadowcorp Pty Ltd*[97] which supports this conclusion.

The Land Transfer Act

[71] We have reached the conclusion that the transfer of the house property to the trustees was an alienation with intent to defraud Regal and that, in terms of subs (3), the property was not received by the trustees in good faith without knowledge at that time of the fraudulent intent. The remaining question is whether the indefeasibility provisions of the Land Transfer Act preclude the making of the order sought by Regal, in the absence of any application by the Official Assignee. Should this Court simply treat the trustees as holding a one-half interest in the property for Mr Lightbody and make an order for the transfer of that interest to the Official Assignee or should it remit the proceeding to the High Court for the Official Assignee to be given an opportunity to intervene and seek an order to that effect?

[72] The obstacle in the way of the former course is that, although s 60 applies to land under the Land Transfer Act 1952, with s 3(2) of the Property Law Act expressly providing that all the provisions of the Act are, as far as they are applicable, to apply to land and instruments under the Land Transfer Act, subs (1) of s 3 provides that the Property Law Act is to be read and construed so as not to conflict with the provisions of the Land Transfer Act as regards land under that Act. Section 60 contains no provision expressly authorising an order to be made overriding the Land Transfer Act. In contrast, s 58 of the Insolvency Act 1967, which provides a procedure to enable the Official Assignee to invoke s 60 of the Property Law Act, does contain, in subs (7), an overriding provision:

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97 (2001) 52 NSWLR 572 (NSWSC).

(7) Nothing in the Land Transfer Act 1952 shall restrict the operation of this section.

[73] In favour of the view that it is implicit in s 60 that an order can be made overriding the Land Transfer Act notwithstanding s 3(1), is that the defence in s 60(3) is explicitly available in relation to any "estate", a term which obviously refers only to land. Section 60 replaced the Statute of Elizabeth[98] on 1 January 1953. By that time there was very little deeds system land remaining in New Zealand. Was it at all likely that s 60 was to be restricted in its application to land only of that small quantity plus unregistered interests in land transfer land? There would also seem to be no good reason for limiting an override under s 60 to applications by the Official Assignee. Arguably, s 58(7) of the Insolvency Act was thought necessary only in relation to applications under the other sections for which its procedure was made available to the Official Assignee. That there is no fundamental policy reason against having a general override for the avoidance of fraudulent alienations of Torrens system land can be seen from the fact that the legislature has now provided for it in s 350(4) of the Property Law Act 2007.[99]

[74] A New Zealand case in which this question has been discussed is *Murtagh v Murtagh*,[100] a first instance decision of MacArthur J on s 34 of the Divorce and Matrimonial Causes Act 1928, the effect of which was that, where an instrument had been executed by one spouse in order to defeat the claim or rights of the other, it could be set aside on such terms as the Court thought proper. There was no express overriding provision in relation to a registered instrument. Having found that the transfer of a mortgage by the husband to the woman with whom he was living was not a bona fide transfer to a purchaser for value, the Judge considered whether her title under the Land Transfer Act was indefeasible. He recognised that the petitioning wife had not been "deprived of any land by fraud",[101] in terms of s 63 of the Land Transfer Act, because she had never had any interest, either at law or in equity, in the mortgage. He referred by way of analogy to cases under the Statute of

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98 13 Eliz. c. 5 (1571).

99 That section is not available in the present case because s 346(1) provides that subpart 6 applies only to dispositions made after 31 December 2007.

100 [1960] NZLR 890 (SC).

101 At p 899.

Elizabeth, citing a passage from an Australian text,[102] and said that he did not think that "the rule as to indefeasibility of title" applied to the case.[103] The proceedings were not a claim for possession or recovery of land; they were, he said, proceedings brought under another statute, so that s 63 and other provisions of the Land Transfer Act did not bar them, even in the absence of actual fraud by the registered proprietor. The authority of this decision is, however, weakened because the Australian text was commenting on cases under the Statute of Elizabeth in the context of a transfer to a volunteer and doing so at a time before majority opinion in that country moved to the view that a volunteer does get the benefit of indefeasibility. The *Murtagh* case seems to have been decided on the basis that the registered proprietor had been a volunteer. Accordingly, it provides only slight support for the view that s 60 overrides the Land Transfer Act.

[75] Some additional support for this view is, however, to be found at first instance in New South Wales in cases concerning s 37A of the Conveyancing Act 1919, which is in the same terms as s 60. In an obiter dictum in *Silvera v Savic* Hodgson CJ in Eq said that s 37A was "a more specific provision which itself identifies the transferees against whom it is not to prevail",[104] and in *Green v Schneller*[105] Barrett J was prepared to make a declaration that a registered transfer of Torrens system land by a debtor wife to her husband was voidable under s 37A.

[76] On the other hand, our Court of Appeal in *Dungey v McCallum*[106] seems to have assumed that s 60 did not authorise any overriding of a registration because, for consistency with the indefeasibility provisions of the Land Transfer Act, the Court required that the applicant creditor, rather than the defendant alienee, must show under subs (3) that the alienee had not taken in good faith and had notice of the debtor's intention to defraud. Because there had been a failure to make allegations in the applicant's pleading to this effect, the application failed. There is no discussion in the judgment of any possibility of overriding the Land Transfer Act.

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102 Kerr *The Australian Land Titles (Torrens) System* (1927), paras [433] –[438].
103 At p 900.
104 (1999) 46 NSWLR 124 (NSWSC) at para [62].
105 [2002] NSWSC 671.
106 [1993] 3 NZLR 551.

[77] We find it unnecessary to resolve this interesting but now historical question because we are of the opinion that the trustees can be ordered to transfer the property interest to Mr Lightbody's Official Assignee without overriding the Land Transfer Act. We are prepared to accept that what the trustees have done should not be characterised as involving any "actual fraud".[107] Even if it had done, the transfer to the trust did not operate so as to defeat any existing interest of Regal in the property as Regal was merely an unsecured creditor which had an expectation of recourse to the property by way of execution if and when it obtained a judgment against Mr Lightbody. For these two reasons, what occurred in this case does not enable the setting aside of the trustees' registration under the fraud exception to the Land Transfer Act.

[78] Nonetheless, for the reasons given by Tipping J[108] we consider that Regal has an in personam claim in respect of the interest which Mr Lightbody transferred to himself and his co-trustees. He acted unconscionably towards Regal in transferring the property with the intention of putting it beyond Regal's reach. Through his participation as a trustee, all the trustees must be treated as having acted unconscionably. Clearly, Regal has a cause of action against them, namely the right to pursue its s 60 application. There is nothing inconsistent with the Torrens system in upholding an in personam claim in these circumstances against the registered interest of the trustees as successor to Mr Lightbody. The necessary elements of the in personam jurisdiction are thus satisfied.[109]

Result

[79] The appeal must accordingly be allowed with the consequential orders set out at the end of the Chief Justice's reasons.

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107 *Assets Co Ltd v Mere Roihi* [1905] AC 176 at p 210.

108 At paras [147] to [164] of his judgment.

109 *CN and NA Davies Ltd v Laughton* [1997] 3 NZLR 705 (CA) at pp 711–712 and *Duncan v McDonald* [1997] 3 NZLR 669 (CA) at pp 683–4.

TIPPING J

Introduction

[80] The appellant, Regal Castings Ltd, contends that a transaction entered into by the first respondents, Mr and Mrs Lightbody, is in part voidable under s 60 of the Property Law Act 1952. Regal claims that this transaction amounted to an alienation with intent to defraud creditors. In November 1998 Mr and Mrs Lightbody transferred their family home to the second respondents (themselves and a solicitor), as trustees of their family trust. The Lightbodys agreed that the trustees need not pay the purchase price of $230,000 for seven years.

[81] They made an immediate gift to the trustees of $54,000 by forgiving that part of the debt representing the purchase price. The balance was forgiven over the next four years. In the result the family home was transferred to the trust for no consideration. This had been the intention of the Lightbodys from the start.

[82] At the time the transfer took place, Mr Lightbody was a guarantor of the indebtedness of his company Capro Three Ltd to Regal. When Capro ultimately defaulted on its obligations, Regal called on Mr Lightbody to honour his guarantee. He was unable to do so and was adjudicated bankrupt. Regal commenced the present proceeding seeking to have the transfer to the trust avoided to the extent of Mr Lightbody's half share of the family home. No attack is made on Mrs Lightbody's half share as she had not guaranteed Capro's indebtedness to Regal. In view of Blanchard J's detailed examination of the background, it is unnecessary for me at this stage to go into any further factual detail.

[83] Regal's claim failed in the High Court. Ellen France J was not satisfied that Regal had shown that Mr Lightbody intended to defraud either it or his creditors generally when he transferred his half share of the family home to the trust.[110]

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[110] *Regal Castings Ltd v Lightbody* (High Court, Auckland, CIV-2005-404-000352, 29 September 2005, Ellen France J).

Regal's appeal to the Court of Appeal was dismissed by a majority.[111] Glazebrook and Arnold JJ came to the same conclusion as that reached by the High Court. William Young P dissented and would have allowed Regal's appeal.

[84] In these circumstances Regal was granted leave to appeal to this Court on the following grounds:

(1) On what basis, if at all, does the rule laid down in *Freeman v Pope*[112] apply in New Zealand where an insolvent debtor voluntarily disposes of an asset to a third party?

(2) Having regard to s 60 of the Property Law Act 1952, and the indefeasibility provisions in the Land Transfer Act 1952, was the judgment of the Court of Appeal correct?

[85] For the reasons which follow I have come to the conclusion that Regal's appeal should be allowed with appropriate consequential relief. As, contrary to the view expressed by the Chief Justice, I consider the rule in *Freeman v Pope* does apply in New Zealand and governs this case, I will deal with the first ground, albeit, as I will indicate later, I would come to the same conclusion as to intent to defraud without reference to *Freeman v Pope*. After considering these issues I will address the second ground of appeal. In doing so I will, consistently with my conclusion as regards *Freeman v Pope*, consider whether a volunteer attains an indefeasible title. Because I consider that this is so, I will finally address Regal's invocation of the in personam "exception" to indefeasibility.

Section 60 and the rule in *Freeman v Pope*

[86] Section 60 of the Property Law Act 1952 which was in force at the relevant time provided that every alienation of property with intent to defraud creditors was

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111 *Regal Castings Ltd v Lightbody* [2008] 2 NZLR 153.
112 (1870) LR 5 Ch App 538 (CA).

voidable at the instance of the person thereby prejudiced.[113] In this context an intent to defraud creditors means an intent to prejudice a creditor or creditors by creating or increasing a risk that they will not be paid or will be hindered or delayed in receiving payment. Intent to defraud under s 60 does not require proof of actual dishonesty.[114] Section 60(3) provides that the reach of the section does not extend to any estate or interest in property alienated to a purchaser in good faith, not having at the date of the alienation notice of the intention to defraud creditors. A purchaser for this purpose is a person who has given valuable consideration for the asset transferred.

[87] Section 60 was the then current equivalent in New Zealand of a statute passed in the 13th year of the reign of Queen Elizabeth the First.[115] The Statute of Elizabeth, as I will call it, provided that all conveyances and dispositions of property made with the intention of delaying, hindering or defrauding creditors should be null and void as against them. The statute contained a proviso in the same terms as those found in s 60(3). An early and instructive application of the statute can be found in *Twyne's Case*.[116] Kerr, in his work on *The Law of Fraud and Mistake*, citing Story's *Equity Jurisprudence*,[117] observes that it gradually grew into a practice when applying the statute:[118]

> to regard certain acts or circumstances as indicative of a so-called fraudulent intention, in the construction of the statute, although, perhaps, there was in fact, no actual fraud or moral turpitude. It is difficult, in many cases of this sort, to separate the ingredients which belong to positive and intentional fraud from those of a mere constructive nature, which the law thus pronounces fraudulent upon principles of public policy.

[88] Kerr then observes that drawing a line for present purposes between actual fraud and constructive fraud would be next to impossible and could rarely serve any useful purpose. Significantly Kerr adds that there were certain circumstances which

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113 The relevant sections are now contained in Subpart 6 of Part 6 of the Property Law Act 2007. Although s 60 has been repealed, it applies to the present case. It is therefore convenient to write these reasons as if it was still in force.

114 See *Julius Harper Ltd v F W Hagedorn & Sons Ltd* [1989] 2 NZLR 471 (HC) and the cases there cited at pp 485 – 487.

115 13 Eliz. c. 5 (1571).

116 (1601) 3 Co Rep 80b; 76 ER 809 (Star Chamber). *Twyne's Case* mentions a number of conventional general indications of an intent to defraud; see para [126] below.

117 Story, *Commentaries on Equity Jurisprudence* (3rd ed, 1920), para [349].

118 *Kerr on the Law of Fraud and Mistake* (7th ed, 1952), p 301.

came to be taken as conclusive evidence[119] of fraud, and as invariably avoiding the conveyance.[120] One of those circumstances was a voluntary conveyance by a person substantially indebted at the time. This circumstance came to be known as the rule in *Freeman v Pope* to which the first ground of appeal is directed.[121] A voluntary conveyance means a transfer of property without valuable consideration. Questions of insufficient consideration do not require attention in this case. It will, however, be necessary to address whether the transaction in issue was voluntary in the relevant sense. The concept of substantial indebtedness developed over time into the concept of insolvency, as adopted and defined in *Freeman v Pope*.

[89] That case was a Chancery Appeal from Vice-Chancellor James heard by Lord Hatherley LC and Giffard LJ. At the start of his judgment Lord Hatherley said:[122]

> The principle on which the statute of 13 Eliz. c. 5 proceeds is this, that persons must be just before they are generous, and that debts must be paid before gifts can be made.

[90] A little later the Lord Chancellor added:[123]

> But it is established by the authorities that in the absence of any such direct proof of intention, if a person owing debts makes a settlement which subtracts from the property which is the proper fund for the payment of those debts, an amount without which the debts cannot be paid, then, since it is the necessary consequence of the settlement (supposing it effectual) that some creditors must remain unpaid, it would be the duty of the Judge to direct the jury that they must infer the intent of the settlor to have been to defeat or delay his creditors, and that the case is within the statute.

[91] The proposition that the Judge was obliged to direct the jury in the terms stated, indicates, consistently with earlier authorities, that in the circumstances posited, the law did not allow the debtor to claim there was no intent to defraud. Hence *Freeman v Pope* is authority for the proposition that there is an irrebuttable

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119 Later described as an irrebuttable presumption: see Sutton, *The Law of Creditors' Remedies in New Zealand* (1978), para [5.10].

120 At p 301. Of this kind of case Kerr says that intent to defraud is established as a presumption of law as opposed to other cases where it must be established as a fact in evidence (p 308).

121 Ellen France J declined to consider Regal's invocation of this rule as she considered it had to be pleaded and Regal's pleadings were inadequate in this respect. The Court of Appeal rejected that view and dealt with *Freeman v Pope* in ways to which I will come in more detail later.

122 At p 540.

123 At p 541.

presumption of intent to defraud in the relevant circumstances. Speaking of the person who had made the alienation in *Freeman v Pope*, Lord Hatherley observed that in truth he was insolvent because he could not "at once put his hands" on the amount for which he was indebted at the time.[124] His Lordship added that on this account the case was one of those where an intention to defraud creditors was to be "assumed" from the act of voluntary alienation.[125]

[92] Lord Hatherley then addressed the decision of the Vice-Chancellor and said:[126]

> It seems to me that the difficulty felt by the Vice-Chancellor arose from his thinking that it was necessary to prove an actual intention to delay creditors, where the facts are such as to shew that the necessary consequence of what was done was to delay them. If we had to decide the question of actual intention, probably we might conclude that the settlor, when he made the settlement, was not thinking about his creditors at all, but was only thinking of the lady whom he wished to benefit; and that his whole mind being given up to considerations of generosity and kindness towards her, he forgot that his creditors had higher claims upon him, and he provided for her without providing for them.

[93] As to that, the Lord Chancellor added:[127]

> [W]e are not to speculate about what was actually passing in his mind. I am quite willing to believe that he had no deliberate intention of depriving his creditors of a fund to which they were entitled, but he did an act which, in point of fact, withdrew that fund from them, and dealt with it by way of bounty. That being so, I come to the conclusion that the decree of the learned Vice-Chancellor is right.

[94] Giffard LJ, in concurring with the Lord Chancellor, said:[128]

> [T]here was a voluntary settlement by a man who, at its date, was solvent, but immediately afterwards realised the rest of his property and denuded himself of everything. Of course the irresistible conclusion from that was, that the voluntary settlement was intended to defeat the subsequent creditors. That being so, I do not think that the Vice-Chancellor need have felt any difficulty about the case of *Spirett v. Willows* [3 DJ & S 293], but he seems to have considered, that in order to defeat a voluntary settlement there must be proof of an actual and express intent to defeat creditors. That, however, is not so. There is one class of cases, no doubt, in which an actual and express intent is necessary to be proved – that is, in such cases as *Holmes v. Penney* [3 K & J

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124 At p 543.
125 At p 543.
126 At p 543.
127 At p 544.
128 At pp 544 – 545.

> 90], and *Lloyd v. Attwood* [3 De G & J 614], where the instruments sought to be set aside were founded on valuable consideration; but where the settlement is voluntary, then the intent may be inferred in a variety of ways. For instance, if after deducting the property which is the subject of the voluntary settlement, sufficient available assets are not left for the payment of the settlor's debts, then the law infers intent, and it would be the duty of a Judge, in leaving the case to the jury, to tell the jury that they must presume that that was the intent. Again, if at the date of the settlement the person making the settlement was not in a position actually to pay his creditors, the law would infer that he intended, by making the voluntary settlement, to defeat and delay them.

[95] That then is the compass of the rule in *Freeman v Pope*. I will now examine the views expressed in the Court of Appeal concerning its applicability in New Zealand.

The Court of Appeal's approach to *Freeman v Pope*

[96] In their joint judgment Glazebrook and Arnold JJ relied in particular on the decision of the High Court of Australia in *Cannane v J Cannane Pty Ltd (in liq)*.[129] That case was decided on a statute which provided that a disposition of property with intent to defraud creditors, not being a disposition for valuable consideration in favour of a person who had acted in good faith was, if the person making the disposition subsequently became a bankrupt, void as against the trustee in the bankruptcy. In their joint judgment Brennan CJ and McHugh J said that in the case of a provision like that before them, based on the Statute of Elizabeth, "it is clearly established that the party seeking to avoid a disposition of property has the onus of proving an actual intent by the disponor at the time of the disposition to defraud creditors".[130]

[97] That proposition is not easy to reconcile with the rule in *Freeman v Pope*, nor with the discussion in *Kerr on the Law of Fraud and Mistake*, if their Honours were intending it to apply in *Freeman v Pope* circumstances. As to that their Honours added:[131]

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129 (1998) 192 CLR 557.

130 At pp 565 – 566. Gaudron and Gummow JJ wrote separately to broadly similar effect.

131 At pp 566 – 567 (references omitted, emphasis added by Glazebrook and Arnold JJ at para [43] of their judgment).

> Although the party impugning the disposition of property must show an actual intent to defraud creditors at the time of the disposition, the intent may be inferred from the making of a disposition which, to adopt the words of Lord Hatherley LC in *Freeman v Pope*, "subtracts from the property which is the proper fund for the payment of [the] debts, an amount without which the debts cannot be paid". The "proper fund" may consist in assets out of which future creditors as well as present creditors would be entitled to be paid a dividend in respect of what is owing to them. Therefore a subtraction of assets which, but for the impugned disposition, would be available to meet the claims of present and future creditors is material from which an inference of intent to defraud those creditors *might* be drawn. *Whether that inference should be drawn depends upon all the circumstances of the case*.

[98] I respectfully consider that this approach, again if intended to apply in *Freeman v Pope* circumstances, does not reflect either the language used in *Freeman v Pope* or the rationale for the "presumption" which that case recognised and authoritatively restated. Nor does it reflect the authorities which preceded *Freeman v Pope*. The whole point of the rule in *Freeman v Pope* is that in qualifying circumstances the inference of intent to defraud must be drawn, not may be drawn, as suggested by Brennan CJ and McHugh J. If the alienation is a voluntary one made by an insolvent debtor, the law presumes an intent to defraud. The inference that this was the alienor's intent *must* be drawn. It does not depend on there being other circumstances beyond those upon which the rule is based.

[99] In his dissenting judgment in *Cannane* Kirby J noted that there were two competing lines of thought in Australia as to the meaning of intent to defraud in this context.[132] One involved proof of dishonesty and the other did not.[133] The leading text on bankruptcy law in Australia favoured the view that dishonesty did not have to be shown.[134] It is worth reproducing here the passage cited from that text by Kirby J:[135]

> The general principle may be stated that any dealing with property (other than by sale for a reasonable price) made with the object of putting it beyond the reach of present or future creditors comes within the definition of a fraudulent conveyance if the person concerned cannot immediately pay his debts or anticipates some event which may render him unable to pay his debts in future; such a dealing will be treated as fraudulent irrespective of the presence or absence of a conscious fraudulent intent on the part of the debtor if the

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132 At pp 589 – 591.

133 Compare *Hardie v Hanson* (1960) 105 CLR 451 at pp 463 – 464 per Kitto J, with *P T Garuda Indonesia Ltd v Grellman* (1992) 35 FCR 515 at p 523 (FCA).

134 *Lewis' Australian Bankruptcy Law* (4th ed, 1955), pp 45 – 46.

135 At pp 590 – 591.

> necessary result of the dealing is to put the property beyond the reach of his creditors. Typical examples are transfers of property to the debtor's wife, transfers to a trustee to hold for the debtor, and transfers to one or a group of creditors to stave off threatened action. The word "fraudulent" indeed has received an interpretation in bankruptcy matters somewhat wider than its ordinary use, and it may be defined as equivalent to "with an intention to deprive creditors of recourse against all or any of his assets."

[100] Kirby J went on to state that the object of sections such as that with which this present case is concerned, expressed generally, was to prevent insolvent debtors from dealing with their property to the prejudice of creditors.[136] His Honour added that it was not necessary to establish that the alienor "actually had in mind" an intention to defraud creditors. An inference could be drawn to that effect if what the alienor had done would reasonably be expected to have such a consequence. It was in this context that Kirby J went on to say that this process derived the "real intention" of the transferor. I acknowledge that Kirby J also said intent was not "imputed" by the law. On this last point I respectfully part company with his Honour if the case is one governed by *Freeman v Pope*. I am not sure whether Kirby J had that situation in mind when he wrote what he did. *Cannane* itself was not a straightforward *Freeman v Pope* case and this must also be borne in mind when considering the joint judgment of Brennan CJ and McHugh J.

[101] That then was the background against which Glazebrook and Arnold JJ concluded that *Cannane* suggested that in Australia there was no irrebuttable presumption in *Freeman v Pope* circumstances. Rather, an inference might be drawn based on the particular circumstances of the case and would probably be drawn in *Freeman v Pope* circumstances. In *Cannane* the High Court did not make a policy choice. It appears to have proceeded on a basis which, if applied to *Freeman v Pope* circumstances, is not consistent with the rule in that case. Hence I do not regard *Cannane* as persuasive authority against applying *Freeman v Pope* in New Zealand, according to a correct understanding of the rule, if it is otherwise appropriate to do so.

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136 His Honour took this statement from *Kerr*, p 302.

[102] After surveying New Zealand authority, including *Re Hale (a bankrupt)*,[137] *Swann v Secureland Mortgage Investment Nominees Ltd*[138] and *Elders Pastoral Holdings Ltd v Grey*,[139] Glazebrook and Arnold JJ expressed their conclusion as follows:

> [55] That approach is consistent with that adopted by Brennan CJ and McHugh J in the *Cannane* case. We consider that it is the correct approach. The establishment of an intention to defraud is not, in our view, a matter for irrebuttable presumptions of law. Rather it is a matter of fact, to be determined in the circumstances of particular cases. In appropriate cases, courts will draw an inference of intention to defraud despite a transferor's claim that he or she had no such intention. In such cases the objective indicators will be decisive. But the exercise is still one of attempting to determine intention as a matter of fact in the particular case.

[103] This conclusion was influenced by what seems to have been a misunderstanding of the rule for which *Freeman v Pope* stands. As in *Cannane*, their Honours do not seem to have declined to follow *Freeman v Pope* as a matter of policy. They appear to have thought they were adopting what *Freeman v Pope* stood for. In this they were, in my view, mistaken. In his separate judgment in the present case, dissenting as to the result, William Young P discussed the rule in *Freeman v Pope* in some detail. He clearly appreciated the effect of the rule when observing:

> [91] If *Freeman* still represents the law, the sale to the trust must be regarded as fraudulent. On the other hand, I accept that a conclusive presumption of fraud now seems somewhat anomalous and there is a distinct lack of contemporary authority in which that conclusive presumption has been applied. Instead, as Arnold J indicates, courts tend to address cases such as this in terms of whether it is appropriate to infer an intent to defraud. As well, it is certainly possible to point to cases in which it has been asserted that an actual intent to defraud must be established. Approaching the case on the basis that this is so has the further advantage of reducing likely awkwardness with s 60(3) and indefeasibility of title principles.
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> [92] Against that background, I am prepared to address the case on the basis that circumstances of the type involved in *Freeman* permit, but do not require, an intent to defraud to be inferred.

[104] I am bound to say that I do not regard the rule in *Freeman v Pope* as anomalous. It reflects the fact that there is a crucial difference in present

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137 [1989] 2 NZLR 503n (CA).
138 [1992] 2 NZLR 144 (CA).
139 (High Court, Auckland, CP 2–SD99, 17 December 1999, Fisher J).

circumstances between intent and motive. The motive of the alienor in *Freeman v Pope* may well have been to benefit the alienee without any conscious wish or intent to harm his own creditors. But his intent, he being insolvent, was taken to have been to defraud the creditor concerned as that was the likely consequence of what he was doing. The policy behind this application of the legislation is simple. Insolvent debtors are not allowed to make gifts which prejudice the interests of creditors. That seems to me to be a very salutary rule which should be maintained in the form of the irrebuttable presumption for which *Freeman v Pope* stands. I do not see any awkwardness with s 60(3) because that subsection does not touch a case of voluntary alienation. The purchaser referred to there must by definition give valuable consideration. Equally, I cannot discern any indefeasibility difficulties arising from the application of the rule in *Freeman v Pope* which would not equally arise by dint of inferring the relevant intent as a "real" intent.

[105] Hence I consider that the rule should be regarded as being in force in New Zealand according to its correct application. A voluntary alienation by an insolvent debtor (that is a person who is already insolvent or who will become insolvent as a result of the alienation) is to be regarded as a transaction caught by s 60(1). The necessary intent is deemed in law to be present in such circumstances. I can think of no good policy or other reason why this longstanding rule, itself developed for good reasons, should not apply in New Zealand and none was suggested by counsel for the first respondents. There is nothing in our social or commercial conditions or our legal landscape which suggests otherwise. It is of some significance that under the corresponding provision in the Property Law Act 2007 a gift can be attacked by a creditor if it is made by a person who is insolvent or becomes insolvent as a result of the gift, irrespective of whether the donor intended to prejudice creditors.[140] Hence Parliament has effectively incorporated the rule in *Freeman v Pope* into the new Property Law Act. It is therefore difficult to see what policy objections there could be to maintaining the rule by way of the proper application of s 60 of the previous Act.

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[140] See s 346 of the Property Law Act 2007.

[106] It is inherent in what I have already written that I do not accept that the rule in *Freeman v Pope* "is not sufficiently supported by the authorities and runs counter to modern authority".[141] The rule as stated in *Freeman v Pope* was a synthesis of a practice which had developed over more than two centuries of judicial administration of the Statute of Elizabeth. It represented nothing new at the time. It is recognised in the leading textbooks in both England and New Zealand.[142] Richmond J's "possible" in *Re Hale* represented an understandable degree of caution as the Court of Appeal was not required in that case to express any view on the point.[143] The rule was adopted and codified by our Parliament when the Property Law Act 2007 was enacted.

[107] The practical basis for the rule in *Freeman v Pope* was the difficulty of contemplating circumstances in which an inference of intent to defraud should not be drawn when an insolvent debtor gives away property. Some, at least, of the authorities which can be cited as doubting the rule seem to suffer from a lack of understanding of the concept of "intent to defraud" in this field, erroneously equating it with conscious dishonesty. The case of *ex p Mercer, Re Wise*[144] is not a case involving *Freeman v Pope* at all. The person making the voluntary settlement was not insolvent at the time. As Lord Esher MR put it, he did not "owe a shilling in the world".[145] Lindley LJ said that he "had not a farthing of debts".[146] Clearly, therefore, intention to defraud in that case had to be resolved as a matter of fact in the ordinary way. Far from doubting the rule, the judgments in the Court of Appeal appear to proceed on the basis that the rule existed but did not apply.

[108] The suggested lack of modern authority on the rule is likely to derive from the fact that its existence has for many years been seen as firmly established and hence no challenge to the rule as such, as opposed to its factual application, has been seen as worthwhile. It does not really help to say that intent to defraud is always a

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141 Para [9] of the Chief Justice's reasons.
142 See, in particular, Kerr and Sutton.
143 At p 508.
144 (1886) 17 QBD 290 (CA).
145 At p 299.
146 At p 301.

question of fact. So it is, but as a matter of policy the law has for centuries taken the view that in the circumstances covered by the rule the alienor cannot deny the fact.

Application of *Freeman v Pope* to this case

[109] In considering whether the rule in *Freeman v Pope* applies in this case, the first question which must be addressed is whether the transfer of the family home to the trust was a voluntary alienation, that is an alienation made without valuable consideration. In formal terms the transaction was constructed as a sale and purchase at a price of $231,000.[147] The relevant agreement dated 12 November 1998 recited that Mr and Mrs Lightbody, as vendors, had agreed to sell the subject property to the trustees, as purchasers, upon the terms and conditions set out. The purchase price, as specified, was subject to adjustment if the Commissioner of Inland Revenue deemed fair market value to be different. The agreement provided for the purchase price to be payable in terms of a Term Loan Contract which was concurrently executed by the parties. This document, also dated 12 November 1998, provided for a principal sum of $230,000 (with no Commissioner of Inland Revenue adjustment provision). The principal sum was to be repaid in one sum on 12 November 2005, seven years after the date of the primary transaction. Interest was to be paid yearly at 11% per annum (with a default rate of 13%). The home was formally transferred to the trustees on this basis and they became the registered proprietors under the Land Transfer Act 1952.

[110] The evidence establishes that Mr and Mrs Lightbody always intended to release the debt owed to them by the trustees at the maximum amount possible per year without attracting gift duty. This process was duly completed with the final gifts being made by deed dated 18 December 2002. In his judgment William Young P said of this process:

> [107] In this area of the law, substance rather than form should prevail. Over time Mr Lightbody disposed of his entire interest in the house and was left with nothing to show for it. From the very start, this was the consequence

[147] The extra amount of $1,000 reflects the price of the shares in Capro transferred to the trustees at the same time. This concurrent transaction which received little attention in argument can only support rather than lessen the inference of intent to defraud. The proposition that it was a necessary step to protect the Lightbodys' children is far-fetched.

> which he intended to bring about. The fact that this voluntary alienation took some time to achieve seems to me to be irrelevant. In any event, with the deeds of gift which accompanied it, the transfer must necessarily be regarded as made for inadequate consideration.

[111] I agree with this view of the matter. The key point, for present purposes, is that there can be no doubt Mr Lightbody intended at the time he entered into the transaction that the family home should be transferred to the trust for no substantive consideration. The consideration specified in the sale and purchase agreement was never intended to be paid. It was, in any event, left outstanding for seven years, thereby immediately putting the debt due to the Lightbodys by the trustees out of reach of Mr Lightbody's creditors for a substantial period of time. I agree with William Young P that what matters for the purpose of s 60, and hence the rule in *Freeman v Pope*, is the substance of what was intended and achieved, rather than its form. The whole purpose of the rule in *Freeman v Pope* would be negated if a transaction of the present kind was held to fall outside the rule. The fact that the transaction would probably be caught by s 60(1) without reference to the rule is of no present moment.

[112] In seeking to resist this conclusion Mr Wilson, for the Lightbodys, relied on the decision of the Court of Appeal in *Mills v Dowdall*.[148] The issue in that case was whether property of different kinds had been acquired by gift for the purposes of the separate property regime in the Matrimonial Property Act 1976. It had been transferred by father and mother to their son for a specified consideration with the price left owing and thereafter immediately or progressively forgiven. The nature of the transactions in that case was materially the same as the transaction in the present case. The difference is that in the matrimonial property context it was decided that form should prevail over substance. That may be the correct approach in some circumstances, but not in these, for the reasons already given.

[113] Mr Wilson also argued that the application to set aside should have focused on the gifts made rather than the transfer of the home. In that case the Court would have been looking at Mr Lightbody's financial position at the date of the gifts; albeit the first gift was made concurrently with the transfer. There is, however, nothing to

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148 [1983] NZLR 154 (CA).

suggest that doing this in respect of the later gifts would have made any material difference. I am, in any event, satisfied that because at the date the home was transferred Mr Lightbody intended that the transaction should in substance be wholly voluntary, the focus of the application on the transfer rather than the gifts does not preclude the operation of s 60. The section 60 jurisdiction and the rule in *Freeman v Pope* should be administered in a way which reflects the realities of what occurred rather than the precise legal clothing in which the transaction was dressed. For these reasons I am satisfied that the alienation was voluntary and that this first aspect of the rule in *Freeman v Pope* is satisfied.

[114] The second issue concerns Mr Lightbody's solvency. The authorities demonstrate that the concept of solvency in the present context concerns a person's ability to pay debts as they fall due.[149] A person who is unable to do so is regarded as insolvent. Mr Lightbody's financial position must be examined in the light of the fact that he had guaranteed Capro's indebtedness to Regal. There was some debate about whether Mr Lightbody was a guarantor or a principal debtor. For reasons to which I will come, I do not consider it matters which he was. He signed on behalf of Capro a document in favour of Regal in which he acknowledged that he accepted "full personal liability should Capro fail to make any payment or do any other thing that resulted in Regal suffering loss".

[115] For what it is worth this seems to me to make Mr Lightbody a guarantor rather than a principal debtor. His obligation arose only if Capro defaulted. As Mr Lightbody's liability as guarantor is of central importance when considering the issue of his solvency, and Mr Lightbody maintains through counsel that he was not insolvent, it is necessary to examine how the rule in *Freeman v Pope* applies to those whose indebtedness or part of whose indebtedness derives from their having entered into a guarantee.

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149 The question is whether Mr Lightbody could "at once put his hands" on the amount for which he was indebted, as Lord Hatherley put it in *Freeman v Pope* at p 543.

[116] The leading case is *Re Ridler*,[150] a decision of the Court of Appeal on appeal from Vice-Chancellor Bacon. Lord Selborne LC commenced his judgment by saying:[151]

> The arguments on behalf of the Respondents turned much on the proposition that when a person is liable on a guarantee he is not to be regarded for the present purpose as owing a debt of that amount, without taking into account the assets of the principal debtor as well as his own. There is a fallacy in this. To hold that a guarantor can make a voluntary settlement of the whole of his property and support it by shewing that when he made it the person guaranteed had assets enough to pay the amount guaranteed, would go far to defeat the contract of suretyship. We must look at the matter as if the event had already happened the possibility of which the parties must have had in contemplation when the guarantee was given of the debtor being unable to pay. I do not think that any close inquiry as to the supposed capacity of the person guaranteed to pay the debt ought to be entered into. I do not say that there might not be a state of things in which the liability of the guarantor might be so remote that it need not be regarded; but if he conveys away all his property by a voluntary settlement I think it doubtful whether the settlement could in any case be supported in the event of his ultimately being called on under his guarantee.

[117] The Lord Chancellor went on to indicate that it was not appropriate to speculate about the ability of the principal debtor to satisfy the indebtedness; the Court should consider only the state of the guarantor's assets. His Lordship concluded his judgment with these words:[152]

> The father [who was the guarantor] when he made the settlement must have known that if the son could not pay the balance to the Bank he himself, if the settlement was sustained, would have substantially nothing available to meet the liability under the guarantee but such dividend as he could get from the son's estate. I am of opinion that a settlement made under such circumstances cannot be supported against the creditors.

[118] Jessel MR agreed with the Lord Chancellor's judgment.[153] Cotton LJ, the third member of a strong Court, said that a man who makes a voluntary settlement without leaving himself enough property to pay his creditors must be considered to do so with intent to prejudice them.[154] This, without his Lordship specifically saying so, was a clear affirmation of *Freeman v Pope*. On the guarantee point, Cotton LJ indicated that guarantors could not take a "sanguine" view of the prospects of the

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150 (1883) 22 ChD 74 (CA).
151 At p 80.
152 At p 81.
153 At p 81.
154 At p 82.

principal debtor paying the guaranteed debt but must take a reasonable view.[155] The effect of the decision in *Ridler* is that, for present purposes, a guarantor must be treated as if the guaranteed debt was due and owing.

[119] That view of the matter is supported by Kerr[156] who cites the statement of Turner LJ in *Goodricke v Taylor*:[157]

> [E]very surety must be taken to contemplate that he may be called upon to pay the debts for which he is surety, and he can no more be justified in placing the whole of his property out of the reach of his liability to pay them than if he was principal debtor.

[120] With these principles in mind, I turn to look at the financial position of Mr Lightbody in November 1998 when the transfer took place. I adopt as an accurate reflection of the position William Young P's statement that Mr Lightbody had no assets of any significance apart from his interest in the family home.[158] His shares in Capro had no value. The company was heavily indebted, primarily to Regal. Capro's total indebtedness to Regal, which Mr Lightbody had guaranteed, was, as at November 1998, in excess of $300,000. The whole of that sum was not immediately payable but at least $65,000 was, with another substantial amount becoming payable within a short time of the date on which the transaction in issue was entered into. There can be little doubt therefore that following the alienation, if not before, Mr Lightbody was unable to pay his debts as they fell due and was therefore insolvent. Regal had not called upon him to answer his guarantee but in terms of the law, as earlier discussed, he must be treated as if it had.

[121] It is also clear that it is not appropriate to enter into any detailed inquiry as to how readily, if at all, Capro could have discharged its indebtedness to Regal. Clearly it had no ready ability to do so. It too was unable to pay its debts as they fell due. It was at the time in arrears and in immediate default of its obligations to Regal for over $50,000. The fact that Capro had money owing to it, and may have had an ability to liquidate stock in trade, is of no significance for the purpose of assessing Mr Lightbody's solvency. In any event Mr Lightbody has certainly not established

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155 At p 82.
156 At pp 315 – 316.
157 (1864) 2 De G J & S 135 at p 141; 46 ER 326 at p 329 (CA).
158 At para [104].

to my satisfaction that Capro was able to pay its debts at the time he entered into the transaction in question. In a case where the guarantor is insolvent the onus must be on him to show that the principal debtor was so clearly able to pay its debts at the relevant time that it would be inappropriate to apply the rule in *Freeman v Pope* against the guarantor.

[122] Mr Wilson complained, on Mr Lightbody's behalf, that Regal's contention that he was insolvent was not open to it because this allegation had not been made at the trial in the High Court. It is, however, of the essence of this type of case that a creditor seeking the assistance of s 60 almost inevitably has to establish that the alienor was insolvent, at least following the alienation. Even a cursory examination of the text of Kerr and the authorities discussed, makes it plain that unless the creditor can establish that the alienor was or became insolvent, it will not be easy to establish that there was an intent to defraud creditors. If the debtor has enough money left over after making the alienation to pay his debts, there is less room to infer an intent to defraud. Hence all cases of the present kind focus primarily on the debtor's financial position at and after the time of the alienation. The fact that in the High Court no allegation of insolvency was made in those terms, if that be the case, cannot possibly mean that when the case is properly analysed, in terms of fact and law, Regal is precluded from contending that Mr Lightbody was insolvent.

[123] I do not see how, on proper principles, Mr Lightbody can claim to have been prejudiced. It cannot be disputed that he had no other assets of any significance beyond his share of the home, which he effectively gave to his family trust in the face of very substantial indebtedness. He clearly could not discharge his current financial obligations at the time, treating as one must his guarantee as having been called on. Mr Wilson did not identify any other evidence that Mr Lightbody might have called in the High Court that could have made any difference. William Young P felt no inhibition in concluding that Mr Lightbody was insolvent and nor do I.

[124] I close this discussion by drawing attention to the observation in the standard New Zealand textbook on the subject, Sutton's *The Law of Creditors' Remedies in New Zealand*, that:[159]

> Where a gift is attacked by the creditors, the crucial question is usually whether the donor was insolvent, rather than what his actual intent may have been.

[125] It is strange that Mr Lightbody is said to have been unaware that his solvency would be under consideration. The fact that the High Court ruled erroneously that *Freeman v Pope* was not available to Regal because it had not been pleaded cannot have made any difference to the course of events at trial, because the question of solvency was just as much an essential issue whether or not *Freeman v Pope* could be invoked.

Intent to defraud without reference to *Freeman v Pope*

[126] As earlier foreshadowed, I agree with Blanchard J that even if the rule in *Freeman v Pope* were not available to Regal, its claim should nevertheless succeed. I cannot accept the contrary views of Ellen France J in the High Court and Glazebrook and Arnold JJ in the Court of Appeal. In my opinion William Young P was correct in the conclusion to which he came. I would draw the inference that Mr Lightbody did intend to defraud creditors in the relevant sense when he gave away his interest in the family home. The following points, in combination, lead me to that conclusion. The property was effectively given away. Both Mr Lightbody and Capro were at the very least in precarious financial circumstances when this was done. If viewed as a sale the debt representing the purchase price was in practical terms put out of the reach of creditors for seven years with no convincing explanation for why payment was deferred for such a long time. The whole transaction was done behind the back of Regal, which had a legitimate commercial interest in it, despite Mr Lightbody's guarantee not being secured, and finally Mr Lightbody remained in possession of the asset which was given away. These are all classic "badges" of intent to defraud as Kerr puts it.[160] The present is precisely

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159 At para [5.11].
160 Section 5 of Chapter VI, pp 350 – 366.

the kind of transaction that the Statute of Elizabeth and its successors were designed to invalidate.

[127] If the Court did not infer an intent to defraud, as that concept should properly be understood, in this combination of circumstances it is difficult to see in what circumstances the inference might properly be drawn. The problem I have with the conclusion reached by the majority of the Court of Appeal is that I consider they misdirected themselves as to the proper scope of the concept of intent to defraud for the purposes of s 60. They seem to have introduced a quasi-criminal law subjective element[161] into the concept which has never been present in the administration of the Statute of Elizabeth and its successors, even in circumstances to which the rule in *Freeman v Pope* does not apply.[162]

Section 60(3)

[128] For completeness, I should state directly what is implicit in my discussion to this point. Mr Lightbody cannot derive any assistance from s 60(3). The trustees were not a purchaser as they gave no valuable consideration for the alienation. Nor were they in good faith because the knowledge of Mr and Mrs Lightbody that the alienation was intended to defraud creditors, which must be attributed to them, must equally be imputed to Mr Horrocks. Similarly, the trustees must all be taken to have had notice of that intent. The position reached to this point is therefore that, subject to what follows, the transaction in issue is voidable and should be avoided at Regal's instance. It is necessary, however, to discuss what effect the indefeasibility provisions of the Land Transfer Act have on the orders the Court can make.

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161 See their Honours' reference at para [51] to the passage from the judgment of Gault J in *Swann* at p 153 which referred to the decision of the House of Lords in *R v Cooke* [1986] AC 909 and to Smith and Hogan, *Criminal Law* (6th ed, 1988).

162 See *Kerr*, p 302, who says that the one great object of the Statute of Elizabeth was to prevent debtors from dealing with their property in any way to the prejudice of their creditors. See also the decision of Malins V-C in the case of *Mackay v Douglas* (1872) LR 14 Eq 106 at p 120 where his Lordship said of circumstances outside the rule in *Freeman v Pope* that it was not necessary for there to be an intention to defraud in the sense of an intention to commit a fraud. All that was necessary was an intention to bring about a state of affairs putting actual or prospective creditors at risk of not being paid. That is how I interpret the language used by the Vice-Chancellor in the light of Kerr's commentary on the case, pp 323 – 324.

Volunteers and indefeasibility

[129] I will consider first whether the trustees, as volunteers, acquired an indefeasible title. If they did not there will be no impediment to the application of s 60. The word "volunteer" means someone who has not given valuable consideration for the interest acquired. I have already held that the trustees were volunteers in this sense. Regal submits their title should not be regarded as indefeasible for that reason. The question whether a volunteer acquires an indefeasible title has proved controversial.[163] It divided the then Supreme Court sitting as a Full Court in the case of *Re Mangatainoka (No 2)*[164] and has more recently divided Australian courts.

[130] The courts of New South Wales[165] and Western Australia[166] have favoured the proposition that volunteers do acquire an indefeasible title, whereas the courts in Victoria[167] have favoured the proposition that they do not. The question really turns on the correct interpretation of the relevant sections of the Land Transfer Act, primarily ss 62, 63, 182 and 183. There is nothing in the Act which expressly states that only those who have given valuable consideration acquire an indefeasible title. Those who have preferred that view derive their conclusion by implication from the references to valuable consideration in some places in the indefeasibility sections.

[131] There is no such reference in s 62 which, as I shall show later, is the key indefeasibility section. Section 63 excepts from its protective terms the case of a person deriving title otherwise than as a transferee bona fide for value from or through a person registered through fraud. This exception says nothing as to the position of volunteers generally. It is simply the obverse of the protection given to those who acquire title bona fide for value from the registered proprietor. Section 182 provides that a person dealing with the registered proprietor is not, except in the case of fraud, required to inquire into the circumstances in which or the

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163 See *Adams' Land Transfer* (looseleaf), para [I.3.10].

164 [1914] 33 NZLR 23.

165 See *Bogdanovic v Kodeff* (1988) 12 NSWLR 472 (CA) and *Silvera v Savic* (1999) 46 NSWLR 124 (SC).

166 In *Conlan v Registrar of Titles* (2001) 24 WAR 299 (SC).

167 See *King v Smail* [1958] VR 273 (SC); *Rasmussen v Rasmussen* [1995] 1 VR 613 (SC); and *Valoutin Pty Ltd v Furst* (1998) 154 ALR 119 (FCA).

consideration for which that registered proprietor or any previous registered owner was registered. The reference here to consideration does not suggest that where no consideration had been provided the position is different. That would be a most remote and strained implication to draw.

[132] Section 183 states that nothing in the Act shall be interpreted to deprive a purchaser or mortgagee bona fide for valuable consideration of their indefeasible title on the ground that their vendor or mortgagor may have derived their title through fraud or error, or under any void or voidable instrument, or through someone whose title was acquired through fraud or error. In other words, once you are registered you give good title to a bona fide purchaser for value, irrespective of any vice there may have been in your own title. The purpose of s 183 is to make it clear that those who take in good faith and for valuable consideration are not affected by any vice in a predecessor's title. The vulnerability to such vice was one of the principal problems with the old English system of titles which it was the purpose of the Torrens system to avoid.

[133] When regard is had to s 62, s 183 cannot, however, be interpreted as meaning that a volunteer does not take an indefeasible title. I do not consider the express reference to a bona fide purchaser for value in s 183 was meant by implication to exclude volunteers from the protection given by s 62. A volunteer who takes without fraud gains the benefit of s 62. There is no other way of harmonising the two sections. The reference in s 183 to valuable consideration does not, in my opinion, carry with it the implication that if you are bona fide but have not given valuable consideration you are liable to be affected by a vice in a predecessor's title. Section 62 makes it clear that this is not so, there being no valuable consideration pre-condition in that section. If those drafting the Land Transfer Act had intended volunteers to be excluded from the scope of s 62, it seems most unlikely they would have left that result to implication from s 183 as opposed to stating the exclusion directly in s 62.

[134] The leading Victorian decision[168] pre-dates the decision in *Frazer v Walker*[169] where the Privy Council adopted the view that registration confers immediate indefeasibility rather than deferred indefeasibility. The High Court of Australia followed that approach in *Breskvar v Wall*.[170] If there was any doubt about the position of volunteers before *Frazer v Walker*, I consider the approach of the Privy Council in that case should have dispelled it. In any event, I prefer the reasoning of the New South Wales Court of Appeal in *Bogdanovic v Koteff* and that of Owen J in *Conlan* to that taken in the Victorian authorities.[171]

[135] My preference is based on the fact that registration creates title; it does not simply record a pre-existing title. Subject to fraud and the other specific statutory exceptions, an indefeasible title is conferred by the act of registration. I cannot see any proper basis for making an exception in the case of a volunteer. To do so would seem illogical when it is possible to acquire an indefeasible title by means of a forged instrument, provided the registered proprietor is not implicated in the forgery. I do not see how the Land Transfer Act can properly be interpreted so as to deny an indefeasible title to someone who is registered without fraud simply on account of their having been a volunteer. To take that view on the basis of a rather fragile implication from the references to valuable consideration in some places in the indefeasibility sections would cut across both the purpose and language of s 62.

[136] That section was rightly described by the Privy Council in *Frazer v Walker* as the key section for understanding the scheme of the Act. Section 62 says that except in the case of fraud the registered proprietor holds his interest in the land subject only to such encumbrances and other estates or interests as are notified on the register and absolutely free from all other encumbrances, estates or interests. It is the fact of becoming the registered proprietor without fraud that gives the estate of the registered proprietor paramountcy. Whether the registered proprietor has given value

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168 *King v Smail* [1958] VR 273 (SC).

169 [1967] NZLR 1069 (PC).

170 (1971) 126 CLR 376.

171 Some support for this view comes from a passage in the recent decision of the High Court of Australia in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 at para [198]. Without any analysis of the competing issues or reference to authority, the Court suggested that volunteers do acquire an immediately indefeasible title. See also the case note on this decision by Griggs, "In Personam: *Barnes v Addy* and the High Court's deliberations in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd*", (2008) 15 APLJ 268, p 274, footnote 47.

for the estate or interest for which he or she is registered can therefore have no relevance to the paramountcy of that estate.[172]

[137] I am therefore satisfied that the trustees, despite being volunteers, acquired an indefeasible title under s 62 of the Act. I am also satisfied that although Mr Lightbody had an intent to defraud creditors for the purposes of s 60 of the Property Law Act, it would not be appropriate to regard the trustees as having committed Land Transfer Act fraud. As we have seen, fraud, for the purposes of s 60, can, as here, exist without there being actual dishonesty, as is required for Land Transfer Act purposes. Subject to what follows, the trustees are therefore entitled to rely on the indefeasibility of their title.

Whether section 60 overrides the Land Transfer Act

[138] I regret I cannot agree with the conclusion to which McGrath J comes on this aspect of the case. I agree with his starting point that if there is a conflict between the Property Law Act and the Land Transfer Act, the Land Transfer Act provisions prevail. That proposition is clearly stated in both Acts. My difficulty with McGrath J's approach thereafter is that I do not agree with the conceptual basis of his approach to the issue. In my view s 60 cannot be read as overriding Land Transfer Act principles unless that is expressly stated by Parliament to be the case or the conclusion arises by necessary implication from the terms of the allegedly overriding statute. That approach is desirable, if not necessary, because of the fundamental importance of indefeasibility of title. Clearly the override is not expressly stated here, as it is in the new Property Law Act. Nor do I consider there is a necessary implication in s 60 or elsewhere in the Property Law Act, that the terms of s 60 create an implied exception to the principle set out in s 62 of the Land Transfer Act.

[139] One complication is that it is only in respect of an intent to defraud that falls short of Land Transfer fraud that the necessary implication is needed and can therefore arise. If the breach of s 60 amounts to Land Transfer fraud, the case

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[172] The only significance of the registered proprietor being a volunteer is that he may be more vulnerable to an in personam claim than someone who has given value.

thereby comes within a recognised exception to s 62.[173] A necessary implication reflecting that distinction is a sophisticated one, which is by no means apparent from the language of either s 60 or s 3 of the Property Law Act. It is quite feasible that those who drafted s 60 considered the position was adequately covered by the conventional fraud exception to indefeasibility, and that there was not otherwise to be an exception. Similarly, the Insolvency Act point could equally go the other way, on the basis that it is only the Official Assignee, following a bankruptcy, who is given the ability to override indefeasibility principles and not an individual creditor outside the bankruptcy regime.

[140] McGrath J refers to questions of policy and the way the two Acts should be read together from that perspective. In my view that approach reduces the concept of a necessary implication to that of a reasonable or desirable implication. Lord Hobhouse, who was the author of the modern articulation of "necessary implication", was at some pains to distinguish between implications which follow as a matter of logic from express language and those which do not, but are nevertheless seen by the Court as desirable or reasonable ways of reading two apparently inconsistent provisions together.[174] Only the former qualify under the rubric of necessary implication.

[141] While I do not necessarily cavil at McGrath J's views on the competing policy issues, which are reflected in the express override in the Property Law Act 2007, I consider there is too much uncertainty in the point to be able to say that it follows as a matter of inevitable logic that Parliament must have intended all cases coming within s 60 of the 1952 Act, not just those demonstrating actual dishonesty, to be an additional exception to the indefeasibility provisions of the Land Transfer

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173 On the basis that a creditor with a right to avoid under s 60 has a sufficient interest within the meaning of s 62.

174 See *R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax* [2003] 1 AC 563 at para [45] adopted by this Court in *Cropp v Judicial Committee* [2008] NZSC 46 at para [26]. Lord Hobhouse said:

> A *necessary* implication is one which necessarily follows from the express provisions of the statute construed in their context. It distinguishes between what it would have been sensible or reasonable for Parliament to have included or what Parliament would, if it had thought about it, probably have included and what it is clear that the express language of the statute shows that the statute must have included. A necessary implication is a matter of express language and logic not interpretation.

Act. As I have said earlier, necessary implication involves much the same degree of certainty as that provided by express language. I do not consider that is shown in the present instance. The prima facie position, whereby the Land Transfer Act provisions prevail, must therefore remain the ultimate position.

[142] Fortunately the difference between McGrath J and myself on this point is of no moment to the outcome of the present case, nor will it matter for cases which fall to be determined under the Property Law Act 2007. It is significant also that the in personam route, which I favour, achieves and will usually achieve much the same outcome as the route which would see s 60 prevail over s 62 as a matter of implication.

[143] Support for the view I take comes from the recent decision of the New South Wales Court of Appeal in *City of Canada Bay Council v Bonaccorso Pty Ltd*.[175] The Torrens system in New South Wales, as enacted by the Real Property Act 1990 (NSW) is, for present purposes, the same as it is in New Zealand. Section 45(1) of the Local Government Act (NSW) prohibited transfers of community land by Local Councils. In breach of the prohibition the Council transferred land to the respondent which became the registered proprietor.

[144] Reversing the primary Judge, the Court of Appeal held that the respondent acquired an indefeasible title upon registration, as the later Act did not impliedly repeal the relevant provisions of the Real Property Act. The Court said that a "very high bar" had to be surmounted before coming to the conclusion that the later Act overrode the general indefeasibility provisions in the Real Property Act.[176] Even though a transfer in breach of s 45(1) was otherwise unlawful and of no effect, the transferee, once registered, obtained an indefeasible title because the suggested exception was not clearly provided for in the later Act.

[145] The Court added, and I agree, that, if possible, potentially conflicting provisions should be construed so as to work harmoniously together. In construing the two pieces of legislation at issue, the Court took the view that the transfer could

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175 (2007) 156 LGERA 294.
176 At para [81].

and should be regarded as having no effect while it was unregistered. But upon registration it gave rise to an indefeasible title.[177] If that approach were taken to the present case, an alienation of Land Transfer land in breach of s 60 would be voidable until registration but not thereafter.[178] This is the same as saying that s 60 does not prevail over s 62.

[146] Despite the correctness of the outcome, the approach of the New South Wales Court of Appeal is, with respect, a little difficult because the potential for conflict does not arise until registration, and the Court's approach does not provide in substance for any harmonisation of the two provisions. In reality the Court did not harmonise the two. It simply stated that indefeasibility prevailed. As I have said above, the issue in the present case is addressed satisfactorily by the in personam doctrine. When the Privy Council adopted the immediate indefeasibility approach in *Frazer v Walker*, their Lordships recognised at the same time that the in personam doctrine would ameliorate, where appropriate, the effects of immediate indefeasibility.[179] The two doctrines work well together and there is therefore no need to strive to find implied exceptions. The Courts should find an exception only when it is signalled by express language or, its practical equivalent, necessary implication. Neither exists here.

The in personam "exception"

[147] Regal seeks to invoke what is often called the in personam exception to indefeasibility. It is a moot point whether this is a true exception as opposed to being simply a situation which the indefeasibility principle does not reach. It is not necessary to dwell on that issue. The cardinal feature of the indefeasibility principle is that, absent fraud, it entitles the registered proprietor and those dealing with the registered proprietor to rely on the register. Sections 62 and 63 allow the registered proprietor to deny unregistered interests and resist claims for possession. Sections 182 and 183 allow purchasers and others dealing with the registered proprietor to rely on the register for the purpose of gaining assurance as to what the registered

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177 At para [88].
178 Unless actual dishonesty could be shown.
179 [1967] NZLR 1069 at pp 1078 – 9.

proprietor can convey. On this basis those dealing with the registered proprietor do not have to go behind the register to ascertain the state of the registered proprietor's title.

[148] An in personam claim against a registered proprietor looks to the state of the registered proprietor's conscience and denies him the right to rely on the fact he has an indefeasible title if he has so conducted himself that it would be unconscionable for him to rely on the register.[180] Such a claim is concerned with the personal obligations of the registered proprietor rather than with the sanctity of their title. A successful in personam claim indirectly affects the registered proprietor's title, such as when a decree of specific performance is made; but the claim is not a claim to the land as such. It is a claim that the registered proprietor perform the contract of sale.

[149] The in personam jurisdiction must not, however, be allowed to impinge on the fundamental purpose of the Torrens system. In terms of s 62, that purpose is to make the registered proprietor's estate (or title, as it is usually put) paramount against interests[181] which are not notified on the register. It is, in my view, immaterial whether such an interest could have been registered. Hence, if Regal had an unregistrable interest in the land which was not susceptible to in personam relief, that interest would not prevail against the paramountcy provisions of s 62.

[150] That section is simply expressed and deliberately so. Except in the case of fraud, the registered proprietor takes free of all interests that are not notified. The certainty and simplicity of that proposition should not be watered down by reference to whether the interest qualifies for registration. It is the fact of non-notification which is crucial. The absence of the interest from the register, for whatever reason, is what matters in a system which has, from earliest times, proceeded on the basis that, as Edwards J put it in *Fels v Knowles*, "the register is everything".[182] If you have an interest, whether registrable or not, of which you wish to give notice, you should, if possible, protect it by caveat. I can find nothing in either the text of the

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180 See, for example, *C N and N A Davies Ltd v Laughton* [1997] 3 NZLR 705 at p 712 (CA) and *Duncan v McDonald* [1997] 3 NZLR 669 at p 683 (CA).

181 I use the word "interests" as a convenient shorthand encompassing encumbrances, liens and estates as well as other interests.

182 (1907) 26 NZLR 604 at p 620 (CA).

Act or in its underlying purpose to support the view that the paramountcy afforded by s 62 does not apply against unregistrable interests.

[151] I express these views fully recognising that there is a body of authority which is to the opposite effect, namely that unregistrable interests are outside the paramountcy given by s 62.[183] I am satisfied, however, that this is an erroneous view of the matter. As well as the points made in the previous paragraph, I add that it is implicit in the structure and purpose of the Land Transfer Act as a whole that a registered proprietor who becomes registered without fraud takes free of any interest which has not been notified on the register, either by registration or by caveat, including interests which are not capable of registration. In respect of caveats, I endorse the view which I joined in expressing in *Waitikiri Links Ltd v Windsor Golf Club Inc*,[184] that an interest can be the subject of a caveat even if it is not registrable.

[152] In the leading contrary authority, *Carpet Import Co Ltd v Beath*,[185] the Court was influenced by the decision of Williams J in *Gray v Urquhart*.[186] Their Honours took the view that Williams J had held that the paramountcy principle did not prevail against an interest which was not capable of registration. In *Gray v Urquhart* the issue was whether a valid licence for a water-race under the Mining Act 1908 prevailed against the paramountcy of the registered proprietor's title. The licence in question was in the event held by the Judge not to be valid. Nevertheless Williams J said that the registered proprietor "would take subject to a valid grant of a water-race, although the grant had not been registered and no caveat had been lodged".[187] It is clear that the grant was not registrable but the Judge's simply stated observation appears to me to have been based on what he considered to be the effect of the Mining Act rather than on any general principle that the paramountcy provisions do not prevail against interests which are incapable of registration. I am sure that Williams J, whose familiarity with and expertise in these matters was considerable

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183 The principal authority is *Carpet Import Co Ltd v Beath & Co Ltd* [1927] NZLR 37 (SC, Full Court) (Skerrett CJ, Stringer, Adams, MacGregor and Alpers JJ).
184 (1998) 8 NZCPR 527 (CA).
185 At p 59.
186 [1911] 30 NZLR 303 (SC).
187 At p 308.

would have expressly stated as much if he had been intending to support his decision on the basis of such a principle.

[153] Hence, I consider that the Court in *Carpet Import* read more into Williams J's decision than was there. The Court's reasoning did not go beyond adopting what it thought Williams J had decided. Cases which have followed *Carpet Import* on this point, for example *Webb v Hooper*,[188] have also tended simply to adopt that decision without examining the underlying issue. This is understandable as *Carpet Import* was a decision of the Full Court of the then Supreme Court comprising five Judges.[189] As far as I am aware, the question has not been examined in the Court of Appeal.[190]

[154] All that said, it is important to recognise, as the in personam jurisdiction does, that the registered proprietor does not take free of interests (whether registrable or not) which his own conduct binds him to acknowledge. That conduct may give rise to contractual obligations or to obligations which equity requires the registered proprietor to observe. Those obligations create interests in other parties over which s 62 does not give paramountcy. The classic example of such an interest is that of a beneficiary where the registered proprietor holds the land as trustee. A trustee's indefeasible title does not prevent the enforcement of trust obligations, they being an obvious case when the registered proprietor's conscience is engaged.

[155] The in personam jurisdiction and its associated jurisprudence have always recognised that the essential purpose of Sir Robert Torrens' system was to simplify and make more certain transactions involving transfer and other dealings in respect of land. Vulnerability to non-notified unregistrable interests would not be consistent with that purpose. The Torrens system was not, however, designed to remove all scope for equitable intervention against those who are registered proprietors of

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188 [1953] NZLR 111 (SC).

189 It may be of significance that *Carpet Import* was decided at a time when the law concerning caveats and the in personam remedy had not developed to its present state. Hence the Court may have seen a need to give some protection to those with unregistrable interests. That need is now accommodated in a way which does not conflict with underlying Torrens principles.

land.[191] In giving the advice of the Privy Council in *Oh Hiam v Tham Kong*, Lord Russell said that the Torrens system did not deprive "equity of the ability to exercise its jurisdiction in personam on grounds of conscience".[192] He added that the Court could make "an order in personam that the registered proprietor should defeat his own title".[193]

[156] That may be done when it would be contrary to good conscience for the registered proprietor to rely on the register so as to defeat a claim or remedy which equity would otherwise enforce or grant against him. A decree of specific performance of a contract to sell Land Transfer Act land is another classic example of equity working alongside rather than in defiance of s 62 of the Land Transfer Act. In short, the in personam jurisdiction exemplifies the role which equity has always performed of preventing people from relying on their rights at law if it would be unconscionable for them to do so; and, in the present instance, provided that equitable intervention would not undermine the statutory purposes of the Act. Against that background I move to examine whether and to what extent Regal can maintain an in personam claim against the trustees of the Lightbody family trust.

In personam remedy – this case

[157] The first thing Regal must show is that it has a cause of action entitling it to the assistance of the Court, indefeasibility issues aside. In this case Regal must show that it has a legal or equitable basis for attacking the trustees' title which is otherwise available to it. In that respect Regal can invoke s 60(1) of the Property Law Act. Its entitlement to avoid the transfer of the family home to the trustees has already been established.

[158] The second thing Regal must show is that it would be unconscionable (contrary to good conscience) for the trustees to rely on their indefeasible title; or, as I have earlier put it, to rely on the register to defeat Regal's claim to avoid the

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190 The only case in the Court of Appeal, of which I am aware, in which *Carpet Import* has been referred to is *Sutton v O'Kane* [1973] 2 NZLR 304 at p 316. Wild CJ simply mentioned *Carpet Import* in passing but did not address the substantive issue.

191 See *Barry v Heider* (1914) 19 CLR 197 at p 213 per Isaacs J.

192 [1980] 2 MLJ 159 at p 164.

transaction. I consider Regal can show this. Both Mr and Mrs Lightbody, as trustees, must be taken to have known that the transfer of the family home for no substantial consideration was likely to prejudice creditors or at least that there was a serious risk that it would do so. I appreciate they considered they could trade the company out of its difficulties and they made considerable efforts in that respect before Capro ultimately collapsed. But, as I have earlier shown, the law does not allow someone in Mr Lightbody's position the luxury of giving away his only significant asset, in the face of substantial indebtedness, upon the hope that the fortunes of the principal debtor will improve.

[159] The third trustee, Mr Horrocks, cannot in these circumstances shelter behind his unawareness of certain aspects of the transaction. The knowledge of Mr Lightbody should be imputed to his co-trustees. It would on that basis be unconscionable for them now to be able to rely on their indefeasible title in order to resist the consequence that a transaction, to which they were knowing parties, is voidable under s 60(1).

[160] The third matter which must be considered is whether depriving the trustees as registered proprietors of the protection of indefeasibility would be contrary to the policy and purposes of the Torrens system. In that respect it is important that no innocent third party is involved. The trustees are simply being told that as they were knowingly implicated in a transaction voidable under s 60, they cannot rely on the register to resist that consequence. This, in my view, is a classic in personam situation. Equity looks to the conscience of the registered proprietors and holds that it would be contrary to good conscience to allow them to rely on the indefeasibility of their title. Put another way, equity says that in these circumstances s 62 of the Land Transfer Act does not protect the trustees from having the transaction whereby they become registered proprietors avoided and appropriate consequential orders made.

[161] The fourth question relates to how that avoidance can be achieved, consistently with Land Transfer Act principles and the fact that Mrs Lightbody's half

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[193] At p 164.

of the transaction is not amenable to avoidance because she was not in any way indebted to Regal.

[162] I consider this case is an appropriate one for the use of a remedial constructive trust. That remedy was discussed by the Court of Appeal in *Fortex Group Ltd (in rec and liq) v MacIntosh* where the difference between institutional and remedial constructive trusts was briefly considered.[194] There are difficulties in viewing this case as one of institutional constructive trust. Logically the time at which such a trust might have arisen is immediately following the implementation of the transaction. But at that time the alienation was only voidable at best and the potential for its avoidance was contingent upon Regal or another creditor of Mr Lightbody having occasion to take the necessary steps. In a sense therefore any institutional constructive trust would itself have been at least initially of a contingent kind and to declare the existence of such a trust would be unconventional. Furthermore, any constructive trust would necessarily have been in favour of Mr Lightbody himself rather than in favour of a particular creditor or creditors generally. They would only benefit through the transmission of the trust to the Official Assignee on Mr Lightbody's bankruptcy. This route strikes me as artificial and unnecessarily problematic when there is available the much more straightforward course of directly imposing a remedial constructive trust on the trustees of the family trust in favour of the Official Assignee.

[163] The ability of the Court to impose a constructive trust as a remedy was provisionally recognised in *Fortex*, albeit the Court emphasised the need for caution not to allow the proprietary nature of this form of remedy to undermine or subvert other recognised principles and priorities. The imposition of a remedial constructive trust in this case and an order for its implementation would not involve that sort of problem.

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194 [1998] 3 NZLR 171 at pp 172 – 173. In short, an institutional constructive trust arises upon the happening of the events which bring it into being. A remedial constructive trust is created by order of the Court. See also the speech of Lord Browne-Wilkinson in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 at pp 714 – 715; and the illuminating article by Sir Terence Etherton, Chairman of the Law Commission in England, "Constructive Trusts: A New Model For Equity and Unjust Enrichment" (2008) 67 Camb LJ 265.

[164] I therefore agree that the appeal should be allowed with the consequential orders set out at the end of the Chief Justice's reasons.

McGRATH J

[165] I agree with Blanchard J that the transfer by Mr Lightbody of his interest in his house property to a family trust, in all the circumstances, amounted to an "alienation of property with intent to defraud creditors" within the meaning of s 60(1) of the Property Law Act 1952.[195]

[166] The alienation in this case comprised not only the transfer of the property, at a consideration determined in accordance with a registered valuer's opinion of its worth, but also the gifting programme in relation to the vendors' loan which financed the transaction. The result of this was that the trust's debt to the vendors, and in particular Mr Lightbody, was extinguished after four years.

[167] The basis of the finding that the alienation was with intent to defraud his creditors lies in Mr Lightbody's knowledge that the effect of what he was doing would be substantially to diminish his personal worth and thus the value of his personal guarantee of the debt owed by his company to Regal Castings. From the time of his initial gift, shortly after the transfer of the property, Regal Castings was exposed to an enhanced risk that the substantial debt would not be repaid in full. The fact that Mr Lightbody had an intention to pay off the debt in instalments, and believed he would be able to do so, does not affect the crucial point which was that he knew from the outset that he was putting Regal Castings at much greater risk. The legal basis on which his actions amounted to an alienation with intent to defraud is set out in Blanchard J's judgment, and I agree with his analysis.

[168] I also agree that the trust as transferee is fixed with the knowledge of Mr Lightbody of the effect of the alienation. He has at all times been one of the

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[195] The Property Law Act 1952 was repealed as from 1 January 2008 by s 366(c) of the Property Law Act 2007. Unless otherwise indicated, reference in these reasons to the Property Law Act is to the 1952 Act.

trustees. The trust accordingly cannot claim to be a purchaser in good faith who, at the time of alienation, had no notice of the intention to defeat or defraud creditors. It follows that s 60(3) of the Property Law Act provides no assistance for its position and that Regal Castings has satisfied the requirements of s 60 for an order avoiding the alienation of property by Mr Lightbody.

[169] The trustees have, however, registered the transfer of the house property and, the next matter the Court must consider is whether the Land Transfer Act, and its provisions concerning indefeasibility, preclude Regal Castings from obtaining an order under s 60. Two points arise. On the first, I agree with Blanchard J that what Mr Lightbody and other trustees have done in procuring registration of the transfer to them of the property cannot be treated as actual fraud under the Land Transfer Act 1952. There is no finding of that level of dishonesty and it would not be appropriate for this Court to address whether there should be such a finding.

[170] The second point is whether the indefeasibility of the title acquired by registration under the Land Transfer Act precludes s 60 of the Property Law Act taking effect to avoid the transfer. On that point I have concluded that the application of s 60(1) of the Property Law Act as an exception to indefeasibility in this case is consistent with the policy of the indefeasibility provisions of the Land Transfer Act. There is, therefore, no impediment to this Court applying it by treating the transfer as void and ordering the vesting of the half interest of Mr Lightbody in the property in the Official Assignee. My reasons for these conclusions follow.

[171] Section 60 of the Property Law Act provides:

> **60 Alienation with intent to defraud creditors**
>
> (1) Save as provided by this section, every alienation of property with intent to defraud creditors shall be voidable at the instance of the person thereby prejudiced.
>
> (2) This section does not affect the law of bankruptcy for the time being in force.
>
> (3) This section does not extend to any estate or interest in property alienated to a purchaser in good faith not having, at the time of the alienation, notice of the intention to defraud creditors.

[172] The Land Transfer Act and the Property Law Act were enacted on successive days.[196] Each came into force on 1 January 1953. Both statutes deal broadly with the same subject matter, with the Land Transfer Act providing for a system of land registration and the Property Law Act a collection of general rules concerning property. Parliament recognised that the two statutes would, to some extent, cover the same ground and it specifically addressed their linkage. At the relevant time s 3 of the Property Law Act provided:

> **3 Application to Land Transfer land**
>
> (1) This Act shall be read and construed so as not to conflict with the provisions of the Land Transfer Act 1952 as regards land under that Act.
>
> (2) Except as otherwise expressly provided, all the provisions of this Act shall, as far as they are applicable, apply to land and instruments under the Land Transfer Act 1952, as well as to other land and instruments.
>
> (3) The provisions of this Act which are specified in Schedule 1 to this Act do not apply to land or instruments under the Land Transfer Act 1952.

The legislative direction for resolving conflicts between the statutes in s 3(1) was mirrored in s 244 of the Land Transfer Act which provided:[197]

> **244 Property Law Act 1952 to be subject to this Act**
>
> The Property Law Act 1952 shall, as regards land under this Act, be read and construed so as not to conflict with the provisions of this Act.

[173] Where there is no conflict between the two statutes s 3(1) and s 244 have no impact on their interpretation. But if there is, the effect of these provisions is that the Land Transfer Act provisions prevail. The prior question, however, is whether there is any inconsistency. As the Court of Appeal once observed:[198]

> It is inevitable that in the complex legislative processes of a modern society there will be occasional conflicts and inconsistencies between the provisions of different statutes. There are well established rules for determining which

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196 The Land Transfer Act was enacted on 23 October 1952 and the Property Law Act on 24 October 1952.

197 Section 244 of the Land Transfer Act was repealed by s 364(1) of the Property Law Act 2007.

198 *Stewart v Grey County Council* [1978] 2 NZLR 577 at p 583 (CA) per Richardson J. A similar approach was taken in relation to legislation dealing with indefeasibility of title by the Court of Appeal of New South Wales in *City of Canada Bay Council v Bonaccorso Pty Ltd* (2007) 156 LGERA 294 at paras [79] and [80].

> provisions are to prevail. The starting point, of course, is that there be an inconsistency. If it is reasonably possible to construe the provisions so as to give effect to both, that must be done. It is only if one is so inconsistent with, or repugnant to the other, that the two are incapable of standing together, that it is necessary to determine which is to prevail.

It is necessary therefore to inquire into whether there is an inconsistency between the provisions in the two statutes that are relevant in this case.

[174] The traditional view of academic writers is that Torrens System legislation is compatible with statutory provisions that enable the setting aside of fraudulent conveyances. This is reflected in the observation of Kerr:[199]

> It is the universal opinion that the Torrens Statutes do not prevent the operation of the statute 13 Eliz., c.5.

That English statute of course was the predecessor of s 60, which only ceased to have effect in New Zealand when the Property Law Act came into effect. Similar statements are made in other texts. Hogg observed:[200]

> But it has been said that the creditors' right under the 13 Eliz. is a "statutory right," and "neither an unregistered title, nor an unregistered interest, nor an unregistered disposition."

More recently, Baalman has referred to the relevant provisions of the Statute of Elizabeth[201] as being one of the "incidents of common law conveyancing [that] have been judicially recognised as being applicable to land under the [Real Property Act 1900], although not expressly mentioned in it".[202] In New Zealand, in 1978, Hinde McMorland and Sim said:[203]

> It is generally accepted that the Torrens System statutes do not prevent the operation of the legislation against fraudulent conveyances. If, therefore, a voluntary transfer of land is voidable under s 60 of the Property Law Act 1952, the transferee cannot set up his registered title against any claim by the person prejudiced by the transfer.

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199 Kerr, *The Australian Lands Titles (Torrens) System* (1927), para [435].
200 Hogg, *Registration of Title to Land Throughout the Empire* (1920), p 110.
201 13 Eliz. c. 5 (1571).
202 Baalman, *The Torrens System in New South Wales* (2nd ed, 1974), p 5.
203 Hinde McMorland and Sim, *Land Law* (1978), para [2.107].

In the current second edition of Hinde McMorland and Sim, only the first sentence of this passage appears.[204] Significantly, however, the cases cited in the texts as the basis of the principle that s 60 operates on Land Transfer land all involve transfers to volunteers and appear to be decided on the basis that a volunteer does not receive immediately indefeasible title on registration.[205]

[175] Since *Boyd v Mayor of Wellington*[206] was decided, by a majority, in 1924, the prevailing judicial opinion in New Zealand has been that registration under the Land Transfer legislation results in immediate indefeasibility of title. In 1966 *Frazer v Walker*[207] put the stamp of Privy Council authority on this principle, stating emphatically that the ratio of *Boyd's* case "applies as regards titles derived from registration of void instruments generally".[208] The lack of any close analysis of the impact of this common law development casts doubt on the authority of the opinions of the textbook writers set out above.

[176] A number of cases address situations where what is at issue is whether statutory provisions which make instruments void and ineffective override the consequences of registration under the Torrens system.[209] In general they do not. But, as McGechan J has pointed out:[210]

> [T]he question at all times remains one of interpretation by way of reconciliation of those two statutes. Decisions in other jurisdictions on other statutes are a guide, but no more.

[177] In *Murtagh v Murtagh*,[211] MacArthur J decided that, under a provision similar to s 60 in matrimonial property legislation, an instrument entered into to defeat petitioners' rights could be voided without the rule of indefeasibility of title having any effect on that Act. Macarthur J reasoned that the avoiding was under a separate statute to the Land Transfer Act to which s 63 did not apply. This is akin to saying

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204 Hinde McMorland and Sim, *Land Law* (looseleaf), para [9.080(d)].

205 Including *Crow v Campbell* (1884) 10 VLR (E) 186 (SC); *Moss v Williamson* (1877) 3 VLR (E) 221 (SC) and *Hall v Hall* (1877) 2 NZ Jur (NS) 259 (SC).

206 [1924] NZLR 1174 (CA).

207 [1967] NZLR 1069.

208 At p 1078.

209 Including *Breskvar v Wall* (1971) 126 CLR 376 and *Housing Corporation of New Zealand v Maori Trustee* [1988] 2 NZLR 662 at pp 677 – 678 (HC).

210 *Housing Corporation of New Zealand* at p 677.

211 [1960] NZLR 890 at p 900 (SC).

that the two statutory provisions can be reconciled. But there is no discussion of how that result is reached. In *Dungey v McCallum*,[212] the Court of Appeal suggests that s 60 of the Property Law Act will not operate to avoid transfers of indefeasible title unless the conduct in issue amounted to Land Transfer Act fraud, which is a higher standard than required by s 60. Again, however, there is no analysis of the provisions to support this conclusion.

[178] As the case law does not provide this Court with reasoned assistance on the question whether s 60 of the Property Law Act is to be read as a provision which can be reconciled with the Land Transfer Act, this must be ascertained on the basis of principles of statutory interpretation of the relevant provisions rather than any common law based analysis.

[179] The completion in 1951 of all work required for the issue of compulsory Land Transfer titles meant, from a practical point of view, the demise of the Deeds System in New Zealand.[213] As a consequence, by 1952, nearly all land in New Zealand had been brought under the Land Transfer registration system. This forms an important part of the context in which the meaning of the two statutes and their application to each other must be ascertained because, to the extent that s 60 was to apply to real property, that was to be Land Transfer land.

[180] The text of s 3 of the Property Law Act makes plain that, in general, the two contemporaneous statutes are to be read together. Section 60, in particular, is to be applied to land under the Land Transfer Act, as provided in s 3(2), s 60 not being one of the provisions excluded from application under s 3(3). The text of s 60 is itself consistent with its application to Land Transfer land. Section 60(3) stipulates circumstances in which the section is not to apply to any "estate" which must mean an estate in land. Parliament's clear intention is that outside of those circumstances s 60 does apply to land and, in the context mentioned, to land that is within the Land Transfer Act registration system.

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212 [1993] 3 NZLR 551 at p 556.

213 See "The Demise of the Deeds System" (1951) 27 NZLJ 271.

[181] In light of these provisions, read in their context, if the matter were to turn solely on the terms of the Property Law Act, I am satisfied that it is plain that s 60 of that Act would apply to alienations of all land, the title to which has passed in accordance with the provisions for registration in the Land Transfer Act.

[182] The question then is whether the Land Transfer Act stands in the way of such an application of the Property Law Act provision. The only potentially conflicting provisions in the Land Transfer Act are those concerning indefeasibility. These provisions are, however, of great importance to the New Zealand system of land registration.

[183] In *Frazer v Walker*, Lord Wilberforce said of the doctrine of indefeasibility of title:[214]

> The expression, not used in the Act itself, is a convenient description of the immunity from attack by adverse claim to the land or interest in respect of which he is registered, which a registered proprietor enjoys. This concept is central in the system of registration.

Whether the indefeasibility of title of a registered proprietor conflicts with the application of s 60 in this case turns on the meaning of the central statutory provisions creating it. Section 62 of the Land Transfer Act provides:

> [T]he registered proprietor of land or of any estate or interest in land under the provisions of this Act shall, except in case of fraud, hold the same subject to such encumbrances, liens, estates, or interests as may be notified on the folium of the register constituted by the grant or certificate of title of the land, but absolutely free from all other encumbrances, liens, estates, or interests whatsoever, …

None of the exceptions in s 62(a) – (c) are relevant in this case. Section 63(1) of the Act provides:

> (1) No action for possession, or other action for the recovery of any land, shall lie or be sustained against the registered proprietor under the provisions of this Act for the estate or interest in respect of which he is so registered, except in the following cases, that is to say –
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> …

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[214] At p 1075.

> (c) the case of a person deprived of any land by fraud, as against the person registered as proprietor of that land through fraud, or as against a person deriving otherwise than as a transferee bona fide for value from or through a person so registered through fraud:

It is only the fraud exception, provided for in s 63(1)(c) of the Act, that is relevant for present purposes.

[184] The argument in support of Mr Lightbody's position is that the contention that the transfer to the trustees is part of a voidable alienation and a nullity, amounts to a claim for the recovery of land, which is prohibited by s 63(1). Whether s 60 of the Property Law Act conflicts with the two indefeasibility provisions is a question of statutory interpretation turning on the meaning of the text of ss 62 and 63(1) read in light of their context and purpose.

[185] The principal purpose of indefeasibility of title is to avoid any need for a person who is dealing with the registered proprietor to have to go behind the register in order to become satisfied of the validity of the registered proprietor's title. In conjunction with s 183 of the Land Transfer Act s 62, and the prohibition on actions in s 63(1), protect a bona fide transferee or mortgagee from liability for any defect in the title of the registered proprietor.

[186] As indicated, it has been clear, since delivery of the judgment of the Privy Council in *Frazer v Walker* in 1966, that ss 62 and 63(1) must be read as conferring immediate indefeasibility of title, in this case on the trustees, from the time of registration of the transfer to them. The object of the immediate aspect of indefeasibility is to give protection against competing interests to transferees who have obtained title under a defective but registered instrument. Protection is given to those who have followed the procedures of the Land Transfer Act from the time they obtain registration.

[187] These policies underlie indefeasibility of title but they are not specifically addressed to situations, such as the present case, in which the registered proprietor has acted with dishonest intentions in relation to a creditor in transferring the property. This is amply demonstrated by the current position in relation to s 60 itself under the Insolvency Act 1967. Parliament expressly provided in the 1967 Act for

s 60 to have effect, notwithstanding the indefeasibility provisions when invoked by the Official Assignee. Section 58 of that Act allows the Official Assignee to apply to set aside a disposition that is voidable under s 60 of the Property Law Act and s 58(7) states:

> Nothing in the Land Transfer Act 1952 shall restrict the operation of this section.

[188] It should not be thought that this indicates that in other situations, where a person prejudiced seeks to avoid an alienation, that it is the Legislature's policy that s 60 only applies subject to indefeasibility. There would be no logic in such a distinction and the legislative history is to the contrary. There was no provision equivalent to s 58(7) included in the Bankruptcy Act 1908.[215] Nor did the Insolvency Bill, when introduced in 1965, contain any clause in the form of what is now subs (7). When the Bill was reintroduced in the House of Representatives in May 1967, this subclause was, however, included. In the interim, of course, the Privy Council's decision in *Frazer v Walker* had been delivered.[216] When the Privy Council decided in favour of immediate indefeasibility of title, rather than deferred indefeasibility, it was apparently seen as desirable to clarify the position in the new insolvency legislation already before the House by stating explicitly that the Land Transfer Act would not restrict the operation of s 60 in a bankruptcy. Similar changes covering all alienations with intent to defraud creditors have been introduced in the recently enacted Property Law Act 2007.

[189] The important point for the present purpose of deciding whether effect can reasonably be given to the provisions of both Acts is that the policy underlying Land Transfer Act indefeasibility has not, at least since the enactment of the Insolvency Act in 1967, been regarded by Parliament as inconsistent with the application of s 60 of the Property Law Act to Land Transfer land.

[190] While s 60 is consistent with the policy of the Land Transfer Act, the operation of s 60 does affect the title of the registered proprietor and is in conflict with the indefeasibility provisions. It is therefore necessary to consider whether its application is permitted as an exception to indefeasibility.

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[215] The relevant provision was s 79 of that Act.
[216] On 7 December 1966.

[191] In *Assets Co Ltd v Mere Roihi*,[217] the Privy Council decided that fraud providing an exception to indefeasibility of title meant "actual fraud", not "constructive or equitable fraud". I have already concluded that the threshold of actual fraud is not established in the present case. It would be possible to read the provisions currently being considered in the two Acts in a way that confined fraud under s 60 to those instances which reach the standard of "actual fraud" when the property concerned is Land Transfer land. There would then be no inconsistency between them. But applying such a limited approach would severely curtail the scope of the legislative policy expressed in s 60 to alienations of land.

[192] Section 60 of the Property Law Act enables those prejudiced to avoid alienations of property with "intent to defraud" creditors. Fraud in that sense has been established in this case. Section 60 is a very specific provision in its prescription of when an alienation is voidable and who is susceptible to loss of property.[218] It is confined to a particular type of dishonest conduct that impacts on creditors. In s 60(3) it states when transferees are protected against steps creditors may take. Section 60 applies to conduct of a dishonest kind which, however, does not have to reach the level of dishonesty that amounts to Land Transfer Act fraud. As well, the fraud exception under s 63 of the Land Transfer Act is concerned with fraud which directly deprives a person of an interest in land. This feature puts s 60 outside the scope of the Land Transfer Act fraud exception.

[193] Nevertheless, having regard to the confined nature of the circumstances addressed by s 60 as a provision dealing with fraud on creditors, and Parliament's expressed intention in s 3(2) of the Property Law Act that s 60 apply to Land Transfer land, I am satisfied that it is reasonably possible to construe s 60 consistently with the indefeasibility provisions as a special additional exception. It is closely akin to the fraud exception under ss 62 and 63 of the Land Transfer Act in dealing with dishonesty in relation to all alienations of property to defeat creditors. Section 60 can consistently stand alongside other exceptions with minimal intrusion on the doctrine of indefeasibility of title. This is an interpretation that is open in the

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[217] [1905] AC 176 at p 210 (PC).

[218] As pointed out by Hodgson CJ in *Silvera v Savic* (1999) 46 NSWLR 124 at para [62] (SC).

context of two statutes that are to be read together in which continuity of legislative approach is to be expected.

[194] This approach does involve extending the number of exceptions to the indefeasibility principle. However, s 60 only applies in the specific situations mentioned, so that the extension is very limited. The intrusion fits with the clear and relevant legislative policies expressed in s 3 of the Property Law Act and the Insolvency Act. In the end, this interpretation is available, to my mind fits in with the purpose of the Land Transfer Act (as well as the Property Law Act), and is consistent with the context. It is an approach based on the meaning of the relevant statutes and accordingly does not require the additional consideration of personal rights and obligations necessarily involved in an in personam approach. I would read ss 62 and 63 of the Land Transfer Act accordingly, and hold that, under s 60 of the Property Law Act, the transfer by Mr Lightbody of his interest in his property is to be avoided. For these reasons I agree with the orders set out in the reasons of the Chief Justice.

Solicitors:
Thomas & Co, Auckland for Appellant
McVeagh Fleming, Auckland for Respondents