

IN REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 236 OF 2012

SMITH LEWIS

Appellant

AND

ANJAN SOOKDEO

Respondent

PANEL: A. Mendonça, J.A.
P. Moosai, J.A.
J. Jones, J.A.

APPEARANCES: Mr. G. Peterson, S.C. and Ms. D Palackdharry Singh for the Appellant
Ms. N. Sharma and Ms. J. Troja for the Respondent

DELIVERY DATE: June 21st 2016

JUDGMENT

Delivered by A. Mendonça, J.A.

1. On May 23rd 2016 we allowed this appeal, set aside the order of the trial Judge, dismissed the respondent's counterclaim and declared that the appellant is the owner of and entitled to possession of the lands described in certificate of title registered in volume 4436 folio 65 then occupied by the respondent. We also made an order that the respondent deliver up possession of the lands and provided for the costs in the Court below and here. At the time we gave brief oral reasons for so doing but we take this opportunity now to provide formal written reasons for our decision.
2. This appeal relates to lands held under the Real Property Act (the RPA) and raises the issue whether someone who claims an equitable interest in lands under the RPA can defeat or take priority over the title of the registered proprietor.
3. By claim form and statement of case issued on June 24th 2011, the appellant, Mr. Lewis, claimed a declaration that he is the owner of and entitled to possession of a parcel of land comprising a little over 6 acres (the lands) described in the certificate of title above mentioned. He claims, and there is no dispute as to this, that the lands were purchased by him for the sum of \$1,000,000.00 from Hugh Sampath, the prior registered proprietor, and transferred to him by memorandum of transfer dated November 28th 2003. He also claimed other relief including possession of the lands. In his statement of case Mr. Lewis alleged that the respondent, Mr. Sookdeo, was currently occupying a lot and a half (the occupied parcel of land) of the lands, which despite demands for him to vacate he refused to do.
4. Mr. Sookdeo filed a defence and counterclaim. He claimed he is in possession of the occupied parcel of land pursuant to an unregistered assignment of an unregistered lease from Nazim and Fareeda Ali who had obtained the lease of the occupied parcel of land from previous owners of the said lands. He stated that Mr. Lewis had notice of his occupation prior to the execution of the memorandum of transfer of the lands in his favour and so too did Mr. Lewis' immediate predecessor in title, Mr. Sampath. Mr. Sookdeo, in

those circumstances, claimed that he has an equitable title to the occupied parcel of land and on January 20th 2004 filed a caveat giving notice of his unregistered title. It should be noted that this caveat was lodged after the execution of the memorandum of transfer of the said lands to Mr. Lewis and was later withdrawn.

5. Mr. Sookdeo further claimed that Mr. Lewis was estopped from denying his right and title to the occupied parcel of land since by the words and conduct of his predecessor in title he was led to believe that his right and title to the occupied parcel of land was lawful and legitimate. He averred that he acted to his detriment by the construction of a building and the establishment of his business on the occupied parcel of land. In those circumstances Mr. Sookdeo claimed that it would be inequitable and unconscionable for the claimant to insist upon his strict legal title to the occupied parcel of land. He counterclaimed that he be granted a declaration that he is the owner of the occupied parcel of land and for an order directing the Registrar to register the lease and assignment of the occupied parcel of land and to endorse his interest on the certificate of title relating to the lands.
6. Mr. Lewis in his evidence stated that he went to see the lands prior to his purchase of them. He did not meet Mr. Sampath who was then the owner of the lands. He however met Mr. Sookdeo and another person. No one showed him the boundaries of the lands and he was not aware that anyone was in occupation of the lands. He therefore agreed to purchase the lands and paid a deposit. He then commissioned a survey of the lands and it was as a consequence of the survey that he discovered Mr. Sookdeo was in occupation of a portion of the lands he had agreed to buy. By letter dated November 4th 2003 Mr. Lewis' attorneys wrote to Mr. Sookdeo stating that Mr. Lewis owned the lands, that Mr. Sookdeo was trespassing on a portion thereof and constructing a house without any lawful authority. They called on Mr. Sookdeo to stop the construction and vacate the lands.
7. Mr. Sookdeo's attorneys responded to Mr. Lewis' attorneys by letter dated November 11th 2003. They denied that Mr. Sookdeo was trespassing on the lands and they enquired as to the basis of the allegation that he was a trespasser. According to Mr. Lewis after that letter was written he was told by Mr. Sookdeo that he had entered into possession of the occupied parcel of land pursuant to a lease agreement that another person had with the previous

owner of the lands. Mr. Sookdeo, however, provided no proof of such an agreement nor did he give the name of any person from whom he purportedly leased the occupied parcel of land. Mr. Lewis made enquiries of Mr. Sampath but was unable to locate any lease in respect of the occupied parcel of land.

8. Mr. Lewis completed the sale of the parcel of land on November 28th 2003 when the memorandum of transfer was executed by Mr. Sampath in his favour.
9. By letter dated December 30th 2003 to Mr. Sookdeo, attorneys for Mr. Lewis informed Mr. Sookdeo that he had purchased the lands, that they had previously called on him to vacate the occupied parcel of land but to no avail and they again called on him to vacate the occupied parcel of land. They stated that *“failure to do so will result in our client taking all necessary steps to make you vacate the said land and to remove your unfinished building.”*
10. Mr. Lewis in his witness statement chronicled a number of interactions with Mr. Sookdeo that he alleged occurred after the letter of December 30th 2003, which for the purposes of this appeal I need not refer to in any detail. They however do illustrate that on the evidence of Mr. Lewis he did not acquiesce or encourage Mr. Sookdeo’s occupation of the occupied parcel of land or any construction thereon.
11. Mr. Sookdeo gave evidence on his behalf and also called as a witness Mr. Anthony Walters. According to Mr. Sookdeo the occupied parcel of land was on October 24th, 1988 leased to Nazim and Fareeda Ali for a term of 999 years by Robert Sanowarand Kayso Rampersad. This lease, it is not disputed, was not registered. Mr. Sookdeo stated that by agreement dated June 1st 2001 Nazim and Fareeda Ali assigned the residue of the 999 year lease to him for the sum of \$55,000.00. This assignment was also not registered. It was therefore Mr. Sookdeo’s contention that he was in possession of the occupied parcel of land by virtue of the assignment of the lease. He said that when Mr. Lewis came to view the lands in 2003, Mr. Walters pointed out the boundaries of the land. Mr. Walters in his witness statement supported Mr. Sookdeo. It was their contention that by so doing Mr. Lewis ought to have been aware that a portion of the lands was occupied.

12. Several issues were raised before the trial Judge and were dealt with in his written judgment. These were:

1. Whether the unregistered lease of October 24th 1988 to Fareeda and Nazim Ali and the assignment of the lease from the Alisto Mr. Sookdeo were invalid against Mr. Lewis for want of registration;
2. Whether Mr. Lewis was a bona fide purchaser for value without notice of Mr. Sookdeo's occupation and interest in the occupied parcel of land;
3. Whether Mr. Sookdeo had an equitable interest in the occupied parcel of land; and
4. Whether Mr. Lewis was estopped from denying Mr. Sookdeo's right and title to the unoccupied parcel of land.

13. As to the first issue the trial Judge stated that the law does not totally undermine unregistered interests if the circumstances of the unregistered interest fall within the exceptions set out in the RPA, for example fraud. He noted that Mr. Sookdeo had alleged fraud on the part of Mr. Lewis in that prior to the transfer of the lands to Mr. Lewis he knew that Mr. Sookdeo was in occupation under a lease arrangement and that he had expended money on the lands. The Judge, however, held that fraud had not been made out. He found that Mr. Sookdeo did not prove that Mr. Lewis knew that he had an unregistered interest, was in possession under an assignment of a lease or that he expended money pursuant to that assignment.

14. On the second and third issues, the Court held that the unregistered lease gave rise to an equitable interest in Mr. Sookdeo, which could be enforceable against Mr. Lewis unless he was a bona fide purchaser for value without notice. The Court found that the proper boundaries of the land were not pointed out to Mr. Lewis, and therefore he would not have known that Mr. Sookdeo was in occupation of any portion of the said lands which he was purchasing before he paid the deposit. The Court also noted that after payment of the deposit, although Mr. Lewis was informed by Mr. Sookdeo that he had a lease, he was never shown the lease by Mr. Sookdeo. Mr. Lewis in those circumstances had no notice of

Mr. Sookdeo's lease even after payment of the deposit on the purchase price of the lands and before completion of the purchase. The Court, therefore, concluded that although there was an equitable interest derived from the unregistered lease and assignment, as Mr. Lewis did not have any notice of that arrangement he was a bona fide purchaser for value without notice and accordingly the equitable interest did not take priority over Mr. Lewis' legal interest.

15. On the fourth issue, however, the Judge found that Mr. Sookdeo had successfully made out a claim, it seems to us, in proprietary estoppel. The Judge found that there was a representation by Mr. Lewis's predecessor in title, Mr. Sanowar. This representation was made by the grant of the lease by Mr. Sanowar to the Alis, Mr. Sookdeo's predecessors in title. It was binding on Mr. Lewis since "*by implication this was sufficient to constitute a representation to both the Alis and to those deriving lawful title from the Ali's that they would acquire a proprietary interest*". The Court then considered the evidence under three heads namely encouragement, expectation/belief and expenditure/detriment. The Judge found that there was encouragement, not by Mr. Lewis but by the previous owners when they executed the lease in favour of the Alis. The Court stated that the execution of the lease "*points to the intention to convey an interest and in this case sufficient encouragement, even if that encouragement came from a predecessor in title and not from the [appellant] himself*". With respect to the other heads the Court found that Mr. Sookdeo proceeded to expend money on the occupied parcel of land when he built structures thereon in the expectation or belief that he had acquired a leasehold interest in the occupied parcel of land.
16. The trial Judge on that basis dismissed the appellant's claim and on the counterclaim granted a declaration that Mr. Sookdeo was entitled to possession of the occupied parcel of land. He ordered that the Registrar General endorse both the lease to the Alis and the assignment to Mr. Sookdeo on the relevant certificate of title. The Court also ordered that Mr. Lewis pay Mr. Sookdeo's costs of the claim and counterclaim on the prescribed costs scale.

17. Mr. Lewis has appealed. Mr. Peterson, S.C, counsel for Mr. Lewis, submitted that the trial Judge erred in the application of the provisions of the RPA. He argued that the real issue was not whether the unregistered lease gave rise to an equitable interest but whether that interest is enforceable against the appellant as the registered owner of the lands. He submitted that it was not. In essence he contended that Mr. Lewis as a registered proprietor of the said lands had obtained an absolute and indefeasible title which could not be impeached by the existence of an equitable interest. Mr. Sookdeo had failed to bring himself within any of the exceptions of the RPA to the indefeasibility of Mr. Lewis' title obtained by registration. He also contended that in any event the evidence did not support a finding of proprietary estoppel and the Judge therefore erred in coming to that conclusion.
18. Ms. Sharma, counsel for Mr. Sookdeo, did not dispute the fact that neither the lease of the occupied parcel to the Alis nor the assignment of the lease to the respondent was registered. She, however, submitted that Mr. Sookdeo retained an equitable interest to the occupied parcel of land which Mr. Lewis was estopped from denying. Ms. Sharma essentially supported the reasoning and conclusions of the trial Judge on the fourth issue mentioned above.
19. The RPA is based on the Torrens system of registered conveyancing. The central feature of that system is that registration confers upon the registered proprietor an indefeasible title. This in essence means that the registered proprietor's title cannot be defeated by a prior unregistered interest and his title is subject only to what appears on the register. In the words of Edwards J, in **Fels v Knowles** (1906) 26 NZLR 604, at 620 "...the register is everything."
20. Although that is the central feature of the Torrens system, it is nevertheless subject to certain exceptions. As the Privy Council observed in **British American Cattle Co. v Caribe Farm Industries Ltd. and anor** [1998] 4 LRC 547, (at 552-3)

"Although the details of the Torrens system vary from jurisdiction to jurisdiction, it is the common aim of all systems to ensure that someone dealing with the registered proprietor of title to the land in good faith and for value will obtain an absolute and indefeasible title, whether or not the title of the registered proprietor from whom he acquires was liable to be defeated by title paramount

or some other cause. The principle is well stated in relation to the State of Victoria by the Board in **Gibbs v Messer** [1891] AC 248 at page 254:

'The main object of the Act, and the legislative scheme for the attainment of the object, appear to them to be equally plain. The object is to save persons dealing with registered proprietors from the trouble and expense of going behind the register, in order to investigate the history of their author's title, and to satisfy themselves of its validity. That end is accomplished by providing that everyone who purchases, in bona fide and for value, from a registered proprietor, enters his deed of transfer or mortgage on the register, shall thereby acquire an indefeasible right, notwithstanding the infirmity of his author's title.'

*That principle has been repeatedly affirmed in the various jurisdictions most recently in relation to the law of New Zealand by the Board in **Frazer v Walker** [1967] AC 569.*

To achieve this objective, it is critical to keep to a minimum the number of matters which may defeat the title of the registered proprietor. However, it is well established that there are certain exceptions..."

21. Sections 45 and 141 of the RPA are of relevance having regard to the issues raised in the Court below. While speaking to the conclusiveness of registration under the RPA, these sections recognize certain exceptions. They are as follows:

45. Notwithstanding the existence in any other person of any estate or interest, whether derived by grant from the State or otherwise, which but for this Act might be held to be paramount or to have priority, the proprietor of land or of any estate or interest in land under the provisions of this Act shall, except in the case of fraud, hold the same subject to such mortgages, encumbrances, estates, or interests as may be notified on the leaf of the Register Book constituted by the grant or certificate of title of such land; but absolutely free from all other encumbrances, liens, estates, or interests whatsoever, except the estate or interest of a proprietor claiming the same land under a prior grant or certificate of title registered under the provisions of this Act, and any rights subsisting under any adverse possession of such land; and also, when the possession is not adverse, the rights of any tenant of such land holding under a tenancy for any term not exceeding three years, and except as regards the omission or misdescription of any right of way or other easement created in or existing upon such land, and except so far as regards any portion of land that may, by wrong description of parcels or of boundaries, be included in the grant, certificate of title, lease, or other instrument evidencing the title of such proprietor, not being a purchaser or mortgagee thereof for value, or deriving title from or through a purchaser or mortgagee thereof for value."

141. Except in the case of fraud, no person contracting or dealing with or taking or

proposing to take a transfer from the proprietor of any estate or interest shall be required or in any manner concerned to enquire or ascertain the circumstances under, or the consideration for which, such proprietor or any previous proprietor of the estate or interest in question is or was registered, or to see to the application of the purchase money or of any part thereof, or shall be affected by notice, direct or constructive, of any trust or unregistered interest, any rule of law or equity to the contrary notwithstanding, and the knowledge that any such trust or unregistered interest is in existence shall not of itself be imputed as fraud.”

22. Section 45 provides that the registered proprietor of the land or any interest therein shall hold the same subject to such mortgages, encumbrances, estates or interest as may be notified on the register but otherwise free from all other encumbrances, liens, estates or interests whatsoever. The section however recognizes certain exceptions to this and these are: (i) cases of fraud; (ii) in the case of a registered proprietor claiming the same land under a prior grant or certificate of title registered under the provisions of the RPA; (iii) any rights subsisting under any adverse possession (see Civ Appeal No. 268 of 2014 **Republic Bank Ltd, v Manichand Seepersad and ors**); (iv) the rights of any tenant under a term not exceeding three years; (v) where there is an omission or misdescription of any right of way or other easement created in or existing upon the lands and (vi) where lands are included in the grant or other instrument evidencing the title of the proprietor by wrong description not being a purchaser or mortgagee thereof for value or deriving title from or through a purchaser or mortgagee thereof for value.
23. Section 141 also recognizes the fraud exception. It provides that except in the case of fraud no person contracting or dealing with or proposing to take a transfer from the proprietor of any estate or interest shall be required to enquire or ascertain the circumstances under which the proprietor or any previous proprietor came to be registered. The section also provides that no one dealing with proprietor shall be affected by direct or constructive notice of any trust or unregistered interest, any rule of law or equity to the contrary notwithstanding, and the knowledge of any such trust and registered interest is in existence shall not of itself be imputed as fraud.
24. In this case fraud was raised but rejected by the Judge and there has been no appeal from that finding. It is clear that in the circumstances of this matter that those provisions quoted above gave to the appellant an absolute title incapable of being challenged on the ground

that Mr. Sookdeo has an unregistered lease to the occupied parcel of land. This is so whether or not Mr. Lewis had actual or constructive notice of the unregistered lease or assignment.

25. Apart from the limited statutory exceptions noted above to the indefeasibility of the registered proprietor's title, there is one other exception that has some relevance to this appeal in view of the estoppel raised by Mr. Sookdeo. This is the exception that has been described as the in personam exception. In our view if the respondent is to enjoy any success in this appeal it would be by virtue of this exception. This exception was recognized by Lord Wilberforce in **Frazer v Walker** [1967] 1 ALL ER 649, a case which involved the Torrens system in New Zealand similar to that contained in the RPA. Lord Wilberforce stated (at p 655):

“...their Lordships have accepted the general principle, that registration under the Land Transfer Act 1952, confers on a registered proprietor a title to the interest in respect of which he is registered which is (under s.62 and s.63) [which are similar to ss. 45 and 143 of the RPA] immune from adverse claims, other than those specifically excepted. In doing so they wish to make clear that this principle in no way denies the right of a plaintiff to bring against a registered proprietor a claim in personam, founded in law or in equity, for such relief as a court acting in personam may grant. That this is so has frequently, and rightly, been recognized in the courts of New Zealand and of Australia...”

26. This is applicable to this jurisdiction as well. The Privy Council in **Frazer v Walker** however, did not discuss the range and extent of the matters which may be enforced against a registered proprietor in personam.

27. In **Oh Hiam v Tham Kong** Privy Council Appeal 22 of 1978, Lord Russell speaking on behalf of the Privy Council referred to the in personam exception in these terms (at p. 9):

“The Torrens system is designed to provide simplicity and certitude in transfers of land, which is amply achieved without depriving equity of the ability to exercise its jurisdiction in personam on grounds of conscience.”

28. Lord Russell referred (at pp 9-10) to the following as examples where the in personam exception would be applicable:

“In the instant case the defendant could have shown an indefeasible title had he sold lot 3660, a step which he could not take because he undertook to the Court not to: the Court could have granted an injunction against sale, and that could scarcely have been described as an order inconsistent with his indefeasible title. If the registered proprietor were a trustee, his indefeasible title would not have precluded intervention by the Court in the execution of the trust... The indefeasible title would not preclude an order for specific performance of a contract for sale by the proprietor. All these are instances of equity acting in personam and indeed the order in the instant case may be described as an order in personam that the registered proprietor should defeat his own title.”

29. The in personam jurisdiction is therefore seen as permitting the intervention of the Court where the registered proprietor acts contrary to good conscience. The examples referred to by Lord Russell all involve some element of unconscionable conduct on the part of the registered proprietor. So that, for example, when he acts in breach of an undertaking given to the Court, or if he acts in breach of trust or fails to perform his contractual obligations, those would be examples where the in personam jurisdiction would be applicable. The decision itself in **Oh Hiam** is an example of the in personam jurisdiction being invoked in response to unconscionable conduct. In that case land was as a consequence of a mistake common to both vendor and purchaser included in a transfer of lands to the defendant. The Privy Council restored the trial Judge’s order retransferring the lands that were mistakenly transferred. It would have been unconscionable for the purchaser to retain lands that he knew were mistakenly transferred to him.

30. In **Gardener v Lewis** [1998] 4 LRC 555 the Privy Council again recognized the existence of the in personam jurisdiction and cited a breach of a contract by the registered proprietor for the sale of land or the enforcement of a trust affecting the registered lands against the trustee as examples where the in personam jurisdiction would be applicable. Both those examples would involve unconscionable conduct on the part of the registered proprietor.

31. It should however be noted that Lord Russell in **Oh Hiam** seems to have signaled that the rules of equity were not necessarily to be applied in the same manner as they might be when dealing with lands that fell outside the Torrens system where without disapproval he referred to **Wilkins v Kannamal** [1951] 17 MLJ 99. He stated that in that case:

“...it was said that the Torrens law is a system of conveyancing; it does not abrogate the principles of equity; it alters the application of particular rules of equity but only

so far as is necessary to achieve its own special objects.”

In other words we think that would mean that in applying the in personam exception it should be done in such a way as to limit the threat to the indefeasibility of title and the Torrens system itself.

32. In the New Zealand case of **Regal Castings v Lightbody** [2009] 2 NZLR 433 the Court of Appeal of New Zealand made reference to the in personam jurisdiction. Tipping J, in that case made the following comments:

“[2] An in personam claim against the 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. Such a claim is concerned with the personal obligations of the registered proprietor rather than 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.

[3] The in personam jurisdiction must not, however, be allowed to impinge on the fundamental purpose of the Torrens system. In terms of s. 62, [similar to s. 45 of the RPA] that purpose is to make the registered proprietor’s estate (or title as it is usually put) paramount against interests which are not notified on the register. It is, in my view, immaterial whether such an interest could have been registered...

[8] All that said, it is important to recognize, 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 others 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.

*[9] The in personam jurisdiction and its associated jurisprudence have always recognized that the essential purpose of Sir Roberts 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 is not however, designed to remove all scope for equitable intervention against those who are registered proprietors of land. 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”. He added that the Court could make “an order in personam that the registered proprietor should defeat his own title”.

[10] 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....”

Tipping J, then set out 4 matters which the court should consider before allowing a claim in personam. First, the claimant must show that he has a cause of action on a legal or equitable basis entitling him to the assistance of the court, indefeasibility issues aside. Second, the claimant must show it would be unconscionable (contrary to good conscience) for the registered proprietor to rely on his indefeasible title. Third, the in personam claim must not be contrary to the policy and purposes of the Torrens system. And fourth the remedy must be such that it is consistent with the principles of the Torrens system.”

33. We agree with the observations of Tipping J. They are in our view consistent with the Privy Council decisions referred to above and should be applied in this jurisdiction to a claim in personam against the registered proprietor of lands under the RPA.
34. How then do the four factors identified by Tipping J, apply to this case.
35. The first factor is that the claimant must show he has a cause of action entitling him to the assistance of the Court which may either be on a legal or equitable basis. In this case the claim which the Judge held to have succeeded, it seems to us, was founded on proprietary estoppel. Mr. Sookdeo’s case was that there was a representation that he was entitled to a leasehold interest in the occupied parcel of land on which he relied on to his detriment. Such a cause of action resting as it does on an equitable basis would entitle him to the assistance of the Court in an in personam claim (see **Ramdeo v Herallall** (2009) 79 WIR 320, 335).

36. With respect to the second factor i.e. that it must be shown that it would be unconscionable for the registered proprietor to rely on his indefeasible title. This touches on the quality of the conduct that is required for the claim in personam to succeed. It is clear on the facts that the representation relied on was not made by Mr. Lewis, the appellant. It was according to the finding of the Judge made by a predecessor in title and this was a representation made by the execution of the lease in favour of the Alis for 999 years. We cannot see how that can amount to unconscionable conduct on the part of the appellant who is now the registered proprietor.

37. In **Cashmere Capital Ltd. v Crossdale Properties Ltd. and others** [2009] NZCA 185 the Court of Appeal of New Zealand referred to the conduct required in these terms (at para 18):

“...its in personam exception should be confined to cases that truly engage the conscience of the party whose registered priority is challenged.”

There is clearly no such conduct on the part of the appellant in this case. He made no representation to the respondent nor did he acquiesce in or encourage his presence or activities on the occupied parcel of land. In his dealings with Mr. Sookdeo, Mr. Lewis’ position was consistently that Mr. Sookdeo was a trespasser on his lands. As soon as Mr. Lewis became aware that Mr. Sookdeo was in occupation of the said lands and undertaking construction on them he called on him to cease the construction and vacate the lands.

38. It was submitted before the trial Judge that the appellant had notice of the lease prior to the completion of the sale but the Court found to the contrary. According to the Judge prior to the payment by Mr. Lewis of the deposit on the purchase price of the said lands he was unaware that Mr. Sookdeo was in occupation of the occupied parcel of land. Even after payment of the deposit when he was informed by Mr. Sookdeo that he was in occupation under a lease, the respondent never produced the lease and despite all appropriate inquiries Mr. Lewis was not able to discover the lease. The Judge concluded that Mr. Lewis did not have precise knowledge of the details of Mr. Sookdeo’s occupation. According to the Judge *“there is little if anything more[Mr. Lewis] could have done which*

may have revealed the existence of an unregistered lease between [Mr. Sookdeo] and another party who is not a party” to the lease and Mr. Sookdeo did not produce the lease or assignment to Mr. Lewis or provide him with copies of them. In the circumstances the Judge concluded that the appellant, Mr. Lewis, was a bona fide purchaser for value without notice. There has been no appeal from these findings of the Judge and in the light of them it cannot be said of Mr. Lewis that he is guilty of any unconscionable conduct.

39. But even if the appellant had notice of the lease or the assignment to Mr. Sookdeo and went ahead and bought the lands we do not think that that by itself is sufficient to allow a claim in personam against Mr. Lewis. In other words such conduct would not be such that would truly engage the conscience of a party whose registered priority is challenged. In our opinion to place such emphasis on notice also offends against the third factor necessary for a successful in personam claim, which is that the claim must not be contrary to the policy and purposes of the Torrens system. We do not believe that it is sufficient for a claimant in an in personam claim to simply show that the registered proprietor had notice of the unregistered interest. The importation of the doctrine of notice would be inconsistent with the Torrens system and is capable of severely undermining the principle of indefeasibility.
40. In view of the above the fourth factor which deals with the remedy that should be granted on a successful in personam claim does not arise.
41. In the circumstances, in our judgment the Judge was wrong to hold that the respondent’s plea in estoppel defeated or took priority over the registered title of the appellant. In view of that conclusion it is unnecessary for us to consider Mr. Peterson’s submission that the evidence in any event did not support a finding of proprietary estoppel and we do not do so.
42. For these reasons the appeal was allowed and the order of the trial Judge set aside. The respondent’s counterclaim was dismissed. The Court declared that the appellant is the owner of and entitled to possession of the lands described in the certificate of title referred

to above and now in the possession of the respondent. The respondent shall deliver up possession of the lands to the appellant within the next six (6) months.

43. With respect to costs, it was ordered that the respondent shall pay to the appellant the costs of the claim and counterclaim each in the sum of \$14,000.00, and the respondent shall also pay to the appellant the costs of the appeal determined at two thirds of the said costs in the Court below.

A. Mendonça
Justice of Appeal

P. Moosai,
Justice of Appeal

J. Jones,
Justice of Appeal