DIMINISHING SCOPE OF THE PRINCIPLE OF INDEFEASIBILITY IN PAPUA NEW GUINEA: TIME TO LEGISLATE FOR DEFERRED INDEFEASIBILITY

John Mugambwa*

INTRODUCTION

The principle of indefeasibility is the guarantee the law gives that title registered under the Torrens System, of which the *Land Registration Act* (Ch No 191) is part, is valid and immune from adverse claims except in certain specified circumstances.[1] In the famous case of *Mudge and Mudge v Secretary for Lands and others*,[2] the Supreme Court of Papua New Guinea applied the principle of indefeasibility to uphold a registered State lease even though the grant of the lease was irregular and in breach of certain provisions of the *Land Act* (Ch No 185)[3]. The Supreme Court rejected the argument that the *Land Registration Act* had to be read subject to the *Land Act*, so that breach or non compliance with the latter Act rendered registration of an estate or interest void. Sir Buri Kidu CJ was in no doubt that upon, registration, a bona fide proprietor of a State lease acquires an indefeasible title regardless of the irregularity.[4] Similarly, Pratt J said that a State lease when registered was in the same position as an ordinary certificate of title under the Torrens System, and therefore was subject to the indefeasibility provisions set out in s 33 of the *Land Registration Act*.[5] His Honour cited with approval the Privy Council's celebrated quotation in *Fraser v Walker*[6] that, except in case of fraud, registration of a void instrument was "effective to vest and divest title and to protect the registered proprietor against adverse claims". Pratt J said that there were numerous public policy justifications for the principal of indefeasibility of title:[7]

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* LLM *Yale*, PhD. *ANU*, Senior Lecturer, School of Law, Murdoch University, Perth.

[1] *The Custodian of Expropriated Property v Tedep* (1964) 113 CLR 318.

[2] [1985] PNGLR 387.

[3] This Act was repealed and replaced by the *Land Act* 1996.

[4] [1985] PNGLR 387 at 391.

[5] *Id* at 395.

[6] [1967]1 AC 569 at 584.

[7] *Supra* n.2 at 397.

[T]he various legislatures have determined quite deliberately that assurance of title is essential to a sound land holding and registration system. Unsoundness of title is a major problem throughout Papua New Guinea. Disputes as to title are notoriously at the bottom of many tribal battles and commercial investment difficulties. I am firmly of the view that the development and enunciation of the law in other common law jurisdictions, which have similar legislation to our own is most apt to the circumstances of Papua New Guinea and should certainly be followed in the present case.

However, as will be seen, the trend of recent authorities support the proposition that registration of a State lease under the *Land Registration Act* does not give the proprietor an indefeasible title whether or not he or she is a bona fide purchaser for value. Based on statutory interpretation, this appears to be the correct legal position.[8] Hence, the dominance of the principle of indefeasibility of title, as espoused by the Supreme Court in *Mudge*'s case, is beginning to wane in Papua New Guinea.

This paper considers the public policy justification for diminishing the scope of the principle of indefeasibility and the possible repercussion upon land transactions and investment, especially, in land leased from the Government. The paper argues that the compromise solution is for Papua New Guinea to adopt the concept of deferred indefeasibility as opposed to immediate indefeasibility.

Background - the three cases[9]

The first major judicial challenge to the operation of the principle of indefeasibility in Papua New Guinea was in the Supreme Court judgment in *Emas Estate Development Pty Ltd v Mea and another.*[10] In that case, the Minister forfeited the respondent's State lease, allegedly on the ground of non-payment of rent and breach of other covenants. Emas Estate, the appellant, and one Leo Minjan submitted rival applications to the Land Board for allocation of the subject land. The Board recommended to the Minister to allocate the land to Emas Estate, whereupon Leo Minjan appealed to the Minister against the Board's decision. Without waiting for the outcome of the appeal, the Minister granted Emas Estate a State lease over the subject land. Emas registered the lease under the *Land Registration Act.* The trial Judge found that the Minister ordered forfeiture of the respondent's lease without following the appropriate procedure and that in any case, the respondent was not in breach of covenant as alleged. The trial Judge held that since the Minister illegally terminated the respondent's lease, the subsequent grant of a State lease to Emas Estate was void. His Honour ordered the Registrar to cancel Emas Estate's lease and to reinstate the respondent's lease.

On appeal to the Supreme Court, Emas Estate argued that by virtue of registration its title was indefeasible, unless it was a party to fraud, which it denied. The

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[8] See below.

[9] The materials in this section of the paper are partly based on my earlier article: "Judicial assault on the citadel of indefeasibility of title under the Papua New Guinean Torrens System of Conveyance" (2001) 5 *Journal of South Pacific Law*, available at http://www.vanuatu.usp.ac.fj/journalsplaw/Article/Mugambwa1.htm.

[10] [1993] PNGLR 215.

Supreme Court by majority decision (Amet and Salika JJ, Brown J dissenting) dismissed the appeal. The Court agreed with the trial Judge that the grant to Emas Estate was illegal and that registration of the purported lease under the *Land Registration Act* did not give Emas Estate an indefeasible tittle. Amet J said that even though the irregularities might not strictly amount to fraud, "they should ... still be good grounds for invalidating subsequent registration, which should not be allowed to stand".[11] Salika J whilst paying lip service to the principle of indefeasibility of title, said that it (the principle of indefeasibility) could not avail a proprietor if the grant of the lease was irregular. The fact that the appellant was innocent of any personal wrongdoing was irrelevant. Justice Amet rejected the argument that the respondent could seek compensation from the Government as provided under the *Land Registration Act.*[12] Brown J, dissenting, would have upheld the appeal based on the principle of indefeasibility espoused in *Mudge's* case. Interestingly, neither of the majority judges referred to *Mudge*'s case.

The Supreme Court's judgment in *Emas* appears to have taken the Papua New Guinea legal profession by surprise. Although, *Emas,* like *Mudge*, was a Supreme Court decision subsequent cases ignored its precedent and continued to follow the holding in *Mudge*'s case that registration of a State lease gives the proprietor an indefeasible title irrespective of the history of the grant.[13] It seems that the principle of indefeasibility, as espoused in *Mudge*'s case, was so firmly established that lawyers and other judges must have thought that *Emas* was wrongly decided. However, two recent cases, both decided by the National Court, have re-opened this issue. They are (i) *Steamship Trading Company Ltd v Minister for Lands and Physical Planning and Garamut Enterprises and others*[14] and (ii) *Hi Lift Company Pty Ltd v Miri Sata, MBE, Secretary for Agriculture and the State of Papua New Guinea.*[15] The facts of the two cases are similar. They both involved the grant of a State lease in breach of various provisions of the *Land Act* 1996.

In *Steamship*'s case, it was alleged that the Minister unlawfully authorised the re-zoning of the subject land as "commercial" to facilitate the grant of a commercial lease to the second defendant, Garamut and also that the Minister without following the appropriate procedure exempted the land from public tendering. Steamship, a business rival, brought proceedings for judicial review and annulment of Garamut's lease. The latter, in its defence, attempted to play down the alleged breaches. In any case it claimed that its title was indefeasible unless Steamship proved that it was a party to any wrongdoing or had notice of such wrongdoing before it was registered, which, of course, it denied. Sheehan J found that there was a fragrant failure by the Minister and Government officials involved to follow the prescribed procedure under the *Land Act* for alienation of Government land. His Honour held that the purported grant of a State lease was a nullity and, accordingly, there was no lease or title under the Act. Sheehan J

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[11] *Id* at 219.
[12] *Ibid.*
[13] See Mugambwa, "Judicial assault on the citadel of indefeasibility of title under the Papua New Guinean Torrens System of conveyance", *supra* n.9.
[14] No OS 552 of 1999.
[15] N2004, 16 and 17 November 2000.

rejected Garamut's argument that it obtained an indefeasible title by virtue of registration under the *Land Registration Act.* He reasoned that before indefeasibility could arise there must first be a valid title to register. In this case, there was no title because Parliament prohibited alienation of Government land except as prescribed by the *Land Act.*

Sheehan J, being a National Court judge, could not of course overrule *Mudge*'s case. He sought to distinguish it on a number of grounds. Firstly, that in *Mudge* the Supreme Court did not address the issue where the breach of procedure was so fundamental that it resulted in a total nullity "such that no lease issued under the Land Act at all; that therefore there was no title to register".[16] Secondly, that the Supreme Court did not consider the conflicting legislative policies under the *Land Act* and the *Land Registration Act*: the former prohibits the grant of Government land except as the Act prescribed, whist the latter validates a title immediately upon registration regardless of how the proprietor acquired title. Finally, his Honour distinguished *Mudge*'s case on the ground that he was satisfied on the facts before him that in the instant case the officials who made the grant acted fraudulently. His Honour dismissed Garamut's argument, based on the Privy Council's judgement in *Assets Company Ltd v Meri Roihi,*[17] that fraud under the *Land Registration Act* meant fraud in which the proprietor whose title it is desired to impeach was implicated or had notice of prior to registration. Sheehan J reasoned that there was nothing in the Act that suggested that fraud had to be shown in a particular way.[18]

In *Hi Lift*'s case, the irregularities included, a grant of a "Business (Light Industry) Lease" over land that was zoned "Public Institution", failure to advertise the land for public tender, and improperly conducted meetings. The plaintiff claimed that notwithstanding the alleged breaches their title was indefeasible except upon proof of fraud against it, which it denied. Sevua J held that the irregularities were "sufficient to invalidate or nullify the registration of the plaintiff's title because they are tantamount to fraud". As in *Steamship* 's case, his Honour was satisfied that the alleged fraud was sufficient to nullify the lease, even though no evidence was adduced in Court implicating the plaintiff in the alleged fraud or knowledge of such fraud before registration.

In an earlier paper, this writer has criticized the judicial reasoning in the three foregoing cases.[19] The writer, decried, in particular, further judicial intrusion on the concept of indefeasibility and the proposition that under the *Land Registration Act*, title of a proprietor is defeasible on the ground of fraud committed by others even though the proprietor is innocent of any such fraud. Nevertheless, for a different reason, it is respectfully submitted herein that both Justices Sheehan and Sevua, in *Steamship* and *Hi Lift*, respectively, were right in their conclusion that the principle of indefeasibility did not avail the proprietor of the State lease. The

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[16] *Ibid.*

[17] [1905] AC 176.

[18] For criticism of his Honour's reasoning, see "Judicial assault on the citadel of indefeasibility of title under the Papua New Guinean Torrens System of conveyance", *supra* n.9.

[19] *Ibid.*

reason, as elaborated below, is that, according to the rules of statutory interpretation, the *Land Act* 1996 prevails over the *Land Registration Act,* with regard to alienation of Government land.

The *Land Act* 1996, prescribes the procedure for the alienation of Government land. Section 64(1) of the Act prohibits alienation of Government land "otherwise than under this Act or another law".[20] The Act then goes on to prescribe the procedure and purposes for which the Minister may grant a State lease. Most of these provisions contain the term "shall", which implies that the provision is mandatory. For example, s 67 provides that a State lease "shall not" be granted for a purpose inconsistent with zoning, physical planning law or any other law relating to land use. Section 69 provides that a State "shall not be granted without first being advertised in according with section 68". Sections 57 – 58, which deal with the functions and meetings of the Land Board, use similar expressions.

According to the rules of statutory interpretation, where there are conflicting statutes the later statute prevails over the earlier one.[21] This, of course, is a prima facie rule, which is based on the presumption that by enacting conflicting provisions Parliament impliedly intended the later to override the earlier to the extent of inconsistency.[22] As Justice Sheehan, rightly observed in *Steamship,* the underlying policies of the *Land Act* and the *Land Registration Act*, conflict: the former prohibits the grant of public land except as provided by the Act, whilst the latter validates titles once registered irrespective of irregularities in the grant. Since the *Land Act* 1996 was enacted later than the *Land Registration Act* (enacted in 1981), it prevails. Therefore, if the Minister makes a grant of a State lease in breach of the provisions of the *Land Act*, the grant is void notwithstanding registration of the lease under the *Land Registration Act* and innocence of the grantee.

Insecure State leases

Based on the foregoing case law and analysis of the *Land Act* 1996, clearly registration does not give a State lessee a certain or secure title. Consequently, grantees of State leases stand to suffer substantial loss where subsequently a court nullifies the grant. For example, in *Emas'* case the lessee claimed that it had already carried out improvements over the land to the tune of 200,000 kina and had a mortgage over the land.[23] Similarly, in *Steamships,* the lessee claimed that in the interim period between registration of the lease and filing the action (some ten months) they had carried out extensive and valuable development over the land, which they were bound to lose if the court nullified the lease.

Therefore, grantees of State leases, in their own interest, should ensure that the Minister and other relevant officials follow the prescribed procedure for alienation

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[20] In *Steamship*'s case, *supra* n.14, Sheehan J observed that it was "obvious" that the *Land Registration Act* was not "another law" referred to in s 64(1), because it has nothing to do with alienation of Government land, but rather deals with registration of titles.

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

[22] See *Goodwin v Phillips* (1908) 7 CLR 1 at 7.

[23] *Supra* n.10 at 224 –225.

of Government land and that they exercise their powers competently and in accordance with the law. In other words, before investing in the land they must satisfy themselves, at their peril, that there are no possible grounds for judicial review of the grant. The decision to invest in the land would be a big gamble because even a thorough investigation may not reveal all possible grounds for judicial review of the grant.[24] It seems that their titles become secure only after either expiration of the limitation period[25] or where they successfully defend an application for judicial review of the grant. Presumably, if a court were to set the lease aside the grantee could seek damages from the State for breach of contract, as long as the grantee was not a party to any wrongdoing. Even then, litigation is risky, costly and, time consuming.

A question one may ask is whether, when a court nullifies a State lease, any estate or interest the grantee purportedly created is automatically void. For example, suppose that a grantee of a State lease mortgages the lease to a bank and the bank registers the mortgage. Subsequently, the court nullifies the lease; does the bank lose its security over the land? It is submitted that since a State lease granted in breach of the *Land Act* is a "total nullity", regardless of registration under *Land Registration Act,*[26] a purported creation of any estate or interest from such a lease would similarly be void. The bank, in this example, cannot claim compensation from the Assurance Fund, under sections150 and 151 of the *Land Registration Act*, because its loss has nothing to do with the operation of the Act.[27] The bank could, of course, sue the mortgagor under their personal covenant. However, that is cold comfort to the bank because it is most unlikely that the mortgagor would be able to pay, especially, after loss of their State lease. Because of the high risk factor involved in lending on security of a State lease, financial institutions would be advised in their own interests to carry out a thorough investigation of the original grant to ensure that it was made in accordance with the *Land Act.* This of course will be expensive both in terms of time and money. For this reason financial institutions might decide to increase their mortgage lending fees and or interest rate to offset the cost of investigating title and to increase their profit margin in view of the high-risk involved. Alternatively, financial institutions might decide not to grant loans on security of a State lease, especially, where the amount involved is substantial. Similar considerations would apply to all other transactions involving State leases.

Proponents of the virtues of the principle of indefeasibility are likely to criticise the courts and legislators in PNG for being myopic as to the consequences of their

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[24] For other possible grounds for judicial review of a grant, see: *Application of Moge Enga Kuipi Group* [1995] PNGLR 3, and *Wankaki v Minister for Lands and another* [1996] PNGLR 116.

[25] The courts may decline to grant relief where it considers that there was undue delay in making an application for judicial review and that granting of relief sought would be likely to cause substantial hardship or substantially prejudice the rights of any person or detrimental to good administration (Order 16 R 4, of the National Court Rules). For illustration of the provision see *Steamship supra* n.14.

[26] In *Steamship, supra* n.14, Sheehan J said that breaches of the *Land Act* resulted in "a total nullity, such that no lease issued under the Land Act at all; there was therefore nothing to register".

[27] *Finucane v The Registrar of Titles* [1902] St R Qd 75 at 94.

decision. However, before one gets too critical, it is important to consider other factors unique to Papua New Guinea.

A PNG perspective

Historically, land ownership in PNG, as in many developing countries, has been and continues to be an explosive issue. Therefore, it needs careful handling taking into account social political and economic circumstances. One of these factors is the public perception of allocation of Government land. It is important that the system of allocation of Government land be fair and seen to be fair. In *Emas'* case, Salika J after stating "other exceptions [to indefeasibility] suitable for Papua New Guinea circumstances" said:[28]

> I lay out these conditions because land is very important commodity in this country. Government land is very scarce in this country, and people or corporations applying for lease of government land must be seen to be allocated such land without any fraud or outside influence, but simply on the merits.

Similarly, in *Steamships,* Sheehan J observed that one of the main objectives of the *Land Act* 1996, was to "provide an open transparent system of access to State lands, and an orderly and fair process of disposition of those lands by the Minister on behalf of the State. Citizens, given due and adequate notice as to the availability of State land, are able to compete on an equal footing with one another by a public open tender for a State lease." Evidently, as far as the legislature and the judiciary are concerned "openness" in the allocation of government land outweighs the attributes of the doctrine of indefeasibility of title.[29]

In *Emas'* case Amet J, as he then was, denounced the operation of the principle of indefeasibility in the circumstances of Papua New Guinea. His Honour observed:[30]

> [T]he doctrine of indefeasibility of title under the Torrens system of land registration does not necessarily apply, nor is it necessarily appropriate in the circumstances such as this that will continue to be experienced by ordinary Papua New Guinean landowners against the might of the State and private corporations. ... [T]his doctrine, which has hitherto been applied without any examination as to its appropriateness and applicability in the development of the underlying law for this country, should not be applied to this case.

Why was the operation of the principle of indefeasibility of title not suitable in this case? As it may be recalled, in that case the Minister had unlawfully forfeited a Papua New Guinean national's State lease and leased the land to an expatriate corporation. Since no evidence was adduced implicating Emas with any wrongdoing, title should have been indefeasible. As counsel for Emas submitted, it would have been open to the former lessee to claim for compensation from the Assurance Fund, as provided by the *Land Registration Act.* Amet J felt that in the

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[28] *Supra* n.10 at 229.
[29] See also *Hi Lift's* case, *supra* n.15.
[30] *Supra* n.10 at 219.

circumstances of PNG that was not a viable solution. He observed that it was very difficult for individuals to pursue claims of compensation from the Government let alone actually getting the money. He suggested that Emas would be in a better position to pursue the compensation claim than the respondent and, on balance, the remedy of damages would rectify its loss. Also, perhaps, if his Honour accepted Emas' argument it would have cemented the public perception of helplessness of indigenous land claimants against the might of the Government and expatriate firms. His Honour was, of course, aware that historically the courts had used the doctrine of indefeasibility of title to dismiss indigenous peoples' land claims against the colonial administration and expatiates.[31] In the eyes of the indigenes, the colonial administration enacted the principle of indefeasibility to facilitate the retention of land acquired by foreigners under dubious circumstances.[32] Perhaps his Honour felt that to apply the principle of indefeasibility in the instant case would simply perpetuate historical injustice.

Another important factor to consider is corruption. On the basis of media reports and some of the land cases,[33] corruption seems to be widespread amongst public servants in PNG. The Prime Minister, Sir Mekere Morauta,[34] described corruption in the country as both "systemic and systematic". He explained that it is "Systematic because it has invaded the whole process of policy making and decision making. It has drowned the whole system, so it's systemic. It's systematic because it's organised". Sir Mekere charged:

> You talk to private people here, particularly [those] you call the whiteys and none of them will say this publicly because they will be deported. Nothing goes through cabinet without a minder approaching you and saying, "Hey, K100,000? ... Because I can make sure that your submission for a licence to do this, or approval to do that, would be organised. But there 's a price. Everyone talk about it.

In a corrupt environment the Torrens System is apt to facilitate fraudulent land deals because of the difficulty of proving fraud against a registered proprietor. A calculating applicant for a State lease can afford to take a gamble and bribe unsophisticated corrupt land officers knowing that once their title is registered under the *Land Registration Act,* it becomes very difficult to evict them. The courts probably suspect this to be the case and try to find ways of dealing with the problem. For example, it is thought that part of the reason Sheehan J in *Steamship*'s case held that the term "fraud' under the *Land Registration Act* was

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[31] See for example, *The Custodian of Expropriated Property and another v Tedep and others, supra* n.1; *The Administration of the Territory of Papua and New Guinea v Blasius Tirupia and others* [1971-72] PNGLR 229.

[32] A Papua New Guinea writer described the principle of indefeasibility as a "wedge" between the people and justice, see Kaputin W, "Indefeasibility and Justice", in Sack (ed), *Problem of Choice – Land in Papua New Guinea's Future*, 1974, Australian National University, Canberra: 159 – 163.

[33] See for example, the facts of *Steamship, supra* n.14 and *Hi Lift, supra* n.15.

[34] Edited transcript of the report "Papua New Guinea: under the spell" by Helen Vatsikopoulos, (1995) 2 *Pacific Journalism Review* 1.

not restricted to fraud committed by the proprietor, was to avert the requirement of proof of fraud against the proprietor.

Clearly, in this writer's view, there are strong arguments for and against the operation of the principle of indefeasibility in Papua New Guinea. The arguments in favour of one over the other essentially depend on conflicting policy preference. Any suggestion to abolish the principle of indefeasibility would be disastrous as would be a recommendation to apply it in the same way as in Australia and New Zealand. There must be a middle ground. It is suggested that the middle ground is the substitution of the concept of deferred indefeasibility for immediate indefeasibility.

Deferred indefeasibility

Under the immediate indefeasibility doctrine, the proprietor acquires an indefeasible title immediately upon registration, barring fraud and other specified exceptions, regardless of the invalidity of the instrument of transfer.[35] In contrast, with the deferred indefeasibility principle, the protection of indefeasibility is only given to a proprietor a step away from a void transfer. For example, if X is registered through an instrument that is void under the general law, he or she does not obtain an indefeasible title even though he or she acted without fraud, in good faith and for valuable consideration. However, if X executes an instrument of transfer or mortgage of the land to BP, a bona fide purchaser for value, upon registration BP obtains an indefeasible title. Hence, indefeasibility is deferred to the next valid transaction.[36]

Deferred/immediate indefeasibility controversy in Australia and New Zealand

The doctrine of deferred indefeasibility has been in existence for over a hundred years.[37] For a long time in Australia and New Zealand there was controversy as to whether indefeasibility under the Torrens system is deferred or immediate. The source of the controversy[38] was the famous Privy Council judgment in *Gibbs v Messer.*[39] In that case the Privy Council held that the Torrens statutes only protect proprietors who derive their titles from a person whose name is upon the register. Persons who derive their title from a forger were not protected because a forger is not *the registered proprietor.* However, "the factor of their being registered will enable them to pass a valid title to third parties who purchase in good faith and for valuable consideration".[40] In *Clements v Ellis,*[41] the High Court of Australia, thanks mainly to Dixon J, affirmed the concept of deferred indefeasibility. In

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[35] *Breskvar v Wall* (1971) 126 CLR 376, at 385-386 (cited with approval in *Mudge v Secretary For Lands, supra* n.2 at 391, 396 –397).

[36] See illustration in *Wicklow Enterprises v Doysal* [1986] 45 SASR 247 at 257.

[37] The term "deferred" indefeasibility was first used by Dixon J in *Clements v Ellis* (1934) 51 CLR 217 (see Wikrama-Nayake, "Indefeasibility and Deferred Indefeasibility" (1993) 67 *Law Institute Journal* 393.

[38] See illustration in *Wicklow Enterprises v Doysal* [1986] 45 SASR 247 at 257.

[39] [1891] AC 248.

[40] *Id* at 255 per Lord Watkin.

[41] (1934) 51 CLR 217.

contrast, in New Zealand the courts embraced the concept of immediate indefeasibility.[42]

For three decades the courts in the two countries were split over this issue. Eventually, the Privy Council in *Frazer v Walker*[43] used the opportunity to put the matter to rest. The Council affirmed the proposition that a registered proprietor who acquires his or her interest under an instrument void for any reason obtains on registration an indefeasible title subject only to exceptions in the Act and the *in personum* obligations. The High Court of Australia in *Breskvar v Wall*[44] followed suit. There was a brief attempt by the Supreme Court of Victoria in the early 1990s to revive the concept of deferred indefeasibility.[45] However, it was short lived and the court's endeavour was subjected to a barrage of judicial and academic criticism.[46] A recommendation by the Victorian Law Reform Commission[47] to incorporate certain aspects of the concept of deferred indefeasibility in that State's Torrens statute was also shelved away.

One can safely say that deferred indefeasibility is dead and buried in Australia and New Zealand.[48] According to Sackville, the concept of deferred indefeasibility was rejected in Australia and New Zealand mainly because potentially all titles are insecure "since an innocent purchaser always runs the risk of having his title impeached on the ground that registration of his title was based on a void instrument".[49] Sackville argues that the risk factor imposes an extra burden on solicitors working for purchasers and mortgagees to establish that the other party has the power to transfer or mortgage the land. The result is increase in the costs of conveyancing transactions as well as detracting from the main objective of the Torrens system: security of title.[50]

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[42] See *Boyd v Mayor of Wellington* [1924] NZLR 1174.
[43] *Supra* n. 6.
[44] (1971) 126 CLR 376.
[45] *Chasfild Pty Ltd v Taranto* [1991] 1 VR 225. Also, the Federal Court, in *Rogers v Rest-Statewide Corporation* (1991) 101 ALJR 377, held that in South Australia the Torrens system dictated deferred indefeasibility. See Butt, " Shaking the Foundations" (1991) 65 ALJ 611.
[46] Schultz, "Judicial acceptance on immediate and deferred indefeasibility in Victoria" (1993) 19 Monash ULR 326; Wikrama-Nayake, "Immediate and deferred indefeasibility - continued", (1993) 67 LJI 393; Wikrama-Nayake, "Immediate and deferred indefeasibility -the story continues", (1993) 67 LJI 733.
[47] Law Reform Commission of Victoria, The Torrens Register Book", Report No 12, November 1987. The Commission recommended that in case of forged transactions the interest of the true owner (the victim) should prevail against an innocent transferee or mortgagee, except in case of demonstrated hardship. That the transferee should receive compensation from the State.
[48] In Queensland, ss 37-38 of the *Land Titles Act* 1994 put the matter beyond argument.
[49] Sackville, "The Torrens System - Some Thoughts on Indefeasibility and Priorities" (1973) 47 *AJJ* 526 at 531.
[50] *Ibid.*

Case for deferred indefeasibility in PNG

The issue whether indefeasibility under the *Land Registration Act* is immediate or deferred indefeasibility arose in *Mudge*'s case, but only Platt J addressed the issue. Citing *Breskvar v Wall,*[51] his Honour held that indefeasibility was immediate and not deferred.[52] The issue has never surfaced again in the courts or in academic circles in Papua New Guinea. Since the *Land Registration Act* was modelled on the Queensland *Real Property Act* 1861 and 1877, which was the basis of *Breskvar,* it is unlikely that the courts in Papua New Guinea will overturn Platt J's ruling in this regard.

It is suggested that the concept of deferred indefeasibility should be incorporated in the *Land Registration Act* by express legislation. The legislation should provide that registration of a State lease does not give the proprietor a title that is immune from attack at the suit of the Government or any other interested party, regardless of the registered proprietor's innocence. There should be a proviso that if the registered proprietor transfers or creates an estate or interest in favour of another person who purchases in good faith for valuable consideration, upon registration the latter shall acquire an indefeasible title.

The effect of the proposed legislation would be to leave the State lessee's title insecure and therefore subject to all the disadvantages and problems mentioned above. However, these concerns should be balanced with other policy considerations we have discussed, such as transparency in allocation of government land. The proposed legislation will force applicants of State leases, in their own interest, to monitor the grant process to ensure that the requirements of the *Land Act* are complied with. Applicants would know that if for any reason a grant is wrongfully made, it is liable to be set aside whether or not they were implicated in any wrongdoing. Therefore, it would be less tempting for applicants to "grease" public servants' hands to make favourable recommendations. From the judicial point of view, it would be a relief because the courts will not have to resort to "restating" established Torrens system concepts such as the meaning of the expression "fraud" or creating further judicial inroads upon the concept of indefeasibility to justify their intervention. Lawyers, land law lectures and their students will also breath a sigh of relief, as the law will become more certain than presently. Where an innocent grantee of a State lease suffers loss because of nullification of the lease, they could seek compensation from the State. It is suggested, however, that the issue whether in such a case the State should pay compensation (and the quantum of the compensation) should be governed by the existing underlying law of contract.

The proposed legislation would benefit subsequent dealers in State leases such as mortgagee and assignees. As suggested earlier, under the current legal position if a court nullifies a State lease all transactions affecting the land are void. Under the proposed regime, subsequent bona fide purchasers for value of a registered State lease will obtain secure titles upon registration of their interest. Their only concern would be simply to see to it that the person they are dealing with is the registered proprietor. The proposal will in particular appeal to banks and other financial

[51] (1971) 126 CLR 376.
[52] *Supra* n.2 at 395-396.

institutions where they advance money on security of a State lease. They will not have to incur additional expenses to investigate the history of the grant. The same will apply to persons wishing to purchase or sub-lease a State lease from the original grantee. Arguably, giving a subsequent innocent dealer an indefeasible title irrespective of whether the original grant was made through fraud or contrary to planing laws, could compromise the underlying policy of the *Land Act*.[53] The inescapable response to the argument is that the proposal is based on a compromise between two extreme situations. Therefore, as the expression goes, you lose some; you gain some. Alternatively, there could be a provision in the legislation giving the courts power to nullify any subsequent title if, in their view, it is in public interest. For example, in a factual situation similar to *Emas'* case, the Court could decide to reinstate the original lessee' title and instead order the Government to compensate the innocent proprietor for their loss.

General application of deferred indefeasibility

So far, we have focused only on State leases. Part of the reason for this is that most of the cases deal with wrongful grant of a State lease. Judging by the cases, incidents of forged instruments of transfer or mortgage do not seem to be common in Papua New Guinea. Nevertheless, at least for consistency, it is proposed that the concept of deferred indefeasibility should apply to all transactions affecting any land or interest registered under the *Land Registration Act*. In other words, indefeasibility of title should only avail a proprietor a step away from a void transaction. Thus, for example, if a person forges a signature on a mortgage instrument in favour of a bank the mortgage's title will remain defeasible, because the bank dealt directly with the forger. In such a case, there will be no recourse to the Assurance Fund for compensation. The only remedy available to the bank will be to sue the creditor on a personal covenant and perhaps for damages for the fraud under the ordinary law. As earlier stated, usually such actions are fruitless. The risk factor will force financial institutions, in their own interest, to take extra precautions to ensure that the person who signs the instrument is the registered proprietor. Similarly, the onus would be on a purchaser of land to ensure that the transfer to him or her is in order. It should be noted that persons dealing in registered land will not be under any obligation to investigate the history of the title they seek to purchase or take as security, unless of course the circumstances warrant investigation. Their only concern will be to see to it that the person who purports to transfer or mortgage the land is the registered proprietor.

CONCLUSION

Under the present legal regime in Papua New Guinea, the principle of indefeasibility does not protect the title of a State lessee, *a fortiori*, interests derived under it. The lack of security is likely to have adverse effects upon future land transactions and investment generally in the country. However, as has been

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[53] For example, if *Hi Lift* had assigned the lease to an innocent third party, under our proposal the latter would have acquired an indefeasible title over land which a Government department had substantial investment and interest. Moreover, under the planning laws the land was supposed to be public purpose land, yet the land was granted for commercial purposes.

demonstrated, these considerations must be balanced with other public policies, some unique to Papua New Guinea. A strict application of the principle of indefeasibility would compromise other policies and could lead to social unrest. Taking into account all factors, it has been argued in this paper that the application of the doctrine of deferred indefeasibility would be more suitable to the circumstances of PNG than immediate indefeasibility. Consequently, it is strongly recommended to the Papua New Guinea Parliament to enact appropriate legislation to incorporate the doctrine of deferred indefeasibility in the *Land Registration Act.* The fact that policy makers in Australia and New Zealand have rejected the doctrine of deferred indefeasibility should not deter PNG from adopting it. As has been established, the circumstances of PNG are in many respects very different from those of the other countries.