I.A.C. (FINANCE) PTY LTD v. COURTENAY AND OTHERS

HERMES TRADING & INVESTMENT PTY LTD v. COURTENAY AND OTHERS

DENTON SUBDIVISIONS PTY LTD v. COURTENAY AND OTHERS[1]

Real Property Act (N.S.W.) (1958) s. 43

These three appeals from the Supreme Court of N.S.W. were heard together by the High Court. The facts of the cases are somewhat complex and detailed. However, they may be summarised as follows.

On 24 February 1958, a certain Miss Austin, the registered proprietor under the Real Property Act 1900-1956 (N.S.W.)[2] of a block of land near Sydney, executed a contract of sale of the land. The respondents in this case were the purchasers. Under the contract a deposit was to be paid and the balance was to be secured by a mortgage back to the vendor. Settlement of the transaction took place on 23 July 1958. The transfer and the mortgage were left, as is customary in circumstances such as these, in the hands of the vendor-mortgagee's solicitor, to enable him to lodge the documents at the Titles Office. The documents were lodged for registration in April 1959.

While the documents were still in the Titles Office awaiting registration, Miss Austin entered into a contract to sell the same block of land to Denton Investments Pty Ltd. That company had arranged with I.A.C. (Finance) Pty Ltd, for a loan to cover part of the purchase money. This loan was to be secured by a first mortgage on the subject land.

Austin's solicitor then uplifted the original documents *i.e.* the transfer to the respondents and the mortgage, back from the Titles Office. This was done without the knowledge of the respondents or their solicitor. Soon afterwards, on the 24 September, Austin entered into a contract with the respondents to repurchase the land. This contract was never completed, due to Austin's default.[3]

Settlement of the transactions between Austin and Denton Investments and Denton Investments and I.A.C., occurred on 23 November, 1959, and the transfer and mortgage were lodged at the Titles Office for registration. It was found as a matter of fact by the trial judge, and accepted by the High Court, that at the time of the settlement Denton had notice of the prior interest of the respondents in the land.

Two months later, in January 1960, a second mortgage over the land was drawn up and lodged. The mortgagee was the appellant company, Hermes Trading & Investment Pty Ltd.

At this stage the respondents became aware of the above dealings

[1] 37 A.L.J.R. 350. High Court of Australia; Dixon C.J., Kitto and Taylor JJ.

[2] The Real Property Act implements in N.S.W. the Torrens System of conveyancing.

[3] Miss Austin's inability to complete the contract was due to the misappropriation of certain of her monies, together with other trust money, by her solicitor. The solicitor was arrested and charged early in 1960.

involving the land and brought a suit against Austin, the three companies, and the Registrar-General, claiming a declaration that they were entitled to have the transfer of the land from Austin registered in priority to the transfer of Denton Investments and to the two mortgages given by that company. They also brought a suit against Austin claiming specific performance of the contract of February 1958. At the time of the action none of the instruments had been registered.

In the Supreme Court of N.S.W., Hardie J. sitting in Equity, gave judgment for the plaintiffs.[4]

The argument of the appellants in the High Court was based on three contentions. In the first place they argued that the respondents had resold the land to Austin and were no longer entitled to have her transfer to them registered. Secondly, they argued that, the respondents' application for registration having been withdrawn, and no new application having been lodged, they were not protected by section 36 (1) of the Real Property Act; and further, that they themselves (the appellants) were protected by section 43 or section 43a of the same Act. Thirdly, they argued that the respondents by their conduct had disentitled themselves from their right to priority of registration.

As regards the first contention, the three members of the Court had no difficulty in holding against the appellants. The contract of sale to Austin had admittedly been signed, but the vital point was, as both Taylor and Kitto JJ. pointed out:

> The contract of resale did not rescind or discharge the contract of sale from Austin to the Courtenays: it assumed its completion.[5]

Kitto J. went on to say:

> Where . . . the contract of sale has been carried out to the extent that a transfer has been lodged for registration and the original vendor is unwilling or unready to complete his resale, there is no ground whatever for holding that the existence of the contract of sale provides a legal obstacle to the registration.[6]

Taylor J. advanced the further reason that since the contract of sale from the respondents to Austin was never completed, the equitable interest in the land never reverted to Austin. It remained vested in the respondents.[7]

The second contention of the appellants raised more difficulty. It was argued firstly that section 43 of the Real Property Act, which is in substantially the same terms as section 43 of the Transfer of Land Act 1958 (Victoria), protected the appellants and gave them priority. However, as the Court pointed out, it has long been settled law that section 43 gives protection to a purchaser only if and when he becomes registered.[8] In

[4] *Courtenay and Others v. Austin and Others* (1961) 78 W.N. (N.S.W.) 1082.
[5] 37 A.L.J.R. at 355. [6] 37 A.L.J.R. at 355.
[7] See *Wall v. Bright* (1820) 1 Jac & W. 494; *Rayner v. Preston* (1881) 18 Ch. D. 1; *Ridout v. Fowler* [1904] 1 Ch. 658.
[8] *Templeton v. Leviathan Pty Ltd* (1921) 30 C.L.R. 34; *Lapin v. Abigail* (1930) 44 C.L.R. 166.

the present case the instruments of none of the appellants had been registered.

Alternatively the appellants argued that they were protected by section 43a of the Real Property Act.[9] This section has been the subject of considerable controversy since it was inserted in the Act in 1930. The section was originally enacted to fill a so-called gap in the law left by the decisions which held that section 43 of the Act protected a purchaser only on registration. As a result of these decisions any conflict between competing equitable interests prior to registration fell to be determined according to the ordinary principles of equity. Normally this will mean that the earlier of the two equitable interests will prevail over the later. Further, the question of whether the later interest was acquired with notice of the earlier is irrelevant. In the light of those principles the basic difficulty in the interpretation of section 43a is apparent. Why does the section begin: 'For the purpose only of protection against notice', when notice is not a relevant factor in establishing priority?

As Taylor J. points out: 'Read literally the section accomplishes nothing. If an intended transferee has paid his purchase money, his position will not be worsened by notice, subsequently, of a prior equitable interest.'[10] But, as he goes on immediately to say: 'It is . . . not unreasonable to expect that the section was intended to achieve some object.' He concludes that the section should be construed as operating to give to the holder of a registrable memorandum of transfer priority over an earlier equitable interest where he has without notice thereof paid his purchase money and obtained a registrable instrument.[11] Thus on this view the protection given is a qualified one. It is not as complete as that given to a registered proprietor, since the notional legal estate is just as vulnerable to notice as a true legal estate would be.

Kitto J. however, goes further. He equates the notional legal estate to the estate of a registered proprietor. Thus under his view section 43a gives to a registrable instrument the same protection as section 43 gives to the estate of a registered proprietor.

Dixon C.J. does not discuss the effect of section 43a at all beyond saying: 'Whatever be the meaning of section 43a it cannot give priority to the later dealing over the earlier in circumstances like this.'[12]

The operative difference between the views of Kitto J. and Taylor J. is brought out when they are applied to the present facts. Kitto J. held that, assuming the withdrawal of the respondents' transfer terminated their application for registration, the section would protect the appel-

[9] S. 43a (1) reads:
'For the purpose only of protection against notice, the estate or interest in land under the provisions of this Act taken by a person under an instrument registrable or which when appropriately signed by or on behalf of that person would be registrable under this Act shall, before registration of that instrument, be deemed to be a legal estate.' This section has no counterpart in the Victorian Transfer of Land Act.

[10] 37 A.L.J.R. at 359.

[11] This is the view of the section held by Baalman in *'A Commentary on the Torrens system in N.S.W'*.

[12] 37 A.L.J.R. at 352.

lants and give them priority over the respondents. Taylor J., on the other hand, considered that the fact that the appellants had notice of the prior interests of the respondents deprived them of the protection afforded by section 43a.

The view of the section held by Taylor J. would seem to be preferable. In the first place, if it was intended to advance the protection given by section 43 it would have been a simple matter to say so. Secondly, the concluding words of section 42 (d)[13] of the Act introduced at the same time as section 43a, would appear to refer to and acknowledge the fact that the protection afforded by section 43a is not unqualified. Again, as Taylor J. points out,[14] if the view of Kitto J. regarding section 43a (1) be correct, there would have been no need to enact sub-sections (2) and (3) of section 43a.

The next issue that arose for consideration was the question of the withdrawal of the documents from the Titles Office by Austin's solicitor. Here again the Court was divided. Dixon C.J. and Kitto J. held that the withdrawal, being unauthorised, was ineffective to determine the application for registration. It followed, they said, that section 36 (1)[15] of the Act applied to give the respondents a right to registration ahead of the appellants.

Taylor J. took a different approach. He considered that section 36 (1) had no application to the present facts.

'What we are bound to determine is which of the two competing interests should be allowed to prevail, and in resolving this question it is immaterial which was first lodged for registration.'[16] Thus on his view it was unnecessary to determine the effect of the withdrawal of the documents from the Titles Office.

The view of the majority on this point is to be preferred. The words of section 36 (1) are unambiguous and direct. They clearly give a statutory right to registration ahead of instruments lodged subsequently. Taylor J. found difficulty in reconciling this view with the caveat provisions. However, it would appear that the caveat provisions provide an exception to the principle laid down by section 36 (1). It may be that the caveat provisions are among the exceptions envisaged by the opening words of section 36 (1).[17]

The judges next moved to consider the appellant's third contention. Were the respondents guilty of conduct of such a kind as would deprive them of their right to priority of registration?

[13] These words refer to an interest 'of which . . . the registered proprietor before he became registered as proprietor had notice against which he was not protected'.

[14] 37 A.L.J.R. at 359.

[15] S. 36 (1) provides: 'Except as is hereinafter otherwise provided, every grant or other instrument presented for registration shall be in duplicate and shall, except in the case of a grant, be attested by a witness, and shall be registered in the order of time in which the same is produced for that purpose.' *Cf.* T.L.A. (Vic.) s. 34 (1).

[16] 37 A.L.J.R. 361.

[17] Under the Victorian Act there may be less doubt on the question. S. 34 (1) of the Transfer of Land Act is couched in stronger and more imperative terms. Note for example, the concluding words of s. 34 (1). Further, this section, unlike the N.S.W. section states expressly that instruments take priority according to the date of lodgement.

Dixon C.J. and Kitto J. proceeded to consider the question on the basis that the right involved was both an equitable one and a statutory one: an equitable one on the basis of the general equitable principle that of two competing equities the one earlier in time takes priority, and a statutory one on the basis of section 36 (1). But at this stage the paths taken by the two judges diverged. Kitto J. applied the test laid down by the Privy Council in *Abigail v. Lapin*.[18] Despite the breadth of this test, he found that on the facts the respondents had not been guilty of an inequitable conduct. Dixon C.J., however, while he did not address himself to a detailed examination of the problem, doubted whether 'under the Torrens system a priority giving a right to registration under the statute can be lost on equitable grounds of such a character'.[19] He agreed with Kitto J. that, even if the equitable test was applicable, the respondents had not lost their priority.

Taylor J. as a consequence of his opinion that section 36 (1) had no application here, considered the question simply as a competition between two equitable interests. Applying general equitable principles he found that there were no grounds on which the prior equity of the respondents should be postponed to that of Denton Investments.[20]

In the final result, then, the whole Court held that the respondents were entitled to priority of registration over the appellants, and the appeals were dismissed.

Few would argue that the ultimate result of the decision is unsatisfactory or unjust. However, the case does leave in doubt several points. Firstly, it gives no clear decision on the effect of section 43a of the Real Property Act. Secondly, it leaves in doubt the question of what conduct, if any, on the part of the holder of a statutory right to registration under section 36 (1) of the Act, will deprive him of that right.

On the other hand, on two points, a clear answer was given, although on neither point was the Court unanimous. The effect of an authorized withdrawal of instruments from the Titles Office may now be taken as settled. Again, a definite answer was given to the problem of whether section 36 (1) of the Real Property Act is applicable to circumstances such as existed here.

It is to be hoped that a definite answer will soon be given to the issues

[18] [1934] A.C. 491 at 498. The test was stated thus: ' . . . the possessor of the prior equity is not to be postponed to the possessor of a subsequent equity unless an act or omission proved against him has conduced or contributed to a belief on the part of the holder of the subsequent equity, at the time when he acquired it, that the prior equity was not in existence.'

[19] 37 A.L.J.R. at 352.

[20] This whole issue thus remains unresolved. The view of Dixon C.J. is perhaps to be preferred. In *Lapin v. Abigail*, no question of a statutory right to registration arose. Both the High Court and the Judicial Committee treated the rights involved in that case as equitable rights only and proceeded to resolve the question on general equitable principles. There would thus seem to be no justification for treating a statutory right to registration, an entirely different concept, as subject to the same principles. It may well be that the only conduct sufficient to postpone a statutory right to registration is conduct amounting to fraud. This would be in line with the principles contained in ss. 42 and 43 of the Real Property Act (ss. 42 and 43 of the Transfer of Land Act, Victoria).

left in doubt by this case. However, the case has made some contribution towards the clarification of this area of the law, an area rendered troublesome by difficulties concerned in determining precisely how far the general law has been modified by the Acts implementing the Torrens system of conveyancing.

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