

IN THE CAYMAN ISLANDS COURT OF APPEAL,
HOLDEN AT GEORGE TOWN, GRAND CAYMAN

C.I.C.A. APPEAL NO. 12/89

BEFORE: THE HONOURABLE MR. JUSTICE ZACCA, PRESIDENT
THE HONOURABLE MR. JUSTICE KERR, J.A.
THE HONOURABLE MR. JUSTICE HENRY, J.A.

BETWEEN: GRACE MYLES
CHARLES WINTON

PLAINTIFF/RESPONDENTS

A N D PROSPECT PROPERTIES LTD. FIRST DEFENDANT
A N D DOUGLAS WOOLF SECOND DEFENDANT/
APPELLANT

MR. N. HILL, Q.C. and MISS CHERRY BRIDGES FOR APPLICANT

MR. T. SHEA FOR THE RESPONDENTS.

AUGUST 8, 9, 10, 11

PRESIDENT:

In Actions which were consolidated, the Respondents Grace Myles and Charles Winton, sought an Order for specific performance against Prospect Properties Ltd. as first defendant and a declaration, order and injunction against the appellant as second defendant.

Prospect Properties, a Company in liquidation, was the registered owner of a parcel of land referred to in the land register as Spotts Registration Section, Block 24E, parcel 148. It was intended that this parcel was to be sub-divided into several lots which were to be sold by Prospect Properties.

In September 1982, the land was sub-divided to form, inter alia, Block 24E parcel 166 and in June 1983, Block 24E parcel 166 was further sub-divided to form,

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inter alia, parcel 24E - 210.

On December 2, 1981, Myles entered into an agreement with Prospect Properties to purchase lot 48 for U.S. \$7,500. A deposit of U.S. \$750 was paid and the balance was to be paid over a period of five years. It is not in dispute that Myles paid her instalments and was ready and willing to complete the sale.

Winton entered into two agreements dated January 8, 1982 to purchase two lots of parcel 148, namely lots 61 and 52 from Prospect Properties. The purchase price for each lot was U.S. \$9,000. Deposit totalling \$900 was paid and the balance to be paid by instalments over a five-year period. It is not in dispute that the full purchase price for each lot has been paid by Winton.

Parcel 24E - 210 corresponds to lot 48 purchased by Myles and Parcel 24E - 186 and 187 corresponds to lots 61 and 52 purchased by Winton.

Neither Myles nor Winton lodged a caution with the Registrar pursuant to section 127 of the Registered Land Law forbidding the Registration of dispositions of the land and the making of entries affecting the land.

S. 127 states :

(i) Any person who -

- (a) claims any unregistrable interest whatsoever, in land or a lease or a charge; or
- (b) is entitled to a licence; or
- (c) has presented a bankruptcy petition against the proprietor of any registered land, lease or charge; or
- (d) being a Bank, has advanced money on a current account to the proprietor of land or a lease or a charge,

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may lodge a caution with the Registrar forbidding the registration of dispositions of the land, lease or charge concerned and the making of entries affecting the same

(2) a caution may either -

- (a) forbid the registration of dispositions and the making of entries altogether; or
 - (b) forbid the registration of dispositions and the making of entries to the extent therein expressed
- (3) A caution shall be in the prescribed form and shall state the interest claimed by the cautioner and the Registrar may require the cautioner to support it by a statutory declaration.
- (4) The Registrar may refuse a caution which he considers unnecessary.
- (5) Subject to the provisions of this section, the cautioner shall be registered in the appropriate register.

In February 1983, Prospect Properties and the appellant caused charges in favour of the appellant to be registered in the encumbrance section of the land register for parcel 24E - 166 which included the lots purchased by Myles and Winton. When the charge was registered, the appellant had prior notice of the purchase agreement between Myles, Winton and Prospect Properties. It is not in dispute that the appellant had prior notice of the respondents' interest in the parcels.

The appellant refused to discharge the charge placed on the three parcels of land. Prospect Properties did not take any part in the trial.

In an amended statement of claim, Respondent Myles claimed :

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(a) Against the first defendant :

(i) An Order for the specific performance of the contract made the 2nd December, 1981 between the first defendant as vendor and the plaintiff as purchaser for the sale and purchase of lot 48 in Prospect Properties Estates sub-division and referred to in the land register as Spotts Registration Section, Block 24E; Parcel 210 ;

(ii) Alternatively to (i) above, damages for breach of contract.

(b) As against the second defendant :

(i) a declaration that the second defendant is not entitled to maintain the charges registered over the said parcel 210 of Block 24E in Spotts Registration Section ;

(ii) An Order of mandatory injunction requiring the second defendant to execute discharges of charge for any charges registered by him or on his behalf over the said parcel 210 of Block 24E in Spotts Registration Section without prejudice to any claim the second defendant may have against the first defendant with respect to the monies, if any, secured by the said charges ;

(iii) an injunction restraining the second defendant from transferring or otherwise dealing with the charges registered in his favour in the encumbrance section of parcel 210 of Block 24E in Spotts Registration Section.

(c) As against both defendants :

(i) an enquiry as to the balance of purchase price due under the contract of sale and a determination as to what part of such balance is due to the first defendant and what part is due to the second defendant and directors as to payment of the same on completion of the contract of sale.

(ii) such further or other order as the Court may deem just and equitable ;

(iii) costs.

The claim by Respondent Winton relating to lots 61 and 52 was in similar terms.

The learned trial Judge entered judgment for both Respondents against Prospect Properties and the appellant. In doing so he granted the Order for specific performance as against Prospect Properties and granted the relief sought against the appellant as set out in paragraph (b)(i)(ii)(iii) in the amended statement of claim.

As against both Prospect Properties and the appellant, he granted an order in respect of Myles that an enquiry be held into the balance of the purchase price due under the contract of sale as to what part of the cash balance was due to Prospect Properties and what part was due to the appellant, unless the same can be agreed between the parties.

In his reasons for judgment, the learned trial judge in finding for the respondents, held that the appellant's charges were subject to the equitable interests of the respondents. He also held that the appellant was only protected if he was a bona fide purchaser for value without notice and that no valuable consideration had been given for the charges over lots 48, 61 and 52. The learned trial judge further held that the respondents' failure to lodge a caution did not amount to a waiver or estoppel of the right to claim that the appellant's charges were subject to their equitable interests.

A finding was also made that a breach of trust was committed on the granting of the charges and that the appellant was a party to the breach of trust.

The appellant in his grounds of appeal challenged all these findings. The main issue of the appeal was whether the equitable interest arising from the purchase agreements takes priority over the subsequent charges registered.

Counsel for the appellant submitted that reliance was being placed on s. 23 of the Registered Land Law for his proposition that upon registration of the charge the appellant's charge was not subject to the equitable interest of the Respondents. In doing so he submitted that s. 23 applied to the proprietor of a charge.

S. 23 states :

" Subject to the provisions of section 27, the registration of any person as the proprietor with absolute title of a parcel shall vest in that person the absolute ownership of that parcel together with all rights and privileges belonging or appurtenant thereto, free from all other interests and claims whatsoever, but subject -

(a) to the leases, charges and other incumbrances and to the conditions and restrictions, if any, shown in the register; and

(b) unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register:

Provided that -

- (i) nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee;

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(ii) the registration of any person under this Law shall not confer on him any right to any mineral oils unless the same are expressly referred to in the register. "

Further, reliance is placed on the definition of proprietor in section 2 which states :

"proprietor" means the person registered under this Law as the owner of land or a lease or a charge.

s. 23 clearly refers to a proprietor with absolute ownership of the land and therefore the person registered as the owner of the land. Whilst the chargee is given the power of sale under section 72 of the Registered Land Law if there is default of payment, the chargee cannot be regarded as the owner of the land. It is my view therefore that s. 23 does not include the proprietor of a charge.

Are the appellant's charges, therefore, subject to the equitable interest of the respondents, the charges having been registered subsequent to the agreement for sale and the appellant having prior knowledge of the sale agreements.

The sale agreement itself includes a 'caution' clause which states :

" Upon the execution of this agreement, the purchaser shall be entitled to lodge a caution pursuant to section 127 of the Registered Land Law 1971 and so long as the caution remains, no disposition which is inconsistent with this agreement shall be registered except with the consent of the cautioner. In the event of this agreement being rescinded or there being a default by the Purchaser, the Purchaser shall remove such caution immediately and the Purchaser hereby appoints the vendor as the duly authorized attorney and agent to remove such caution upon the Purchaser failing so to do. "

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The Registered Land Law provides for the Registration of Interests and for priority of interests to be registered.

S. 30 provides for all such entries to constitute actual notice and is as follows :

S. 30. Every proprietor acquiring any land, lease or charge shall be deemed to have had notice of every entry in the register relating to land, lease or charge. "

S. 41 provides for the priority of registered interests and is as follows :

" (1) Interests appearing in the register shall have priority according to the order in which the instruments which led to their registration were presented to the registry, irrespective of the dates of the instruments and notwithstanding that the actual entry in the register may be delayed :

Provided that where an instrument is prepared in the registry it shall be deemed to have been presented on the date on which application for its preparation was made to the Registrar.

(2) Instruments sent by post or under cover and received during the hours of business shall be deemed to be presented simultaneously immediately before the closing of the office on that day, and instruments so sent out received between the time of closing and the next opening of the office for business shall be deemed to be presented simultaneously immediately after such opening.

(3) Where more than one instrument or application are presented on the same day, or on different days but at so short an interval from each other that in the opinion of the Registrar there is doubt as to their order of priority, the Registrar may refuse registration until he has heard and determined the rights of the parties interested thereunder. "

S. 38 is as follows :

" (1) No person dealing or proposing to deal for valuable consideration with a proprietor shall be required or in any way concerned -

(a) to inquire or ascertain the circumstances in or the consideration for which such proprietor or any previous proprietor was registered ;
or

(b) to see to the application of any consideration or any part thereof; or

(c) to search any register kept under the Public Recorder Law or The Registration (Länd) Law.

(2) Where the proprietor of land, a lease or a charge is a trustee he shall, in dealing therewith, be deemed to be absolute proprietor thereof, and no disposition by such trustee to a bona fide purchaser valuable consideration shall be defeasible by reason of the fact that such disposition amounted to a breach of trust. "

It is to be observed that the Register plays an important part in the scheme of things. S. 38(1) provides that a person dealing for valuable consideration with a proprietor is not required or to be concerned to search any register under the Registered Land Law.

This means that a person dealing with the land for valuable consideration is entitled to ignore entries in the Register and can only be affected by notice of any interest which S. 30 declares him to have had notice of.

The Respondents' equitable interest is protected by section 127 which permits him to lodge a caution with the Registrar forbidding the registration of dispositions of the land and the making of entries affecting it. S. 128 provides

for notice of the caution to be given to the Proprietor where land, lease or charge is affected by it.

S. 128(2) provides as follows :

" So long as a caution remains registered no disposition which is inconsistent with it shall be registered except with the consent of the cautioner or by order of the court. "

The failure of the respondents to lodge a caution and the effect of the sections referred to above would in my view make a registered interest (other than in cases of fraud) for which there was valuable consideration not subject to an unregistered interest even though prior in time and which the proprietor of the registered interest had prior notice at the time of the registration of such interest.

The respondents' equitable interest cannot, therefore, take priority over a registered interest for which there was valuable consideration.

Counsel for the respondents, however, submitted, that the protection given to a bona fide purchaser for valuable consideration under s. 38(2) must mean 'a bona fide purchaser for valuable consideration without notice'.

An examination of s. 121(3) leads me to the view that this submission is incorrect.

S. 121(3) states :

" Where the proprietor of land, a lease or a charge is a trustee, he shall hold the same subject to any unregistered liabilities, rights or interests to which it is subject by virtue of the instrument creating the trusts, but for the purpose of any registered dealings he shall be deemed to be the absolute proprietor thereof, and no person dealing in good faith for valuable consideration shall be deemed to have notice of the trust, nor shall any breach of the trust create any right to indemnity under this Law. "

Assuming that there was a breach of trust on the part of Prospect Properties, the Charge could not be defeasible even if the appellant was aware of such breach of trust, provided the appellant was a purchaser for valuable consideration.

It is now necessary to consider the submission of Counsel for the respondents that the appellant was not a bona fide purchaser for valuable consideration. It was submitted that the lots purchased by the respondents were not included in the original Charge. Two Charges were registered. There was a Charge for \$80,500.00 and that was dated January 31, 1983. The Second Charge for \$228,500.00 was dated February 2, 1983.

The learned trial judge, in considering whether or not the appellant was a bona fide purchaser for valuable consideration, came to the conclusion that he was not a bona fide purchaser for valuable consideration.

In his judgment Schofield J. summarised the facts and stated:

"There were two sets of agreements between Prospect Properties and Woolf. The first was a share purchase agreement which was dated 23rd October, 1981 by which Woolf was to purchase 7,291 shares of Prospect Properties from one James M. Bodden, Sr. That agreement was cancelled by a further agreement by which Prospect Properties was to register a First Charge over a number of lots of land. Neither of the Plaintiffs' lots was included in that agreement, but in the event, because there had been no subdivision, a Charge was registered in favour of Woolf over the lots of Spotts Registration Section Block 24E Parcel 166 within which parcel was included the Plaintiffs' three lots. When further subdivision took place so that the Plaintiffs' lots were registered as separate parcels, Woolf maintained his Charge over all the parcels included in the former parcel 166, although Prospect Properties had contracted to register a First Charge over only some of these parcels.

"The second set of agreements related to the sale by Prospect Properties to Woolf of four plots of land in this development. Some of these plots are those which the Plaintiffs contracted to purchase. However, it appears that Prospect Properties permitted a Charge to be registered over the whole parcel 166 in connection with the agreement in relation to those four plots. Again, when the parcel 166 was further subdivided and the Plaintiff's parcels were identified on the Register, Woolf maintained his Charge in connection with these transactions over the parcels which the Plaintiffs had contracted to purchase. There is nothing in the documentation before me, and it has not been argued that such is the case, to show that Prospect Properties entered into an agreement with Woolf that he could register a Charge over the three parcels which the Plaintiffs had contracted to purchase. The Company did indeed cause such a Charge to be registered, but there is no written agreement between the parties to demonstrate that valuable consideration was given for the Charges to be put in place over the three parcels to which this suit relates."

In my view, Schofield J. has accurately stated the facts as disclosed in the evidence before the Court.

Mr. Hill in his submissions argued that there need not be a written agreement to show that there was valuable consideration.

Is there any evidence at all to show that it was intended that the Plaintiffs' lots should be included in either of the two Charges?

There is an agreement dated February 1, 1982 made between Prospect Properties Ltd. as Vendor and Douglas Woolf as Purchaser whereby it was agreed as follows:

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"1. The Vendor will sell and the Purchaser will purchase all those parcels of land shown on the Prospect Properties subdivision plan annexed hereto marked 'A' for identity as lots number 146, 200, 205 and 207 (hereinafter called "the property") with titles absolute and free from encumbrances for the price and upon the terms and conditions hereinafter appearing.

"2. The total purchase price for the property shall be Seventy Thousand United States Dollars (US\$70,000.00) which shall be paid on the day of , 1982 to the vendor.

"6. At any time after the execution and exchange hereof and pending completion, the Purchaser shall be entitled to lodge and keep a Caution on the registers relating to the land hereby agreed to be sold as Contracting Purchaser, and the Vendor shall not raise any objection thereto and the vendor further agrees on request in writing to furnish the Purchaser with such consent or consents as may be required by the Purchaser to enable the Purchaser to obtain official searches of the Registers relating to the property with stays of registration.

"7. The Vendor shall have the option to repurchase the property by paying therefor US\$70,000.00 plus interest thereon as from the date hereof at the rate of 15-1/2% per annum on the outstanding balance from time to time at any time on or before one calendar year from the date hereof.

Should the Vendor make part payments during the aforesaid period of one calendar year the Purchaser shall resell the property to the Vendor on the following basis:-
Upon payment of US\$40,000.00 lot 207;
upon payment of US\$28,500.00 either lot 146 or 205; upon payment of US\$10,800.00 lot 200."

Then there is the agreement dated December 17, 1982 made between James M. Bodden, Sr., James Bodden II, Douglas Samuel Woolf and Prospect Properties Ltd.

This is the agreement whereby in Clause 1 the agreement dated October 23, 1981 between Mr. Bodden, Sr. and Mr. Woolf for the sale and purchase of 7,291 shares in the Company was cancelled on the following terms:

"(2) For the consideration aforesaid

Mr. Bodden, Jr. shall and hereby agrees to pay to Mr. Woolf the sum of US\$228,500.00, which shall be satisfied in the following manner:

- (a) by the immediate endorsement by Mr. Bodden, Jr. of a Promissory Note ("the Note") in the amount of US\$228,500.00 given by the Company, a copy of which is attached hereto and marked "A";
- (b) by the immediate issue by the Company to Mr. Woolf at the direction of Mr. Bodden, Jr. of an assignment of book debts to secure its indebtedness under the Note, such assignment to be in the form attached hereto and marked "B";
- (c) by the registration by the Company in favour of Mr. Woolf as soon as possible but not later than the 30th day of June, 1983 as to which time shall be of the essence, of a First Charge over the following lots in the Company's subdivision known as "Prospect Park", being lots 30, 32, 37, 38, 39, 42, 44, 45, 46, 62, 63, 64, 67, 69, 77, 78, 79, 85, 86, 88, 95, 96, 97, 98, 99, 103, 107, 110, 114, 117, such Charge to be in the form attached hereto and marked "C".

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"(3) Upon the issue and delivery to Mr. Woolf of:

- (a) the Note duly endorsed; and
- (b) the assignment of book debts aforesaid, the agreement referred to in Clause(1) hereof shall thereupon be cancelled, notwithstanding that the Company is not in a position to execute and register the First Charge referred to in Clause (2)(c) above.

"(4) The Company agrees to issue and deliver to Mr. Woolf:

- (a) the assignment of book debts; and
- (b) the First Charge in accordance with the provisions of Clause (2) above, and Mr. Bodden, Sr. and Mr. Bodden, Jr. warrant and agree that they will each promise that the Company observes and performs its obligations under this Clause."

It is to be observed that whilst this agreement called for the registration of a First Charge by the Company to Mr. Woolf, in fact the Charge dated February 2, 1983 was registered as a Second Charge on February 3, 1983 over Block 24E Parcel 166.

On January 29, 1983 Prospect Properties Ltd. wrote to Mr. K. Dunlop, Registrar of Lands, in the following terms:

"Please accept this letter as the Company's confirmation of its permission for Mr. Douglas S. Woolf of Box 1651, George Town, Grand Cayman, B.W.I. to register a Charge against the Company's land situated at Prospect, Grand Cayman, and described as 24E 166. Permission for this Charge to be placed is consistent on a contract between Prospect Properties Ltd. and Mr. Douglas S. Woolf, dated February 1, 1982 and concerning the purchase by Mr. Woolf of lots Nos. 146, 200, 205, and 207 and appearing on the Estate Plan as approved by the Cayman Islands Planning Authority, from the Company.

"We further understand that Washington International Bank Ltd. of George Town, Grand Cayman, has instructed your department to lift the Charge that the Bank holds on the property, and we would be happy to learn that this instruction has been carried out."

The letter was signed by J. Bodden, II as Chairman and Managing Director.

We then find a Charge over Block 24E Parcel 166 dated January 31, 1983 and registered on February 1, 1983. This Charge was for \$80,850.00. It is reasonable to infer that this Charge, having regard to the letter dated January 29, 1983, was as a result of the agreement dated February 1, 1982. Both the agreement and the letter referred to the same lots, i.e. 146, 200, 205 and 207. None of these lots are the lots purchased by the Plaintiffs.

Similarly, the lots mentioned in the agreement dated December 17, 1982 and for which the Second Charge was given do not include any of the Plaintiffs' lots.

It is true that both Charges refer to Block 24E Parcel 166. The Charges over the Company's land had to be over the whole section as the subdivision had not yet been carried out in accordance with S. 21 of the Registered Land Law. It was never intended that the Charges which were granted by the Company should include the Plaintiffs' lots. This is borne out by the agreement and the letter referred to above.

In my view there was no evidence before the learned trial judge to warrant a finding that the appellant was a bona fide purchaser for valuable consideration. The finding of the trial judge was therefore a correct finding.

What, then, is the position insofar as the Plaintiff's Equitable Interest is concerned? S. 164 of the Registered Land Law states:

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"Any matter not provided for in this Law or in any other Law in relation to land, leases, and Charges registered under this Law and interests therein shall be decided in accordance with the principles of justice, equity and good conscience."

I hold that the appellant was not a bona fide purchaser for Valuable Consideration, and therefore the appellant's Charge would not take priority over the Plaintiff's equitable interest but must be taken subject to that interest.

It is also argued by Mr. Hill that the Plaintiffs' failure to lodge a Caution amounted to a waiver of their rights to claim that the appellant's Charges were subject to their equitable interests. In my view, there is no evidence to support such a proposition and this ground of appeal is without merit.

Having regard to S.164 I hold that the Orders made by Schofield J. should be affirmed.

The appeal is dismissed with costs to the Respondents.

Delivered the day of December, 1989.

KERR, J.A.

Each Plaintiff respectively brought an action against Prospect Properties Limited, a Cayman Company (now in liquidation), as the First Defendant and against the Appellant as Second. There were questions of Law and issues of fact common to both actions and they were quite properly consolidated.

The Company (Prospect) during the material period was the owner of certain land in Grand Cayman and registered as such under the Registered Land Law. The land was originally described in the Register as Spotts Registration, Section 24E Parcel 148 and Prospect then embarked upon a subdivision and sale of lots. The First Plaintiff entered in an agreement dated 2nd December 1981 to purchase for US\$7,500 a lot then numbered 48. The down-payment of \$750 and the subsequent instalments to complete payment of the balance and within the stipulated period of five years were duly made and it was her unchallenged assertion that at the time of filing the action she was ready, willing and able to complete payment.

The Second Plaintiff, Winton, entered into two similar agreements on January 8, 1982, in respect of two lots numbered 61 and 52 at purchase price of \$9,000 each and it is not disputed that he had paid the purchase price in full.

Both Plaintiffs imprudently omitted to register their agreement as a caution and as provided by Section 127 of the Registered Land Law (hereinafter referred to as "The Law").

Section 127 provides:

"Any person who -

(a) claims any unregistrable interest whatsoever, in land or a lease or a charge, or

(b)

(c)

(d)

may lodge a caution with the Registrar forbidding the registration of dispositions of the land, lease or charge concerned and the making of entries effecting the same".

The registered land was subdivided in September 1982 to form Block 24E Parcel 166 and on a further subdivision in June 1983, the First Plaintiff's lot was designated, parcel 24E 210 and the Second Plaintiff's lots, 24E, 186 and 187, respectively.

On his own admission, the Appellant was a Director of Prospect for the period 21st October, 1982 to 28th April, 1983.

Pursuant to an agreement between Prospect and the Appellant charges were registered in the Encumbrance Section of the Register, in respect of Parcel 24E 166, in favour of the Appellant and the Parcels of the Plaintiffs fell within that registration. It is not in dispute that the Appellant was aware of the Plaintiffs' interests when he took and registered the charges. Prospect apparently unable to meet the obligations under the charges and the Appellant unwilling to discharge the charges as against the Plaintiffs' lots, by Writs filed in April 1985, each sought as against Prospect an Order for specific performance and alternatively damages for breach of contract. In respect of Prospect, it was a "no contest" and an Order was granted in each suit that depending on the outcome of the trial between the Plaintiffs and the Appellant, each would be at liberty to elect which of the two remedies would be pursued -

As against the Appellant the Plaintiffs sought in effect:

- (i) a declaration that he is not entitled to maintain the charges registered over the said parcels [210 of Block 24E and 24F, 186 and 187];
- (ii) an Order of mandatory injunction requiring him to execute discharges of any charges registered by him or on his behalf over the said lots [without prejudice to any claim he may have against the First Defendant with respect to the moneys, if any, secured by the said charges];
- (iii) an injunction restraining him from transferring or otherwise dealing with the charges registered in his favour in the Encumbrance Section in respect of those lots.

In his written judgment, Scholefield J found for the Plaintiffs

with the following consequential Orders:

(i) In each case -

- (a) specific performance against Prospect as prayed; and
- (b) the declarations sought with attendant injunctions.

(ii) As regards Myles' action an enquiry to determine the unpaid balance of the purchase price and the part thereof due to each Defendant.

It is against these judgments and Orders the Second Defendant appealed.

The questions raised and argued before us are substantially those debated before and dealt with by the Learned Trial Judge in his written judgment.

The Plaintiffs' case shortly put was that, notwithstanding their failure to register their interests, on the basis of their executed agreements for sale, Prospect was a Trustee and that as

the Appellant when he took the charges had notice of the Plaintiffs' equitable interests, then the Plaintiffs' interests out-ranked the Appellant's in priority.

Here as before the Learned Trial Judge for the Appellant it was contended that the Registered Land Law of the Cayman Islands established a system of priorities based upon the registration of certain interests such as the Plaintiffs' and that the purely equitable doctrine in relation to the bona fide purchaser for value without notice out-ranking prior equitable interest was inapplicable to the instant cases and that the Plaintiff by failing to register their interest as provided by the Law, lost all claim to priority over the duly registered charges of the Appellant. In support of this contention, Mr. Hill painstakingly indulged in a comparative analysis between the Kenya Legislation and the Cayman Islands Legislation and referred to the Torrens' system of registration as the basis for this type of legislation. While the reference to such foreign legislation and decided cases are undoubtedly helpful with regard to the legislative intent of the Law, I am constrained to be mindful that our primary concern is the meaning and effect of the Cayman Legislation and, accordingly, differences with the legislation of other countries and which differences would include additions as well as omissions, will generally be considered purposeful.

At the outset Mr. Hill sought to claim for the Appellant the indefeasibility of title as provided by Section 23 of the Law.

That Section reads:

"Subject to the provisions of section 27, the proprietor of the proprietor of any person as the proprietor with absolute title of a parcel shall vest in that person the absolute ownership of that parcel together with all rights and privileges belonging or appurtenant thereto, free from all other interests and claims whatsoever, but subject -

- (a) to the leases, charges and other incumbrances and to the conditions and restrictions, if any, shown in the register; and
- (b) unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register;

Provided that -

- (i) nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee;

(ii)

I am in agreement with the Learned Trial Judge that that with the Section "does not operate to give the Appellant or Chargee an indefeasible interest". That Section deals specifically with the registration of the "proprietor with absolute title of a parcel or parcel" which the Appellant clearly is not. As defined in Section 24 of the Law -

"A charge shall not operate as a transfer but shall have effect as a security only".

In like manner section 24 deals specifically with the registration of a person as proprietor with provisional title and Section 25 with the proprietor of a lease. All these sections are expressly subject to Section 27 (post) which in its generality deals with voluntary transfers of land, leases and charges.

Now en route to his determination that equitable principles apply, the Learned Trial Judge considered, inter alia, the Torrens System of Registration as embraced in the legislation of Australia and the dicta in *West Permanent Loan Company v. Freeson* [1925] ALL p. 223 and Section 3 of the Law, which reads:

3. "Except as otherwise provided in this Law, no other law and no practice or procedure relating to land shall apply to land registered under this Law so far as it is inconsistent with this Law:

Provided that, except where a contrary intention appears, nothing contained in this Law shall be construed as permitting any dealing which is forbidden by express provisions of any other law or as overriding any provision of any other law requiring the consent or approval of any authority to any dealing".

In holding that equitable principles applied, he implicitly recognized the limited role of equity when he said:

"I am satisfied that our Registered Land Law recognizes equitable claims and interests unless they are inconsistent with the Law".

However, the limitations on the role of equity in this regard rests not merely on reasoned conclusion but on the very last Section of the Law - Section 164 - which provides:

"Any matter not provided for in this Law or in any other Law in relation to land, leases and charges registered under this Law and interests therein shall be decided in accordance with the principles of justice, equity and good conscience".

I interpret these provisions as intended to make equitable principles applicable only to matters not dealt with under the Law either expressly or by inescapable implication. Therefore, it follows that to determine whether or not equitable principles apply in cases such as the instant appeal, regard must be had to such provisions of the Law as expressly deal with matters arising in the instant case as well as to the scheme and general legislative intent of the Law.

Accordingly, for easy reference the following Sections of the Law which seem directly relevant are quoted:

Section 27:

"Every proprietor who has acquired land, a lease or a charge by transfer without valuable consideration shall hold it subject to any unregistered rights or interests subject to which the transferor held it and subject also to the provisions of the Bankruptcy Law and to the winding-up provisions of the Companies Law, but save as aforesaid such transfer when registered shall in all respects have the same effect as a transfer for valuable consideration".

Section 30:

"Every proprietor acquiring any land, lease or charge shall be deemed to have had notice of every entry in the register relating to the land, lease or charge".

Section 38:

- (1) "No person dealing or proposing to deal for valuable consideration with a proprietor shall be required or in any way concerned -
- (a) to inquire or ascertain the circumstances in or the consideration for which such proprietor or any previous proprietor was registered; or
 - (b) to see to the application of any consideration or any part thereof; or

(c) to search any register kept under the Public Recorder Law or The Registration (Land) Law.

(2) Where the proprietor of land, a lease or a charge is a trustee he shall, in dealing therewith, be deemed to be absolute proprietor thereof, and no disposition by such trustee to a bona fide purchaser valuable consideration shall be defeasible by reason of the fact that such disposition amounts to a breach of trust."

Section 41(1)

Section 41(1)

Interest appearing in the register shall have priority according to the order in which the instrument which led to their registration were presented to the registry, irrespective of the dates of the instruments and notwithstanding the actual entry in the register may be delayed:

Provided that where an instrument is prepared in the registry it shall be deemed to have been presented on the date on which application for its preparation was made to the Registrar.

(2)

(3) Where more than one instrument or application are presented on the same day, or on different days but at so short an interval from each other that in the opinion of the Registrar there is doubt as to their order of priority, the Registrar may refuse registration until he has heard and determined the rights of the parties interested thereunder."

Section 65

"A proprietor whose land or lease or charge is subject to a charge may create a second or subsequent charge in the same manner as the first charge and the same provisions shall apply thereto, but any sale under the power expressed or implied in any such charge shall be expressed to be subject to all prior charges unless all those charges have been discharged."

Section 120(3)

"Where the proprietor of land, a lease or a charge is a trustee, he shall hold the same subject to any unregistered liabilities, rights or interests to which it is subject by virtue of the instrument creating the trusts, but for the purpose of any registered dealings he shall be deemed to be the absolute proprietor thereof, and no person dealing in good faith for valuable consideration shall be deemed to have notice of the trust, nor shall any breach of the trust create any right to indemnity under this Law."

As I understand it, this Appeal is not confined to the question whether or not equitable claims and interests are recognized by the Law but, more in point, whether in the instant case the equitable

interests which the Plaintiffs undoubtedly have against Prospect enjoy a priority over the Appellant's charges so that in the circumstances he took the charges subject to their interests. I do not find the dicta quoted by the Learned Judge from the Great West Paramount Loan Company helpful in determining that question in the light of the provisions of the Law.

Now the general and accepted rule in relation to priority is the order of creation. As stated in Cheshire's Modern Law of Real Property, Tenth Edition, p. 66 - "An equitable interest is one enforceable against the whole world except a purchaser for valuable consideration of the legal estate which is subject to the equitable interest provided that when the purchaser acquired the legal estate he had no notice, either actual or constructive of the equitable interests". And, as stated in Megarry & Wade, Fifth Edition, p. 144 - "Such a person, bona fide purchaser for value reverses the natural order of priority" [the natural order of priority being the order of creation].

It was the basis of the submissions on behalf of the Plaintiffs that the Appellant taking the charges with notice of the prior created Plaintiffs' interests, on this equitable doctrine, was not qualified to reverse the order of creation and reliance was placed on the following dicta in Midland Bank and Trust Company Limited and another v. Green and another [1981] 1 All E.R. 153:

"My Lords, the character in the law known as the bona fide (good faith) purchaser for value without notice was the creation of equity. In order to affect a purchaser for value of a legal estate with some equity or equitable interests, equity fastened on his conscience and the composite expression was used to epitomise the circumstances in which equity would, or rather would not, do so. I think that it would generally be true to say that the words in good faith related to the existence of notice. Equity, in other words, required not only absence of notice, but genuine and honest absence of notice. As the law developed, this requirement became crystallised in the doctrine of constructive notice which assumed a statutory form in the Conveyancing Act 1882, S3. But, and so far I would be willing to accompany the respondents, it would be a mistake to suppose that the requirement of good faith extended only to the matter of notice, or that when notice came to be regulated by statute the requirement of good faith became obsolete. Equity still retained its interests in, and power over, the purchaser's conscience."

It is beyond debate that in equity, for reversing the order of creation the criteria a party must possess are:

(i) Bona fide purchaser for value of the legal estate.

(ii) Without notice of the prior equitable interest.

Both essentials must be genuine and co-exist. Notice in that connection would include constructive notice. But, is there such a complex person under the Cayman Statute? A complex person under the Section 27 deals with voluntary transfers and includes a proprietor who has acquired a charge without valuable consideration while Sections 38 and 121(3) offers protection to the prospective purchasers in dealing with a registered proprietor.

Notice is dealt with separately and purposefully in Section 30 and Section 121(3). By these provisions the bona fide purchaser is protected from matters dealt with in the Sections including a breach of trust by a trustee but in any case subject to the overriding interests set out in Section 28 and to notice of a registered interests under Section 30 of the Law.

In the light of the separation of the 'essentials' then the notice applicable and to which the bona fide purchaser for value is subject must be notice within the contemplation of the Act.

In so concluding, I have given consideration to the scheme of the Law.

THE LAW.

As expressed in its title, the Law was designed "to make provision for the registration of land and for dealings in land so registered and for purposes connected therewith". It purposefully avoids such well-worn terminologies as Fee Simple Absolute in Possession, Estate Contract, Legal Estate, or Equitable Interests but speaks of leases, charges, encumbrances, rights and interests yet implicitly recognizes the interests of the cestui quæ trust by reference to trusts and trustees.

Part II deals with the organisation and administration of the Registry. Part III - the Effect of Registration, Part IV -

Certificates and Searches, Part V - with Dispositions, Part VI - Instruments and Agents, Part VII - Transmission and Trusts, Part VIII - Restraints on Disposition - including Division 124-134 - dealing with Inhibitions, in which Division "Cautions" are specifically treated and in relation to which

Section 128 reads:

- (1) "The Registrar shall give notice in writing of a caution to the proprietor whose land, lease or charge is affected by it.
- (2) So long as a caution remains registered no disposition shall be registered which is inconsistent with it shall be registered except with the consent of the cautioner or by order of the court"

and 129, which provides for the withdrawal or removal of a caution, in subsection (3) reads:

"On registration of a transfer by a chargee in exercise of his powers of sale under section 75, the Registrar shall remove any caution which purports to prohibit any dealing by the chargor and which was registered after the charge by virtue of which the transfer has been effected".

In my view the Law provides a complete regime for priority in relation to a registrable caution and while it is true as the Learned Judge puts it that "Section 127 does not make it obligatory for a caution to be lodged" the effect of not protecting an interest such as the Plaintiffs' - by imprudently failing to register - is that against registered charges, the Plaintiffs lose their place in the queue. The Law was clearly aimed at simplifying and facilitating dealings in land in the Cayman Islands. In assessing the value of registered land as a security, by Section 30 a lender is enjoined to consider such interests as are entered against the land in the register and correspondingly need not concern himself with registrable interests such as a caution which have not been registered. Indeed, a person holding an interest such as the Plaintiffs' may deliberately defer registering a caution in order that the lender may take a charge unencumbered by the caution and by so doing obliquely assist the registered owner in his financing pursuits. The form of agreement for sale expressly advises registration of the purchaser's interest created on execution thereof.

Prospective purchasers who fail to act on this advice do so to their detriment.

Section 41 of the Law makes it clear that registration determines priority. I am fortified in this interpretation by the following opinion of Mantell J, in the Australian case of Kali Sun Investments Limited and Dah Sing Bank Limited (1986) ALLR 487 at p 856.

"Where there are two or more conflicting interests in land the first registered takes priority regardless of the date of acquisition. Otherwise the purpose of the Land Registration Ordinance set out in the preamble would be defeated."

Although the wording in Section 41 is somewhat different from the provisions of the Statute being considered in the cited case, I would give it the same meaning and effect.

On the general approach Lord Wilberforce in Frazer v. Walker (1967) 1 ALL ER at p. 653 said:

"In all systems of registration of land it is usual and necessary to modify and indeed largely to negative the normal rules as to notice, constructive notice, or inquiry as to matters possibly affecting the title of the owner of the land."

Accordingly, I am of the view that there is no room here for the equitable principle relating to the bona fide purchaser for value without notice, reversing the order of creation. In this regard the Law furnishes all that may be required to determine priority of interests. On this question the Appellant succeeds.

As the second plinth to his judgment, the Learned Judge held that the Appellant was not a bona fide purchaser for value while the question of priority is a general one this is special to the circumstances of the case.

In the absence of valuable consideration, then the Appellant would take the charges "subject to any unregistered rights or interests to which the transferor held it" (Section 27 of the Law). It has not been argued to the contrary that on the basis of the agreement, Prospect was a trustee in relation to the Plaintiffs' interest.

By the Plaintiffs' amended replies it was pleaded thus:

2(a) "Further and/or in the alternative, the plaintiff and the plaintiff's lot (later parcel) were excluded from the agreement(s) on foot of which the said charges were executed by the first defendant in favour of the second defendant and that in favour of the subsequent registration of the said charges in relation to the said lot/parcel was invalid as this entailed a variation of the said agreement(s) for which there was no legal consideration or alternatively insufficient legal consideration

3. The plaintiff will further contend that by a deed of assignment made about the 17th December 1982 the first defendant purported to assign to the second defendant certain accounts receivable of the first defendant including the balance of the purchase money then due by the plaintiff to the first defendant under the said contract of sale for lot 48 and by a covenant contained in the schedule to the second charge registered against parcel 24E 210 it was provided as follows:

"it is further agreed that where any debt assigned to the chargee by the company as security under an Assignment of Debts of even date herewith is paid in full, that the chargee will release from this charge the parcel of land hereby charged to which such debt related".

The facts upon which Scholefield, J., rested this finding were so concisely and clearly summarised in his judgment that I make no apologies for full incorporation herein:

"There were two sets of agreements between Prospect Properties and Woolf. The first was a share purchase agreement which was dated 23rd October 1981 by which Woolf was to purchase 7291 shares of Prospect Properties from one James M. Bodden Snr. That agreement was cancelled by a further agreement by which Prospect Properties was to register a first charge over a number of lots of land. Neither of the Plaintiff's lots was included in that agreement, but in the event, because there had been no subdivision, a charge was registered in favour of Woolf over the lots of Spotts Registration Block 24E parcel 166, within which parcel was included the plaintiffs' three lots. When further subdivision took place so that the plaintiffs' lots were registered as separate parcels Woolf maintained his charge over all the parcels included in the former parcel 166 although Prospect Properties had contracted to register a first charge over only some of these parcels.

The second set of agreements related to the sale by Prospect Properties to Woolf of four plots of land in this development. None of these plots are those which the plaintiffs contracted to purchase. However, it appears that Prospect Properties permitted a charge to be registered

over the whole parcel 166 in connection with the agreement in relation to those four plots. Again when the parcel 166 was further subdivided and the plaintiffs' parcels were identified in the registers Woolf maintained his charge in connection with these transactions over the parcels which the plaintiffs had contracted to purchase. There is nothing in the documentation before me, and it has not been argued that such is the case, to show that Properties entered into an agreement with Woolf that he could register a charge over the three parcels which the plaintiffs had contracted to purchase. The company did indeed cause such a charge to be registered, but there is no written agreement between the parties to demonstrate that valuable consideration was given for the charges to be put in place over the three parcels to which this suit relates."

Section 2 of the Law contains the following definition -

"valuable consideration" includes marriage, but does not include a nominal consideration."

It is clearly open to challenge a Charge that he is not a genuine purchaser on the basis of the absence of, or, in the light of the definition of valuable consideration in the Law, the inadequacy of the consideration. Clearly, on the basis of that definition a nominal consideration is insufficient.

In that regard I consider as a commendable approach the following comment in Baalman as quoted with approval in Simpson's Land Law and Registration at p. 498:

"The Torrens System of land registration is predominantly a purchaser's system. Its aim is to facilitate the transfer of land as a commercial commodity by removing most of the risks of financial loss which beset purchasers under the general law. As a transferee does not give value for his land is not exposed to that risk, there is no need to protect him. But the Torrens statutes have not always said so in plain words; in many of them it is simply being left to necessary implication."

Now the "subsequent agreement" to that of 23rd October, 1981, referred to by the Learned Trial Judge was:

"AN AGREEMENT made the 17th day of December One Thousand Nine Hundred and Eighty Two

BETWEEN:

JAMES M. BODDEN SNR., of George Town,
Grand Cayman, Cayman Islands
(hereinafter called "Mr. Bodden Snr")
OF THE ONE PART

AND:

JAMES BODDEN II of George Town,
Grand Cayman, Cayman Islands
(hereinafter called "Mr. Bodden Jnr")
OF THE SECOND PART

AND:

DOUGLAS SAMUEL WOOLF of George Town,
Grand Cayman, Cayman Islands
(hereinafter called "**Mr. Woolf**")
OF THE THIRD PART

AND:

PROSPECT PROPERTIES LTD., a Cayman
Islands company having its registered
office at P.O. Box 499, Grand Cayman,
Cayman Islands
(hereinafter called "**the Company**")
OF THE FOURTH PART

WITNESSES as follows:-

(1) At the request of Mr. Bodden Snr., and Mr. Bodden Jnr., the Agreement dated 23rd October 1981 made between Mr. Bodden Snr., and Mr. Woolf for the sale and purchase of 7,291 shares in the Company shall be cancelled on the terms hereinafter appearing.

(2) For the consideration aforesaid, Mr. Bodden Jnr., shall and hereby agrees to pay to Mr. Woolf the sum of US\$228,500.00 which shall be satisfied in the following manner:-

- (a) by the immediate endorsement by Mr. Bodden Jnr., of a Promissory Note ("the Note") in the amount of US\$228,500.00 given by the Company, a copy of which is attached hereto and marked "A";
- (b) by the immediate issue by the Company to Mr. Woolf at the direction of Mr. Bodden Jnr., of an assignment of book debts to secure its indebtedness under the note, such assignment to be in the form attached hereto and marked "B";
- (c) by the registration by the Company in favour of Mr. Woolf as soon as possible but not later than the 30th day of June 1983 as to which time shall be of the essence, of a first charge over the following lots in the Company's sub-division known as "Prospect Park", being lots 30, 32, 37, 38, 39, 42, 44, 45, 46, 62, 63, 64, 67, 69, 77, 78, 79, 85, 86, 88, 95, 96, 97, 98, 99, 103, 107, 110, 114, 117, such charge to be in the form attached hereto and marked "C".

It is not necessary for the purposes of this Appeal to review the various transactions between the Appellant and the Boddens, who apparently at the outset had the controlling interests of the Company and the role of Bodden (Jnr.) who was Managing Director at the time the Agreement of the 17th December was executed. Apparently these astute arrangements were to the detriment of the Appellant.

Be that as it may, neither the Plaintiffs nor their lots were included in (b) or (c) above. It was, therefore, clearly not in contemplation that the Plaintiffs' lots should form part of the Security granted the Appellant. Two charges were registered after this agreement. The first was registered on 1st February and the

the second on 3rd February 1983.

The first charge was a security for US\$80,050 and was the result of a decision taken at a Directors' meeting held subsequent to the agreement of 17th December and authorised registration of such a charge in favour of the Appellant. This apparently was based on an Agreement dated 1st February 1982 between the Company and the Appellant for the sale to him of certain lots (Plaintiffs' not included). This Agreement contained an option for the company to repurchase the lots which option the Company apparently exercised - and the amount on the charge was based upon a computation in accordance with the terms of this Agreement. It was expressly stated in the charge that the principal sum and interest would be repayable on 1st September 1983. The granting of a first charge over the whole section would then be in conflict with Agreement of the 17th December in which it was stipulated that there should be a first charge over certain specified lots.

The second charge was also over the whole section and was obviously as additional security for the Promissory Note in paragraph 2(a) of the Agreement of the 17th December. In the circumstances, the reasonable inference was that the lots in contemplation at the Directors' meeting and over which the charge should be effective were those referred to in the February Agreement and that it was never in contemplation that the Plaintiffs' lots should be included as security pursuant to either the Agreement of December 17 or the decision at the Directors' meeting. Any charge then against the Company's land had to be over the whole section as the subdivision had not been perfected in accordance with Section 21 of the Law. Accordingly, the inclusion of the Plaintiffs' lot was, therefore, inescapably incidental.

I am of the view that despite these and other arrangements subsequent to the Agreement of the 17th December,

it was never contemplated that the charges granted the Appellant should be effective against the Plaintiffs' lots and like the Learned Trial Judge, I hold that there was no real consideration held for the continued inclusion of the Plaintiffs' lots in the charges. As regards those lots the Appellant was a volunteer within the ambit of Section 27 of the Law and took the charges subject to the Plaintiffs' interest.

But, for this finding, I would be prepared to hold that in the special circumstances of the case, including (i) the fact that the Plaintiffs and their lots were purposefully excluded from the Agreement of the 17th December 1982; (ii) that the grant of the first charge in relation to the Agreement of February 1, was in conflict with the terms of the Agreement of the 17th December; and (iii) that the Appellant at the time was one of the Directors of the Company, the usage residuary provisions of Section 164 would be applicable and that "in accordance with the principles of justice, equity and good conscience" the decision in the court below that the Appellant took his charges subject to the Plaintiffs' interests should be affirmed.

Notwithstanding the opinions expressed supra, in deference to the earnest efforts of counsel on both sides, I shall deal briefly with two other points raised on appeal.

By consent, the following ground of Appeal was added:

"The Learned Trial Judge erred in law in holding that the granting of the charges constituted a breach of trust and that the Appellant was a party to such breach of trust" -

On this the Learned Judge said:

"I do not think there is any dispute that Prospect Properties in creating the charges in favour of Woolf were in breach of trust. Woolf had actual knowledge of the Plaintiffs' interest in the parcels. His close relationship with Prospect Properties, be it as employee, shareholder, director, or if a

or as merely looking after his financial interests, demonstrates that he was a party to that breach of trust. I do not think the provisions of the RLL protect him from the consequences of that."

Even if the Plaintiffs' interests were registered it was still open to Prospect to grant the charges. The Appellant's knowledge of the Plaintiffs' interest was not by itself sufficient to make him a party to a breach of Trust by Prospect. As Higgins, J., said in the Australian Case - Wicks v. Bennett (1921) 30 CLR 449: it:

"Where there is nothing but knowledge of an unregistered interest, it is not a fraud to buy. Such knowledge may be an element in the building up of a case of fraud, but it does not "of itself" constitute fraud."

As Mr. Hill pointed out no breach of trust occurred until Prospect was unable to honour the obligations upon which the charges were founded. In the circumstances, it would mean crediting Woolf with the foreknowledge that Prospect would so fail. In my view the inference of the Appellant's involvement in a breach of Trust is too remote to be reasonable.

Another ground argued was that the Learned Trial Judge erred in Law in holding that the Plaintiffs' failure to lodge a Caution did not amount to a waiver of their right to claim that the Second Defendant's charges were subject to their equitable interests. In support of this ground, Mr. Hill submitted that where there is an abandonment of a right in such a way as to affect the legal rights of others and where a third party acts in relation to that abandonment he is entitled to plead the abandonment as confession and avoidance. He sought support for his proposition in Banning v. Wright (1972) 1 ALL ER 972 at pages 973 and 981. (1972) 1 ALL ER 972 There really is no factual foundation to support the cry of abandonment and I can find no fault in the Learned Trial Judge's terse treatment of this question.

As the subdivision has been completed and the Plaintiffs' Defendants lots identified, I can see no undue detriment or hardship to the Defendants by the Orders made in the Court below.

For these reasons, I would dismiss the Appeal and affirm the Judgment and Orders in the Court below with attendant costs to the Respondents.