

IN THE GRAND COURT OF THE CAYMAN ISLANDS

HOLDEN AT GEORGE TOWN, GRAND CAYMAN

CAUSE NO. 160-161/85

BETWEEN: GRACE MYLES/CHARLES WINTON  
 AND: PROSPECT PROPERTIES LTD  
 AND: DOUGLAS WOOLF

PLAINTIFFS  
 FIRST DEFENDANT  
 SECOND DEFENDANT

30-03-89

For the plaintiffs: Mr. T. Shea  
 For the second defendant: Mr. N. Hill Q.C.  
 with him Mr. D. Kitch and Ms. C. Bridges

J U D G M E N T

These are consolidated suits filed by Grace Myles (hereinafter called "Myles") and Charles Winton (hereinafter called "Winton") against Prospect Properties Ltd. (in liquidation) (the first defendant, to whom I shall refer as "Prospect Properties") and Douglas Woolf ( the second defendant to whom I shall refer as "Woolf").

Prospect Properties was the registered owner of a parcel of land referred to in the land register as Spotts Registration Section, Block 24E, parcel 148. This parcel was to be subdivided into various lots which were being sold by Prospect Properties.

Myles entered into an agreement dated 2nd December 1981 with Prospect Properties to purchase lot 48 for US\$7500. She paid a deposit of US\$750 and the balance, according to the agreement, was to be paid over five years, with interest accruing thereon. I do not think it is disputed that Myles paid her instalments diligently but withheld further instalments when the difficulties to which I shall later refer became apparent. She maintains she is ready and willing to pay the balance.

Winton entered into two agreements dated 8th January 1982 to buy two lots of parcel 148, ie. lots 61 and 52, from Prospect Properties. In both cases the purchase price was US\$9000, a deposit of \$125 was paid immediately, the balance of deposit of \$775 was paid, and instalments were to be paid over a five year period, with interest. Again I do not think it is in dispute that the full purchase price has been paid for each lot.

Spotts Registration Section Block 24E parcel 148 ie. the whole of Prospect Properties Estate was, in or about September 1982, subdivided to form, inter alia, Block 24E parcel 166 and was further subdivided in or about June 1983 to form, inter alia, parcel 24E 210, which corresponds to lot 48 which Myles had contracted to purchase, and parcels 24E 186 and 187 which correspond to lots 61 and 52 which Winton had contracted to purchase.

The plaintiffs claim that Woolf was employed by Prospect Properties to manage and supervise the development and the subdivision of the estate at the time they entered into their contracts. This is denied by Woolf who states he was a director of Prospect Properties from 21st October 1982 to 28th April 1983 and that he has never received any remuneration, payment, salary or reimbursement in relation to any services rendered to Prospect Properties. He maintains he was merely keeping an eye on the affairs of Prospect Properties to safeguard his investment of 29% interest in the share capital of Prospect Properties. Be that as it may, it is clear from a letter dated 16th June 1982 signed by Woolf on behalf of Prospect Properties that he was taking an interest in the day-to-day running of the company. Woolf does not deny that he was aware of the existence of these agreements between Myles and Winton on the one hand and Prospect Properties on the other.

In February 1983 Prospect Properties and Woolf caused charges in favour of Woolf to be registered in the encumbrance section of the land register for Parcel 24E 166. When the registers for parcels 24E 210, 24E 186 and 24 E 187, that is the parcels purchased by the plaintiffs, was opened these charges were entered in the encumbrance section of the registers for the three parcels. This, of course, was done with prior notice of the plaintiffs' interest in the parcels.

Woolf has refused to discharge the charges placed on the three parcels of land. The plaintiffs seek an order against Prospect Properties for specific performance of the contracts, alternatively for damages for breach of contract. Prospect Properties have not taken any part in these proceedings and are in liquidation. An order was granted in each suit that the plaintiffs are entitled at the

culmination of this trial to elect which of the remedies they will seek as against Prospect Properties.

Neither plaintiff lodged a caution with the Registrar of Lands pursuant to section 127 of the Registered Land Law. The plaintiffs maintain that Prospect Properties became a trustee for the plaintiffs when the agreement to sell the lots was entered into. That the plaintiffs' equitable interest has priority over subsequent equitable and legal interests except those of a bona fide purchaser of an interest for value without notice of the plaintiffs' interest. That Woolf had notice of the plaintiffs' interest and thus the plaintiffs interest rank as against him.

Woolf replies that equitable doctrines do not apply to this case. That the Registered Land Law does not recognize an equitable and unregistered interest and that by failing to lodge a caution under the provisions of section 127 of the Registered Land Law the plaintiffs have lost any claim to priority over Woolf's charges which were noted on the register.

Does the Registered Land Law recognize equitable interests which are not noted in the register? There is no local authority on the point but I have received guidance from overseas authorities, particularly those of Australia where a Torrens System of registration of land prevails.

Section 3 of the Registered Land Law (RLL) is what I may term the 'inconsistency section'. It 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 as overriding any provision of any other law requiring the consent or approval of any authority to any dealing.'

That section, according to Woolf's counsel, settles the

matter. The principles of equity relied on in this case are inconsistent with the statutory provisions relating to registration of interests. The Real Property Act of New South Wales has, in section 2(4), a similar "inconsistency" provision. I say similar in that although the wording is different to our section 3 its clear effect is to repeal all former "laws, statutes, Acts, ordinances, rules, regulations and practice," inconsistent with the provisions of the Act. Griffith CJ. of the High Court of Australia said in Barry v Heider (1914) 19 C.L.R. 197 that in his opinion equitable claims and interests are recognized by the Real Property Act of New South Wales. This proposition, and the general principle of recognition, were approved by the Privy Council in Great West Permanent Loan Co. v Eriksen [1925] A.C. 208 at p. 223. It is as well to set out the passage in that case here, particularly as I have not had the advantage of seeing the full text of Barry v. Heider.

"The effect of provisions similar to, but not identical with, those quoted, contained in the Real Property Act, 1900, of the State of New South Wales, on the position of the holders of unregistered transfers and subsequent mortgages by the transferees was considered by the High Court of Australia on the case of Barry v. Heider. In that case the contest was between Barry, the registered owner, and Heider and Gale holders of successive unregistered mortgages given by one Schmidt, the transferee under an unregistered transfer executed by Barry. The transfer to Schmidt had been set aside at the instance of Barry on the ground that it was obtained by fraud, and the question of the rights of the mortgagees from Schmidt was directly in issue. The provisions of the Saskatchewan Act are in some respects different from those of the New South Wales Act, but for the purpose of the point now under discussion the differences are immaterial. In that case Griffith C.J. said: "In my opinion equitable claims and interests in land are recognised by the Real Property Acts. It follows that the transfer of October 19, if valid as between the appellant and Schmidt, would have conferred upon the latter an equitable claim or right to the land in question recognized by the law. I think that it also follows that this claim or right was in its nature assignable by any means appropriate to the assignment of such an interest. It further follows that the transfer operated as a representation, addressed to any person into whose hands it might lawfully come without notice of Barry's right to have it set aside, that Schmidt had such an assignable interest."

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

Reference was made in the submissions to me to the indefeasibility of a title to land under the RLL, and the defence contended that only fraud or mistake affect such indefeasibility. The 'indefeasibility section', if I may call it such, is section 23 of the RLL which reads:-

' 23, 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 encumbrances 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) 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.'

I must say that I accept here the plaintiffs' contention that section 23 is confined to the proprietor of a parcel and does not extend to the proprietor of a charge. It does not, therefore, operate in this case to give Woolf an indefeasible interest.

The 'indefeasibility section' of the New South Wales Real Property Act is section 42. It is in many ways similar to our own section 23 but specifically excepts cases of fraud. In the commentary on section 42 in 'The Torrens System in New South Wales' by Baalman (Second Edition at p. 195) the following is stated:

'The Court will accordingly uphold, as against a registered proprietor, unregistered equitable interests created by himself. Thus, if A, a registered proprietor, contracts to sell his land to X, he cannot repudiate the contract on

the ground that the Act gives him an indefeasible title. "It is to my mind a clear principle of equity, and I have no doubt there are abundant authorities on the point, that equity will interfere to prevent the machinery of an Act of Parliament being used by a person to defeat equities which he has himself raised, and to get rid of a waiver created by his own acts": per Darley C.J. in Phillips v. Martin (1890) 11 L.R. (N.S.W.) 153 approved by the Privy Council in Wilson v. McIntosh [1894] A.C. 129 at 134. If A, in breach of his contract, transfers the land to B for value, X has no claim in equity against B personally because B, unless a party to fraud, obtains upon registration an indefeasible title. Cases in support of this principle are mentioned in the judgement of Isaacs J. in Barry v. Heider (1914) 19 C.L.R. 197 at 213, 214."

This means, of course, that Prospect Properties cannot hold up the indefeasibility of their title to defeat the claims of Myles and Winton. It also means that a purchaser of their title, under the New South Wales System, would obtain an indefeasible title unless they were a party to fraud. There are two points I would make in that connection. Firstly, for our purposes no great significance should be placed on the reference to fraud in this passage because our section 23 RLL does not specifically refer to fraud whereas the New South Wales section does. Secondly, as I have stated above our section 23 only gives protection to the proprietor of a parcel and not to the proprietor of a charge in this case Woolf. We must therefore look further to see whether, Prospect Properties being unable to hold up the indefeasibility of their title as against the plaintiffs the RLL provides protection to Woolf who acted in full knowledge of the contracts between the plaintiffs and Prospect Properties.

That leads me to consideration of section 38 of the RLL.

- \*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 was registered; or
  - (b) to see to the application of any consideration or any register kept under the Public Recorder Law or The Registration (Land) Law.
- (2) Where the proprietor of land, 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 for valuable consideration shall be defeasible by reason of the fact that such disposition amounted to a breach of trust."

Counsel for Woolf would have me hold that this section means that no person dealing with registered land need go behind the register. He referred me to the commentary in Baalman (supra) on the equivalent New South Wales provision, Section 43, of their Real Property Act where it says (at p. 202):

"On occasions the Privy Council has remarked upon a tendency in Colonial and Dominion Courts, in construing the Torrens standard of fraud, to mix too much equity with their Statute Law."

Three cases are cited in support. But it will be noted that we are not here dealing with the Torrens standard of fraud. The references to fraud in sections 42 and 43 of the New South Wales Statute are not contained in our equivalent sections, 23 and 38. The decision in this case does not rest upon an interpretation of fraud but basically on whether equitable doctrines apply to our RLL and in particular whether the doctrine of notice has been superseded by the legislative provisions for recording interests on the register.

Subsection (1) of section 38 does provide that a person dealing with a proprietor need not go behind the register, but only in respect of the several ways specifically referred to in the subsection. Had the Legislature intended to say that no person dealing with a proprietor need take account of any interest not contained in the register then it could have said so.

Subsection (2) of section 38 has no equivalent in the New South Wales Statute. It is interesting that this section does contain reference to a creature of equity, the bona fide purchaser for value. To my mind this lends support to my view that equitable doctrines are not in themselves to be regarded as inconsistent with the RLL.

The defence contention is that the RLL has signed the death warrant on the equitable doctrine of notice and points to the absence of reference to notice in section 38 (2) as an indication

thereof. It is argued that notice of an interest in land is given to the world by causing that interest to be lodged in the register, and notice cannot be given in any other way.

Whatever the reason for the Legislature leaving reference to notice out of section 38 (2) I have been referred to no provision which specifically provides that interests, legal or equitable, not noted in the register may be overridden in the manner suggested by the defence. Certainly the RLL provides for indefeasibility of title to land and we have section 30 of the RLL which provides :

'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.'

This means that a person who lodges notice of an interest in the register gives notice to the world. It does not create an obligation to register an interest, and indeed Section 127 does not make it obligatory for a caution to be lodged; it is discretionary at the instance of the person holding the interest. I do not consider, in the absence of any specific provision to the contrary, that failure to lodge notice of an interest in the register permits that interest to be overridden by those with actual notice of the interest. Most certainly a registered proprietor who creates an equitable interest is bound to acknowledge it and, to my mind, so must someone who acquires an interest through him with full knowledge of that prior equitable interest.

Returning now to the absence of reference to notice in section 38 (2) RLL, that subsection clearly envisages the concept of good faith being applied to dealings under the Law. In Midland Bank and Trust Co. Ltd. and another v. Green and another [1981] 1 All ER 153 Lord Wilberforce had this to say about good faith :

'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 interest, 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, S 3. 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.'

Clearly therefore there is some relationship between good faith referred to in section 38 (2) and notice.

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' interests in the parcels. His close relationship with Prospect Properties, be it as employee, shareholder, director, 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.

Furthermore, it was argued by the plaintiffs that there was in any case no valuable consideration for the charges raised in Woolf's favour. In other words even if notice was deemed to be absent, if equitable doctrines are to apply Woolf was not a purchaser for valuable consideration. This contention came out in paragraph 2(a) of the plaintiffs' amended reply to defence. So far as I understand it Woolf's position has been, not to argue that valuable consideration was given for the charges, but to argue that so long as his charges were registered he need not acknowledge any prior equitable interest not noted on the register. As I have shown Woolf was only protected if he was a bona fide purchaser for value without notice.

I need not burden this judgment with detailed consideration of the various transactions between Prospect Properties

and Woolf or detailed consideration of the many documents which were exhibited by consent in this case. I can state the position, I hope, succinctly. 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 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. 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 of 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 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. I am satisfied that no such valuable consideration was given.

That leaves me to consider the defences raised in paragraphs 9, 10 and 12 of the defence of Woolf. These are defences of waiver, estoppel and acquiescence, and reliance on a clause of the contracts between the plaintiffs and Prospect Properties. There is also a defence that as Prospect Properties is unable to deliver title to the plaintiffs because of the charges being in place the contracts between Prospect Properties and the plaintiffs are rescinded and thus damages are the appropriate remedy.

I can deal with these defences in a few lines since, not surprisingly, they were not dwelt on by Woolf's counsel. No authority was cited to me to demonstrate that the plaintiffs' failure to lodge a caution amounted to a waiver of their rights under the contracts with Prospect Properties or operated as an estoppel so as to bar them pursuing their claims under the contract. I suspect these defences were merely a corollary to the defence relating to notice. I see no merit in the defences.

The clause in the contracts relied on by the defence is:

"In the event of the vendor being unable to deliver title as provided for in this agreement the purchaser shall be entitled to a return of the monies paid hereunder and neither party shall have any further rights whatsoever."

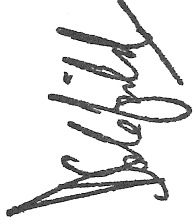
I do not consider that this clause would protect Prospect Properties, never mind Woolf who was not a party to the contract. This Court would not permit a party to defeat a contract in the way the defence urges this Court to do and force an innocent party to accept a remedy to that party's detriment when it is open to the Court to grant an appropriate remedy. To my mind specific performance is the appropriate remedy in this case and the Court is not restricted to awarding damages.

It follows from all this that I consider that Myles and Winton are entitled to their reliefs. Judgment is thus entered for both plaintiffs against both defendants.

I grant to both plaintiffs the orders for specific

performance as against Prospect Properties as prayed in paragraph (a) (i) of their amended statements of claim. I grant the two plaintiffs their orders for declaration, mandatory injunction and injunction as prayed in paragraph (b) (i) (ii) and (iii) of the amended statements of claim. As against both defendants I grant Myles an order 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 is due to Prospect Properties and what part is due to Woolf, unless the same can be agreed between the parties.

The plaintiffs will have their costs of this suit.



D. Schofield

Judge

30th March, 1989