

IN THE FIJI COURT OF APPEAL  
Civil Appeal No. 71 of 1985.

Between:

ATTORNEY-GENERAL

Appellant

- and -

1. VIJAY KUMAR

2. EVERETT RILEY

Respondents

Mr. J.K.L. Maharaj for the Appellant.  
Mr. D.C. Maharaj for the Respondents.

Date of Hearing : 29th October, 1985

Delivery of Judgment: 8<sup>th</sup> November, 1985

JUDGMENT OF THE COURT

SPEIGHT, VP

This appeal raises important questions under the Land Transfer Act (Cap. 131) concerning the powers of the Registrar of Titles to correct errors in the register of titles or to remedy omissions.

As between the first and second respondents there are serious conflicts of interest as to proprietorship of certain land; and the Registrar through the Attorney-General is concerned as to :

- (a) his liability, if any, in respect of errors which may have been made; and
- (b) broader questions as to the legal situation as to land ownership which arises in cases such as will be here described.

We are concerned with a plot of land containing 1 rood 4.3 perches in area at Deuba (Pacific Harbour). The Developers of that complex subdivided and sold freehold lots to various members of the public. The second Respondent (whom we propose to refer to by name) Mr. Everett Riley bought Lot 24, on which was erected Villa 93, in the year 1976 and became the registered proprietor under Certificate of Title No. 14576 by virtue of a memorial entered thereon and signed by the Registrar evidencing the registration of Transfer 144302 to him on 7th October 1976 from the previous registered proprietor P.D.C. Construction (Fiji) Ltd. This memorial was entered on both the original and duplicate copies of the Certificate. Contemporaneously a memorial was also entered, both on original and duplicate, of a mortgage from Riley back to P.D.C. Limited. In the ordinary course of events the mortgagee would have uplifted the duplicate and retained it until the mortgage was eventually discharged. That apparently occurred, for both original and duplicate bear a cancellation stamp showing a Discharge of that mortgage, but regrettably in neither case has the cancellation memorial been dated or timed by the signing Deputy Registrar - contrary to the requirements of Section 24 and 25. The Registrar should note this irregularity.

The next entries on the original title relate to two caveats.

The first is Caveat 164908 of 20 September 1978 at noon by Henry Grunstein. This is not signed by a Deputy Registrar and strictly speaking could be ignored for it is of no effect. In addition it has the word "Withdrawn" across it in handwriting but again no authentication. Then there follows Caveat 165271 also by Henry Grunstein and entered on the same date 20 September 1978 at noon - and in this instance authenticated by a Registrar's signature. It seems a possibility that the first entry referred to above may have been merely mistaken writing which has been deleted to be followed by an authentic entry - in which case there may only have been one caveat, although two widely differing caveat numbers are cited.

However that may be, once one ignores the first informal caveat memorial, one notices that the second caveat memorial bears the stamp "Cancelled" with the handwritten words "Withdrawn No. 172774" followed by a Deputy Registrar's signature. As with the mortgage discharge this cancellation is not dated and timed. The point may not be of great importance but we take the view that such a cancellation, withdrawal or discharge originating as it will from a separate document, or from a signed endorsement, constitutes a memorial and the requirements of Section 24 and 25 should be observed. The register in Land Transfer work is paramount, so procedural requirements should be meticulously complied with.

Now the duplicate copy of the certificate of title, by now presumably in the hands of the registered proprietor Riley, was not endorsed with these caveat memorials, and that is standard practice - the procedure merely requires the Registrar to enter the caveat in the original register and send notices to the proprietor (Sections 108, 109 and 115).

In 1979 there was a sale of an interest in this land from Riley to one Henry Grunstein. A transfer was lodged with the Registrar on 31st October, 1979 by a firm of solicitors and in accordance with normal practice they would have presented the duplicate certificate of title. Both the original and duplicate copies of the certificate were then endorsed with a memorial as follows:

" Trfr. 172774 Registered 31  
October 1979 @ 11.30a.m. to Henry Grunstein -  
Chandra, Deputy Registrar."

In due course the duplicate copy of the certificate would have been uplifted by Grunstein or his solicitors.

However it has subsequently been ascertained that the Transfer document from Riley set out the description of the interest being sold as:-

"Area 1 rood 4.3 perches. As to one undivided half share."

Riley has given evidence, accepted by the trial judge, that that was all he agreed to sell, and that Grunstein, who has since disappeared, was aware of that. By an error in the office of the Registrar the memorial was incorrectly written up and signed without this limitation, so that Grunstein was able subsequently to purport to sell the whole of the land.

He first asked the First Respondent (Vijay Kumar) who is an estate agent, to sell the villa on his behalf. Because the market was depressed there were no buyers. Grunstein said he was desperate for money and he agreed to accept an offer from Kumar himself. A deal was concluded. Grunstein brought in his duplicate certificate and gave it to Kumar and signed a transfer prepared by Kumar purporting to transfer "all the land" to him.

Kumar had had a search made of the original certificate in the registry and indeed obtained a photocopy of it. At that time the transfer memorials were identical, showing Grunstein as the proprietor of the whole of the land. The caveat or caveats of course appeared on the searched original but Kumar thought nothing of them because they had been cancelled.

An odd discrepancy was not noted by him. Although the clerk who had made the mistake in writing up the transfer had omitted to include the restriction as to "one undivided half interest" those words had been written in on the memorials entering the two (or one) earlier caveats.

An argument was advanced in the Supreme Court and again before us that Kumar ought to have observed those notations and been put on enquiry as to why only a half interest had been caveated. In his judgment Kearsley J.

5.

rejected that submission - he accepted the evidence of Kumar that he had not been further interested in the details of the caveats, once he noticed that they had been withdrawn. The Judge further held that the last memorial then appearing was sufficient justification for Kumar to accept it as an official announcement that Grunstein was the sole proprietor. We agree with these conclusions.

Kumar then had the signed transfer together with the duplicate title lodged at the Registry and as a consequence a memorial was entered on both copies of the certificate, witnessing the transfer of the land to him on 16.9.80.

Shortly thereafter he went to take possession of Villa 93, only to find Riley still in possession, and unaware of the transactions just described. As a consequence of Riley's complaint made through his solicitor the Registrar re-examined the position. The transfer from Riley to Grunstein was checked and of course it showed only a half interest was included on the transfer document and consequently on 22nd September 1980 the Registrar, purporting to act under Section 131(2) altered the Register original of Certificate of Title 14576 by adding the words "one individed half share only" and "as to one individed half share of H. Grunstein only" to the memorials of transfer Riley to Grunstein and Grunstein to Kumar respectively.

Section 131(2) reads as follows:

"131(2) The Registrar may, upon such evidence as shall appear to him sufficient in that behalf, correct errors in certificates of title, or in the register, or in entries made therein respectively, and may supply entries which may have been omitted to be made :

Provided that in the correction of any such error he shall not erase or render illegible the original words, and shall insert the date upon which such correction was made or entry supplied, and shall affix his initials thereto, and every certificate of title so corrected and every entry so corrected or supplied shall have the like validity and effect as if such error had not been made or such entry omitted except as regards any entry made in the register prior to the actual time of correcting the error or supplying the omitted entries."

Section 166 requires that if such a correction is made the Registrar should recall any instrument (in this case the duplicate certificate) for correction. This was not done, but by some means Kumar ascertained what had happened and when he again searched the Register he found the alterations which had been inserted on the original certificate as already described.

Consequently he issued an originating summons against the Attorney-General as nominal Defendant asking for determination of 3 matters.

1. Whether he was the registered proprietor of the whole of the land in the certificate.
2. Whether the Registrar had been entitled to unilaterally amend the transfer (meaning the memorial).
3. Whether he was entitled to have the Register amended and an order for possession against Riley.

In a succinct judgment Kearsley J. reviewed the facts and the relevant law and held that the Registrar had been wrong, that Kumar was entitled to have the Register amended to show him as the sole proprietor, and he made an order for possession in his favour. We will shortly discuss the submissions made in this Court

in support of the appeal, but we say at once that we agree with the conclusions of Kearsley J. and with the reasons he gave. As a matter of interest we also note that the file contains a copy of an opinion by Sir John Falvey, obtained by Riley, and it expressed the same view, and in our view the opinion he gave was a correct one.

A number of grounds of appeal were set out, but in the course of submissions some of these merged together. In renumbered form the grounds advanced were :

1. In some circumstances the principle "nemo dat qui non habet" still has relevance under the Land Transfer system.
2. Kumar was not entitled to take the memorial of transfer at face value, as the restrictions in the cancelled caveat memorials should have put him on guard.
3. Kumar was not a bona fide purchaser for value but was guilty of fraud.
4. The Registrar had power to alter the memorials by virtue of Section 131.
5. An order for possession should not have been made.

In support of the first contention Mr. Maharaj submitted that the facts in this case differ from those in such landmark decisions as Frazer v. Walker (1967) 1AC 569 (1967) NZLR 1069, Boyd v. Mayor of Wellington (1924) NZLR 1174 and Assets Company v. Mere Roihi (1905) AC 176. He submitted that in those cases the transferor intended to transfer the property in question, but there were imperfections in the documentation, whereas in the present case Riley never intended to transfer the whole of the land. Therefore he submits the maxim he relies on still has a place, because Grunstein had not received and therefore could not transfer more than the half interest

held by Riley. This submission overlooks the entire philosophy underlying the Land Transfer system : the purpose is to establish certainty of title based on registration, which can be taken as notice to the world of the identity and extent of interest of the person who is certified to be the owner. Gibbs v. Messer (1891) AC 248. It is recognized that innocent persons may suffer through error or other causes, but this must take second place to the merit of certainty, leaving injured parties to be compensated - in Fiji from the Consolidated Funded pursuant to Part XXII of the Act. The phrase so often used is that the registered proprietor's interest is indefeasible although that word is not used in the Act. A recent, but certainly not a novel summation of this cardinal principle can be found in a passage from a judgment of Barker J. in Church of Samoa Trust Board v. Broadlands Finance Ltd (1984) 2NZLR 704 at 712:-

" Prior to the determination of Frazer v. Walker by the Privy Council, there had been considerable debate amongst legal writers on the Torrens system, as to whether the principle should be one of deferred, as opposed to immediate, indefeasibility. The Privy Council ruled in favour of immediate indefeasibility. This concept confers on any bona fide registered proprietor or registered mortgagee (such as the defendant) all the benefits, rights and interests consequent upon registration, irrespective of any irregularity or error leading to the registration of the instrument, falling short of fraud on the part of the person seeking registration. This is clear from the advice of the Board delivered by Lord Wilberforce at p. 1075; he pointed out that registration, once effected, must attract the consequences which the Act attaches to registration whether that registration was regular or otherwise. In other words, the fact of registration determines the rights and interest of the parties in relation to the land."

Now in circumstances such as the present the title of Grunstein to the whole of the land could, at a certain stage of the proceedings, i.e. before the transfer to



Kumar, have been impugned; but not on the basis of the nemo dat principle, but because if he had acted fraudulently (which prima facie seems to be the case) his registration was an exception to the indefeasibility established by the Act as a whole and by Section 40 in particular:

"40. Except in the case of fraud, no person contracting or dealing with or taking or proposing to take a transfer from the proprietor of any estate or interest in land subject to the provisions of this Act shall be required or in any manner concerned to inquire or ascertain the circumstances in or the consideration for which such proprietor or in any previous proprietor of such estate or interest is or was registered, or to see to the application of the purchase money or any part thereof, or shall be affected by notice, direct or constructive, of any trust or unregistered interest, any rule of law or equity to the contrary notwithstanding, and the knowledge that any such trust or unregistered interest is in existence shall not of itself be imputed as fraud."

In cases of fraud of course enquiry can be had into the right of the registered proprietor to hold - but saving that exception and the correction of clerical errors - the Act recognises that once registered the proprietor's position is guaranteed, regardless of earlier blemishes.

"The effect of registration is to validate the purchaser's title notwithstanding defects in the vendor's registered title. The common law rule of Non dat qui non habet is wholly abolished in favour of purchasers of registered titles in good faith" Boyd v. Mayor of Wellington (1924) NZLR 1174 @ 1202."

Had Riley become aware of the error at an earlier stage, he would have been able to have the registration altered, either by demonstrating fraud against Grunstein, or by showing the simple clerical error that had occurred and which a Registrar has power to correct under Section 131(2). But, and this is the crux of the case,

the power to undo fraud or to correct clerical slips ceases when a new transaction occurs whereby a bona fide purchaser for value, relying on the face of the register, purchases and becomes registered.

"42(3) Nothing in this Act contained shall be so interpreted as to leave subject to an action of ejectment or for recovery of damages or for deprivation of the estate or interest in respect of which he is registered as proprietor any bona fide purchaser for valuable consideration of any land subject to the provisions of this Act, or any estate or interest therein, on the ground that the proprietor through or under whom he claims was registered as proprietor through fraud or error or has derived from or through a person registered as proprietor through fraud or error; and this whether such fraud or error consists in wrong description of the boundaries or of the parcels of any land or otherwise howsoever."

In Frazer v. Walker Lord Wilberforce made it clear that the equivalent New Zealand Section 183 limited the Registrar's powers of correction (which we will discuss in more detail shortly) to the period before a bona fide purchaser acquires title - in this case Kumar.

"It is clear, in any event, that s.81 must be read with and subject to s.183 with the consequence that the exercise of the Registrar's powers must be limited to the period before a bona fide purchaser, or mortgagee, acquires a title under the latter section."

Although the specific remark referred to the restrictions on the Registrar's power to correct, it follows from what has been said earlier that if the purchaser is bona fide he is free from fraud and no action whether by the Registrar or by an earlier proprietor taking proceedings could avail. There is authority elsewhere, not relevant to this case, that the protection is to a purchaser for value - not a volunteer.

We think this discussion of Section 40 and of cases which have considered the equivalent section in the

New Zealand jurisdiction dispose of appellant's first and second grounds as we have listed them.

Recognising the strength of these authorities Mr. J.K.L. Maharaj was really obliged to turn his main attention to the position of Kumar as a subsequent purchaser and endeavour to impeach his bona fide status.

In the Supreme Court some point had been made that the price paid by Kumar was low when compared with other sales which he would have known of, and that it could be inferred that he must have known that Grunstein only had a half interest to sell. Kearsley J. did not accept this submission and it was not renewed before this Court. It was submitted however that as Riley and Kumar were both land dealers, and had known each other for years, Kumar ought to have had knowledge of Riley's affairs, particularly as Kumar had bought a half interest from Grunstein of another piece of land which he had owned in shares with Riley. We see no reason to infer that, in the face of the title shown to him, Kumar should have thought the same situation applied with villa 93. Nor are we persuaded to the even more speculative, indeed fanciful submission that Riley Grunstein and Kumar were all conspiring together to defraud the Registrar or the Fund, when they discovered the registration error. There are no grounds shown for impeaching the bona fides of Kumar. Once the Grunstein - Kumar transfer was entered in the Register the position of Riley was beyond recall. Nor did the Registrar have any power to alter his Register.

The correction sections are Section 131, of which subsection (2) has already been recited, and Section 166 which reads :

"166. If it appears to the Registrar that any grant, certificate of title or other instrument of title has been issued in error or contains any misdescription of land or of boundaries, or that any entry or endorsement has been made in error on any such instrument, or that any such instrument, entry or endorsement has been fraudulently or wrongfully retained, he may summon the person to whom such instrument has been so issued, or by whom it has been so obtained or is retained, to deliver up the same for the purpose of being cancelled or corrected as the case may require, and, in case such person refuses or neglects to comply with such summons or cannot be found, the Registrar may apply to the court to issue a summons for such person to appear before the court and show cause why such instrument should not be delivered to be so cancelled or corrected, and, if such person were served with such summons neglects or refuses to attend before the court at the time therein appointed, it shall be lawful for the court to issue a warrant authorising and directing the person so summoned to be apprehended and brought before the court for examination."

34 Now these two are similar for all practical purposes and sections 80 and 81 of the New Zealand Act save that the power in the later part of Section 166 to issue a summons for the holder's position to be examined by the Supreme Court (Section 167) does not exist in New Zealand.

An interesting question has emerged during the course of submissions concerning the Registrar's powers of correction, which as far as we are aware has not been litigated before a Court previously. It relates to correction of the record in fraud cases. As this is a slip or clerical error case the point is not directly in issue nor was it fully argued, and consequently we propose to draw attention to it for guidance only, and the issue could only be resolved definitively on another occasion.

Section 131(2) gives the Registrar power to "correct errors in certificates of title, or in the register, or in entries made therein..." In dealing with the equivalent

NZ Section 80 Lord Wilberforce said that it was "little more than a slip section and not of substantive importance" (at p. 581) - it was this subsection which would have enabled the Registrar to correct the Register before the Grunstein to Kumar transfer had been registered.

Section 166 empowers the Registrar to call for return to him of any instrument which has been issued in error or contains a misdescription of boundaries (or has been fraudulently or wrongfully obtained for the purpose of having cancelled or corrected. (Our emphasis).

Now the point which arises is that the section allows the recall of any grant certificate or other instrument of title which has been issued and the power to summons is to the person to whom such instrument has been issued...to deliver up the same for the purpose of being cancelled or corrected. We point out that no express power is given to the Registrar to cancel or correct the original instrument retained in the register. In the case of an "error" in a certificate such power is expressly given by Section 131(2) but in Frazer v. Walker that has been held to apply as a "slip" section and not of substantive importance. It appears to us that a very real doubt emerges as to whether the Registrar can of his own volition alter the Register in cases where he may believe a fraud has occurred - albeit he has that power under Section 166 in the case of the issued duplicate. The question arises : Must he not first have a pronouncement from a court directing a correction on such a ground.

Three matters seem to point in that direction.

First, despite the high qualifications which a Registrar must have, and despite the integrity which is a sine qua non for the holder of such an office, he is not entrusted with judicial functions and powers as a judge is, before whom fraud cases are invariably tried.

Secondly there are other sections immediately preceding and following Section 166 which provide for the Court's jurisdiction in such matters to be invoked and given effect to :

- Section 165            Reference by the Registrar in cases of doubt
  
- Section 167            Powers in the Court to examine cases of recall of instruments under Section 166.
  
- Section 168            Power in the Court to direct corrections of the Register in inter party disputes.

Thirdly there have been pronouncements by the Courts that the Registrar should in any event only act in clear cases, and when in doubt should refer to the Courts.

See Duthie v. District Land Registrar at Wellington (1911) 31 NZLR 245 per Sim J @ 250.

"The power given by these sections should be exercised only where the right of the applicant is demonstrably plain. Where the right has to be made out against a registered title, upon facts and law it must be established in a regular action."

Similarly :

Manahi te Hiakai v. District Land Registrar  
29 NZLR 130; and

District Land Registrar v. Thompson (1922)  
NZLR 627.

This however has been a digression. The simple answer in this case is that what occurred was a clerical slip, capable of being rectified, if done in time, under Section 131(2). But once the subsequent transfer was

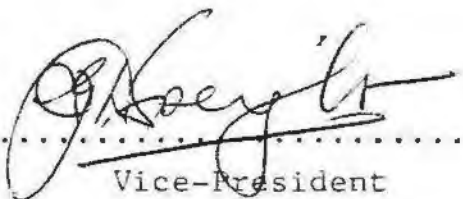
made to a bona fide purchaser for value (as Kumar has been held to be) then Section 42(3) became an absolute bar.

Alternatively, if the Registrar had believed there were grounds for challenging Kumar's bona fides, Court proceedings would have been required under Section 165, 167 or 168.

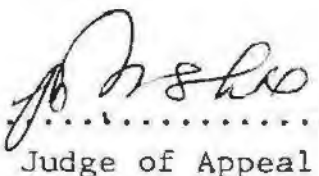
The remaining ground of appeal challenged the order for vacant possession on the basis that such relief was not available in these proceedings. We cannot accept this submission. The originating summons asked for an order for vacant possession and paragraph 18 of the Statement of Claim spelled out such a prayer.

The appeal is dismissed with costs to be fixed or taxed.

As a consequence the Registrar will be obliged to consider the position of Mr. Riley. Although it does not arise for determination in these proceedings it is clear he will be entitled to compensation for loss of his half share of the land and we suggest that it would be appropriate for the Crown to meet his reasonably demonstrated losses without delay.

  
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Vice-President

  
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Judge of Appeal

  
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Judge of Appeal