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MAGAN LAL GANDHI

v.

1. TRENHOLME ALLAN EDWARDS
2. WILLIAM STANDING

B

(COURT OF APPEAL—Gould V.P., Marsack, J.A., Spring J.A.,)

Civil Jurisdiction

Date of Hearing: 12 July 1982
Date of Judgment: 30 July 1982

C

Sale of Land—Torrens system—meaning of "registrable"—does not refer to instrument already stamped.

B. C. Patel for Appellant

M. S. Sahu Khan & S. D. Sahu Khan for the Respondents

D

Appeal against declaration made by the Supreme Court that the appellant (vendor) was liable to pay the stamp duty payable under an agreement of 15 May 1980 for sale and purchase of land at Nadi, Fiji called the Melanesian Hotel of which the respondents were purchasers.

E

The agreement recited that Vendor was the owner and the purchaser Standing the lessee and licensee. The Stamp Duties Act (Cap. 205) (the Act) provided that duty shall be levied in respect of instruments specified in the Schedule, including a transfer on sale, the duty being calculated according to the consideration. By s. 98 an agreement for the sale of any estate or interest in any property was to be charged with "the same valorem duty to paid by the purchaser as if it were an actual transfer on sale"

F

By s.5(1) duty was to be deemed to be a debt due to Her Majesty. S.5(2) and (3) read:

G

"5.—(2)Every person who with respect to any instrument of the nature mentioned in the Schedule comes with the description specified in the column thereof headed 'persons primarily liable' is personally liable to Her Majesty for the payment of the duty so chargeable on such instrument immediately upon the execution thereof.

(3) Nothing herein shall be deemed to exonerate any other person from any liability imposed upon him by or under this Act or to exempt any instrument from any duty or disability to which it is liable under this Act."

H

By the schedule, the person primarily liable in the case of a transfer upon sale is the transferee and section 98 made it clear that the same rule applied to an agreement for sale. The Court rejected an argument that the personal liability of the purchaser could not be shifted by agreement between the parties.

An agreement for the sale of the Hotel dated 15 May 1980 was signed by both parties. A

This contained the following—

6(h) The Vendor to be responsible for all costs in providing the purchases with registrable documents and any costs which may be incurred in clearing title. B

10. If there be any assessment or dues payable to governmental authorities in respect of the transfer of any licenses and without limiting the generality of the foregoing to include the Fijian Stamp Tax the same shall be borne by the Purchasers.

The court said the question for decision was whether “registrable document” in Clause 6(h) meant registrable and stamped documents. C

Held: “Registrable” indicates there will be no impediment to registration and registration relates to title. D

It was logical to provide that the vendor would have to pay costs of remedying matters which were his responsibility—and essential to giving the purchasers a clear title.

The Court said— E

“In our judgment (the purchasers) received a registrable document, though they had to pay the duty (and pay the registration fee)”

“In order to change the normal burden, it would be necessary to use clear words and this has not been done in Clause 6(h).” F

Appeal allowed.

Cases referred to:

The Commonwealth v. The State of New South Wales (1918) 25 CLR 325
Maynard v. Consolidated Kent Collieries Corporation Ltd. (1903) 2 K.B. 121 G

GOULD, Vice President:

Judgment of the Court H

The first and second respondents commenced proceedings against the present appellant by Originating Summons in the Supreme Court of Fiji at Lautoka seeking a declaration that the appellant was liable to pay the stamp duty payable under an agreement for sale and purchase dated the 15th May 1980, of land at Nadi, Fiji, called the Melanesian Hotel. The appellant was the vendor and the respondents were the purchasers; the stamp duty was \$4,000. The learned Judge in the Supreme

- A Court, having heard evidence, gave judgment for the respondents for the declaration sought and the costs of the action; from this judgment the present appeal is brought.

It will be convenient to refer to the appellant as the vendor and to the first and second respondents as the purchasers. The agreement recited that the vendor was the sole owner of the hotel, and that the purchaser Standing was the lessee thereof under an existing lease; it appeared from evidence given that Standing had the necessary licence and the vendor did not have to transfer any licence for the hotel.

- B
- C The vendor now resides in Canada where the negotiations for the sale took place. He acted through his lawyer, Mr R. E. Prouse, a barrister and solicitor of Brampton, Ontario. The purchaser, Edwards, is also a practising barrister in Alberta. The unfamiliarity of these gentlemen with Fiji law seems to have been accepted by counsel on both sides as falling within the realm of "surrounding circumstances" and in the event a good deal of evidence of at least doubtful admissibility had been put in without objection. No point has been made about this on the appeal and we do not propose to pursue it. The learned Judge correctly directed himself that he had to construe the document as a whole.

- D Section 3 of the Stamp Duties Act (Cap. 205) provides that duty shall be levied in respect of the instruments specified in the Schedule. A transfer on sale attracts duty on a scale according to the consideration money and by section 98 of the Act an agreement for the sale of any estate or interest in any property shall be charged with "the same ad valorem duty to be paid by the purchaser as if it were an actual transfer on sale...." Section 5(1) of the Act provides that duty shall be deemed a debt due to Her Majesty. Sections 5(2) and (3) read:—

- E "5—(2) Every person who with respect to any instrument of the nature mentioned in the Schedule comes within the description specified in the column thereof headed 'persons primarily liable' is personally liable to Her Majesty for the payment of the duty so chargeable on such instrument immediately upon the execution thereof.

- F (3) Nothing herein shall be deemed to exonerate any other person from any liability imposed upon him by or under this Act or to exempt any instrument from any duty or disability to which it is liable under this Act."

By the Schedule the person primarily liable in the case of a transfer upon sale is the transferee and section 98 (supra) makes it clear that the same rule applies to an agreement for sale.

- G Before proceeding further we will deal with an argument put forward by Mr Patel for the appellant: he said that the effect of the legislation to which we have referred was that because it made the purchaser personally liable that liability could not be shifted by an agreement between the parties.

- H We reject this argument. It is based on a dictum of Isaacs J. and Rich J. in their joint judgment in *The Commonwealth v. The State of New South Wales* (1918) 25 C. L. R. 325 at 344 where they said, in a stamp duty matter, that no man's legal obligation can be performed by another unless as agent of the first. We would agree that in the present case the parties could not, so far as the Crown is concerned, negate the primary liability of the purchaser to the Crown for the duty payable, but that does not prevent the parties from making, as part of their bargain, an agreement binding

on themselves and as between themselves that one or other shall pay the duty. There is nothing in the legislation to render such an agreement invalid. **A**

We proceed to consider the agreement. There was first a written offer by the purchasers to purchase the hotel. A draft agreement dated the 9th April 1980, was prepared by the vendor and submitted to the purchasers a number of amendments were made and these were agreed and the agreement signed. A good deal of time was taken up in the Supreme Court in evidence and discussion of the intention of the purchaser. Edwards, in making these amendments, but we are of opinion that the task of the Court is to construe the final agreement as it stands. This, in the end, appears to have been the course adopted by the learned Judge. **B**

The full terms of the agreement are as follows:

"MEMORANDUM OF AGREEMENT made this 15 day of May 1980 between: **C**

T. ALLAN EDWARDS and WILLIAM STANDRING
(hereinafter called the 'Purchasers')
OF THE FIRST PART

AND

MAGANLAL GANDHI
(hereinafter called the 'Vendor')
OF THE SECOND PART **D**

WHEREAS the Vendor is the sole owner of the Melanesian Hotel, in Nadi, Fiji.

AND WHEREAS William Standring, one of the purchasers, is Lessee thereof under existing Lease. **E**

AND WHEREAS the Purchasers are desirous of purchasing the same.

NOW THIS AGREEMENT WITNESSETH AS FOLLOWS:

1. The Vendor agrees to sell and the Purchasers agree to purchase the whole of the real estate being an estate in fee simple and buildings comprising the Melanesian Hotel in Nadi, Fiji at and for the price of Two Hundred Thousand (\$200,000.00) Dollars in Fijian currency in manner following: **F**

(a) Ten Thousand (\$10,000.00) Dollars Canadian (\$7,092.19 Fijian) as deposit to apply on account of the purchase price and to be deposited in a Fijian bank on closing, if the transaction is closed. If the transaction is not closed through no fault of the Vendor the said deposit shall be forfeited to the Vendor. **G**

(b) Two Hundred Thousand (\$200,000.00) Dollars (Fijian) less the deposit aforesaid on closing subject to usual adjustments.

2. The Purchasers may assign this agreement to a limited company (Fijian authority) in which they hold a major interest and upon supplying the Vendor with a copy of such assignment the transaction shall be closed out by the Vendor with such limited company and thereafter all liabilities hereunder on the part of the Purchasers shall be borne by the limited company. **H**

3. The purchase price shall include all buildings, improvements, fixtures, appurtenances and attachments, blinds, awnings, storm and screen doors and

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- A** windows, curtain rods, tracks, valances, fixed mirrors, carpeting, electric plumbing and heating fixtures and including all licences, benefits and rights presently associated with the property.
4. Adjustments for taxes, rents, insurance, etcetera shall be made as of July 1st, 1980 herein specified as the date of closing and time shall be of the essence.
- B** 5. All buildings shall remain at the risk of the Vendor until closing and if a fire or other catastrophe should occur the purchasers may elect in writing within ten days thereof to take the insurance proceeds and close the transaction or avoid the transaction and be entitled to the return of all monies paid on account.
- C** 6. This agreement is subject to the following conditions precedent to be made on or before July 1st, 1980:
- (a) Purchase price in Fijian funds and the amount is to be payable in those funds and is subject to adequate financing.
- (b) Fijian Company in which T. Allan Edwards and William Standring have an equal interest and equal control to be the registered owner of the property which Company is to be properly registered as a Limited Company.
- D** (c) Subject to Fijian licensing approval and subject to approval of Fijian authorities of the purchase by the Company hereinbefore referred to in which the Purchasers are to be equal shareholders.
- (d) Any dispute between the parties is to be resolved in accordance with the laws of Fiji and any triable issue between the parties is to be heard in Fijian Court.
- E** (e) Any monies paid by way of deposit are to be invested in a term saving Certificate in Canada with interest accruing to the purchasers until such time as all of the conditions precedent have been met.
- (f) Land is to be valued to Ten Thousand (10,000.00) Fijian and the balance applied to buildings and fixtures.
- F** (g) The Purchasers are to receive clear title with all adjustments as of July 1st, 1980.
- (h) The Vendor to be responsible for all costs in providing the Purchasers with registrable documents and any costs which may be incurred in clearing title.
7. On closing hereof the Purchasers will assume the existing Lease agreement with Bill Standring and the Vendor shall thereafter be freed therefrom.
- G** 8. Closing hereof shall be at the offices of the Vendor's solicitors in Fiji viz Bhupendra C. Patel (Stuart Reddy & Co.) Barristers and Solicitors, P.O. Box 60, Lautoka, Fiji Islands at 2.00 p.m. Fiji time or at such other time and place as the parties may in writing agree upon.
- H** 9. Each of the parties shall pay his own legal expenses attendant upon this transaction and the Purchasers shall search the title at their own expense within forty days of the date of execution hereof by the Purchasers and submit requisitions, if any, on title to the Vendor's solicitors within that time and if there be any which the vendor is unable or unwilling to remove notwithstanding any intermediate negotiations the transaction shall be at an end with all monies paid on account thereof refunded to the Purchasers.

10. If there be any assessment or dues payable to governmental authorities in respect of the transfer of any licences and without limiting the generality of the foregoing to include the Fijian Stamp Tax the same shall be borne by the Purchasers. **A**

11. Notwithstanding that this agreement is drafted and executed by the Vendor in Canada, if any dispute should arise in respect thereto the same shall be resolved by reference only to Fijian law. **B**

This agreement is for the benefit of and binding upon the heirs, executors, administrators and assigns of the parties hereto.

SIGNED, SEALED AND DELIVERED
in the presence of:

(Sgd)	(Sgd)	C
.....	
	Maganlal Gandhi	
(Sgd)	(Sgd)	
.....	
L. Carruthers	T. Allan Edwards	D
(Sgd)	(Sgd)	
.....	
L. Carruthers	William Standring	

The parties hereto agree that the Purchasers are trustees for a Company to be incorporated by the Purchasers in Fiji under the name of Melanesian Hotel Company Limited or such other name as may be approved by the Purchasers for the Registrar of Companies. **E**

Signed by said in the presence of:

	(Sgd)	
	F
	Maganlal Gandhi (by his agent)	
(Sgd)	(Sgd)	
	
	T. Allan Edwards (by His Lawful Attorney)	
	(Sgd)	G
	
	William Standring	

Clause 11, showing that Fiji law is to be applied, is to be noted. Of the other clauses Clauses 6, 9 and 10 are relevant to the present problem.

In our opinion there is only one question for decision and that is whether the words "providing the Purchasers with registrable documents" in Clause 6(h) of the agreement are properly to be construed as meaning "registrable and stamped" documents. The learned Judge so held, on the basis that a document such as a **H**

A transfer on sale would not be accepted for registration unless it were first stamped or the prior agreement had been stamped. The learned Judge said—

“It follows that payment of stamp duty is a prerequisite to the registration of a document of title and clause 6(h) of the agreement requires the vendor to provide a registrable document of title and he cannot do so without paying the stamp duty.

B On the basis of clause 6(h) the plaintiff would be entitled to the declaration unless clause 10 varies or negatives it.”

The learned Judge did not find that Clause 10 interfered with his view of Clause 6(h).

C We fully agree that this transaction could not have been registered in the Land Registry without the requisite duty having first been paid. Comprehensive evidence of the practice of that office, which was given by Suresh Chandra, Deputy Registrar of Titles, fully supports that view. In one sense then the learned Judge was justified in finding that the document was not registrable.

D Yet we are convinced that this is not the correct or intended interpretation. The normal use of the word registrable in a context such as this, is to indicate that there will be no impediment to registration, and registration relates to title. The word imports that registration will not be impeded, prevented or delayed by matters which lie at the door of the vendor. There might be a caveat, a lien or the like registered against the title, or a mortgage or other encumbrance which should have been released may not have been. Such matters prevent a transfer from being “registrable” and the references to costs in Clause 6(h) refer to the costs of making the transfer registrable in this sense. It is logical to provide that the vendor shall pay the costs of remedying matters which are his responsibility and are essential to give the intending purchasers a clear title. It is the reverse to seek by interpretation to include a payment which, by law and practice, has nothing to do with the vendor but is the responsibility of the purchasers. In the context the latter, in our judgment, received a registrable document, though they had to pay the duty (and pay the registration fee) to complete the process of registration. In order to change the normal burden in relation to stamp duty it would be necessary to use clear words and this has not been done in Clause 6(h).

F Having regard to the view we take of Clause 6(h) we do not need to discuss Clause 10. Whatever its purport, it obviously does not relieve the purchasers of liability for stamp duty. Neither does Clause 9 assist the purchasers in any way. They must pay their own “legal expenses”, an expression which, in the case of a purchaser, includes stamp duty. This practice will be indicated in almost any text book (we select Moss on *Sale of Land in New South Wales* 5th Edn p. 187) and is supported by the fact that the Stamp Duties Act places primary liability on the purchaser.

G We would mention that in the course of his argument for the respondents Mr Sahu Khan referred to the case of *Maynard v. Consolidated Kent Collieries Corporation Ltd.* [1903] 2 K.B. 121, the case of a company refusing registration of a share transfer on the ground that it was insufficiently stamped. Though of interest in relation to the effect of unstamped documents it does not have a bearing on the meaning of the word registrable in a context such as the present. As we have indicated, the transfer in the present case was not capable of registration without prior payment of stamp duty. It remains, however, in our opinion, a registrable document in the only

sense really germane to the essential transaction, to which the payment of stamp duty is no more than incidental. A passage from Baalman's *The Torrens System in New South Wales* (2nd Ed), in discussing section 43A of the Real Property Act, 1900 (N.S.W.), though not directly in point, conveys fairly aptly the nature of the meaning we prefer. It reads: **A**

"Clearly a dealing is registrable within the meaning of section 43A where the dealing is: **B**

- (a) wholly in order in a formal sense
- (a) received from, and properly executed by, the registered proprietor
- (c) accompanied by the duplicate instrument of title."

For the reasons we have given, the appeal is allowed and the declaration sought in the Supreme Court is directed to be refused. The respondents will pay the costs of the appellant in the Supreme Court and of this appeal. **C**

Appeal allowed.