

ANZ (Vanuatu) Ltd.vGraziella Laille Gougeon, Aime Claude Malere,Reuben Q Tamata Hon. Joe Natuman, Levi Tarosa,and the Government of the Republic of Vanuatu

Case Reference: Civil Appeal Case No. 6 of 1998

Court: This case was heard in the Court of Appeal of the Republic of Vanuatu on September 28th 1999.

Coram: The judges were: Acting Chief Justice Vincent Lunabek, Mr. Justice J. Bruce Robertson, Mr. Justice John von Doussa and Mr. Justice Daniel Fatiaki.

Summary: Indefeasibility of title registered under the Land Leases Act CAP 163 – Availability of rectification – Whether the right to rectification a mere equity or an equitable interest – The nature of a right to register a mortgage - The ranking of equities – Application of the maxim "where the equities are equal the first in time prevails".

The Facts:

This case was an appeal from a decision of the Supreme Court delivered on 25th September 1998. The Appellants were the ANZ Bank. There were six respondents. Significant to the decision of the court were the first and second respondent, Laille and Malere.

Madame Laille acquired title to leasehold land. The date of the acquisition is not clear from the transcript, but this must have happened sometime before March 1995. The acquisition was done through her agent Mr. Malere, who held a power of attorney for this transaction, as she was out of the country. Title was registered in her name.

In March 1995 Mr. Malere registered a transfer of Madame Laille's interest to himself, acting as her attorney as vendor and as himself as purchaser, signing the transfer document with his own name in both capacities. This transfer was a fraud. Madame Laille had never agreed to such a transfer and never received any consideration for it.

Prior to the registration of Mr. Malere on the register of title Madame Laille had received notification from the Lands Department of his application for such a transfer and seeking her confirmation of this. She denied any transfer. She also completed a form revoking the power of attorney conferred on Malere. None of these communications, nor others made through the Consulate of Vanuatu, reached their intended recipients and the registration to Malere went ahead.

Shortly after Mr. Malere borrowed 26 million vatu from the ANZ bank, secured by way of a mortgage against the property. In 1996 Madame Laille applied to have the register rectified so that the property was

registered in her name. The ANZ Bank sought to have their mortgage registered. Both parties had suffered as a result of Mr. Malere's fraud.

The Law:

The relevant law under consideration was that contained in the Land Leases Act CAP 163 sections 15, 16 and 100.

Section 15 states that the rights of the holder of a registered interest shall not be liable to be defeated by other rights unless these are registered, or a declared not to require registration, or as otherwise provided by the Act.

Section 16 states that were the person holding the registered interest has acquired it without valuable consideration then his rights may be defeated by any unregistered rights which would have bound the transferor, and by any legal provisions relating to bankruptcy or winding up. Apart from these interests however, the registered proprietor who had not given consideration would have similar rights to the registered proprietor who had given valuable consideration.

Section 100 provides that the Court has the power to order rectification of the register either under powers conferred under the Act, or it is satisfied that "any registration has been obtained, made or admitted by fraud or mistake". This power could not be exercised if the proprietor in possession had acquired the interest in the property for valuable consideration and had no knowledge or part in the fraud, omission or mistake.

It was not disputed that Mr. Malere was on the register, nor that the registered owner had certain rights. Under section 16 he had not given valuable consideration for the property and he knew of the fraud. The court was satisfied that Madame Laille had not contributed to the fraud or mistake. The court, could therefore, exercise its powers under section 100.

Although under section 16 Mr. Malere was a person who had acquired a registered interest by transfer without valuable consideration, the unregistered mortgage held by the bank was not an interest falling under that section as it had not been an interest affecting Madame Laille – the transferor. If the register was rectified then under section 15 Madame Laille would take free of the bank's interest which was not on the register.

The bank had no objection to Madame Laille seeking to have the register rectified. However it wished to have its mortgage registered against the property.

The Court recognised that the bank had an equitable interest in the property in an unregistered mortgage. The Court also held that Madame Laille had the right to seek rectification of the register and the Court had the power to rectify the register in the circumstances.

There were, therefore, two competing claims. It was argued before the Court that while the bank only needed to register its mortgage Madame Laille depended on the Court to exercise its powers under section 100. It followed, it was suggested, that Madame Laille's right was a lesser right than that claimed by the bank. Her right was a "mere equity" the bank's was an "equitable interest".

The Court considered this distinction and dismissed it. It held that there were two rights in equity and the question for the court was which one should be given priority. Applying the general principle that the first in time will prevail, the Court held that the primary judge had been correct if ordering the register to be rectified.

The Appeal was dismissed.

Ratio:

The ratio of the case is based on a rejection of any rigid categorization of interests into "equitable interests" and "mere equities", and the adoption of a more pragmatic test of "weighing the particular circumstances of individual cases".

In this case Madame Laille had lost her position on the register as the result of Mr. Malere's fraud and the wrongful actions of the Government Department responsible for maintaining the record. The Bank had not checked the record or registered its interest. The court did not accept that it had an advantageous position over Madame Laille who had been improperly and fraudulently removed from the register.

Obiter Dicta:

Early in the case there is some discussion on the issue of indefensibility of title once title is registered. The general principle applied in the law of Australia, New Zealand and England is that title, once registered, is indefeasible. The Court referred with approval to dicta in a Papua New Guinea case of *Emas Estate PTY Ltd. v John Mea (1993) PNG LR 215*, challenging this principle. As section 100 of the Land Leases Act of Vanuatu, CAP 163, clearly gives the Court the power to rectify the register, it is apparent that title is not indefeasible in certain circumstances.

Comment:

This case reflects a growing trend in the region to adopt a pragmatic, just and practical solution to the problem. Indeed the decision upheld by the Court of Appeal would appear to do that. Innocent and unsuspecting Madame Laille gets back her property from the fraudulent, deceiving Mr. Malere, and the Bank, which is big, anonymous and implicitly negligent, has to look elsewhere. In passing the efficiency of the Government Department – which claimed it never received any communications from Madame Laille – is criticised for its "wrongful actions".

And so a "just" result is reached by finding that the "equities are equal" and so "the first in time prevails". The distinction between a "mere equity" and "an equitable interest" is cast aside in order to land safely on this useful equitable maxim.

The danger with pragmatism is that principle may be thrown out of the window. Indeed the conflict is acknowledged in the report of the case: *Principle and rights are at the core but finding practical, just and pragmatic solutions to human problems is the preferred route.*

This raises the age-old problem of certainty versus flexibility in the law; of weighing the particular circumstances of the case or constraining equity into some kind of system.

In fact the Court could have reached the same result and not thrown established legal principles to the wind. Indeed the opening was present before the Court. Quoting from Parkinson *The Principles of Equity* (1996) p. 81, it was stated: *The right to set aside a transaction for fraud or undue influence may be characterised as an equitable interest only if it is the transferor of that property who is entitled to set the transfer aside. The transferor will be treated as having never parted with that property in equity, despite the transfer of the property at law. In this sense the transferor's equitable interest in the subject property still subsists.*

Surely Madame Laille fitted this definition. If so it could have been argued – and perhaps it was but not recorded in the judgment – that she retained an equitable interest, which, being the first in time prevailed over that of the Bank. She may, in addition have had an equity to have the register rectified.

The equitable remedy of rectification is probably most familiar to students of law in the context of

contract, and problems relating to what was the common intention and what was reflected in the document evidencing that. Unilateral rectification is allowed, however, in the case of fraud, or where the guilty party is estopped from resisting rectification. Being equitable, rectification will not usually be granted where it would adversely affect the rights of a third party who has acquired rights bona fides and for value (*Smith v Jones* [1954] 1 WLR 1089; *Frazer v Walker* [1967] AC 569; *Thames Guaranty Ltd v Campbell* [1985] QB 210). Thus the Bank would be protected in equity against rectification, but here rectification was statutory.

The right to rectification is personal and therefore generally regarded as a "mere equity" (*Cave v Cave* (1880) 15 Ch D 639; *Reeves v Pope* [1914] 2 KB 284). As such it will not bind a subsequent purchaser for value without notice (*Downie v Lockwood Supreme Court of Victoria* (1965) VR 257). Only if the "mere equity" is dependent upon an equitable interest or estate in land might it bind a purchaser, but then only if the purchaser has notice of it (*National Provincial Bank Ltd. V Ainsworth (HL)* [1965] AC 1175 per Lord Upjohn). Here Madame Laille had not protected her right to rectification with a caution on the register – a course which would have been open to her.

Even if the equities were equal, it is not always the case that the first in time must prevail. There are exceptions to this rule. Had Madame Laille been found to be negligent in protecting her title or to have connived in the fraud in some way, then the merits of the second in time may displace the claim of the first in time. The attention given by the Court to Madame Laille's actions may have been directed at trying to ascertain this, although this is not clear from the report. The case of *Breksvar v Wall* [1971] 126 CLR 376, which is referred to in favour of the idea that there is not absolute rule of classification, is authority for exceptions to the maxim that "the first in time prevails".

Although it may be tiresome, the distinction between an equitable interest in property and a mere equity as a personal right – here the right to rectification – remains important. Personal rights cannot be devised by will, property rights can. While the case does not definitively label the equity of rectification as always being an equitable interest – as opposed to a "mere equity", the approach adopted may engender some problems in the coming years.

Note:

Vanuatu is fortunate in having an established law reporting system. Without such systems there can be no body of regional jurisprudence. In this respect the judiciary of Vanuatu play a key role through their judgments. In this case, as in others, reference is made to authorities relied on by counsel before the court. While it may not be possible to have the full arguments of counsel reported, it would be helpful if law reports contained a reference to these by way of cases approved, cases distinguished and cases rejected. This would assist both future litigants, legal practitioners, law students and legislators.

Sue Farran
17.5.00

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