

Privy Council Appeal No. 33 of 1995

Racoon Limited Appellant

v.

(1) Harris Turnbull Executor of James Turnbull

(deceased) and

(2) Harris Turnbull

Respondents

FROM

**THE COURT OF APPEAL OF THE
BRITISH VIRGIN ISLANDS**

JUDGMENT OF THE LORDS OF THE JUDICIAL
COMMITTEE OF THE PRIVY COUNCIL,

Delivered the 22nd May 1996

Present at the hearing:-

Lord Goff of Chieveley

Lord Griffiths

Lord Jauncey of Tullichettle

Lord Steyn

Lord Hoffmann

[Delivered by Lord Jauncey of Tullichettle]

1. This appeal arises out of a disputed right of way over land in Tortola in the British Virgin Islands and involves consideration of certain sections of the Land Adjudication and Registered Land Ordinances of 1970 which changed the system of land registration from one of deeds to one of title.

2. The background to the action may conveniently be summarised chronologically:-

28th August 1965 Samuel Penrose acquired 100.68 acres of land known as Greenbank Estate which was bounded on the south *inter alia* by lands belonging to James Turnbull.

8th September 1967 Penrose conveyed to Greenbank Estate Company Limited ("GECL") 49.87 acres of the above land including that part bounded by the land of Turnbull.

21st June 1968 GECL agreed to sell to Simrose Limited a part of the above 49.87 acres which included the part bounded by the land of Turnbull. Penrose was a director of both GECL and Simrose.

11th February 1972 Turnbull granted to GECL a lease for five years from 21st December 1971 of "a strip of graded road approximately twenty (20) feet wide and approximately one hundred (100) feet long connecting land of the lessee known as Greenbank Estate to the public road" which bounded Turnbull's land. There was an estate road over Greenbank Estate which terminated at the above strip of graded road. Although at the date of the lease the land abutting that of Turnbull was owned by Simrose, it appears that GECL retained

responsibility for the estate road and that the buyers of plots of ground from Simrose were obliged to pay to GECL an annual maintenance charge in respect of the road.

5th December 1972 Simrose conveyed 1.22 acres to Mr. and Mrs. Schaum. This area did not abut on the land of Turnbull and the Schaums were required to contribute towards the upkeep of the Greenbank Estate road.

12th June 1979 The Schaums conveyed the above 1.22 acres to **Racoon Limited**, the appellant.

3. The lease of the road was not renewed and in 1982 Turnbull blocked the road as a result of which the appellant raised the present action.

4. The Land Adjudication Ordinance 1970 requires the preparation of an adjudication record consisting of a form relating to each parcel of land which is to form the basis of the land register prepared under the Registered Land Ordinance. Section 9 of the latter Ordinance provides that the land register shall comprise a register in respect of every parcel of land adjudicated upon and shall be divided into three sections namely, the property section, the proprietorship section, and the incumbrances section "containing a note of every incumbrance and every right adversely affecting the land or lease". Section 10 is in the following terms:-

"Whenever an adjudication record has become final under section 23 of the Land Adjudication Ordinance and the Adjudication Officer has delivered the adjudication record to the Registrar, the Registrar shall prepare a register for each parcel shown in the adjudication record and for any lease required to be registered, and shall register therein any of the particulars in the adjudication record which requires registration."

5. The Schaums submitted an adjudication claim form dated 4th April 1973 which made no reference to any right of way over Turnbull's land but the adjudication record prepared in response thereto contained the following entry:-

"3A. APPURTENANCES.

1. EASEMENT:- 20ft Right of Way over 2638B 27 from Public Road to Greenbank Estate Road (see lease No. 195 of 1972)"

6. This was a reference to the lease by Turnbull to GECL and suggests that the adjudication officer misconstrued the lease of the strip of land as a grant of a right of way. However, when the Schaums' title came to be registered on 28th June 1974 bearing parcel number 16 there was recorded as an appurtenance:-

"20ft Right of Way over 2638B 27 from Public Road to Greenbank Estate Road".

7. In omitting the reference to the lease the Registrar completely altered the character of the appurtenance which appeared in the adjudication record. This was an alteration which he was not empowered by section 10 to make and which was clearly erroneous.

8. Turnbull's title was registered bearing parcel number 27 on 25th September 1974 and the incumbrances section contained the following entry:-

"20ft Right of Way to Greenbank Estate created for five years from 21.12.71 by lease No. 195 of 1972 (filed with this parcel)."

This entry also misconstrued the lease as a grant of a right of way but accurately reflected the limited duration of the right which was conferred thereby. The result of these two entries was to produce a discrepancy in that the title to parcel 16 was

shown as having a general right of way over parcel 27 whereas that of the latter merely showed a right in favour of parcel 16 limited in duration to five years.

9. On 20th October 1982 after the blocking of the road the appellant raised the present action against Turnbull's executor seeking a declaration that as registered proprietor of parcel 16 it was entitled to a right of way 20 ft wide for pedestrians, horses and vehicles over parcel 27 and for an injunction against interference with the exercise of the right. A hearing took place in the High Court before Bertrand J. on seven days in June and July 1988 and on 30th May 1991 she gave judgment in which she held that the appellant had established more than twenty years continuous use of the road and was therefore entitled to the declaration and injunction sought.

10. The Court of Appeal set aside the order of Bertrand J. holding that the appellant had established neither appropriate user for twenty years nor acquiescence on the part of Turnbull for a lesser period and that accordingly the entry in the register recording as an appurtenance to parcel 16 a general right of way should be cancelled.

11. Before this Board Dr. Ramsahoye Q.C., for the appellant, argued that as a subsequent purchaser for value and without notice of parcel 16 he was entitled to rely on the entry in the register and that the proper remedy for the respondents was to have the entry relating to parcel 27 rectified and to claim compensation as provided for in the Ordinance. Mr. Douglas, for the respondents, submitted that registration of a right of way in the title of the dominant tenement was insufficient without a corresponding entry in that of the servient tenement to create a right enforceable against the latter. He further argued that the title to parcel 27 could not be rectified under the Ordinance.

12. The philosophy underlying a system of registration of title is that it confers indefeasibility of title to the specified parcel of land upon the registered proprietor and dispenses with any need on the part of persons dealing with him to investigate further his right thereto. Thus it is provided in section 38(1) of the Registered Land Ordinance 1970:-

"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

...

(c) to search any register kept under the Registration and Records Ordinance."

The register referred to in subsection (c) *supra* is a register of deeds prepared in accordance with the previous system of land registration. The Ordinance also makes provision for rectification of the register and for indemnification out of public funds of persons suffering damage as a result of rectification or impossibility thereof. Their Lordships were informed that the registration system in the British Virgin Islands was modelled on similar systems in Australia and New Zealand and were referred to observations of this Board in *Frazer v. Walker* [1967] A.C. 569. In that case a forged memorandum of mortgage granted by one of two joint proprietors was registered and subsequently enforced by the mortgagees on default by the mortgagor. A purchaser in good faith at auction whose title was thereafter registered

was held entitled to found on his registered title in proceedings for possession against the other joint proprietor. Lord Wilberforce delivering the judgment of the Board at page 580 referred to the phrase "indefeasibility of title" and continued:-

"The expression, not used in the Act itself, is a convenient description of the immunity from attack by adverse claim to the land or interest in respect of which he is registered, which a registered proprietor enjoys. This conception is central in the system of registration. It does not involve that the registered proprietor is protected against any claim whatsoever; as will be seen later, there are provisions by which the entry on which he relies may be cancelled or corrected, or he may be exposed to claims in personam. These are matters not to be overlooked when a total description of his rights is required. But as registered proprietor, and while he remains such, no adverse claim (except as specifically admitted) may be brought against him."

13. Their Lordships were also referred to *Breskvar v. Wall* [1971] [126 C.L.R. 376](#) in which the High Court of Australia held that the fact that an instrument of transfer of land was void or voidable did not prevent the transferee from acquiring an indefeasible interest in accordance with the instrument when it was registered.

14. Section 23 of the Registered Land Ordinance provides that:-

"... 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 of this Ordinance not to require noting on the register."

15. Section 28 provides that in the absence of a contrary intention all registered land shall be subject to such of certain specified overriding interests, including rights of way, as may for the time being subsist and affect the land without their being noted in the register. It might appear from section 23 that the effect of registration was to render unchallengeable any right recorded as an appurtenance. But Dr. Ramsahoye conceded, correctly in their Lordships'

view, that the Registrar had no power under that section on first registration to create a right of way or other easement which did not exist at the time of registration. How then has parcel 16 acquired a right of way over parcel 27? Dr. Ramsahoye argued that the appellant was a purchaser for value without notice and that therefore the registered entry for parcel 16 could no longer be rectified. It followed that the right of way referred to in the register had become indefeasible.

16. The two principal rectification provisions are section 139 which empowers the Registrar to rectify what may broadly be described as minor errors and omissions and section 140 which empowers the court to order rectification and is in the following terms:-

"140.(1) Subject to the provisions of subsection (2) of this section, the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration including a first registration has been obtained, made or omitted by fraud or mistake.

(2) The register shall not be rectified so as to affect the title of a proprietor who is in possession or is in receipt of the rents or profits and acquired the land, lease or charge for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default."

17. The Ordinance also makes provision for indemnification in section 141(1):-

"Subject to the provisions of this Ordinance and of any written law relating to the limitation of actions, any person suffering damage by reason of -

(a) any rectification of the register under this Ordinance; or

(b) any mistake or omission in the register which cannot be rectified under this Ordinance, other than a mistake or omission in a first registration; or

...

shall be entitled to be indemnified by the Government out of moneys provided by the Legislative Council."

18. Had the Schaums sought to enforce a right of way over parcel 27 in reliance on the entry on their title Turnbull could have applied to the court under section 140(1) for rectification of that title to conform to the true state of affairs. However, the position of the appellant, Dr. Ramsahoye argued, is different inasmuch as it purchased for value without knowledge of the error in the Schaums' title and therefore could rely on section 140(2) to avoid rectification. The Court of Appeal were accordingly in error in ordering such rectification. The proper course now was to rectify the title to parcel 27 under section 140(1) which would enable the respondents to claim compensation under section 141. Mr. Douglas argued that the Court of Appeal were correct to hold that any purchaser of a dominant tenement who did not search the title of the servient tenement was presumed to have knowledge. He further argued that the provisions of section 93 demonstrated that the system presumed that an easement was only effective where it was registered in the titles of both dominant and servient tenements. This section so far as relevant to the argument is in the following terms:-

"93.(1) The proprietor of land or a lease may, by an instrument in the prescribed form, grant an easement over his land or the land comprised in his lease, to the proprietor or lessee of other land for the benefit of that other land.

...

(4) The grant or reservation of the easement shall be completed by its registration as an incumbrance in the register of the land burdened and in the property section of the land which benefits, and by filing the instrument."

19. In their Lordships' view rectification of the respondent's title cannot take place under section 140(1). That subsection refers to the registration having been "obtained, made or omitted by fraud or mistake". When Turnbull's title was registered on 25th September 1974 the only mistake therein was to describe the right conferred by the lease as a right of way rather than a right of occupancy. The reference to the lease and the duration of the right were entirely accurate. There was accordingly no relevant mistake which could be rectified under section 140(1). The existence of the error in the registered entry of parcel 16 could

not *ipso facto* convert the subsequent substantially accurate entry of parcel 27 into a mistaken one. If Dr. Ramsahoye is correct that the entry of parcel 16 cannot be rectified it must follow that two inaccurate entries will remain on the register. Furthermore it would also appear to follow that Turnbull, due to the Registrar's error, has had imposed upon his land and without his knowledge a burden in respect of which he can obtain compensation neither from public funds nor from anyone else. This would be an unhappy situation and one which it seems unlikely that the Ordinance was intended to produce. Sections 140 and 141 provide broadly that a person adversely and unknowingly affected by an error in the register should be entitled either to rectification or compensation.

20. Dr. Ramsahoye argued that section 38 absolved a purchaser from looking at anything other than the entry of the parcel in the register. The section is undoubtedly concerned primarily with obviating the need for an individual to go behind the register in order to discover whether the seller, mortgagor or lessor derives his title from valid deeds. It does not however follow that where there is noted in the register a right or burden related to another parcel of land the individual can rely on section 38 to ignore the registered entry in relation to that parcel. Section 93 provides that where an easement is granted by instrument it is completed when registered in relation to both parcels of land. It would be surprising if an erroneous entry by the Registrar could become effective against the servient tenement without the knowledge of the proprietor thereof when an express grant by him is only completed by registration in relation to both properties. The fact that an examination of the title of the servient tenement might reveal nothing because an overriding interest was not noted in the register is nothing to the point. The person dealing with the proprietor of the dominant tenement would be put on his guard.

21. It is one thing to protect a proprietor with a registered title in relation to his rights over his own land. This was the position in *Frazer v. Walker* and *Breskvar v. Wall* where only one parcel of land was involved and where the issue was whether an adverse claim to land or an interest therein could succeed against the

registered proprietor. It is however another thing to protect a proprietor in relation to his rights over another registered parcel of land in circumstances where the other proprietor has no knowledge of the asserted right and consequential burden. In a situation where the rights of A extend over B's land it is entirely reasonable and consistent with the scheme of registration that someone dealing with A should satisfy himself as to the validity of his right by examining the registered entry of B. This does not require him to go behind the register but merely to examine two entries instead of one.

The system cannot have been designed solely to protect benefits conferred *ex facie* on proprietors without regard to the consequential burdens imposed on other proprietors. Where the registered entry of proprietor A erroneously detracts from his rights or fails to give him full advantage he has the opportunity of having the matter corrected. Where on the

other hand the error in A's title benefits him at the expense of proprietor B the latter has no opportunity of taking any corrective steps. In short a burden is imposed on his land without his knowledge and in circumstances in which he may be powerless to take any action and unable to claim compensation from anyone. He would thus be subjected to a form of compulsory acquisition without compensation. This cannot have been intended and shows that the general philosophy of indefeasibility of title cannot be applied without qualification to a situation in which the register shows that the titles of two or more proprietors are involved.

22. In these circumstances their Lordships consider that section 38 was not intended to apply to a situation such as the present and that the Court of Appeal were correct to conclude that a prudent purchaser of parcel 16 would and should also have examined the registered entry of parcel 27. It therefore follows that the appellant must be deemed to have had knowledge of the mistake in the registered entry of parcel 16 and that subject to any further considerations that entry falls to be rectified under section 140(2).

23. As a secondary submission Dr. Ramsahoye submitted briefly that Bertrand J. was entitled on the facts to find that there was acquiescence on the part of Turnbull. This contention was rejected by Liverpool J.A. in a carefully reasoned judgment in which the other members of the court agreed and which found no evidence to support acquiescence of Turnbull between the expiry of the lease in 1976 and the blocking of the road in 1982. Their Lordships see no reason to differ from this conclusion.

24. Their Lordships will accordingly humbly advise Her Majesty that the appeal should be dismissed. The appellant must pay the respondents' costs before their Lordships' Board.