

Nathalie Creque

Appellant

v.

Cecil Penn

Respondent

FROM

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

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

Delivered the 27th June 2007

Present at the hearing:-

Lord Bingham of Cornhill
Lord Rodger of Earlsferry
Lord Walker of Gestingthorpe
Lord Carswell
Lord Mance

[Delivered by Lord Walker of Gestingthorpe]

1. This appeal is concerned with the sale of two parcels of land (plots 125 and 126) in Virgin Gorda. The vendor was Mrs Nathalie Creque (the appellant before the Board) acting as administratrix of her late husband's estate. The purchaser was Mr Cecil Penn (the respondent, though he has not appeared, before the Board).

2. The sale was not preceded by any written contract. It was effected by two transfers executed on 22 July 1996. The transfers were in the standard form set out in the Third Schedule to the Registered Land Rules and contained the printed words "In consideration of . . . (the receipt

whereof is hereby acknowledged)". The words "the sum of \$40,000" and "the sum of \$60,000" were typed in on the transfers of plot 125 and plot 126 respectively. But Mrs Creque claimed that when she executed the transfers she had not in fact received \$100,000 or any part of that sum; and that her subsequent attempts to attain payment produced only \$14,800 from Mr Penn. Her case was that she executed the transfers without the purchase price having been paid because Mr Penn was a friend and she trusted his statement that he needed the executed transfers in order to obtain finance from a bank.

3. In 2002, shortly before the end of the limitation period, Mrs Creque commenced proceedings against Mr Penn, claiming \$85,200 as the balance of the purchase price, and interest from 22 July 1996 (there were further and alternative claims which are no longer relevant). Mr Penn's pleaded case was that he had paid the purchase price in full on execution of the transfers. His case at trial was that the consideration took the form of the release of Mrs Creque from pre-existing indebtedness to him under various commercial transactions.

4. The case was heard by d'Auvergne J who on 25 May 2004 delivered a reserved judgment in favour of Mrs Creque. The judge accepted Mrs Creque's evidence and found the evidence of Mr Penn inconsistent and unreliable. Her judgment contained some paragraphs concerned with the parole evidence rule but no discussion of section 106 of the Registered Land Act (which neither side seems to have referred to). The judge ordered Mr Penn to pay to Mrs Creque \$85,200 and costs of \$10,000. Her judgment did not award interest (nor did she give any reason for not awarding it). It appears that no formal order was drawn up, since when Mr Penn appealed to the Eastern Caribbean Supreme Court his notice of appeal annexed the full text of the judgment below.

5. Mr Penn's notice of appeal set out several grounds of appeal. There was no respondent's notice claiming interest. None of the grounds of appeal referred to section 106 of the Land Registration Act, although the second ground did refer to "evidence that contradicted and undermined the written documents." Nor was the section mentioned in the course of argument.

6. On 28 February 2005 the Court of Appeal (Alleyne and Gordon JJA and Rawlins JA (Ag)) gave judgment allowing the appeal and setting aside the judge's order. Rawlins JA (Ag) gave a written judgment in which the other members of the Court concurred. Section 106 of the Land Registration Act assumed central importance in his judgment. It is in the following terms:

“(1) Every disposition of land, a lease or a charge shall be affected [*sic*] by an instrument in the prescribed form or in such other form as the Registrar may in any particular case approve, and every person shall use a printed form issued by the Registrar unless the Registrar otherwise permits.

(2) [Relates to leases and charges]

(3) Instruments shall contain a true statement of the amount of [*sic*] value of the purchase price or loan or other consideration (if any), and an acknowledgment of the receipt of the consideration.”

7. The crucial passage in the judgment of Rawlins JA (Ag) was as follows (para 20):

“Section 106 contemplates that when a person executes a transfer in accordance with the stipulated requirements and acknowledges receipt of the value of the consideration, that person has in fact received it. A court cannot go behind an instrument of transfer, which is completed in accordance with the terms of section 106. The court cannot go behind the transaction and rely on extrinsic evidence in order to determine whether a seller in fact received the consideration that he or she acknowledges or whether the consideration was the same as that which is acknowledged in the instrument. The words in the instruments, ‘. . . in consideration of the sum of \$60,000 (receipt of which is hereby acknowledged)’ suffice.”

8. Mrs Creque now appeals to the Board. Mr Penn has not been represented, nor has he appeared in person, before the Board. But their Lordships have had the advantage of excellent written and oral submissions from Mr Chivers QC and Mr Wells, counsel for Mrs Creque. Mr Chivers has ably performed counsel’s duty of putting before the Board any matters on which counsel for Mr Penn, if instructed, might have been expected to rely.

9. Counsel’s submissions on behalf of Mrs Creque can be summarised in two basic propositions. First, there is a well-settled rule of equity that a vendor or mortgagor may, *as against his own purchaser or mortgagee*, give evidence to contradict a receipt clause, even if it is contained in a deed. Second, there is nothing in the scheme or language of the Land Registration Act which operates, either expressly or by necessary implication, to oust this well-settled equitable rule.

10. The leading statement of the equitable rule is in the judgment of Sir John Romilly MR in *Wilson v Keating* (1859) 27 Beav 121, 54 ER 47, affirmed by Lord Campbell LC and the Lords Justices 4 De G & J 588, 45 ER 228. The Master of the Rolls said (27 Beav 121, 126, 54 ER 47, 49),

“It is true the deed does estop the parties at law, because at law you cannot contradict the deed, but it is settled by abundance of authority, that in this [Rolls] Court you can contradict the statement of the payment of the purchase-money; nay more, though there is a receipt for the purchase-money endorsed and duly signed by the vendor, yet, even then, the vendor would have a lien on the estate for the unpaid purchase-money, and which would also be a debt due from the purchaser to the vendor.”

The position as against a third party (such as a mortgagee or a later purchaser deriving title from the original purchaser) would be quite different, because then it would be a matter of title, not personal obligation: see for instance the observations of Fry LJ in *Bickerton v Walker* (1885) 31 Ch D 151, 157, that the plaintiffs, although morally excusable, “were inexact and careless, and placed in the hands of [an unscrupulous assignee] the means of deceiving other persons.”

11. Mr Chivers rightly submitted that under section 14 of the Eastern Caribbean Supreme Court (Virgin Islands) Act (equities of the plaintiff) the equitable rule (coupled with the judge’s findings of fact) must be decisive in entitling Mrs Creque to relief, unless there is anything in the Land Registration Act to oust the rule.

12. The appellant’s second basic point, that there is nothing in the statute to oust the rule, was elaborated in written submissions which can be summarised in three propositions:

- (1) The Torrens system of land registration, although producing titles which are generally indefeasible, does not normally affect any personal right of action between parties to a transfer.
- (2) The Land Registration Act indicates that it was not intended to interfere with existing equitable and common law principles.
- (3) The Court of Appeal paid insufficient attention to some settled principles of statutory construction: that existing law can be changed only by clear statutory words, or if there is no other way of making sense of the enactment; and that a statute should not be permitted to become an engine of fraud.

13. The first of these three propositions is in the opinion of their Lordships correct, and conclusive of this appeal. The Land Registration Act provides for the British Virgin Islands to have the Torrens system of land registration, named after Robert Torrens, a South Australian MP who promoted the Bill by which the system (actually the brainchild of a German immigrant, Dr Hübbe) was introduced in South Australia in 1858. Torrens later became Registrar-General of South Australia. The system was described by Barwick CJ in *Breskvar v Wall* (1971) 126 CLR 376, 385 as:

“not a system of registration of title but a system of title by registration.”

See also Windeyer J at pp399-400. In *Breskvar v Wall* the High Court of Australia followed (and applied to the Queensland statutes with which they were concerned) the advice of the Board (of which Sir Garfield Barwick was a member) in *Frazer v Walker* [1967] AC 569 (an appeal from New Zealand).

14. Both those cases were mainly concerned with expounding the concept of indefeasible title (subject only to specific statutory exceptions) under the Torrens system. But in *Frazer v Walker* (at pp584-585) Lord Wilberforce explained that indefeasibility of title does not exclude the possibility of a right of action for a personal remedy between the original parties to a transaction:

“Before leaving this part of the present appeal their Lordships think it desirable, in relation to the concept of ‘indefeasibility of title’ as their Lordships have applied it to the facts before them, to make two further observations.

First, in following and approving in this respect the two decisions in *Assets Co. Ltd v Mere Roihi* and *Boyd v Mayor of Wellington*, their Lordships have accepted the general principle that registration under the Land Transfer Act, 1952, confers upon a registered proprietor a title to the interest in respect of which he is registered which is (under sections 62 and 63) immune from adverse claims, other than those specifically excepted. In doing so they wish to make clear that this principle in no way denies the right of a plaintiff to bring against a registered proprietor a claim *in personam*, founded in law or in equity, for such relief as a court acting *in personam* may grant. That this is so has frequently, and

rightly, been recognised in the courts of New Zealand and of Australia: see, for example, *Boyd v Mayor of Wellington* and *Tataurangi Tairuakena v Mua Carr*.”

Observations to the same effect were made by Lord Russell of Killowen in an appeal from Hong Kong, *Oh Hiam v Tham Kong* (1980) 2 BPR 9451, 9454.

15. Their Lordships do not think it necessary or appropriate to say much about the appellant’s second proposition, which is expressed in very general terms. The first part of section 3 of the Land Registration Act provides:

“Except as otherwise provided in this Ordinance, no other written law and no practice or procedure relating to land shall apply to land registered under this Ordinance so far as it is inconsistent with this Ordinance.”

Their Lordships do not find it necessary to attempt to determine the precise content of the rather vague words “practice or procedure relating to land”. There are some rules of equity (notably the general rule as to the effect of actual notice) which plainly are inconsistent with section 23 of the Land Registration Act (effect of registration with absolute title) and do not apply to registered land. It is sufficient to repeat the point made by Lord Wilberforce in *Frazer v Walker*, that the continued existence of rights of action of a personal nature, as between the original parties to a land transaction, is not inconsistent with the Land Registration Act. There is in fact a parallel with the equitable rule as explained in cases such as *Bickerton v Walker*: a plaintiff may contradict a receipt clause as against the original contracting party, but not as against the latter’s successor in title.

16. As regards the third proposition, principles of statutory construction, counsel’s written submissions refer to some well-known authorities such as *National Assistance Board v Wilkinson* [1952] 2 QB 648, 659 (Lord Goddard CJ) and 661 (Devlin J), *R v Secretary of State for the Home Department ex parte Pierson* [1998] AC 539, 587 (Lord Steyn) and *British Railways Board v Pickin* [1974] AC 765, 795-796 (Lord Wilberforce). It is not necessary to go into these authorities at any length but their Lordships accept that they support the conclusion that the Land Registration Act was not intended to exclude the possibility of a personal remedy which has no effect on the principle of indefeasibility of title.

17. For these reasons their Lordships conclude that the Court of Appeal erred in allowing the appeal (on grounds which had been barely, if at all, argued before them). There remains the judge's omission to award interest. This point was raised briefly before the Court of Appeal (despite the absence of a respondent's notice) but it was not referred to in the judgment (unsurprisingly, since the judge's order was set aside).

18. The Board has received further written submissions on this point from Mr Chivers and Mr Wells (a copy of these submissions has been sent to Mr Penn and acknowledged by him, with no further response). Their Lordships accept those submissions. They are satisfied that the court had jurisdiction to award pre-judgment interest on the unpaid purchase price, and that Mrs Creque has an equitable entitlement to such interest (see the opinion of the Board, delivered by Luxmore LJ, in *International Railway Co v Niagara Parks Commission* [1941] AC 328, 344-346, and section 14 of the Eastern Caribbean Supreme Court (Virgin Islands) Act).

19. The re-amended statement of claim asked for "interest on such sums found due at such rate and for such periods as to the court shall seem just," which amounted to substantial (though not complete) compliance with rule 8.6(4) of the Civil Procedure Rules 2000. There is no reason to suppose that either the failure to comply strictly with rule 8.6(4), or the absence of a formal respondent's notice, has caused any unfairness. The rate of pre-judgment interest to be awarded should be "that on which the plaintiff would have had to borrow money in place of the money wrongfully withheld by the defendant" (*British Caribbean Insurance Co Ltd v Perrier* (1996) 52 WIR 342, 354). In this case, on the materials put before them, their Lordships consider that the rate should be 9 per cent.

20. For these reasons their Lordships will humbly advise Her Majesty that the appeal should be allowed with costs before the Board and in the courts below; and that the order of d'Auvergne J should be restored, but with an order for interest at the rate of 9% from 22 July 1996 to the date of the judge's order (in addition to statutory interest at the rate of 5% from judgment and until satisfaction of the judgment).