LAND LAW

Indefeasibility of Title

In the recent Supreme Court of New South Wales decision, *Ratcliffe* v. *Watters* [1969] 2 N.S.W.R. 146, the facts were as follows: A was the registered proprietor in fee simple of certain land under the Real Property Act 1900 (N.S.W.). His daughter, S, by means of a forged authority purporting to be signed by A, fraudulently obtained the certificate of title to the land from solicitors holding it on behalf of A. S then went to see another solicitor intending to raise a loan on the security of the land. This was arranged by way of mortgage between the solicitor and the plaintiffs (mortgagees) and a person whom S obtained to masquerade as her father, A. On satisfactory completion of his requirements the solicitor caused the transfer and mortgage to be lodged for registration which was effected. A subsequent default having been made under the mortgage, the plaintiffs commenced an action in ejectment to recover possession of the land and the dealings therewith came to the knowledge of A who resisted the claim.

On the facts of the case it was held that there was no act or omission on the part of the solicitor going to the length of rendering him party to a course of conduct so reckless as to be tantamount to fraud. He was perhaps incautious in certifying that he personally knew the individual who signed as transferor, but Street J. stated that this did not differ from what any one of a great number of solicitors might well have done in similar circumstances. Street J. followed his decision in *Mayer* v. *Coe* [1968] 2 N.S.W.R. 747 applying *Frazer* v. *Walker* [1967] 1 A.C. 569 and held that:

> The Privy Council's decision is direct and binding authority laying down that a registered proprietor who acquires his interest under an instrument void for any reason whatever obtains on registration an indefeasible title. This will avail him against all comers unless:—
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> (a) There is a specific basis under the statute rendering him open to challenge; an example of such a specific basis of challenge is actual fraud on his part or on the part of his agent . . . or
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> (b) he is subject to a personal obligation by which he may be bound *in personam* to deal with his registered title in some particular manner.

In *Schultz* v. *Corwill Properties Pty. Ltd.* [1969] 2 N.S.W.R. 576 it was argued that the indefeasibility sections of the Real Property Act 1900 (N.S.W.) did not give to the registration of a discharge of mortgage the same indefeasible characteristics that flow, for example, from the registration of a transfer of an estate or of a grant of a mortgage from one person to another.

The facts of the case were as follows. Corwill Properties Pty. Ltd. was registered proprietor under the Real Property Act 1900 (N.S.W.) of land against which a mortgage was registered in favour of Mrs Schultz. The purported execution of the mortgage by the company as mortgagor was a forgery, committed by Mrs Schult's solicitor. Later a discharge of the mortgage was registered to which Mrs Schult's signature had again been obtained fraudulently by the same solicitor. Mrs Schultz died and her husband, as executor of her estate, brought proceedings against the company seeking declarations that he was the proprietor of the mortgage and that the company held the land subject to it.

Applying *Kissick* v. *Black* (1892) 10 N.Z.L.R. 519, Street J. held that a title registered by transmission has no greater indefeasibility than

the title of the previous proprietor. On the basis of *Frazer* v. *Walker, supra,* he held that the register is conclusive evidence establishing the title as disclosed by it on its face unless there is statutory authority for the removal of a registered interest, or unless there is some personal equity outstanding against the proprietor of that registered interest. In order to impeach the registered title on the ground that the dealing was tainted by the fraud of an agent the fraud must, Street J held, be committed by the agent within the scope of his actual or apparent authority. Although both the mortgage and the discharge were tainted by the fraud of the solicitor, in neither instance, it was held, was the principal vicariously responsible for such fraud nor was knowledge of it to be imputed to the principal. Therefore the company was declared to have an unencumbered fee simple in the land free from any interest therein on the part of the plaintiff.

Mortgage

The rights of a third party dealing on the faith of an unregistered memorandum of transfer of land under the Land Transfer Act 1952 were considered by the Supreme Court in *Premier Group Ltd.* v. *Lidgard* [1970] N.Z.L.R. 280. This case confirms that such cases as *Otago Harbour Board* v. *Spedding* (1885) N.Z.L.R. 4 S.C. 272 and *Waitara* v. *McGovern* (1899) 18 N.Z.L.R. 372 must be read in the light of the pronouncements of the High Court of Australia in *Barry* v. *Heider* (1914) 19 C.L.R. 197 and the Privy Council in *Great West Permanent Loan Co.* v. *Friesen* [1925] A.C. 491 and *Abigail* v. *Lapin* [1934] A.C. 491. Section 41(1) of the Land Transfer Act 1952 states that

> No instrument shall be effectual to pass any estate or interest in any land . . . , or to render any such land liable as security for the payment of money, but, upon the registration of any instrument . . . , the estate or interest specified in the instrument shall pass, or, as the case may be, the land shall become liable as security in manner and subject to the covenants, conditions, and contingencies set forth and specified in the instrument, or by this Act declared to be implied in instruments of a like nature.

This relates to legal interests in the land but equitable interests have always been recognised. Henry J. held that the plaintiff got more than a mere contractual right when it took delivery of an unregistered transfer and second mortgage. He was of the opinion that the case was to be determined by reference to principles laid down in *Barry* v. *Heider, supra,* where it was held by the High Court of Australia that an unregistered transfer of land confers upon the transferee an equitable claim or right to the land which is assignable by any appropriate means, and it also operates as a representation, addressed to any person into whose hands it may lawfully come without notice of any right of the transferor to have it set aside, that the transferee has such an assignable interest. In *Abigail v. Lapin, supra,* Lord Wright commented that "the statutory form of transfer gives a title in equity until registration, but when registered it . . . is effective to pass the legal title" (*ibid.,* 500). The equitable rights, previously acquired by the plaintiff without notice, could not be set aside.

Mortgage—Section 92 Property Law Act 1952—Notice

The notice given by the mortgagee under section 92 of the Property Law Act 1952 is not invalidated either because it specifies an excessive amount of principal as due, or because it may erroneously seek to

require from the mortgagor the payment of interest as part of the means specified by the mortgagee to remedy a specified default in payment of the principal sum. This was the decision of Richmond J. in the recent Supreme Court case of *Clyde Properties Ltd.* v. *Tasker* [1970] N.Z.L.R. 754.

In applying the Privy Council decision in *Campbell* v. *Commercial Banking Co. of Sydney* (1879) 2 N.S.W.L.R. 375 (a case decided under section 55 of the Real Property Act 1862 of New South Wales), the learned judge stated that "Section 92 requires the mortgagee to specify the default complained of and to require the owner to remedy the default . . . . In this respect it is similar to section 118(1) of the Property Law Act 1952 which deals with the notice to be given before any right of re-entry or forfeiture under a lease can be enforced." Although the amount of principal specified as due by the mortgagee in *Campbell's* case, *supra,* was in excess of the amount actually owing, the notice was nevertheless held to be valid, their Lordships stating " . . . not only that a notice under the Act is not bad because it demands more than is due, . . . but that where a demand is made for a larger amount than that which is really due, such demand does not do away with the necessity for tendering what is actually due, unless there is at the same time refusal to receive less" (*ibid.,* 385). Richmond J. distinguished *Jaffe* v. *Premier Motors Ltd.* [1960] N.Z.L.R. 146 (the only reported decision which dealt with a question in any way analagous to that which arose in the *Clyde Properties* case), on the grounds that in the present case there was no dispute that the principal moneys had in fact been due under the mortgage.

Landlord and Tenant—Pound Breach

In *Miami Buildings Ltd.* v. *Sullivan* [1970] N.Z.L.R. 653 a bailiff executing a warrant to distrain the chattels on premises owned by the plaintiff and originally leased by S, took an inventory but left the chattels entirely undisturbed and did not move, mark or physically secure them in any way. The goods were subsequently removed by a carrier engaged by one of the third defendants acting on S's instructions. The action for pound breach brought by the plaintiff under the Distress Act 1689 (Eng.) before Richmond J. failed against all the defendants and was dismissed because "the goods were not 'impounded or otherwise secured' in the true legal sense". They were left undisturbed, were not locked up or stored together and were not even marked in any way.

Richmond J. applied the decision in *Abingdon Rural District Council* v. *O'Gorman* [1968] 2 Q.B. 811 in which Lord Denning M.R. and Davies L. J. both took the view that in order to "impound or otherwise secure" the distress on the premises within the meaning of the statute, the landlord had to move the goods into a fit and convenient place on the premises, such as one of the rooms and lock them up. The goods have to be visibly secured on the premises against danger of removal by the tenant or anyone else. They agreed, however, that it was open to the tenant to agree to the goods being left as they were in the whole house, undisturbed with him having the use of them (a "walking possession agreement"). In this case the distraint would be good as against him but in their view it would not be as good as against a stranger without notice of the agreement. But, in the instant case, Richmond J. found that there was no evidence of bargaining or of an agree-

ment, express or implied, or of any unequivocal statement or conduct of any defendant precluding him from contending that the goods had not, in fact, been validly impounded or otherwise secured.

Legislation

There were no major legislative changes affecting the general law of real property. In the specialised field of Maori land law a number of detailed amendments which were made to the Maori Affairs Act 1953 and to the Maori Vested Lands Administration Act 1954 are embodied in the Maori Purposes Act 1970. Some changes were also made to the Land Act 1948 by the Land Amendment Act 1970.

J. W. Troon

TORTS

Negligence

(1) *Duty of Care*

In *Ross* v. *McCarthy* [1970] N.Z.L.R. 449 the Court of Appeal upheld the decision of Richmond J. that there is no liability in negligence on the owner of an animal which strays on to the highway and causes damage. In *Bativala* v. *West* [1970] 1 Q.B. 716 however, the defendant was held liable in negligence for damage caused by an animal which was on a highway. The defendant held a gymkhana in which one of the events involved young people unsaddling and saddling horses and riding them around a circuit as quickly as possible. One horse bolted, galloped on to a highway and caused damage to the plaintiff's car. The defendant was held liable for the damage in negligence on the ground that she ought to have realised that there could be " . . . a foreseeable reaction on the part of the animal to an incident of the activity in which the animal is engaged." (*ibid.*, 730).

An interesting fact situation is added to the list in which the duty of care as laid down in *Donoghue* v. *Stevenson* [1932] A.C. 562, has been applied by the decision of the House of Lords in *Home Office* v. *Dorset Yacht Co. Ltd.* [1970] 2 W.L.R. 1140. The Home Office was held liable for the damage caused by trainees who had escaped from a borstal as a result of the negligence of the borstal officers. The case is also interesting because the House of Lords showed its willingness expressly to analyse its own law making processes and to admit the way in which concepts such as justice and reasonableness were used by judges. Lord Morris emphasised that a judge's first task is to consider analagous cases and look to authority but if no lead was to be found then he was able to resort simply to whether it would be fair and reasonable for a duty to exist in such circumstances. He said, "Policy need not be invoked where reason and common sense will at once point the way" (*ibid.*, 1157).

(2) *Damages*

Before 1970 the position regarding the awarding of damages in negligence for economic loss was uncertain. However, as a result of the decision of the English Court of Appeal in *S.C.M. (U.K.) Ltd.* v.