CASE NOTES

REAL PROPERTY – VENDOR AND PURCHASER – TRANSFER OF LAND ACT 1928, TABLE A – REQUISITIONS ON TITLE NOT MADE – DEMOLITION ORDER

Zsadony v. Pizer[1]

A contract was made for the sale of a house which, without the knowledge of either party to the contract, had been declared by the Housing Commission to be unfit for habitation, and had been ordered to be demolished. Condition 2 of Table A of the Transfer of Land Act 1928, relating to requisitions on title, was incorporated in the contract;[2] but no requisitions were made and the purchasers took possession and sold the property to a sub-purchaser. Later they learned of the demolition order and after several more months they sought rescission of the contract, and repayment of the purchase money. The vendor counter-claimed for rescission on the ground of default in payment of purchase money. Dean J. held that in the absence of any reason for suspecting that the Housing Commission had taken action, the vendor was not under any duty to make enquiries on the subject. He held that although Condition 2 of Table A did not apply in the case of so substantial a burden as the demolition order, nevertheless, the purchaser's inaction after the disclosure of the order did amount to an acceptance of title. The resale precluded any *restitutio in integrum* and the vendor was entitled to rescind and to retain the deposit.

Dean J. in his judgment, considered the two broad contentions advanced by the plaintiffs. They had argued first that the defendant should have known of the existence of the declaration and order and disclosed the fact to them. It was this failure to do so which entitled the plaintiffs to the relief which they sought. Voumard Q.C. for the defendants, however, claimed that the vendor was under no duty to disclose this burden, as he was not aware of its existence and his lack of knowledge was not due to any negligence. On the authorities he was not bound to make enquiries any more than were the purchasers.

His Honour pointed out that if the defendant had known of the existence of the declaration and order at the date of the contract then on discovery of them, the plaintiffs could have rescinded this contract and claimed repayment of what had been paid subject to

[1] [1956] A.L.R. 140. Supreme Court of Victoria, Dean J.

[2] '. . . the purchaser or his solicitor shall within fourteen days from the day of sale deliver to the vendor or his solicitor in writing all requisitions . . . to the title . . . and in default of such requisitions (if none) . . . the purchaser shall be deemed to have accepted title.'

certain adjustments.[3] Here, however, the defendant had no such knowledge. But the plaintiffs had contended further, relying on dicta of Wills J. in the *Nottingham Patent Brick* case (*supra*) that where a vendor has the means of knowledge and fails to make proper enquiries the same result follows. Dean J. rejected this view. 'A vendor is not bound before contract to investigate his own title and disclose the result of his searches to the purchaser. It takes something more than this, something in the nature of improper conduct amounting to a breach of duty towards the purchaser before the doctrine can be applied.'[4] His Honour felt that the defendant here was guilty of no improper conduct. The matters in question were not within her knowledge nor to be found in any documents to which she had access and the plaintiffs had not. It was therefore equally open for them, as purchasers, to make the necessary enquiries.

The second ground of the plaintiffs claim presented more difficulties. They contended that the existence of the declaration and order constituted a defect in the defendant's title, that they had not accepted title and were not bound to do so, but were entitled to rescind by reason of such defect and recover the deposit paid.

The success of such a claim turned basically on the conditions of the concept – and more particularly on Condition 2 of Table A of the Transfer of Land Act 1928. The vendors conceded that the effect of the documents served by the Housing Commission did constitute a burden on the title which the purchasers might have required them to comply with. But they submitted that by failing to deliver requisitions or objections to title within fourteen days of the sale, the purchasers must be deemed to have accepted title and therefore could not now rely upon the defect constituted by the action of the Housing Commission.

Dean J. observed that it was fundamental to the contract that the vendor should be able to convey that which the purchaser has purchased. He referred to *Want v. Stallibrass*,[5] where Pollock B. (with whom Martin B. agreed) pointed out that it would be a very unreasonable construction of the conditions of sale to hold that a vendee who failed to object to the abstract within the stipulated time might become liable to accept a title wholly bad when the very basis of the contract, apart from the conditions of sale, was that the vendor was bound to give a good title.[6]

[3] Dean J. cited *Nottingham Patent Brick and Tile Co. v. Butler* (1885) 15 Q.B.D. 261, *Carlisle v. Salt* [1906] 1 Ch. 335, *Beyfus v. Lodge* [1925] Ch. 350, in support of this proposition.

[4] [1956] A.L.R. 140, 143.

[5] (1873) L.R. 8 Ex. 175.

[6] Thus in *Re Brine and Davies' Contract* [1935] Ch. 388 where a vendor had only a possessory title, a fact discovered by the purchaser after the stipulated time for objections had elapsed, Farwell J. held that a clause in substantially the same form as Condition 2 of Table A did not prevent the purchaser from

The problem is to know what is meant by 'wholly bad' for the purpose of the doctrine of *Want v. Stallibrass*. How bad must the vendor's title be before it can be held that no effect is to be given to Condition 2?

Various tests have been proposed to determine this question.[7] Dean J. here declined to go as far in favour of the purchasers as some of these tests suggest but he came to the conclusion that the vendor was precluded from relying on the condition here. 'The disection is so substantial a burden on the land, and effects so seriously the description of the property in the contract that, consistently with the authorities, I think the condition cannot be relied upon.'[8]

Despite this initial finding, however, it is clear that the purchasers could, if they so chose, have accepted title, in which case it would no longer be open to them to object to it if at the time of acceptance they knew of the defect.

Here, the plaintiffs clearly did not know of the defect when they took possession. But it is just as clear that they did learn of it. It would seem to follow that as there were additional circumstances, they should be treated as having accepted title. And so it proved to be. His Honour said, 'With knowledge of the Housing Commission orders they have remained in possession for some 10 months. They were only entitled to possession under the contract, that is, on terms that they accepted the vendor's title.'[9] Dean J. went on to add that the plaintiffs were likewise disqualified from obtaining rescission because they were unable to restore the property free of the rights of the sub-purchaser and his tenants. It followed therefore that, if they could not rescind, the plaintiffs had no legal right to the return of the deposit already paid.[10]

The final point that fell for decision was whether the court should exercise the discretion conferred on it by s. 49(2) of the Property Law Act 1928, to order a return of the deposit. The learned judge thought that the subsection gave the court a discretion in every case when a purchaser sought to recover money paid by way of deposit under a contract of sale, a discretion which could not be destroyed by the exercise by the vendor of his right to forfeit the deposit. But he declined to exercise it in favour of the plaintiffs on this occasion, inclining to the view that the vendor was entitled to retain the sum paid over. This judgment was entered on the claim and counterclaim for the defendant.

---

successfully contending that he should recover his deposit. He considered that the contract was misleading as the vendor represented thereby that he could give an absolute title. But cf. *Roberts v. Balfour* (1891) 18 V.L.R. 140 where the full court denied such an approach to a purchaser who failed to object within the stipulated time.

[7] See Voumard, *Sale of Land*, 310-12.

[8] [1956] A.L.R. 140, 145.

[9] *Ibid.* 146.

[10] See *Beyfus v. Lodge* [1925] Ch. 350.

The case is interesting in that it provides a striking illustration of the difficulties and dangers that can arise when a conveyancing dealing is not accurately carried out. Neither party had employed solicitors and there was no request by the purchasers for production of the certificate of title and no requisitions or objections were delivered by them. There can be little doubt that, had the transaction gone through the hands of competent solicitors, the grievance would never have arisen, since enquiries concerning orders under the Slum Reclamation and Housing Act are now part of standard requisitions. It is to be hoped that the decision will serve as a timely warning to less cautious land purchasers.

GRAEME EMANUEL

TRUSTEE – JURISDICTION TO MAKE ORDER FOR REMUNERATION

In re Moore, deceased; Moore v. Moore[1]

On the death of a beneficiary of a deceased estate, infants became interested in that estate, so that it was no longer possible to deal with the question of the trustee's remuneration by agreement – for an agreement by all the affected beneficiaries to remunerate is only effective if they are all *sui juris*. The question of the circumstances in which a court will assume jurisdiction to make an order for the remuneration of a trustee arose for determination when the trustee took out an originating summons seeking answers to various questions. The austere rule laid down by courts of equity was that trustees must act gratuitously, but this was subject to any express provision in the trust instrument. Courts of chancery always exercised, albeit reluctantly, jurisdiction to authorize the payment of remuneration in certain circumstances; in addition to this, the effect of certain enactments also has to be considered.

While Lowe A.C.J. held that there was jurisdiction to make an order for remuneration,[2] following *Nissen v. Grunden*,[3] his judgment throws little light on the relevant criteria, as His Honour simply stated, 'I think the question of my jurisdiction is established by the High Court decision in *Nissen v. Grunden* (1912) 14 C.L.R. 297 (see p. 307).'[4] But while this summary statement is singularly unilluminating, it seems possible to say with confidence that the decision reveals a substantial inroad upon the old 'gratuitous trustee' rule.

Looking, however, to the parent authority of *Nissen v. Grunden*, the *ratio* may perhaps be formulated that jurisdiction is predicated

[1] [1956] V.L.R. 132. Supreme Court of Victoria; Lowe A.C.J.

[2] His Honour did not, however, make the order sought, which was for a remuneration of £10,000 per annum; on taking into account various pertinent considerations, he decided that £7,500 p.a. was a fair remuneration.

[3] (1912) 14 C.L.R. 297.

[4] [1956] V.L.R. 132, 134.