

The Waimiha Sawmilling Company, Limited (in liquidation) - *Appellants*

v.

The Waione Timber Company, Limited - - - - *Respondents*

FROM

THE COURT OF APPEAL OF NEW ZEALAND.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 30TH JUNE, 1925.

Present at the Hearing :

LORD BUCKMASTER.

LORD ATKINSON.

LORD SHAW.

[*Delivered by* LORD BUCKMASTER.]

The respondents, the Waione Timber Company, Limited, are the registered proprietors of a piece of land situate at Waimiha known as Rangitoto Tuhua No. 80 B.I.C. and the appellants claim that this title is subject to whatever rights they possess by virtue of an agreement in writing dated 23rd December, 1916. The action was heard by Mr. Justice Herdman, and he, after taking the evidence, removed the case for argument into the Court of Appeal, who decided, Chief Justice Stout C.J., dissenting, that the respondents had acquired a good title to the land, freed from any claims on the part of the appellants. From that decision this appeal has been brought. The question of what rights the appellants originally possessed in the land has been the subject of consideration in several Courts and with varying consequences. For the determination of this appeal it is desirable to narrate in some detail how those rights arose and how they have been dealt with. On 23rd December, 1916, a man called Howe was the registered owner of the land in question and by the agreement of that date he granted to the appellants the right to

cut timber on and to carry it away from the said land, he also for the better exercise of such rights, granted them further rights of building saw mills, laying tramways along roads, etc. Such instrument could not be registered under the Land Transfer Act, but the appellants, on the 23rd August, 1917, lodged a caveat against the title to protect their rights. In July, 1919, Howe, alleging that there had been breaches of covenant, purported to determine the agreement and re-entered on the land. The appellants thereupon brought an action for a declaration that the agreement was still on foot and in the alternative applied for relief against the forfeiture.

This latter question was put down for argument as a preliminary point of law and, on the 13th January, 1920, the Supreme Court decided that the appellants' rights under the agreement constituted a lease and that they were entitled to relief. From this decision Howe appealed. The action came on for trial before this appeal was heard and on the 13th May, 1920, Mr. Justice Sim decided that Howe had validly determined the rights of the appellants, but withheld the entry of judgment until the decision of the Court of Appeal on the preliminary question of law. This judgment was given on the 28th July, 1920, and the Court of Appeal then decided that the agreement did not constitute a lease and that no relief could be given against the alleged forfeiture. Meanwhile Howe, who appears to have been heavily overdrawn at his bank and badly in need of money, had entered into an agreement with one Wilson to buy the land, and, on the 2nd August, 1920, Howe applied to the appellants for the removal of the caveat. This request was declined and Howe was informed that an appeal against the judgment of 13th May, 1920, was under consideration. Upon this refusal proceedings were commenced by Howe to obtain an order of the Court for removing the caveat, and, on the 20th September, 1920, this order was made by Mr. Justice Sim. A further agreement was then made on the 25th September, 1920, with Wilson and a transfer of the freehold portion of the land was executed and registered in his name on the 30th September, 1920, and sub-leases of the leasehold portion on the 5th October, 1920, and the 27th May, 1921. It is admitted throughout that in these negotiations Wilson acted with the intention of forming a company to whom the land should be transferred, and the respondent company having been formed in pursuance of this intention on the 8th June, 1921, the land was transferred to them and registration effected in their name.

No step was taken to appeal against the order of Mr. Justice Sim removing the caveat but, on the 9th September, 1920, the appellants appealed against the decision of the 13th May, 1920, lodged the necessary security, and before the judgment of 20th September, 1920, notified both Mr. Justice Sim and Howe's solicitors that an appeal had been commenced. This appeal came on for hearing on the 18th July, 1921, when the Court of Appeal declared

that there was no valid ground for determination of the rights granted to the appellants by the agreement of the 23rd December, 1916, and they referred the case back for the assessment of damages.

The proceedings subsequent to this are not really material for the present purpose. They are not fully set out in the record and it is not easy to understand exactly what occurred. It does appear, however, that, the enquiry as to damages proving abortive, the Court of Appeal on the 24th April, 1922, amended the judgment of the 18th July, 1921, by deleting therefrom the direction as to assessment of damages and substituting the words "In order that the Supreme Court shall enter judgment for such relief as the appellant company may be entitled to under its statement of claim." It must be remembered that this could not, however, be based upon the view that the agreement of the 23rd December, 1916, constituted a lease, as the Court of Appeal had themselves definitely decided that it did not. Apart from this the only possible remedy would have been a remedy by way of an injunction as in the case of *James Jones & Sons, Limited v. Earl of Tankerville*, L.R. [1909] 2 Ch., p. 440, but such a remedy depends upon very special circumstances; in the result of events such an Order as against Howe would have been inoperative and the question whether, if such relief were to be granted, it could be granted against the present respondents really depends upon the point that arises for decision in this appeal, and that is whether, in the circumstances, notwithstanding the removal of the caveat, the purchasers of the property were affected by the rights created under the agreement of the 23rd December, 1916. The appellants support their case by two independent arguments:—

- (1) That there was actual fraud committed in obtaining the registration of Wilson as the absolute owner.
- (2) That as at the date of this registration litigation was pending affecting the property, the title was necessarily subject to whatever rights the appellants would be held to possess if this litigation resulted in their favour.

The first of these questions depends upon the construction of two important sections of the Land Transfer Act, 1915, namely, section 58 and section 197, which are in the following terms:—

58. Notwithstanding the existence in any other person of any estate or interest, whether derived by grant from the Crown or otherwise, which but for this Act might be held to be paramount or to have priority, the registered proprietor of land or of any estate or interest in land under the provisions of this Act shall, except in the case of fraud, hold the same subject to such incumbrances, liens, estates, or interests as may be notified on the folium of Register constituted by the grant or certificate of title of

such land, but absolutely free from all other incumbrances, liens, estates, or interests whatsoever

- (a) Except the estate or interest of a proprietor claiming the same land under a prior certificate of title or under a prior grant registered under the provisions of this Act; and
- (b) Except so far as regards the omission or misdescription of any right of way or other easement created in or existing upon any land; and
- (c) Except so far as regards any portion of land that may be erroneously included in the grant, certificate of title, lease, or other instrument evidencing the title of such registered proprietor by wrong description of parcels or of boundaries.

197. Except in the case of fraud, no person contracting or dealing with or taking or proposing to take a transfer from the registered proprietor of any registered estate or interest shall be required or in any manner concerned to inquire into or ascertain the circumstances in or the consideration for which such registered owner or any previous registered owner of the estate or interest in question is or was registered, or to see to the application of the purchase money or of any part thereof, or shall be affected by notice, direct or constructive, of any trust or unregistered interest, any rule of law or equity to the contrary notwithstanding, and the knowledge that any such trust or unregistered interest is in existence shall not of itself be imputed as fraud.

The first of these sections provides in plain language that, except in the case of fraud, the registered proprietor of land holds it freed from everything except what is notified on the register, subject to the three exceptions, not one of which is relevant for the present purpose; while section 197 expressly declares that knowledge of the existence of an unregistered interest shall not of itself be imputed as fraud. Upon the first point, therefore, it is plain that unless conduct coming within the meaning of the word "fraud" as used in these sections can be imputed to the respondents their title succeeds.

In the words of the Court of Appeal in *Fels v. Knowles*, 26 N.Z. L.R. 604 at p. 620 :—

"The cardinal principle of the statute is that the register is everything, and that except in cases of actual fraud on the part of the person dealing with the registered proprietor such person upon the registration of the title under which he takes from the registered proprietor has an indefeasible title against all the world. Nothing can be registered the registration of which is not expressly authorised by the statute." ('By statute' would be more correct.) "Everything which can be registered gives, in the absence of fraud, an indefeasible title to the estate or interest or in the cases in which registration of a right is authorised, as in the case of easements or incorporeal rights, to the right registered."

Now fraud clearly implies some act of dishonesty. Lord Lindley in *The Assets Company, Limited v. Mere Roihi and others*, 1905 Ap. Cas., p. 210, states that :—

"Fraud in these actions (*i.e.*, actions seeking to affect a registered title) means actual fraud, dishonesty of some sort, not what is called constructive or equitable fraud, an unfortunate expression and one very apt to mislead but often used for want of a better term to denote transactions having consequences in equity similar to those which flow from fraud."

If the designed object of a transfer be to cheat a man of a known existing right, that is fraudulent, and so also fraud may be established by a deliberate and dishonest trick causing an interest not to be registered and thus fraudulently keeping the register clear. It is not, however, necessary or wise to give abstract illustrations of what may constitute fraud in hypothetical conditions for each case must depend upon its own circumstances. The act must be dishonest and dishonesty must not be assumed solely by reason of knowledge of an unregistered interest. In the present case fraud is sought to be established by the following facts:—That Wilson knew of the appellants' claim and that they were pursuing litigation to have that claim upheld, and also that the solicitors of Howe immediately after the removal of the caveat stated that they desired the utmost expedition to get the transaction registered in favour of Wilson, because they regarded it as possible that an application might be made for an injunction, the documents being in fact prepared with such haste that the boundaries had to be rectified subsequently to the transfer. All this is true, but it is also true that Howe knew that the judgments of the Courts were in his favour, and that any hindrance or delay in the carrying out of the transaction would cause him grave embarrassment so that having got a judgment in his favour, he wished to be secure and protected against the delay that might ensue if further steps were taken in the litigation; at the same time he was also aware of this—that an original notice of appeal in the action had not been proceeded with, and the learned Judge before whom the case had come not being satisfied as to the *bona fides* of the appellants and realising the importance of Howe being prevented from dealing with his lands expressly removed the caveat in order that those dealings should not be delayed. Had that judgment been appealed against and the order of Mr. Justice Sim reversed, different considerations might have arisen, but it was left unchallenged, and all that Howe did was to act upon the hypothesis that it was sound and to attempt to strengthen the position as far as possible by speedy completion of the transaction. Even now no attempt has been made to question Mr. Justice Sim's judgment and that circumstance, in their Lordships' opinion, alone is sufficient; for the learned Judge, with full knowledge of the facts, held that the hindrance to dealing with the property caused by the entry of the caveat should be removed, and even if he were wrong in the view that he took it seems to their Lordships impossible to say that people who acted upon the faith of that judgment were guilty of fraud.

The second question can be dealt with briefly. In their Lordships' opinion the judgment of Hosking J. is complete and unassailable upon this point. Litigation is the means by which a disputed interest in land can be established. If knowledge of the interest itself does not affect a registered proprietor knowledge that steps are being taken to assert that interest can have no more serious effect.

Their Lordships will humbly advise His Majesty that this appeal ought to be dismissed with costs.

In the Privy Council.

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LIMITED (IN LIQUIDATION)

v.

THE WAIONE TIMBER COMPANY, LIMITED.

DELIVERED BY LORD BUCKMASTER.

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