CASE NOTE*

MERCANTILE MUTUAL LIFE ASSURANCE CO LTD v GOSPER[1]

The recent case of *Mercantile Mutual Life Assurance Co Ltd v Gosper*[2] raises questions as to the application of the personal equities exception to indefeasability of title under the *Real Property Act* 1900 (NSW). The decision of the New South Wales Court of Appeal[3] denied indefeasability protection to a forged variation of mortgage which had been registered by the mortgagee. It is submitted that the reasoning of the majority represents an extension of the *in personam* exception recognised in *Frazer v Walker*[4] and applied by the High Court in *Bahr v Nicolay*.[5]

I. THE FACTS

In 1982 the respondent (Mrs Gosper) became registered proprietor of land in Neutral Bay which she mortgaged in favour of Mercantile Mutual Insurance (Workers Compensation) Ltd to secure an amount of $205 000. This was

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1 (1991) 25 NSWLR 32; (1991) NSW Conv R 55-608.

2 Hereinafter *Gosper's case*.

3 Per Kirby P and Mahoney JA; Meagher J dissenting.

4 [1967] 1 AC 569 at 580, 585. See also *Mayer v Coe* [1968] 2 NSWLR 747 at 754 per Street J.

5 [1988] 164 CLR at 613 per Mason CJ and Dawson J, 637 per Wilson and Toohey JJ, 654 per Brennan J. See also *Logue v Shoalhaven Shire Council* [1978] 1 NSWLR 537 at 543, 563.

increased in 1985 to a total of $265 000. In 1988 the mortgage along with the certificate of title which had been held by the former mortgagee was transferred to the appellant (a company within the same group).

Shortly thereafter the respondent's late husband fraudulently obtained a variation of the mortgage registered in favour of the appellant for an additional amount of $285 000. The husband had forged the respondent's signature on all the necessary documents. The respondent did not become aware of the transaction until after the death of her husband. The appellant also was unaware of the forgery. It had always understood itself to be dealing with the respondent, through her husband and through solicitors who purported to act on her behalf, but who were in fact acting on the instructions of the respondent's late husband.

The respondent brought proceedings to have the register rectified. At trial Cohen J ordered removal of the variation of mortgage from the register.

II. THE APPEAL

On appeal from the orders of Cohen J, the three judges of the Court of Appeal each approached the situation differently. The leading judgment is that of Mahoney JA.

A. THE APPROACH OF MAHONEY JA

Mahoney JA accepted that the concept of immediate indefeasability of title endorsed by the High Court[6] and the Privy Council[7] meant that:

> ... the registration of a void instrument may be set aside only if there is ... a 'personal' equity against the new owner.[8]

This exception was, in His Honour's judgment, subject to the limitation that the interest recognised must not be inconsistent with the terms or policy of the Act. In so doing the submission of the appellant that a 'personal' equity might arise only from the acts of the new owner was rejected.[9] Mahoney JA, after reviewing the authorities,[10] concluded that a 'personal' equity may arise against the new registered proprietor independently of his or her own acts. The contrary view was described as being "unsatisfactory.... [and resulting] in the new owner retaining the registered estate in circumstances in which he should not".[11] Illustrative support was drawn from cases where a fiduciary has been

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6 *Barry v Heider* (1914) 19 CLR 197 at 213 per Isaccs J; *Breskvar v Wall* (1971) 126 CLR 376 at 384-385 per Barwick CJ; *Bahr v Nicolay* note 5 *supra* at 613 per Mason CJ and Dawson J, at 637 per Wilson and Toohey J, at 653 per Brennan J.

7 *Frazer v Walker* note 4 *supra* at 585.

8 (1991) 25 NSWLR 32 at 45.

9 *Ibid* at 46.

10 *Breskvar v Wall* (*supra*) at 384-385 per Barwick CJ; *Frazer v Walker* note 4 *supra* at 585; *Bahr v Nicolay* note 5 *supra*.

11 Note 8 *supra* at 46.

denied the benefit of property bequeathed to him or her, in conflict with the fiduciary obligations, in circumstances where the fiduciary had not procured the bequest.[12]

The authorities did establish, in His Honour's view, that the mere fact of a forgery or a void instrument did not establish a 'personal' equity in the relevant sense. In Justice Mahoney's judgment the unauthorised use of the certificate of title constituted the necessary additional circumstance giving rise to the 'personal' equity. In breach of duties ordinarily owed by a mortgagee having possession and custody of the certificate of title, the appellant produced to the Registrar General the certificate to obtain registration of the variation. The appellant had no authority to use the certificate for such a purpose. No authority arose by implication under the existing mortgage and there was, of course, no actual authority given by the respondent.

B. THE APPROACH OF PRESIDENT KIRBY

The approach adopted by Kirby P is, with respect, perhaps the most bold of the approaches adopted by the members of the Court. The learned President held that the respondent had an equity of redemption (under s 93 of the *Conveyancing Act* 1919 (NSW)) as between herself and the appellant which might only have been varied by deed under s 91(1) and (2) or by variation "duly executed by the parties" under s 36(11) of the *Real Property Act* 1900 (NSW), neither of which had occurred.

Being a case in which no "equities of innocent third parties" had arisen as a result of dealings on the faith of the register, this was a situation where, in the learned President's judgment, the respondent was merely seeking to have the register recognise the personal equity which existed between herself and the appellant. The Court might then give effect to this equitable relationship which was unaffected by the subsequent registration.

Kirby P rested his decision solely upon this ground, but also expressed agreement as to the reasoning of Mahoney JA in respect of the unauthorised use of the certificate of title.[13]

C. THE DISSENTING JUDGMENT OF MEAGHER JA

In a short dissenting judgment Meagher JA described the submissions for the respondent as being "something like a sleight of hand". His Honour held that:

> The combined effect of the general law, the *Real Property Act* and s 91 of the *Conveyancing Act* 1919 is not that the equity of redemption is a right to discharge the mortgage on tender of the amount contractually due but to have the discharge on tender of whatever amount is due by operation of the relevant statute law was the amount specified in the registered instrument, void thought it might be apart from statute.[14]

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12 *Bukley v Wilford* (1864) 2 CL & F 102 6 ER 1094; *Nocton v Ashburton* [1914] AC 932.

13 Note 8 *supra* at 37.

14 *Ibid* at 52.

Meagher JA also rejected the submission of the respondent that the husband had acted as agent of the appellant, a submission upon which neither of the judges in the majority had expressed a concluded view. Even if the husband had been acting as the agent of the appellant, which his Honour doubted, it was an agency for the limited purpose of obtaining his wife's signature and the fraud had been outside the scope of such a limited agency and could not be imputed to the appellant.

III. COMMENT

It is submitted that the learned President's reasoning draws a distinction which is unjustified as a matter of principle or policy. This approach emphasises the pre-existing equitable relationship between the parties and seeks to deny the effectiveness of a registration which upsets that equitable relationship unless validly entered into by the parties.

It is suggested that this reasoning is contrary to the spirit, if not the letter, of the accepted principle under the Torrens system of title that an instrument void at general law effectively derives, except in the case of fraud, validity and indefeasability from subsequent registration.[15] The reasoning favoured by Kirby P unnecessarily requires a distinction to be drawn between void instruments arising out of a pre-existing equitable relationship, such as a forged variation of mortgage, and other void instruments such as the creation of a mortgage itself.[16] In the first case the mortgagor would be entitled to deny the validity of the forged mortgage variation, while in the second, he would be held subject to the forged mortgage if it had become registered.[17] Such a distinction is difficult to justify as matter of principle and there would appear to be no reason based on public policy for its acceptance.

It is further submitted that the conclusion reached in *obiter* by Mahoney JA that an equity may arise out of acts other than those of the new registered proprietor personally,[18] cannot be justified in the face of the judgments of the members of the High Court in *Bahr v Nicolay*. In that case Wilson and Toohey JJ in a joint judgment held that the concept of indefeasability did not:

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15 *Mercantile Credits Ltd v Shell Co (Aust) Ltd* (1976) 136 CLR 326 at 338 per Barwick J; *Frazer v Walker* note 4 *supra*; *Breskvar v Wall* note 6 *supra* at 385 per Barwick CJ who said that "...a registration which results from a void instrument is effective according to the terms of the registration. It matters not what the cause or reason for which the instrument is void". Windeyer J (at 399) and Owen J (at 400) specifically agreed with the Chief Justice.

16 The same situation would apply if the respondent's husband, instead of forging a variation of mortgage, had discharged the original mortgage and had then forged a new mortgage.

17 This was the situation raised in *Mayer v Coe* note 4 *supra* where Street J held at 754 "... the plaintiff has not sought to call in aid any personal equity. Nor in my view could she do so". The decision was approved by the High Court in *Breskvar v Wall* note 6 *supra*.

18 In light of his Honour's conclusion that the equity was created by the mishandling of the certificate of title by the respondent, this conclusion appears not to have been essential to his Honour's reasoning.

> ... protect a registered proprietor from the consequences of *his own actions* where those give rise to a personal equity in another.[19]

In his judgment, Brennan J accepted this limitation holding that indefeasability was:

> ... designed to protect a transferee from defects in the title of the transferor, not to free him from interests with which he has burdened *his own title*.[20]

The joint judgment of the Chief Justice and Dawson J was to the same effect.[21]

It is conceded, however, that His Honour's comments may be read merely as an acceptance that knowledge on the part of the new registered proprietor of the wrongs of others may render the equity enforceable against the new registered proprietor. To the extent that the judgment expresses this view the comment expressed above is inapplicable.

V. CONCLUSION

The holding of the Court, it is submitted, is contained in the judgment of Mahoney JA where His Honour stated:

> ...where the registration of a forged instrument has been produced by ... a breach by the new owner [of duties owed in respect of custody of the certificate of title], that is sufficient to create, in the relevant sense, a 'personal equity' against the new owner. The existence of such an equity does not depend upon any intention on the part of the new owner to contravene the rights of the previous owner. But the obligations of a mortgagee, whether strictly fiduciary or not, are in my opinion such that the mortgagee should not be allowed to retain a benefit by an act which constitutes a breach of such obligations.[22]

It is submitted that the decision gives rise to valid concerns that the concept of deferred indefeasability, long thought to have died an honourable death, has re-entered the fray in the guise of equity.[23] It is also suggested that the case sits rather uneasily with the decision of the same court (though differently constituted) in *Bogdanovic v Koteff*.[24]

The decision in *Gosper's case* recognises that the *in personam* exception has moved beyond the enforcement of the registered proprietor's own contracts and express trusts. It establishes that the use of a certificate of title outside the limited purpose for which it is held, innocent though it may be, will render a registered interest impeachable at the suit of the defrauded party.

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19 *Bahr v Nicolay* note 5 *supra* at 638 per Wilson and Toohey JJ (my emphasis).

20 *Ibid* at 658 per Brennan J (my emphasis).

21 *Ibid* at 613 per Mason CJ and Dawson J.

22 Note 8 *supra* at 49.

23 In this regard, the similarity in result between *Gosper's case* and the decision of the Privy Council in *Gibbs v Messer* [1891] AC 248 should be noticed.

24 (1988) 12 NSWLR 477 (Hope, Samuels and Priestley JJA) where a volunteer was held to be entitled to the protection of immediate indefeasability notwithstanding the existence of an equitable interest in the property. It is to be noted that this decision was not cited to the court in *Gosper's case*.