

whether registration of charges for income tax can be  
made against purchaser, not registered proprietor of land.  
Dispute between Commissioner of Inland Revenue and AG of Fiji  
regarding imposition of charges for income tax upon the estate  
owner in real property IN THE FIJI COURT OF APPEAL  
purchaser or registered proprietor.

First property - charges against 82  
land - charges for income tax  
against title  
Income Tax Act 1974 § 70  
Land Transfer Act 1911  
Interpretation, Income Tax Act 1974

Civil Jurisdiction

Civil Appeal No. 67 of 1980

Between:

COMMISSIONER OF INLAND REVENUE

Appellant

and

THE ATTORNEY-GENERAL OF FIJI

Respondent

M.J. Scott and I.V. Helu for the Appellant  
J.R. Flower for the Respondent

Date of Hearing: 15th July, 1981

Delivery of Judgment: 31 JUL 1981

JUDGMENT OF THE COURT

Chilwell, J.A.

The Commissioner of Inland Revenue and the Registrar of Titles have disagreed concerning the construction and application of section 75(6) of the Income Tax Act 1974 in relation to the registration of charges for income tax against the title of land charged with taxes, interest, costs and penalties imposed by the Act where the person whose land is charged is not the registered proprietor but a purchaser under a specifically enforceable agreement of sale and purchase.

The Commissioner therefore sought declarations under Order 15 Rule 16 of the Rules of the Supreme Court that sections 75(3) and 75(6) of the Income Tax Act :

- "(a) Impose, in favour of the Commissioner of Inland Revenue, a charge upon the estate or interest in real property of a purchaser thereof subsisting solely by virtue of a specifically enforceable agreement to purchase same, notwithstanding that said purchaser is not registered proprietor thereof, to the extent of any taxes, interest, costs and penalties imposed upon said purchaser under the Income Tax Act, 1974.
- (b) Entitle the Commissioner of Inland Revenue to register with the Registrar of Titles, without fee, a charge upon the estate or interest in real property of a purchaser thereof subsisting solely by virtue of a specifically enforceable agreement to purchase same, notwithstanding that said purchaser is not registered proprietor thereof, to the extent of any taxes, interest, costs and penalties imposed upon said purchaser under the Income Tax Act 1974, said charge to be filed in the form described in section 75(6) of the Income Tax Act.
- (c) Require the Registrar of Titles to accept a charge against such estates or interests, and in such form, as are described in (b) above."

Kermode J. made a declaration in terms of paragraph (a) but limited to section 75(3) of the Act and he refused to make the other two declarations. That refusal was the consequence of his finding that a charge under section 75(3) can be registered under section 75(6) only if the taxpayer liable to pay the taxes etc. is the registered proprietor of the land under the Land Transfer Act 1971.

The Commissioner has appealed against that part of the judgment of Kermode J. in which he refused to make the two declarations expressed in the formal order as rejected. The grounds of appeal are :

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- "(a) That the learned Judge erred in law in holding that charges which can be registered pursuant to section 75(6) of the Income Tax Act can only be registered pursuant to and in compliance with the Land Transfer Act;
- (b) That the learned Judge erred in law in holding that the fact that under section 75(6) of the Income Tax Act 1974 charges created by section 75(3) of said Act must be registered 'against the title of the land charged' precluded registration by the Registrar of Titles of charges against the estate or interest in real property of an unregistered purchaser thereof subsisting solely by virtue of a specifically enforceable agreement to purchase same."

The material parts of section 75 state :

"75(1) The taxes and all interest, penalties and costs assessed shall be recoverable as a debt due to Her Majesty from the person on whom it is assessed or imposed.

(3) Taxes, interest, costs and penalties imposed under this Act shall be a lien and charge upon the property, whether real or personal, movable, or immovable, of the person liable to pay the same.

(6) A charge on any real property shall be registered by the Registrar of Titles without fee against the title of the land charged upon the filing with him by the Commissioner of a memorandum under the hand of the Commissioner setting forth the description of the land so charged and the amount payable.

(7) When any such charge as aforesaid has been satisfied, the Commissioner shall deposit with the Registrar of Titles a memorandum of satisfaction and the Registrar of Titles shall, without fee, register the same against the title of the land.

(8) If any taxes, interest, costs and penalties are in arrear and constitute by virtue of subsection (3) of this section a charge on any property, the Commissioner may apply by petition to the Supreme Court for the enforcement of the charge and the Court may make such order in the premises as it

thinks just, either by sale of that property or any part thereof or for the appointment of a receiver of the rents, profits or income thereof and for the payment of the amount in arrear and the costs of the Commissioner out of the proceeds of the sale or out of the said rents, profits or income."

The passages in the judgment of Kermode J. which are reflected in the two grounds of appeal are :

Ground (a):

" The charge which can be registered pursuant to subsection (6) however, can only be registered pursuant to and in compliance with the provisions of the Land Transfer Act and by the wording of the subsection it is registered 'against the title of the land charged'."

Ground (b):

" Where the taxpayer is the registered proprietor of land section 75 creates no problem. The taxpayer's title to his land can be the subject of a charge which the Registrar is obliged to register against that title. Apart from specifically providing for a charge which must be registered by the Registrar of Titles free of charge, there is nothing in section 75 of the Act which in any way conflicts with or overrides the provisions of the Land Transfer Act. Nothing in section 75 absolves the Registrar from complying with the mandatory provisions of the Land Transfer Act.

Under section 35 of the Land Transfer Act, for example, the Registrar can only register an instrument purporting to affect 'any estate or interest in land', 'in the manner provided in this Act'. Such a charge as Mr. Scott would seek to have him register, in my view, would have to be rejected by the Registrar, and it would be his duty to do so, as there is no 'title' to that interest in the land against which the charge can be registered. The interest is solely an equitable one which can be protected by caveat but is not capable of being registered.

In subsection (6) 'the title of land' must be registered in the name of the person liable to pay the taxes, etc. before a charge can be registered. The purchasing taxpayer's interest in that land is his property and if he owed taxes, that interest would be the subject of a lien or a charge pursuant to subsection (3) but, until he took title to that land, the charge is not capable of being registered under the provisions of the Land Transfer Act.

'Title' in the phrase 'title of land' means an 'instrument of title' as defined in section 2 of the Land Transfer Act namely 'a certificate of title, Crown grant, lease, sublease, mortgage or other encumbrance'."

In making the declaration under section 75(3) that a charge attaches to the estate or interest in real property of a purchaser under a specifically enforceable agreement Kermode J. accepted, we think correctly, the proposition basic to Mr. Scott's argument that such a purchaser becomes the owner in equity of the land, that in equity the vendor no longer has an interest in land but an interest in personal estate i.e. in the balance of the purchase money due to him. Many authorities to this effect were cited by Mr. Scott. It suffices to refer to Hillingdon Estates Co. v. Stonefield Estates Ltd. [1952] 1 All E.R. 853, 856 per Vaisey J. and Maidstone Park Timber Co. Ltd. v. Williams & Mitchell Ltd. [1977] 2 N.Z.L.R. 380, 384 per White J. a judgment affirmed on appeal in [1978] 2 N.Z.L.R. 462 and to text books such as Garrow Real Property in New Zealand 4 Ed. 147 and 186, Megarry & Wade The Law of Real Property 3 Ed. 582 and to H.A.L. Ford's treatment of the equitable doctrine of conversion in his book Principles of the Law of Death Duty paragraph 3-06. We do not think that there is any doubt that the purchaser becomes the equitable owner of the land, nor do we think that there can be any doubt about the correctness of the affirmative declaration made by Kermode J. under section 75(3) which was accepted by



Mr. Flower. What must not be overlooked, however, is that while the unpaid vendor becomes the equitable owner of personalty in the form of the purchase price he retains the legal estate with certain rights in the land as unpaid vendor. See Vaisey J. (supra) and White J. in Wight Construction Ltd. v. Developers Demarco Ltd. [1978] 1 N.Z.L.R. 377, 379. Nor should it be overlooked that the charge imposed by section 75(3) is upon the property "of the person liable to pay" the taxes etc., in this case, the purchaser.

Founding upon the affirmative declaration Mr. Scott submitted in this Court that the charge must be registered under section 75(6). The declaration refers to a charge upon the estate or interest in real property of a purchaser. The submission is that that is the same real property referred to in section 75(6), the command "shall be registered" is to be obeyed and obedience requires registration against the formal documents of title. When asked to define "the title of the land charged" Mr. Scott submitted that "the title of the land charged means the formal documents of title to the land which is charged with the payment of tax, which land is owned by the purchaser" or, putting it another way, the words "of the land charged" are merely descriptive and point in the present case to the title of the registered proprietor.

It is axiomatic that the "real property" referred to in section 75(6) is that upon which the charge is imposed by section 75(3) i.e. the real property of "the person liable to pay" the taxes etc. (the taxpayer). But we do not agree that it necessarily follows that that real property of the taxpayer is the land charged within the phrase "the title of the land charged". We agree with Kermode J. that "title" means an instrument of title as defined in section 2 of the Land Transfer Act

1971. The reference to the Registrar of Titles is to the person appointed under the provisions of the Land Transfer Act. His statutory function is prescribed by section 6 of that Act. He is "charged with the administration of the provisions of" the Act. It is an Act relating to the transfer of land and to the registration of title to land. When section 75(6) refers to the "Registrar of Titles", to "registered", to "title" it has the Land Transfer Act in contemplation. It is clear to us, as it was to Parliament, that there was no need to make specific reference to the Land Transfer Act. The word "registered" in the Property Law Act 1971 and in the Acts Interpretation Act 1967 reinforces our opinion.

In construing section 75(6) of the Income Tax Act the opening words should be read :-

"A charge on any real property of the person liable to pay the taxes etc. .... shall be registered ..... against the title of the land charged ....."

The change in language from that of the real property lawyer draftsman to that of the Land Transfer Act is significant. The swingeing effect of section 75(3) has, of necessity, been cut down in order to comply with the more specific requirements of the Land Transfer Act. That is because the draftsman appreciated that it would not be appropriate to give the Registrar of Titles directions which were outside the scope of the Act under his administration. The drafting distinction is again noticeable when one considers section 75(8) which gives the Court power to order a sale or to appoint a receiver. The word "property" is there used and that is because it embraces all forms of property covered by section 75(3), but that property is still the property of the taxpayer and in the instant case could not include the title of the registered proprietor. An instrument of title is not issued in vacuo. It is

issued in the name of a registered proprietor in respect of his estate or interest. It is the taxpayer's estate or interest in real property which is the subject of the charge, it is his estate or interest which is liable to sale or receivership. In the case of an estate or interest which is registered in the taxpayer's name as registered proprietor it is appropriate to refer to registration against the title of the land charged. "Instrument of title" as defined in section 2 of the Land Transfer Act includes "a certificate of title, Crown grant, lease, sublease, mortgage or other encumbrance". We agree with Mr. Scott that "title" in section 75(6) is a reference to the documents of title but we do not agree that the words "of the land charged" are merely descriptive in the sense that they point to the relevant title. We agree with his submission that the Registrar of Titles can only carry out the physical act of registration against the documents of title. The relevant document of title is as much a pointer to the land charged as the land charged is a pointer to the title. The words -

"A charge on any real property shall be  
registered by the Registrar of Titles....  
against the title of the land charged...."

must in our judgment be read as a whole with the result that if the real property of the taxpayer has no document of title under the Land Transfer Act because there can be no registered proprietor of the particular estate or interest there is no link between the taxpayer and his real property charged on the one hand and the "title of the land charged" on the other hand. By adopting what we consider to be the proper construction of the material parts of section 75, which is implicit in the judgment of Kermode J., we have arrived at the same result. We agree with his judgment and specifically with the passages which we have cited from it.



Mr. Scott submitted that the judgment is based on a false assumption, namely that a charge under section 75 can only be registered pursuant to and in compliance with the provisions of the Land Transfer Act and that that assumption is wholly erroneous for the reasons :-

(a) The assumption relies upon section 75 becoming subordinated to the provisions of the Land Transfer Act whereas it is an Act earlier in time dealing generally with land while the later Income Tax Act deals in section 75(6) with a special class of land i.e. land charged with tax liabilities.

(b) The assumption ignores four decisions of the Fiji Court of Appeal, two decisions of the Privy Council and decisions of Australian and New Zealand Courts which define the relationship between Land Transfer Acts and other relevant legislation.

(c) In particular with reference to (b) there are decisions of Fiji and Australian Courts which establish :-

(i) That section 3 of the Land Transfer Act does not subjugate section 75 of the Income Tax Act.

(ii) That the system of registration established by section 75 is a self contained code which provides its own procedure for registration, independently of any other legal provision.

(iii) That, if it becomes necessary to decide the matter, section 75 overrides the Land Transfer Act.

We have considered the authorities referred to by Mr. Scott in argument at the hearing of this appeal and at the hearing before Kermode J. So far as Mr. Scott's submissions (b) and (c) are concerned we acknowledge that legislation can make provision for the registration of instruments or for charges affecting land which operate independently of Torrens system statutes such as the Fiji Land Transfer Act and that such legislation can over-ride the indefeasibility provisions of Torrens system statutes. Two striking illustrations are to be found in Miller v. Minister of Mines [1963] A.C. 484 and Coast Brick & Tile Works Ltd. v. Premchand Raichand Ltd. [1967] A.C. 192. It is in the end a matter of construction. In Miller v. Minister of Mines Lord Guest said at page 498 :

"It is not necessary in their Lordship's opinion that there should be a direct provision over-riding the provisions of the Land Transfer Act. It is sufficient if this is a proper implication from the terms of the relative statute."

In Fiji section 3 of the Land Transfer Act provides a specific aid to construction. It states :

"All written laws, Acts and practice whatsoever so far as inconsistent with this Act shall not apply or be deemed to apply to any land subject to the provisions of this Act or to any estate or interest therein."

We say at once that we have not found it necessary to resort to section 3 because we have not found section 75 inconsistent with the Land Transfer Act. On the contrary section 75(6) was drafted with the provisions of the Land Transfer Act in mind. It follows that we do not find that section 75 over-rides the Land Transfer Act: it does not do so either expressly or by implication. Nor are the provisions of sections 75(6) and (7) a self

contained code. They do provide a procedure for registering the charge and its satisfaction but not independently of the Land Transfer Act; the sections engraft that procedure upon the Act but otherwise leave the provisions of the Act untouched.

We do not accept that Kermode J. ignored authorities which were cited to him or any of Mr. Scott's submissions. Indeed he appeared to accept the submissions in most respects except one as appears from the following passages in his judgment :

" It is not necessary to consider Mr. Scott's lengthy argument in detail or to refer to any of the authorities. Step by step as he advances his argument I would have to agree with a great deal of his reasoning and the authorities he quoted in support. Some important authorities quoted by him however, are clearly distinguishable and I will refer to one or two of them later.

There is in my view only one issue I have to consider and that is whether subsection (6) of section 75 enables the Commissioner to register a charge on the equitable interest of the taxpayer in land which he is purchasing against the title to that land."

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" Where Mr. Scott has in my view gone astray, is in not appreciating that while the purchasing taxpayer is the owner of an interest in the land which he is purchasing he has no title to that interest against which a charge can be registered."

Without intending any disrespect to Mr. Scott's submissions which have been extremely thorough and helpful we too have come to the conclusion that there is a fundamental misconception in his argument which is that highlighted by Kermode J. in his concise and lucid judgment. In our opinion his judgment does not suffer from the erroneous assumption attributed to it by Mr. Scott or from any other erroneous assumption.

It remains to mention the New Zealand Wages Protection and Contractors' Liens Act 1939 and certain authorities under it such as Pollock v. Miramar North Building etc. Co. Ltd. (1910) 29 N.Z.L.R. 1014, Maidstone Park Timber Co. Ltd. v. Williams & Mitchell Ltd. (supra) and Wight Construction Ltd. v. Developers Demarco Ltd. (supra). Those authorities are distinguishable because the Act in question is markedly different from section 75 of the Income Tax Act. It is closer to being a self contained code than section 75 of the Income Tax Act. It provides for the registration of a lien upon the estate or interest in land of an employer who contracts with another for the performance of work by that other. Where the employer and the land owner are not the same person it provides for registration of the lien against the estate or interest of the owner of the land to the extent that he has consented in writing to be liable for the contract price or that his estate or interest should be liable. There is an extended definition of owner to include a person having a limited estate or interest in the land. The charging section states :

"21(1) Where any employer contracts with or employs any person for the performance of any work upon or in respect of any land or chattel, the contractor and every subcontractor or worker employed to do any part of the work shall be entitled to a lien upon the estate or interest of the employer in the land or chattel, and every subcontractor or worker employed by the contractor or by any subcontractor to do any part of the work shall be entitled to a charge on the money payable to the contractor or subcontractor by whom he is employed, or to any superior contractor, under his contract or subcontract."

The material parts of the registration section state :

"41(1) No land shall be affected by a lien unless the lien is registered against the title to the land as provided in this section."



(2) Where the land is subject to the Land Transfer Act 1952 a copy of the statement of claim in the action to enforce the lien, certified by the proper officer of the Court, may be lodged with the District Land Registrar, who shall thereupon register it in the manner in which caveats are required to be registered. Notice of the registration shall be given by the Registrar, by registered letter, to the registered proprietor of the land and to every person entitled to a mortgage or encumbrance over the land.

(3) Where the land is not subject to the Land Transfer Act 1952 the statement of claim, certified as aforesaid, may be registered in the manner in which deeds and other instruments affecting the land may be registered."

Like section 75(3) of the Income Tax Act the charging section is not tied to the Land Transfer Act. Unlike section 75(6) the registration section is not tied to the Land Transfer Act. The word "title" in section 41(1) refers to title in the broader sense because it has to include titles to land not subject to the Land Transfer Act. Finally the charge arises from work upon or in respect of land. The work identifies the land. By contrast the charge under section 75 of the Income Tax Act arises from the personal liability of the taxpayer to pay his taxes etc. That tax liability does not identify his land.

The other authority referred to by Kermode J. Property Discount Corporation Ltd. v. Lyon Group Ltd. [1980] 1 All E.R. 334; [1981] 1 All E.R. 379 depends on specific provisions of United Kingdom statutes. We do not find this authority of any assistance in the construction of section 75 of the Income Tax Act.

We conclude that Kermode J. was right in making the declaration under section 75(3) and in

refusing to make the other two declarations in respect of section 75(6). The appeal is dismissed. There will be no order for costs.

*Charles Read*

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Judge of Appeal

*Mr. [unclear] [unclear]*

.....  
Judge of Appeal

*M.F. [unclear]*

.....  
Judge of Appeal