

IN THE SUPREME COURT OF FIJI  
Civil Jurisdiction  
ACTION NO. 377 OF 1980

IN THE MATTER OF THE INCOME TAX  
TAX ACT 1974, Sections 75(3),  
75(6).

A N D

IN THE MATTER OF AN APPLICATION  
BY THE COMMISSIONER OF INLAND  
REVENUE FOR CERTAIN DECLARATIONS.

Mr. M.J. Scott for the Applicant.  
Mr. J.R. Flower for the Respondent.

J U D G M E N T

The Commissioner of Inland Revenue seeks 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 1974 :

- (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.

Sections 75(3) and 75(6) of the Income Tax Act 1974 are as follows :

- " (3) Taxes, interests, 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."

Mr. Scott appeared for the Commissioner of Inland Revenue and Mr. Flower for the Registrar of Titles.

Mr. Scott submitted a typed argument of 36 pages and a further 18 pages when I queried whether the Commissioner had any locus standi and whether the Attorney-General should not have been seeking the declarations. The further 18 pages of argument also deal with the questions whether a 'mere inter-departmental dispute' was involved and whether alternative remedies were available to the Commissioner.

While I am still of the view that section 12(1) of the Crown Proceedings Ordinance makes it necessary for the Commissioner in the present type of action to bring the action in the name of the Attorney-General, I do not propose to dismiss the application on that ground.

In a nutshell, and it is not easy to so reduce Mr. Scott's argument, he contends that by virtue of subsections (3) and (6) of section 75 of the Act, the Commissioner has a charge to secure payment of taxes, interest penalties and costs owing to Government by a taxpayer in respect of the taxpayer's interest in land which he is purchasing under an enforceable sale and purchase agreement, which charge can be registered against the title of the land which the taxpayer is purchasing. (The underlining is mine to emphasise what I consider is the issue in dispute between the two departments.)

The corner stone on which Mr. Scott builds his argument is that the purchaser of land under an enforceable sale and purchase agreement becomes "the owner" of that land, albeit only the equitable owner, and the registered proprietor no longer has "an interest in land" but only an interest in personal estate, namely the balance purchase money due to him. From that corner stone Mr. Scott eventually arrives at a conclusion that as the taxpayer is "the owner" of that land, subsection (3) creates a charge on that land in respect of taxes, etc. imposed on the taxpayer under the Act which, by virtue of subsection (6) of the Act, can be registered against the title of that land.

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.

Mr. Scott at page 11 of his written submission listed 7 objections which had been raised in respect of his argument. The first of these is the very issue I have just referred to namely :

"(a) That section 75(6) may not apply to equitable interests in land as distinct from legal interests".

Mr. Scott's argument in respect of this objection is commendable in brief. He says :

"Objection (A) is absolutely untenable, particularly in view of the wide definitions of "land" and "property" contained in the Interpretation Act."

"Owner of land" is defined in section 2 of the Income Tax Act as :

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" 'owner of land' includes the owner of any interest in the land".

I would agree with Mr. Scott that a purchaser of land under an agreement has an interest in that land and is the owner of that interest. I would also agree that the word "property" which is referred to in subsection (3) of the Act as defined in the Interpretation Act is wide enough to include such an interest in land and could be the subject of a lien or charge by virtue of that subsection.

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".

"Real property" in subsection (6) is the same real property as is referred to in subsection (3) - i.e. "the property, whether real.....of the person liable to pay the same" that is the tax, etc.

Subsection (6) enables a charge on "real property" the property of the taxpayer to be registered "against" "the title of the land charged". "Real property" in that subsection means land or an "interest in land".

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.

A purchaser can, under the provisions of the Land Transfer Act, protect his interest in the land by lodging a caveat against the title to the land but his interest is not registerable under that Act. His "land" (in the sense of an interest as purchaser in that land) cannot be the subject of a "title" under the Act.

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 support of his argument that "the title of land charged" may be registered in the name of one person but the land itself may be the land of another" Mr. Scott relies on several cases. The latest case is Property Discount Corporation v. Lyon Group 1980 1 A.E.R. 334. This case was said to be authority for the proposition that a charge against an equitable interest in land can be registered as a charge against that land. Mr. Scott quoted from Goulding J.'s judgment on p.338 but he ignored what the learned Judge said at p.340 where he said :

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"No one, I observe in passing, has referred in argument to S. 137 of the Law of Property Act 1925. However, in such a case, that is where a merely equitable interest is mortgaged, S.3(1) of the Land Charges Act 1972 requires registration in the name, not of the mortgagor but of the owner of the underlying legal estate. (the underlining is mine)

Mr. Scott also referred to the New Zealand Wages Protection and Contractors Liens Act 1972. There is specific provision in section 23 of that Act for the liability of an owner who is not an employer. In such a case, his estate or interest in the land on which work is done, is subject to a lien only to the extent to which the owner has consented in writing that he should be liable for the contract price.

In the case and the Act I have just referred to there are clear statutory provisions which permits an owner's land, that is the registered owner, to be charged in respect of a debt which may be due by someone else.

One case quoted by Mr. Scott would appear at first glance to support his argument. It is the case of Wright Construction Ltd. v. Developers Demarco Ltd. (1978) 1 N.Z.L.R. 377 where it was held that, under the Wages Protection and Contractors' Liens Act, "so long as an agreement for sale and purchase of land remains in force and specific performance of it can be ordered, a lien may be validly registered against the title of the vendor in order to charge the equitable interest the purchaser has in the land under the agreement with claims against him for building work done for him on the land or materials supplied".

When the report is read however, and the Act considered, it is clear that section 41 of the Act provides that no land shall be affected by a lien "unless the lien is registered against the title to the land" as provided in the section. The section has specific provisions regarding registration of the lien and the giving of notice "to the registered proprietor of the land and to every person entitled to a mortgage or encumbrance over the land".

The New Zealand Act seeks to protect persons who have done work on the land the subject of the lien and in Wright's case a title had been issued and the vendor was in a position to enforce the contract.

There is a difference also between a lien "registered against the title to land" as provided in the New Zealand Act and a charge "registered against the title of land charged" as provided in the Income Tax Act.

In the New Zealand Act the lien is in respect of work done on the land and cannot affect that land until registered against the title to that land. The lien may or may not affect the registered proprietor's interest in the land.

In the Fiji Income Tax Act where the land is charged, it is the taxpayer's interest in the land which is charged by virtue of subsection (3). The registered proprietor's interest in that land is not and cannot be charged unless he is also the taxpayer indebted to Government for tax, etc. The registered proprietor is the owner of the "underlying legal estate" and, unless prevented from doing so by caveat, he can legally convey title to that land to someone other than the taxpayer who has no notice of the taxpayer's interest. Section 75 does not create a registerable charge on the registered proprietor's interest in land, which is evidenced by a title, unless the taxpayer is also the registered proprietor.

I would repeat that subsection (3) of section 75 of the Act does impose a charge on any interest in land being the property of a person liable to pay tax, etc. but, unless that interest in the land is evidenced by a title registered under the provisions of the Land Transfer Act, the charge cannot be registered against that title under the provisions of subsection (6).

I grant the first declaration in slightly amended form by deleting reference to section 75(6) as follows :-

I declare that section 75(3) of the Income Tax Act 1974 imposes 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.

Holding the view I do on the interpretation of section 75(6) of the Act I decline to make the other two declarations sought by the Commissioner.

*R.G. Kermod*

(R.G. KERMODE)

J U D G E

SUVA,

24 October, 1980.