

CANADA / JUDGMENT

Gill v. Bucholtz

2009 BCCA 137

COURT

British Columbia Court of Appeal

DECIDED

6 April 2009

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2009 BCCA 137 Gill v. Bucholtz

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Gill v. Bucholtz,

2009 BCCA 137

Date: 20090406

Docket: CA036193

Between:

Amritpal Singh Gill

Respondent

(Plaintiff)

And

Arthur Bucholtz, Beverly Lynn Bucholtz, 4337

Investments Ltd., John Doe a.k.a. Amritpal Singh Gill and

Jane Doe a.k.a. Gurjeet Gill

Respondents

(Defendants)

And

The Land Title and Survey Authority of British Columbia

Appellant

(Defendant)

Corrected Judgment. On October 28, 2009 the cites at para. 9 were corrected and the Land Title Act reference at para. 25 was corrected to read 1978.

Before:

The Honourable Madam Justice Newbury

The Honourable Madam Justice Kirkpatrick

The Honourable Madam Justice Neilson

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Amritpal Singh Gill

R. Lee

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Counsel for the Respondents

Arthur Bucholtz, Beverly Lynn Bucholtz and 4337 Investments Ltd.

Place and Date of Hearing:

Vancouver, British Columbia

March 19, 2009

Place and Date of Judgment:

Vancouver, British Columbia

April 6, 2009

Written Reasons by:

The Honourable Madam Justice Newbury

Concurred in by:

The Honourable Madam Justice Kirkpatrick

The Honourable Madam Justice Neilson

Reasons for Judgment of the Honourable Madam Justice Newbury:

- [1] This appeal arises in a classic case of real estate fraud, reminiscent of a law- school examination. It raises some basic questions about the Torrens land registration system of this province that have not previously reached this court. Historically, the relevant provisions of the Land Title Act, R.S.B.C. 1996, c. 250 (the "Act") and its predecessor R.S.B.C. 1979, c. 219, gave "mixed if not conflicting signals" as to whether the system was one of 'deferred' or 'immediate' indefeasibility: see D.C. Harris, "Indefeasible Title in British Columbia: A Comment on the November 2005 Amendments to the Land Title Act", *The Advocate*, vol. 64 (July 2006) at 530-2. Amendments made to the Act in 2005 have added to the jigsaw puzzle of provisions and case authority without stating a unifying principle. Certainly the conception of British Columbia's land registration system as one on which anyone dealing with any interest in land may safely rely, is not clearly reflected in the present legislation, at least where interests less than fee simple are concerned.

Factual background

- [2] The plaintiff Mr. Gill was the registered owner of certain real property (which I shall call "Lot 4"), located in the New Westminster District. In November 2005, a fraudster ("John Doe") forged his signature on a transfer of Lot 4 to one Gurjeet Gill, who was working in concert with him. She then purported to grant a mortgage to the defendants Mr. and Mrs. Bucholtz, who in reliance on the register advanced some \$40,000 to her. Their mortgage was filed with the Land Title office at the same time as the forged transfer, on November 10, 2005. Later, Gurjit Gill negotiated a second mortgage in favour of the corporate defendant, which was executed on December 8 and filed for registration the following day. Before it could be registered, the plaintiff filed a caveat, which led the registrar to refuse to register the second mortgage. However, the corporate defendant had already advanced \$55,000 under it, relying on the state of the title on December 8, 2005. This was hardly a prudent course, but the parties agreed below that they would proceed on the basis that the second mortgage was actually registered. The chambers judge found that none of the mortgagees had had knowledge of the fraudulent root of Gurjeet Gill's title and that they had sought and obtained confirmation of her identity before advancing funds. John Doe's identity remains unknown.
- [3] The facts obviously raised for interpretation the central 'indefeasibility section' of the Act, s. 23, and the 'fraud exception' in s. 23(2)(i). At the date of registration of the first mortgage in favour of Mr. and Mrs. Bucholtz, it read as follows:

An indefeasible title, as long as it remains in force and uncanceled, is conclusive evidence at law and in equity, as against the Crown and all other persons, that the person named in the title is indefeasibly entitled to an estate in fee simple to the land described in the indefeasible title, subject to the following:

- (i) the right of a person to show fraud, including forgery, in which the registered owner, or the person from or through whom the registered owner derived his or her right or title otherwise than in good faith and for value, has participated in any degree.

Between the registration of the first mortgage and the filing of the second, the Act was amended by the Miscellaneous Statutes Amendment Act (No. 2), S.B.C. 2005, c. 35. The amending statute reworded s. 23(2)(i) such that it now reads:

An indefeasible title, as long as it remains in force and uncanceled, is conclusive evidence at law and in equity, as against the Crown and all other persons, that the person named in the title as registered owner is indefeasibly entitled to an estate in fee simple to the land described in the indefeasible title, subject to the following:

- (i) the right of a person deprived of land to show fraud, including forgery, in which the registered owner has participated in any degree; (Amendments underlined.)

The amending statute also added s. 25.1(1), which provides:

Subject to this section, a person who purports to acquire land or an estate or interest in land by registration of a void instrument does not acquire any estate or interest in the land on registration of the instrument.

For ease of reference, I have attached as a schedule to these reasons the material portions of ss. 23, 25.1, 26, 294.21, 296, 297 and 387(2), all reflecting the amendments. The chambers judge stated at para. 8 of his reasons (indexed as 2008 BCSC 758) that nothing turned on the amendments for purposes of his analysis and the case, including the appeal, was argued on the basis of the amended Act.

- [4] At paras. 11-6 of his reasons, the chambers judge outlined three principles he took from the foregoing provisions of the Act. The first was the "indefeasible quality of title as long as it remains 'in force and uncanceled'", subject to the exception that "as against a titleholder who has participated to any degree in a fraud in acquiring title, the true owner can recover title" under s. 23(2)(i). Second, he noted that the Act does not give to a registered charge, such as a mortgage, the indefeasible quality afforded to a registered fee simple interest. The holder of a charge that has been registered is merely "deemed" by s. 26(1) to be entitled to the interest reflected in the instrument. As this court ruled in *Credit Foncier Franco-Canadien v. Bennett* (1963) 43 W.W.R. 545, the words "shall be deemed" in the section that corresponded to what is now s. 26(1) establish only a rebuttable presumption of entitlement. In the words of Sheppard J.A. for the Court, "the omission of 'conclusive' from sec. 41 [of the then Land Registry Act] together with the use of the word 'deemed', which is capable of meaning 'rebuttably presumed', implies that the legislature intended such omission to be observed by assigning a meaning not 'conclusive' and raising only a rebuttable presumption." (At 548.) In the result, a mortgage forged by a fraudster who was purporting to be the registered owner remained a nullity even though it had been registered and then assigned to a bona fide lender.

- [5] The third principle noted by the chambers judge in the case at bar was that both before and after the amendments of 2005, the Act preserved the principle, in relation to registered interests less than fee simple, of *nemo dat quod non habet*. In the chambers judge's words, "one cannot validly or effectually give that which one does not have. Prior to the amendments, s. 297(3) provided as much: subsequent to the amendments the principle is found in s. 25.1." (Para. 16.)
- [6] Another important element of the legal context referred to by the chambers judge was the seminal decision of the Privy Council in *Gibbs v. Messer* [1891] A.C. 248, on appeal from the Colony of Victoria, Australia. In *Gibbs*, one Cresswell, the fraudulent lawyer of a registered owner, transferred title into the name of a fictitious person, "Hugh Cameron". Registered title was issued in that name. Then Cresswell, representing himself to be Hugh Cameron, arranged a loan from the defendants to be secured by mortgage. The mortgage was also duly registered in the defendants' names. The fraud was eventually discovered, and the plaintiff 'true owner' petitioned to be restored to the register and to have the mortgage cancelled. At the time, s. 4 of Victoria's Transfer of Land Statute, 1866 (No. 301) defined "proprietor" to include the holder of a lease, mortgage, or charge. Section 47 of the Transfer of Land Statute, the 'indefeasibility section', referred expressly to interests less than fee simple in the following terms:

No certificate of title issued upon an application to bring land under this Act or upon an application to be registered as proprietor on a transmission shall be impeached or defeasible by reason or on account of any informality or irregularity in the application or in the proceedings previous to the registration of the certificate and every certificate of title issued under any of the provisions herein contained shall be received in all courts of law and equity as evidence of the particulars therein set forth and of the entry thereof in the register book and shall be conclusive evidence that the person named in such certificate as the proprietor of or having any estate or interest in or power to appoint or dispose of the land therein described is seised or possessed of such estate or interest or has such power.

and s. 50 (which has no counterpart in British Columbia) stated:

Except in the case of fraud no person contracting or dealing with or taking or proposing to take a transfer from the proprietor of any registered land lease mortgage or charge shall be required or in any manner concerned to enquire or ascertain the circumstances under or the consideration for which such proprietor or any previous proprietor thereof was registered or to see to the application of any purchase or consideration money or shall be affected by notice actual 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. [Emphasis added.]

- [7] Speaking for the Judicial Committee, Lord Watson noted that the "main object of the Act", was to:

save persons dealing with registered proprietors from the trouble and expense of going behind the register, in order to investigate the history of their author's title, and to satisfy themselves of its validity. That end is accomplished by providing that everyone who purchases, in bona fide and for value, from a registered proprietor, and enters his deed of transfer or mortgage on the register, shall thereby acquire an indefeasible right, notwithstanding the infirmity of his author's title. [At 254; emphasis added.]

In what Mr. Janes emphasizes were obiter dicta, Lord Watson stated that if Hugh Cameron had been a real person whose name was fraudulently registered by Cresswell, his certificates of title, "so long as he remained undivested by the issue of new certificates to a bona fide transferee, would have been liable to cancellation" at the true owner's behest, but that a "mortgage executed by Cameron himself, in the knowledge of Creswell's fraud, would have constituted a valid encumbrance in favour of a bona fide mortgagee." (At 254-5.) However, since Cameron was a fictitious person, the mortgagees in Gibbs could not be said to have relied on the register. In Lord Watson's analysis:

The protection which the statute gives to persons transacting on the faith of the register is, by its terms, limited to those who actually deal with and derive right from a proprietor whose name is upon the register. Those who deal, not with the registered proprietor, but with a forger who uses his name, do not transact on the faith of the register; and they cannot by registration of a forged deed acquire a valid title in their own person, although the fact of their being registered will enable them to pass a valid right to third parties who purchase from them in good faith and for onerous consideration. [At 255; emphasis added.]

[8] The Judicial Committee concluded, then, that although a forged transfer or mortgage, void at common law, could when registered become the root of a valid title in a bona fide purchaser, nothing in the Land Transfer Statute made indefeasible "the registered right of the transferee or mortgagee under a null deed." (At 257-8.) The mortgagees could not bring themselves within the protection of the statute because they had not dealt with a registered proprietor, but with a fraudster "whose [true] name was not on the register, in reliance upon his honesty."

[9] Against this background, the plaintiff and the Authority argued in the court below that Gibbs - or more properly, the obiter dicta in Gibbs - was distinguishable on the basis of the significant differences between the Transfer of Land Statute of Victoria and the amended British Columbia Act. They argued that following from the second principle noted by the chambers judge, a chargeholder such as a mortgagee in this case could not acquire a valid charge from someone, such as Gurjit Gill, who did not own the interest purported to be granted by the charge. They submitted that two British Columbia cases, *Kwan v. Kinsey* (1979) 15 B.C.L.R. 31 (S.C.), which had relied on the obiter dicta in Gibbs, and *CMIC Mortgage Inv. Corp. v. Viridi* 2006 BCSC 1126, 57 B.C.L.R. (4th) 392, which relied on *Kwan*, were wrongly decided.

[10] The defendant mortgagees on the other hand based their argument on the indefeasible nature of fee simple interests. The chambers judge summarized their position thus:

The narrow thesis advanced by the defendant mortgagees is that s. 23 (2) clothes the registered owner with title as long as that person is shown in the registry as the registered owner. While the true owner has the ability to show fraud on the part of the registered owner, and thus recover title to his or her lands, until that is done the title holder, as shown on the register, can deal with the lands and in doing so can create a valid charge. If a mortgagee relies on the register in taking a mortgage, then the mortgage is valid as against the true owner notwithstanding that the title holder acquired his or her title by fraud. In short, the mortgagees argue that between the time the fraudster takes title and the time the true owner discovers and remedies the fraud, the fraudulent title holder can validly encumber the land provided the mortgagee is unaware of the fraud and relies on the title as it stood at the time it accepted its security.

Put more broadly, the mortgagees argue that the purpose of the Act is to allow those who rely on title to lands as shown in the register, to do so without the need of investigating the root of that title. They argue that if the Land Title and Survey Authority's position is correct that principle is significantly undermined. [At paras. 20-1; emphasis added.]

[11] There was little doubt that as the "true owner" of Lot 4, the plaintiff Mr. Gill was entitled to the return of his title, and the chambers judge made an order accordingly, directed to the registrar of the New Westminster Land Title office. The real question for the Court was whether the defendants' mortgages would continue to encumber the plaintiff's title as valid charges. The chambers judge reviewed the authorities cited by counsel, including in particular Gibbs, and Kwan v. Kinsey, supra, to which I shall return below. He found that the "tension" between the preservation of the nemo dat principle in relation to charges and the indefeasibility of title was "more apparent than real", since, he said, the Act clothes the registered title holder with an "indefeasible right to deal with the property." (My emphasis.) He continued:

from the perspective of a mortgagee dealing with the registered title holder bona fide and for value, the title holder owns that which is transferred. Viewed from that perspective, it is not inconsistent with the provisions of the Act which preserve the nemo dat quod non habet principle to find that a registered owner who acquired title through fraud can still grant a valid charge on the property.

In summary, I find that the mortgagees were entitled to rely on the title as it stood at the time they accepted the mortgages. The title showed the defendant mortgagor to be the owner. By operation of s. 23(2), the title is conclusive evidence both at law and in equity of the mortgagor's entitlement to the property. All of this I consider flows from the language of the Act itself. Further, the authorities support this conclusion; specifically Kwan does so. I am not persuaded that Kwan was wrongly decided; however, even if I were I am bound to follow it. It is a considered judgment of this Court, the validity of which has not been called into question by subsequent authority and in relation to which it has not been demonstrated that binding authority, whether

statutory or common law, was not considered (*Re Hansard Spruce Mills Ltd.*, [1954] 4 D.L.R. 590 (B.C.S.C.)).

In reaching this conclusion I have not overlooked the parties' arguments relating to the distinction between deferred and immediate indefeasibility as those concepts are reflected in the Act. Neither the plaintiff nor the Land Title and Survey Authority rely on those principles, and thus it is unnecessary to deal with them. [At paras. 39-41; emphasis added.]

[12] In respect of the policy arguments advanced by counsel, the chambers judge reasoned:

While there is an attraction to the argument that the mortgagee, who deals with the fraudster, is in a better position to detect fraud, that ability is, it seems to me, more apparent than real. The fraudster appears before the mortgagee as the registered owner. In this case, the fraudster is not impersonating someone other than the registered owner. The ability of the mortgagee to detect the underlying fraud is thus limited. Moreover, to require a mortgagee to do so, would undermine the very purpose of the land title system, a system whose object is, in the words of Lord Watson,

to save persons dealing with the registered proprietors from the trouble and expense of going behind the register, in order to investigate the history of their author's title, and to satisfy themselves of its validity.

Thus while there is merit in the policy considerations advanced by the plaintiff and the Land Title and Survey Authority in support of their positions, I do not find them compelling and in any event, as noted, I consider that I am bound by authority to conclude that as against the mortgagees the plaintiff's action must be dismissed. [At paras. 49-50.]

[13] In the result, although the plaintiff Mr. Gill was adjudged entitled to be restored to title to Lot 4, his title remained encumbered by the two mortgages granted by Gurjeet Gill to the defendants, and his prayer for the cancellation of the mortgages as charges against Lot 4 was dismissed. The Court did not address whether the plaintiff could redeem the mortgages and look to the Assurance Fund for compensation, but counsel in this court acknowledged that this was likely to be the next step if the appeal was not successful.

On Appeal

[14] On appeal, the parties' arguments largely expanded upon those made below. The Authority submitted that the chambers judge erred in law in misapprehending s. 23(2) and in failing to give effect to the exception to the indefeasibility of title established by para. (i) thereof. In Mr. Janes' submission, s. 23(2) limits indefeasibility to the person named in the title as registered owner (i.e., it does not extend to all persons appearing on the title as holding lesser interests.) Further, the exception is a true exception to indefeasibility and is not limited temporally: it applies to negate indefeasibility even while the fraudster's title is "in force and uncanceled". Consistent with the differentiation made by the Act between fee simple interests and charges, the exception allows a person who has been deprived of land

and who is able to show fraud (which is not limited by the Act to cases of forgery) in which the registered owner has participated, to challenge his or her "title as registered owner", but that is all it does. Subsections (2) and (3) of s. 25.1 then give the protection of registration to the bona fide purchaser of fee simple, but they do not extend to lesser interests, and s. 25.1(1) clarifies that those interests, where acquired under void instruments, remain invalid. Taken together, the rebuttable nature of the presumption established by s. 26, and the new s. 25.1 make it clear, counsel says, that chargeholders do not obtain the protection of indefeasibility (and the reversal of the nemo dat rule) that bona fide purchasers obtain on registration. On this point, we were referred to a passage from *Hansard* in which the Minister of Agriculture and Lands told the Legislature that the purpose of the 2005 amendments was "to give the authority the ability to protect a purchaser who unknowingly purchases a property that is identified with a void instrument." (My emphasis.) As well, Mr. Janes notes that if s. 23(2) had the meaning ascribed to it by the chambers judge, s. 25.1 would have no purpose.

- [15] In more general terms, the Authority contends that the chambers judge fell into error in that he was seeking to achieve a "preconceived notion" of the purpose of the Act as intended to protect anyone relying on the register in respect of any interest in land. Counsel referred us in this regard to the observations of the Court in *Vassos et al. v. State Bank of South Australia* [1993] 2 V.R. 618 (S.C.) in a similar situation:

In my view it is of the first importance to bear steadily in mind that the questions at issue in this case are not to be resolved by application of one of the two competing labels of "immediate indefeasibility" or "deferred indefeasibility". Those are no more than convenient shorthand expressions generally describing the effect of provisions of Torrens title legislation; they are not in any relevant sense principles from which conclusions can be drawn about the proper construction of the legislation. Further, I consider it equally important to recall that none of the Torrens title legislation to which I have been referred provides for absolute indefeasibility of title. Each of the statutes provides for circumstances in which a registered title may be defeated or qualified. Accordingly, although a policy in favour of immediate indefeasibility is to be discerned in the legislation, that policy is not absolute. Thus, although Windeyer J. noted in *Breskvar v. Wall*, at p. 400, that "the doctrine of an indefeasible title arising by registration was seen as the very essence of the Torrens system from its beginning", his Honour goes on to add that the registered proprietor under a Torrens system has legal property in the land "subject only to equities and such interest as the Act expressly preserves". The question that arises now is whether the title of the bank is subject to an equity or interest preserved by the Transfer of Land Act. That question is not answered simply by applying a principle in favour of indefeasibility for that is to assume the answer to the very question presented for decision.

The Torrens system legislation found in various States of Australia and New Zealand is not identical. No doubt powerful arguments can be mounted for there being uniform systems of land title registration throughout Australia but I consider that those arguments must not be permitted to obscure the fact that the legislation does differ from State to State, in the end the question that is presented is to be answered by construing the particular statute that governs the parties. [At 322; emphasis added.]

- [16] In response, the mortgagees argue that the Act must be read in light of what they characterize as the "key objective" of the Torrens system and in the context of the "commercial reality of the marketplace where [the] statute is intended to function": see *Canada 3000 Inc. (Re)*; *Inter-Canadian (1991) Inc. (Trustee of)* 2006 SCC 24, [2006] 1 S.C.R. 865 at para. 38. They say the object of the scheme was to do away with the mischief caused by the *nemo dat* rule. Mr. Lee submits that given this object, s. 23(2)(i) should be interpreted so as not to apply while the fraudulent owner's title is "in force and uncanceled", such that while he or she is the registered owner, the fraudster is able to give a valid charge as an attribute of the indefeasibility of title. Counsel observes that none of the decided cases supports the argument that a lender taking security from the registered owner is not indefeasibly entitled to its interest in the land, and that the result sought by the Authority would significantly (and inappropriately) alter a system relied upon daily by the real estate and lending industries and by the public generally.
- [17] It is hardly necessary to state the "modern approach" to statutory interpretation in Canada - that the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of the legislator: *Bell ExpressVu Limited Partnership v. Rex* 2002 SCC 42, [2002] 2 S.C.R. 559 at para. 26. What was the intention of the Legislature in this case? It is often said (echoing the Privy Council in *Gibbs*) that the goal of a Torrens system is to protect any person relying on the register. But all Torrens schemes are not the same. As Professor Harris observes, *supra*, the legislative goal may or may not be to protect all persons dealing with the registered owner. Some Torrens statutes, for example, provide immediate indefeasibility, while others provide deferred indefeasibility; some statutes (such as the *Land Transfer Statute of Victoria*) expressly make any enquiries other than a search of the register unnecessary, while others do not. As the Court noted in *Vassos*, *supra*, none of them provides absolute protection. Given this reality, it would be wrong for us to start our analysis from any particular assumption about the policy and intended meaning of the relevant provisions of the Act. At least in the first instance, we must focus on the 'grammatical and ordinary sense' of the words of the Act rather than on broad public conceptions or expressions of the policy underlying Torrens systems in other jurisdictions or other times.
- [18] Section 23(2) is of course of central importance. It establishes that an indefeasible title is conclusive evidence as against all persons - that the "person named in the title as registered owner" is "indefeasibly entitled to an estate in fee simple to the land", subject to the listed exceptions, including sub-para. (i), "the right of a person deprived of land to show fraud,

including forgery, in which the registered owner has participated". (My emphasis.) On its plain meaning, this section deals with title to fee simple belonging to a registered owner. It does not on its face extend to lesser interests, and the exception is not limited to any particular time - e.g., at such time as the title remains in force and is uncanceled. It is, in other words, a true exception to the indefeasibility of title held by a registered owner.

[19] Section 26 deals with registered charges. It provides:

- (1) A registered owner of a charge is deemed to be entitled to the estate, interest or claim created or evidenced by the instrument in respect of which the charge is registered, subject to the exceptions, registered charges and endorsements that appear on or are deemed to be incorporated in the register.
- (2) Registration of a charge does not constitute a determination by the registrar that the instrument in respect of which the charge is registered creates or evidences an estate or interest in the land or that the charge is enforceable.

As was emphasized in *Credit Foncier*, the underlined wording is considerably weaker than the 'indefeasible' and 'conclusive' wording of s. 23(2). Section 26(1) states only that the registered owner of a charge is "deemed to be entitled" to the estate or interest on the register, subject to appropriate exceptions; and s. 26(2), to which there was no counterpart when *Credit Foncier* was decided, now warns that the registration of a charge does not constitute a determination by the registrar that the charge in fact creates an interest in land or that it is enforceable.

[20] The mortgagees in the case at bar naturally rely on the obiter dicta in *Gibbs*, mentioned above, to the effect that if Hugh Cameron had been a real person, a mortgage granted by him to a bona fide lender would have been a valid encumbrance against the true owner's title. But as Mr. Janes on behalf of the Authority points out, s. 50 of the *Transfer of Land Statute of Victoria* clearly extended indefeasibility to mortgages and other charges - unlike the *British Columbia Act*, which gives only a rebuttable presumption of validity to such instruments. This point was made in *Credit Foncier*, where the Court distinguished *Gibbs* as follows:

The plaintiff has further contended that under *Gibbs v. Messer* any estate or interest appearing in the register becomes the root of a valid title and therefore that the plaintiff at bar, having purchased in good faith a registered mortgage, would be taken to have acquired a valid charge. *Gibbs v. Messer* is, however, distinguishable from the case at bar. There a transfer to a fictitious person was forged and registered and a mortgage then given in the name of the fictitious person to a mortgagee. The question was whether or not the true owner could invalidate the title to the land as against the mortgagee claiming under the registered mortgage. It was held that while a person need not investigate the origin of the title under which he takes, nevertheless he must ascertain at his own peril the validity of the document under which he claims and which he presents for registration, and as the mortgage was invalid, being from a fictitious mortgagor, therefore its registration did not give the mortgagee priority over the true owner. In the case at bar there is no question of the validity of the title to the land. The sole question is the validity of

the forged mortgage registered against the valid title; the effect of that mortgage must depend upon sec. 41.

In conclusion, upon the registration of the assignment of the mortgage to the plaintiff, then under sec. 41 the plaintiff's rights in respect of the mortgage became not conclusive but rebuttable. On the evidence, the mortgage was a nullity by virtue of forgery and remained a nullity notwithstanding the registration of the assignment to Stuart and the further assignment by Stuart to the plaintiff. [At 551; emphasis added.]

[21] In *Credit Foncier*, of course, the registered owner was the 'true owner' at all times; the mortgage was forged. In the present case, the mortgage was granted by the registered owner who held title in her true name. But in both situations, the mortgage is ineffective at common law to pass any interest: *nemo dat*. In both situations as well, the new s. 25.1(1) reinforces the point that the mortgage remains void notwithstanding registration. Section 25.1 provides:

Subject to this section, a person who purports to acquire land or an estate or interest in land by registration of a void instrument does not acquire any estate or interest in the land on registration of the instrument. [Emphasis added.]

Subsections (2) and (3) create exceptions for bona fide purchasers for value, but they apply only to instruments purporting to transfer fee simple estates. The Act does not purport to validate every grant of interest carried out by a fraudster who is a registered owner, nor to protect, as did the legislation in *Gibbs*, every person relying bona fide on the register. Further, nothing resembling s. 25.1 was present in the statute at issue in *Gibbs* or the cases to which we were referred from other jurisdictions, namely *de Lichtbuer v. Dupmeier et al.* [1941] 3 W.W.R. 64 (Sask. K.B.), which was concerned with s. 220 of the Land Title Act, R.S.S. 1940, c.98, and *Bonneu v. District Registrar of Winnipeg* [1935] 3 W.W.R. 181 (Man. Q.B.), which dealt with s. 79 of the Real Property Act, R.S.M. 1913, c.171.

[22] *Kwan v. Kinsey*, supra, was a 1979 decision of Munroe J. of the Supreme Court of British Columbia. A fraudster had forged the signature of the registered owner of property, transferring it to one Kinsey for one dollar. The deed was registered (subject to a second mortgage that had been also forged) and Kinsey then granted a third mortgage to one Morrisseau, who gave value and was acting in good faith without notice of the forgery. Munroe J. gave brief reasons in which he ruled that having obtained title under a forged deed, Kinsey had no valid claim to title, which was restored to the true owner. Similarly, the second mortgage was found to be "invalid". The third mortgage in favour of Morrisseau, however, "having been executed and delivered by the then registered owner and . accepted in good faith without notice of any forged instrument", was found to be valid against the owner on the authority of, *inter alia*, *Gibbs* and *Credit Foncier*, supra. The Assurance Fund was ordered to indemnify the owner for the money payable by her to discharge the Morrisseau mortgage.

[23] Munroe J. did not deal explicitly with the specific provisions of the Land Registry Act, R.S.B.C. 1960, c. 208 in force at the time. The wording of the 'indefeasibility section' and the 'fraud exception' in force at the time were materially different from the present s. 23(2)(i). Section 38(1)(j) then read as follows:

38.(1) Every certificate of indefeasible title issued under this Act shall be received in evidence in all Courts of justice in the Province without proof of the seal or signature thereon, and so long as it remains in force and uncanceled, shall be conclusive evidence at law and in equity, as against Her Majesty and all persons whatsoever, that the land therein described against the whole world, subject to

(j) the right of any person to show fraud, wherein the registered owner or wherein the person from or through whom the registered owner derived his right or title otherwise than bona fide for value has participated in any degree.

[24] Section 41 of the Land Registry Act, which was the focus of *Credit Foncier*, corresponded to what is now s. 26(1), but the Land Registry Act did not contain anything analogous to the present s. 25.1. Kwan may be distinguished on that basis alone, but there are other difficulties with the decision. As Mr. Janes noted, the Court cited *Credit Foncier* in support of its conclusion, but that case suggests the opposite conclusion to that reached in Kwan. Further, Munroe J. did not state a finding that Kinsey had participated in the fraud by which the rightful owner was deprived of her title. (The chambers judge in the case at bar inferred that Kinsey must have been found to be a party to the fraud because he had acquired title for \$1.)

[25] Kwan remains problematical, however, and has recently been relied on at the trial level in British Columbia, at least in dicta: see *CMIC Mortgage Inv. Corp. v. Viridi*, *supra*. In the interval, the Land Registry Act was replaced by the Land Title Act, S.B.C. 1978, c. 25, which came into force on October 31, 1979. It contained s. 277(2), which provided:

A person taking under a void instrument is not a purchaser and acquires no interest in the land by registration of the instrument.

Section 277(2) eventually became s. 297(3), and was "moved" to s. 25.1(1) of the present Act in 2005 in slightly different terms:

Subject to this section, a person who purports to acquire land or an estate or interest in land by registration of a void instrument does not acquire any estate or interest in the land on registration of the instrument.

In my respectful view, Kwan simply cannot stand in the face of the amendments made since 1979.

[26] Returning to the case at bar, it seems to me that the chambers judge's conclusion that the Act gives any registered owner - even a fraudster - an "indefeasible right to deal with the property" rests on a misapprehension of s. 23(2)(i) and fails to give effect to the Act as it now reads. The chambers judge himself recognized that a registered charge does not obtain the

same quality of indefeasibility as the registered fee simple, but he failed to apply this principle. On its plain meaning, the exception in s. 23(2)(i) to the indefeasibility of title applies and the phrase "void instrument" in s. 25.1(1) includes a mortgage taken from a person who obtained her title by fraud or forgery, as occurred in this case. The Act preserves the nemo dat rule with respect to charges - even where the holder has relied on the register and dealt bona fide with a non-fictitious registered owner. The mortgagees in this case did not acquire any estate or interest in Lot 4 on registration of their instruments because having been granted by a person who had no interest to give, those instruments were void, both at common law and under s. 25.1(1). With respect, I conclude that the chambers judge erred in law in his interpretation of the scope and nature of indefeasibility in the context of the scheme, and in "applying a principle in favour of indefeasibility ... [by assuming] the answer to the question presented for decision." (Vassos, *supra*, at 322.)

[27] It may be that in a perfect Torrens system, any person lending money bona fide on the security of a mortgage granted by the registered owner, would have a valid charge. But there are sound policy arguments on both sides of the question. The Legislature of British Columbia would appear to have adopted the policy that the cost of frauds perpetrated against mortgagees and other chargeholders should be borne not by the public (as the funders of the Assurance Fund) but by lenders and other chargeholders themselves. Whether this policy choice is a good one or not is not for us to decide. We must give effect to the language of the statute in its ordinary and grammatical meaning.

[28] I would allow the appeal and order that the mortgages be cancelled as encumbrances against the plaintiff's title. In view of the fact that this was in some ways a 'test' case which the Authority wished to have decided by this court, I would order that the parties bear their own costs.

[29] We are indebted to counsel for their able submissions.

"The Honourable Madam Justice Newbury"

I Agree:

"The Honourable Madam Justice Kirkpatrick"

I Agree:

"The Honourable Madam Justice Neilson"

Schedule A

Effect of indefeasible title

23(1) In this section, "court" includes a person or statutory body having, by law or consent of parties, authority to hear, receive and examine evidence.

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- (2) An indefeasible title, as long as it remains in force and uncanceled, is conclusive evidence at law and in equity, as against the Crown and all other persons, that the person named in the title as registered owner is indefeasibly entitled to an estate in fee simple to the land described in the indefeasible title, subject to the following:
- (a) the subsisting conditions, provisos, restrictions, exceptions and reservations, including royalties, contained in the original grant or contained in any other grant or disposition from the Crown;
 - (b) a federal or Provincial tax, rate or assessment at the date of the application for registration imposed or made a lien or that may after that date be imposed or made a lien on the land;
 - (c) a municipal charge, rate or assessment at the date of the application for registration imposed or that may after that date be imposed on the land, or which had before that date been imposed for local improvements or otherwise and that was not then due and payable, including a charge, rate or assessment imposed by a public body having taxing powers over an area in which the land is located;
 - (d) a lease or agreement for lease for a term not exceeding 3 years if there is actual occupation under the lease or agreement;
 - (e) a highway or public right of way, watercourse, right of water or other public easement;
 - (f) a right of expropriation or to an escheat under an Act;
 - (g) a caution, caveat, charge, claim of builder's lien, condition, entry, exception, judgment, notice, pending court proceeding, reservation, right of entry, transfer or other matter noted or endorsed on the title or that may be noted or endorsed after the date of the registration of the title;
 - (h) the right of a person to show that all or a portion of the land is, by wrong description of boundaries or parcels, improperly included in the title;
 - (i) the right of a person deprived of land to show fraud, including forgery, in which the registered owner has participated in any degree;
 - (j) a restrictive condition, right of reverter, or obligation imposed on the land by the Forest Act, that is endorsed on the title.
- (3) After an indefeasible title is registered, a title adverse to or in derogation of the title of the registered owner is not acquired by length of possession.
- (4) Despite subsection (3), in the case only of the first indefeasible title registered, it is void against the title of a person adversely in actual possession of and rightly entitled to the land included in the indefeasible title at the time registration was applied for and who continues in possession.

Void instruments - interest acquired or not acquired

25.1(1) Subject to this section, a person who purports to acquire land or an estate or interest in land by registration of a void instrument does not acquire any estate or interest in the land on registration of the instrument.

(2) Even though an instrument purporting to transfer a fee simple estate is void, a transferee who

(a) is named in the instrument, and

(b) in good faith and for valuable consideration, purports to acquire the estate,

is deemed to have acquired that estate on registration of that instrument.

(3) Even though a registered instrument purporting to transfer a fee simple estate is void, a transferee who

(a) is named in the instrument,

(b) is, on the date that this section comes into force, the registered owner of the estate, and

(c) in good faith and for valuable consideration, purported to acquire the estate,

is deemed to have acquired that estate on registration of that instrument.

Registration of a charge

26(1) A registered owner of a charge is deemed to be entitled to the estate, interest or claim created or evidenced by the instrument in respect of which the charge is registered, subject to the exceptions, registered charges and endorsements that appear on or are deemed to be incorporated in the register.

(2) Registration of a charge does not constitute a determination by the registrar that the instrument in respect of which the charge is registered creates or evidences an estate or interest in the land or that the charge is enforceable.

Protection of purchaser in good faith and for value

294.21(1) In this section, "transferee" means a transferee who, in good faith and for valuable consideration, acquires an estate or interest in land less than a fee simple estate.

(2) Despite anything to the contrary in this Act, no transferee is subject to a proceeding under this Part in respect of an estate or interest in land of which the transferee is the registered owner, for

(a) recovery of land,

(b) deprivation of land, or

(c) damages in respect of land

on the ground that the transferor

(d) may have been registered as owner through fraud, error or a wrongful act, or

(e) may have derived title from or through a person registered as owner through fraud, error or a wrongful act.

(3) [Repealed 2005-35-15.]

Remedies of person deprived of land

296(1) In this Part, "court" means the Supreme Court.

(2) A person, in this Part referred to as the "claimant",

(a) who is deprived of any estate or interest in land

(i) because of the conclusiveness of the register, in circumstances where, if this Act had not been passed, the claimant would have been entitled to recover the land from the present owner, and

(ii) in consequence of fraud or a wrongful act in respect of the registration of a person other than the claimant as owner of the land, and

(b) who is barred by this Act or by any other Act, or otherwise precluded from bringing an action

(i) for possession, or any other remedy for the recovery of land, or

(ii) for rectification of the register,

may, subject to subsections (3) and (4), proceed in court for the recovery of damages against the person by whose fraud or wrongful act the claimant has been deprived of the land.

(3) In a proceeding under subsection (2), the minister must be joined as a nominal party defendant as a condition of recovering damages and costs from the assurance fund, and the minister has the right in the proceedings to all the defences available to the minister or any other person for the purpose of protecting the assurance fund.

Protection of purchaser in good faith and for value

297(1) In this section, "transferee" means a transferee who, in good faith and for valuable consideration, acquires an estate or interest in land less than a fee simple estate.

(2) Despite anything to the contrary in this Act, no transferee is subject to a proceeding under this Part in respect of an estate or interest in land of which the transferee is the registered owner, for

(a) recovery of land,

(b) deprivation of land, or

(c) damages in respect of land

on the ground that the transferor

(d) may have been registered as owner through fraud, error or a wrongful act, or

(e) may have derived title from or through a person registered as owner through fraud, error or a wrongful act.

(3) [Repealed 2005-35-18.]

Offence of fraud

387(2) An order of the court affecting the title to land procured by fraud, an act consequent on the order and an endorsement, alteration or erasure made as a consequence of the fraud or the order is void as between all parties or privies to the fraud.

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Prepared on 26 October 2026 · Esheria