

SUPREME COURT OF QUEENSLAND

CITATION: *Gilbert & Ors v Goodwin & Ors* [2003] QSC 380

PARTIES: **ERROL RODERICK GILBERT, TREVOR GEORGE GILBERT, NEROLI DORELLE GILBERT, HIRAM ROSS GILBERT, VERNEE JOSEPH GILBERT and EDWARD JOHN GILBERT**
(plaintiffs)
v
JOHN PATRICK ANTHONY GOODWIN and CATHERINE ALICE GOODWIN as Personal Representatives of the Estate of JOHN TAYLOR GOODWIN
(defendants)

FILE NO: S5632 of 2000

DIVISION: Trial Division

PROCEEDING: Application

DELIVERED ON: 7 November 2003

DELIVERED AT: Brisbane

HEARING DATES: 8 August 2003

JUDGE: Wilson J

ORDERS: **1. That the application be dismissed;**
2. That the defendants pay the plaintiffs' costs of and incidental to the application to be assessed on the standard basis.

CATCHWORDS: PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PRACTICE UNDER RULES OF COURT – PLEADING – STATEMENT OF CLAIM – where application by defendants for order that part of statement of claim be struck out and further or alternatively that amendments to statement of claim be disallowed and further or alternatively that plaintiffs amend pleading to plead all material facts on which plaintiffs bear onus of proof - where plaintiffs seek declaration of their entitlement to be registered as owners of estate in fee simple – where plaintiffs rely on s 27(11) *Local Government Act 1936* – where s 27(11) *Local Government Act 1936* enabled Local Authority to sell land for arrears of rates – whether plaintiffs must plead all arrears of rates and compliance with statutory procedures

Local Government Act 1936 (Qld), s 27(11), s 27(12), s 52(30)
Uniform Civil Procedure Rules 1999 (Qld), r 171, r 149, r 151, r 153

Truth About Motorways Pty Ltd v Macquarie Infrastructure Management Ltd (1998) ATPR 41-633, cited
International Gems Pty Ltd v Livingstone Shire Council [1981] Qd R 465, considered
In re Church's Caveat [1905] St R Qd 201, cited
Bank of New South Wales v Laing [1954] AC 135, cited
Zuk v Miller [1957] SASR 25, cited
Hillebrand & Anor v Penrith City Council & Ors (2001) 51 NSWLR 424, referred to

COUNSEL: DR Cooper SC and MP Amerena for the applicant/defendants
 JA Griffin QC and P McQuade for the respondent/plaintiffs

SOLICITORS: Tony Goodwin & Company for the applicant/defendants
 Short Punch & Greaterix for the respondent/plaintiffs

- [1] **WILSON J:** In this proceeding the plaintiffs seek a declaration that they are entitled to be registered as owners of an estate in fee simple in certain parcels of land in the Gold Coast hinterland. Broadly, they claim that relief on two alternative bases: as purchasers from the Albert Shire Council which sold the land to them more than thirty years ago when the then owners had failed to pay rates, and by reason of adverse possession.
- [2] At all material times until 3 April 2000 John Taylor Goodwin and Frances Goodwin as joint tenants were registered as owners of the land. Frances Goodwin died on 21 July 1974 and John Taylor Goodwin died on 15 April 1999. On 3 April 2000 the defendants as personal representatives of John Taylor Goodwin became registered as owners of the land.
- [3] In this application the defendants attack that part of the plaintiff's statement of claim which deals with the claim to title based on purchase from the Albert Shire Council. Specifically, they ask the Court –
- (a) to strike out that part of the statement of claim pursuant to rule 171 of the *Uniform Civil Procedure Rules*;
 - (b) further or alternatively, to disallow amendments effected by an amended pleading filed on 2 April 2003;
 - (c) further or alternatively, to order the plaintiffs to amend the pleading to plead all material facts on which they bear the onus of proof.

To understand the relief sought, it is necessary to consider the statutory scheme pursuant to which the Council sold the land and the different versions of the statement of claim.

Section 27 of the *Local Government Act 1936 (QLD)*

- [4] By s 27 of the *Local Government Act 1936* the Council could levy rates on the owner of land within its jurisdiction. Subsection (11) dealt with sale of land for arrears of rates. Paragraph (i) provided -

“(11)(i) Power to sell for land for arrears of rates.

When in respect of any rateable land any rates accrued thereon under this Act ... have ... remained unpaid for three years or longer ... the Local Authority shall without further authority than this Act be empowered to sell such land.”

Paragraph (ii) dealt with notice of the intended sale, and then paragraph (iii) provided -

“(iii) Powers of sale.

- (a) After the expiration of three months ... and before the expiration of six months from the date of the notice of sale, unless the rates due and in arrear in respect of the said land, and all expenses incurred by the Local Authority in connection with the proposed sale of the said land, are sooner paid, the Local Authority shall proceed with the sale of the land.
...”

Paragraph (iv) dealt with the application of moneys arising from the sale, and paragraph (v), which dealt with the issue of title upon sale, was in these terms -

“(v) Issue of title on certificate of sale of land for rates.

Upon the sale of any land as aforesaid ..., the Local Authority shall furnish to the registrar of titles under the seal of the council a certificate which shall be in the following form set out hereunder, or to the like effect certifying that the land has been sold in pursuance of this section and specifying the description of the land, the name, occupation, and address of the purchaser of such land, and the registrar of titles shall thereupon, without any further authority than this Act, and notwithstanding any other Act to the contrary, and notwithstanding the non-production of the instrument of title, register the person named in such certificate for an estate in fee-simple in the said land free of an obligation hereinbefore referred to in paragraph (iv) of this subsection ..., and shall, without any fee in respect of such registration, issue to such person a clear title to the said land.”

Subsection (12), which I shall consider below, was headed “When sales of land valid notwithstanding any irregularity”.

The statement of claim

- [5] In their amended statement of claim filed on 19 December 2000 the plaintiffs described the land as “the Gilbert land”. They alleged -

“3. Up to and prior to 29 January 1970 John Taylor Goodwin and Frances Goodwin had failed to pay and were in arrears of rates due by them to the Albert Shire Council.

4. In or about January 1970:-

- (a) the Albert Shire Council sold the Gilbert land by reason of the arrears of rates;
- (b) the Albert Shire Council sold the Gilbert land pursuant to s 27 of the *Local Government Act 1936*;
- (c) the Albert Shire Council sold the Gilbert land to the Plaintiffs;
- (d) On or about 29 January 1970 the Albert Shire Council, in accordance with s. 27 of the *Local Government Act 1936*, gave to the Plaintiffs a Certificate of Sale of Land in respect of the sale of the Gilbert land.”

They went on to plead (inter alia) that the transfer to the plaintiffs had not been registered. Curiously they pleaded (in paragraphs 6 and 7) that on 24 January 2000 the defendants had “purported to seek a transmission by death of the title ... to themselves” and that they (the plaintiffs) had lodged a caveat on 9 May 2000, but they did not plead that the defendants, as personal representatives of John Taylor Goodwin, had become registered as owners on 3 April 2000. The latter was pleaded in the defence.

- [6] When pressed for particulars of paragraphs 3 and 4, the plaintiffs filed a further amended statement of claim on 2 April 2003 making these changes -

~~“3. Up to and prior to 29 January 1970 John Taylor Goodwin and Frances Goodwin had failed to pay and were in arrears of rates due by them to the Albert Shire Council.~~

4.3. In late 1969 and in or about January 1970:-

- ~~(a)~~ the Albert Shire Council sold the Gilbert land by reason of the arrears of rates;
- ~~(b)~~(a) the Albert Shire Council sold the Gilbert land pursuant to s. 27 of the *Local Government Act 1936*;
- ~~(c)~~(b) the Albert Shire Council sold the Gilbert land to the Plaintiffs;

~~(d)~~(c) On or about 29 January 1970 the Albert Shire Council, in accordance with s. 27 of the *Local Government Act 1936*, gave to the Plaintiffs a Certificate of Sale of Land in respect of the sale of the Gilbert land.”

[7] The plaintiffs propose to amend paragraph 4 further, so that it would become -

“~~4.3.~~ In late 1969 and in or about January 1970:-

(a) ~~the Albert Shire Council sold the Gilbert land by reason of the arrears of rates;~~

~~(b)~~(a) the Albert Shire Council sold the Gilbert land or purported to do so pursuant to s. 27 of the *Local Government Act 1936*;

~~(e)~~(b) the Albert Shire Council sold the Gilbert land to the Plaintiffs;

~~(d)~~(c) On or about 29 January 1970 the Albert Shire Council, in accordance with s. 27 of the *Local Government Act 1936*, ~~gave to the Plaintiffs a~~ issued two Certificates of Sale of Land in respect of the sale of the Gilbert land, and in or about 1972, such Certificates were lodged with the Registrar of Titles in accordance with the provisions of s 27(11)(v) of the said Act.”

The plaintiffs submit that those amendments should not affect the determination of the issues raised by the defendants. The defendants submit that they should be disallowed because they would be ineffectual. I am not prepared to disallow them. The addition of the words “or purported to do so” in paragraph 3(b) acknowledges an alternative legal analysis of the actions taken by the Council. The second amendment also raises issues of law as to the legal effect (if any) of the mere issue of the certificates of sale and their being lodged with the Registrar of Titles. Certainly under the Torrens system generally and under paragraph (v) of subsection 27(11) it is registration of an instrument, not lodging, which effects a change of title to land. However, the plaintiffs should not be precluded from making submissions on the legal effect of what was done in the present case.

The defendants’ contentions

- [8] In this application the defendants contend that the plaintiffs must plead facts showing -
- (i) that the land was the subject of unpaid rates for the period specified in the *Local Government Act*;
 - (ii) that the Council complied strictly with all the requirements of the *Act* relating to the exercise of the power of sale;
 - (iii) that facts exist which require the defendant’s registered title to be forfeited.

- [9] A pleading must contain a statement of all the material facts upon which the party relies: *UCPR* r 149(1)(b). The defendants contend that by their reliance on the certificate of sale the plaintiffs are asserting rights arising under a statute (namely, s 27 of the *Local Government Act*), and thus that they are obliged to plead the factual basis upon which that section is brought into play. See *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (1998) ATPR 41-633 per Foster J. They contend that requisite arrears of rates in respect of the subject land and compliance with all stated statutory procedures are essential ingredients of the statutory cause of action which the plaintiffs seek to set up under s 27; that they are matters upon which the plaintiffs bear the onus of proof; and that accordingly the plaintiffs must plead them.

The plaintiffs' contentions

- [10] The plaintiffs contend that in pleading their cause of action they are entitled to rely on -
- (i) the certificates issued by the Council which on their face record that the sale was effected pursuant to s 27 of the *Local Government Act* 1936;
 - (ii) s 27 of the *Local Government Act*; and
 - (iii) s 52(30) of the *Local Government Act* 1936.
- [11] Subsection (12) of s 27 was in the following terms -

“(12) When sales of land valid notwithstanding any irregularity

No sale of land ... made or purporting to have been made under the provisions of this section, and no action of the Local Authority in taking possession of any land under the provisions of this section shall be rendered invalid merely by reason of any failure to comply with any of the said provisions, or of any omission, irregularity, insufficiency, or inaccuracy in the observance of any of the said provisions, whether in substance or in form; and every such sale shall be valid and effectual for all purposes whatsoever, notwithstanding any such failure, omission, irregularity, insufficiency, or inaccuracy.

No registrar of titles and no purchaser upon any such sale shall be bound to inquire whether such sale has been properly made under the said provisions or be affected by notice, either express or implied, that there has been any failure, omission, irregularity, insufficiency, or inaccuracy as aforesaid.

No action or other proceeding shall lie or be taken against any registrar of titles or against any such purchaser as aforesaid, or against the Crown or any Minister of the Crown, or State officer acting for the Crown, or against the assurance fund established under “*The Real Property Acts, 1861 to 1877*,” or any fund administered or controlled by the State, or any such State officer in respect of any sale of land ... made or purporting to have been made under the provisions of this section, or by reason of any failure to comply with any of the said provisions, or of any omission, irregularity, insufficiency, or inaccuracy in the observance of any of the said provisions, whether in substance or in form, on the part of any such

purchaser, or any such Local Authority or officer thereof, or any registrar of titles or any Minister of the Crown, or any such State officer.

Provided always, that this subsection shall not be construed so as to afford any protection to any officer or person who has been guilty of fraud or wilful default in connection with any such sale or any such taking possession, or to any Local Authority which has not complied with the provisions of this section in connection with any such sale or any such taking possession.”

The plaintiffs contend that the effect of subsection (12) of s 27 is to deem any sale (or purported sale) of land under s 27 valid and regular irrespective of whether there was any failure to comply with the provisions of s 27, and that in this context the plaintiffs do not have to plead satisfaction of pre-sale requirements such as non-payment of rates for the specified period. They contend that they have to prove no more than that the Council purported to sell pursuant to s 27 - that their interest is not dependent on proof that the Council attended to those matters prior to sale. There is no reference to s 27(12) in the statement of claim, but on the plaintiffs’ argument, there is no need for any reference to it.

[12] Section 52 subsection (30) was in these terms -

“(30) Presumption against registered proprietor

The production in any court of a certificate of title, memorandum of transfer, or other instrument creating an interest in land, or of a duly certified copy thereof, shall be sufficient evidence that the person named therein as registered proprietor, or as entitled to such interest, is the owner of or person entitled to an interest in such land until the contrary is proved.”

The plaintiffs contend that a certificate of sale under s 27 is an instrument creating an interest in land. There is a presumption that they have the interest recited in each certificate, and they are entitled to be registered in accordance with s 27 (11)(v) until the contrary is proved. They submit -

“Accordingly, if there is any challenge to the entitlement to the claimed interest the onus is on the [defendants] to plead and prove that the [plaintiffs] are not entitled to rely on that presumption. For this reason, also it is not incumbent on the [plaintiffs] to plead matters relating to non payment of rates by the [defendants’] predecessors. It is for the [defendants] to do it, if they wish.”

Discussion

[13] Rule 151 of the *UCPR* provides -

“Presumed facts

151. (1) A party is not required to plead a fact if -

(a) the law presumes the fact in the party’s favour; or

(b) the burden of proving the fact does not lie with the party.

(2) Subrule (1) does not apply if it is necessary to plead the fact -

- (a) to comply with rule 149; or
- (b) to meet a denial by another party.”

(Rule 149 deals (inter alia) with the obligation to plead material facts.)

- [14] In *International Gems Pty Ltd v Livingstone Shire Council* [1981] Qd R 465 Demack J granted an injunction restraining a local authority from proceeding with a purported sale of land pursuant to s 27(11) of the *Act*. At page 468 he said -

“... section 27(11) confers a right or privilege on the local authority, namely, the right to sell a person’s land. The conditions upon which that right is acquired must exist before the right is acquired. The condition prescribed in s 27(11) is that accrued rates have remained unpaid for three years or longer. It seems to me this is clearly a condition precedent to the Council’s having the right to take the steps set out in s 27(11). It does not seem to me possible to construe s 27(11) in any other way. ...”

He found that when the local authority resolved to sell the land, the rates had not been unpaid for the requisite period. It followed that the local authority was not empowered to sell the land, and it could not act, or purport to act, under s 27(11)(ii) and resolve to sell the land (page 470).

- [15] His Honour then considered s 27(12). First, he described the proviso as “really meaningless” (at page 471). A similar proviso in earlier legislation which had not contained the words “or to any Local Authority which has not complied with the provisions of this section in connection with any such sale” had had an obvious purpose and meaning, but the purpose and meaning of the proviso in the 1936 legislation had been “quite hopelessly obscured” (page 471) by the addition of those words.

- [16] Then, His Honour opined that the provisions of s 27(12) ought to be construed, subject to the proviso, as dealing with a problem such as that presented in *In re Church’s Caveat* [1905] St R Qd 201, namely, a misdescription in the notice of sale. He went on -

“However, that is not the case here. Section 27(12) has no application here, as the condition precedent to the exercise by the Council of its power had not occurred. Because the time limit which gave rise to the Council’s right had not passed, the Council could not purport to take steps; neither could it take steps under the section. Consequently, the provision of s 27(12) offered no protection. The Council was simply acting quite unlawfully outside the provisions of the *Local Government Act*.

In those circumstances, the purported sale can not stand.”

[17] Rule 153 of the *UCPR* provides -

“Condition precedent

153 (1) An allegation of the performance or occurrence of a condition precedent necessary for the case of a party is implied in the party’s pleading.

(2) A party who denies the performance or occurrence of a condition precedent must specifically plead the denial.”

In r 153 a “condition precedent” is a condition agreed between the parties or imposed by statute, which must be fulfilled before a party is entitled to succeed in an action. See Cairns BC, *Australian Civil Procedure*, 5th ed, Law book, Sydney 2002, at page 190; Jacob J & Goldrein I, *Pleadings: Principles and Practice*, Sweet & Maxwell, London, 1990, at page 57. If non-performance or non-fulfilment of a condition precedent is properly pleaded by a defendant, the burden of proving its performance or fulfilment then shifts back to the plaintiff: *Bank of New South Wales v Laing* [1954] AC 135. However, a “condition precedent” within the meaning of r 153 must be distinguished from a material fact which is of the essence of a cause of action - for example, due search and inquiry for an unidentified vehicle before commencing an action against the Nominal Defendant under legislation dealing with the recovery of damages for personal injuries sustained in motor vehicle actions. The latter must be pleaded: *Zuk v Miller* [1957] SASR 25. In *International Gems* Demack J used the expression “condition precedent” in the sense of a substantive or constitutive element of the local authority’s right to sell the land. In other words, he did not use it in the sense in which it is used in r 153.

[18] Senior counsel for the plaintiffs submitted that the scheme or purpose of s 27(12) is to enable a purchaser to purchase the land without having to investigate whether the matters specified in s 27, such as non-payment of the rates for the requisite period and the service of appropriate notices, have been satisfied and submitted that this scheme or purpose would be frustrated if a purchaser, who was a stranger to the land and all prior dealings relating to it, were required to investigate and prove matters such as nonpayment of the rates. He focused on expressions such as “purporting to have been made under the provisions of this section”, “rendered invalid”, “any omission”, etc, “any of the said provisions”, and submitted that there is nothing in the language of s 27(12) which would warrant its being read down to relate only to minor failures to comply with s 27.

[19] Further he submitted that the present case is distinguishable from *International Gems*. There the dispute was between the local authority and the registered owner, and the sale had not been completed. Here the purchase price was paid in full, the certificates under s 27(11)(v) “issued” and were lodged with the Registrar of Titles. Of course, the transfers were not registered (apparently because of the plaintiffs’ failure to satisfy requisitions of the Registrar of Titles). Nevertheless, I think there is considerable force in the submission. The use of the past tense in subsection (12) is an indication that it applies at a time after a sale has been completed.

[20] He sought support for his argument in the decision of Hodgson CJ in *Hillebrand & Anor v Penrith City Council & Ors* (2001) 51 NSWLR 424. That case, too, was

concerned with a local authority's sale of land for non-payment of rates, and His Honour held that section 604(4) of the *Local Government Act* 1919 (NSW), which relieved the purchaser and others of any obligation to inquire whether the provisions of that *Act* in respect of the sale had been complied with, was not limited to defects in compliance with procedural requirements but covered all possible defects, including a failure to comply with the provision about non-payment of rates. However, because the provision was differently worded from s 27(12) of the Queensland legislation, I do not think it is of any great assistance.

- [21] Senior counsel for the defendants submitted that subsection 52(30) was intended to apply in a case between a registered proprietor and a local authority, but not to a case such as the present, which is between third parties and incidentally involves a question going to the validity of the exercise of the local authority's statutory powers. He relied on the heading to the subsection in support of his argument. However, that was not part of the legislation (having been inserted before 30 June 1991: *Acts Interpretation Act* 1954 (Qld) s 14), and it is doubtful whether the Court can have regard to it, even if it is satisfied that the subsection is ambiguous. See Pearce DC & Geddes RS, *Statutory Interpretation in Australia*, 5th ed, Butterworths, Australia, 2001, at paras [1.31], [4.41], [4.42]. The scope of this provision was not fully explored in argument, and it would be inappropriate for me to rule on it on an application such as this.
- [22] This is an application to strike out a pleading. Under *UCPR* r 171 the Court has a discretion to strike out all or part of a pleading if it -
- (a) discloses no reasonable cause of action ...;
 - (b) has a tendency to prejudice or delay the fair trial of the proceeding;
 - (c) is unnecessary or scandalous;
 - (d) is frivolous or vexatious; or
 - (e) is otherwise an abuse of the process of the court.
- [23] Such applications are approached cautiously. The plaintiff's argument that subsection (12) of s 27 relieves them of any obligation to prove matters such as non-payment of the rates for the requisite period and that accordingly they do not have to plead these matters is certainly tenable. Assuming for the moment that it is correct, they still face the hurdle of persuading the Court that the defendants' registered title should be displaced. That issue was adverted to on the present application, but not fully developed. These are matters which should be fully aired at trial, and not dealt with summarily on an application such as this. Here the Court is asked to strike out that part of the pleading which deals with the claim to title based on purchase from the Council; it is not asked to strike the other part which deals with the claim based on adverse possession. I am not persuaded that the impugned part of the further amended statement of claim filed on 2 April 2003 meets any of the descriptions in r 171. It is ultimately for the trial judge to rule whether the facts pleaded and proved are sufficient to entitle the plaintiffs to the relief they claim.
- [24] The application is dismissed with costs on the standard basis.