IN THE COURT OF APPEAL [1993] QCA 426

SUPREME COURT OF QUEENSLAND

Appeal No. 82 of 1993

Before The President
Mr Justice Davies
Mr Justice Lee

[Registrar of Titles v. Keddell]

BETWEEN:

THE REGISTRAR OF TITLES and the TREASURER OF QUEENSLAND — Appellants

- and -

MAXWELL JOHN KEDDELL, HEATHER RAE KEDDELL (Plaintiffs) — First Respondents

- and -

REGAROSE PTY. LTD. (First Defendant)

- and -

ADVANCE BANK AUSTRALIA LIMITED (Second Defendant) — Second Respondent

REASONS FOR JUDGMENT - THE COURT

Judgment delivered 25/10/93

Prior to 1 November 1991, the first respondents were the registered proprietors of their family home at Pimpana and the property was unencumbered. The certificate of title was held for safe-keeping by their solicitor, one Palmer. By successive fraudulent transactions, Palmer caused the property (i) to be transferred first to Horizonlink Pty. Ltd. (transfer registered on 1 November 1991) and then to Regarose Pty. Ltd. (transfer registered on 14 November 1991) and (ii) to be mortgaged to the second respondent (mortgage registered 14 November 1991). The mortgage initially secured repayment of a $205,000.00 loan by the second respondent and subsequently was extended to further

monies which it lent to Palmer. The judge below found that the indebtedness under the mortgage as at the date of her judgment (28 April 1993) was $534,930.73 and that the value of the property had decreased from $280,000.00 to $270,000.00, so that its value was (and for present purposes it must be assumed still is) substantially less than the amount secured by the second respondent's mortgage. These findings were not disputed in this Court. Further, it was accepted by all parties that the first respondents are not under any personal liability to the second respondent on the mortgage and that this will not change when the first respondents are re-registered as proprietors of the land.

This proceeding is somewhat complicated because (i) the first respondents combined claims against the second respondent with claims against Regarose and (ii) the appellants were not then parties to the litigation. (One of the orders made on 28 April 1993 gave them "leave to appeal against this judgment to the extent necessary" and the respondents have not challenged that on this appeal). It is necessary to set down the orders made on 28 April, a number of which are not challenged, as background to what is in issue on this appeal.

The formal orders were as follows:

> "IT IS THIS DAY ADJUDGED that the Plaintiffs do recover possession of the land described as Lot 1 on Registered Plan No. 168942 County of Ward Parish of Pimpama being the whole of the land contained in Certificate of Title Volume 5935 Folio 12,
> AND IT IS ORDERED pursuant to s.124 of the Real Property Act 1861 that the recording in the Register on the said Certificate of Title of a Memorandum of Transfer of the said land to Horizonlink Pty. Ltd. registered on the 1st day of November 1991 and a Memorandum of Transfer of the said land to the First Defendant registered on the 19th day of November 1991 be cancelled and a fresh Certificate of Title be substituted in lieu thereof showing the Plaintiffs as registered proprietors as joint tenants of an estate in fee simple in the said land, subject to registered Mortgage No. K836999R in favour of the Second Defendant as mortgagee;
> AND IT IS FURTHER ADJUDGED that the Plaintiffs do recover against the First Defendant the sum of $535,080.58 as

damages under s.126 of the Real Property Act 1861;
AND IT IS FURTHER ORDERED that interest thereon pursuant to the provisions of s.73 of the Common Law Practice Act 1867 accrue at the rate of 12.285% per annum compound interest capitalised monthly calculated from the 28th day of April 1993, such interest accruing at the daily rate of $149.85 until 30th April 1993 when unpaid interest will be capitalised, and wit interest thereafter calculated and payable on the capitalised amount with outstanding interest to be continued to be capitalised on the 30th day of each month thereafter until payment;
AND IT IS FURTHER ORDERED that the First Defendant pay the Plaintiffs' costs of and incidental to this action including this application to be taxed on a solicitor and own client basis;
AND IT IS FURTHER ORDERED that the Registrar of Titles and the Treasurer of Queensland have leave to appeal against this judgment to the extent necessary;
AND IT IS FURTHER ADJUDGED that upon the Plaintiffs paying to the Second Defendant the sum of $535,080.58 together with interest thereon calculated as set out in paragraph (d) above, the Second Defendant execute and deliver to the solicitors for the Plaintiffs a release of Mortgage No. K836999R in registrable form (except for stamping) together with the Certificate of Title to the said land."

Subsequently, on 2 July 1993, a different judge certified that judgment had been given in those terms on 28 April 1993 and continued as follows:

"2. The Sheriff has certified that the full amount of the Judgment for damages in favour of the Plaintiffs against the First Defendant cannot be recovered from the First Defendant as appears from the return endorsed on the Writ of Fieri Facias, such return being dated the 17th day of June, 1993;
3. The Plaintiffs are entitled to recover the damages awarded being the sum of $535,080.58, together with interest thereon pursuant to the provisions of Section 73 of the Common Law Practice Act 1867 at the rate of 12.285% per annum, compound interest capitalised monthly calculated from the 30th day of April, 1993, such interest accruing at the rate of $149.85, until 30th April, 1993, when unpaid interest was capitalised and with interest thereafter calculated and payable on the capitalised amount with outstanding interest to be continued to be capitalised on the 30th day of each month thereafter until payment from the assurance fund constituted pursuant to Section 41 of the Real Property Act 1861, such amount to be paid to the Second Defendant in order to redeem the Registered Mortgage held by the Second Defendant over the

land.
4. The Plaintiffs are entitled to recover their costs of and incidental to the action to be taxed on a solicitor and own client basis from the assurance fund."

No party challenges the first respondents' judgment for possession of the property or the order cancelling the transfers in favour of Horizonlink and Regarose and providing for a fresh certificate of title showing the first respondents as registered proprietors as joint tenants of an estate in fee simple in the property subject to the second respondent's mortgage. It is appropriate in the interests of clarity to proceed on the footing that that has occurred, as it might have done prior to the institution of the first respondents' claim for damages had the first respondents not joined their various claims in the one proceeding. Further, in the course of argument on this appeal, the first and second respondents asked, without objection by the appellants, that the judgment for redemption of the second respondent's mortgage by the first respondents be set aside if the appellants succeed in their appeal, which is confined to the quantum of the damages payable to the first respondents. It is a reasonable inference from the respondents' request that the first respondents intend to pay out the second respondent's mortgage only if awarded damages in the amount secured by the mortgage. There is no direct evidence concerning what course will be adopted with respect to the property if the appeal is successful.

Shortly stated, the appellants' submission is that the first respondents are only entitled to damages equal to the value of their land. The respondents contend that the first respondents are entitled to the amount secured by the second respondent's mortgage over their land. The second respondent is interested in supporting this contention because of the intention of the first respondents to redeem the mortgage if they receive damages in that sum.

So far as presently material, sections 126 and 127 of the

Real Property Act 1861 provide:

> "126.Any person deprived of any land or of any estate or interest in land in consequence of fraud ... may bring and prosecute an action at law in the Supreme Court for the recovery of damages against the person who derived benefit by such fraud ... .
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> ...
>
> ...
>
> Provided also that nothing in this Act contained shall be interpreted to subject to any action of ejectment or for recovery of damages any purchaser or mortgagee bona fide for valuable consideration of any land under the provisions of this Act although his vendor or mortgagor may have been registered as proprietor through fraud ... or may have derived from or through a person registered as proprietor through fraud ...
>
> 127. ... in any case in which damages may be awarded in any action against the person deriving benefit by any fraud and the Sheriff shall make a return a nulla bona or shall certify that the full amount with costs awarded cannot be recovered from such person the Treasurer ... upon receipt of a certificate of a Judge of the Supreme Court ... shall pay the amount of such damages and costs or the unrecovered balance thereof as the case may be and shall charge the same to the account of the assurance fund.
>
> ... ."

In Beardsley v Registrar of Titles (CA. No. 97 of 1992; unreported judgment delivered on 12 October 1992), Mrs Beardsley and her husband were registered proprietors as joint tenants of a home unit on the Gold Coast which Mr Beardsley fraudulently mortgaged to a finance company and then to a credit union. Both mortgages were accepted as valid. Subsequently, the first mortgagee sold the property but the proceeds were insufficient to pay the second mortgagee in full and Mrs Beardsley received nothing. In the course of dismissing Mrs Beardsley's appeal against the rejection of her claim against the Registrar of Titles under section 127 of the Act on the basis that it was brought out of time, the Court said:

> "Plainly, the circumstance that the mortgages did not wholly and irrevocably deprive the appellant of her entire estate or interest in the land does not mean that they did not deprive her of any estate or interest at all. Logic and authority support the conclusion that they did. After the mortgages were registered, although the appellant retained the fee simple she had been pro tanto deprived of the land which was encumbered by the mortgages; the estate or interest of which she had been deprived corresponded with the estate or interest of the mortgagees. ...
>
> It is clear that the appellant was also deprived of an interest in the property when it was sold by the first mortgagee ... . However, ... the parties' agreement as to the value of the property at material times demonstrated that the fee simple encumbered by the mortgages was valueless.
>
> S.126 does not entitle a person deprived of an interest in land by fraud to recover all loss attributable to the fraud ... . The section provides a right to recover the loss caused by the deprivation relied on, which is ordinarily measured by reference to the value of the land, or interest, of which the person seeking damages was relevantly deprived ..."

Consistently with that passage, it is established that where a landowner is fraudulently deprived of an interest in land by the registration of a mortgage, the ordinary measure of damages under s.126 of the Act is the amount required to redeem the mortgage: Queensland Trustees Ltd. v. Registrar of Titles (1893) 5 QLJ 46, 50-51; Gibbs v. Messer (1891) AC 248, 253; Registrar of Titles v. Crowle (1947) 75 CLR 191, 200-201; Parker v. Registrar-General [1976] 1 NSWLR 342, 363; Registrar-General v. Behn (1979) 2 NSWLR 496; [1980] 1 NSWLR 589, 596; (1981) 148 CLR 562.

However, it is also established that, as a general rule, damages assessed under s.126 of the Act should not exceed the value of the land: Queensland Trustees Ltd. v. Registrar of Titles at p.52; Cox v. Bourne (1897) 8 QLJ 66, 69; Spencer v. Registrar of Titles (1908) AC 235, 240; Heron v. Broadbent (1919) 20 S.R. (NSW) 101, 106; Registrar of Titles v. Crowle at pp.200-201; Parker v. Registrar-General at p.363.

Since the amount required in order to redeem a mortgage is ordinarily less than the value of the land over which the mortgage is security, these two principles do not, in the usual case, conflict. However, where the value of the land is less than the sum secured by the mortgage over it, it is impossible to give effect to both principles and a choice must be made. The judge below held that the correct measure of damages in such circumstances is the amount required to redeem the mortgage, but the appellants contend that the upper limit is the value of the land.

The authorities which are referred to above do not provide a clear answer.

Queensland Trustees Ltd. v. Registrar of Titles was an action for damages under section 127 of the Real Property Act in which the value of the land exceeded the mortgage debt and the plaintiff received compensation equivalent to the amount of the mortgage. Real J. commented in passing at p.50 that:

> "If it was mortgaged for more than it was worth, you might possibly get a reduction".

In Cox v. Bourne, which was also an action under section 127 of the Real Property Act, Griffith CJ. stated at p.69 that damages awarded against the Assurance Fund cannot exceed the value of the land. He went on to say that:

> "... although the measure of damages against the person guilty of the fraud might include all the expenses of getting the land back from an innocent mortgagee, I think that the right of recourse against the Assurance Fund is not co-extensive, but must follow the general rule in actions for mere conversion or deprivation of property".

It was subsequently held in Registrar-General v. Behn (148 CLR at 571) that the damages recoverable against the Assurance Fund under section 127 are co-extensive with the damages for fraud under section 126, so that, at least to that extent, Cox v. Bourne was wrong.

In Finucane v. Registrar of Titles (1902) St.R. Qd. 75, the Full Court of the Supreme Court of Queensland held that a

life tenant who had incorrectly been registered as having the fee simple in two parcels of land would be bound to indemnify the remaindermen when they came into possession against any mortgage of the land by the life tenant. The life tenant failed to redeem a mortgage over the land before her death. By the time the case was heard in the High Court (Registrar of Titles v. Crowle), one parcel of land remained which was subject to a mortgage which was for a lesser amount than the value of the land. The High Court said at p.201 that "Prima facie, the amount of the mortgage debt is the measure of damages in such a case as this". A further question was raised in that case concerning whether, in calculating compensation, the amount should be reduced by the value of improvements made to the land by the life tenant. It was within that context, which is of no present relevance, that the High Court said at p.201 that:

> "... the loss or damage ... is to be measured by the value of the land in the state in which it was at the time when he is taken to have been deprived of it ...".

See also Spencer v. Registrar of Titles at p.240.

In Parker v. Registrar-General, Lee J. said at p.363 that "... the damages cannot exceed the value of the land at the date of deprivation" and that:

> "Where a mortgage has been placed on the title that represents the extent to which the rightful owner has been deprived of an estate of [sic] interest, the damages are the amount necessary to redeem the mortgage."

In Registrar-General v. Behn, although the mortgage debt exceeded the value of the land, the owner had intended to sell the property in any event. The measure of damages was determined by Holland J. at first instance and was not varied on appeal by either the N.S.W. Court of Appeal or the High Court. Holland J. ((1979) 2 NSWLR at pp.520-521) concluded that the damages should be restricted to the value of the land "... unless perhaps it could be shown that, to the defrauded party, possession of the land in specie exceeded its market value and, incidentally, its

value as security to the mortgagee; and that therefore the only remedy which would place the deprived party in the same position as if the wrongful act had not been done would be to require the wrongdoer to discharge the mortgage debt, whatever the value of the land might be". His Honour did not need to go further since, in that case, the land had no special value to the owner.

In the absence of direct authority, it is appropriate to look to the common law measure of damages for fraud.

Subject to the rules as to remoteness of damage and a plaintiff's duty to mitigate his loss, a party defrauded is entitled "... to be put, so far as possible, in the position he would have been in" if the fraud had not occurred: Gould v. Vaggelas (1985) 157 CLR 215, 220. This is consistent with the "... underlying principle ... that damages in the law of tort are essentially restitutionary, being designed to ensure that the plaintiff is restored, so far as money can do it, to his former position by compensating him for the loss sustained, no less and no more": per McPherson J. (as his Honour then was) in Davidson v. J.S. Gilbert Fabrication Pty. Ltd. (1986) 1 Qd.R.1,4. In Hungerfords v. Walker (1989) 171 CLR 125, Mason CJ. and Wilson J. at p.143 similarly spoke of the fundamental principle that "the plaintiff is entitled to full compensation for the loss which he sustains in consequence of the defendant's wrong, subject to the rules as to remoteness of damage and to the plaintiff's duty to mitigate his loss." See also The Commonwealth v. Amann Aviation Pty. Limited (1991) 174 CLR 64, in which Deane J. said at p.116:

> "The general principle governing the assessment of compensatory damages in both contract and tort is that the plaintiff should receive the monetary sum which, so far as money can, represents fair and adequate compensation for the loss or injury sustained by reason of the defendant's wrongful conduct. The application of that general principle ordinarily involves a comparison, sometimes implicit, between a hypothetical and an actual state of affairs: what relevantly represents the position in which the plaintiff would have been if the wrongful act (ie. the repudiation or breach of contract or the tort) had not

> occurred and what relevantly represents the position in which the plaintiff is or will be after the occurrence of the wrongful act."

These statements of general principle do not provide a solution to the choice which must be made where there are two different bases upon which compensation can be assessed. However, that issue has arisen in various contexts; for example in Davidson v. J.S. Gilbert Fabrication Pty. Ltd., which involved a choice between the diminution in value or the cost of repairs of a vessel which had been tortiously damaged, and in Evans v. Balog (1976) 1 NSWLR 36, which involved a similar choice in respect of a house property which had been undermined and damaged by excavations on an adjoining property.

In Evans v. Balog, Samuels JA., with whom Moffit P. and Hutley JA. agreed, said at pp.39-40:

> " One commences, I think, with the general proposition that the measure of damages in tort is: `... that sum of money which will put the party who has been injured ... in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation.'
>
> I have quoted the words of Lord Blackburn in Livingstone v. Rewards Coal Co. (1880) 5 App.Cas. 25 at p.39. I need not multiply citations in support of this principle. But I observe in addition that in Admiralty Commissioners v. S.S. Susquehanna [1926] A.C. 655, at p.661, Lord Dunedin said that the purpose of an award of damages is to give the injured party, so far as money can, reparation for the wrongful act. But that object may be achieved in different ways, and a proper assessment is determined by the circumstances of the case and by the overriding requirements of what is reasonable. As Denning L.J., as he then was, said in Philips v. Ward [1956] 2 WLR 471, at p.473; [1956] 1 All E.R. 874, at p.876: `It all depends on the circumstances of the case;... The general rule is that the injured person is to be fairly compensated for the damage he has sustained, neither more nor less.'
>
> In a case such as the present, involving tortious damage to a building, it cannot be said that the normal measure of damages is the amount of diminution in the value of the land and improvements. I agree with the analysis of the cases contained in the 13th edition of McGregor on Damages, pp.711-713, pars. 1059-1062, and see Minter v.

> Eacott (1952) 69 WN (N.S.W.) 93. The view that an equally admissible measure is the cost of reinstatement and restoration is supported by Hollebone v. Midhurst and Fernhurst Builders Ltd. [1968] 1 Ll.R.38, and Harbutt's "Plasticine" Ltd. v. Wayne Tank and Pump co. Ltd. [1970] 1 QB 447. Mr Toomey endeavoured to distinguish Harbutt's case [1970] 1 QB 447 on the ground that there the building destroyed was a factory vital to the maintenance of the plaintiff's business. But it is in truth the controlling importance attributed to that fact in that case which establishes the validity of the reinstatement principle where the necessity of the case requires its application. Reliance was also placed upon Hutchison v. Davidson (1945 S.C. 395). But there is nothing in that case which makes against allowing the cost of reinstatement where the circumstances are such that it is only by that means that fair compensation may be made. There is much indeed in the opinions of Lord Russell (1945 S.C. 39, at p.403 et seq.) and Lord Moncrieff (1945 S.C. 395, at p.409 et seq) which supports it. As the learned author of McGregor on Damages says at p.713, the case sustains what I take to be the true criterion of the selection between diminution of value and the cost of reinstatement. What he says is this: 'The test which appears to be the appropriate one is the reasonableness of the plaintiffs' desire to reinstate the property; this will be judged in part by the advantages to him of reinstatement in relation to the extra cost to the defendant in having to pay damages for reinstatement rather than damages calculated by the diminution in value of the land.'
>
> Hence, it is sometimes said that a plaintiff may have the cost of restoration provided that it is not disproportionate to the diminution in value: Cf. Public Trustee v. Hermann (1968) 88 WN (Pt.1) (N.S.W.) 442."

The test of reasonableness, which is there laid down, involves consideration of what is reasonable not only from the point of view of the plaintiff but also from that of the defendant who has to pay: Bartlett v. D.J. Small and Son Ltd. (1967) NZLR 260, 261; Jansen v. Dewhurst (1969) VR 421, 426.

The suitability of the test of reasonableness for present purposes can be confirmed by assuming that the second respondent had already been paid by the first respondents when this proceeding was commenced and had already discharged its mortgage over the land. If the first respondents had paid the market value of the land, as on a sale by the second respondent as

mortgagee exercising power of sale, that amount would mark the measure of their loss (perhaps together with incidental losses for costs, etc associated with the transaction). If, on the other hand, the first respondents had paid out the second respondent's mortgage then, whether nor not the issue would properly be seen as one of mitigation, the reasonableness of their conduct would fall for scrutiny: cf Burns v. M.A.N. Automotive (Aust.) Pty. Ltd. (1986) 161 CLR 653.

The conclusion to be drawn from the authorities, shortly stated, is that the damages recoverable when land is fraudulently subjected to a mortgage is ordinarily the lesser of the amount secured by the mortgage and the value of the land. However, the higher amount may be recovered where that is reasonable between the parties.

In contrast to the situation in Registrar-General v. Behn, the first respondents do not wish to sell the property but to retain it for their home. That it has some special value to them seems a proper inference from the circumstances that it was purchased by them in 1988 as their family home and they have resided there ever since and intend to reside there indefinitely. It seems simply to have been assumed that the second respondent will not release its mortgage or dispose of the land by sale for less than the amount of the mortgage debt and that, in order to retain their property without encumbrance, the first respondents must pay the second respondent the amount of its mortgage debt. While this is theoretically possible, a more reasonable inference would be that the second respondent, as a prudent bank, will sell the land if it is not paid out and will accept market value from the purchaser, whether or not the first respondents. That seems to have been accepted by the primary judge who spoke of a possible purchase of the property by the first respondents from the second respondent when it "puts it to auction as it might be assumed it will do". As was noted in Registrar-General v. Behn ((1979) 2 NSWLR at pp.520-521), the value of the mortgagee's security is only equal to the

value of the land where the amount secured exceeds the value of the land.

The appellants sought to rely upon the circumstance that the damages awarded to the first respondents will come from public moneys but it is unnecessary to take that into account. The special value of the property to the first respondents is insufficient to make it reasonable for them to pay almost twice its value to the second respondent to redeem the mortgage when it is more probable than not that the property can be purchased by the first respondents from the second respondent for approximately half the cost of redemption. However, the first respondents should not be confined to the bare market value of the property, but should be awarded damages which take account of the possibility that something more than the amount which, in a valuer's opinion, is the market value might well be needed to purchase the property if it goes to auction and that, in any event, there will be associated expenses, including solicitors' costs and stamp duty and registration fees. In the absence of clear evidence on these matters, the damages should be assessed on the basis of a broad approach at $300,000.00.

Accordingly, the appeal ought be allowed and the 3rd, 4th, 6th and last paragraphs of the judgment and orders pronounced and made on 28 April 1993 set aside. In lieu thereof, it is adjudged that the first respondents recover against the appellants the sum of $300,000.00. The first respondents must pay the appellants' taxed costs of the appeal but are granted a certificate pursuant to section 15 of the Appeal Costs Fund Act 1973. There should be no order with respect to the second respondent's costs.

IN THE COURT OF APPEAL

SUPREME COURT OF QUEENSLAND

Appeal No. 82 of 1993

Brisbane

[Registrar of Titles v. Keddell]

BETWEEN:

THE REGISTRAR OF TITLES and the TREASURER OF QUEENSLAND — Appellants

- and -

MAXWELL JOHN KEDDELL, HEATHER RAE KEDDELL (Plaintiffs) — First Respondents

- and -

REGAROSE PTY. LTD. (First Defendant)

- and -

ADVANCE BANK AUSTRALIA LIMITED (Second Defendant) — Second Respondent

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The President
Mr Justice Davies
Mr Justice Lee

Judgment delivered 25/10/93

Judgment of the Court

APPEAL ALLOWED.
SET ASIDE THE THIRD, FOURTH, SIXTH AND LAST PARAGRAPHS OF THE JUDGMENT AND ORDERS PRONOUNCED AND MADE ON 28 APRIL 1993.
IN LIEU THEREOF, IT IS ADJUDGED THAT THE FIRST RESPONDENTS RECOVER AGAINST THE APPELLANTS THE SUM OF $300,000.00.
THE FIRST RESPONDENTS TO PAY THE APPELLANTS' TAXED COSTS OF THE

APPEAL.
THE FIRST RESPONDENT IS GRANTED AN INDEMNITY CERTIFICATE PURSUANT TO S.15 APPEAL COSTS FUND ACT 1973.
NO ORDER IS MADE WITH RESPECT TO THE SECOND RESPONDENT'S COSTS.

CATCHWORDS: VENDOR AND PURCHASER - Mortgages - fraud - quantum of damages - whether plaintiff to receive value of land or value of mortgage debt incurred by fraud - ss.126, 127 Real Property Act 1861.

Counsel: Mr. K. Dorney Q.C., with him Mr. D. Campbell for the appellants
Mr. D.J. McGill, with him Mr. J.S. Allman for the first respondents
Mr. J. Muir Q.C., with him Mr. J. McKenna for the second respondent

Solicitors: Franzen for the appellants
Michell Sillar Cannons for the respondents
Clayton Utz for the second respondent

Hearing Date: 03/08/93