Uukw et al. v. R. In Right of British Columbia and Registrar, Prince Rupert Land Title District

[1988] 1 C.N.L.R. 173

British Columbia Court of Appeal
Carrothers, Macdonald and Wallace JJ.A.

April 2, 1987

D.M.M. Goldie and C.F. Willms, for the appellant.
S.A. Rush and S. Guenther, for the respondents Delgam Uukw and others.
P.J. Pearlman, for the respondent Registrar.

The Crown in right of British Columbia and the registrar of land titles appealed an order directing the registrar to register two certificates of lis pendens against certain unalienated Crown lands arising out of an action asserting aboriginal rights over those lands. The appellant contended that if the interest in land claimed by the respondents is not registrable under the Land Title Act, R.S.B.C. 1979, c.219, then they are not entitled to register a certificate of lis pendens in respect of that interest. In answer the respondents contended that they claim an interest in land and a registrable interest need not be shown for registration of a certificate of lis pendens. Alternatively, they contend that their claims to interests in land are encumbrances under the Act and registrable as such.

Held: Appeal allowed.

1. The respondents' contention that the estate or interest need not be registrable cannot stand in the face of s.31 of the Act, which contemplates the claimant applying for registration of the title or charge which he has won through his successful action. It is not sensible that the statute would provide for registration of a certificate of lis pendens with respect to a claimed estate or interest in land which, if established, is not entitled to be registered. The underlying premise of registration of a certificate of lis pendens is to provide a successful plaintiff with priority of registration under the Act of the title or charge he asserts.
2. Even if established, aboriginal title is generally inalienable, except to the Crown. Aboriginal title can have no place in a Torrens system which has the primary object of establishing and certifying the ownership of indefeasible titles and simplifying transfers thereof.

Editor's Note: Leave to appeal to the Supreme Court of Canada was dismissed June 1, 1987.

MACDONALD J.A.:— On 23rd October 1984 the respondents commenced action against the appellant Her Majesty the Queen in right of the province of British Columbia, asserting aboriginal rights over extensive lands and claiming declarations and orders in recognition and enforcement of those rights. The question before us is their right to have certificates of lis pendens registered against those unalienated Crown lands.

The action was commenced in the Smithers Registry of the Supreme Court. On 5th July 1985 a certificate of lis pendens was obtained from that registry and on 12th July 1985 an application to register it in respect of 2,069 district lots was tendered to the respondent Registrar, Prince Rupert Land Title District. By consent the registrar excluded 54 district lots. The certificate was given a pending No. 7913. On 13th August 1985 the registrar gave notice pursuant to s.288 of the Land Title Act, R.S.B.C. 1979, c.219, of refusal to proceed with the pending application. Reasons were given. On 13th September 1984 notice of appeal from that decision of the registrar was filed in the Smithers court registry.

On 4th October 1985 a second certificate of lis pendens with respect to the same action was obtained and, the same day, an application to register it with respect to three district lots not included in the first certificate was tendered. The registrar summarily rejected the application pursuant to s.165 of the Land Title Act. Upon request he provided written reasons. On 8th November 1985 notice of appeal from the decision of the registrar with respect to the second certificate was filed in the Smithers Registry.

The appeals were consolidated. On 14th July 1986, dealing with many issues in lengthy and careful reasons for judgment, Mr. Justice Finch allowed the appeals and ordered registration of the certificates of lis pendens [5 B.C.L.R. (2d) 76, 41 R.P.R. 240, 28 D.L.R. (4th) 504, [1986] 4 C.N.L.R. 111].

Mr. Goldie and Mr. Willms for the appellant, supported by Mr. Pearlman for the respondent registrar, say that the judge erred in two findings of law which were crucial to his judgment. In my opinion one of them is decisive and I will confine discussion to it.

The particular submission of the appellant is that if the interest in land claimed by the respondents is not registrable under the Land Title Act, then they are not entitled to register a certificate of lis pendens in respect of that interest. In answer the respondents say that they claim an interest in land and a registrable interest need not be shown for registration of a certificate of lis pendens. Alternatively, they say that their claims to interests in land are encumbrances under the Land Title Act and registrable as such.

The judge stated his view on the point in this passage at p.40 of his reasons [p.104 B.C.L.R., p.141 C.N.L.R.]:

> Whether such title, if established, is recognizable by and registrable under our Torrens land title registry system is not a question for me to decide on this application. The appellants did not seek to register their aboriginal title. They sought to register a certificate verifying that they made a claim which asserted such an interest.

The section of the Land Title Act governing registration of certificates of lis pendens is, in part, as follows:

> 213.(1) A person who has commenced or is a party to a proceeding and who is
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> (a) claiming an estate or interest in land; or
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> (b) given by another enactment a right of action in respect of land,
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> may register a certificate of lis pendens against the land in the same manner as a charge is registered, and the registrar of the court in which the proceeding is commenced shall attach to his certificate a copy of the originating process, or, in the case of a lis pendens under the Court Order Enforcement Act, Part 3, a copy of the notice of motion or other document by which the claim is made.

It does not prescribe that the estate or interest in land must be registrable.

The title and rights claimed by the respondents appear in the following paragraphs of their statement of claim:

> 54. The Plaintiffs have owned and exercised jurisdiction over the lands described in Schedule A and set out on the map attached as Schedule "B" (hereinafter referred to as "the territory").
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> 55. Without restricting the generality of paragraph 54 since time immemorial the Plaintiffs and their ancestors have:
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> (a) lived within the territory;
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> (b) harvested, managed and conserved the resources within the territory;
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> (c) governed themselves according to their laws;
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> (d) governed the territory according to their laws and spiritual beliefs and practises;
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> (e) exercised their spiritual beliefs within the territory;

(f) maintained their institutions and exercised their authority over the territory through their institutions;

(g) protected and maintained the boundaries of the territory;

(h) expressed their ownership of the territory through their regalia, adawks kun'xa and songs;

(i) confirmed their ownership of the territory through their totem poles.

56. The Plaintiffs continue to own and exercise jurisdiction over the territory to the present time.

57. The right to own and exercise jurisdiction over the territory of the Gitksan Chiefs and the resources thereon and therein was at all material times a right enjoyed by the Gitksan Chiefs and the members of their Houses.

58. The right to own and exercise jurisdiction over the territory of the Wet' suwet 'en Chiefs and the resources thereon and therein was at all material times a right enjoyed by the Wet'suwet'en Chiefs and the members of their Houses.

59. The Plaintiffs and their ancestors exercised exclusive jurisdiction over the territory.

60. The Plaintiffs continue to exercise jurisdiction over the territory and resources in the territory in accordance with Gitksan and Wet' suwet' en laws and practises.

61. In addition to the rights aforementioned, the Plaintiffs have enjoyed and still enjoy the rights recognized and confirmed by the Royal Proclamation made by His Majesty King George the Third on the 7th of October, 1763, (hereinafter called the "Royal Proclamation"). The Royal Proclamation, which applies inter alia to British Columbia is part of the Constitution of Canada.

62. By virtue of the Royal Proclamation of 1763, the Plaintiffs enjoy ownership and jurisdiction over the territory including, without restricting the generality of the foregoing:

1. A right that the territory be reserved to the benefit of the Plaintiffs until by the Plaintiffs' informed consent the said rights are surrendered to the Crown;
2. A recognition of the Plaintiffs aboriginal title, ownership and jurisdiction and the special relationship of the Plaintiffs as Indians to the Crown.

63. In the alternative, by virtue of the Royal Proclamation of 1763, the Plaintiffs enjoy the rights hereinafter set out:

1. A right of ownership to the territory and to the territorial waters and resources, and
2. A right to jurisdiction over the plaintiffs and their descendants, the territory, waters and resources of the territory, and

3. A right to the Crown's protection in reserving the aforementioned rights to the benefit of the Plaintiffs until, through the informed consent of the Plaintiffs, the said rights are surrendered to the Crown.

69. The plaintiffs have never ceased to assert their aboriginal title, ownership and jurisdiction, and right of possession over their territory in accordance with their aboriginal laws and practises.

70. Any laws of the Province of British Columbia are subject to the reservation of aboriginal title, ownership and jurisdiction by the Gitksan Chiefs and the Wet' suwet'en Chiefs and do not confer any jurisdiction over or interest in the said lands to the Defendant.

71. In the alternative, the aboriginal title, jurisdiction and ownership of the Plaintiffs cannot be extinguished or diminished without their consent.

72. The defendant has wrongfully alienated lands within the territory to other persons without the consent of the Plaintiffs or their ancestors. The effect of the said wrongful alienation by the Defendant has been the appropriation and use of the Plaintiffs' lands within the territory by the Defendant, or other persons relying on the Defendant's unlawful exercise of jurisdiction over the land, without the consent of the Plaintiffs or their ancestors.

73. Each Plaintiff and the members of the House of each Plaintiff have been denied their right to access and use of their lands and resources and the right to exercise jurisdiction over parts of their territory as a result of the wrongful alienation by the Defendant to third parties of the Plaintiffs' interests in the territory.

74. Each Plaintiff and the members of the House of each Plaintiff have been denied their rights and jurisdiction and have suffered damages and continue to suffer damages as a result of restrictions imposed by the Defendant on the rights of the Plaintiff to exercise jurisdiction over their territories.

In addition to a declaration of entitlement to damages, a lis pendens, and an interlocutory and permanent injunction, the respondents claim for these two declarations:

1. A declaration that the Plaintiffs' ownership and jurisdiction over the territory has never been lawfully extinguished or removed;
2. A declaration that the Defendants do not have jurisdiction over the territory of the Plaintiffs.

Section 213 requires claim to an estate or interest in land. In his reasons at p.39 [p.103 B.C.L.R., p.140 C.N.L.R.], the judge, referring to the respondents, said: "They have advanced a claim concerning land in an action...." Counsel for the appellant said that a

claim as described by the judge would have been sufficient for registration of a certificate of lis pendens under the predecessor statute, the Land Registry Act, R.S.B.C. 1960, c.208, which required that "a claim in respect of land is made". But following the decision of this court in Hugh M. Fraser Ltd. v. Midburn Hldg. Ltd., [1971] 2 W.W.R. 387, 17 D.L.R. (3d) 212, the statute was amended to require a claim to an estate or interest in land. There was considerable argument over the question whether the respondents' claim really is one meeting this requirement of the statute. But my understanding of the argument is that the appellant is not seriously contesting that the claim in this case is one to an estate or interest in land. However that may be, I am assuming for disposition of this appeal that it is a claim coming within the words of s.213. So there remain only the questions, is registrability a requirement and is the estate or interest claimed registrable?

The answers to these questions must be sought in the Land Title Act. And its sections have to be considered with regard to the nature and purpose of a Torrens system. They are stated by Bird J.A. (later C.J.B.C.) delivering the judgment of this court in Heller v. Reg., Vancouver Land Registration Dist. (1960), 33 W.W.R. 385, 26 D.L.R. (2d) 154 at 159-60:

> As to question (1), the Torrens System of land registration has been recognized by Legislatures and Courts throughout the Commonwealth, since the first legislation on the subject was enacted in Australia in 1858, as a system of which the primary object was to establish and certify to the ownership of absolute and indefeasible titles to land under Government authority as well as to guarantee the titles, and to simplify transfers thereof: Hogg, The Australian Torrens System, 1905, pp.1 & 2; Megarry, Law of Real Property, 1957, p.930; Re Shotbolt (1888), 1 B.C.R. 337, per Crease, J., at p.342; see also Fels v. Knowles (1906), 26 N.Z.L.R. 604, where Edwards J. said at p.620:
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> "The cardinal principle of the statute is that the register is everything and that, except in cases of actual fraud on the part of the person dealing with the registered proprietor, such person, upon registration of the title under which he takes from the registered proprietor, has an indefeasible title against all the world. Nothing can be registered the registration of which is not expressly authorized by the statute. Everything which can be registered gives, in the absence of fraud, an indefeasible title to the estate or interest."
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> The quoted passage was cited with approval by Sir Louis Davies, C.J.C. in Union Bank of Canada & Phillips v. Boulter-Waugh Ltd. (1919), 46 D.L.R. 41 at p.43, 58 S.C.R. 385 at pp.387-8, as well as by Lord Buckmaster speaking for the Judicial Committee in Waimiha Sawmilling Co. v. Waione Timber Co., [1926] A.C.101 at p.106. See also as to indefeasibility C.P.R. & Imperial Oil Ltd. v. Turta, [1954] 3 D.L.R. 1 at pp.24-5, [1954] S.C.R. 427 at pp.443-4, per Estey, J.
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> In my judgment the British Columbia Land Registry Act, in substance and

effect applies the same principles as those above cited and was enacted for the same purposes.

Various sections show how these purposes are achieved:

20.(1) Except as against the person making it, no instrument purporting to transfer, charge, deal with or affect land or an estate or interest in it is operative to pass an estate or interest, either at law or in equity, in the land unless the instrument is registered in compliance with this Act.

22. Every instrument purporting to transfer, charge, deal with or affect land or an estate or interest in it shall pass the estate or interest either at law or in equity created or covered by the instrument at the time of its registration, irrespective of the date of its execution.

23.(1) Every indefeasible title, as long as it remains in force and uncancelled, shall be 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

(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 which 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 which may after that date be imposed on the land, or which had before that date been imposed for local improvements or otherwise and which 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 situated;

(d) a lease or agreement for lease for a term not exceeding 3 years where 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) [Repealed 1981-10-24, proclaimed effective November 30, 1981.]

(h) a caution, caveat, charge, claim of builder's lien, condition, entry, exception, judgment, lis pendens, notice, reservation, right of entry, transfer or other matter noted or endorsed on the

title or which may be noted or endorsed subsequent to the date of the registration of the title;

(i) the right of a person to show that the whole or a portion of the land is, by wrong description of boundaries of parcels, improperly included in the title;

(j) 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 right or title otherwise than bona fide for value, has participated in any degree; and

(k) a restrictive condition, right of reverter, or obligation imposed on the land by the Forest Act, endorsed on the title.

(2) After an indefeasible title is registered, no title adverse to or in derogation of the title of the registered owner shall be acquired by length of possession.

166.(1) Where an application is made for the registration of indefeasible title to land, the registrar, if satisfied

(a) that the boundaries of the land are sufficiently defined by the description or plan on record in his office or provided by the applicant; and

(b) that a good safe holding and marketable title in fee simple has been established by the applicant,

shall register the title claimed by the applicant.

(2) Where the registrar considers it advisable he may, before registration under subsection (1), direct that a person named by him be served with notice of his intention to register the title of the applicant at the expiration of a period fixed in the notice unless within that period the person served lodges a caveat or registers a certificate of lis pendens contesting the applicant's right to registration.

(3) Where a caveat is lodged or a lis pendens is registered under subsection (2), the registrar shall defer consideration of the application until the caveat expires or is withdrawn or the adverse claim is disposed of.

34.(1) Except as provided in section 176, the registrar shall not register an indefeasible title in favour of a person pursuant to a direction contained in an order of a court unless the order declares that it has been proved to the satisfaction of the court on investigation that the title of the person designated in the direction is a good safe holding and marketable title.

(2) Subsection (1) applies to the registration of a charge.

1. . . .

"charge" means an estate or interest in land less than the fee simple and

includes

(a) an estate or interest registered as a charge under section 175; and

(b) an encumbrance;

"encumbrance" includes a judgment, mortgage, lien, Crown debt or other claim to or on land created or given for any purpose, whether by the act of the parties or any Act or law, and whether voluntary or involuntary.

26. A registered owner of a charge shall be deemed to be entitled to the estate or interest in respect of which he is registered, subject only to such exceptions, registered charges and endorsements as appear existing on or are deemed to be incorporated in the register.

27.(1) The registration of a charge gives notice, from the date and time the application for the registration was received by the registrar, to every person dealing with the title to the land affected, of

(a) the estate or interest in respect of which the charge has been registered; and

(b) the contents of the instrument creating the charge so far as it relates to that estate or interest,

but not otherwise.

193. On application being made for the registration of a charge, the registrar, on being satisfied that a good safe holding and marketable title to the charge has been established by the applicant, shall register the title to the charge claimed by the applicant by endorsing it in the register.

In my opinion the contention that the estate or interest need not be registrable cannot stand in the face of s.31. The relevant portion states:

31. Where a caveat has been lodged or a lis pendens has been registered against the title to land,

(a) the caveator or plaintiff, if his claim is subsequently established by a judgment or order or admitted by an instrument duly executed and produced, is entitled to claim priority for his application for registration of the title or charge so claimed over a title, charge or claim, the application for registration, deposit or filing of which is made subsequent to the date of the lodging of the caveat or registration of the lis pendens.

The section contemplates the claimant applying for registration of the title or charge which he has won through his successful action. It cannot be accommodated under the Land Title Act if it is incapable of registration. It is not sensible that the statute would

provide for registration of a certificate of lis pendens with respect to a claimed estate or interest in land which, if established, is not entitled to be registered. I agree with the appellant's submission that the underlying premise of registration of a certificate of lis pendens is to provide, if a plaintiff is successful in his claim, priority of registration under the Land Title Act of the title or charge he asserts.

I focus now on the requirement, which emerges from what I have said, that the title or charge won in the litigation must be capable of registration. It should be observed that if the respondents are completely successful and establish the claims and obtain the declarations they seek they will not have an estate or interest in land registrable under the Land Title Act. That is because the Land Title Act and all other provincial legislation will have been found inapplicable to the territory subject to the claims. If the respondents are successful, the estate or interest they establish will depend upon the evidence adduced. However, while particular questions as to the nature and scope of the aboriginal rights, if the respondents succeed, remain to be determined, the general inalienable nature of the rights appears from their statement of claim and falls within the description given by Dickson J. (now C.J.C.) giving the majority judgment of the Supreme Court of Canada in Guerin v. R., [1984] 2 S.C.R. 335 at 382, [1984] 6 W.W.R. 481, 36 R.P.R. 1, 20 E.T.R. 6, [1985] 1 C.N.L.R. 120, 13 D.L.R. (4th) 321, 55 N.R. 161 (sub nom. Guerin v. Can.) [pp.135-36 C.N.L.R.]:

> It appears to me that there is no real conflict between the cases which characterize Indian title as a beneficial interest of some sort, and those which characterize it a personal, usufructuary right. Any apparent inconsistency derives from the fact that in describing what constitutes a unique interest in land the courts have almost inevitably found themselves applying a somewhat inappropriate terminology drawn from general property law.
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> There is a core of truth in the way that each of the two lines of authority has described native title, but an appearance of conflict has nonetheless arisen because in neither case is the categorization quite accurate.
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> Indians have a legal right to occupy and possess certain lands, the ultimate title to which is in the Crown. While their interest does not, strictly speaking amount to beneficial ownership, neither is its nature completely exhausted by the concept of a personal right. It is true that the sui generis interest which the Indians have in the land is personal in the sense that it cannot be transferred to a grantee, but it is also true, as will presently appear that the interest gives rise upon surrender to a distinctive fiduciary obligation on the part of the Crown to deal with the land for the benefit of the surrendering Indians. These two aspects of Indian title go together, since the Crown's original purpose in declaring the Indians' interest to be inalienable otherwise than to the Crown was to facilitate the Crown's ability to represent the Indians in dealings with third parties. The nature of the Indians' interest is therefore best characterized by its general inalienability, coupled with the fact that the Crown is under an obligation

> to deal with the land on the Indians' behalf when the interest is surrendered. Any description of Indian title which goes beyond these two features is both unnecessary and potentially misleading.

Dickson J. spoke of the "general inalienability" of the Indian title. The respondents' argument concedes that it is alienable only to the Crown. That being so, it cannot be registered under the Land Title Act. The registrar will register an indefeasible title or a charge upon being satisfied that the applicant has established a good safe holding and marketable title. One need not be concerned with the precise definition of "marketable" in this context. It is enough to observe that aboriginal title can have no place in a Torrens system which has the primary object of establishing and certifying the ownership of indefeasible titles and simplifying transfers thereof. I conclude that s.213 requires the claim of a registrable estate or interest in land and what is claimed in this case is not registrable.

I would allow the appeal and declare the first and second certificates of lis pendens null and void.