[1988–90 Gib LR 150]

MIFSUD v. ATTORNEY-GENERAL

SUPREME COURT (Kneller, C.J.): March 31st, 1989

Succession—wills—registration in Supreme Court—extension of time to register—application to extend time for registration under Land (Titles) Order, s.3(4) to show "good and sufficient reason or cause" (e.g. malicious concealment of will, infancy of beneficiary entitled to devised land, temporary loss of will or force majeure) for extension—parties' ignorance or default not sufficient grounds to extend time—prejudice to third party's rights militates against granting of extension

The applicant sought an extension of the time within which to register the will of her late husband.

The applicant's husband had died in December 1978, leaving her as the executrix and sole trustee of his will, as well as a beneficiary under it. He had owned a house on Main Street, which he devised to the applicant, and a share in a plot on Devil's Tower Road, which he left on trust for his children. The applicant's solicitor did not obtain a grant of probate, despite being asked to do so three times, nor did he register the will, a requirement for wills relating to land in Gibraltar. The caveator, Stud Ltd., was the tenant of business premises forming part of the estate, and had applied for a new tenancy, but the applicant opposed the grant of a new tenancy on the ground that she wanted the premises to carry on her own business. Stud Ltd., in proceedings related to the application, questioned her right to have granted the former lease or to oppose its application, as her late husband's will had not been registered, and registered a caveat against the title to the premises. The judge adjourned those proceedings to allow the applicant to apply for the time to register the will to be extended.

The applicant submitted that the court should exercise the discretion conferred on it by the Land (Titles) Order, s.3(4) to extend the time for registration of the will, as (a) her lack of awareness of the requirement and her solicitor's decade-long lack of attention to the matter constituted "good and sufficient reason" for it to do so; and (b) neither the Attorney-General nor the caveator strenuously opposed the application.

The Attorney-General submitted, however, that the court should not exercise its discretion in the applicant's favour, as (a) the applicant's solicitor's failure to attend to the matter and the long delay did not constitute "good and sufficient reason" for the registration period to be extended; and (b) the rights of the caveator could be adversely affected by the registration of the will.

Held, dismissing the application:

(1) The discretion conferred on the court by the Land (Titles) Order, s.3(4) was not unlimited: the applicant had to show "good and sufficient reason or cause" for the registration period to be extended. Neither the failure of the applicant or her solicitor to attend to the registration of the will within the reasonable time-limit imposed in s.3(3) of the Order nor the applicant's ignorance of the registration requirement constituted "good and sufficient reason or cause" for the court to exercise its limited discretion in her favour. Circumstances which might constitute "good and sufficient reason" would include the malicious concealment or suppression of the will, the infancy of a beneficiary entitled to land under the will, the temporary loss of the will or *force majeure*—but for the court to extend the period in its discretion when the reason for failure to register the will was the relevant parties' ignorance or default (or both) would make a nonsense of the requirement that they show a valid reason (para. 14; paras. 18–21).

(2) It further militated against the exercise of the court's discretion in favour of the applicant that the caveator's right to a renewed tenancy of the premises could be prejudiced by an extension to the period for registration of the will (para. 21).

Case cited:

(1) *Webb* v. *Ipswich B.C.* (1989), 88 L.G.R. 165; 21 H.L.R. 325, referred to.

Legislation construed:

Land (Titles) Order (1984 Edition), s.2: The relevant terms of this section are set out at para. 10.

s.3(1): The relevant terms of this section are set out at para. 8.

s.3(3): "All wills shall be so registered within six months next after the death of the testator in cases where he shall have died in Gibraltar . . ."

s.3(4): The relevant terms of this sub-section are set out at para. 9.

s.3(5): The relevant terms of this sub-section are set out at para. 10.

s.3(6): The relevant terms of this sub-section are set out at para. 10.

E. Russo for the applicant;
J.M.P. Nuñez, *Crown Counsel*, for the respondent;
L. Attias for the caveator.

1 **KNELLER, C.J.:** Mrs. Julia Mifsud asks the court to extend the time for registering the will of her husband, Mr. James Patrick Mifsud, dated July 19th, 1978, by 15 days.

2 Mr. Mifsud died on December 25th, 1978. He had been ill for a long time. Mr. Ernest Russo was his solicitor, and drew up his will. Mrs.

Mifsud was appointed the sole executrix and trustee of the will. She was also a beneficiary under it.

3 Mr. Mifsud's share in Plot 10, Devil's Tower Road, North Front, Gibraltar was devised to Mrs. Mifsud. The rest of his real and personal estate was devised and bequeathed to Mrs. Mifsud as his trustee upon the usual trusts for their children. All the Mifsuds were and are British subjects.

4 Mr. Russo had been Mr. Mifsud's friend and solicitor for many years. He knew that Mr. Mifsud was maintaining his wife and their young family from the rents of shops on the ground floor of his house in Main Street, which was his main asset and heavily mortgaged. He helped the widow Mrs. Mifsud with income tax returns for two years, acted for her when she obtained possession of one of the shops, and registered her partnership with her daughters in "Bubbles," their venture into selling sweets in that shop. On June 20th, 1980, Mrs. Mifsud granted an eight-year lease of one shop to Stud Ltd., but I do not know if Mr. Russo acted for her in that matter.

5 Shortly after Mr. Mifsud died, and both at the end of 1979 and in early 1980, Mrs. Mifsud asked Mr. Russo to obtain probate of the will. He should also have registered it under the Land (Titles) Order. Mr. Russo has been in practice here for 40 years and has always done this with wills that relate to or affect lands in Gibraltar as a matter of course. He did not register the will, and has not registered it or obtained probate of it.

6 Mr. Russo, I think, hints that he did not—at first, at any rate—apply for probate because Mrs. Mifsud and her daughters were not left a fortune by Mr. Mifsud. This may be bound up with the question of estate duty and repayment of the mortgage or an arrangement to do so, but it is not clear. He admits that the failure to register the will under the Order is his fault and not that of Mrs. Mifsud. He explains that he had and has no partner or associate, and employed only a secretary.

7 The omission to register and to obtain probate of the will was discovered by another solicitor, Mr. Levy Attias, acting for Stud Ltd. when it applied for the grant of a new lease from the estate of Mr. Mifsud and it was opposed by Mrs. Mifsud on the ground that she wanted it for a business of her own. Mr. Attias challenged her right to have granted the former lease or oppose the application for a new one when the matter came before Alcantara, A.J., who adjourned it to allow the estate's present solicitor to ask for the time to register the will to be extended. Stud Ltd. had entered, or then entered, a caveat against the title.

8 The Land (Titles) Order is an Order in Council relating to titles to land which was made on May 3rd, 1888 and came into effect on May 28th, 1888. It requires "all wills and deeds executed before and after [May 28th,

1888] which in any wise affect or relate to any lands situate in Gibraltar [to] be registered in the Supreme Court": s.3(1).

9 Section 3(3) provides that if a testator dies in Gibraltar, his will must be registered in Gibraltar within six months; if not, it is "absolutely void and of no effect so far as [it] relates to, affects, or may be intended to affect any lands in Gibraltar" (s.3(4)). By the proviso to s.3(4), the Chief Justice has "power to order [its] registration . . . upon such terms as to costs and expenses as he in his discretion shall think fit," but only "upon good and sufficient reason or cause being shown for the omission to register."

10 "A will . . . registered under [such] an order of the Chief Justice . . . [has] the same effect and [is] as valid" as one registered in time: s.3(6). "[The] Attorney-General [must] be a party for all purposes . . . [to such an] application," which should "be made in the same manner and under the same rules . . . as applicable . . . in any cause or matter pending before the Supreme Court . . ." (s.3(5)). "Lands" in the Order are defined as including "messuages, tenements and hereditaments of any tenure, and to any part, share, estate, right, title or interest therein" unless the context otherwise requires: s.2.

11 Mrs. Mifsud's solicitor sent a letter to the Attorney-General and Registrar informing them of this application in obedience to this court's Practice Direction (No. 1 of 1982); the Attorney-General refused to consent to the application without the caveator's solicitor being served, which was done.

12 The rigidity of the scheme introduced by the Land (Titles) Order 1888 was softened by two provisos whereby the court had power to order the registration of any such will notwithstanding the time of registering it had elapsed if it could be satisfactorily proved that this was because (i) the testator had died out of Gibraltar and his will had been fraudulently concealed or suppressed, or (ii) an infant took any interest under it and more than six months had not passed since he had attained his majority. A will registered under such an order of the court was to have the same effect and validity as if it had been timeously registered.

13 And that was the law from May 28th, 1888 to May 19th, 1920, when the two provisos were repealed and replaced by one, which gave the Chief Justice "power to order the registration of any . . . will or deed" which in any wise affected or related to lands situate in Gibraltar "notwithstanding that the time . . . appointed for its registration shall have elapsed" if "good and sufficient reason or cause [were] shown for the omission to register" it: Titles to Lands Amendment Ordinance 1920 (No. 4 of 1920), s.2. And that is the law today.

14 So all along there has been a reasonable time-limit, at first with two

specific exceptions, and later with any that amounted to good and sufficient reason or cause for the Chief Justice to exercise his statutory power to order the late registration of a will. The law was not and is not that the executor may as of right register it at any time after the death of the testator, and it would make a nonsense of the Order's clear and simple wording to hold that he could; there would be no time-limit specified in the Order, nor would there be any need for one.

15 The Order also applies to deeds or documents that in any wise relate to or affect lands situate in Gibraltar. The objects of the Order include that of providing a practical workable system for the registration of titles to land in Gibraltar and, because Gibraltar is a fortress besides being a colony and a city, there are matters in the Order for the protection of its security. Thus land cannot by deed be granted and assured to any foreign power, or to any person who is not a British subject unless he is the duly accredited representative of a foreign power or has been domiciled and actually resident in Gibraltar for the space of 15 years before the date of the execution of the deed unless approved by the Governor. And an alien who is seised of, or entitled—by descent, inheritance or by virtue of any will or codicil—to any lands situate in Gibraltar, cannot hold or enjoy them without such residence and domicile or the Governor's licence: ss. 4–7.

16 Such being the facts and the law, I turn to the issues. First, the caveator, in my view, had *locus standi* in this application because its rights to a further tenancy of premises dealt with by this will may be affected, and that is a matter that the Chief Justice should take into account when deciding whether or not to order the registration of this will, and because the Attorney-General would not as usual consent to such an order being made unless the Chief Justice heard argument on his behalf.

17 Secondly, has Mrs. Mifsud shown good and sufficient reason or cause for the omission to register the will of her husband? No direct authority, Gibraltarian or English, on what would constitute "good and sufficient reason or cause" was cited and I can find none. Maybe the proviso is unique.

18 A simple discretion could have been conferred on the Chief Justice by such words as: "The Chief Justice may order the registration of any such will notwithstanding the time for doing so has elapsed upon such terms as to costs and expenses as he in his discretion shall think fit." Such a discretion would have to be exercised judicially, which means that it would not be based on prejudice, whim or sentiment. Here the discretion is fettered by the phrase "good and sufficient reason or cause."

19 Fraudulent or malicious concealment or suppression of the will by anyone, the infancy of anyone beneficially entitled under the will to any lands situate in Gibraltar, a significant period of grave illness, or the mislaying or temporary loss of the will due to a move between premises,

war or terrorist action would, in my judgment, among other matters, amount to "good and sufficient reason or cause."

20 Mrs. Mifsud's reasons, as I understand them, are her solicitor's decade of unintended inattention and her ignorance of the law requiring her to register the will because it related to or affected lands situate in Gibraltar. The lady seems to have known, however, that she had to obtain probate of it because three times in the first two years after the testator's death she asked the solicitor to do this. Also, she adds, the Attorney-General does not oppose the application. Nor, I think I should add, did the caveator's counsel strenuously oppose it. The Mifsuds were and are British subjects, so the security of the fortress is not in jeopardy.

21 Whilst I am aware of the fallibility of solicitors' best intentions to follow the usual procedures when a client testator dies, in my judgment Mrs. Mifsud's reasons, taken singly or together, do not constitute "good and sufficient reason or cause" for any reasonable Chief Justice in the circumstances of this application to order the registration of Mr. Mifsud's will over 10 years after his death. The delay is excessive and it was not discovered by the testator's solicitor or the testatrix. Furthermore, the rights of others in some of the lands affected by the will may be partly prejudiced by an order for late registration of the will which would mean that the will would have the same effect and validity as if it had been registered in time, which might amount to unfair ratification: see *e.g. Webb* v. *Ipswich B.C.* (1). Therefore, in the exercise of this limited discretion, I reject this application.

Application refused.