

[2015 Gib LR 130]

**NATWEST v. ATTORNEY-GENERAL**

SUPREME COURT (Jack, J.): February 23rd, 2015

*Land Law—title—registration of deeds affecting Gibraltar land—Gibraltar Land Titles Act 2011, s.3(2) not to apply to deeds executed between November 8th, 1990 and October 23rd, 2011—these deeds to be registered under Gibraltar Land Titles Act 1990 by October 23rd, 2011, or application for late registration made under 2011 Act, s.11(5)*

The claimant sought an order for the registration of a deed of assignment and a mortgage which were executed on October 17th, 2011 but were not registered within the six-month statutory time limit.

The assignor, Ms. Jarman, became the leaseholder of a house in 2002. On October 17th, 2011, she made a deed assigning the lease to Ms. Seed, who, by a deed of the same date, mortgaged the property to the claimant. Neither the deed of assignment nor the mortgage was registered within the six-month time limit specified by the Gibraltar Land Titles Act 1990 and subsequently the Gibraltar Land Titles Act 2011, s.3(2)(a). The claimant sought an order for the registration of the deeds, notwithstanding that the time appointed for their registration had elapsed, under s.11(5) of the 2011 Act.

**Held**, making the order:

(1) On the proper construction of ss. 3 and 11 of the 2011 Act, the court would make the order sought under s.11(5). Section 3(1) would be read as subject to s.11(3), so that the rule in s.3(2) (that all deeds must have been registered within six months of their execution in Gibraltar) would not apply to deeds executed between November 8th, 1990 and October 23rd, 2011, which was the last day of operation of the 1990 Act before the 2011 Act came into force. All deeds executed between November 8th, 1990 and October 23rd, 2011 could only be registered under the 1990 Act and therefore had to be registered on or before October 23rd, 2011. If any such deed was not registered by this date, a person who acquired an interest in land under that deed would be eligible to obtain relief under s.11(5), as the deed “should have been completed before the date on which [the 2011 Act] shall have come into operation” as required by s.11(4). The claimant could therefore obtain relief under s.11(5) and the court would order registration of the deed of assignment and the mortgage (para. 14; paras. 17–18).

(2) The problem with the above construction was that it meant that all deeds executed on or before October 23rd, 2011 had to be registered by October 23rd, 2011, including deeds executed less than six months before that date, or a person who acquired an interest in land under such a deed would have to seek relief under s.11(5). Such a person would therefore be denied the full six-month statutory period in which to register the deed. However, this was merely a theoretical rather than a practical problem, as the Registrar of Land Titles had been registering within six months of their execution all deeds made up until October 23rd, 2011 and such registration was good against the world. Even if the Registrar in fact had no power to register deeds executed in the six months before October 23rd, 2011, after that date the court would be able to make an order for registration with retrospective effect under s.11(7) of the 2011 Act (paras. 15–16).

(3) The alternative construction would be that deeds which were executed between April 24th, 2011 and October 23rd, 2011 but were not registered within six months would have no legal operation or effect as a result of s.11(3) and could not be saved by a court order under s.11(5) because they were not deeds which “should have been completed before the date on which this Act shall have come into operation” as required by s.11(4); they should have been registered within six months of their execution but not necessarily before October 24th, 2011 when the 2011 Act came into force. This construction would give an unsatisfactory and bizarre result, in that deeds executed between April 24th, 2011 and October 23rd, 2011 but not registered within six months would be void with no possibility of redemption under s.11(5), whereas deeds executed before April 24th, 2011 and not registered within six months could be saved under s.11(5). This would not accord with Parliament’s intention in passing s.11 and this construction would therefore be rejected (paras. 10–13).

**Cases cited:**

- (1) *Martinez v. No Named Defendant*, 2015 Gib LR 8, referred to.
- (2) *Pepper (Inspector of Taxes) v. Hart*, [1993] A.C. 593; [1992] 3 W.L.R. 1032; [1993] 1 All E.R. 42; [1992] S.T.L. 898; [1998] I.C.R. 291; [1993] I.R.L.R. 33; [1993] R.V.R. 127, referred to.

**Legislation construed:**

Gibraltar Land Titles Act 2011, s.3: The relevant terms of this section are set out at para. 7.

s.5: The relevant terms of this section are set out at para. 8.

s.11: The relevant terms of this section are set out at para. 9.

*D. Martinez* for the claimant;

*K. Drago* for the defendant.

1 **JACK, J.:** This case raises a short point on the effect of the transitional provisions of the Gibraltar Land Titles Act 2011 on certain deeds executed, but not registered, before that Act came into force.

2 The facts are straightforward. By a deed made on September 28th, 1988, the then acting Governor of Gibraltar granted a lease of 5 Rose Shrine House, Naval Hospital Road to Eugenia Valarino for a term of 150 years from January 1st, 1988. That lease was registered under the relevant land titles legislation. There were then various assents and assignments (all of which were registered), culminating in Rebecca Jarman becoming the leaseholder in 2002.

3 By a deed of assignment made on October 17th, 2011, Ms. Jarman assigned the lease to Georgina Nancy Ann Seed. By a deed of the same day, Ms. Seed mortgaged the property to the claimant bank by way of sub-demise. Both deeds were made in Gibraltar. Neither the deed of assignment nor the mortgage has been registered. It is to rectify this failure that the current action has been brought.

4 Since the coming into force of the Land (Titles) Order 1888, Gibraltar has had a system of registration of deeds. I recounted the legislative history in *Martinez v. No Named Defendant* (1). As I pointed out there (2015 Gib LR 8, at para. 38): “Unlike the Land Registry in England and Wales, the Gibraltar Register gives no form of title guarantee; all it does is create a definitive collection of deeds and wills affecting land in Gibraltar.”

5 The main practical sanction for a failure to register a deed timeously is that the purchaser runs the risk of the vendor selling the property a second time. If the purchaser does not apply to the Registrar of Land Titles to register, he loses priority to a subsequent purchaser who applies before him. Registration also creates a presumption that deeds and wills have been duly executed.

6 The legislation now in force is the Gibraltar Land Titles Act 2011. This Act came into force in two stages. Section 1 (the title and commencement provision) and s.9 (the rule-making power) came into force on October 13th, 2011. The remaining sections came into force on October 24th, 2011 and it is common ground that this is the relevant commencement date for the sections with which we are concerned. The Act replaced the Gibraltar Land Titles Act 1990, which was repealed with effect from October 24th, 2011.

7 Section 3 of the 2011 Act provides:

“(1) All deeds and wills executed before or after the coming into operation of this Act, which in any way affect or relate to any land situate in Gibraltar, shall be registered in the Land Titles Register in accordance with this Act.

- (2) A deed must be registered under subsection (1)—
- (a) where it was executed in Gibraltar, within six months from the date of execution;
  - (b) where it was executed outside Gibraltar, within eighteen months from the date of execution.
- (3) A will must be registered under subsection (1)—
- (a) where the testator dies in Gibraltar, within six months from the day of his death;
  - (b) where the testator dies outside Gibraltar, within eighteen months from the day of his death.
- (4) Subsection (1) does not apply to any grant, demise, lease or conveyance of any land in Gibraltar where it is for a term of three years or less.
- (5) This section is subject to section 11 in the case of deeds and wills executed before the coming into operation of this Act.”

These time periods are the same as under the 1990 Act.

8 Section 4 provides for the Registrar of Land Titles to approve the registration of deeds on his being satisfied as to due execution and compliance with the Act. Section 5 provides:

“(1) Where any deed or will is not registered in accordance with section 3, any interest in any lands in any way affected by such will or deed which, subsequent to the period specified in subsections (2) and (3) of that section, has been registered in the Land Titles Register, shall have priority and prevail over any right, title or interest purported to be created by such deed or will, insofar as the same would relate to or affect, or may be intended to affect any land in Gibraltar.

(2) In any case where such deed or will shall not have been registered within the time appointed it may be so registered and if so registered shall be subject to the provisions of this section.

(3) This section is subject to section 11.”

9 Section 11 provides:

“(1) A deed or will duly registered—

- (a) in the Supreme Court under the Land (Titles) Order, 1888;
- (b) in the Supreme Court under the Gibraltar Land Titles Act 1990 after the 31st day of December 1934 but before the coming into force of this Act,

shall, for the purposes of this Act, be deemed to have been duly registered in the Land Titles Register on the date of its registration in the Supreme Court and such registration shall be deemed to have been with the approval of the Registrar of Land Titles.

(2) No deed executed prior to 8 November 1990 shall be registered under this Act or have any legal operation or effect unless the provisions of paragraph 4 of the Land (Titles) Order 1888 have been complied with and any approval of the Registrar of Land Titles has been signified by some memorandum in writing annexed to or endorsed upon such deed and signed by him.

(3) No deed executed on or after 8 November 1990 but before the coming into force of this Act, which concerns any grant, demise, lease or conveyance of land for a period exceeding three years, shall be registered under this Act or have any legal operation or effect unless it has been recorded in accordance with the Gibraltar Land Titles Act 1990 and has been endorsed to that effect by the Registrar of Land Titles.

(4) Subject to subsection (5), a deed or will, the registration of which in accordance with section 3 should have been completed before the date on which this Act shall have come into operation, and has not been so completed, shall be absolutely void and of no effect, so far as the same relates, or affects, or may be intended to affect any lands in Gibraltar.

(5) In any case where a deed or will to which subsection (4) applies has not been registered within the time appointed the Supreme Court may order the registration of such deed or will, notwithstanding that the time appointed for the registration has elapsed, upon such terms as to cost and expenses as it in its discretion thinks fit.

(6) Any application made under subsection (5) shall be made to the Supreme Court and the Attorney-General shall be made a party to all such applications.

(7) A deed or will registered pursuant to an order of the Supreme Court made pursuant to such an application shall have the same effect and be as valid as if such deed or will had been registered within the time prescribed by the Land (Titles) Order, 1888 or the Gibraltar Land Titles Act 1990 (as appropriate)."

10 The problem in the current case arises because the deed of assignment and the mortgage were executed on October 17th, 2011. That date is "on or after 8 November 1990 but before the coming into force of [the 2011] Act," but the deeds were not recorded under the 1990 Act. Section 11(3), therefore, would mean that the deeds did not "have any legal operation or effect."

11 Section 11(5) gives a means of escape, but only in respect of “a deed or will, the registration of which in accordance with section 3 *should have been completed* before the date on which this Act shall have come into operation, and has not been so completed” [Emphasis supplied]: see s.11(4). The deeds of October 17th, 2011 did not, on this argument, *need* to have been registered under the 1990 Act before October 24th, 2011; under the 1990 Act, the purchaser had six months to register. Accordingly, on this argument, s.11(5) had no application to the current case. It would follow that, by reason of the failure to register the deeds within the six months given by s.3 of the 2011 Act, the deeds “shall be absolutely void and of no effect”: s.11(4).

12 This would be an extremely unsatisfactory result. It would mean that all deeds made between April 24th, 2011 and October 23rd, 2011 which were not registered within six months were rendered void with no possibility of rectification by the court or by the Registrar. It would also be a bizarre result because deeds made before April 24th, 2011 which were not registered under either the 1888 Order or the 1990 Act could be registered if the court made an order under s.11(5).

13 It is clear that this was not the intention of the legislature. Pursuant to *Pepper (Inspector of Taxes) v. Hart* (2), I was referred to the relevant passages in Gibraltar’s *Hansard*, at 35–40 (2011). The then Minister for Justice, Mr. Feetham, M.P., said in his speech on the Second Reading of the Bill (*op. cit.*, at 36):

“Clause 11 makes transitional and miscellaneous provisions. Sub-clauses (1) to (3) ensure that deeds and wills, duly registered when the Bill comes into force, shall be deemed to have been duly registered under the Bill, with the approval of the Registrar. [Sub-clauses (4) to (7)] then make provision for the late registration of deeds and wills that should have been registered under the *current and previous* legislation.” [Emphasis supplied.]

The Bill was approved without amendment to this clause.

14 One answer is to read s.3(1) as being subject to s.11(3), so that there is an exception to the general rule in s.3(2). The effect of this would be that all deeds executed between November 8th, 1990 and October 23rd, 2011 stood to be registered (and could only be registered) under the 1990 Act. If they were not so registered, then the purchaser or the mortgagee needed to obtain relief under s.11(5).

15 That construction presents a problem in that it would mean that all deeds made between April 24th, 2011 and October 23rd, 2011 had to be registered by October 23rd, 2011 on pain of having to apply under s.11(5). It would mean that the Parliament of Gibraltar wanted to provide that a deed made on October 23rd, 2011 had to be registered on the same day.

16 In fact, this has proved to be a wholly theoretical problem. The Registrar of Land Titles, under the 2011 Act, has been happily registering, within six months of their execution, deeds made between April 24th, 2011 and October 23rd, 2011, notwithstanding the argument presented in the previous paragraph. The Registrar may only register a deed or will in the Registry if the deed or will “has satisfied the relevant provisions of the [2011] Act”: Gibraltar Land Titles (Register) Regulations 2011, reg. 5(b)(i), but once an instrument is registered, the registration is good against the world. Thus, for all practical purposes, the problem no longer exists. Further, even if it did exist and the Registrar had no power to register those deeds, the court could make an order which would have retrospective effect under s.11(7).

17 Looking at the two possible interpretations of s.11, I very much prefer the construction which permits a purchaser (or, as here, a mortgagee) to apply for relief under s.11(5). Although there are, as I have pointed out, difficulties with this construction, in my judgment, it does less violence to Parliament’s intention than the other construction.

18 Accordingly, I shall make an order under s.11(5) permitting the late registration of the deed of assignment and the mortgage.

*Order accordingly.*

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