

Fraudulent alienation of foreign immovables and the Moçambique rule in the Western Australian Court of Appeal

Singh v Singh (2009) 253 ALR 575; [2009] WASCA 53, in the Western Australian Court of Appeal, was a dispute between two brothers, both resident in Western Australia. One, the plaintiff, claimed that the alienation by the other, the defendant, of real estate in Malaysia was made with the intent to defraud creditors, within the meaning of s 89(1) of the *Property Law Act 1969* (WA). (That section is the modern equivalent in Western Australia of the Elizabethan statute 13 Eliz c 5, which has been reproduced in all Australian states and the Commonwealth.)

The defendant owed the plaintiff money arising from the purchase of a restaurant in Western Australia. After the plaintiff commenced an action in Western Australia to recover the debt, the defendant transferred his interests in real estate both in Western Australia and in Malaysia to relatives. He transferred the Malaysian property to his wife and daughter, also resident in Western Australia. The instruments of transfer were all executed in Western Australia. As to the Malaysian property, the plaintiff sought orders restraining the wife and daughter from dealing with the property and that they deliver up vacant possession for the property to be sold at auction. The defendant sought summary judgment on the basis that the Supreme Court of Western Australia had no jurisdiction under the *Moçambique* rule or alternatively that the proceeding should be stayed on the grounds of *forum non conveniens*. A Master dismissed the defendant's application and the defendant appealed to the Court of Appeal.

Pullin JA (with whom the rest of the Court of Appeal agreed) dismissed the appeal. Pullin JA held that the plaintiff's claims fell within an exception to the *Moçambique* rule, saying (at [22]):

The case does not concern the Moçambique rule itself. The [plaintiff]'s claim falls within an exception to the rule. This is because in this case the [plaintiff]

does not deny that the [defendant] is the legal owner of the Malaysian land, ie the registered proprietor and does not seek an in rem judgment. His complaint is that the [defendant] became the registered proprietor by reason of the train of events beginning in Perth, when the [defendant] signed a transfer of the Malaysian land, and ending with the registration of the transfer in Malaysia. It was contended that this was an alienation of property with the intent of the appellant to defraud his creditors. The [plaintiff] having become aware of the alienation of the Malaysian property elected to exercise his right to avoid the alienation based on his allegation that the [defendant] had the intent to defraud. In the Supreme Court, he asks for declarations concerning the conduct of the [defendant] and the [wife and daughter] and in personam relief against [them]. If the [plaintiff]'s claims are upheld then the court will 'act upon the conscience' of the [defendant] and his wife and daughter. The jurisdiction is not over the property but over the person of each of [them].

His Honour referred to various cases in which claims in equity based on fraud provided an exception to the *Moçambique* rule and concluded (at [32]):

The Western Australian Parliament must be taken to have known of the equitable jurisdiction of its courts to make decrees to deal with fraudulent dealing of foreign immovable property by a person within the jurisdiction and it is therefore clearly arguable that it must have intended to legislate to confer the right on a person, prejudiced by an alienation of foreign immovable property with intent to defraud creditors, to avoid such a disposition.

Pullin JA further considered that it was at least arguable that any judgment of the Supreme Court of Western Australia could be enforced in Malaysia. In any event, his Honour agreed with the plaintiff's submission that since the relief sought was *in personam* relief against the wife and daughter, this issue did not arise, because it could be enforced against them in Western Australia.

Pullin JA also rejected the defendant's submission that, for various reasons, the transfer of the Malaysian property did not fall within the terms of the Act. In particular, his Honour held that the Act was not confined to property in Western Australia, but extended to applications by persons resident in Western Australia to set aside alienations of foreign property by acts performed within the state by other persons resident in the state. This was not an extraterritorial operation of

the Act because (at [75]): 'Parliament does not legislate extraterritorially if it legislates concerning fraudulent conduct (occurring in the state) by a person resident within the state.'

Finally, Pullin JA considered that the connections to Western Australia meant that the Supreme Court was not *forum non conveniens* (in the sense of a clearly inappropriate forum).