



HIGH COURT OF AUSTRALIA

9 March 2011

LEONILDA MARCOLONGO v YU PO CHEN & ANOR
[2011] HCA 3

Today the High Court allowed an appeal from the New South Wales Court of Appeal and set aside a registered transfer of land from Lym International Pty Limited ("Lym") to Mr Chen by application of s 37A of the *Conveyancing Act 1919* (NSW). Section 37A(1) provides that, except for certain specified exceptions, every alienation of property made with the intent to defraud creditors shall be voidable at the instance of any person thereby prejudiced.

Mrs Marcolongo owned and lived on a property adjacent to a property development project in which Lym was involved. Mrs Marcolongo sued Lym in the New South Wales District Court for damages for the removal of support during the building operations. During 2004 and 2005 the solicitors for Mrs Marcolongo and Lym corresponded concerning Mrs Marcolongo's desire to obtain a property preservation order over a second property development project, in which Lym was also involved, so as to protect Mrs Marcolongo's position in her District Court action against Lym.

Later in 2005, the second property development project was valued with the result that the expected proceeds of sale would not exceed Lym's liabilities. In 2006, Lym transferred the property comprising the second project to Mr Chen to hinder Mrs Marcolongo's claim.

On 26 November 2009, Mrs Marcolongo recovered a judgment against Lym for the damage caused to her property for \$388,643.62 with costs. In a Supreme Court action against Lym and Mr Chen, Mrs Marcolongo relied upon s 37A to have the contract declared voidable at her instance and to require Mr Chen to transfer the property back to Lym. The result would be Lym retaining a substantial asset to meet any order for damages. The trial judge found in favour of Mrs Marcolongo. The Court of Appeal reversed the trial judge's decision on the basis that Lym had not been dishonest, and the transfer was not "predominantly" motivated by the intent to defeat the claim of Mrs Marcolongo as a creditor.

French CJ, Gummow, Crennan and Bell JJ considered that s 37A should receive a liberal construction in accordance with the provenance of the provision. Their Honours held that "defraud" includes the hindering or delaying of creditors in the exercise of their legal remedies. The plurality further held that s 37A requires a finding of intent to achieve the proscribed prejudice. French CJ, Gummow, Crennan and Bell JJ held that s 37A is not qualified by a notion of constructive fraud, does not require an element of dishonesty and does not require a predominant or sole intent to defraud.

Heydon J held that whatever the precise test called for by s 37A, the intent underlying Lym's conduct was enough to satisfy it. The intent was as "actual" and "dishonest" as it is possible to have.

The High Court held that s 37A applied despite the transferor having formed the proscribed intent by reason of the misconduct of another. The Court also held that Mr Chen was not within an

exception to s 37A for purchasers in good faith not having, at the time of the alienation, notice of the intent to defraud creditors.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*