

Internal Publication: Meridian Bay Restaurant (Pty) Ltd And Others v Mitchell NO 2011 (4) SA 1 (SCA)

Case Name:

Meridian Bay Restaurant (Pty) Ltd And Others v Mitchell NO 2011 (4) SA 1 (SCA)

Area of Law:

Commercial / Property

Brief Facts/ Summary:

This case concerned the sale of immovable property. The basis of the application was that fraud had been perpetrated on the sectional title scheme and the other registered owners of the units in the scheme by the developer who had secretly appropriated a large part of the common property of the scheme for the benefit of two corporate entities which he controlled.

The scheme was comprised of residential as well as commercial units, but consisted mainly of units which were equipped as hotel suites to be operated as such through a rental pool agreement. A number of units were sold before the coming into existence of the body corporate.

In terms of the agreement, each purchaser (owner) would make his unit available for the purposes of conducting the hotel business which would be managed by a management company. Each owner would in turn be entitled to a certain percentage of the rental accruing from the aforesaid business plan and the rest would accrue to the management company. It is important to note that the units had not yet been transferred into the names of the purchasers and therefore at this stage they only acquired a personal right to the units as well as to the rental accruing from same.

The body corporate was liquidated and a curator was applied for. After application but before the appointment of the curator, the developer sold certain units already sold (double sale) despite the personal rights which vested in the purchasers and the management company.

The Law:

The doctrine of notice is an equitable doctrine that runs counter to the rule that a real right must take preference over a personal right. It provides that a person who acquires an asset while aware that someone else has a prior personal right to it, may be held bound to give effect to that right.

Fraud or mala fides, or even actual knowledge on the part of the acquirer is not required: it suffices if he subjectively foresaw the possibility of the existence of the first purchaser's personal right, but proceeded with his acquisition of his real right regardless of the consequences to the first purchaser's personal right.

Once the above pre-condition is satisfied, the first purchaser is afforded what is in effect a limited real right against the acquirer, and may recover the res vendita directly from him, the absence of contractual privity between them being no bar to the claim.

The doctrine of notice also extends to the case where the initial dispositive act (the first sale) had the

effect of creating new objects of ownership out of property that was already the subject of a prior personal right. Thus, where a sectional title developer secretly and fraudulently appropriated parts of the common property and transferred them to entities controlled by him, which in turn sold them to a third party who had knowledge of the rights of the prior purchasers, the unit holders are entitled to recover the property so sold directly from the third party.

Conclusion:

The court therefore ordered the third party (who purchased the property from the developer) to transfer the properties to the curator.

Importance/ Significance:

The case explains when the doctrine of notice will apply and the requirements for same. It is important as it states that the doctrine of notice will apply despite the absence of fraud, mala fides, contractual privity or even actual knowledge. The only requirement is that the party against whom the doctrine will apply subjectively foresaw the possibility of the existence of the first purchasers personal right, but proceeded with his acquisition of his real right regardless of the consequences to the first purchasers personal right.