

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

ANGUILLA

AXAHCVAP2020/0002

BETWEEN:

EMANUEL WEBSTER

Appellant

and

**[1] KHAMAL VERE HODGE
[2] PATRICIA HARDING-HODGE
[3] VALENCIA HODGE**

Respondents

Before:

The Hon. Dame Janice M. Pereira, DBE
The Hon. Mde. Margaret Price-Findlay
The Hon. Mr. Trevor Ward

Chief Justice
Justice of Appeal
Justice of Appeal

Appearances:

Mr. Roger Forde, KC with him Mr. Kennedy Hodge for the Appellant
Mr. John Carrington, KC with him Mr. Horace Fraser for the Respondents

2023: January 9;
April 27.

Civil appeal – Partition of land held in common – Application form for partitioning land held in common - Grounds for the rectification of the land register - Fraud - First respondent's failure to appear before third respondent when he certified the application form – Whether the register ought to be rectified on the ground of fraud due to the alleged false certification on the application form – Damages for fraud – Whether actual fraud pleaded and proved by appellant to warrant an award of damages - Mistake – Application form bearing a date different to the date form actually signed – Whether the mistake on the application form warrants rectification of the register – Exclusive ownership of partitioned land – Section 109 of the Registered Land Act - Whether under section 109 of the Registered Land Act a partition of land formerly held in common is sufficient to bestow ownership of individual parcels on proprietors who formerly held land in common

– Trespass to land – Exemplary damages - Aggravated damages – Whether the learned judge erred by failing to award exemplary and aggravated damages to the respondents

Mr. Emanuel Webster (“Mr. Webster”) and Mr. Khamal Vere Hodge (“Mr. Khamal Hodge” or “Mr. Hodge”) were registered as proprietors in common of $\frac{3}{4}$ share and $\frac{1}{4}$ share respectively of Parcel 29 Block 48841B North Central Registration Section, Anguilla (“Parcel 29”). On or about 13th February 2006, by form R.L.16 of the Registered Land Act (“RL16”), Mr. Webster lodged an application for a partition of Parcel 29 into four lots. The application was signed by Mr. Webster and Mr. Hodge and was certified by Mr. Valencia Hodge (“the third respondent”) in his capacity as a Notary Public. The application also included an illustration of the map sheet with a note which read ‘Lot 2 to K. Vere Hodge’.

Four new parcels were created by the partition, becoming Parcels 231, 232, 233 and 234. Mr. Khamal Hodge was registered as the sole proprietor of Parcel 232 representative of his $\frac{1}{4}$ share in the original Parcel 29. Mr. Webster was also registered as the sole proprietor of the other 3 parcels, namely, Parcels 231, 233 and 234, representing his $\frac{3}{4}$ ownership in the original Parcel 29. Shortly after the partition, Mr. Webster sold Parcel 231 to Happy Island Ltd. and they became the registered proprietor of Parcel 231. Mr. Webster then applied for and obtained the amalgamation of the remaining two parcels, Parcels 233 and 234, which, on amalgamation, became Parcel 236. Around 2007, Mr. Webster constructed a commercial complex and gas station on Parcel 236, which he rented to Delta Petroleum (Anguilla) Ltd. During construction, he used a part of Parcel 232 as an entry to Parcel 236. He averred that when construction was completed, the access was improved by paving the entrance to the gas station with asphalt and maul surfacing the entrance to the commercial complex. This, Mr. Hodge contends, was done with his permission and by way of oral licence to Mr. Webster, for the limited purpose of accessing the gas station.

This state of affairs continued for approximately 11 years without Mr. Webster or Mr. Hodge questioning the sole ownership of the other. However, in December 2017, Mr. Hodge terminated the licence given to Mr. Webster to pass over the portion of Parcel 232. Mr. Hodge and his parents, the second and third respondents, say permission was terminated as a result of abuses of its use by Mr. Webster. After revoking the licence, the respondents erected a barricade and dug up a trench on Parcel 232 to prevent Mr. Webster or his patrons from accessing it. Mr. Webster thereafter tore down this barricade and refilled the trench to allow him and his patrons to continue to use the access on Parcel 232. He then applied for and obtained an interim injunction in the High Court restraining the respondents from disrupting the access.

Mr. Webster then commenced a claim in the lower court seeking rectification of the land register on the grounds of fraud and/or mistake and an order declaring that he was the owner of Parcel 232. He contended that there was no agreement for the sale of a $\frac{1}{4}$ share in Parcel 29 and that the respondents had not provided consideration for that share. He also contended that there had been a false certification of the form which transferred Parcel 29 to him and Mr. Hodge. Further, he averred that when he signed the application for partition, Mr. Hodge’s name was not on the form and that he (Mr. Hodge) came to be the registered proprietor of Parcel 232 by way of fraud. In the alternative, Mr. Webster pleaded that Mr. Hodge was estopped from denying him access to the right of way. The respondents counterclaimed alleging that Mr. Webster had

trespassed on Parcel 232 along with his servants and/or agents by removing the barricade they erected and refilling the trench. As a result, Mr. Hodge suffered loss and damage as he had to incur the expense of excavating the trench all over again and re-erecting the barricade. They accordingly claimed damages against Mr. Webster in respect of the trespass and the resulting loss.

The judge held that there was no fraud or mistake and accordingly there was no basis for rectification of the land register for Parcel 232. He also found that there was no fraud in the partition of Parcel 29 and that Mr. Hodge had been rightfully registered as the proprietor of Parcel 232. As to the right of way or access over Parcel 232, the judge held that the licence granted to Mr. Webster had been revoked and that in any event, Mr. Webster had an alternative access over Parcel 236 which was just as convenient. The judge, having found that Mr. Hodge was a co-owner together with Mr. Webster in respect of the original Parcel 29, which had been subsequently partitioned giving effect to their respective share in that parcel, dismissed Mr. Webster's claim. Moreover, having found that the licence to Mr. Webster had been revoked, he held that the respondents had made out their claim in trespass and awarded them US\$1,500.00 in special damages and US\$2,500.00 in general damages. He was not satisfied however that the respondents had established a case for an award of exemplary or aggravated damages.

Being dissatisfied with the judge's ruling Mr. Webster appealed and, being dissatisfied with the award of general damages, the respondents cross appealed. The essential issues which arose for determination on appeal were: (i) whether the issue of fraud in the partition of Parcel 29, specifically the alleged false certification of the RL16 form and the consequences flowing therefrom, were raised and fully ventilated in the court below; (ii) whether there are grounds for rectification of the land register; (iii) whether Mr. Webster is entitled to damages for fraud; (iv) whether the partition of Parcel 29 was sufficient to bestow separate parcels of land on Mr. Webster and Mr. Hodge; and (v) whether Mr. Webster's trespass on Parcel 232 warranted an award of exemplary or aggravated damages.

Held: dismissing the appeal and the counter-notice of appeal and awarding costs of the appeal, costs of the application for interim relief and costs of the application to strike out in accordance with the order of Ramdhani J dated 13th April 2018 to the respondents, and awarding costs of the counter-notice of appeal to the appellant, such awards of costs to be assessed by a judge or master of the High Court if not agreed within 21 days, that:

1. Upon reading Mr. Webster's Statement of Claim filed in the lower court, it cannot be said that the assertion that he and Mr. Hodge owned all the parcels emanating out of Parcel 29 as proprietors in common in their original shares of $\frac{3}{4}$ and $\frac{1}{4}$ respectively, was ever pleaded and put before the judge. Instead, Mr. Webster seemed to argue that Mr. Hodge owned no share in Parcel 29 and consequently none in the subdivided Parcel 232. The consequence of this is that the issue of fraud in the partition of Parcel 29, specifically the alleged false certification of the RL16 form and the consequences flowing therefrom, were never raised in the lower court. Accordingly, it cannot be said that the learned judge erred in failing to determine an issue which was not properly put before him.

2. Under section 146 of the Registered Land Act, the register may be rectified for fraud. However, what must be proved is actual fraud which entails some deliberate act, misrepresentation or concealment of facts by a person in the process of registering land ownership. The acts must be deliberately aimed at swindling the rightful owner out of some unregistered right or interest. Intention to defraud is therefore necessary. On the facts, the alleged false certification of the RL16 form by Mr. Hodge can amount to no more than an irregularity for the purposes of fraud and rectification of the register. Despite Mr. Hodge's admission that he did not appear before the third respondent to certify the RL16 form, the fact is that when the transactions in relation to Parcel 29 began, he was under the age of 18 and his parents were acting on his behalf. Moreover, the third respondent was Mr. Hodge's father. Mr. Hodge and Mr. Webster intended that Parcel 29 be partitioned and these were matters known to all the parties. On the evidence, it therefore cannot be said that a case of actual fraud was made out by the appellant to warrant the rectification of the register and nullify the partition of Parcel 29.

Section 146 of the **Registered Land Act** Revised Statutes of Anguilla, Chapter R30 applied; **Assets Co Ltd v Mere Roihi** [1905] AC 176 applied.

3. Even if non-compliance with the Registered Land Act's requirements as to registration may involve the possibility of cancellation or correction of the entry, registration once effected must attract the consequences which the Act attaches to registration, whether that was regular or otherwise. It is the registration and not its antecedents which vests and divests title. On the facts, despite the alleged false certification of the RL16 form by Mr. Hodge's father, this alone would not be sufficient to deprive Mr. Hodge of his absolute title to Parcel 232. This is so, particularly in circumstances where the partition of the original Parcel 29 was the intention of all parties involved and the parties acted upon the said partition.

Phillip Brelsford et al v Providence Estate Limited et al MNIHCVAP2016/0008, MNIHCVAP2016/0009, MNIHCVAP2016/0010, MNIHCVAP2016/0011 (delivered 15th February 2018, unreported) followed; **Cenac and others v Schafer** [2016] UKPC 25 applied.

4. The register may be rectified under section 146 of the Registered Land Act for mistake. However, a clerical error on the RL16 form, where there was no such error on the land register would not amount to a mistake for the purposes of section 146. Despite the fact that the RL16 form presented to the Registry bore the date 13th February 2004, when in fact it was signed by Mr. Webster on 13th February 2006, this was a clerical error. It had no bearing on the substance and content of the form or the parties' intention that Parcel 29 be partitioned. Additionally, there was no error on the land register for any of the parcels and the date of the first registration thereon was correctly recorded. Thus, there was no mistake as contemplated by section 146 which would warrant a rectification of the register.

Section 146 of the **Registered Land Act** Revised Statutes of Anguilla, Chapter R30 applied; **Phillip Brelsford et al v Providence Estate Limited et al**

MNIHCVAP2016/0008, MNIHCVAP2016/0009, MNIHCVAP2016/0010, MNIHCVAP2016/0011 (delivered 15th February 2018, unreported) followed.

5. For a party to claim damages for common law fraud or deceit, the prayer for relief is not sufficient and a party must specifically plead and prove all the elements thereof. On the facts, the appellant failed to set out any claim for damages for common law fraud or deceit and no effort was made to prove any of the elements either in this Court or in the court below. Particularly, the appellant failed to show any loss suffered as a result of the alleged fraudulent certification. Consequently, Mr. Webster was not entitled to damages for fraud.

Bullen & Leake & Jacob's Precedents of Pleadings 17th Edition Volume 2 applied.

6. A partition of a parcel of land under section 109 of the Registered Land Act is sufficient to bestow ownership of individual parcels on proprietors who formerly held land in common. Whilst it is true that partition does not vest title, section 109 explicitly allows the Registrar to effect a partition in accordance with any agreement of the proprietors. On the evidence, the RL16 form presented by Mr. Webster contained an illustration of the map sheet and how it ought to look after the partition, with a note that Lot 2 was to be recorded as being owned by Mr. Hodge only, as his $\frac{1}{4}$ share of the original Parcel 29, and Lots 1, 3 and 4 to be recorded as owned by Mr. Webster only, as his $\frac{3}{4}$ share of the original Parcel 29. This was clearly the intention of the parties as evidenced by their conduct since Mr. Webster sold Parcel 231 and amalgamated Parcels 233 and 234, without the consent or input of Mr. Hodge. The evidence clearly pointed to an agreement between the parties for the partition of the land in the manner in which it was effected. Consequently, there was no merit in the appellant's argument that all of the parcels were still owned in common.

Section 109 of the **Registered Land Act** Revised Statutes of Anguilla, Chapter R30 applied.

7. An award of exemplary damages is exceptional, and the defendant's conduct must be particularly egregious to warrant punishment beyond the compensatory damages that the claimant would normally receive. Exemplary damages may be awarded where the defendant's conduct has been calculated to make a profit for himself however, this is not confined to moneymaking in the strict sense. It extends to cases in which the defendant is seeking to gain, at the expense of the claimant some object. On the facts, Mr. Webster's conduct of tearing down the barricade and refilling the trench were merely demonstrations of an assertion of ownership over Parcel 232. Such acts, on their own, would not have made a profit at Mr. Hodge's expense and so the learned judge did not err by not making an award of exemplary damages.

Rookes v Barnard [1964] 1 All ER 367 applied.

8. An award of aggravated damages for trespass to land would be made on the basis of subjective evidence as to injury to the plaintiff's feelings caused by the defendant's conduct. On the facts, insufficient evidence was adduced before the

learned judge as to injured feelings on the part of any of the respondents. Consequently, the learned judge did not err by not making an award of aggravated damages.

Horsford v Bird and others [2006] UKPC 3 applied; **Eaton Mansions (Westminster) Ltd v Stinger Compania de Inversion SA** [2014] EGLR 89 applied.

JUDGMENT

- [1] **PEREIRA CJ:** The central issue raised in this appeal is whether the appellant, Mr. Emanuel Webster (“Mr. Webster”) and the first respondent, Mr. Khamal Vere Hodge (“Mr. Khamal Hodge” or “Mr. Hodge”) are owners in common of Parcel 232 Block 48841B North Central Registration Section, Anguilla (“Parcel 232”) in shares of $\frac{3}{4}$ and $\frac{1}{4}$ respectively. If it is found that the appellant is not the owner of a share in Parcel 232, the next question which arises is the basis and quantum of damages to be awarded to Mr. Hodge for Mr. Webster’s trespass upon Parcel 232 following the revocation of permission formerly granted to Mr. Webster to pass and repass over a portion of Parcel 232 to a parcel of land adjoining Parcel 232, and described on the land register as Parcel 236 of the same Block and Registration Section. Parcel 236 is recorded in the name of Mr. Webster solely. The relevant background giving rise to these issues is now set out.

Background

- [2] Mrs. Patricia Harding-Hodge (“the second respondent”) and Mr. Valencia Hodge (“the third respondent”) are husband and wife, attorneys-at-law and the parents of Mr. Khamal Hodge. Mr. Webster is or was a close friend of the second and third respondents.
- [3] Mr. Webster and Mr. Khamal Hodge were registered as proprietors in common of $\frac{3}{4}$ share and $\frac{1}{4}$ share respectively of Parcel 29 Block 48841B North Central Registration Section, Anguilla (“Parcel 29”). There was significant dispute in the court below regarding the sale and purchase of Parcel 29 and the focus of the dispute during trial was whether Mr. Khamal Hodge was in fact entitled to a share in Parcel 29. At the trial, Mr. Webster had contended that he was the sole purchaser and therefore the sole person entitled to be registered as owner of Parcel 29. However, that argument has fallen away as Mr. Webster by his

counsel, at the commencement of the hearing of the appeal, abandoned the challenge to the trial judge's finding of co-ownership in the proportions already mentioned and conceded that Parcel 29 was owned in common in the aforementioned proportions. The land transfer recording them as co-owners was recorded on the land register on 27th January 2006.

- [4] Sometime on or about 13th February 2006, by form R.L.16 of the **Registered Land Act**¹ ("RL16"), an application was lodged with the Registrar of Lands by Mr. Webster for a partition of Parcel 29.² The application was signed by Mr. Webster and Mr. Khamal Hodge and was certified by the third respondent in his capacity as a Notary Public. The application also included an illustration of the map sheet with a note which read 'Lot 2 to K. Vere Hodge'.
- [5] Consequently, 4 new parcels were created, becoming Parcels 231, 232, 233 and 234. Mr. Khamal Hodge was registered as the sole proprietor of Parcel 232 on 14th February 2006, representative of his $\frac{1}{4}$ share in the original Parcel 29.³ On the same date, Mr. Webster was registered as the sole proprietor of the other 3 parcels, namely, Parcels 231, 233 and 234, representing his $\frac{3}{4}$ ownership in the original Parcel 29. Shortly thereafter, in March 2006, Mr. Webster sold Parcel 231 to a third party, Happy Island Ltd. for the sum of US\$450,000.00. Happy Island Ltd. became the registered proprietor of Parcel 231 on 13th March 2006.⁴ Mr. Webster then applied for and obtained the amalgamation of the remaining two parcels, Parcels 233 and 234, which, on amalgamation, became Parcel 236.
- [6] Sometime in or about 2007, Mr. Webster constructed a commercial complex and gas station on Parcel 236, which he rented to Delta Petroleum (Anguilla) Ltd ("Delta Petroleum"). During construction, he used a part of Parcel 232 as an entry to Parcel 236. He averred that when construction was completed, the access was improved by paving the entrance to the gas station with asphalt and

¹ Revised Statutes of Anguilla, Chapter R30.

² Pgs. 503-504 of Hearing Bundle 1.

³ See Land Register at pg. 516 of Hearing Bundle 1.

⁴ See Land Register at pg. 514 of Hearing Bundle 1.

maul surfacing the entrance to the commercial complex. This, Mr. Hodge contends, was done with his permission and by way of oral licence to Mr. Webster, for the limited purpose of accessing the gas station.

[7] This state of affairs continued for approximately 11 years without Mr. Webster or Mr. Hodge questioning the sole ownership of the other, with Parcel 236 being wholly owned by Mr. Webster, and Parcel 232 being wholly owned by Mr. Hodge. However, in December 2017, Mr. Hodge terminated the licence given to Mr. Webster to pass over the portion of Parcel 232. Mr. Hodge and his parents say permission was terminated as a result of abuses of its use by Mr. Webster. Mr. Hodge contended that the licence was granted solely for the purpose of Mr. Webster's customers gaining access to the fuel pumps at the gas station, but that Mr. Webster began permitting the access to be used as a means of ingress and egress to the commercial premises located on Parcel 236, which involved the use of parts of Parcel 232 for customer parking. He also contended that Mr. Webster and/or his agents began dumping debris onto Parcel 232.

[8] After revoking the licence, the respondents erected a barricade and dug up a trench on Parcel 232 to prevent Mr. Webster or his patrons from accessing it. Mr. Webster thereafter tore down this barricade and refilled the trench to allow him and his patrons to continue to use the access on Parcel 232. He then applied to the court for an interim injunction restraining the respondents from disrupting the access. This was granted on 13th April 2018.

[9] Mr. Webster then commenced a claim in the High Court on 20th April 2018 seeking, in essence, rectification of the land register on the grounds of fraud and/or mistake, and an order declaring that he was the owner of Parcel 232. His primary arguments were that there was no agreement for the sale of a ¼ share in Parcel 29 and that the respondents had not provided consideration for that share.

[10] He also contended that there had been a false certification of the form which transferred Parcel 29 to him and Mr. Hodge. Further, he averred that when he

signed the application for partition, Mr. Hodge's name was not on the form and that he (Mr. Hodge) came to be the registered proprietor of Parcel 232 by way of fraud. In the alternative, Mr. Webster pleaded that Mr. Hodge was estopped from denying him access to the right of way.

- [11] The respondents counterclaimed, alleging that Mr. Webster had trespassed on Parcel 232 along with his servants and/or agents by removing the barricade they erected and refilling the trench. As a result, Mr. Hodge suffered loss and damage as he had to incur the expense of excavating the trench all over again and re-erecting the barricade. They accordingly claimed damages against Mr. Webster in respect of the trespass and the resulting loss.

The judgment below

- [12] Much of the learned judge's judgment understandably, focused on the ownership of Parcel 29 and whether there had been an agreement for the transfer of $\frac{1}{4}$ share of Parcel 29 to Mr. Hodge and whether any of the respondents had provided consideration for that $\frac{1}{4}$ share. He also considered whether there had been fraud or mistake in the transfer and the registration of the transfer. He concluded that there was no such fraud or mistake and accordingly there was no basis for a rectification of the land register for Parcel 232. He also found, though somewhat incidentally, that there was no fraud in the partition of Parcel 29 and that Mr. Hodge had been rightfully registered as the proprietor of Parcel 232. Interestingly, at trial, Mr. Webster did not seek to suggest that his sole ownership of Parcel 231 (quickly resold to a third party) and his amalgamation of Parcels 233 and 234 to become 236 and subsequently enjoyed solely by him, should be rectified due to fraud or mistake.

- [13] In relation to the right of way or access over Parcel 232, the learned judge found that the licence granted to Mr. Webster had been revoked and that in any event, Mr. Webster had an alternative access over Parcel 236 which was just as convenient. This access had been clearly provided for in the land development permission given to Mr. Webster in respect of his commercial development on Parcel 236. The learned trial judge, having found that Mr. Hodge was a co-owner

together with Mr. Webster in respect of the original Parcel 29, which was subsequently partitioned giving effect to their respective share in that parcel, dismissed Mr. Webster's claim in its entirety. Furthermore, having found that the licence to Mr. Webster had been revoked, he was of the view that the respondents had made out their claim in trespass and awarded them US\$1,500.00 in special damages and US\$2,500.00 in general damages. He was not satisfied however, that the respondents had established a case for an award of exemplary or aggravated damages.

The appeal

[14] Being dissatisfied with the judgment of the learned judge, Mr. Webster has appealed to this Court. The respondents, being dissatisfied with the award of general damages, cross appealed. Despite the 14 grounds of appeal raised in his Notice of Appeal,⁵ and the 4 grounds of appeal raised by the respondents in their counter-notice,⁶ it became apparent at the hearing, Mr. Webster having made several concessions, that only 5 substantive issues fell to be decided by the Court:

- (1) Whether the issue of fraud in the partition of Parcel 29, specifically the alleged false certification of the RL16 form and the consequences.
- (2) Flowing therefrom, was raised and fully ventilated in the court below.
- (3) Whether there are grounds for a rectification of the register.
- (4) Whether Mr. Webster is entitled to damages for fraud.
- (5) Whether the partition of Parcel 29 was sufficient to bestow separate parcels of land on Mr. Webster and Mr. Hodge.
- (6) Whether Mr. Webster's trespass on Parcel 232 warranted an award of exemplary or aggravated damages.

⁵ See Notice of Appeal filed on 27th February 2020.

⁶ See Counter-notice of the respondents filed on 13th March 2020.

Issue 1: Whether the issue of fraud in the partition of Parcel 29, specifically the alleged false certification of the RL16 form and the consequences flowing therefrom, was raised and fully ventilated in the court below

- [15] Mr. Webster's pleaded case, as expressed by Mr. Roger Forde KC before this Court, is that there was a false certification of the RL16 form by the third respondent in breach of his duties as a Notary Public. He asserted that the third respondent signed the application for partition certifying that Mr. Hodge had appeared before him and signed the form, when this was not the case.
- [16] He averred that this was a fraudulent act which warranted rectification of the land register and a reversion to Parcel 29 or at least the initial shares held in Parcel 29. The legal consequence of this, he asserted, was that Mr. Webster and Mr. Hodge presently own all the parcels emanating out of Parcel 29 as proprietors in common in their original shares of $\frac{3}{4}$ and $\frac{1}{4}$ respectively.
- [17] Counsel for Mr. Webster complained that the learned judge failed to properly consider this argument and the legal consequences flowing therefrom, but instead focused on the transfer of Parcel 29 and whether Mr. Hodge was entitled to a share in it at all.
- [18] However, counsel for the respondents, Mr. John Carrington KC, informed the Court that this argument was never canvassed before the learned judge and that in the court below, Mr. Webster sought to impugn Mr. Hodge's ownership of Parcel 232 on the basis of a fraudulent transfer of Parcel 29 and a lack of consideration for his $\frac{1}{4}$ share.
- [19] Although Mr. Webster's submissions in the court below were not formally before this Court, a reading of his Statement of Claim and the affidavits filed in the matter, as well as the transcript of the proceedings provides helpful insight. From these I am satisfied that the argument asserting that Mr. Webster and Mr. Hodge own all the parcels emanating out of Parcel 29 as proprietors in common in their original shares of $\frac{3}{4}$ and $\frac{1}{4}$ respectively, was never put before the learned judge. I am fortified in this view, as such a position would have frontally placed before

the learned trial judge the potential impact on the title of the third-party purchaser for valuable consideration of Parcel 231 which was sold to the third-party by Mr. Webster himself as sole proprietor, in circumstances where that purchaser, now recorded on the land register for Parcel 231, was not and is not a party to the proceedings.

[20] Counsel for Mr. Webster directed the Court to paragraphs 12 and 13 of the Statement of Claim⁷ which he asserted was evidence that this argument had been raised before the learned judge. The paragraphs read as follows:

“12. The Claimant further avers that the said Application for Partition which was registered on the 10th of March 2006 was obtained by fraud or alternatively mistake and the same occurred during the registration process.

PARTICULARS

... (i) The said Application Form discloses that it is dated on the 13th of February 2004 and signed by the Claimant and K. Vere Hodge. In truth and in fact, the Claimant signed the Application Form in 2006 and at the time of signing the sole name on the Application Form was that of the Claimant which was typed and the sole signature on the Application Form was that of the Claimant's.

(ii) At the time of signing the said Application Form there was no certification by the Third Defendant. In truth and in fact, the Claimant did not appear before the Third Defendant on the 13th day of February 2004 and acknowledged that the signature on the Application Form was that of the Claimant.

13. The said fraud was perpetrated or alternatively, the said mistake was made by the First Defendant or the Third Defendant and that the First Defendant had knowledge of the said fraud or mistake or substantially contributed to it by his act, neglect or default. Further, the Third Defendant concealed the said fraud or mistake from his client, the Claimant.

PARTICULARS

... (i) The First Defendant or the Third Defendant wrongly inserted the name and signature of the First Defendant on the Application Form and delivered the same to the Land Registry in circumstances where the First and Third Defendants knew that the First Defendant provided no consideration for the property which was the subject matter of the Application.

⁷ Pgs. 8-9, Record of Appeal.

(ii) The First Defendant or the Third Defendant wrongly inserted the date on the Application Form as 13th February, 2004 and delivered the same to the Land Registry.

(iii) The Third Defendant wrongly certified that the Claimant appeared before him on the 13th February, 2004 and acknowledged his signature.

(iv) The Third Defendant fraudulently represented to the Claimant that the Application Form was filed and recorded in the same form and manner as it had been signed by the Claimant when in truth and in fact he knew or ought to have known that it had not been so filed and recorded."

[21] Nothing in these pleadings suggests that Mr. Webster was seeking to have all the subdivided parcels revert to being Parcel 29 to be held as $\frac{3}{4}$ share to him and $\frac{1}{4}$ share to Mr. Hodge. What Mr. Webster in my view was seeking to establish was that Mr. Hodge owned no share in Parcel 29 and consequently none in the subdivided Parcel 232. Counsel for Mr. Webster made bald assertions that there had been some sort of fraud or mistake in the execution of the RL16 form, largely stemming from some confusion in the date of execution. However, there was no allegation that all the parcels are still owned in common by Mr. Webster and Mr. Hodge. Indeed, this would be totally at odds with his assertion of sole ownership of the entire Parcel 29.

[22] It appears to me that Mr. Webster took a rather scattershot approach in laying out his pleadings, in that, several arguments and alternate arguments were raised. However, at the actual hearing, Mr. Webster's focus was the alleged fraudulent transfer of $\frac{1}{4}$ share in Parcel 29 to Mr. Hodge. While he may have raised the issue of fraud in the partition of Parcel 29 in his Statement of Claim, the particulars of fraud being put forward on the appeal, and the legal consequences now being advanced, were not put forward at the trial. Accordingly, it cannot be said that the learned judge erred in failing to determine an issue which was not properly put before him.

[23] The focus of Mr. Webster's appeal, having conceded the co-ownership status of the original Parcel 29, turned on his effort to impugn the partition of Parcel 29 which led to the creation of the 4 new Parcels 231 to 234. He contends that the partition form RL16 was fraudulent because of the false certification of the

form by the third respondent and that on this basis, the land register should be rectified. In essence, he contends that the partition should be nullified, and the land register rectified by having the subdivided lots returned to being Parcel 29 with him holding a $\frac{3}{4}$ share and Mr. Hodge a $\frac{1}{4}$ share. I now turn to this issue.

Issue 2: Whether there are grounds for a rectification of the register

[24] What Mr. Webster now seeks on appeal is that the third respondent, by falsely certifying that Mr. Khamal Hodge appeared before him to sign the RL16 form, committed fraud. He asserts that this fraud is sufficient to rectify the register and nullify the partition of Parcel 29. In the alternative, if the partition stands, there must be a reversion to the original shares in ownership, i.e. following the partition, Mr. Webster and Mr. Hodge would have been owners in common of Parcel 231, Parcel 232, Parcel 233 and Parcel 234, with Mr. Webster having a $\frac{3}{4}$ share in each and Mr. Hodge having a $\frac{1}{4}$ share in each. Counsel for Mr. Webster forcefully contended at the hearing that a partition does not transfer or bestow title and that whatever the legal consequences of nullifying the partition, all parties must abide by them however undesirable.

[25] Implicit in this contention appears to be an appreciation that were this Court to find favour with this argument, then the proceeds of sale of Parcel 231 sold by Mr. Webster may have to be accounted for - at the least to the extent of a $\frac{1}{4}$ share to Mr. Hodge, and further that Mr. Hodge would have at least a $\frac{1}{4}$ interest in Parcel 236, now commercially developed by Mr. Webster. Although the Court did not hear detailed argument on the difficulties of reconstituting the original Parcel 29, such a course may now be totally impossible since Parcel 231, a portion of the original Parcel 29, has been sold to a third party for valuable consideration. This purchaser was not joined as a party to the proceedings and a nullification of the partition and a reversion to Parcel 29, in these circumstances, would be wholly improper both as a matter of law and practicality. Parcel 29, as matters currently stand, simply cannot be restored, not because of any conduct on the part of Mr. Hodge, but solely due to the conduct of Mr. Webster who, shortly after the partition, acted and relied on the said partition in two material respects.

- [26] Firstly, relying on the said partition which resulted in him being recorded as sole owner of one of the resulting parcels namely Parcel 231, he promptly sold that parcel to Happy Island Ltd. for valuable consideration - a sum of US \$450,000.00. He has not said that he paid Mr. Hodge $\frac{1}{4}$ of the proceeds of that sale or that he holds the same for him.
- [27] Secondly, again relying on the same partition which resulted in him being recorded as owner of the remaining parcels 233 and 234 (Parcel 232 being recorded in the sole name of Mr. Hodge), he amalgamated those two parcels to form Parcel 236 on which he constructed a commercial premises operated solely by him. There is no assertion that he discussed or sought the permission of his alleged co-owner Mr. Hodge to so do or that any consideration has been given to him accounting to Mr. Hodge in respect of any income from his sole use of Parcel 236.
- [28] It is also of interest that Mr. Webster has never sought to exercise rights of ownership over Parcel 232 until the dispute arose in respect of the access road over a portion of Parcel 232.
- [29] Mr. Webster also asserted that there had been a mistake in the preparation of the RL16 form in that the date printed on the form was inconsistent with the date that he signed it. This, he contends, is another basis on which rectification should be made.

The Law

- [30] Anguilla has a registered system of conveyancing based on the Torrens system which is governed by the **Registered Land Act**. One of the hallmarks of this system is that it confers absolute and indefeasible title to the registered proprietor of land.
- [31] Section 146 provides two bases on which the register can be rectified: fraud or mistake. It states:
- “(1) Subject to the provisions of subsection (2), the Court may order rectification of the register by directing that any registration be cancelled

or amended where it is satisfied that any registration including a first registration has been obtained, made or omitted by fraud or mistake.

(2) The register shall not be rectified so as to affect the title of a proprietor who is in possession or is in receipt of the rents or profits and acquired the land, lease or charge for valuable consideration, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default.”

Fraud - False certification

[32] In support of his allegation of a false certification of the RL16 form, Mr. Forde KC directed this Court to the transcript of proceedings which contained certain admissions made by the third respondent at the trial in the court below. He said: ‘Khamal Vere Hodge did not appear before me in respect of the RL16’.⁸ The third respondent explained this by saying:

“I knew of the circumstances leading to his signature being there. It was not averse to his interest. I knew that we had paid money towards the purchase of that particular property in the caption. I knew Mr. Webster was in a hurry, he did look for him to sign. I thought that in all the circumstances it would be safe for me to certify the document.”⁹

[33] This admission was corroborated by the evidence of Mr. Hodge who admitted that he did not appear before the third respondent when he certified the RL16 form and that he did not see the form until December of 2017. However, he indicated to the court that the certification was not averse to his interests and that he was not seeking to set aside the partition. Given the familial relationship and the history of the matter from the inception of the sale and purchase of the larger original parcel, it is reasonable to conclude that Mr. Hodge was quite content to have his father, the third respondent, attend to all transactions in respect of the property on his behalf. Mr. Webster has not said that he did not appear before the third respondent. Rather, he challenges the accuracy of the date that he is said to have done so - not that he did not at all.

[34] Section 114 of the **Registered Land Act** governs the certification of documents to be presented for registration. It reads:

⁸ Hearing Bundle 1, Pgs. 816-817.

⁹ Hearing Bundle 1, Pg. 819.

“(1) Subject to subsection (3), a person executing an instrument shall appear before the Registrar or such public officer or other person as is prescribed and, unless he is known to the Registrar or such public officer or other person, shall be accompanied by a credible witness for the purpose of establishing his identity.

(2) The Registrar or public officer or other person shall satisfy himself as to the identity of the person appearing before him and ascertain whether he freely and voluntarily executed the instrument and shall complete thereon a certificate to that effect.”

[35] Upon a plain reading of the section, it appears that its purpose is to prevent fraudulent or unauthorized registration of documents at the Registry of Lands by ensuring that the identity of the executing person is verified, and the document is executed freely and voluntarily. This is accomplished by requiring the Registrar or a public officer to satisfy himself as to the identity of a person who appears before him seeking to register a document.

[36] In the instant case, the fact that Mr. Hodge did not appear before the third respondent is not to my mind a false certification. The third respondent is Mr. Hodge's father. When the transactions in relation to Parcel 29 began, Mr. Hodge was under the age of 18 and his parents were acting on his behalf. They were also the ones who paid for his share in Parcel 29. This was a fact known to all the parties. Although Mr. Hodge may not have physically appeared before the third respondent, section 114 was satisfied in my opinion, as the third respondent could naturally verify the identity of his son. It is also reasonable to infer that Mr. Hodge left these matters to be handled by his father on his behalf. He does not seek to impugn the partition. To the contrary, he relies on it for establishing his sole ownership of Parcel 232. He insisted that it was his intention that Parcel 29 be partitioned.

[37] While it is arguable that the third respondent may very well have been in breach of his duty as a public officer, I do not find that he breached any provision of the **Registered Land Act** or acted fraudulently. There is also no dispute by Mr. Webster that he appeared before the third respondent and signed the RL16

form. Therefore, there can be no allegation of false certification in that respect. Accordingly, I do not find that there was a false certification of the RL16 form.

[38] In the event that I am wrong, and there was a false certification of the RL16 form, I must go further and determine whether such a false certification could amount to fraud for the purposes of rectification of the land register.

[39] Section 23 of the **Registered Land Act** provides that the registration of any person as the proprietor with absolute title of a parcel shall vest in that person the absolute ownership of that parcel, subject of course, to charges and overriding interests. This means that once a person's ownership of a property is registered, their title is unassailable and can only be challenged on the basis of fraud or mistake in the registration process.

[40] Establishing fraud for the purposes of rectification of the register is not an easy hurdle to surmount. What must be proved is actual fraud. In the oft cited case of **Assets Co Ltd v Mere Roihi**,¹⁰ the Privy Council found that the fraud that is required to defeat a registered proprietor's title is actual fraud, which involves dishonesty of some sort, and not constructive or equitable fraud. The fraud which must be proved in order to invalidate the title of a registered purchaser for value must be brought home to the person whose registered title is impeached or to his agents.

[41] I would go further to say that actual fraud means some deliberate act, misrepresentation or concealment of facts by a person in the process of registering land ownership. This can include knowingly omitting or providing false information, falsifying or tampering with documents or records, or impersonating another person. These acts must be deliberately aimed at swindling the rightful owner out of some unregistered right or interest. Intention to defraud is the necessary element.

[42] On the facts of this case, it seems to me very difficult to arrive at any finding of actual fraud. The alleged false certification of the RL16 form could be no more

¹⁰ [1905] AC 176.

than an irregularity for the purposes of fraud and rectification of the register. As this Court said in **Phillip Brelsford et al v Providence Estate Limited et al**:¹¹

“Even if non-compliance with the Registered Land Act’s requirements as to registration may involve the possibility of cancellation or correction of the entry, registration once effected must attract the consequences which the Act attaches to registration, whether that was regular or otherwise. It is the registration and not its antecedents which vests and divests title... Registration, based on a void instrument, is still effective to vest and divest title.”

This sentiment was also expressed by the Privy Council in **Cenac and others v Schafer**,¹² where the Board found that ‘it is the fact of registration that transfers legal title’.

[43] It follows therefore that a ‘false certification’ of an application for partition could not be sufficient to deprive Mr. Hodge of his title to Parcel 232, particularly, in circumstances where it appears that the said partition was the intention of all parties involved. There could be no other reasonable conclusion based on Mr. Webster’s own conduct and dealings on the partition. In this respect, I fully endorse and adopt the findings made by the learned judge at paragraphs 171 to 173 of his judgment where he said:

“[171] The court has determined that the dispute regarding the access over Parcel 232 only arose near in time to Mr. Webster’s negotiation with Delta Petroleum over the lease arrangements concerning the gas station on Parcel 236. The inference to be drawn from the surrounding circumstances is that Mr. Webster may have become disgruntled by the fact that he could not obtain the lease as he was unable to satisfy Delta Petroleum that he in fact could provide ready access to the gas station which was exacerbated by the defendants’ denial to grant him use of the access.

[172] Furthermore, the court found that Mr. Webster, by his conduct, as shown by the evidence presented at the trial, confirmed not only the defendants’ ownership of Parcel 232 but also their right of use and occupation of the same. In particular, the court is fortified in this view by the very fact of Delta Petroleum’s email to Mr. Webster.

[173] Therefore, the court is inclined to accept the defendants’ evidence that they had granted permission to Mr. Webster to use an access over part of Parcel 232. The totality of the evidence presented at the trial clearly favours this inference.”

¹¹ MNIHCVAP2016/0008, MNIHCVAP2016/0009, MNIHCVAP2016/0010, MNIHCVAP2016/0011 (delivered 15th February 2018, unreported).

¹² [2016] UKPC 25.

[44] All of the evidence presented before this Court and in the court below suggests that both parties wanted, procured and acted upon the partition brought about by the RL16 form. In fact, Mr. Webster was the first to act upon this partition for his own benefit as detailed above. How then can he seek to impugn the same partition which he relied on to carry out these transactions? Given his course of dealings with the partitioned land I am driven to the view that Mr. Webster is being wholly disingenuous in advocating for the results he now seeks even, it seems, to his own potential detriment.

[45] As the English Court of Appeal said in **Re Eaves, Eaves v Eaves**:¹³

“It is well settled that if a party has so acted that the fair inference to be drawn from his conduct is that he consents to a transaction to which he might quite properly have objected, he cannot be heard to question the legality of the transaction as against persons who, on the faith of his conduct, have acted on the view that the transaction was legal.”

[46] I find that the fraud alleged by Mr. Webster was not sufficient to nullify the partition of Parcel 29 or to challenge the absolute title to Parcel 232 enjoyed by Mr. Hodge and accordingly, there is no basis for a rectification of the land register.

Mistake

[47] I will touch briefly on the issue of mistake which was raised somewhat peripherally by counsel for Mr. Webster. He posited that the RL16 form presented to the Registry bore the date 13th February 2004, when in fact it was signed by Mr. Webster on 13th February 2006. This was not disputed by the respondents.

[48] In my view, it is very obvious that this was a clerical error made in the preparation of the RL16 form. It has no bearing on the substance and content of the form or the parties' intention that Parcel 29 be partitioned. Additionally, there was no error on the land register for any of the parcels, and the date of the first registration thereon was correctly recorded. As was said in

¹³ [1939] 4 All ER 260.

Brelsford,¹⁴ it is registration and not its antecedents which vests title. Registration based on a void instrument is still effective to vest title.

[49] Accordingly, Mr. Webster has failed to show any basis upon which the register for Parcel 232 ought to be rectified and this ground of appeal must, in my view, fail.

Issue 3: Whether Mr. Webster is entitled to damages for fraud

[50] Mr. Forde KC argued in the alternative, that if the fraud complained of was not sufficient to justify a rectification of the register, Mr. Webster would still be entitled to damages for common law fraud or deceit as established in **Derry v Peek**.¹⁵ He contended that such damages for fraud were included in his prayer for relief in the court below. However, Mr. Carrington KC argued that a prayer for relief is not sufficient and a party seeking damages for fraud must prove all the elements thereof.

[51] The authors of **Bullen and Leake**,¹⁶ culling from the authorities, noted that:

“In order to sustain the common law action of deceit, the following facts must be established, i.e. they must be pleaded and proved, namely:

- (1) there must be a representation of fact made by words or by conduct and mere silence is not enough;
- (2) the representation must be made with knowledge that it is false, i.e. it must be wilfully false or at least made in the absence of any genuine belief that it is true or recklessly, i.e. without caring whether his representation is true or false (**Derry v Peek** [1889] 14 App. Cas. 337);
- (3) the representation must be made with the intention that it should be acted upon by the claimant, or by a class of persons which will include the claimant, in the manner which resulted in damage to him;
- (4) it must be proved that the claimant acted upon the false statements; and
- (5) it must be proved that the claimant has sustained damage by so doing (see **Bradford Third Equitable Benefit Building Society v Bowers** [1941] 2 All E.R. 205 at 211, per Viscount Maughan).”

¹⁴ Supra n. 11.

¹⁵ (1889) 14 App Cas 337.

¹⁶ See **Bullen & Leake & Jacob's Precedents of Pleadings** 17th Ed. Vol 2 para. 58-01.

[52] To my mind, counsel for Mr. Webster has woefully failed to set out any claim for damages for common law fraud or deceit. It is trite that in order to succeed on a claim for fraud, every aspect must be specifically pleaded and particularised. The claim for common law fraud was presented as a secondary argument, in the event that the claim for rectification of the register was unsuccessful. No concerted effort was made by him to prove any of the elements of common law fraud either in this Court or in the court below. Particularly, he failed to show any loss suffered by Mr. Webster as a result of the alleged fraudulent certification. Mr. Webster received his allotted 3 parcels from the partition and Mr. Hodge received 1 parcel. He has suffered no loss such that he is required to be compensated in damages and so, this ground of appeal must also fail.

Issue 4: Whether the partition of Parcel 29 was sufficient to bestow separate parcels of land on Mr. Webster and Mr. Hodge

[53] Mr. Forde KC's alternative argument, as canvassed before this Court, was that if the partition was valid and effective, which I have already found it to be, then that partition, in and of itself, would not be sufficient to vest title. There must have been some subsequent act of the parties to transfer the individual parcels to the intended owners. Until then, Mr. Webster and Mr. Hodge owned all of the parcels as proprietors in common in their respective shares.

[54] The starting point in considering this argument must be section 109 of the **Registered Land Act** which deals specifically with partition of land owned in common. The section reads:

“(1) An application for the partition of the land owned in common may be made in the prescribed form to the Registrar by –
(a) any one or more of the proprietors; or
(b) any person in whose favour an order has been made for the sale of an undivided share in the land in execution of a decree;

and, subject to the provisions of this Act and of any written law by or under which minimum areas or frontages are prescribed or the consent of any authority to a partition is required, the Registrar shall effect the partition of the land in accordance with any agreement of the proprietors in common or in the absence of agreement in such manner as the Registrar may order.

(2) Partition shall be completed by closing the register of the parcel partitioned and opening registers in respect of the new parcels created by the partition and filing the agreement or order.”

[55] I also think it would be helpful at this juncture to set out section 108 which details the characteristics of proprietorship in common under the **Registered Land Act**. It reads:

“(1) Where any land, lease or charge is owned in common, each proprietor shall be entitled to an undivided share in the whole, and on the death of a proprietor his share shall be administered as part of his estate.

(2) No proprietor in common shall deal with his undivided share in favour of any person other than another proprietor in common of the same land, except with the consent in writing of the remaining proprietor or proprietors of the land, but such consent shall not be unreasonably withheld.”

[56] In interpreting these two sections, I look first at what the framers must have intended. Section 109 deals not with partition, but with partition of land owned in common. Proprietorship in common, as described by section 108, means that a single parcel of land is owned by multiple proprietors in undivided shares in the whole. Unlike a joint tenancy or joint proprietorship, it is not characterised by a right of survivorship but instead, each owner’s share devolves on their estate after their death. Practically, this is not an ideal situation, especially in circumstances where proprietors wish to use their share of the property for individual purposes. This was a state of affairs contemplated by the **Registered Land Act**.

[57] The remedy to this problem, as put forth in section 109, was to allow proprietors to partition the land owned in common, such that each may receive his own parcel to be used to the exclusion of all others. The section explicitly allows the Registrar to effect the partition in accordance with any agreement of the proprietors, usually to reflect their shares in the initial parcel, or in the absence of an agreement, in such manner as he may order. It seems unlikely that the framers’ intention would have been for the proprietors to go through the hassle of having the land partitioned only for it to continue to be owned in common until some separate deed or instrument was executed to vest parcels

in individual proprietors as the only possible method for achieving sole ownership to one's prior undivided share. While it is true that partition does not vest title, the position as a matter of law is that title is already vested and the process of partition provides a means of apportioning to each co-owner a portion allocated as the exclusive share of that co-owner.

[58] The evidence suggests that this was the method contemplated and adopted by the parties in this case. The RL16 form presented by Mr. Webster to the Land Registry contained an illustration of the map sheet and how it ought to look after the partition, with a note that Lot 2 was to be recorded as being owned by Mr. Hodge only, as his $\frac{1}{4}$ share of the original Parcel 29, and Lots 1, 3 and 4 to be recorded as owned by Mr. Webster only, as his $\frac{3}{4}$ share of the original Parcel 29. What was the object of that note if not to convey that Lot 2 was to be vested in Mr. Hodge as the sole proprietor? Further, why would Mr. Webster act in reliance upon it and sell Lot 1 and then amalgamate Lots 3 and 4 – all as sole proprietor of those lots?

[59] I am of the firm view that Mr. Webster's course of conduct does not support the argument that all of the parcels are still owned in common, nor do I accept that he believes this to be the case. If he truly so believed, then would Mr. Hodge not have been entitled to $\frac{1}{4}$ of the sale price of Parcel 231? Would he not have required his consent to amalgamate Parcel 233 and 234? And would Mr. Hodge not be entitled at least to an accounting of the commercial use to which Parcel 236 has been put by Mr. Webster? To the contrary, all the evidence points to an agreement between the parties for the partition of the land in the manner in which it was effected, and for the entries in the land register reflecting their agreement on the partition as to who would exclusively own what parcel. This, in my view, was a perfectly permissible course under section 109 of the **Registered Land Act**. It is not open to Mr. Webster to now resile from it having with full knowledge acted upon it and for his benefit.

[60] Accordingly, Mr. Webster's argument that the new parcels emanating out of Parcel 29 are still owned in common by himself and Mr. Hodge is without merit. A partition of a parcel of land under section 109 is sufficient to bestow

ownership of individual parcels on proprietors who formerly held land in common. Mr. Hodge was properly and rightfully registered as the proprietor of Parcel 232 to the exclusion of all others, just as Mr. Webster was rightly registered as the proprietor of the other parcels, which he subsequently dealt with as if he was the one and only owner. Therefore, as the learned judge found, Mr. Hodge was well within his rights to revoke Mr. Webster's licence to use the access on Parcel 232, especially as an alternative access existed on Mr. Webster's own Parcel 236.

[61] For all of the reasons given, I would dismiss Mr. Webster's appeal in its entirety. I turn now to the respondents' counter appeal.

Issue 5: Whether Mr. Webster's trespass on Parcel 232 warranted an award of exemplary or aggravated damages

[62] The respondents appealed against the decision of the judge to order general damages for trespass in the sum of US\$2,500.00, as well as his refusal to make an award of aggravated and/or exemplary damages. While Mr. Carrington KC accepted that the quantum of damages would have been at the discretion of the trial judge, he argued that the sum awarded was clearly insufficient and outside the ambit within which reasonable disagreement is possible and should be set aside by this Court. He posited that Mr. Webster's entry onto Parcel 232 with workers and heavy machinery warranted a greater award as well as an award of aggravated and/or exemplary damages.

Exemplary damages

[63] The House of Lords in the seminal case of **Rookes v Barnard**¹⁷ discussed the categories of cases in which exemplary damages can be awarded. The court recognised three categories of cases: (i) oppressive, arbitrary, or unconstitutional actions by the servants of the government; (ii) where the defendant's conduct has been calculated to make a profit for himself which may well exceed the compensation payable to the claimant; and (iii) where exemplary damages are expressly authorised by the statute.

¹⁷ [1964] 1 All ER 367.

- [64] The court emphasised that exemplary damages should only be awarded in exceptional cases where the conduct of the defendant is particularly egregious and warrants punishment beyond the compensatory damages that the plaintiff would normally receive. The court cautioned against the routine use of exemplary damages and emphasised the need for restraint in their application.
- [65] In relation to the second category, the court noted that it:
- “...is not confined to moneymaking in the strict sense. It extends to cases in which the defendant is seeking to gain at the expense of the plaintiff some object, —perhaps some property which he covets, — which either he could not obtain at all or not obtain except at a price greater than he wants to put down. Exemplary damages can properly be awarded whenever it is necessary to teach a wrongdoer that tort does not pay.”
- [66] Mr. Carrington KC argued that Mr. Webster’s conduct fell into this second category of cases as it was calculated to make a profit. He was facing pressure from Delta Petroleum to secure a lease or some other right to the access located on Parcel 232 and his acts of trespass were done in an effort to assert those rights.
- [67] From Delta Petroleum’s correspondence with Mr. Webster, or rather with his attorney at the time, it is clear that what they were seeking from him was some arrangement in the nature of a written lease or registrable right from Mr. Hodge, who was the registered proprietor of Parcel 232, as opposed to some demonstration or assertion of physical possession.
- [68] In my view, tearing down the barricade or refilling the trench would take Mr. Webster no further in his negotiations with Delta Petroleum. He would not have made a profit at the expense of Mr. Hodge on this basis alone. His acts, which the learned judge found, and with which I agree, were merely demonstrations of an assertion of ownership. He was asserting, albeit for the first time, that he owned Parcel 232 or at least had a right to use a part of it, and that the respondents could not deprive him of that right. Accordingly, I do not find that this situation falls within the limited category of cases

contemplated by the House of Lords in **Rookes v Barnard** and there is no basis to disturb the learned judge's finding that the respondents had not made out a case for exemplary damages.

Aggravated damages

[69] In dealing with an application for aggravated damages for trespass to land in **Horsford v Bird and others**,¹⁸ the Privy Council said:

"It is well established that trespass to land accompanied by high-handed, insulting or oppressive conduct may warrant an award of aggravated damages. The award in such a case is to compensate the plaintiff for the distress and injury to his feelings caused by the conduct in question."

[70] The English Court of Appeal in **Eaton Mansions (Westminster) Ltd v Stinger Compania de Inversion SA**¹⁹ echoed these sentiments when they said:

"...it seems to be settled law at first instance that aggravated damages cannot be awarded absent some subjective feelings on the part of the claimant which have been injured by the defendant's conduct."

[71] I do not find that any or any sufficient evidence was adduced before the learned judge indicative of injured feelings on the part of any of the respondents as contemplated by the authorities. Rather, the crux of the respondents' argument was that Mr. Webster's actions were motivated by him gaining a profit for himself through the continuation of the lease to Delta Petroleum or to assert ownership of Parcel 232. While a case for aggravated damages could potentially have been made out, it was well within the discretion of the learned judge, with the evidence before him, to make no order for such damages. It is not open to an appellate court to merely substitute its view for that of the trial judge unless it can be shown that he was plainly wrong. I do not so find.

[72] Counsel for the respondents also complained that the learned judge failed to give reasons for making the awards of US\$1,500.00 and US\$2,500.00 for

¹⁸ [2006] UKPC 3.

¹⁹ [2014] 1 EGLR 89.

special and general damages respectively. However, it has been the position of this Court, as was stated in **Wakeem Guishard v The Attorney General of The Virgin Islands**²⁰ that a judge need not repeat every fact or legal principle presented in a trial, or conduct a detailed analysis of all the evidence. The important thing is for the judge to provide a clear and well-reasoned decision, allowing the parties to understand why they won or lost, and enabling an appellate court to determine if the decision is sustainable. Again, it is not for an appellate court to merely substitute its view as to what it may have considered to be a reasonable award of damages.

[73] I am satisfied with the conclusions drawn by the learned judge with respect to his decision not to award aggravated or exemplary damages. This Court is entitled and bound to assume that the trial judge considered all the materials before him, in the absence of compelling evidence to the contrary.²¹ He wrote a fulsome and well-reasoned judgment addressing the issues raised by the parties and I do not find that his decision was blatantly wrong such that it must be set aside by this Court. Accordingly, I would also dismiss the counter-notice.

Costs

[74] Counsel for the respondents provided supplemental submissions to this Court in respect of an order made in the court below in relation to an application for interim injunctive relief and an application to strike out. As this order was made before proceedings were commenced, costs were ordered to be costs in the cause. Mr. Carrington KC argued that the costs of these applications could not fall within the prescribed costs awarded by the learned judge as rule 65.7(2)(d) of the **Civil Procedure Rules 2000** ("CPR") expressly precludes this.

[75] I agree with Mr. Carrington KC on this issue. The rule states that prescribed costs exclude the making or opposing of any application except at a case

²⁰ BVIHCVAP2018/0006 (delivered 2nd October 2020, unreported).

²¹ See *Jhawnie Gage et al v The Attorney General of The Commonwealth of Dominica* DOMHCVAP2020/0005 (re-issued 15th June 2021, unreported).

management conference or pre-trial review. Clearly, the applications having been made before proceedings were initiated, they could not have been made at either of these instances. It appears that this costs order was an oversight on the part of the learned judge and accordingly the respondents, being the predominantly successful party in the court below and on this appeal, are entitled to their costs on those two applications and I would so order.

[76] Ordinarily, costs on an appeal are awarded applying CPR 65.13 which provides for two thirds of the prescribed costs in the claim below. The prescribed costs were based, it seems, on the default value of the claim as EC\$50,000.00. Two thirds of the sum of EC\$7,500.00 awarded below amounts to EC\$5,000.00 and to my mind does not meet the justice of the case. I consider that an assessment of costs in respect of the appeal and cross appeal would be a more appropriate approach.

Disposal

[77] For the foregoing reasons, I would make the following orders:

- (1) The appeal is dismissed with costs to the respondents, such costs to be assessed by a Judge or Master of the High Court, if not agreed within 21 days.
- (2) The counter-notice of appeal is dismissed with costs to the appellant, such costs to be assessed by a Judge or Master of the High Court, if not agreed within 21 days.

- (3) The respondents are awarded costs on the application for interim relief and the application to strike out in accordance with the order of Ramdhani J dated 13th April 2018, such costs to be assessed by a Judge or Master of the High Court, if not agreed within 21 days.

I concur.

Margaret Price-Findlay
Justice of Appeal

I concur.

Trevor Ward
Justice of Appeal

By the Court

Chief Registrar