

THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

SAINT LUCIA

CLAIM NO.: SLUHCV2021/0361

BETWEEN:

OLIVER MATHURIN

Claimant

and

BERNADETTE FLORENT

Defendant

CONSOLIDATED WITH:

CLAIM NO. SLUHCV2022/0109

BERNADETTE FLORENT
HUBERT ST. MARTHE
HILARY FLORENT

Claimant

and

OLIVER MATHURIN

Defendant

Appearances:

Mr. Gerard Williams of counsel for the Claimant in Claim No. SLUHCV2021/0361
and counsel for the Defendants in Claim No. SLUHCV2022/0109
Mr. Horace Fraser of counsel for the Defendant in Claim No. SLUHCV2021/0361
and counsel for the Claimant in Claim No. SLUHCV2022/0109

2022: July 28.
: December 1.

Claim for possession of land and trespass – Claimant obtaining title from the Court by prescription under the Supreme Court- Prescription by Thirty Years (Declaration of Title) Saint Lucia Rules – Whether declaration of title obtained under the Supreme Court- Prescription by 30 years Rules a final order – Whether the High Court had jurisdiction to set aside declaration of title made by the High Court – Whether declaration of title could only be set aside on appeal – Whether the defendant could rely on prescription as provided for by Article 2103 of the Civil Code as a defence to the claim for possession and trespass

Party alleging that the petition that lead to the order granting prescriptive title was defective in that the application failed to comply with rules 5(e), 8 and 9 of the Supreme Court – Prescription by Thirty Years (Declaration of Title) Rules – Whether the order granting prescriptive title was irregular and ought to be set aside pursuant to the court’s inherent jurisdiction

Whether court having jurisdiction to determine claim for prescriptive title to registered land – Whether Court’s jurisdiction under article 2103A of the Civil Code has been impliedly repealed by the Land Registration Act – Whether the Supreme Court-Prescription by Thirty Years (Declaration of Title) Rules impliedly repealed by the Land Registration Act – Whether a court of coordinate jurisdiction can set aside order made without jurisdiction

Summary judgment – CPR 15.3(c) – Whether summary judgment amenable to proceedings commenced by fixed date claim – Striking out – CPR 26.3 – Whether defendant has any reasonable prospect of successfully bringing or defending the claim – Striking out defence filed out of time – CPR 12.2(b) – Whether court can strike out a defence filed out time in the absence of an order granting an extension of time in proceedings commenced by fixed date claim

JUDGMENT

- [1] **INNOCENT, J.:** Mr. Oliver Mathurin (‘Mr. Mathurin’), the claimant in Claim No. SLUHCV2021/0361 and the defendant in Claim No. SLUHCV2022/0109, is the registered proprietor with provisional title to the immovable property registered as Block 1247B Parcel 216 (the ‘Property’). Mr. Mathurin became registered as proprietor of the Property by virtue of an order of the High Court dated 28th November 2013 on a petition for prescriptive title made pursuant to the Supreme Court-Prescription by Thirty Years (Declaration of Title) Rules (the ‘Prescriptive Title Rules’).
- [2] The substance of Mr. Mathurin’s petition for prescriptive title under the Prescriptive Title Rules is uncertain as no evidence of these matters has been presented to the court by either party.
- [3] On 31st August 2021, Mr. Mathurin brought a claim against Ms. Bernadette Florent (Ms. Florent’) the defendant in Claim No. SLUHCV2021/0361 and one of the claimants in Claim No. SLUHCV2022/0109 for possession of the Property and trespass based on the allegation that Ms. Florent’s residential dwelling had

encroached on the Property and that Ms. Florent had thereby committed an act of trespass.

- [4] By virtue of this claim, Mr. Mathurin sought the following substantive relief, namely: (1) a declaration that the Ms. Florent had trespassed on the Property; (2) an order for vacant possession of the Property; and (3) an order directing Ms. Florent whether by herself, her agents and assigns to deliver up vacant possession of that part of the Property encroached upon by her dwelling house.
- [5] In her defence filed 15th November 2021, Ms. Florent claimed that she had been in occupation of the Property for a period in excess of thirty years along with other persons namely, the second and third-named claimants in Claim No. SLUHCV2022/0109 who also have residential structures erected on the Property. Ms. Florent denied that Mr. Mathurin had ever been in possession of the Property to the exclusion of herself and the other named persons. Essentially, Ms. Florent admitted that part of the residential structure which she occupies is located on a portion of the Property and that this has been the case for a period in excess of thirty years with Mr. Mathurin's knowledge.
- [6] Ms. Florent also alleged in her defence that Mr. Mathurin had petitioned the High Court for a declaration of title by prescription without having notified the other occupants of the Property and did not serve them with the requisite summons as prescribed by the Prescriptive Title Rules. In the premises, Ms. Florent alleged that the declaration of title obtained by Mr. Mathurin was irregularly obtained or otherwise obtained by fraud and noncompliance with the Prescriptive Title Rules.
- [7] On the basis of the foregoing allegations, Ms. Florent's pleaded case was also that Mr. Mathurin's claim is prescribed by the operation of Article 2103 of the Civil Code¹; and in the circumstances, his claim cannot be sustained and ought to be struck out with costs.

¹ Cap. 4.01 of the Revised Edition of the Laws of Saint Lucia

- [8] On 7th March 2022, Mr. Mathurin filed an application for summary judgment purportedly made pursuant to Part 15.2 of the Civil Procedure Rules 2000 ('CPR') and for the striking out of Ms. Florent's defence in accordance with CPR 26.3(1)(b) and (c) on the grounds that Ms. Florent's defence did not disclose any reasonable ground for defending the claim and that it was an abuse of process respectively.
- [9] Mr. Mathurin took the position that Ms. Florent's defence invited the court to litigate afresh the merits of the claim for prescriptive title that culminated in the Court's order of 28th November 2018; and that the said order was a final order against which there had been no appeal. In the circumstances, Mr. Mathurin adopted the posture that Ms. Florent could not challenge the Court's order declaring title to him in these subsequent proceedings.
- [10] In his written submissions, Mr. Mathurin also challenged Ms. Florent's allegations of fraud. However, the court in this instance will not deal with this aspect of the case as it is overtaken by the more pressing issue as it relates to the effect of the order granting Mr. Mathurin prescriptive title.
- [11] Mr. Mathurin also alluded to the fact that Ms. Florent had filed her defence out of time and in the absence of any order of the court granting an extension of time. Accordingly, the defence ought to be struck out.
- [12] Ms. Florent opposed the strikeout application and the application for summary judgment on the basis that Mr. Mathurin by virtue of CPR 15.3(c) was incapable of obtaining summary judgment in proceedings commenced by fixed date claim.
- [13] Counsel appearing for Ms. Florent submitted that the defence filed raises three distinct grounds for disputing the claim, namely: (1) that the claim for trespass is prescribed by Article 2103 of the Civil Code; (2) Mr. Mathurin obtained prescriptive title by fraud; and (3) the High Court had no jurisdiction to grant Mr. Mathurin's petition for prescriptive title in the first instance, the petition being granted by the Court without there being compliance with the relevant provisions of the Prescriptive Title Rules.

- [14] In the course of the proceedings, and as appears from the written submissions filed on behalf of Ms. Florent, it was revealed that on 11th March 2022, Ms. Florent, Mr. Hubert St. Marthe ('Mr. St. Marthe') and Mr. Hilary Florent ('Mr. Florent') filed a petition in the High Court for an order that the order of the High Court dated 23rd November 2013 granting Mr. Mathurin title to the Property by prescription be set aside and that the court grant them prescriptive title to the Property. It was this revelation which triggered the consolidation of the present claims before the court. The court makes no comment or observations on the propriety or appropriateness of this litigation strategy at this present stage. The foregoing provides a convenient segue into questions raised on the substantive claim filed by Ms. Florent and others in Claim No. SLUHCV2022/0109.
- [15] This subsequent claim was filed shortly after Mr. Mathurin had filed his strikeout application and his application for summary judgment. In their petition in the subsequent collateral proceedings, Ms. Florent and others sought the following orders and relief, namely: (1) an order setting aside the order of the High Court dated 23rd November 2018 wherein Mr. Mathurin was granted prescriptive title to the Property; and (2) an order for rectification of the Land Register as it pertains to the Property directed to the Registrar of Lands, deleting Mr. Mathurin's name from the Proprietorship Section of the Land Register, the latter presumably made pursuant to section 98 of the Land Registration Act ('LRA').
- [16] This petition was grounded ostensibly on the same bases advanced in Ms. Florent's defence. In short, they contended that the order of 28th November 2013 was a nullity on the grounds that there was noncompliance by Mr. Mathurin with the procedure set out in the provisions of the Prescriptive Title Rules and therefore, the Court had no jurisdiction to make the order.
- [17] In the true spirit of litigation, it was not surprising that on 14th April 2022, Mr. Mathurin filed an application disputing the court's jurisdiction to hear the claim pursuant to CPR 9.7. The substantive basis of Mr. Mathurin's application was that the claimants, by virtue of their petition sought to set aside a final order of the Court by engaging

the jurisdiction of a court of coordinate jurisdiction. Mr. Mathurin's submissions on this point were substantially the same as in the previous strikeout application.

[18] In the court's view, the following questions arise for determination, namely, (1) whether Ms. Florent can rely on negative prescription as a defence to Mr. Mathurin's claim; and (2) whether the order of 28th November 2013 granting Mr. Mathurin prescriptive title to the subject property could be set aside by way of petition in an ordinary civil action. It is apparent that a resolution of these two substantive issues will effectually determine the questions of whether Mr. Mathurin succeeds in his application to strike out Ms. Florent's defence and whether the petition brought by Ms. Florent and others can be maintained. The court will first deal with the second issue.

[19] Ms. Florent contended that the Court's order of 28th November 2013 was irregularly obtained and was therefore a nullity. The complaint of the order's irregularity was premised on there being noncompliance with the provisions of Rule 9 of the Prescriptive Title Rules. Therefore, Ms. Florent and others contended that the order was void and therefore a nullity and ought to be set aside *ex debito iustitiae* in accordance with the court's inherent jurisdiction. Ms. Florent and others found support for this proposition in the case of **Hilton Joseph v St. Pierre Volney and another; St. Pierre Volney and another v Hilton Joseph**.²

[20] It appears that Ms. Florent and others relied on two main grounds for alleging that the order was irregular. The first was based on procedural irregularity which in essence they claimed deprived them of their right to be heard in accordance with the principles of natural justice in the proceedings leading up to the Order, and the other, based on the absence of the Court's jurisdiction to have made the order. In addition, they rely on the allegation of fraud to support the proposition that the court can set aside the order in the exercise of its inherent jurisdiction without the requirement of an appeal.

² [1988] ECSCJ No. 1

- [21] With respect to the procedural ground, they alleged that the procedure leading up to the Order, involved the failure on the part of Mr. Mathurin to comply with a number of provisions governing his petition. Ms. Florent alleged that Mr. Mathurin had failed to comply with the provisions of Rule 5(e) and Rule 9 of the Prescriptive Title Rules. Ms. Florent and others seemed to have relied on Mr. Mathurin's petition not being in compliance with the provisions of Rule 5(e) as amounting to fraud.
- [22] The question which immediately arises is whether such procedural irregularities complained of and leading up to the making of the Order were so serious that the Order in question ought to be treated as a nullity requiring the Court to set it aside.
- [23] Rule 5(e) of the Prescriptive Title Rules requires that the petition set out whether any other person claims to be owner of the property. Rule 9 requires that the applicant for prescriptive title within 7 days after the filing of the petition cause a copy of the summons to be served personally upon all owners or occupiers of land adjoining the property to which the application relates and that no declaration of title shall be issued until proof has been given by the applicant that such copy has been served and that 8 weeks have expired since the service thereof. These provisions appear to be merely procedural and not substantive.
- [24] It is beyond dispute that Rule 11(1) of the Prescriptive Title Rules gives a person entering an appearance to the summons issued under Rules 8 and 9 the right to be heard on the petition. Rule 11(1) states that any person who enters and appearance under rule 8 shall within 14 days from the date of such appearance file in the Registry a written claim setting out his or her title to the property and a statement of the facts on which the same is founded and that a copy of the appearance and of the claim must be served on the applicant or his or her attorney-at-law.
- [25] The court has not been provided with any documentary or real evidence that there had been noncompliance with the provisions of rules 8 and 9. The absence of such proof compels the court to apply the Latin maxim *Omina Praesumuntur Rite Esse Acta*. It can only be readily presumed that the judge hearing the petition must have addressed their mind to the provisions of the Prescriptive Title Rules and the

relevant provisions of the Civil Code as they pertained to prescriptive title before making the Order particularly as it relates to the question of service of notice of the petition. However, assuming the allegations made by Ms. Florent and the other claimants to be true, it stands to reason that Ms. Florent and the other claimants being occupiers of the Property and land adjoining the property were deprived of their right to be heard on Mr. Mathurin's petition for prescriptive title.

- [26] Rule 12 of the Prescriptive Title Rules sets out the procedure to be followed where there has been no appearance filed in the petition. Rule 12(1) states that where no appearance has been entered under rule 8 the Registrar shall, on the application of the applicant, issue a certificate of non-appearance and fix a day and time for the hearing of the petition. Rule 12(2) requires that the court may be satisfied in such manner as it thinks fit that no person has entered an appearance. It is the court's view, it may be presumed until the contrary is proven, that the judge making the Order must have satisfied themselves with respect to the requirement for service of the petition pursuant to rules 8 and 9.
- [27] In any event, Ms. Florent and the other claimants have not given any indication in their pleaded case as to when they received notice of the Order. Additionally, it appears that Ms. Florent and the other claimants have not shown that they followed any procedure to set aside the Order other than by petition in an ordinary civil action.
- [28] In the court's view, the general principle emanating from the case law as it relates to a procedural irregularity that may render a judgment or order a nullity and capable of being set aside is by applying the test of whether the irregularity has caused a failure of natural justice and on the view that it was irregular for the Court to have proceeded to make the Order.³
- [29] Applying this test to the present case, the court has formed the view that, it being presumed that the procedural requirements of rules 8 and 9 had not been complied with, or that the Court making the Order had not been satisfied that these rules had

³ Marsh v Marsh [1945] A.C. 271

been complied with before the Order was made, clearly amounted to an irregularity that was sufficiently serious that it resulted in a failure of natural justice. Accordingly, the Order ought to be disturbed on the grounds of its irregularity.

- [30] Also, the court has arrived at the conclusion that in the circumstances, any failure, if one existed, to comply with rule 9 in respect of notice to owners and occupiers of adjoining land was not of such a kind that it rendered the Order ineffective for the purpose of granting prescriptive title. In other words, the Order remained in force until such time as it is set aside.
- [31] Advertisement by publication in the official Gazette and a newspaper circulating within the State was the prescribed method of giving notice to persons claiming to have an interest in the Property. Rule 8 did not require personal service. The simple point is that Ms. Florent and the other claimants did not enter an appearance to the summons and did not make any claim to having an interest in the property.
- [32] With respect to the complaint related to rule 5(e) of the Prescriptive Rules, which requires that the petition states whether any other person claims to be owner of the property, the court has formed the view that this would have been fatal to the petition if indeed Mr. Mathurin had failed to state that Ms. Florent and others had an interest in the property.
- [33] The court understands the purport and effect of rule 5(e) as being a reference to a person or persons who have already demonstrated whether by acts of ownership or otherwise that they are entitled to the ownership of the land. The requirement stated in rule 5(e) presupposes that the petitioner was aware of or had knowledge of such matters. In any event, the court has formed the view that this is a matter that goes to the merits of the petition for prescriptive title and involved matters of evidence which are better left to be challenged on appeal. To that extent the matters canvassed by Ms. Florent as they relate to the provisions of rule 5(e) are somewhat evidential and not merely procedural.

- [34] Persons affected by orders of a court of unlimited jurisdiction such as the High Court are entitled to apply to have the order set aside *ex debito justitiae* in the exercise of the inherent jurisdiction of the court without the need to have recourse to the rules that deal expressly with proceedings to set aside orders for irregularity and gives to the judge a discretion as to the order he will make.
- [35] In **Isaacs v Robertson**⁴ the court observed that the judges in the cases that have drawn the distinction between void and voidable orders have continuously refrained from seeking to lay down a comprehensive definition of defects that brings an order into the category of *ex debito justitiae*, the right to have it set aside, save that it specifically includes orders that have been obtained in breach of rules of natural justice.
- [36] Their Lordships in **Isaacs v Robertson** held that:
- “The contrasting legal concepts of voidness and voidability form part of the English law of contract. They are inapplicable to orders made by a Court of unlimited jurisdiction in the course of contentious litigation. Such an order is either irregular or regular. If it is irregular, it can be set aside by the Court that made it upon the application to that Court; if it is regular, it can only be set aside by an appellate court upon appeal if there is one to which an appeal lies.”
- [37] Ms. Florent seemed to have placed immense reliance on the decision in **Hilton Joseph v St. Pierre Volney** in support of the proposition that the court could set aside the Order on the petition brought by her and the other claimants for that purpose. It is doubtful whether the case of **Joseph v Volney** provides any support for the claimants’ contentions on the present application.
- [38] The decision in **Joseph v Volney** is authority for the proposition that the general rule that no Court has power to review, alter or vary any judgment or order after it has been entered except by way of appeal is subject to certain exceptions. One such exception was where there has been some procedural irregularity in the proceedings leading up to an order which is so serious that the order in question

⁴ (1984) 43 WIR 126

ought to be treated as a nullity, then the Court will set it aside. The application of this principle was coupled with the proviso that the appropriate procedure would have to be followed to have the order set aside on that basis.⁵

[39] The Court in the case of **Joseph v Volney** found that the correct procedure for getting the Order of 25th April, 1985 reviewed and set aside had not been followed. However, they observed that in the procedure leading up to the Order of Glasgow J, there was a failure on the part of the petitioner Volney to comply with a number of provisions governing his petition, for example, there was no service of process as was required and there was no statement of the facts on which he based his claim in accordance with Rule 5(c) of the Supreme Court - Prescription by Thirty Years (Declaration of Title) Rules. Accordingly they found that on the application by Hilton Joseph to have that Order set aside, there was good and sufficient reason for the Order of 25th April 1985. The Court reasoned that since Volney did not appeal against nor in any way question the Order of 25th April 1985 but instead took steps to have his petition heard before the High Court pursuant to that very Order, this left the Court with no basis for a review of the Order and it stood.

[40] It appears that Ms. Florent and the other claimants have relied on this passage in **Joseph v Volney** in support of their argument that the court in the present proceedings could at this stage set aside the order granting prescriptive title. Notwithstanding the court's observations in **Joseph v Volney**, the court applied the correct principle; and their findings in relation to the Joseph's appeal against the order of Glasgow J. was based on the peculiar facts of that case.

[41] Therefore, it appears that the Court in **Joseph v Volney** must have treated the order of 25th April 1985 as being irregular. To that extent the present case is distinguishable from the case of **Joseph v Volney**. In **Joseph v Volney**, instead of proceeding with the application to set aside the original order, Joseph proceeded to have his claim heard on its merits and being dissatisfied with the decision of the court below, did not challenge the judge's findings on the merits of the evidence but

⁵ At para 16

instead challenged the order of 25th April 1985 setting aside the order granting prescriptive title to Volney.

- [42] Transposed to the present case, the question that arises is whether the order of 28th November 2013 was regular or irregular. This court has already found that any failure, if one existed, to comply with rule 9 in respect of notice to owners and occupiers of adjoining land was of such a kind that it rendered the Order ineffective for the purpose of granting prescriptive title.
- [43] Therefore, it is the court's considered view that the order of 28th November 2013, although presumably irregularly obtained, could only be set aside on appeal. This is also the case because separate and apart from any procedural failure complained of, the court should be presumed to have determined the application on the evidence and in accordance with the law set out in the Civil Code as it pertains to obtaining title to land by prescription. In these circumstances, the court's order of 28th November 2013 was a final order which was determined on its merits and could only be set aside on appeal. This is critical bearing in mind that in the present case Ms. Florent and the other claimants appear to be challenging findings of law or fact made by the judge granting the order on the basis that Mr. Mathurin's petition was precipitated by fraud.
- [44] Ms. Florent and the other claimants also relied on the decision of the Court of Appeal in **Planviron (Caribbean Practice) Limited and another v Ferdinand James**⁶, a prequel to a later decision of the Court of Appeal which is discussed below, in support of the proposition that the Court can set aside the order granting prescriptive title on the grounds that there was non-compliance with the provisions of Rules 8 and 9 of the Supreme Court-Prescription by Thirty Years (Declaration of Title) Rules.
- [45] In the above cited case, the Court of Appeal determined the question regarding whether the judge below erred when he dismissed the appellants' application to set aside an order granting prescriptive title on the basis that the appellants had

⁶ SLUHCVP2013/0005 delivered 19th December 2013

employed the wrong procedure to challenge the order which was made in their absence, without due notice and in breach of the principles of natural justice ought to have deprived them of the remedy to have the order set aside.

- [46] The facts in **Planviron v James** were that the appellants who were occupiers of land adjoining to which the respondent obtained title by prescription, were never served with a copy of the summons the purpose of which was to indicate to any person claiming an interest in the property would enter an appearance. When the declaration of title was issued in the respondent's favour, the appellants were not made parties to the petition. They subsequently learned of the declaration of title after it had been granted. The appellants applied to the court by way of application under the inherent jurisdiction of the court to set aside the orders made by the judge, on the basis that they had not been duly notified in accordance with the provisions of rules 8 and 9 of the Supreme Court-Prescription by Thirty Years (Declaration of Title) Rules. The appellants complained that they were not afforded an opportunity to be heard on the question whether or not the respondent had made out a title by prescription. The appellants also claimed that because the rules had not been complied with, the judgment or order granting the respondent title was irregular and improper.
- [47] The judge in the court below ruled, in respect of the appellants' application to set aside the order, that the appellant had employed the wrong procedure to move the court in that they had come by way of an application under the inherent jurisdiction of the court instead of by way of a petition under articles 381 and 382 of the Code of Civil Procedure, and dismissed their application on the basis that the appellants could not rely on the inherent jurisdiction of the court and that article 381 applied.
- [48] The Court of Appeal, allowing the appeal, found that in so finding the judge at first instance did not evaluate in any manner whatsoever, the complaints of the procedural non-compliance alleged by the appellants. In the opinion of the Court of Appeal, the learned trial judge was required not to issue a declaration of title until he was satisfied with proof of service of the summons on the appellants, and that

there was nothing before the court to indicate that he had any such evidence before him. According to the Court of Appeal, this raised the question whether the judge could have exercised the power conferred on him by article 2103A of the Civil Code to make a declaration of title. The Court of Appeal found that he could not. The Court of Appeal ordered that the decision of the court of first instance be set aside and the matter was remitted to be heard by a different judge.

[49] Ms. Florent relied substantively on the Court of Appeal's reasoning in **Planviron v James** that the appellants had been deprived of their right to be heard where their interest in the subject matter of the proceedings was materially affected. However, in the present case, the court has made some observations as it relates to application of Ms. Florent and the other claimants.

[50] Firstly, Ms. Florent and the other claimants have moved the court by way of petition, presumably in conformity with the provisions of articles 375 to 381 et seq. of the Code of Civil Procedure. The provisions of articles 375 to 380 (petitions to set aside judgements) and articles 381 to 383 (oppositions by third parties) of the Code of Civil Procedure have been repealed by S.I. 3 of 1970 (the repealed Rules of the Supreme Court), the latter enactment having been repealed and replaced by the CPR 39.5 which sets out the procedure where a party seeks to set aside an order given in their absence.

[51] Secondly, Ms. Florent and the other claimants have not availed themselves of the provisions of CPR 39.5 and in any event, given the timing of their application, could not rely on this procedural rule. CPR 39.5 sets out the procedure to be followed when a party who was not present at a trial at which judgment was given or an order made may apply to set aside that judgment or order on application made within 14 days after the date on which the judgment or order was served on the applicant; the application to set aside the judgment or order must be supported by evidence on affidavit showing a good reason for failing to attend the hearing; and that it is likely that had the applicant attended, some other judgment or order might have been given or made.

- [52] The question that arises is whether, notwithstanding the procedural improprieties mentioned above, Ms. Florent and others can succeed in setting aside the order relying solely on the court's inherent jurisdiction. The decision in **Tombstone Limited v Raja and another**⁷ provides an answer to this question. In the before cited case it was accepted that the application to set aside ought to have been brought under the relevant provisions of the CPR and it was not. The court held that applications to set aside orders were determined in accordance with the CPR and the overriding objective; and that where the order is one that affects the rights of a party in an important respect it will only be in exceptional circumstances that the court would decline to exercise its discretion to set aside the order or judgment. It was held that this principle was no more than the recognition and enforcement of the need to ensure adherence to the basic principles of natural justice. The court also held that if, contrary to the view which they held, the application to set aside fell outside of the scope of the CPR, and had to be dealt with under the inherent jurisdiction, they would have held that the jurisdiction should be exercised conformably with the CPR.
- [53] Ms. Florent and others have also challenged the Order of 28th November 2013 on the basis that the court had no jurisdiction to grant the same and therefore, the order of 28th November 2013 was null, void and of no effect and ought to be set aside. In support of this argument Ms. Florent and others relied on the decision in **Ferdinand James v Planviron (Caribbean Practice) Limited and others**.⁸ In order to properly assess and distill Ms. Florent's argument it will be necessary to examine in detail the decision in **Ferdinand James v Planviron**. In large measure, Ms. Florent's posture resembles the position adopted by the respondent in that case.
- [54] In **Ferdinand James v Planviron** the appellant, Ferdinand James, filed a petition pursuant to article 2103A of the Civil Code of Saint Lucia ("the Civil Code") and the Supreme Court Prescription by Thirty Years (Declaration of Title) Rules, claiming that he had acquired title by prescription to land owned by the respondent, Planviron

⁷ [2008] EWCA Civ 1444

⁸ [2019] ECSCJ No. 336

(Caribbean Practice) Limited. On 31st January 2011, the High Court issued a declaration of title naming Mr. James the owner of the land. Following this, the respondent, applied to set the Prescription Order aside on several grounds. The set-aside application was overtaken by an application for summary judgment, made on the basis that Mr. James' claim for title by prescription was wrongly made in accordance with the Prescription Rules which had been impliedly repealed by the LRA. The application for summary judgment was heard by Smith J who entered summary judgment in favour of the respondents, found that part 9 of the LRA had impliedly repealed the Prescription Rules, and declared the Prescription Order to be null, void and of no effect. Mr. James appealed, the issue for determination before the Court of Appeal being whether part 9 of the LRA impliedly repealed article 2103A of the Civil Code and/or the Prescription Rules.

- [55] The Court of Appeal held, that it was not open to any person to ignore the plain language and express provisions of the LRA and to continue to use the procedure under the Civil Code and the Prescription Rules, when the LRA does not provide for it and, instead, expressly provides its own procedure or gateway for obtaining title by prescription.
- [56] The judgment of the Court of Appeal in **James v Planviron** bears testimony to the fact that the LRA grants security of title to a person who has become registered as proprietor to land. On first registration the person registered as proprietor to the land was guaranteed security of title by the state. This title could not be disturbed otherwise than in accordance with the circumstances set out in sections 97 and 98 of the LRA. A person who had not obtained title by prescription prior to first registration under the LRA could not disturb a title so registered otherwise than by following the provisions for rectification under section 98 of the LRA. Section 98 of the LRA provide for the limited circumstances in which the land register can be rectified by the Court. These circumstances clearly do not arise in the present case. Therefore, a person who seeks to become registered as proprietor by seeking rectification of the Land Register must comply with the provisions of section 98 of the LRA.

- [57] Mr. Mathurin obtained declaratory title by prescription by Order of the High Court made in 2013 pursuant to article 2103A and the Supreme Court-Prescription by Thirty Years (Declaration of Title) Rules, long after first registration and after the previous owner became registered as proprietor in 1986. There is no evidence that either Mr. Mathurin or Ms. Florent had claimed title to the subject property during the LRTP. Similarly, there is no evidence presented that Ms. Florent or any of the other occupants of the Property had made any claim to title thereto during the LRTP.
- [58] Section 94 of the LRA sets out the procedure for obtaining title by prescription. Therefore, the Court of Appeal has held that the procedure under the Supreme Court-Prescription by Thirty Years (Declaration of Title) Rules has outlived its longevity. However, the Court of Appeal was hesitant and exercised great restraint in making any determination with respect to the effect that their decision would have on previous declarations of title obtained under the Supreme Court-Prescription by Thirty Years (Declaration of Title) Rules. In the present case, the court is only concerned with the state of the law as it exist at the time of determining the present application. In the premises, the court will not attempt to discuss the question of whether the decision in **James v Planviron** operates retrospectively to defeat Mr. Mathurin's title.
- [59] Ms. Florent has sought an order declaring her proprietor of the property pursuant to article 2103A of the Civil Code and the Supreme Court-Prescription by Thirty Years (Declaration of Title) Rules and has also not engaged the procedure under section 94 of the LRA. Instead, Ms. Florent has sought to set aside the Order purely on the basis that the Court had no jurisdiction to make it in the first place and that it was obtained by fraud; and consequently she claimed rectification of the Land Register as it pertains to the property. Such an approach is highly untenable and cannot be maintained on the basis of the reasoning of the Court of Appeal in **James v Planviron**.
- [60] Therefore, assuming that the Court were to set aside the Order, this would not result in Ms. Florent and others automatically becoming registered as proprietors.

Ms. Florent's recourse, in the court's view, is by way of appeal against the decision of the Registrar of Lands to register Mr. Mathurin with title to the Property on the basis of the order and pursuant to section 80 of the Land Registration Act and not by seeking an order from the Court to rectify the register since the rectification sought is not of the kind contemplated by section 98 of the LRA. If Ms. Florent or any one of the parties are dissatisfied with the decision of the Registrar of Lands it is open to them to pursue whatever recourse that they have by virtue of the appellate provisions under section 105 of the LRA.

[61] Therefore, in the court's view, it would not be appropriate for this court to set aside an order made by a court of coordinate jurisdiction, although it is accepted that the Order was irregular, on the basis of **James v Planviron** the same having been made without jurisdiction. That being the case, the court has assumed the position that the proper route to challenge the order would be by way of appeal under section 105 of the LRA.

[62] It is interesting to note that the decision in **James v Planviron** did not interrogate the propriety of the learned judge's orders as a judge of coordinate jurisdiction. This issue falls to be determined in the present case. Therefore, even if this court were to find that the Order was made without jurisdiction and that in all the circumstances of the case it was irregular, the court still maintains that it does not possess the power to set aside the Order of a judge of coordinate jurisdiction. The appropriate remedy in this instance is by way of appeal.

[63] Having regard to the reasoning of the Court of Appeal in **James v Planviron**, the court has formed the view that there are other avenues available to Ms. Florent by which she may seek to obtain the relief that she seeks. The court is of the opinion that implicit in the decision in **James v Planviron** is the suggestion that a person aggrieved by a decision of the Registrar made pursuant to section 94 and 97 of the LRA can approach the Court by way of appeal under section 105 of the LRA. One of the grounds would most likely be that the Registrar of Lands lacked the jurisdiction to make the entry in the Land Register for the Property in the first place.

- [64] The Registrar of Lands effected Mr. Mathurin's title as proprietor to the property by virtue of the provisions of section 80 of the LRA. Section 80 of the LRA deals with transmission by compulsory acquisition or judgment of court and provides that where the Crown or any person has become entitled to any land, lease or hypothec under any law or by virtue of any order or certificate of sale made or issued under any law, the Registrar shall, on the application of any interested person supported by such evidence as he or she may require, register the Crown or the person entitled, as the proprietor.
- [65] Therefore, the Registrar of Lands purported registration of the Order pursuant to section 80 of the LRA was erroneous. Section 80 of the LRA permits registration where the land in question has passed from a registered owner to a subsequent owner by operation of law, on death or insolvency or on acquisition by the Crown. However, this point has not been specifically raised in the present proceedings and it is unlikely that this is the proper forum to raise it in any event.
- [66] In addition, Ms. Florent's reliance on fraud does not entitle her to bring a claim pursuant to section 98 of the LRA. This position is reinforced by the provisions of section 105 of the LRA. Notwithstanding that on the basis of the Court of Appeal's decision in **James v Planviron** the Order was clearly a nullity or rather irregular, the simple fact remains that the Registrar of Lands had already registered Mr. Mathurin as proprietor with provisional title. Therefore, Ms. Florent's grievance is against the Registrar's registration of title in favour of Mr. Mathurin however obtained and accordingly could only be alleviated by following the procedure under section 105 of the LRA by appealing the decision of the Registrar to register Mr. Mathurin as proprietor on the basis of the declaration of title made by the Court.
- [67] Ms. Florent and the other claimants, some 35 years after the first registration of the previous proprietor with absolute title to the property, and 9 years after Mr. Mathurin became registered as proprietor, can no longer, by way of a defence and claim, claim ownership of the disputed land and invoke the statutory remedy of rectification. The remedy of rectification pursuant to section 98 is not an alternative remedy for a

party who failed to avail himself of the process of making a claim to land under the Land Adjudication Act ('LAA') or of the avenues for review and appeal provided in the said Act.⁹

- [68] Ms. Florent and the other claimants were required by the provisions of the LAA to claim any land in which they had an interest as owners during the LRTP. Their failure to make a claim, whether based on documentary or possessory title, meant that the title to the disputed land fell to be recorded in the names of the person(s) who claimed it, subject to whether the title to be vested is adjudged to be absolute or provisional title. Once the adjudication record became final and absolute title to the said land vests in the proprietor, the only avenue available to a person to challenge that title is by way of an application for rectification of the land register under section 98 of the LRA, in circumstances where there has been fraud or mistake in the registration of the parcel, including its first registration.
- [69] The remedy of rectification of the land register by the court pursuant to its powers under section 98 of the LRA, is available only where the mistake or fraud alleged occurred in the process of registration, including a first registration. It is noteworthy that Ms. Florent's allegation of fraud does not relate to the registration process or the first registration; it clearly relates to Mr. Mathurin's petition whereby he obtained the order declaring prescriptive title.
- [70] The claimants made no claim to the disputed land during the LRTP, whether based on documentary or possessory title. No fraud has been properly pleaded by the claimants, and there could be no error, omission or mistake in the registration process such as to lead to the court's powers under section 98 of the LRA being invoked and the rectification of the land register relating to the disputed land.
- [71] In addition, the claimants cannot sustain a claim to title by prescription. It is well settled that the conjoint effect of the LAA and LRA is that the adjudication and first registration of a parcel of land interrupts any prescriptive rights which have or were

⁹ Francis Chitolie and another v St. Lucia National Housing Corporation [2022] ECSCJ No. 8

being acquired prior to first registration and, accordingly, the period of occupation prior to first registration is not to be counted or reckoned when making a defence or claim based on prescription. The claimants' failure to make a claim during the LRTP did not preserve any entitlement to maintain a claim to prescriptive title or any other right, title or interest in the disputed land after the first registration in 1986.

[72] In such circumstances, the first registration of the property in the name of the first proprietor extinguished any documentary or possessory claim which the claimants had acquired or may have been in the process of acquiring based upon their actual occupation of the said land or receipt of the income from it. Any claim which the claimants make based upon occupation of and receipt of income from the disputed land prior to 1986, were and have been extinguished by the legislative effect of the LAA and LRA which required them at the time to make a claim to the land which they occupied, which they failed to do. In the premises it is safe to conclude that any occupational or prescriptive claim by the claimants would have to be reckoned from 1986.

[73] In the court's considered view, the mere setting aside of the Order, if the court was entitled so to do, cannot operate to divest Mr. Mathurin of his title and seemingly usurp the authority of the Registrar of Lands under section 94 of the LRA.

[74] Ms. Florent's subsequent claim does not seek to trigger the Court's jurisdiction under sections 98 and 105 of the LRA. Instead it seeks to challenge the Order of 28th November 2013 on the grounds of fraud. Having examined the claim filed by Ms. Florent, it appears that she attempts to challenge the order of 28th November 2018 on the grounds that it was obtained by fraud. These assertions of fraud appear to relate to the evidence that Mr. Mathurin placed before the Court in his petition for prescriptive title. Ms. Florent's assertions in relation to fraud appear to be thwarted by the fact that she was not a party to the petition for prescriptive title and also no evidence of what was before the court on the petition for prescriptive title has been laid before this court to substantiate the allegation of fraud.

- [75] The question that arises is whether this court, being a court of coordinate jurisdiction can set aside the Order of 28th November 2013 on the ground that the court had no jurisdiction to make it in the first place.
- [76] The answer to this question was determined in the case of **Strachan v Gleaner Co Ltd and Another**¹⁰ where it was held that the Supreme Court is a superior court or court of unlimited jurisdiction, and consequently has jurisdiction to determine the limits of its own jurisdiction; and whenever a judge makes an order he must be taken implicitly to have decided that he has jurisdiction to make it. If the judge is wrong, he makes an error whether of law or fact which can be corrected by the Court of Appeal. But he does not exceed his jurisdiction by making the error; nor does a judge of co-ordinate jurisdiction have power to correct it. As between the parties, and unless and until reversed by the Court of Appeal, his decision is *res judicata*.¹¹
- [77] Accordingly, an order made by a judge without jurisdiction is obviously vulnerable, but it is not wholly without effect; it must be obeyed unless and until it is set aside and it provides a sufficient basis for the Court of Appeal to set it aside.
- [78] Another question which the court must determine is whether Ms. Florent can rely on the provisions of article 2103 as a defence to Mr. Mathurin's claim for possession and trespass.
- [79] In the court's considered view, in order for Ms. Florent to successfully rely on the provisions of article 2103 she would have to first establish negative prescription as against the previous proprietor and Mr. Mathurin which she is incapable of doing.
- [80] The Court of Appeal in the case of **Moses Joseph et al v Alicia Francois** consolidated with **St. Torrence Matty et al v Alicia Francois**⁵ held that the same elements required for establishing positive prescription apply equally in a case where negative prescription is being set up as a bar to the claim. The same elements required for establishing positive prescription apply equally to setting up negative

¹⁰ [2005] UKPC 33; (2005) 66 WIR 268

¹¹ *Infra* at para [32]

prescription as a bar. Evidence must be led which satisfies Article 2051 of the Civil Code of Saint Lucia in order to successfully defeat a claim made by a person as an owner.¹²

- [81] Having already held that the period of prescription must be reckoned from 1986 being the date of first registration, it follows that Ms. Florent cannot rely on the provisions relating to negative prescription in article 2103. In addition, Mr. Mathurin having obtained title by prescription in 2013 also interrupted Ms. Florent's claim to negative prescription against him. Therefore, Ms. Florent has not satisfied the 30 year requirement under article 2103.
- [82] Distilled to its essence, Ms. Florent's contention was that since Mr. Mathurin became registered by fraud he was not the true owner and this meant that her own possession was unaffected by Mr. Mathurin's title, since that title is a nullity. This argument is defeated by the authority of **Isaacs v Robertson** where their Lordships declared that it is entirely wrong to call any order of a Court of competent jurisdiction a nullity; until it is reversed on appeal or set aside such an order is valid and binding and must be obeyed. Mr. Mathurin was registered as proprietor by virtue of that order. There can be no rectification of the Land Register, without first setting aside that order. The Court order declaring that Mr. Mathurin acquired prescriptive title stands. So long as it stands the registered title issued in consequence of that order is a perfect title. It is not a nullity. Therefore, Mr. Mathurin is entitled to maintain his action for trespass.
- [83] Mr. Mathurin sought to prescribe against the title of the previous owner. Therefore, the previous owner or persons claiming title through him would seem to be the proper parties to challenge the prescriptive title which defeated the title of the previous owner. If Mr. Mathurin perpetrated a fraud then the previous owner or those capable of claiming through him were the victims of that fraud; if there was fraud, these were the persons who were defrauded. Therefore, Ms. Florent cannot claim to have been defrauded. It is clear that unless the previous owner or his estate

¹² Article 2057 of the Civil Code of Saint Lucia

challenges Mr. Mathurin's title they must be treated as having accepted Mr. Mathurin's title.

- [84] Ms. Florent and the other claimants not being competing title holders of the property cannot be allowed to challenge the title of a registered owner with absolute title. In the court's opinion, it appears that Ms. Florent has brought the present claim directly or indirectly asserting the title of the previous owner over that of Mr. Mathurin. The law does not permit a private individual, not as a defence but by way of attack, to assert the rights of another private individual, without the latter's permission. It is well settled that in an action of trespass a defendant may not set up a *jus tertii*. He may set up title in himself, or show that he acted on the authority of the real owner, but he cannot set up a mere *jus tertii*. Therefore, if title in another cannot be set up as a defence, in trespass, then it is even more the case that it cannot be set up as the entire foundation for a cause of action, in a claim for a negative declaration of title.
- [85] The evidence revealed that Ms. Florent and others have only asserted their right to title by prescription to the disputed land in the present claim before the court; however, they have not asserted their right to prescriptive title by applying to the Registrar in accordance with section 94 of the LRA. This omission is also fatal to the defendants' reliance on prescriptive title as a defence to the claim for trespass.
- [86] Ms. Florent and others assertion of their right to prescriptive title does not deny Mr. Mathurin the right to bring an action for possession and trespass. Also, the prescription claim does not oust the court's jurisdiction to hear the claim for possession and trespass. The court's jurisdiction to hear such claims is separate and distinct from the jurisdiction exercised by the Registrar under the LRA and is not ousted by the provisions of the LRA as it pertains to the acquisition of title by prescription.¹³

¹³ Section 115 Land Registration Act

- [87] Therefore, the defendants' assertion of a right to prescriptive title, even if there was a claim before the Registrar of Lands, there was no legal impediment in respect of the claimant bringing a possessory or trespass claim while applications for prescriptive title are before the Registrar of Lands. This course of action is specifically recognized and provided for by the Civil Code as a method of interrupting possession.
- [88] In the present case, Ms. Florent and others have claimed a right by prescription to counter Mr. Mathurin's assertion to the title and possession of the Property. Ms. Florent and others have not exercised their statutory right given by the LRA which provides for a person claiming title by prescription to apply to the Registrar of Lands. It is well settled and accepted, that the defendants cannot bring a claim in the court for prescriptive title. Therefore, they are only competent to use any prescriptive right they may have as a sword only by application to the Registrar of Lands if they satisfy the requirements as stipulated under the relevant provisions of the LRA and the Civil Code.
- [89] If sued for recovery of possession, as Mr. Mathurin has done in this case, then Ms. Florent and others may set up their adverse possession as a shield to defeat Mr. Mathurin's claim for recovery of possession which is precisely what the defendants are incapable of doing by praying in aid the provisions of Article 2103. The defendants may defeat Mr. Mathurin's possessory claim as being time barred under the provisions of Article 2103 but that would not afford them a right to title by prescription without more, and certainly not by way of asserting a positive claim for prescriptive title before the court.¹⁴

Conclusion

- [90] With respect to Mr. Mathurin's prayer that Ms. Florent's defence be struck out and that the court grant summary judgment, the court will only give cursory treatment these questions. When proceedings are commenced by way of fixed date claim, a

¹⁴ Jeffery Adolphus Carty v Raphael Edwards [2007] ECSCJ No. 10 at para 5

defendant does not run the risk of the claimant obtaining default judgment where the defendant has failed to file a defence or has filed a defence out of time. As long as the defendant files his defence before the court enters judgment, either on application of the claimant or at the first hearing of the fixed date claim, the defence is properly filed. The CPR does not provide a sanction for not filing a defence within the time prescribed by the rules and the consequence of not filing a defence is that the claimant can obtain default judgment. But where a claim is commenced by fixed date claim, default judgment is not available to the claimant.¹⁵ Therefore, Mr. Mathurin's application to strike out Ms. Florent's defence on that basis fails.

- [91] In addition, Mr. Mathurin is not entitled to summary judgment by the operation of CPR 15.3(c) which specifically provides that the court can give summary judgment in any type of proceedings except proceedings commenced by way of fixed date claim.

Order

- [92] For the reasons set out in this judgment, Ms. Florent's defence filed in Claim No. SLUHCV2021/0361 is struck out as disclosing no reasonable grounds for defending the claim. The case shall proceed to case management and trial in accordance with the CPR. Costs is awarded to the claimant in the sum of \$1,000.00.
- [93] Also, the claimants' claim in Claim No. SLUHCV2022/0109 is struck out as disclosing no reasonable grounds for bringing the claim and in all the circumstances of the case amounts to an abuse of process. Costs is awarded to the defendant assessed in the sum of \$1,000.00.

Shawn Innocent
High Court Judge

By the Court



Dp. Registrar

¹⁵ CPR 12.2(b)