

**EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS**

IN THE HIGH COURT OF JUSTICE

Claim No. BVIHCV 2020/0056

**IN THE MATTER OF SECTION 129 OF THE REGISTERED LAND ACT (CAP. 229) OF THE REVISED
EDITION OF THE LAWS OF THE VIRGIN ISLANDS**

AND

IN THE MATTER OF AN APPLICATION TO REMOVE A CAUTION FILED BY EUGENIA O'NEAL

AND

IN THE MATTER OF AN APPEAL AGAINST THE ORDER OF THE REGISTRAR OF LANDS

BETWEEN

GARNA O'NEAL

Claimant

and

[1] REGISTRAR OF LANDS

First Defendant

[2] EUGENIA O'NEAL

Second Defendant

[3] JULIA DAWSON

Third Defendant

[4] BRIAN MARSHALL

Fourth Defendant

Appearances: Mrs. Hazel-Ann Hannaway Boreland and Ms. Kisha Frett, Counsel for the Applicant
Mr. Christopher Forde, Counsel for the First Defendant
Mr. John Carrington, Counsel for the Second Defendant
Mr. Sydney Bennett QC and, Counsel for the Third and Fourth Defendants

2021: 25th and 26th January
2021: 30th March

JUDGMENT

- [1] **ELLIS J:** In the Claim herein, the Claimant seeks two- fold relief. First, pursuant to section 147 of the Registered Land Ordinance (“the Ordinance”) she seeks to appeal the decision of the Registrar of Lands (“the Registrar”) made in favour of the Second Named Defendant removing Caution No. 1069/2017 (“the Caution”) entered on Block 3136B Parcel 4 (“Parcel 4”). Secondly, she seeks to have the land register for Parcel 4 rectified in accordance with section 140 of the Ordinance on the basis of fraud or mistake.
- [2] At the centre of this dispute are two first cousins, the Claimant and the Second Named Defendant, and two (2) parcels of contiguous land – Parcel 4 Block 3136B and Parcel 5 Block 3136B (“Parcel 5”) Road Town Registration Section located at Sophie Bay. The Claimant and the Second Defendant are the children of two brothers, Bregado O’Neal and Eugene O’Neal.
- [3] Eugene O’Neal, the father of the Second Defendant (now deceased) purchased parcels of land from the Amey’s family (Eugene and William Amey) in a series of purchases which began in 1954 and concluded in 1970 that became known as Parcel 4 and Parcel 10 (which latter parcel is not relevant to these proceedings). Parcel 5 was originally owned by William Amey who, by the 27th September 1956 Deed No. 105 of 1956 sold the land that came to be known as Parcel 5 to Bregado O’Neal, the father of the Claimant (now deceased) who was registered as proprietor thereof pursuant to the Adjudication Record on 19th October 1973.
- [4] During the Land Registration and Titling Process, the brothers, Bregado O’Neal and Eugene O’Neal submitted adjudication claims in respect to their properties. Bregado O’Neal submitted an adjudication Claim No. 42/116 on 15th May 1972 in respect of land at Sophie Bay, Tortola and submitted Deed No. 105 of 1956 in support. In that claim the approximate acreage of the land claimed by Bregado O’Neal was stated to be four acres. On 23rd May 1972 Eugene O’Neal submitted two adjudication claims: Claim No. 45/1190 for land at Sophie Bay, Tortola which became Parcel 4 (Deed No. 376 of 1970 was subsequently submitted in support of the claim) and Claim No. 45/1191 for what became Parcel 10 and Deed No. 105 of 1956, supporting the claim for both what became the greater Parcel 4 and for what became Parcel 10.

- [5] On 23rd June 1972, demarcation of the land claimed by Bregado O'Neal in Claim No. 42/1116 was completed. In respect of that claim the Certificate of Completion of Demarcation was dated 26th June 1972 and was signed by the Demarcation Officer and Eugene O'Neal as representative of Bregado O'Neal. In respect of that claim, the Adjudication Record dated 26th June 1972 showed that notwithstanding the fact that he had described the estimated acreage of the land claimed by him to be four acres Parcel 5 Block 3136B of the 2.9 Road Town Registration Section comprising approximately 2 acres in extent were adjudicated to Bregado O'Neal. The adjudication record was duly signed by the Adjudication Officer, and by Bregado O'Neal who confirmed by his signature that he accepted that record. A certified copy of the Adjudication Record reflects a notation on line 5 for Restrictions, which originally read 'Nil' but was crossed out and initialed and replaced with an insertion: "*Restriction on powers to deal until eastern and western boundaries are cut demarcated to the satisfaction of the Registrar of Lands.*" The words "*cut demarcated*" were also crossed out and replaced with the word "fixed" in a different color ink.
- [6] On 21st June 1972, demarcation of the land claimed by Eugene O'Neal in Claim No. 45/1190 was completed. In respect of that claim, the Adjudication Record dated 21st June 1972 showed that Parcel 4 comprising approximately 5 ½ acres in extent were adjudicated to Eugene O'Neal. The Adjudication Record was duly signed by the Recording Officer and by Eugene O'Neal who confirmed by his signature that he accepted that record.
- [7] The respective registers of Parcels 4 and 5 Block 3136B of the Road Town Registration Section therefore reflect the acreages of Parcel 4 as being 5 ½ acres and that of Parcel 5 as being 2 acres. Upon registration, a note was made in register of Parcel 4 of a "restriction on powers to deal until eastern boundary [i.e. boundary between Parcels 4 and 5] is cut and a note was made in the register of Parcel 5 of a "restriction on powers to deal with until eastern and western boundaries are fixed to the satisfaction of the Registrar of Lands."
- [8] Under section 22 of the Land Adjudication Ordinance, the adjudication record was to become final at a date 90 days after publication of the Notice of Completion or, if later, 90 days after determination of all petitions. Once the Adjudication Record became final, section 23 of the Land Adjudication Ordinance required the adjudication officer to certify the finality of the record and to

deliver the final adjudication record to the Registrar of Lands. The Ordinance required the Registrar to prepare a register for each parcel shown in the adjudication record and for any lease required to be registered, and he or she was obliged to register therein any of the particulars in the adjudication record which required registration. Section 23 of the Land Adjudication Ordinance provided that an appeal from the Adjudication Officer's decision would lie to the Court of Appeal. The time limited for such an appeal was 90 days from the date of the Adjudication Officer's certificate that the Adjudication Record had become final.

- [9] During their lifetimes neither Bregado O'Neal nor Eugene O'Neal filed an appeal against the outcome of the land adjudication process nor did they take any other action to challenge to the decision of the adjudicating officer with regard to their respective parcels. Indeed, there is no evidence of any dispute between the brothers concerning the registration of their respective Parcels.
- [10] Bregado O'Neal passed away in 1981. On 31st December 1982, title to Parcel 5 was transferred from his estate to the Claimant along with her mother and sister. On 17th August 1984, title to Parcel 5 was transferred to the Claimant as sole proprietor. On 2nd December 2008 title to Parcel 4 was transferred to Eugenia – the Second Defendant by the estate of her father Eugene O'Neal (now deceased).
- [11] Prior to her registration as proprietor of Parcel 4, the Second Defendant caused a survey to be conducted by Mr. Michael Adamson of the boundary between the parcels ("The Adamson Survey"). On 6th February 2009, a site visit was conducted on Parcels 4 and 5 by Mr. Adamson. In attendance were the Second Defendant and the Claimant's daughter, Kimberly Copaceanu. The Claimant was residing in the United States of America at the time of the site visit. Kimberly Copaceanu's denies being aware that a survey was being under taken at the time of the site visit and denies being authorised by the Claimant to attend on her behalf. In the course of that survey, Mr. Adamson drew a survey sheet, Plan No. CA-3136-60-T, showing a demarcated boundary between the Parcels and this Plan was signed by both the Claimant and the Second Defendant evidencing their agreement to the location of the boundary. The Adamson Survey was approved by

the Chief Surveyor on 10th March 2009, and showed the boundaries of Parcel 4 in the position now contended for by the Defendants and further depicted Parcel 4 as comprising 5 ½ acres.

- [12] On 4th August 2017, the Claimant lodged the Caution claiming an interest in over 2 acres of Parcel 4 on the basis of fraud and/or mistake, namely that the signature appearing on the Adamson Survey (No. CA-3136B-60-T) was not hers. The basis of the challenge centered on a particular allegation of forgery, in the words of the Claimant - *"The fraud and/or mistake consist of the fact that the said Survey Sheet Plan No. CA-3136-60-T is purportedly signed by me, Garna O'Neal, as agreeing to the boundaries as shown on the plan which signature is not mine and was not placed by me."* Accordingly, a core issue in the Caution proceedings was whether the Claimant had consented to the boundary line as determined by Surveyor Adamson. The Claimant's position on the caution was that she had an interest in Parcel 4 on the basis that the above fraud and/or mistake deprived her of over two (2) acres of land.
- [13] On 12th December 2017, the Second Defendant applied to have the Caution removed. The application to remove the Caution was heard by the Registrar of Lands in August and September 2018 and he delivered his decision on 27th November 2019 directing that the caution be removed. On 16th January 2020, the Caution placed by the Claimant on Parcel 4 was removed pursuant to the order of the Registrar of lands.
- [14] On 13th December 2019, the Claimant notified the Registrar of Lands of her intention to appeal against the Decision to remove the Caution that the Claimant had placed on Parcel 4.
- [15] By Instrument of Transfer dated on 29th January 2020 and initially registered 13th February 2020, as Instrument No. 229 of 2020 and then subsequently reregistered on 28th February 2020 as Instrument No. 323/2020, the Second Defendant transferred Parcel 4 to the intended Defendants Julia Dawson and Brian Marshall in consideration of the purchase price of \$400,000.00
- [16] The appeal from the decision of the Land Registrar removing the Caution was filed on 13th March 2020. The Claimant's appeal is centered around four core areas: (a) fraud on the first registration and adjudication process; (b) fraud on the subsequent survey process; and (c) errors of the

Registrar of Lands in presiding over the Second Defendant's application to remove the Caution; and (d) the powers of this court on an appeal against the Registrar of Lands.

COURT'S ANALYSIS AND CONCLUSION

[17] The issues which arise in this Claim are manifold but they can be classified into the following categories:

- i. Removal of the Caution
- ii. Rectification of the land register on the basis of fraud on first registration
- iii. Rectification of the land register on the basis of mistake on first registration

The Court will now consider these in turn.

DECISION TO REMOVE CAUTION

[18] This Court is satisfied that legal basis upon which a caution can be maintained on a land register is as set out in 127 of Ordinance which provides as follows:

127. (1) Any person who—
- (a) claims any unregistrable interest whatsoever, in land or a lease or a charge; or
 - (b) is entitled to a licence; or
 - (c) has presented a bankruptcy petition against the proprietor of any registered land, lease or charge; or
 - (d) being a bank, has advanced, money on a current account to the proprietor of land or a lease or a charge, may lodge a caution with the Chief Registrar forbidding the registration of dispositions of the land, lease or charge, concerned and the making of entries affecting the same.
- (2) A caution may either—
- (a) forbid the registration of dispositions and the making of entries altogether; or
 - (b) forbid the registration of dispositions and the making of entries to the extent therein expressed.
- (3) A caution shall be in the prescribed form and shall state the interest claimed by the cautioner and the Registrar may require the cautioner to support it by a statutory declaration.
- (4) The Chief Registrar may reject a caution which he considers unnecessary.

(5) Subject to the provisions of this section, the caution shall be registered in the appropriate register.

[19] It appears to be common ground between the Parties that the application in respect of the Caution is advanced on the basis of section 127 (1) (a) since there can be no doubt that the Claimant does not come within categories (b) – (d). The remit of the term “*unregistrable interest in land*” under section 127 (1) (a) of the Ordinance has been considered by a number of judicial authorities and this Court is guided by the following dictum of Octave J at paragraph 34 of **Lilian Riley v Christopher Gerald et al.**¹ where the learned judge observed:

“Section 127 refers to an unregistrable interest. This is an interest which is not capable of registration but is recognizable by law. Section 127 gives a person with such an interest the ability to protect it. What is clear is that the caveator must have the interest and it must be clear what that interest is and it must be an interest in the land. Lodging does not establish any right in the land it only gives notice that there is an interest which is not capable being registered on the Title.”

[20] This authority was later considered and applied in the Belizean judgment of **David Gaynair v Registrar of Lands**² where at paragraph [19], Young J observed;

“As explained in **Lilian Riley v Christopher Gerald, Registrar of Lands and Hon. Attorney General Claim No MN1HCV 2004/0009 (Eastern Caribbean Supreme Court)**, unregistrable interests in land are interests which the RLA does not recognize for the purpose of registration but which the law recognizes. A good example is a contract to purchase land. Its basic requirement is that the cautioner must claim to have an actual interest in the land, lease or charge itself. Interest here describes the nature, quality or extent of a person’s right in a freehold or leasehold estate. The Registrar need not enquire into the veracity of the claim or whether it could actually be proven. Her duty is only to ensure that what is claimed is actually an unregistrable interest. If this criteria is not met, a caution is not appropriate.”

[21] In her application of 4th August 2017, the basis upon which the Claimant sought to have the Caution imposed is as follows:

“I was fraudulently and or mistakenly deprived of over 2 acres of land from my Property by the allocation of the boundary marks in accordance with Survey Plan No. CA-3136B-60-T in favour of Parcel 4 Block 3136B Road Town Registration Section in the name of Eugene O’Neal and or Eugenia O’Neal. The fraud and or mistake consist of the fact that the said Survey Sheet Plan No. CA-3136B-60-Tis purportedly signed by me Grana O’Neal as agreeing to the boundaries as shown on the plan which signature is not mine and was not

¹ MNIHCV2004/0009

² CIVIL APPEAL No. 1 of 2017

placed there by me. I therefore claim an interest in the said Parcel 4 Block 3136B Road Town Registration Section as a result of the fraud and or mistake which deprives me of 2 acres of land."

[22] Counsel for the Second, Third and Fourth Defendants have submitted that this reveals that the basis for the Caution is that the Claimant does not agree to the boundary demarcation as her signature on the Adamson Survey was forged. This signature evidenced an agreement between the Claimant and the Second Defendant as to the location of the boundary between Parcel 4 and Parcel 5. Counsel for the Second Defendant argued that the right to set aside the document was therefore no more than a personal right to disclaim the existence of such an agreement. Counsel further argued that in any event, the right to apply to have the correct position of a boundary determined is a statutory right under Part II of Division 3 of the Ordinance which does not equate to an interest in the contiguous parcel which shares the boundary. It is at best a means of determination of the entire interest in Parcel 5, the extent of which parcel is to be determined by the fixing of the boundaries.

[23] If the "unregistrable interest in land" advanced by the Claimant amounts to no more than an interest in the determination and fixing of the boundaries between Parcels 4 and 5, then it is clear to this Court that this Claim could not be maintained. The Court is satisfied the authority of **Gaynair** that this would not be a basis upon which the Caution would be sought to be maintained because the right to have the boundaries determined is not an unregistrable interest in land. The Court has considered and applied the following ratio from the judgment of Young J:

"...In my humble opinion a claim of an encroachment of boundary posts cannot be a claim of an interest (unregistrable or otherwise) in land. As the Registrar explained it is a boundary dispute.

Land boundaries, generally, do not move but the interpretation of the location of the boundary could be difficult. A boundary defines the legal limits of ownership of a parcel of land and a marked boundary serves only as prima facie evidence of this. A boundary does not convey or take away any existent interest. Equally, determining the precise location of a boundary gives no one an interest in land, it simply settles the position of the disputed boundary of what is already legally owned. It is for this reason that the boundaries of land registered under the RLO are only approximately situated, until any uncertainty or dispute is determined by the Registrar. Such a dispute can be determined regardless to whether the land passes to a third party and is not dependent on who the proprietor is. A boundary dispute, involving no other legal issues, needs no protection against a purchaser of the

legal estate. For this simple reason I find that the cautioner has no cautionable interest in the Property and the caution ought not to be on the register”

- [24] It follows that even if all of the challenges to the authenticity of the Claimant's signature, alleged email communications and lack of essential authority to act could be made out, if it still means that all she would be pursuing was a boundary dispute between the Parcel then this would not amount to an unregistrable interest in land and the claim to maintain the Caution would fail.
- [25] However, the Claimant contends that the position is much more complex. According to the Claimant by virtue of a fraud or mistake which took place as during the land adjudication process, Parcel 5 was wrongly registered as containing 2 rather than 4 acres. This defect continued through to first registration and was compounded during the surveying process in 2009 when the Second Defendant attempted to settle the boundaries between Parcels 4 and Parcel 5.
- [26] Counsel for the Claimant therefore contended that the Claimant has what can only be described as an equitable interest in 2 acres of Parcel 4 which she contends the Second Defendant would have held on trust for her as a result of the fraud/ mistake which took place during the adjudication process by which she would have been wrongly deprived.
- [27] The scheme of land registration which is based on the Torrens System seeks to recognise only registered interests in land, but just as it was impossible under the old system to confine all estates in land to the legal estate, so under the Torrens System it is equally impractical to confine all interests in land to registered interests.³ The system of cautions is therefore founded upon the basic principle that existing equitable rights should be protected and that some basis should be provided for the proof of alleged claims to interests.
- [28] Under the Torrens System of land registration, the term "equitable estate or interest" defines those *in personam* rights which a court of equity may enforce against a registered proprietor (or someone entitled to be such) when to do so is not prohibited by statute. Equitable interests may be either interests under unregistered but registrable instruments, or interests under unregistrable transactions which in the general law would confer an equitable title.

³ Thom, Canadian Torrens System (2nd ed) 601

[29] If therefore, it is contended that this Caution is being maintained to protect the Claimant's equitable interest in land which forms part of Parcel 4 then it is at least arguable that this may amount to an unregistrable interest in land which may be deserving of protection.

[30] The Claimant alleges that the Registrar failed to take into account critical relevant considerations when considering whether to remove the caution. The Court must therefore consider the matters which are alleged to have been ignored by the Registrar. The Claimant contends that the Registrar erred in that he failed to adequately address the allegations of fraud or irregularities surrounding the 2009 survey process. In particular, she contends that:

- i. The Registrar failed to consider the contents of the emailed communications of the surveyor, Mr. Adamson and whether they would have met the legal requirements for properly notifying the Claimant of the intended survey. According to the Claimant, she was not served with the notice and neither was anyone served on her behalf. She submitted that this position was maintained during the proceedings before the Registrar and so the Registrar made a determination which was plainly contrary to the facts as she never accepted Mr. Adamson's contentions that she had received his emailed communications.
- ii. The Claimant further submitted that there were several admissions made by Mr. Adamson which were critical⁴ and which would put the validity of his survey into question since they went to the issue of whether the alleged conversations, emails or even the signed document relied on by him were actually made with the Claimant who he admitted he did not know prior to the proceedings before the Registrar. Counsel for the Claimant further argued that even if the purported emails were genuinely received and made by the Claimant, the Registrar failed to take into account that Mr. Adamson failed to explain the potential impact of his survey on the size of Parcel 5. Mr. Adamson's emails also wrongly suggested that the Claimant could suggest any concerns arising from his survey when she demarcates the eastern boundary of Parcel 5.

⁴ Paragraph 74 of the Claimant's Trial Submissions on Appeal filed on 22nd January 2021.

- iii. The Claimant further took issue with the fact that Mr. Adamson admitted that he did not examine or consider the original survey plan by R.J.P dated 16th July 1954 as well as the earlier survey of R.J. Pollock dated 14th July 1954. In fact, he conceded that he should have done so before concluding his survey and asked for time to consider it and its impact. She also failed to consider the relevant adjudication record for Parcel 10 prior to completing his survey and as such he failed to consider the impact of Parcel 10 or provide the owner of that Parcel which notice.
- iv. Importantly, the Claimant failed to properly weigh the fact that the Second Defendant would have signed the Adamson Survey on behalf of her father, Eugene O'Neal (then registered proprietor of Parcel 4) when she would not have had the benefit of a power of attorney as well as the Claimant's categorical denial that she signed the survey plan prepared by Mr. Adamson. According to the Claimant;

“...there is no way that I would have signed any document depriving me of more than half of my property and no way would have conducted such important business from overseas.”

[31] However, all of these factors are informed by fact that what was an issue before the Registrar was a boundary determination dispute. This is clearly articulated by the following evidence of the Claimant in her third affidavit at paragraphs 5 – 6:

“Subsequent to the said survey plan being lodged [the Adamson Plan]; I tried to engage the land Registry both by way of seeking rectification and by seeking to have the exact boundary point determined. I do not recall if Eugenia was notified of my application for boundary determination, but, I know she was certainly aware of my application for rectification. True copies of the documents pertaining to rectification are at pages 2 to 5 of “GO-3”. True copies of documents pertaining to boundary determination are at pages 6 to 11 of “GO-3.”

The unsigned survey plan at page 10 is a plan that I retained licensed surveyor Dwayne Nibbs to conduct on my behalf. It shows the correct demarcation of Parcels 4 and 5, belonging to Eugenia and myself, respectively. However, before the plan could be submitted, Mr. Nibbs was made Chief Surveyor and could not or preferred not to attach his signature to said plan. So my efforts in that regard were frustrated.”

[32] Further reinforcing this conclusion is the fact that the Claimant now seeks to rely on the fact that Registrar failed to consider the remedies available under sections 15 and 17 of the Ordinance.⁵ At paragraphs 14 and 16 of her Notice of Intention to Appeal the Claimant asserted as follows:

“I employ (*sic*) the Chief Registrar to not remove any caution from any land of which I am concerned with until she has declared my boundaries.

Had the Registrar of Lands acknowledged my separate letter of July 23rd 2019 and granted my request for a Boundary Determination he might have recognized his error in doing so...”

[33] For the reasons which have already been indicated, this Court is satisfied that even if these matters could be proved on a balance of probabilities, they would not have afforded the Claimant the unregistrable interest needed to maintain a caution on the land register for Parcel 4.

[34] Simple disputes as to irregularities in a survey process which is intended to inform the delineation or marking of boundaries between parcels of land would not in this Court’s judgment provide a basis upon which an applicant could seek to invoke the Registrar’s jurisdiction under section 127(1) (a) of the Ordinance. Applying the ratio in **Gaynair** and **Riley**, whether the Adamson Survey reflected inaccurate boundaries would not convey or take away any existent interest in land. It would simply provide *prima facie* evidence of the position of the disputed boundary of what is already legally owned. The sum total of the factors highlighted by the Claimant could not have informed an application for a caution and consequently, the Registrar could not have relied on the same to refuse the Second Defendant’s application to remove the same.

[35] However, the Claimant’s claim goes further than that. In what can only operate as an original claim for relief (as this specific relief never arose in the proceedings before the Registrar) she seeks to have the Court make a finding that the Adamson Survey is invalid. However, in the Court’s judgment this claim for relief was not properly advanced and certainly not diligently pursued by the Claimant.

⁵ Under section 15, the Registrar has the power to correct the Registry Map and Register and under section 17, the Registrar may consider, determine and indicate the position of an uncertain or disputed boundary on application of a party.

[36] The fact that the Adamson Survey was authenticated and approved by the Chief Surveyor on 10th March 2009 is critical because under section 25 (2) of the Land Surveyors' Ordinance⁶ every plan authenticated by the Chief Surveyor is conclusive evidence (in any court of law or in any proceeding of a legal or quasi-legal nature) of the matters stated or depicted in unless and until such plan is cancelled by the Chief Surveyor by virtue of section 26. This legislation then provides the basis upon which the Chief Surveyor may act to cancel his authentication of the plan. At section 26, it provides that;

“26. (1) Where, in the case of a document or instrument to which an authenticated plan is attached, or in which reference to such plan is made—

(a) the plan is found to be inaccurate by reason of any error or omission in the survey; or

(b) the plan does not conform with the terms and conditions subject to which permission to subdivide the land to which the plan relates has been given, the Chief Surveyor may cancel the authentication of such plan and may recall any copies which may have been issued, and in every case the provision of section 24 shall apply.

(2) The Chief Surveyor shall forthwith upon the cancellation of the authentication of any plan notify in writing—

(a) the owner of the land to which such plan relates;

(b) the surveyor by whom the survey was executed; and

(c) the Registrar of Lands.

[37] These legislative provisions were largely ignored by the Claimant despite the fact that any claim to invalidate an authenticated survey plan would demand consideration of the jurisdiction of Chief Surveyor, the only authority empowered under the Land Surveyors' Ordinance to cancel authentication, recall a plan and effect such corrections as he deems necessary under section 24 of the Land Surveyor's Ordinance. Such action could never have been contemplated by the Registrar as he is without the relevant jurisdiction to act.

[38] The Court has noted that neither the Chief Surveyor nor the surveyor in question was made a party to this action. In the Court's judgment to grant the relief sought by the Claimant would be to ignore the basic principles of natural justice which demands that affected Parties be permitted to make representations and have their evidence tested under cross examination. This is especially so as

⁶ Cap 215 of the Laws of the Virgin Islands

the allegations raised concern ethical breaches of a professional surveyor. In the Court's judgment this claim for relief as advanced is not maintainable.

[39] In any event, under section 17 (1) of the Ordinance, a survey plan is not determinative of the boundaries to the lands delimited and/or partially depicted on it. That will still require the full ventilation of an application to the Registrar under section 18 of the Ordinance to fix the boundaries of the Parcels. It seems to the Court that it is that application which should have been vigorously pursued at all material times.

[40] Counsel for the Claimant has submitted that the Claimant is entitled to have a caution placed and/or maintained on Parcel 4 because her claim for an interest in Parcel 4 is related to the allegedly incorrect location of the boundary between that Parcel and Parcel 5. Expressed in such one-dimensional terms, this contention is clearly not maintainable. Counsel for the Claimant must appreciate this fact because paragraphs 84 – 91 of her written legal submissions she reinforces the submission, contending that the Claimant has an equitable interest in approximately 2 acres in Parcel 4.

[41] The Claimant's case therefore does not disclose a simple boundary dispute as the Adamson Survey accurately reflects the acreage as set out in the relevant land registers for the Parcels. This factor is critical and indeed alludes to the main issue which the Claimant was ignored by the Registrar in coming to her decision – the fact that a fraud or mistake occurred in the adjudication process which carried over into the first registration of both Parcels 4 and 5. Counsel argued that there are underlying flaws in the adjudication record which are so obvious on their face that the land registry would have been on notice of the same and would thus have been compelled to make inquiries as to the correctness of the adjudication record.

[42] Counsel submitted to the Court that the Registrar's Decision makes no mention of these matters which is demonstrative of the fact that he failed to take any of these matters into account. She assert that the Registrar ignored all of the documentary evidence submitted in support of the alleged fraud or mistake and that he failed to sufficiently discuss the evidence of at all such that the Claimant is unable to appreciate the reasoning for his Decision.

[43] The Court has had regard to the Registrar's Decision and is satisfied that this criticism is somewhat justified. Indeed, the Decision reflects the narrow view which the Registrar took of the Claimant's case before him at paragraph 10 of the Decision, he states;

"The Caution registered by Garna sought to protect over 2 acres of property (Parcel 5 Block 3136B Road Town Registration Section) which she claims was fraudulently and or mistakenly taken from her property by the allocation of the boundary marks in accordance with Survey Plan No. CA-3136B-60-T and that the plan is purportedly signed by her agreeing to the boundary as shown on the said survey plan. She contends that he signature above where her name is printed on the plan, Garna O'Neal, is not her signature."

[44] The brief *ratio* of the Decision deals solely with this narrow issue. The wider submissions which sought to impugn the adjudication and first registration process and the evidence submitted in support thereof were not properly considered by the Registrar and did not feature in his reasoning.

[45] In the normal course, this would have provided a sufficient basis to set aside the Registrar's decision and thus dispose of the Appeal. However, in this case, the Claimant has chosen to pursue a substantive claim for relief which would not ordinarily fall within the remit of an appeal. This claim for relief nevertheless calls for an examination of the very same issues which were not considered by the Registrar in arriving at his Decision. At paragraphs (v) and (vi) of the prayer, the Claimant seeks;

"A finding that the first registration of Parcel 4 Block 3136B, Road Town Registration Section was obtained by fraud or mistake;

An Order that the Land Register for Parcel 4 Block 3136B Road Town Registration Section be rectified in accordance with sections 140 – 141 of the Registered Land Act Cap 229;"

[46] The court must therefore go on to consider whether, if the Registrar had only considered these matters, his decision would have been different. In so doing, the Court must first consider the basis on which the claim is for rectification is being advanced and in that regard it is clear that the highest at which the Claimant's case would be pegged is set out in her evidence at paragraphs 3 – 9 and 11 – 13 and section 19 of her first affidavit in support and paragraphs 48 – 61 of the written submissions.

- [47] The Court is satisfied that this case was not strengthened by the oral submissions made during the course of this trial. Indeed, having considered the legal evidence and the submission of the Parties, the Court is satisfied that this aspect of the Claim also cannot be maintained.

RECTIFICATION OF THE LAND REGISTER – section 140 of the Ordinance

- [48] It is settled law that once a register in respect of a discreet parcel of land is established by the Registrar, a court may only intervene to alter or amend such registration in strictly limited circumstances. Section 140 of the Ordinance reads as follows:

“(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 and acquired the land, lease or hypothec for consideration, unless such 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 or her act, neglect or default.”

- [49] It is therefore plain that in accordance with the specific provisions of section 140, the High Court could lawfully interfere with the first registration of Parcel 4 in the absence of an appeal under the Land Adjudication Ordinance, but only on proof of mistake or fraud in the registration process.

Allegation of Fraud

- [50] In the case at bar, the Claimant raises allegations of both fraud and mistake. Turning first to the question of fraud, it is clear that courts have long held that in order to prove that a fraud was committed, it is incumbent on a claimant to specifically lead credible and reliable evidence of the exact nature of the fraud and how it was perpetrated. In order to set aside a decree allegedly obtained by fraud, it is not sufficient merely to allege fraud without giving the particulars. The learned authors of **Halsbury's Laws of England** state the position in the following terms;⁷

⁷ Halsbury's Laws of England 4th Ed. Vol. 26 paragraph 560

“.....In such an action it is not sufficient merely to allege fraud without giving any particulars, and the fraud must relate to matters which prima facie would be a reason for setting the judgment aside if they were established by proof, and not to matters which are merely collateral. The court requires a strong case to be established before it will set aside a judgment on this ground, and the action will be stayed or dismissed as vexatious unless the fraud alleged raises a reasonable prospect of success and was discovered since the judgment.”

- [51] Refining these principles, the Eastern Caribbean Court of Appeal in **Ecedro Thomas lawful attorney for Alice Thomas and Alphonso Thomas v Augustine Stoutt and Grethel Stoutt-Richardson**⁸ observed that;

“The mere averment of fraud in general terms, is not sufficient for any practical purpose in the prosecution of a case. It is necessary that particulars of the fraud are distinctly and carefully pleaded. There must be allegations of definite facts, or specific conduct. A definite character must be given to the charges by stating the facts on which they rest.”

From this, the appellate court extrapolated the following legal principles: (i) a court ought to disregard general and vague allegations of fraud; (ii) it is necessary to show that the alleged fraud was discovered since the judgment sought to be set aside; (iii) the alleged fraud must be shown to relate to matters which prima facie would be a reason for setting aside the judgment. After considering the allegations levied in that case, the Court concluded that the allegations of fraud were general and vague.

- [52] The standard of proof for fraud is also recounted at paragraph 50 of the appellate judgment in **Brelsford v Providence Estate Ltd.**⁹ in which the court noted;

“In **Assets Company, Limited v Mere Roihi and Others**, the Privy Council determined that fraud referred to in section 140 must be actual fraud, i.e. dishonesty of some sort, and not merely equitable fraud arising from an unconscionable act that should affect the conscience of the proprietor. Lord Lindley observed that “The mere fact that he might have found out fraud if he had been more vigilant, and had made further inquiries which he omitted to make, does not of itself prove fraud on his part”. In the absence of a finding of fraud or mistake, the conditions for rectification of the register under RLA section 140 do not arise and the court has no jurisdiction otherwise to order the rectification, i.e. either cancellation or correction, of the land registers.”

⁸ Civil Appeal 1 of 1993 (BVI)

⁹ MNIHCVAP2016/0008 MNIHCVAP2016/0009 MNIHCVAP2016/0010 MNIHCVAP2016/0011

[53] In the case at bar, the Claimant contends that the fraud in this case pre-dated first registration of Parcel 4 and in fact occurred during the adjudication process. The Claimant's case is summarized in the following paragraphs of her evidence;

"The relevant Deeds in respect of the aforementioned properties are Deed No. 105 of 1956 showing my father, Bregado O'Neal purchased approximately four (4) acres of land from William Amey on 27 September 1956; Deed No. 51 of 1956 showing that Eugene O'Neal purchased approximately three and a half (3 ½) acres of land, also from William Amey, on 4 April 1956 and Deed No. 376 of 1970, showing that Eugene O'Neal purchased approximately 1.143 acres of land from Eugene Amey on 28 April 1970. ...

On 15 May 2972, my father, Bregado O'Neal submitted a claim form to the Land Registry Department with deed No. 105 of 1956 attached to have his property approximately four (4) acres adjudicated and registered in his name. However, on 23 June 1972, when his property was actually adjudicated by his brother, Eugene O'Neal acting as his representative, my father's property was recorded as only approximately two (2) acres. The first survey done by R.J.P. on 16 July 1954 shows the area of my father's property, now my property (Parcel 5) as being 4.302 acres. ...

So in essence, by 23 June 1972, when Eugene O'Neal had completed the adjudication record for the properties for both himself and his brother, Bregado O'Neal, Eugene O'Neal properties had increased by more than two (2) acres and his brother's had decreased by approximately the same. I will not seek to explain or repeat all the discrepancies to be found in the adjudication records of Eugene O'Neal in his affidavit as I did so in my final submissions to the Land Registry Tribunal filed on 19 June 2019, at paragraphs 12 and 18 – 26....

[54] On the basis of this evidence, Counsel for the Claimant submitted that at the land adjudication hearing, Eugene O'Neal fraudulently or mistakenly represented that the Claimant's father, Bregado O'Neal owned 2 acres of land contrary to Deed No. 51 of 1956. Counsel noted that there is no evidence that Bregado O'Neal sold or disposed of any lands that he acquired at Sophie Bay, neither is there any evidence that Eugene O'Neal had the authority to represent his brother Bregado at the adjudication hearing.

[55] Despite the trenchant submissions advanced on behalf of the Claimant, what is clear is that there is no specific allegation of dishonesty or actual evidence of deceptive conduct that would impact the conscience of Eugene O'Neal. Instead, the Claimant's contention is rife with conjecture and supposition. The Claimant asks this Court to draw an inference that Eugene O'Neal was somehow responsible for the alleged erroneous records related to Parcels 4 and 5 simply on the basis that he signed the demarcation certificate. The Claimant asks this Court to infer that 2 acres were

taken from the Parcel 5 and applied to augment Parcel 4 based on representations and/or conduct which according to the Claimant must have been made by the Eugene O'Neal. The details of such representations and or conduct and indeed whether they were in fact any representations made are unknown – the particulars are not pleaded and undetailed because they are unknown. Nevertheless, the Claimant asks the Court to suppose that they were made, that they were false and that they were made with dishonest intent or motive. The Court can find no basis to do so.

[56] It is apparent that the adjudicator would have had available to him in respect of Parcel 5; a claim for land measuring 4 acres, supported by a deed of transfer which reflects a scheduled acreage of 4 acres as well as the 1954 Survey Plan. Notwithstanding this, the adjudicator would have come to the conclusion that Parcel 5 consisted of 2 acres. The Court agrees with counsel of the Second Defendant that there is no presumption of fraud at law. Rather, the presumption operates in the reverse. A court must presume an innocent explanation and then entertain cogent evidence intended to rebut this presumption.

[57] In this regard the Court is guided by the following ratio from **Portland Stone Firms Ltd and others v Barclays Bank Plc and others**¹⁰;

25. Where, as here, a Claimant wishes to amend to plead fraud and the application is opposed, it is material to bear in mind the approach that the Court routinely takes to proving fraud in civil litigation. A sufficient summary for present purposes is provided by *Fiona Trust & Holding Corp v Privalov* [2010] EWHC 3199 (Comm) at [1438]-[1439] per Andrew Smith J:

It is well established that “cogent evidence is required to justify a finding of fraud or other discreditable conduct”: per Moore-Bick LJ in *Jafari-Fini v Skillglass Ltd.*, [2007] EWCA Civ 261 at para.73. **This principle reflects the court's conventional perception that it is generally not likely that people will engage in such conduct: “where a claimant seeks to prove a case of dishonesty, its inherent improbability means that, even on the civil burden of proof, the evidence needed to prove it must be all the stronger”,** per Rix LJ in *Markel v Higgins*, [2009] EWCA 790 at para 50. The question remains one of the balance of probability, although typically, as Ungood-Thomas J put it in *In re Dellow's Will Trusts*, [1964] 1 WLR 415,455 (cited by Lord Nicholls in *In re H*, [1996] AC 563 at p.586H), “The more serious the allegation the more cogent the evidence required to overcome the unlikelihood of what is alleged and thus to prove it”...

¹⁰ *Portland Stone Firms Ltd. v Barclays Bank Plc* [2018] EWHC 2341

...Thus in the *Jafari-Fini* case at para 49, Carnwath LJ recognised an obvious qualification to the application of the principle, and said, “**Unless it is dealing with known fraudsters, the court should start from a strong presumption that the innocent explanation is more likely to be correct.**”” Emphasis mine

- [58] In the Court’s judgment, the weight of the evidence is far from sufficient to reach the threshold required to prove that the registrations in respect of Parcel 4 or indeed Parcel 5 was obtained by fraud. The evidence in respect of the Claimant was equivocal and inconclusive. The reality is that other than unsupported conjecture, the Claimant has posited no cogent proof that Eugene O’Neal fraudulently attempted to deprive Parcel 5 of 2 acres of its land mass.

Allegation of Mistake

- [59] Turning next to the allegation of mistake, the Court is guided by several important judicial precedents emanating from the Eastern Caribbean Supreme Court. The type of mistake which may warrant a rectification of the land register is such that would have arisen in the process of registering the determination made by the adjudication officer. It is not the type of error which the court perceived would have been made by the adjudicator in arriving at his determination. This general principle is best illustrated in the Privy Council judgment in **Louisien v Jacob**,¹¹

“39. The LAA and the LRA were intended to operate as two interlocking elements of the process of first registration of title. The LAA was concerned, as its name indicates, with the adjudication of claims to land ownership. If there were competing claims the adjudication officer was to decide them in a quasi-judicial capacity, weighing up the evidence and applying principles of land law. Even if there was no contest between claims, the recording officer still had to subject the claim to scrutiny (section 14 refers to “such investigation as he or she considers necessary”) before completing and signing the adjudication record for certification by the adjudication officer. Once it became final the certified record was to be passed to the Registrar (as provided in section 10 of the LRA) for first registration. If the confirmed adjudication record appeared to be in order there would be no reason for the Registrar to seek to go behind it.

40. It is clear that rectification of the register under section 98 of the LRA can sometimes be ordered in respect of a first registration. That is clear from the words “subject to the provisions of the Land Registration Act” in section 23 of the LAA, and from the references to first registration in sections 98(1) and 99(1)(b) of the LRA. But it is also clear from the authorities that rectification is not intended to be an alternative remedy for a claimant under the LAA who, having failed in a contested claim before the adjudication officer, omitted to

¹¹ [2009] UKPC 3 at paragraphs 39 - 42

use the avenues of review and appeal provided for by sections 20 and 24 of the LAA. This conclusion does not depend on *res judicata* or estoppel properly so called; it follows simply from a correct understanding of the statutory machinery (see Byron JA in *Portland v Joseph*, 25 January 1993, Civ App No. 2 1992).

41. There is a line of jurisprudence on section 98 of the LRA and similar enactments in force in other Caribbean countries, indicating that rectification of the register is available only if the mistake in question (or, no doubt, the fraud, when fraud is in question) occurred in the process of registration. See *Skelton v Skelton* (1986) 36 WIR 177, 181-182; *Portland v Joseph*; and *Webster v Fleming*. Their Lordships consider that this principle is a correct and useful statement of the law, but would add two footnotes by way of explanation or amplification.

42. A mistake in the process of registration” is a useful phrase, but it is judge-made, not statutory language, and its scope must depend on a careful evaluation of the facts of the particular case. Moreover the fact that there has been a mistake in the course of the adjudication process does not automatically exclude the possibility of the same mistake being carried forward, as it were, so that it becomes a mistake in the registration process.”

[60] At paragraphs 42 – 44 of the judgment the Board amplified;

“A mistake in the process of registration” is a useful phrase, but it is judge-made, not statutory language, and its scope must depend on a careful evaluation of the facts of the particular case. Moreover the fact that there has been a mistake in the course of the adjudication process does not automatically exclude the possibility of the same mistake being carried forward, as it were, so that it becomes a mistake in the registration process.

Several different situations can be imagined. First, an entirely correct adjudication record, confirmed by the adjudication officer, is passed to the Land Registry, where one of the staff makes a mistake in transcribing the contents of the record into the Register. In that case there is plainly a mistake in the process of registration (there has been no mistake in the process of adjudication). Rectification is available. Secondly, suppose there has been a mistake in the process of adjudication, such as a recording officer acting beyond his statutory authority by altering the record after its confirmation by the adjudication officer. In a case of that sort there is a serious mistake (probably amounting to nullity) in the process of adjudication. That mistake gets carried forward to the registration process, since the staff of the Land Registry are presented with a record which does not correctly embody the adjudication officer’s final decision. Again, rectification is available. That is *Webster v Fleming*.

In their Lordships’ opinion the same principle may extend to a case in which the adjudication record, although not a nullity, contains on its face an obvious error or inconsistency such as to put the staff of the Land Registry on enquiry as to the correctness of the record. If they were to omit to make such enquiries, and proceed on the basis of a defective adjudication record, that may amount to repeating the original mistake so that it becomes part of the process of registration. In a case of that sort, again, rectification would be available.”

[61] The practical application of these principles is also seen in the case of **Skelton v Skelton**.¹² In that case, the trial judge found for the respondent and ordered rectification of the Land Register. In doing so, she noted:

'It seems to me that by holding that the [respondent] was entitled to one-eighth share, the adjudication officer mistakenly concluded that the [respondent] was one of the children of James Skelton (senior) when in fact he was the son of Joseph Emmanuel Skelton and claimed half share through purchase from his father. It follows that the subsequent registration giving effect to this finding was done by mistake.'

[62] However, in reversing the trial judge's decision, the Court of Appeal held¹³:

"I would agree that, if the expression of the final decision of the adjudication officer was incorrectly recorded on the Land Register, section 140 could be resorted to. I cannot, however, accept that it can be applied in the original jurisdiction of the High Court to alter in a material particular his individual findings of fact, based upon his own inquiry, simply because the judge sitting in an original jurisdiction is of the opinion that his findings were erroneous. That is not the type of mistake contemplated by section 140."

[63] And so the Court of Appeal concluded that the appeal procedure provided by section 140 of the Land Adjudication Ordinance was appropriate if the final decision of the adjudication officer was incorrectly recorded in the Land Register, but it was not appropriate where a challenge is made to findings of fact reached by the adjudication officer even though these were in effect embodied in an entry in the Land Register. The correct procedure for an appeal in the latter circumstances was an appeal in accordance with the procedure under section 23 of the Land Adjudication Ordinance.

[64] The claim at bar therefore demands that the Court consider the provisions of the Land Adjudication Ordinance, which was enacted for the purpose of effecting the adjudication and registration of rights and interest in land. It effectively changed the system of land registration from one of deeds to one of registered title. The Ordinance required the preparation of an adjudication record consisting of a form relating to each parcel of land which is to form the basis of the land register prepared under the Ordinance. Once the adjudication record in respect of any adjudication section had been completed, the adjudication officer was required to sign and publish a certificate to that effect. Within 90 days of the publication of the notice of completion, any person named in or affected by the adjudication record or the demarcation map who considered such record or map to

¹² [1986] 36 W.I.R. 177

¹³ Judgment of Robotham CJ at paragraph 51

be inaccurate in any respect might give notice of his intention to petition the adjudication officer in respect of the alleged mistake and the petition would then be heard by the adjudication officer.

[65] Critical to this dispute resolution process is section 22 of the Ordinance which provided as follows:

“After the expiry of 90 days from the date of publication of the notice of completion of the adjudication record or on the determination by the adjudication officer of all petitions presented in accordance with section 20(1), whichever shall be later, the adjudication record shall, subject to the provisions of the Land Registration Act, become final and the adjudication officer shall sign a certificate to that effect and shall deliver the adjudication record and demarcation map to the Registrar together with all documents received by him or her in the process of adjudication.”

[66] The end product of this adjudication process was the compulsory creation by the Registrar of a first registration of land with absolute or provisional title on the land register. Under the provisions of the Ordinance¹⁴, whenever an adjudication record became final under section 23 of the Land Adjudication Ordinance and the Adjudication Officer delivered the adjudication record to the Registrar, the Registrar had to prepare a register for each parcel shown in the adjudication record and for any lease required to be registered, and she was obliged to register therein any of the particulars in the adjudication record which required registration.

[67] In the case at bar, the Claimant alleges that;

“On 23 May 1972, Eugene O’Neal, father of Eugenia O’Neal, submitted two claim forms (Claim 45/1190 and Claim 45/1191) and attached the above-mentioned Deeds, Deed No. 51 of 1956, showing purchase from William Amey, approximately three and a half (3 ½) acres of land, and Deed No. 376 of 1970, showing purchase from Eugene Amey approximately 1/143 acres of land. The Claim forms seem to be mismatched with the adjudication records as the adjudication record pertaining to Parcel 10 references Claim No. 45/1191 but Claim Form No. 45/1190 is attached and vice versa. Complicating matters even more is the fact that the claim form attached to the adjudication record for Parcel 4, states the estimated acreage as being 4.143 instead of the 1.143 recorded in Deed No. 276 of 1970 (see page 3 for Parcel 10 and page 4 for Parcel 4). I however know with certainty that Deed No. 51 of 1956 pertains to both Parcel 4 and 10. Therefore, deed No 3376 of 1970 have no relevance in these proceedings, except for the purpose of showing the size of the properties that were to be registered to Eugene O’Neal at the time of adjudication.”¹⁵

¹⁴ Section 9 and 10 of the Registered Land Ordinance

¹⁵ Paragraph 6 of the Claimant’s First Affidavit

- [68] At paragraphs 7 and 8 of her first affidavit, the Claimant then goes on to provide further evidence of the discrepancies. She notes that Parcel 10 which was later sold to Joyce M. Westwood is the southern part of Parcel 4. She noted that in the schedule to Deed No. 51 of 1956 that land was described as measuring approximately $\frac{1}{2}$ of an acre. However, when the land was later surveyed it actually measured $1\frac{3}{4}$ acre. The Claimant then states that in any event the total acreage for the properties pertaining to Eugene O'Neal as per his deed is 4.643. However, on 21st June 1972, the adjudication records recorded $5\frac{1}{2}$ acres and $1\frac{3}{4}$ acres for a total of $7\frac{1}{4}$ acres approximately $2\frac{1}{2}$ acres more than what is supported by the two deeds he provided. Coincidentally, the adjudication record for Bregado O'Neal on that same date awarded him 2 acres which was 2 acres short of his entitlement.
- [69] Counsel for the Claimant cited the judgment in **Joseph v Francois**¹⁶ and submitted that the mistake in the adjudication carried over into the registration process and ultimately led to a mistake in the process of registration. She further submitted that the underlying flaws in the adjudication record contain such obvious flaws on its face that the registry staff was on notice to make inquiries as to the correctness of the adjudication record.
- [70] It is clear to the Court that prior to first registration, Parcel 4 was made up of two parcels of land which were conveyed to Eugene O'Neal under separate deeds. The northern part of that Parcel would have been conveyed by the Deed No. 376 of 1970. In respect of the southern part of the parcel, it appears that that portion would have been transferred twice: conveyed to Eugene O'Neal either by virtue of the 1954 or 1956. Counsel for the Claimant was however, not able to persuade the Court as to the import of this since it is not disputed that these lands were actually conveyed to Eugene O'Neal. The scheduled descriptions reflected in the schedule to these conveyances are expressed in approximate terms but their descriptions dovetail clearly. In light of this, the Court is not satisfied that this apparent irregularity would have contributed to any purported error.
- [71] Instead, what is in contention is that the schedule to the 1956 Deed which conveyed approximately $\frac{1}{2}$ acre to Eugene O'Neal was used to underpin a claim for increased acreage in Parcel 4 notwithstanding that its description clearly set out its separate boundaries. Counsel argued that

¹⁶ SLUHCVP 2011/0025

there were mismatched documents in the adjudication claims in respect of Parcel 4 and Parcel 10 which resulted in the two additional acres being assigned to Parcel 4 to the detriment of Parcel 5.

[72] The Claimant asks the Court to draw this conclusion from evidence which is not sufficiently cogent. This Court cannot ignore that under the Land Adjudication Ordinance the process by which parcels were created and registered was overseen by critical officers. The adjudication officer was placed in charge of the adjudication process. Section 5 – 6 and 8 - 11 provides the process by which the process would be undertaken. Together these officers were responsible for seeing that the boundaries of each piece of land, which is the subject of a claim, are indicated or demarcated in accordance with the requirements of the notice given under section 10; public roads, public rights of way and other Crown land, and unclaimed land. The demarcation officer or survey officer was empowered to enter upon any land within the adjudication area for the purpose of demarcating or surveying any parcel therein and could summon any person who can give information regarding the boundaries of any such parcel to point out the boundaries. Under section 13, subject to any general or particular directions issued by the adjudication officer, the duties of the survey officer included the carrying out such survey work as would be required in the execution of the adjudication process. He was also empowered to prepare or cause to be prepared a demarcation index map of the adjudication section which was compiled from survey data or aerial photographs. This index map would show every separate parcel of land identified by a distinguishing number.

[73] The Claimant's contention must therefore be considered having regard to the statutory functions of these officers. What is critical is that the Claimant's contention does not explain the creation and first registration of Parcel 10 (originally made up of ½ acre) which is located on the opposite side of the Blackburn Road which does not apart from Parcel 4. The description of those lands set out schedule of the Deed correctly matches the actual land conveyed. Given this fact it seems implausible that the demarcation and adjudication officer could have created this Parcel and yet also used its acreage to increase the size of Parcel 4.

[74] The Claimant's contention also does not derogate from the fact that the deeds relied on by Eugene O'Neal demonstrate that he had (1) 3 acres; (2) 1.143 acres, totaling 4.143 acres. It is not lost on the Court that these deeds would have contained approximate acreages only and that they would have been the subject of review by the survey officer/demarcation officer.

- [75] It is also readily apparent that in respect of Parcel 5, the adjudication officer would have had a clear unambiguous claim for 4 acres supported by the applicable deed of conveyance which referenced a survey plan which also demonstrated the applicable acreage. Notwithstanding this, the adjudication officer ascribed 2 acres to Bregado O'Neal following the completion of the demarcation process.
- [76] The Claimant failed to address this but she nevertheless contends that this was an incorrect decision or determination. However, what is clear is that it was a material finding or determination made after reviewing the supporting documentation advanced in respect of Parcel 5 during the demarcation and adjudication process.
- [77] Applying the reasoning at paragraphs 40 – 44 of **Louisien v Jacobs**, this Court is not satisfied that such a finding would fall within that class of mistake contemplated by section 140 of the Registered Land Ordinance. In the event that it was an incorrect finding, the appropriate remedy would have been an appeal under the Land Adjudication Ordinance. Under section 23 of the Land Adjudication Ordinance an appeal from the Adjudication Officer's decision lay to the Court of Appeal. The time for appeal was 90 days from the date of the Adjudication Officer's certificate. On appeal, if satisfied that the Act, decision or omission was erroneous, the Court of Appeal could make such order or substitute such decision as it may consider just and may under section 140 of the Registered Land Ordinance order rectification of the land register.
- [78] Having reviewed the relevant statutory provisions, in the Court's judgment there is much to commend the arguments of Counsel for the Third Defendant, who argued that it is too late for Claimant to assert a claim to 2 acres of Parcel 4 on the basis which she alleges. There are a number of regional judicial authorities which support this view. In considering a provision similar to section 22 of the Virgin Islands Land Adjudication Ordinance, Byron J.A. (as he then was) at page 9 of **James Ronald Webster and another v Beryl St. Clair Fleming** observed that:¹⁷
- “The legislation intends that this adjudication process should be final except for a right to appeal to the High Court against the decisions and acts of the adjudication officer within a limited time . . . “

¹⁷ Civil Appeal No. 6 of 1993 (Anguilla) delivered on 5/5/95

- [79] It is apparent that for over 40 years, Bregado O'Neal and those who claim through him were content with the adjudication and first registration of Parcel 5 despite the clear indication on the face of the land register.
- [80] Indeed, throughout these proceedings, the way in which the claims for relief were advanced were the source of grave consternation to the Court since it is unclear how the rectification of Parcel 4 would provide any real assistance to the Claimant, who does not seek a corresponding rectification of Parcel 5. Indeed, the Claimant has done little to directly address what must surely be the central issue for her – an increase of the acreage for Parcel 5. She has instead not sought such relief. This is perhaps unsurprising as the Claimant has not advanced any cogent case to warrant rectification of Parcel 5.
- [81] It follows that on the basis of either of these limbs fraud or mistake, the Claimant's claims for rectification fails. Moreover, it is clear that even if the Registrar had properly considered these arguments he could not have properly reached any contrary or different conclusion and so to the extent that these issues underpin the appeal against removal of the caution, it is clear that this aspect of the appeal would also fail.

Culpability and Knowledge of the Defendants

- [82] Even if the Claim were maintainable, the Claimant would also need to satisfy the court that pursuant to section 140(2) of the Ordinance that the present registered land owners had knowledge of the fraud and/or mistake in consequence of which rectification is sought or caused the fraud and/or mistake or substantially contributed to it.
- [83] Counsel for the Claimant has alleged that the current registered proprietors, the Third and Fourth Defendants in this case had the requisite knowledge. The evidence in support of this contention is set out at paragraphs 9 – 12 of the Claimant's Third Affidavit she states;
- “... Mr Marshall approached me in Road Town not long after the passing of Hurricane Irma in 2017 and asked me whether or not my property at Kingston/Sophie Bay was for sale. I responded that it was not and that any property and Eugenia was purporting to sell him, half of it was mine. Additionally, the caution had been on the register since 4th August 2017.

I am also aware that the Third and Fourth Defendants are close friends with the Second Defendant and it is my plain view to see that they would have been kept abreast of the progression of the proceedings at the Land Registry and would have known exactly when to conclude the sale/purchase agreement.

It is my belief that the fact that they knew that the Second Defendant's title at least, her title for a portion of the property was being challenged, means that they are not protected by the notice principle and were under a duty to make inquiries and to ensure that the matter was indeed concluded before purchasing the property.

Additionally, the Registrar of Lands after ordering that the caution be removed saw it prudent on 17 February 2020 to enter a restriction on the register pertaining to the aforesaid property but later gave in the prodding of counsel for the Second Defendant and removed said restriction without explanation..."

[84] Counsel for the Claimant therefore submitted that the Third and Fourth Defendants are not *bona fide purchasers for value without notice* and as such there would be no bar to the rectification of the land register.

[85] This evidence is disputed by the Third and Fourth Defendants. The Court notes that all Parties decline cross-examination and so their evidence was not taxed. However, even if this Court were to take the Claimant's evidence at face value, it is clear to the Court that this would not render the Claimant very much assistance.

[86] It is well known that the essential purpose of the scheme created by the Ordinance is to provide a system of state-guaranteed registered title.¹⁸ The learned authors of **Cheshire and Burn's Modern Law of Real Property**¹⁹ confirm that;

"The fundamental principle of the system of registration of title is that the register is conclusive as to the legal title of the registered proprietor to the estate that is registered in his name."

The register therefore provides the only accurate and complete reflection of property rights in relation to a piece of land. Title guarantee is however qualified because the land register may be rectified in certain circumstances. Part X of the Ordinance however imposes a high test to rectify the register, which is applicable where the correction of a mistake prejudicially affects the

¹⁸ Per Rimer LJ in *Chief Land Registrar v Franks* [2011] EWCA Civ. 772, [2012] 1 WLR 2428 at [25],

¹⁹ 18th edition OUP, 2011 at p.1079

registered proprietor's title. It then raises the bar still higher if that proprietor is in possession of the land or is in receipt of the rents or profits and acquired the land for valuable consideration. In those cases, that proprietor must have either had *knowledge of the fraud or mistake in consequence of which rectification is sought* or he or she must have caused or substantially contributed to the fraud or mistake by his own act of lack of proper care.²⁰

[87] In the Court's judgment, the evidence advanced by the Claimant does not by any means meet this threshold. As the claim for rectification is made after the Second Defendant had conveyed Parcel 4 to the current proprietors, she must prove on a balance of probabilities that they knew of the alleged fraud leading to the first registration or caused or contributed to the fraud or mistake in 1972. The evidence advanced shows no nexus between the Third and Fourth Defendants and such registration or the events surrounding it. At best, the evidence discloses that in 2017, the Fourth Defendant would have had some knowledge of the fact that the Claimant had levied a disputed claim in respect of Parcel 4.

[88] The reality is that prior to March 2020 (following the transfer to of Parcel 4 to the Third and Fourth Defendants), the only allegation of fraud which was alleged centered on the Adamson's Survey. It is further clear to the Court that at the time when the Third and Fourth Defendants purchased Parcel 4, there was no caution or restriction maintained on the register nor any Note relative to any pending action or appeal. At the point of sale the Third and Fourth Defendants were therefore entitled to assume that there were no pending disputes and that there were issues regarding the title to Parcel 4.

[89] It also bears mentioning that in regard to the Second Defendant, the Claimant's evidence is even more nebulous. At paragraph 12 of her First Affidavit she asserts:

"I am of the view that it may be the case that Eugenia may not have known about the acreage of Parcel 4 belonging to my father being wrongly recorded in the adjudication record by her father in 1972."

...she would have no doubt discovered this later and certainly, I believe prior to hiring Surveyor Michael Adamson to conduct a survey of Parcel 4."

²⁰ Section 140 (2) of the Registered Land Ordinance

[90] In the Court's judgment, this evidence amounts to no more than mere speculation as the Claimant does not establish why the Second Defendant would possibly concern herself with the state of the Parcels which did not belong to her and in respect of which there would have been no dispute.

[91] Moreover, even if culpability or knowledge could be proved, there is no cogent evidence to show that the Second Defendant actually communicated any such knowledge of the alleged fraud or mistake in the first registration to the current proprietors. This Court is guided by the following dictum in **Assets Co. Ltd et al v Mere Roihi**²¹:

"Further, it appears to their Lordships that the fraud which must be proved in order to invalidate the title of a registered purchaser for value, whether he buys from a prior registered owner or from a person claiming under a title certified under the Native Land Acts, must be brought home to the person whose registered title is impeached or to his agents. Fraud by persons from whom he claims does not affect him unless knowledge of it is brought home to him or his agents. The mere fact that he might have found out fraud if he had been more vigilant, and had made further inquiries which he omitted to make, does not of itself prove fraud on his part. But if it be shewn that his suspicions were aroused, and that he abstained from making inquiries for fear of learning the truth, the case is very different, and fraud may be properly ascribed to him. A person who presents for registration a document which is forged or has been fraudulently or improperly obtained is not guilty of fraud if he honestly believes it to be a genuine document which can be properly acted upon."

[92] Even if the Court found that fraud or mistake had been made out in this case (which is not the case) the Claimant's evidence simply does not meet the standard of proof required under section 140 (2) of the Ordinance.

COSTS

[93] The Court has also considered the supplemental legal submissions advanced by the Parties on the issue of costs. It seems to the Court that the starting point has to be section 147 (5) of the Ordinance which provides that the costs of an appeal shall be in the discretion of the Court. In the Court's judgment this provision gives the Court not only the discretion to determine costs liability but also the basis of quantification.

²¹ [1908] AC 176 at 210

- [94] In exercising this power, the Court is guided by the same principles that apply when determining costs in the civil jurisdiction. This includes the usual rule that costs follow the event. The First Defendant took no part in these proceedings and so there will be no costs awarded in his favour. The Court is otherwise satisfied that costs should follow the event. In this case, the Court is satisfied that Second, Third and Fourth Defendants are entitled to their costs.
- [95] As to the basis upon which such costs are to be quantified, neither the Ordinance nor the CPR specifically mandates a basis of quantification for the costs on an appeal. However, the Court has noted that under in the CPR Rule 65.2, where the court has any discretion as to the amount of costs to be allowed to a party, the sum to be allowed is the amount that the court deems to be reasonable were the work to be carried out by an attorney-at-law of reasonable competence and which appears to the court to be fair both to the person paying and the person receiving such costs. In deciding what would be reasonable the court must take into account all the circumstances, including— (a) any orders that have already been made; (b) the conduct of the parties before as well as during the proceedings; (c) the importance of the matter to the parties; (d) the time reasonably spent on the case; (e) the degree of responsibility accepted by the attorney-at-law; (f) the care, speed and economy with which the case was prepared; and (g) the novelty, weight and complexity of the case.
- [96] Further complicating the issue is that fact that this Claim was atypical in that it merged an appeal under CPR Part 60 with that of a substantive original claim for rectification.²² Both parts of the Claim were argued in tandem and it is clear to the Court that the costs on an original claim for rectification would have been quantified on a prescribed basis.
- [97] The Court has considered the Parties' submissions in which they detail the factors which should be taken into account by the Court in determining the basis of quantification. The Court has also taken into account the broad discretion given to a court under section 147 (5) in respect of the costs on an appeal. The Court has also considered the provisions of the CPR including Part 65.1; Part 65.3 and Part 65.5 and Part 65.12 as well as the several judicial authorities advanced including that of

²² In the case of claim for rectification, it is clear costs are to be assessed on a prescribed basis see CPR part 65.1 65.3 and 65.5

Lucien Callwood et al v Registrar of Lands et al²³ in which the Court of Appeal held that the costs of an appeal are to be assessed in accordance with Part 65.12 and the later case of **Richardson et al v Richardson et al**²⁴ in which that same court found that such costs should be assessed on a prescribed basis.

[98] **Richardson et al v Richardson** concerned an appeal against the decision of the learned Acting Justice Combie-Martyr, dismissing an appeal by the appellants/counter respondents, Collins Richardson's family, against decisions of the Registrar of Lands dismissing the appellants/counter respondents' applications to be registered as proprietors by prescription. At paragraph 53 - 54 Blenman JA observed:

"[53] It is of note that in the court below the learned judge had ordered costs to be assessed instead of the correct order for prescribed costs in accordance with CPR65.5.

[54] The 7th respondent has prevailed against the appellants/ counter respondents on the appeal and is entitled to its costs on the appeal of two-thirds of the prescribed costs awarded in the court below.

[99] The Court acknowledges that there are apparent conflicting appellate decisions but will nevertheless apply the decision in **Richardson et al v Richardson et al** in which the Eastern Caribbean Court of Appeal took time to specifically consider the quantification of costs of an appeal to the Anguilla High Court. It is indeed helpful that section 147 (5) of the Anguilla Registered Land Act ²⁵ sets out the identical provision as obtains in the Virgin Islands Ordinance which provides that the costs of the appeal shall be in the discretion of the court.

[100] Having regard to all these factors and all of the circumstances of this case the Court is satisfied that the Defendants' costs in this Claim should be quantified on a prescribed basis. The Court is satisfied that such costs would in any event be reasonable and proportionate in all the circumstances.

²³ BVIHCVAP 2012/008

²⁴ AXAHCVAP2016/002

²⁵ Chapter R 30 of the Laws of Anguilla as amended

[101] The Court therefore finds that this Claim should be dismissed on the basis of the reasons set out herein. The Court's order is therefore as follows:

- i. **The Claimant's Claim is dismissed.**
- ii. **The Claimant will pay the Second, Third and Fourth Defendant's costs to be assessed on a prescribed basis.**

**Vicki Ann Ellis
High Court Judge**

By the Court

Registrar