

**EASTERN CARIBBEAN SUPREME COURT
SAINT LUCIA**

**IN THE HIGH COURT OF JUSTICE
(CIVIL)**

SLUHCV2018/0099

BETWEEN:

**MARIE DELAIRE
DOMINIC FASSAL**

Claimants

and

**(1) STEPHEN DELAIRE
(2) BRYAN DELAIRE
(3) LORRAINE DELAIRE
(by their duly constituted attorney LARIE DELAIRE)
(4) JENNIFER DELAIRE
(5) ANTHONY DELAIRE
(6) GEORGE DELAIRE
(7) 1ST NATIONAL BANK ST. LUCIA LIMITED**

Defendants

Before: The Hon. Mde. Justice Kimberly Cenac-Phulgence High Court Judge

Appearances:

Mr. Horace Fraser, Counsel for the Claimants
Mr. Gerard Williams, Counsel for the 1st to 6th Defendants
Ms. Danielia Chambers, Counsel for the 7th Defendant

Present:

Ms. Marie Delaire, 1st Claimant
Mr. Larie Delaire, duly appointed attorney for the 1st to 3rd Defendants
Ms. Sylvia Alcee, representative of the 7th Defendant

2021: January 27;
February 5, 8; (Written submissions)
May 10.

JUDGMENT

- [1] **CENAC-PHULGENGE J:** The claimants filed an amended fixed date claim on 12th June 2018. The affidavit in support was sworn by the first claimant, Ms. Marie Delaire, (“Marie”) in which she states that she is authorised by the second claimant, Mr. Dominic Fassal (“Mr. Fassal”) to also swear to the affidavit on his behalf. I have referred to some of the parties by their first names since they carry the same surname and mean no disrespect thereby.
- [2] The first claimant, Marie, together with the sixth defendant, Mr. George Delaire (“George”) being the named executors, in the last will and testament of Edmund Delaire (“the deceased”) were granted probate of the deceased’s will on 11th July 2011,¹ and recorded on the land register for Block and Parcel 1646B 1 (“the Property”) as proprietors by transmission in 2011.² Marie and George are the paternal aunt and uncle respectively of the first to fifth defendants. George is named as a defendant as he allegedly suffered a defect in his memory and denied giving instructions to file this claim.
- [3] The estate of Edmund Delaire comprised three parcels of land, one of them being the Property which is the subject of the dispute in this matter. Mr. Fassal is the ‘purchaser’ of the Property.
- [4] The first to fifth defendants are the beneficiaries under the will of Edmund Delaire and are currently named as proprietors on the land register for the Property. The first to third defendants are represented by their duly appointed attorney Larie Dulaire and have filed a defence to the claim. The fifth and sixth defendants although represented by counsel took no part in the proceedings. The seventh defendant, 1st National Bank St. Lucia Limited (“1st National Bank”) is the holder of a hypothec in its favour taken out by Mr. Fassal with the Property as its security.

¹ Page 35 of Bundle 3.

² See Land Register at page 6 of Bundle 3.

The Claim

- [5] Marie alleges that in order to deal with outstanding debts of the deceased's estate she and George decide to sell the Property and on 9th April 2013 entered an Agreement for Sale ("the Agreement") with Mr. Fassal of the Property for the sum of \$270,000.00.³
- [6] Marie alleges that it was an express term of the Agreement that on its execution Mr. Fassal would go into immediate possession of the Property and he is currently in occupation and in receipt of the rent for same.
- [7] Mr. Fassal obtained a loan facility from 1st National Bank to complete purchase of the Property. In July 2013, not being satisfied with the pace at which their former legal practitioner, Mr. Oswald Larcher was handling the matter, the executors instructed Fraser & Co. to apply for an extension of time to administer the succession of the deceased's estate and to prepare a vesting deed.
- [8] In October 2013, Marie alleges that she discovered that a vesting deed was duly registered by Mr. Larcher in the Land Registry on 6th August 2013 ("the Vesting Deed").⁴ In the statement of claim, Marie states that she and George signed the Vesting Deed sometime in February 2013 after giving instructions to Mr. Larcher to prepare same and before executing the Agreement with Mr. Fassal. They, however, did not pay Mr. Larcher to complete matters relating to the Vesting Deed and it remained unregistered pending the payment of his fees. Marie alleges that they never paid Mr. Larcher and gave no instructions as regards registration of the Vesting Deed.
- [9] On 26th June 2013, the first to fifth defendants filed an application to stop the sale of the Property to Mr. Fassal. On 25th July 2013, when the matter came on for hearing, it was removed from the Court's list after Marie and George agreed to stop the sale of the Property

³ The agreement at page 5 of Bundle 3 stated the purchase price as 'THREE HUNDRED THOUSAND DOLLARS (\$300,000.00)'.

⁴ Instrument Number 3684/2013 registered on 3rd September 2013. The date of registration was actually 3rd September 2013. It was received for registration at the Land Registry on 6th August 2013.

upon the promise by the first to third defendants that they would personally pay all the debts of the estate and compensate Mr. Fassal for the cancellation of the sale.

- [10] It is the claimants' contention that the Vesting Deed was never intended to be registered to affect the Property which was sold to Mr. Fassal. They allege that the vesting of the Property in the names of the first to fifth defendants was a mistake or was a result of their fraudulent act to deprive the rightful owner of the land. The allegation is that the first to fifth defendants by an act of deception and without the executors' authority paid and instructed Mr. Larcher to register the Vesting Deed knowing that there were estate debts to be paid, there was an agreement for sale of the Property and that their actions would have the effect of denying Mr. Fassal his right to the Property and exposing the estate to potential litigation.
- [11] Fraser & Company had given an undertaking to 1st National Bank to register the hypothec secured against the Property but was unable to do so as the Property had been vested in the first to fifth defendants. Based on all that had transpired, the executors filed an application to correct the Vesting Deed on 24th October 2013. The result was an order dated 11th November 2013 which granted an interim declaration that Mr. Fassal was the owner of the Property with absolute title subject to the declaration becoming permanent on the expiration of 28 days of the date of the Order should the Registrar of Lands not oppose the declaration.
- [12] On 21st September 2016, the Court of Appeal set aside the Order dated 11th November 2013 and the first to fifth named defendants were restored as the proprietors of the Property and Mr. Fassal's name was removed.
- [13] The claimants therefore claim the following relief:
- (1) A declaration that the inclusion of the Property in the Vesting Deed was done by mistake or fraud;
 - (2) A declaration that the first to fifth defendants hold title to the Property as constructive trustee for Mr. Fassal;

- (3) A declaration that the first to fifth defendants acquired title to the Property by a fraudulent and unlawful act;
- (4) A declaration that the first to fifth defendants intermeddled with the estate of Edmund Delaire;
- (5) A declaration that Mr. Fassal is a purchaser for value in relation to the Property without notice of any purported interest of the first to fifth defendants;
- (6) An order improbatum of the Vesting Deed excluding therefrom Block and Parcel 1646B 1;
- (7) An order directing the Registrar of Lands to correct the land register in relation to the Property by inserting Mr. Fassal's name as the absolute owner;
- (8) Costs.

Replies to the Claim

1st National Bank

- [14] 1st National Bank, in its reply to the claim, seeks an order of the Court declaring the Hypothec registered in its favour to be a valid and subsisting charge over the Property and alleges as follows:
- (a) On 9th April 2013, Mr. Fassal applied for a loan in the sum of \$270,000.00 to purchase the Property and presented an agreement for sale between himself and the executors where the stated purchase price was \$300,000.00.
 - (b) Mr. Fassal signed an application for the loan on 9th April 2013 which was approved on 22nd April 2013 and a Facility Letter dated 23rd April 2013 was prepared informing Mr. Fassal that the loan was approved. That was signed by Mr. Fassal on 25th April 2013;
 - (c) The Facility Letter stated that 1st National Bank would require a first mortgage on the Property;
 - (d) By letter dated 23rd April 2013, 1st National Bank issued instructions to Fraser & Co. to prepare the mortgage in its favour and to send it to its lawyers on completion, confirming that all the relevant searches at both the Registry of Lands and the Registry of Deeds and Mortgages had been done and all rates and taxes paid;
 - (e) Mr. Fassal signed a hypothecary obligation ("Hypothec") on 30th July 2013 in favour of 1st National Bank with the Property as security for the loan;

- (f) By letter dated 31st July 2013, Fraser & Co. wrote to 1st National Bank requesting that the loan funds be disbursed to them on the undertaking that they would register the Hypothec in 1st National Bank's favour. That letter 1st National Bank avers implied that all the necessary searches had been conducted in order to register the Hypothec as a first mortgage against the Property and in fact the land register dated 26th June 2013 showed the executors as the proprietors of the Property;
- (g) By letter dated 7th November 2013, Fraser & Co. wrote to 1st National Bank advising that the Vesting Deed had been registered on behalf of the beneficiaries which due to a mistake by previous counsel had resulted in the Property being transferred by the said Vesting Deed and that this had prevented the registration of the Hypothec in accordance with the undertaking which they had given. The letter also advised of proceedings which had been commenced to set aside the Vesting Deed;
- (h) By letter dated 29th November 2013, Fraser & Co. wrote to 1st National Bank advising that an interim order had been granted on 11th November 2013 declaring Mr. Fassal as the absolute owner of the Property and that the declaration would become permanent if not opposed by the Registrar of Lands within 28 days of the Order and that once there was no opposition the Hypothec would become registrable;
- (i) There being no opposition to the Order of 11th November 2013, it became final and the Hypothec was executed by 1st National on 18th December 2013. Subsequent to the registration of the Order of 11th November 2013 at the Land Registry on 8th January 2014, the Hypothec was registered at the Land Registry on 17th January 2014. Mr. Fassal therefore had title to the Property at the time of registration of the Hypothec and 1st National had no knowledge of any adverse claim to his registered proprietorship;
- (j) 1st National Bank's attorneys informed that the first to fifth defendants, the beneficiaries, had opposed the order dated 11th November 2013 which was set aside on appeal consequent on their not being served and/or heard when it was made;
- (k) 1st National Bank relied on the Order which confirmed Mr. Fassal's title to the Property, in good faith when it executed the Hypothec.

First to third Defendants represented by their attorney, Mr. Larie Dulaire

[15] In their reply, the 1st to 3rd defendants allege as follows:

While the estate was indebted to third parties, steps were being taken to relieve the estate of having to deal with them. By letter dated 4th July 2013, Mr. Larcher acting then for the executors confirmed the extent of the debts as at the date of the letter. The Vesting Deed was not previously registered due the estate's indebtedness to third parties and it was upon settlement of the debts that it was registered. Mr. Larcher's fees of \$30,000.00⁵ for the Vesting Deed were settled as part of ongoing efforts of the first to third defendants to settle the estate's debts as he had insisted that the fees be paid before he would move forward with the vesting.

[16] The sale of the Property was not stopped by the executors upon any condition that the defendants were going to pay the executors any sum as compensation. The matter was removed from the Court's list upon the Court being satisfied that there was no further need for the proceedings to continue in the face of the efforts made by the defendants to settle the outstanding debts.

[17] The defendants allege that there was never any agreement or communication between them and the executors to pay the estate's debts or on issues relating to the debts as the parties were not even on speaking terms. They had disputed some of the estate expenses and requested evidential proof to justify them, but the executors failed or refused to reply to their requests for such evidence.

[18] The defendants deny that the registration of the Vesting Deed was by fraud or mistake. They did not know of the identity or existence of Mr. Fassal until the court order dated 11th November 2013 came to their attention in about January 2014 after a search was conducted at the Land Registry. They also deny knowledge of the existence of an agreement for sale in favour of Mr. Fassal and aver that there is no evidence that they had such knowledge.

⁵ A copy of the cheque to Mr. Larcher was exhibited.

[19] The defendants aver that the letters of 7th and 29th November 2013 clearly implicates Mr. Fassal as Fraser & Co. was acting on his instructions to acquire the Property which had been used as security for the hypothec in favour of 1st National Bank. The defendants aver that these letters strongly suggest that Mr. Fassal knew and contributed to the events leading to the registration of the Property in his name.

[20] The defendants contend that in the face of the apparent mistake, it would have been reasonable for the executors to approach the defendants with a view to rectifying the said mistake but instead they sought to institute questionable proceedings without the knowledge of the defendants and any of their other siblings.

Issues for Determination

Issues as set out in the pre-trial memorandum of the parties:

[21] The claimants:

- (a) Whether the sale of the Property was fraudulent?
- (b) Whether the first to fifth defendants are entitled to the Property in accordance with the last will and testament of the late Edmund Delaire in the face of the sale to the second named Claimant and the hypothecary obligation registered against the Property?

In the written submissions filed after trial, the issues cited as 'the real issues for determination' were stated as (i) whether in the factual circumstances of the case the Vesting Deed can be improbated; and (ii) whether the land register in relation to the Property can be corrected on the ground of mistake.

First to third Defendants:

- (a) Whether the Vesting Deed should be rectified on the grounds of mistake or fraud?

Seventh Defendant

- (a) Whether the Vesting Deed ought to be improbated to exclude the vesting of the Property to the first to fifth defendants on the basis of fraud and/or mistake?

(b) Whether a declaration ought to be made that Mr. Fassal is the absolute owner of the Property?

[22] Having looked at the pleadings, I am of the view that the issues for determination are as follows:

- (a) Whether the Vesting Deed ought to be impugned to exclude the vesting of the Property to the first to fifth defendants?
- (b) Whether the inclusion of the Property in the Vesting Deed was done by mistake or fraud?
- (c) Whether the first to fifth defendants acquired the Property by a fraudulent act?
- (d) Whether the land register in relation to the Property ought to be corrected to insert Mr. Fassal's name?
- (e) Whether Mr. Fassal is a purchaser for value without notice of any interest of the first to fifth defendants?
- (f) Whether the Hypothec registered in favour of 1st National Bank should be cancelled?

Discussion

Preliminary Observations

[23] Mr. Fraser in his submissions mentions evidence which was unchallenged and proven. I will address two of his submissions. At paragraph 1.2(v), he says the first-fifth defendants were aware of the sale of the property by the executors to the second named claimant because on 26th June 2013 they filed an application before the court to stop the sale. However, the application filed on 26th June 2013 was exhibited and it was an application to stop the sale of not just the Property but all properties falling in the deceased's estate. There is no mention in the application of a proposed sale to Mr. Fassal so I do not know that this application proves that there was knowledge of the sale to Mr. Fassal by the first to fifth defendants.

[24] At paragraph 1.2(vii), of the submissions, Mr. Fraser says that shortly after the agreement the second named claimant went into occupation of the land. In her witness summary at paragraph 7 Marie says that it was an express term of the agreement that on execution of the agreement Mr. Fassal would go into immediate possession of the land. Having looked

at the Agreement for Sale, there is no express term on its face which supports Marie's evidence. The documents referred to were part of Marie's evidence.

Evidence

[25] There was no evidence before the Court from the first to third defendants they having failed to file witness statements or obtain an extension of time to so do. The fourth to sixth defendants did not respond to the claim and had no evidence before the Court. The only evidence for the claimants was given by Marie. A witness summary had been filed on behalf of Mr. Fassal but he did not attend the trial and therefore this witness summary was struck out. The evidence for 1st National Bank was given by Ms. Solange Jn. Charles who was the lending officer who dealt with Mr. Fassal's application for the loan to purchase the Property and was in similar terms to the reply which had been filed in response to the claim. Accordingly, I will not restate same as it has no significant impact on the claim as filed.

[26] Marie's witness statement is a carbon copy of the affidavit in support of the claim and therefore I will not repeat save to say that her evidence is substantially contained in paragraphs 5 to 12 above.

Issues:

(a) Whether the Vesting Deed ought to be improbated to exclude the vesting of the Property to the first to fifth defendants?

[27] In his closing submissions, Mr. Fraser addresses this issue very cursorily. He simply submits that the Vesting Deed ought to be improbated in accordance with article 1142 of the Civil Code which states states that 'an authentic writing may be impugned and set aside as false in whole or in part, upon improbation...' This submission was made with no reference to any case law.

Analysis

[28] It is settled law that in Saint Lucia a notarial document cannot be improbated unless the executing notary is joined as a party to the claim.⁶ In this case, this was not done and

⁶ Marguerite Desir et al v Sabina James Alcide, [2015] UKPC 24.

therefore the order improbating the Vesting Deed sought at paragraph (6) of the claim form is refused.

- [29] In addition to the failure to make the executing notary a party, there is no basis shown on the claim for the improbation of the Vesting Deed. In the case of **George Poleon represented by Pauline Poleon v Joseph Joshua Poleon et al**,⁷ the Court speaking to the necessity of joining the executing notary in a claim for improbation, said,

“...This would be consistent with the notion that the improbation procedure is designed and directed at the notarial act of the notary and is not an open-ended procedure designed to generally correct all manner of wrongs that might affect a notarial instrument.”

- [30] In this case, there was no allegation of a mistake or failure on the part of the notary to record the true intentions of the parties to the Vesting Deed. Improbation is therefore not appropriate in the circumstances of this case as pleaded.

(b) Whether the inclusion of the Property in the Vesting Deed was done by mistake or fraud?

- [31] Marie’s cross-examination was very revealing and, in many instances, contradicted her evidence in chief. When asked whether she understood what the Vesting Deed was, she asked that it be explained to her. That having been done, she then denied signing that document despite having said at paragraph 12 of her witness summary that she and George had signed the Vesting Deed in February 2013. She was adamant that she never signed the Vesting Deed with Mr. Larcher. Marie was directed to paragraph 14 of her witness summary where she said, ‘the Vesting Deed duly registered by Mr. Larcher was never intended by them to be registered to affect Block 1646B 1 which they sold to the second claimant’ and once again she very forcefully said that she never signed any document with Mr. Larcher.

- [32] Another contradiction is the fact that although Marie said in her evidence in chief that the Vesting Deed was signed in February 2013, the Vesting Deed which was registered states

⁷ SLUHCV2013/0422 delivered 11th May 2018, unreported at para. 40.

at the 'Whereof Record' clause that it was signed by the executors on the 12th December 2011. Marie denied knowing that Mr. Larcher had proceeded to register the Vesting Deed despite saying at paragraph 15 of her witness summary that she found out about the registered Vesting Deed on 18th October 2013.

[33] Marie denied that her claim was seeking to correct the Vesting Deed and indicated that she came to Court because of the land that she sold. Obviously, she did quite appreciate the nature of the claim which had been filed. Asked whether she ever went to Mr. Larcher to advise him that the Property was being sold, she said she never mentioned that to him. She then said that she told Mr. Larcher that she needed to sell a piece of land and when she got a buyer, she told him but there was a misunderstanding between them, and she took her file and went to her current attorney; another glaring inconsistency.

[34] Marie did not seem to know that the Property was in the name of the beneficiaries and that this was the mistake that her claim was seeking to correct. She said she never said that and never made any mistake.

[35] She was asked again whether it was not her case that Mr. Larcher registered the Vesting Deed with the Property included and that she had made a mistake by not telling him to leave out that Property and again insisted that she never got to that point with Mr. Larcher. She insisted that she did not make a mistake.

Analysis

[36] Based on Marie's evidence it is impossible to conclude that there was any mistake made in the Vesting Deed as she has effectively resiled from her pleaded case. It is also clear on the evidence that when the instructions were given to Mr. Larcher and the document was signed in December 2011 as seen on the Vesting Deed exhibited by Marie herself, the Property was not included in that document by mistake since at that time there was no agreement for sale. The Agreement was only executed in 2013. Marie's evidence was inconsistent as to whether she had apprised Mr. Larcher of the fact that she and George had planned to sell the Property and therefore there is no evidence that other instructions

had been issued as regards the inclusion of the Property in the Vesting Deed. There is also no evidence to support any allegation of fraud given Marie's evidence in cross-examination which was totally contrary to her evidence in chief.

- [37] Therefore, the declaration that the inclusion of the Property in the Vesting Deed was done by mistake or by an act of fraud sought at paragraph (1) of the reliefs sought is refused.

(c) Whether the first to fifth defendants acquired the Property by a fraudulent act?

- [38] At paragraph 2.1(ii), Mr. Fraser submits that Marie was a poor witness. She was inconsistent and contradicted her evidence in chief in cross-examination. He concedes that her inconsistent evidence affects the issue of fraud and that this can be disregarded as a ground for the correction of the land register as she resiled from the pleaded case and from her own witness summary admitted into evidence. He accepts that the Vesting Deed is a genuine document and the reason for its registration by the first to fifth defendants suggests a genuine belief on their part of securing what was due to them as opposed to a scheme of a fraudulent design. He also submits that the first to fifth defendants meddling with the estate is not in itself a fraudulent act. This is a complete shift from the pleaded case. In any event though, what is required to prove fraud for the purposes of section 98 of the Land Registration Act is actual fraud of which there was no evidence.

- [39] Despite it being stated in paragraph 13 of her witness summary that 'the first, second and third named Defendants later reneged on their promises and thereafter formulated a scheme to take the property from the second named Claimant', Marie was adamant that she never said that and admitted that the statement was not true because she never said it. Marie also said she knew nothing about the children/beneficiaries 'going behind her back' to pay Mr. Larcher to register the Vesting Deed. This therefore goes against any allegation that the first to fifth defendants interfered or intermeddled with Edmund's estate which Marie had alleged as part of her pleaded case.

- [40] Based on the foregoing, the declarations sought at paragraphs (2), (3) and (4) of the claim form are refused.

(d) Whether the land register in relation to the Property ought to be corrected to insert Mr. Fassal's name as the absolute owner?

[41] Marie seeks an order rectifying the land register in relation to the Property. Section 98 of the **Land Registration Act**⁸ (“LRA”) is pellucidly clear as to the circumstances where a land register can be rectified. That section states:

“(1) Subject to the provisions of subsection (2) the Court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration including a first registration has been obtained, made or omitted by fraud or mistake.

(2) The register shall not be rectified so as to affect the title of a proprietor who is in possession or is in receipt of the rents 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.”

[42] It has already been established that fraud is a non-issue having not been proven on the evidence as presented by the claimants. The question is whether there is any mistake which could lead to rectification of the land register. In the well-known case of **Sylvina Louison v Jacob**,⁹ the Privy Council looked at the scope of section 98 and said thus:

“[41] ...rectification of the register is available only of the mistake in question (or, no doubt, the fraud, when fraud is in question) occurred in the process of registration. See *Skelton v Skelton* (1968) 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. ...”

[43] It is clear that a land register can be corrected post the Land Registration and Titling Project as section 98 refers to rectification of a register relating to any registration including a first registration. Mr. Fraser referred to the case of **Prisca Sharon Irving Qua Administratrix of the Estate of Joseph Leo aka Joseph St. Holl aka Lucius Joseph Polius v Geest**

⁸ Cap. 5.01, Revised Laws of Saint Lucia, 2008.

⁹ [2009] UKPC 3 at para 41-42.

Industries (Estates) Limited et al¹⁰ at paragraphs 29 and 30. However, counsel failed to appreciate that the reference at paragraph 30 of that judgment was to highlight the approach to interpretation of ‘mistake’ by the UK Court of Appeal in the cited case of *NRAM Ltd. v Evans* where the point was made that ‘the question of whether there is a mistake being based on whether the particular disposition or transaction is void or voidable is still one filled with controversy’. That paragraph is followed by paragraph 31 where the Court stated without any qualification:

“As it stands, the Privy Council case of *Louison v Jacobs* settles the matter. What is contemplated is a mistake in the registration process ...”

[44] I have already found that there is no evidence of any mistake given that Marie in her evidence denied that any mistake was made. Even if it were the case that the inclusion of the Property in the Vesting Deed was an error, the question is would this qualify as a mistake in the registration process. I think not. Were it the case that the Vesting Deed had only included two of the estate properties and not the Property but the Registrar of Lands mistakenly registered the Property in the names of the beneficiaries notwithstanding that that parcel of land did not form part of the Vesting Deed, that clearly would class as a mistake in the registration process for which rectification could flow.

[45] There is therefore no basis for rectification of the land register to insert Mr. Fassal’s name instead of the beneficiaries as there is no mistake as contemplated by section 98(1) of the LRA. Consequently, the order sought at paragraph (7) of the claim form is refused.

(e) Whether Mr. Fassal is a purchaser for value without notice of any interest of the first to fifth defendants?

[46] Mr. Fraser in closing submissions seeks to introduce two issues which were never part of the claimants’ pleaded case. At paragraph 5.0 of the submissions Mr. Fraser says:

“The sale of the land by the first named Claimant and sixth named Defendant is a genuine sale. No suggestion of fraud is attached and the first to fifth Defendants failed to make out a case that the sale is not authentic. In this regard the second named Claimant is entitled to specific performance of the agreement: Article 1386 of the Civil Code. Having also gone into occupation and having paid the purchase

¹⁰ SLUHCV2015/0969 (delivered 19th July 2019, unreported).

for the land prior to registration of both the Vesting Deed and the Deed of Transfer, the Second named Claimant acquired an overriding interest in the land in accordance with Section 28(g) of the LRA."

- [47] It must be noted that neither specific performance nor overriding interest were part of the claimant's pleaded case and it cannot simply be introduced in submissions. The defendants would not have had any opportunity to address these issues. It has been said many times and is the clear position of the Court that the purpose of pleadings is to allow the other side to know the case they must answer. The case of **Shankiel Myland v The Commissioner of Police et al**¹¹ is often cited in support of this. In that case, the Court said:

"The Court cannot accept that in these circumstances it is appropriate for a claimant to ignore the requirements set out under the CPR and to seek to litigate an issue which has not been raised in his pleadings, thus taking the opposite party completely by surprise."¹²

...

"Litigation proceeds on the basis that the court is a court of pleadings. They are critical in that they give fair notice of the case that has to be met, so that the opposing party may direct its evidence to the issues disclosed and they assist the court in adjudicating on the allegations made by the litigants."¹³ (my emphasis)

- [48] I will therefore not address these two new claims in any detail as they were never pleaded by the claimants as part of their case. Mr. Fraser relied on the case of **Ulina Jennifer George v Hilary Charlemagne**¹⁴ but in that case the court found that there had been mention of the defendant having an overriding interest in the statement of claim notwithstanding the reference to section 28(g) was not mentioned. It is different in the instant case as there is no such pleading in the claimants' affidavit in support of the claim.

- [49] Suffice it to say that even if the Court had to consider the matter of an overriding interest in the Property, there is no evidence of any actual occupation of the Property by Mr. Fassal except what is stated by Marie in her evidence at paragraph 7 and which does not amount to evidence of actual occupation. Neither is it the case that Mr. Fassal could be said to have

¹¹ GDAHCV2012/0045, delivered 9th May 2014, (unreported).

¹² At paragraph 37.

¹³ At paragraph 41.

¹⁴ SLUHCVP2001/0024, delivered 3rd April 2003, unreported.

had a registrable interest at the date of registration of the Vesting Deed, there being no evidence of a deposit having been paid pursuant to the Agreement or the purchase price having been paid by then. Section 28(g) of the LRA could not be applicable in such circumstances.

[50] Does the evidence prove that the second claimant is a purchaser for value without notice? Interestingly and quite curiously I would add, Mr. Fassal who is at the center of this claim and whose interests will in one way or another be affected by its outcome, has never attended court and although a witness summary was filed on his behalf, never appeared on the day of trial despite the fact that the proceedings were held via the Zoom platform which would have allowed any witness to participate no matter their location.

[51] I have reviewed the evidence and make the following observations and conclusions.

(a) Contrary to what the claimants contend in their pre-trial memorandum that the sale of the Property was sanctioned by the Court, there is nothing on the face of the Order of 25th July 2013 which suggests this. In fact, the application filed by the first-third defendants was not only in relation to the Property but to all the three properties which formed part of Edmund's estate. The Order of 25th July 2013 in the preamble stated, "AND UPON HEARING COUNSEL for the respective parties and the Court being informed that the proposed sale of land which is subject of [sic] had been stopped without the Court's intervention" and then the matter was removed from the Court's list. Therefore, the Court did not sanction any sale as contended by Mr. Fraser. It is the case that as at 25th July 2013, the evidence shows that the parties left Court on the understanding that the sale of the Property had been stopped.

(b) The existence of the Agreement which the claimants allege was signed in April 2013 was put into question by Marie in cross-examination where she completely denied signing the Agreement with Mr. Larcher even though this document is referred to and exhibited in her evidence. In any event, the exhibited document does not as alleged, contain any express term that on its execution, Mr. Fassal would go into immediate possession of the Property. Further, there is no evidence from the claimants except a

bald statement by Marie that Mr. Fassal is currently in occupation of the Property and is in receipt of the rent. There is no evidence from Mr. Fassal himself as to his alleged occupation of the Property.

- (c) As to the purchase price, Mr. Fraser contends that Mr. Fassal paid the purchase price prior to the registration of the Vesting Deed. However, there is no evidence of this. Marie has produced no evidence of receipt of the purchase price prior to the registration of the Vesting Deed in September 2013.

In cross-examination, Marie initially said she sold the Property for \$275,000.00 but then agreed that she got \$300,000.00 from Mr. Fassal. She produced no evidence of receipt of this money which would at least show that the purchase price was indeed paid. Asked what she did with the monies she received from the sale, she said she paid the debts with the only one being outstanding being the Tapion bill and she put the rest in the bank. Despite listing the liabilities in her evidence and making mention of them in cross-examination, no receipts were produced evidencing the payments. Marie claimed that she had misplaced some of the receipts and Mr. Larcher had some and she threw some away. She could not recall how much money she had put in the bank. Overall, there was no evidence that the purchase money was paid to the executors by Mr. Fassal although it is not disputed that he did; however, there was no evidence of when the payment was made. Mr. Fassal himself never even attended the trial to provide this evidence to support his claim.

The documentary evidence also does not support Mr. Fraser's contention as it shows that 1st National issued a cheque to Fraser and Company Inc. dated 18th October 2013 in the sum of \$270,000.00. That was a month after the Vesting Deed was registered at the Land Registry. Marie also confirmed in cross-examination that Mr. Fassal did not pay a deposit of \$30,000.00 to her but she received \$300,000.00 from him. There is no evidence to suggest that any monies were paid when the Agreement for Sale was executed or any other time prior to October 2013.

(d) It is the case that by October, 2013, the Vesting Deed had been registered at the Land Registry. Section 30 of the Land Registration Act provides that 'every proprietor acquiring any land, lease or hypothec shall be deemed to have had notice of every entry in the register relating to the land, lease or hypothec.' Therefore, when Mr. Fassal sought to register his hypothec and deed of transfer he would have been deemed to have had notice of the registration of the vesting deed and the fact that the first to fifth defendants were proprietors on the record. This is bolstered by the claimants' own evidence when Marie gives the account of an application being made in November 2013 to the Court to 'correct the Vesting Deed in relation to this parcel of land that was registered in the names of the first, second and third named defendants.' The resulting order on that application dated 11th November 2013 was an interim declaration that Mr. Fassal was the owner with absolute title to the Property to become final in 28 days if the Registrar of Lands did not object. That order was subsequently reversed by the Court of Appeal on the grounds that the first to third defendants were never made aware of the application made in November 2013 and did not have the opportunity to be heard. In such circumstances, Mr. Fassal would be deemed to have had notice of the registration of the Vesting Deed and cannot be said to be a bona fide purchaser for value without notice.

[52] The relief sought at paragraph (5) of the claim form is accordingly refused.

(f) Whether the Hypothecary Obligation in favour of 1st National Bank should be cancelled?

[53] Ms. Danielia Chambers ("Ms. Chambers"), counsel for 1st National Bank pointed out that there are no pleadings, allegations or evidence contesting the validity of the registration of the hypothecary obligation executed in favour of 1st National Bank nor was any relief claimed seeking to cancel the registration of same. In submissions from counsel for the first to sixth defendants, Mr. Gerard Williams suggested that the hypothecary obligation would be unmaintainable and invites the Court to make an order directing the Registrar of Lands to rectify the land register by deleting its registration in the incumbrances section of the land register relating to the Property.

[54] I think it is very clear and I agree with Ms. Chambers that this is not relief which can be given on the basis of the claim and pleadings before the Court. That would have been for the defendants to seek and it is noted that after their counterclaim was struck out as not being properly before the Court, they never took any steps to remedy the situation and file the requisite pleadings.

[55] In addition, article 2028 of the Civil Code of Saint Lucia states that the registration of real rights may be cancelled with the consent of the parties, or by virtue of a judgment from which there is no appeal, or which has become final. Article 2029 goes on to state that if the cancellation is not consented to, it can be demanded from the court by among other persons, the debtor or by any interested party. Article 2030 provides that the cancellation is ordered when the registration has been effected without right or irregularly or upon a void or informal title, or extinguished by prescription or otherwise. There is no consent and no pleading or evidence that 1st National's hypothec was effected without right or was irregular or void.¹⁵ Applying the above articles in the Civil Code, I am of the view that it is not open to the Court on the pleadings before it to make the order cancelling the hypothec as alluded to by the defendants in their submissions.

Conclusion

[56] Based on the forgoing discussion, the claimants' claim as set out in the amended claim filed on 12th June 2018 is dismissed.

Costs

[57] On the matter of costs, Mr. Gerard Williams, counsel for the first to sixth defendants submits that costs should be based on the value of the Property being \$300,000.00. However, the claim in this case did not involve any claim for monetary relief and the prescribed costs would be calculated on the default value of \$50,000.00 in accordance with CPR. Therefore, the order as to costs is as follows:

¹⁵ See 1st National Bank of St. Lucia Limited v St. Honore De Sainte Lucie Limited (In Receivership), SLUHCVP2013/0030, (delivered 15th January 2015, unreported).

- (a) The claimants shall pay to the first to third defendants prescribed costs in the sum of \$7,500.00, the first to third defendants having filed one defence.
- (b) The claimants shall pay to the seventh defendant prescribed costs in the sum of \$7,500.00.
- (c) There shall be no costs payable to the fourth to sixth defendants as they did not participate in the proceedings at all.¹⁶

**Kimberly Cenac-Phulgence
High Court Judge**

By The Court

Registrar

¹⁶ The defence filed was only on behalf of the first to third defendants.