

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

MONTSERRAT

MNIHCVAP2019/0013

**IN THE MATTER of an application for
Prescriptive Title pursuant to Section 135 of the
Registered Land Act Cap 8.01**

- and

**IN THE MATTER of an Appeal to High Court
pursuant to Civil Procedure Rules 2000 (Part
60)**

BETWEEN

JANETTE CYNTHELIA LEE

Appellant

and

**[1] THE ESTATE OF NOEL OSBORNE deceased, represented by lawfully
appointed representative OLIVE OSBORNE**

First Respondent

[2] THE REGISTRAR OF LANDS

Second Respondent

Before:

The Hon. Dame Janice M. Pereira, DBE

Chief Justice

The Hon. Mr. Maio Michel

Justice of Appeal

The Hon. Darshan Ramdhani

Justice of Appeal [Ag.]

Appearances:

Ms. Chivone Gerald for the Appellant

Mr. Jean Kelsick for the First Respondent

2021: July 28, August 3.
Re-issued: 7th March 2022

REASONS FOR DECISION

Civil Appeal – Application for prescriptive title – Powers of the High Court on hearing an appeal from the Registrar of Lands - Whether the learned judge could set aside the registrar’s declaration without hearing the evidence

[1] **RAMDHANI JA. (Ag.):** Applications to the Registrar of Lands under section 135 of the Registered Land Act of Montserrat¹ (“the Act”) for title by prescription to land is not an infrequent event in Montserrat. These applications and the grant of title impact on the lives of quite a few Montserratians, and it is important that there is clarity to the process to be adopted and the role that the High Court should play in any appeals which may flow from a grant of title by the Registrar of Lands hearing an application.

[2] This appeal raises a narrow procedural point relating to the approach of a High Court Judge on an appeal from a decision of the Registrar of Lands under section 135 of the Act. At the hearing, this Court allowed the appeal, setting aside the judge’s order and remitting the section 135 appeal to be heard by a different judge of the High Court. These are the reasons for that decision.

Brief Factual context – The Application for Prescriptive Title Pursuant to Section 135 of Registered Land Act of Montserrat

[3] On 15th May 2017, the appellant, Ms. Janette Cynthelia Lee of Nixons, Montserrat, filed an application for title by prescription under section 135 of the Act. The application was supported by her own declaration dated 12th May 2017, and two other declarations as required by the Act. These were from one George Christopher Gerald of Banks, Montserrat, dated the 12th day of May 2017 and one William Elnathan Buntin of Nixons, Montserrat, dated 12th day of May 2017.

¹ Registered Land Act, Cap 8.01, Revised Laws of Montserrat 2019

- [4] As directed by the Registrar of Lands, notice of the application was given to the adjacent registered proprietors namely, Olive & Desmond Osborne, Linda Holloran, Janet Dyer, Jean-Arlene & Simon Morson, Ellen Veronica Eliza Sweeney and Edward B. Fenton as the Administrator of the Estate of Lazarus Simeon Fenton (deceased) at their last known addresses and/or their local agents via registered post on 19th May, 2017.
- [5] Beginning on 19th May 2017 and lasting for six weeks, notice of the claim was also given to the public by way of it being displayed prominently at various locations, namely (a) on a light post along the main road situated on Block 13/11 parcel 001 for a period of six (6) weeks, commencing on the 19th day of May 2017; (b) on a light post along the main road situated on Block 13/06 parcel 44; (c) by displaying the notice in a prominent place on the above mentioned parcel of land, namely on the western and southern sides of the dwelling house within the boundaries of the said parcel. The notice was also posted on the notice boards at the Lands and Survey Department, the Public Library and the Legislature Department. Two separate publications were also done in the Montserrat Reporter on the 19th and the 26th of May 2017.
- [6] On expiration of the period within which an objection could be filed and on there being no such objection filed within the time stipulated, and on being satisfied that the application was in the proper form, the Registrar of Lands granted the application for prescription and ordered on 17th July 2017, that the subject parcel be registered in the name of Janette Cynthelia Lee, 'as owner with Title Absolute by virtue of her acquisition of ownership of the said parcel of land by prescription'.
- [7] Notice of an intention to appeal any decision of the Registrar of Lands is to be filed within 30 days of the decision. On 9th August 2017, Mr. Noel Osborne, formerly of Nixons but then residing at 59 Albert Square, Stratford, London, E15 1HJ, ('the Respondent') acting through Ms. Olive Osborne his then lawful attorney, gave such a notice to the Registrar. (Mr. Noel Osborne is since deceased having passed away

in 2020. His daughter Ms. Olive Osborne was appointed as representative of his estate to carry on these proceedings.) In that notice, a number of grounds were set out, namely:

- (1) "The Learned Registrar erred in law in finding that Ms. Lee had acquired title to the entire property by adverse possession.
- (2) The Learned Registrar erred when she relied solely on the statutory declaration of Ms. Lee and the affidavits of William Elnathan Buntin and George Christopher Gerald which were but mere repetitions of Ms. Lee's misrepresentation.
- (3) The Learned Registrar erred when she failed to request evidence to support the representations made by Ms. Lee. This includes but is not limited to her assertion that she can recall the boundaries when in fact the property has not been surveyed; paid the property taxes when there has been no registered owner.
- (4) The Learned Registrar erred when she found that Ms. Lee possessed the requisite animus possidendi and disregarded the fact that there is a wooden house belonging to Noel Osborne, located in the middle of the property.
- (5) The Learned Registrar erred when she found that the Applicant "carried out acts of proprietorship with regards to the lards" when there was no tangible evidence provided to support said representation and the structure occupied by Ms. Lee is a chattel mounted on concrete blocks."

[8] On 28th September 2017, the Registrar of Lands, as is required by law, issued a 'Statement by the Registrar of Lands in Response' in response to the Notice of Intention to Appeal. In that response, the Registrar addressed each ground of the intended appeal. Having noted that "[t]he main issue appears to be whether the Registrar ought to have taken cognizance of a house situated on the property as a basis for refusing the application. The authorities are clear that the Registrar is not required to visit the property. In any event, the Notice of the application was posted on two separate locations on the same said house", the Registrar gave a response to each ground:

"In response to Ground 1:

That there was no evidence before the Registrar of Lands, nor was there any objection raised by any member of the public, or any of the parties served in relation to the said application to indicate that [Ms. Lee] was entitled to less than the entire parcel. Further, no evidence had been submitted to the Registrar of Lands that the said parcel 104 was subject to any form of partition.

In response to Ground 2:

That in relying on the statutory declaration of [Ms. Lee], and two other deponents in support of [her], there was no basis to consider the statements contained therein to be misrepresentations. Further, that in the absence of an objection, or any indication presented to the Registrar of Lands that the facts as averred by [Ms. Lee] were untrue, the Registrar was not in error in granting the said application.

In response to Ground 3:

That in accordance with the Registered Land Act, the Registrar of Lands was entitled to rely on the assertions made, to substantiate the claim of [Ms. Lee], that she was in possession of the said parcel 104, to the degree that there was physical control, coupled with the requisite intention or animus possidendi, that would be sufficient to satisfy the said application.

Further that there was no basis before the Registrar of Lands to challenge the assertion of [Ms. Lee] that she can recall the boundaries of the land physically occupied by her. Further as part of the statutory function, the Registrar of Lands was required to, and did fulfill the requirement to serve notices to all adjacent owners and occupiers, including placing the notices in prominent public places, as stated in the order.

In response to Ground 4:

That the Registrar of Lands did not disregard the fact that there was a wooden house located in the middle of the property, and in fact, did take care to ensure that Notice of the application was brought to the attention of any occupier/owner of the said house by securing the Notice on the western and southern boundary of the house.

In response to Ground 5:

That no evidence was submitted to the Registrar of Lands to rebut the assertions of [Ms. Lee] and the deponents that [Ms. Lee] carried out acts of proprietorship with regards to the said parcel, and that any evidence adduced, or objections mounted within the stipulated time would have been duly considered by the Registrar of Lands.”

The Appeal by way of Fixed Date Claim to the High Court

- [9] On 22nd November 2018, pursuant to section 147 of the Act and Part 60 of the **Civil Procedure Rules** 2000, an appeal to the High Court, by way of a fixed date claim was filed relying on those five grounds of appeal as was earlier contained in the notice of intention to appeal. It was supported by several affidavits. First, there was the affidavit of 87 years old Noel Osborne himself.
- [10] Notwithstanding his demise, it would be useful to set out his narrative which, it appears has been supported by his daughter's evidence. Essentially, he had deposed that his family had always occupied the land in question and that he had begun to exercise acts of ownership of the same sometime around 1972 when he returned to Montserrat from the UK. He had deposed that in or about 1989, Janet Lee, his niece, erected a wooden house on the western side of the property; where she lived was separated by a drain from the portion which the respondent occupied. His affidavit evidence was that he continued to occupy without interruption until 2007 when he left for the UK where he remained. He had stated that his daughter Olive Osborne, his lawful attorney would visit Montserrat from time to time and would attend to the land. He had deposed that he found out that the appellant had applied for all of the land including the part which he occupied and that effectively she had no lawful right to claim all of the lands.
- [11] His then attorney, Olive Osborne, also swore an affidavit and supported the evidence of her father now deceased. She deposed that she returned on vacations several times between 2007 and 2017 and on two occasions, the land being overgrown with vegetation, she caused the lands to be cleared. She deposed that in August 2017 when she visited Montserrat, she discovered that the appellant had laid claim to all of the lands. An affidavit of one Laura Malone of Nixons, Montserrat and one from Ellen Sweeney of Brades, Montserrat also supported certain aspects of the affidavits of the Respondent and his daughter.

- [12] It would appear that the essence of the appeal was that whilst the appellant may be entitled to some part of the lands across from the drain, the respondent's estate was entitled to ownership of everything else, as, in his lifetime, he had occupied for the requisite period.
- [13] The appellant filed an affidavit in answer deposing that the notice of intention to appeal was filed by Olive Osborne when there was no valid power of attorney registered, and also over a year outside of the statutory period allowed for same. She also disputed the evidential basis for the claim contending that she was in occupation for in excess of 27 years and had occupied as owner and paid property taxes for the lands for the last 15 years. She deposed that whilst Mr. Noel Osborne had lived on a portion of the land and did 'plants vines and other little plants' around his house, no one had laid any claim to the lands in questions (family members including Ms. Olive Osborne making claims to various pieces of adjoining lands) and she had exercised acts of ownership over all of it. The only clearing of the lands which was arranged by Ms. Olive Osborne, she deposed, was in 2017, after she had obtained her title.
- [14] The matter came on before the High Court judge sitting on appeal from the decision of the Registrar of Lands. Early during the case management, the High Court judge directed that the parties attempt to mediate the matter. On 10th October 2019, whilst settlement should have been ongoing, counsel for the respondent wrote to the opposite side copying the judge and attaching to this mail a letter from the Commissioner of Police indicating that the immigration records did show that the respondent had left the jurisdiction in 2007. It was intimated that this letter should have been attached as an exhibit and would be relied on at the High Court. The other side responded to counsel by email and strongly objected to the mode of communicating with the court.

- [15] On the next day, 11th October 2019, the matter then came on for further case management before the judge who noted that he had seen the communication and the 'evidence' that Noel Osborne had left the jurisdiction in 2007.
- [16] The High Court judge then insisted that he wished to proceed to hear the matter. There was quite a bit of discussion of whether the matter could be resolved and whether it ought to be sent back to the Registrar for a new hearing. The High Court judge stood down the in-court proceedings and visited the lands in questions. Shortly thereafter the matter was resumed in court. When the discussion resumed, at one stage in response to a question from the Court, Ms. Gerald responded that she was willing to concede the appeal, though this was in the context of ongoing attempts of the learned judge to mediate a settlement. Talks of such a concession were overtaken by questions raised by the judge as to whether on hearing of the appeal he was empowered to make orders granting to each of the parties a half of the lands. There were opposing views to this, with Mr. Kelsick submitting that the judge could only, either confirm the Registrar's order granting title or setting it aside but could not grant orders as the judge appeared to be considering. Eventually, and it appeared reluctantly, the learned judge adjourned the matter for the parties to research the points and to make further submissions.
- [17] The matter came again before the learned judge on 15th October 2019. Framing the issues on that day, the learned judge stated that he was concerned about whether he could proceed on paper to determine whether to confirm or set aside the Registrar's order, or whether he could proceed to take evidence and determine what portions if any of the lands each party owned. The essence of the arguments for the learned judge to consider was whether proceeding with the latter could be considered a 're-hearing' or whether it would amount to a 'de-novo' hearing. The learned judge appeared to have accepted that if he could proceed to determine what portions of the land each side was entitled to, he would have to have a trial on the evidence. Eventually the learned judge noted that: "I can't decide who owns what

on the land because a rehearing was never designed to deal with that. The rehearing is simply designed to established whether prescriptive title arises.”

[18] An order was then drawn up in the following terms:

“RECALLING the action is an appeal against the decision by the Lands Registrar on 16.07.17 to grant prescriptive title to unclaimed plot 13/06/104 to Janette Lee, who claimed the plot by application on 12.05.17;

NOTING there is evidence now offered Noel Osborne was in occupation of at least a portion of the claimed land up to 2007 during the purported period for which the land must be unoccupied by him in order for Lee to claim prescriptive title (being a period from 2005 of twelve years prior to Lee's application);

CONSIDERING prescriptive title would not have been granted wholly to Lee if such evidence that Noel Osborne was in partial occupation in 2007 was presented and accepted by the Lands Registrar;

CONSIDERING a determination of who owns what of plot 13/06/104, if anything, will require adjudication on evidence offered on competing claims;

CONSIDERING Noel Osborne is now through counsel claiming the bulk of plot 13/06/104, and not about half as divided by 'the cut' as originally contemplated in the evidence he has offered on this appeal;

CONSIDERING the appeal has been prepared in order to set aside the award of prescriptive title wholly to Lee, and not to adjudicate on the competing claims, (which might be legally permissible under s147(4) supra, but in the context of what material has been offered is not a practicable outcome within the action filed as it currently stands before the High Court on appeal);

IT IS ORDERED THAT:

1. The appeal succeeds with the effect the award of prescriptive title to Janette Lee on 16.07.17 is set aside, so that plot 13/06/104 is returned to the status of being unclaimed land (anticipating there will next be competing claims filed to the Lands Registrar by Osborne and Lee).

2. The appeal by Osborne having succeeded, costs are awarded to Osborne in the sum of \$1,000EC.”

The Appeal to the Court of Appeal

[19] The appeal against this order was filed on 6th January 2020. It relied on several grounds, namely:

- “1. The judge erred in ostensibly allowing the appeal and quashing the order of the Registrar of Lands (“Registrar”), without a hearing of the appeal, in accordance with section 147 of the Registered Land Act, and Part 60 of the Eastern Caribbean Supreme Court Civil Procedure Rules 2000.
2. The judge erred in ruling that the High Court did not have jurisdiction to have a re-hearing.
3. The judge erred in failing to provide its reasoning or authority to set aside the Order of the Registrar, in the absence of hearing the appeal.
4. The judge in purporting to allow the appeal, failed to consider that the issue of rectification of the register in accordance with section 140 of the Act becomes relevant to these proceedings, notwithstanding the extension of time granted to appeal, in the first instance.
5. The judge erred in ruling that the High Court did not have jurisdiction to declare ownership of the land in issue on hearing the appeal.
6. The judge erred in ruling that the hearing of the appeal would be a *de novo* hearing, as opposed to a re-hearing.
7. The judge erred and exceeded his jurisdiction in relying on a letter from the Commissioner of Police and of which no leave was requested or obtained to admit, as a reason for allowing the appeal, and overturning the decision of the Registrar of Lands.
8. The judge erred and exceeded his jurisdiction in relying on a letter from the Commissioner of Police which was not properly before the court without giving the appellant an opportunity to challenge, respond to or test the veracity of the same.
9. The judge erred and exceeded his jurisdiction in ostensibly determining the appeal without a hearing, after requesting submissions on whether (i) the High Court had jurisdiction to declare ownership of the land, and (ii) an appeal in the circumstances amounted to a rehearing and not a trial *de novo*, as suggested by the First Respondent.
10. The judge erred in ruling that the High Court could not make an order as to ownership of land, consistent with what was pleaded in the claim of the First Respondent.

11. The judge erred in permitting the First Respondent, through his Counsel, to advance a different position to what was pleaded and offered in evidence, without any amendment to the pleadings.
12. The judge erred and exercised its discretion incorrectly in awarding costs to the First Respondent, when there was no hearing of the appeal.”

The Issues on this Appeal

[20] The many grounds may be narrowed down to two short questions which will frame the issues for this Court. These are:

1. Whether, on the hearing of an appeal from an order made by the Registrar of Lands, the High Court Judge has the jurisdiction, where the affidavit evidence raises contesting claims, to conduct a trial to determine what share in the subject lands each party is entitled to, if any?
2. Whether a High Court Judge sitting on appeal from an order from Registrar of Lands granting title under the Registered Land Act may reverse the order of the Registrar on the basis of evidence placed before the High Court without hearing the appeal?

First Issue – The Powers of the High Court on Hearing an Appeal from the Registrar of Lands under Section 147 of the Lands Registration Act of Montserrat

[21] The first point for determination is what is the scope of powers to be exercised by a High Court judge sitting on appeal from an Order of the Registrar of lands under section 135 of the Registered Land Act of Montserrat.

[22] The source of the High Court’s jurisdiction is section 147 of the Act. This section reads as follows:

“147. (1) The Crown or any person aggrieved by a decision, direction, order, determination or award of the Registrar may within thirty days of the decision, direction, order, determination or award, give notice to the

Registrar in the prescribed form of his intention to appeal to the court against the decision, direction, order, determination or award.

(2) On receipt of a notice of appeal, the Registrar shall prepare and send to the court and to the appellant, and to any other person appearing to him from the register to be affected by the appeal, a brief statement of the question in issue.

(3) On the hearing of the appeal, the appellant and the Registrar and any other person who, in the opinion of the Court, is affected by the appeal may, subject to any Rules of Court, appear and be heard in person or by a legal practitioner.

(4) The Court may make such order on the appeal as the circumstances may require, and every such order shall be given effect to by the Registrar.

(5) The costs of the appeal shall be in the discretion of the court.”

[23] This appeal provision does not set out the scope of the powers given to the judge on appeal, but this is dealt with by Part 60.8 of the Eastern Caribbean Supreme Court **Civil Procedure Rules** 2000 (“CPR”) which governs the procedure on hearing such appeals:

“Hearing of appeal

60.8 (1) Unless an enactment otherwise provides, the appeal is to be by way of rehearing.

(2) The court may receive further evidence on matters of fact.

(3) The court may draw any inferences of fact which might have been drawn in the proceedings in which the decision was made.

(4) The court may—

(a) give any decision or make any order which ought to have been given or made by the tribunal or person whose decision is appealed; and

(b) make such further or other order as the case requires; or

(c) remit the matter with the opinion of the court for rehearing and determination by the tribunal or person.

(5) The court is not bound to allow an appeal because of –

(a) a misdirection; or

(b) the improper admission or rejection of evidence; unless it considers that a substantial wrong or a miscarriage of justice has been caused.”

[24] Mr. Kelsick has argued both before the High Court and this Court that it would be wrong for the High Court on hearing an appeal, to do anything other than either confirming the order of the Registrar or setting it aside; the court had no power to substitute any new orders such as apportioning shares in the lands to each of the opposing parties. Counsel submitted that fixed date claim before the High Court had framed the issue as whether there should be a reversal of the Registrar’s order and that there was no counterclaim which raised whether the High Court should determine ownership and apportionment. Learned Counsel further submitted that a court hearing an appeal is not allowed to go ‘re-running’ the evidence and to troll through the evidence to determine what the facts were. In this regards he relied on Court of Appeal’s decision in **Re Collins Richardson, Carolyn Richardson et al.**²

[25] Ms. Gerald on the other hand, submitted that the learned trial judge had erred when he failed to hear the appeal and as it were, rehearing the matter which had been heard by the Registrar. Learned counsel stated that the High Court was required to hear the evidence and make any orders, it saw fit, including orders apportioning the land between the parties.

[26] I consider that Ms. Gerald is right on these points. Whilst the Act provides for a right of appeal, it does not expressly define the scope of the court’s jurisdiction on that appeal. This is where rule 60.8 of the CPR comes alive. This rule makes it clear that that any appeal from such a tribunal is to be by way of a ‘re-hearing’. The rule further provides that the court may receive further evidence on matters of facts and may draw such inference which could have been drawn by the tribunal. Significantly, the court is entitled to give any such decision or order which could have been made by the Tribunal.

² AXAHCVP2016/0002 (delivered 24th May 2019, unreported).

[27] Mr. Kelsick's reliance on **Re Collins Richardson, Carolyn Richardson et al** is misplaced. That is a case in which the appeal, though originating under the Land Registration Act of Anguilla which contains a provision similar to section 147, was not an appeal from the Registrar to the High Court, but it involved an appeal from the High Court to the Court of Appeal. It was on that appeal that the Court of Appeal was being asked to revisit findings of facts. It was in that context that the Court of Appeal there relied on the observations of the Privy Council in **Sandra Juman v The Attorney General of Trinidad and Tobago and Anor** ³ where the Board stated:

"14...The limited role of an appellate court when asked to review the factual findings of a lower court has been expounded and emphasised in authorities too many to mention. Their effect was summarised by Lord Reed in *Henderson v Foxworth Investments Ltd* [2014] 1 WLR 2600, at paragraph 67, as follows

"...in the absence of some other identifiable error, such as (without attempting an exhaustive account) a material error of law or the making of a critical finding of fact which has no basis in the evidence, or a demonstrable misunderstanding of relevant evidence, or a demonstrable failure to consider relevant evidence, an appellate court will interfere with the findings of fact made by a trial judge only if it is satisfied that his decision cannot reasonably be explained or justified."

[28] Whilst this is surely the correct approach for the Court of Appeal, it is not the approach which is to be taken by the High Court conducting a rehearing under rule 60.8. A rehearing, though not a hearing *de novo*, is a full hearing of the proceedings where the court is required to consider all the evidence that was before the Registrar of Lands and may where warranted, hear further evidence. In short it is not by way of review. If the issues on appeal are not limited by the fixed date claim, such as a discrete point of law, all issues are open to the High Court on the appeal. A fixed date claim seeking a reversal of the order of the Registrar granting title cannot limit the scope of the High Court's powers; in fact, everything is at large. The Court would ordinarily be duty bound to case manage the fixed date claim and clearly make such orders which would allow each party to know what to expect at the hearing, including

³ [2017] UKPC 3

whether additional evidence was to be allowed and whether cross examination would be limited. At the hearing where the dispute remains one of fact, the learned judge would be obliged to consider all the evidence, written oral and documentary which was before the Registrar, as well as any further evidence which may have been directed to be filed including any other physical evidence such as a visit to the locus in quo, and to make findings of fact. In a given case, where both sides may have led evidence before the Registrar, it is quite open to the High Court to consider the same evidence and be entitled to make different findings of fact. In a case such as the present, both parties would have been entitled to lead new evidence before the High Court. The Court would have been entitled to order a survey if it considered one was necessary. The High Court would then be entitled, on the basis of the facts it so found, to make such orders as it considers appropriate including orders apportioning portions of the land to each of the parties.

[29] Rule 60.8(4)(c) which permits the High Court to remit the matter to the Registrar with an opinion for rehearing is perhaps best suited to cases where the Registrar has heard all the evidence but misapplied some rule of law. Regardless, however, it clearly cannot be resorted to by the High Court without that court first 'rehearing' the matter.

[30] It would appear in this case that the High Court judge's initial instinct that he was entitled to rehear the matters and make any orders he saw fit was correct. He should not have permitted himself to depart from that view. The appellant succeeds on this point.

Second Issue – Whether the Learned Judge could set aside the Registrar's Declaration without hearing the evidence

[31] It must be obvious from the foregoing and on basic principles of law that the learned High Court judge ought not to have set aside the Registrar's declaration without a proper hearing of the matter. In fact, there was no proper basis to make any findings

of fact without the benefit of a proper hearing and especially on evidence which was not properly before the court.

[32] The complaint on this point is that the learned trial judge erred when he relied on affidavit evidence without allowing cross examination, and on evidence which was not properly before the court to make findings which grounded his decision to set aside the Registrar's declaration.

[33] The appellant pointed this Court to the Commissioner's letter which spoke to the date when Noel Osborne, deceased, had left Montserrat, and which had been copied in an email to the judge.

[34] Ms. Gerald submitted that the CPR and rules of evidence, provide clear directives on how evidence is admitted by the court. The learned judge exceeded his jurisdiction in relying on evidence in the form of an emailed letter which was not filed in the High Court, as a reason for allowing the appeal, and overturning the decision of the Registrar. Further, the appellant was not given an opportunity to challenge, respond or test the veracity of the same.

[35] Ms. Gerald submitted that at all material times Ms. Lee objected to the court considering this evidence. Learned counsel stated that such evidence could not be accepted without testing its veracity and that this would mean that 'a full history of the first respondent's travel records would be required'.

[36] Mr. Kelsick approached this evidence from a different tact. Counsel avoided the issue as to whether the information had been properly placed before the court. Instead, he asserted that this was an important piece of evidence as it allowed the Learned judge to find as a fact that Noel Osborne was in occupation of the Land until as late as 2007 and therefore the Appellant had not been in possession of the land for 12 continuous years as claimed by her in her affidavit to the Registrar of

Lands. Implicit in this finding, and as specifically stated in the Order, the appellant concealed important information from the Registrar of Lands.

[37] For this Court, it is always wrong for correspondence to be sent directly to the Learned Judge. Much more contumacious is for one party to send what is considered by that party to be critical evidence and to urge the court to rely on this evidence. There was no basis in law for this evidence to be relied on. I also agree that immigration records that the deceased left the jurisdiction in 2007 do not at all lead to a finding that the deceased was therefore, without more, in occupation of the lands up to that date. I would expect that this information would have to be interrogated to determine where the truth lies.

[38] For all the reasons given, the order of the High Court setting aside the Registrar's declaration is set aside. If Ms. Lee's name has been removed from the Register as the title holder, then it should be corrected to reflect the order made by the Registrar. Since the appeal to the High Court was never heard, that appeal shall be remitted to the High Court for a rehearing of the fixed date claim. The matter shall be heard by a different judge.

[39] On the matter of costs, this Court considers that Ms. Lee should have his costs, that being two thirds of the prescribed costs on appeal.

I concur.
Dame Janice M. Pereira, DBE
Chief Justice

I concur.
Mario Michel
Justice of Appeal

By the Court

Chief Registrar