

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
ANGUILLA CIRCUIT
(CIVIL)
A.D. 2020**

CLAIM NO. AXAHCV 2017/0065

BETWEEN:

EMANUEL WEBSTER

Claimant

and

**KHAMAL VERE HODGE
PATRICIA HARDING HODGE
VALENCIA HODGE**

Defendants

Appearances:

Mr. Roger Forde, QC with him Mrs. Cara Connor instructed by Tacomi Chambers
of Counsel for the Claimant

Mr. John Carrington, QC with him Mr. Horace Fraser instructed by Wright & Co. of
Counsel for the Defendants

2019: April 3; 4;
June 13; 14;
2020: January 20.

Transfer of land – Registered Land Act, R.S.A. c. R30 – Title to land – Claim for possession of land – Partition – Setting aside transfer of land – Rectification of Land Register – Section 146 of Registered Land Act – Fraud – Mistake – Notary Public – Legal Profession Act – Transfer of land to Notary’s family member – Notary Public executing verification of Transfer – Whether contrary to Legal Profession Act – Transfer not verified by Notary in presence of transferee – Execution of instruments – Section 113 Registered Land Act – Whether Notary acting in capacity as Attorney-at-Law for one of the transferees and transferor – One transferee a minor – Whether capable of affecting registered title – Section 117 Registered Land Act – Payment by Notary as contribution towards purchase price – Right of way – Estoppel – Trespass to land – Damages – Aggravated damages – Exemplary damages

JUDGMENT

- [1] **INNOCENT, J. (Ag.):** This is a claim brought by the claimant, Mr. Emanuel Webster (Mr. Webster) against the defendants, Mr. Khamal Vere Hodge (Mr. K. Hodge), Mrs. Patricia Harding Hodge (Mrs. Hodge) and Mr. Valencia Hodge (Mr. V. Hodge) for a Declaration that he is the proprietor of the property registered as North Central Block 48841B Parcel 232 ('Parcel 232'); an Order for the rectification of the Land Register directing the cancellation of the entry made on 14th February 2006 whereby Mr. K. Hodge became registered as proprietor with absolute title to Parcel 232 and that Mr. Webster being registered as the sole proprietor with absolute title thereto; damages for fraud and/or mistake as it relates to the registration of Mr. K. Hodge as proprietor of Parcel 232. In the alternative, Mr. Webster claims a Declaration that he has the equitable right to the use of Parcel 232 to gain access to Parcel 236; a Declaration that Mr. K. Hodge is estopped from denying him access over Parcel 232; damages for the wrongful obstruction and/or interference with his access over Parcel 232.
- [2] The defendants have counterclaimed and seek the following relief, namely: damages for trespass to land including aggravated damages; exemplary damages for trespass; and, a Declaration that the oral license granted to the claimant has been revoked.

Introduction

- [3] Mr. V. Hodge and Mrs. Hodge are husband and wife and are both Attorneys-at-Law. Mr. K. Hodge is the son of Mr. V. Hodge and Mrs. Hodge. Mr. Webster claims to be a close friend and client of Mr. V. Hodge. Mr. V. Hodge accepts that he and Mr. Webster are close personal friends but denies that at the material time they shared an attorney-client relationship.

- [4] Mr. K. Hodge is the registered proprietor of Parcel 232. Mr. Webster is the registered proprietor of Parcel 236. Parcels 232 and 236 are adjoining lots and share a common boundary. Parcel 232 is vacant, while Mr. Webster operates a gas station on Parcel 236. Parcels 232 and 236 originally formed Parcel 29 and are subdivisions of Parcel 29.
- [5] Both Mr. K Hodge and Mr. Webster acquired title to Parcel 29 as proprietors in common on or about the year 2006. Parcel 29 formed part of the estate of William Joseph Alfred aka William Joseph Niles ('Mr. Niles'). Mr. Webster's wife, Mrs. Adelaide Webster (now deceased) held a Power of Attorney for Mr. Jose Manuel Alfred Riley ('Mr. Riley'), the beneficiary of the estate of Mr. Niles (deceased).
- [6] Parcel 29 was subsequently partitioned into four separate parcels as appears by Plan of Survey. The partition was effected by way of a partition form that was duly registered at the Land Registry whereby Mr. K. Hodge became registered as proprietor with absolute title to Parcel 232.
- [7] On or about 2017 a dispute arose between the parties over Mr. Webster's entitlement to the use of an access over the eastern boundary of Parcel 232 that accommodated vehicular access to Parcel 236.
- [8] Mr. Webster applied to the court for an interim injunction (the 'Injunction Order'). The Injunction Order was granted by the Court on 13th April 2018.

Mr. Webster's Claim

- [9] Mr. Webster claims that Mr. K. Hodge became the registered proprietor of Parcel 232 by fraud. Mr. Webster alleges that there was no agreement between Mr. V. Hodge and Mrs. Webster wherein Mrs. Hodge agreed to transfer a ¼ share of Parcel 29 to Mr. V. Hodge.

- [10] Mr. Webster also alleges that Mr. V. Hodge never paid his wife any money amounting to $\frac{1}{4}$ of the purchase price of Parcel 29 whereby he and Mr. V. Hodge would have become proprietors in common upon the transfer of Parcel 29.
- [11] Mr. Webster also alleges that he had solely agreed to purchase the entire Parcel 29 from Mrs. Webster and that he paid the full purchase price for Parcel 29. In addition, Mr. Webster says that the partition of Parcel 29 was also obtained by fraud.
- [12] According to Mr. Webster, he and his wife signed the Transfer Form for Parcel 29 in the presence of Mr. V. Hodge in his capacity as an attorney-at-law and a Notary Public, a fact which Mr. V. Hodge and Mr. K. Hodge both deny. Mr. Webster also alleges that Mr. K. Hodge's signature was affixed to the Transfer Form after he and his wife had signed the same in Mr. V. Hodge's presence.
- [13] Mr. Webster also alleges that the transfer of a $\frac{1}{4}$ share in Parcel 29 to Mr. K. Hodge, in any event, is void since at the time of the alleged agreement for sale and the purported transfer of Parcel 29 Mr. K. Hodge was 17 years old and therefore did not have the capacity to enter into a binding contract or to hold land in his own right.
- [14] In relation to the right of way over Parcel 232, Mr. Webster alleges that the said license to pass over Parcel 29 granted to him by Mr. K. Hodge was never revoked and that Mr. K. Hodge is estopped by his conduct from denying him access over Parcel 29. In the premises, he says that he is entitled to damages resulting from the defendant's actions, which he says are unlawful, and interrupted his right to access Parcel 236 over Parcel 232.

The Hodge's Defence and Counterclaim

- [15] In their defence, Mr. V. Hodge alleges that he agreed to purchase from Mrs. Webster a portion of Parcel 29 equivalent to $\frac{1}{4}$ of the purchase price of Parcel 29. Mr. V. Hodge claims to have paid the purchase price by paying Mrs. Webster various sums of money totaling US\$70,000.00.
- [16] The defendants also contend that the access or right of way granted to Mr. Webster over Parcel 232 was only in respect of the gas station pumps and did not confer the right to use the remainder or any part of Parcel 232.
- [17] The defendants in their counterclaim contend that Mr. Webster has committed certain acts of trespass on Parcel 232.

Issues

- [18] The following issues arise for determination in the present case:
- (a) Whether there was an agreement for sale between Mr. V. Hodge and Mrs. Webster for the purchase by Mr. V. Hodge for the sale by Mrs. Hodge for a share of Parcel 29.
 - (b) Whether the registration of Mr. K. Hodge as proprietor with absolute title to a $\frac{1}{4}$ share in Parcel 29 was obtained by fraud or mistake.
 - (c) Whether the partition of Parcel 29 that resulted in the registration of Mr. K. Hodge as proprietor with absolute title of Parcel 232 was obtained by fraud or mistake.
 - (d) Whether Mr. Webster is entitled to have the Land Register for Parcel 232 rectified.
 - (e) Whether Mr. K. Hodge granted a license or right of way to Mr. Webster over Parcel 232 for the purpose of gaining access to Parcel 236 owned by Mr. Webster.

- (f) If (e) is decided in the affirmative, whether Mr. K. Hodge is entitled to terminate and did terminate the license granted to Mr. Webster over Parcel 232.
- (g) Whether Mr. K. Hodge, either by words or conduct, is estopped from denying Mr. Webster, his servants, agents and customers access over Parcel 232 for the purpose of ingress and egress over Parcel 236 that comprised the Commercial Centre and Gas Station.

[19] Mr. Webster has relied on several grounds in support of his claim for rectification. Ultimately, the question to be decided is, whether any of the matters relied on by Mr. Webster amount to fraud or mistake that can provide grounds for rectifying the register pursuant to section 146 of the Registered Land Act. The court will deal with each ground seriatim.

Agreement for Sale

[20] The court will first consider the question of whether there was indeed an agreement between Mr. V. Hodge and Mrs. Webster for the purchase of a portion of Parcel 29; and by implication, whether Mr. V. Hodge had in fact paid the consideration expressly agreed to or alleged.

[21] Mr. Webster avers that sometime during the year 2005 he agreed to purchase from Mrs. Webster a parcel of land comprising 2 acres for the sum of US\$320,000.00.

[22] On the other hand, Mr. V. Hodge alleges that prior to the completion of the sale of Parcel 29 Mrs. Webster invited him to purchase a ½ acre or a ¼ share of Parcel 29 as proprietor in common in consideration of the sum of US\$70,000.00 to which he agreed.

- [23] Mr. Webster denies that Mrs. Webster had any agreement with Mr. V. Hodge for the sale of a portion of Parcel 29. Mr. Webster also denies that Mr. V. Hodge made any payments as a contribution towards the purchase price. Unfortunately, Mrs. Webster has passed away and the court does not have the benefit of her evidence on this point.
- [24] At the trial, Mr. Webster testified that he purchased Parcel 29 from the estate which Mrs. Webster represented and that he purchased the property for US\$300,000.00. The beneficiary of this estate he said was a gentleman named Jose Manuel Alfred Riley ¹. He denied that Mr. V. Hodge paid Mr. Riley the sum of US\$70,000.00 towards the purchase price of Parcel 29. He also denied that his wife obtained the sum of US\$5,000.00 from Mr. V. Hodge to meet certain expenses incurred by Mr. Riley in 2005.² The court understood this to mean prior to the sale of Parcel 232.
- [25] Mr. Webster in his oral testimony disagreed that if Mr. V. Hodge paid the sum of US\$35,000.00 to Mr. Riley that would have meant that he contributed to the purchase price of Parcel 232. Mr. Webster insisted that Mr. V. Hodge never paid Mr. Riley because Mr. V. Hodge never knew Mr. Riley. He said that Mr. Riley never visited Anguilla and that he had a representative in the person of Mr. Olise Ramos ('Mr. Ramos')³.
- [26] In cross-examination, Mr. Webster was referred to the remittance advice for the purchase of a bank draft by Mr. V. Hodge on 23rd December 2005 from First Caribbean International Bank (Barbados) Limited ('FCIBBL') in the sum of US\$35,015.00 made payable to Jose M A Riley (the 'Bank Draft')⁴. He denied that this sum was paid by Mr. V. Hodge to Mr. Riley as payment of the balance of the purchase price for the ¼ share in Parcel 29. In fact, Mr. Webster demanded to see

¹ At page 26 Transcript – Part 1B – 3rd April 2019

² At page 27 Transcript – Part 1B – 3rd April 2019

³ At page 28 Transcript – Part 1B – 3rd April 2019

⁴ At pages 29 – 38 Transcript – Part 1B – 3rd April 2019

the actual bank draft and insisted that he be presented with a receipt for the payment of that sum⁵.

[27] In cross-examination Mr. Webster's attention was directed to a letter dated 25th February 2019 from FCIBBL⁶. This letter confirmed the purchase of the draft by Mr. V. Hodge in the sum of US\$35,000.00 payable to Jose Manuel Alfred Riley dated 23rd December 2005. The letter indicated that the records of FCIBBL showed that the Bank Draft was no longer outstanding in the bank's books, which meant that it would have been honoured.

[28] In cross-examination Mr. Webster's attention was also drawn to Mr. V. Hodge's affidavit filed 14th December 2018⁷. Mr. Webster also denied the payment of US\$30,000.00 by Mr. V. Hodge to Mrs. Webster as a contribution towards the purchase price of a share in Parcel 29. He also denied that Mr. V. Hodge had paid to Mrs. Webster the US equivalent of EC\$10,750.00 in cash which represented a contribution towards the stamp duty payable on the transfer of Parcel 29 that amounted to the sum of EC\$40,323.00.

[29] He also denied that Mr. V. Hodge paid Mrs. Webster the sum of US\$5,000.00 cash advanced for the use and benefit of the beneficiary to Mr. Riley's estate. Mr. Webster also denied that Mr. V. Hodge paid Mrs. Webster the sum of EC\$34,000.00 as the final payment towards his share in Parcel 29. Mr. Webster also denied that Mrs. Webster had issued receipts to Mr. V. Hodge in respect of these sums and that the receipts had been destroyed.⁸

[30] Mr. Webster was asked in cross-examination whether he was capable of producing proof of the payment of the sum of US\$300,000.00 to Mr. Ramos as the full purchase price for Parcel 29. Mr. Webster testified that he did not pay the

⁵ At page 39 Transcript – Part 1B

⁶ Supplemental Trial Bundle No. 2

⁷ At page 134 of Trial Bundle 1 -

⁸ At page 38 – 44 Transcript Part 1B

purchase price to Mr. Ramos in one lump sum but that he paid it by installments by way of cashier's cheques drawn from his account with Caribbean Commercial Bank. He stated that he had sold another property in Shoal Bay and he used the proceeds of that sale to purchase Parcel 29. However, there was no evidence presented to substantiate this. He said that some cheques were made payable to Mr. Riley and others to Mr. Ramos. According to Mr. Webster, he never met Mr. Riley and that all his dealings concerning the purchase of Parcel 29 were with Mr. Ramos.

[31] However, it appears that quite apart from producing bank statements showing withdrawals of various sums from his bank account, Mr. Webster was unable to produce any evidence of direct payments to either Mr. Riley or Mr. Ramos totaling the actual purchase price of Parcel 29.⁹

[32] Mr. Odalis Ramos ('Mr. Ramos'), a lawyer from Santo Domingo, and representative of the estate of Mr. Riley also testified at the trial. Mrs. Webster had held a Power of Attorney for Mr. Riley. He testified that he got to know Mr. V. Hodge in 2005. He agreed that the purchase price for Parcel 29 was in the sum of US\$320,000.00. He said that this was set out in a written agreement. Mr. Ramos testified that he received several cheques for the payment of the purchase price for Parcel 29 and that those cheques were in the name of William Joseph Alfred who was the owner of Parcel 29. He said that some of the cheques were made out in his name. He said that the cheques were delivered to him by Mrs. Webster. This witness denies that he received any cheques from Mr. V. Hodge. However, Mr. Ramos stated that once he received the cheques he delivered them to Mr. Riley.

[33] Mr. V. Hodge, testified at the trial. Mr. V. Hodge has practiced as an attorney-at-law since November 1982. Mr. V. Hodge was cross-examined in relation to the payment of US\$35,000.00. Mr. V. Hodge insisted that he paid the

⁹ At pages 44 – 47 Transcript Part 1B

sum of US\$35,000.00 to Mrs. Webster by way of bank draft in the presence of Mr. Webster.

- [34] In cross-examination, Mr. V. Hodge testified that he entered into an agreement with Mrs. Webster for the transfer to him of a $\frac{1}{4}$ share of Parcel 29. This agreement, he said, was entered into on or about the month of November 2005. With respect to this agreement, Mr. V. Hodge testified as to the circumstances surrounding the agreement for the sale. In a nutshell he says that Mrs. Webster made him an offer which at first he was reluctant to accept. However, according to him, Mrs. Webster was persistent and she gave him a good price of US\$70,000.00 which he accepted. Mr. V. Hodge said that there was nothing written on paper.
- [35] Mr. V. Hodge was cross-examined in relation to certain cash payments that he allegedly paid to Mrs. Webster totaling US\$35,000.00 in cash¹⁰. He gave an account of how he obtained this sum. According to Mr. V. Hodge, the cash payment along with the draft in the sum of US\$35,000.00 and another cash payment of US\$5,000.00 completed the payment of the purchase price for a share in Parcel 29.
- [36] Mr. V. Hodge further testified under cross-examination that Mrs. Webster gave him three receipts for the separate payments on the same day that he paid her the sum of \$35,000.00 in cash. According to Mr. V. Hodge the transaction involving the payment of cash and the giving of receipts by Mrs. Webster occurred after the transfer form for Parcel 29 had been executed which was on 29th December 2005. He said that the Transfer Form had been executed on 27th December 2005. Mr. V. Hodge's evidence was that it was sometime in January 2006 that he handed Mrs. Webster the sum of US\$10,000.00 representing his portion of the Stamp Duty consequent on the transfer. He also attested to having been given a receipt for the payment of this sum. Here Mr. V. Hodge appears to be correcting himself with respect to the date when he received the receipts from Mrs. Webster.

¹⁰ At paragraph 37 Affidavit of V. Hodge; pages 316 et seq. Transcript Part 1C

- [37] Evidence related to the issue of whether there was in fact an agreement for the sale in respect of a $\frac{1}{4}$ share in Parcel 29 came from the witness Mr. Kensington Richardson ('Mr. Richardson'). This witness gave evidence confirming that he heard Mrs. Webster offer to sell to Mr. V. Hodge a $\frac{1}{2}$ acre of Parcel 29. According to Mr. Richardson, that conversation took place in Mr. Hodge's office sometime in the month of December 2005.
- [38] Mr. Glenford Smith ('Mr. Smith') gave evidence with respect to the payment made by Mr. V. Hodge in the sum of \$35,000.00 by way of bank draft made payable to Mr. Riley. Mr. Smith is employed as the Director for the Northern Caribbean islands and country manager for Antigua with FCIBBL. He testified that FCIBBL would not be in possession of a hard copy of the bank draft because the bank issues thousands of documents and that they do not keep records beyond the stipulated time period which is six years.
- [39] Mr. Smith also testified that based on a review of the computerised records of the bank, the draft would have been honoured. He also explained the process by which bank drafts are cleared in the banking system. A search of the bank's records revealed that the cheque was issued on 23rd December 2005. According to Mr. Smith when the cheque is issued an entry is created in the bank accounting records and it remains there until the item is negotiated. Hence, when the bank's accounting records were checked in 2019, that item was no longer on the record which meant that it had been negotiated prior to that date.
- [40] This witness went on to testify that he made a request for archived information going back closer to the date when the cheque was issued. Based on the records extracted from this archive, it appeared that the cheque was negotiated during the week of 26th December 2005. Although the archived records are maintained for a period of six years, there are times when the electronic information is retained for longer periods because there is the capacity to store it. He said that he had personally verified the records.

- [41] Mr. Smith was cross-examined. He testified that he was requested to provide information concerning the issuance of a bank draft in the amount of US\$35,000.00 and if possible to provide a copy of the draft. Mr. Smith testified that the bank's ledger balance report indicated who received the proceeds of the draft. The draft was made out to Jose M. A. Riley. On the question of who actually cashed the draft, he testified that in order to verify this one would have to see the actual copy of the draft, which was not available.
- [42] He was asked by Mr. Forde, QC in cross-examination, whether it was part of his remit to ascertain whether the sum of US\$35,000.00 had been redeposited into Mr. V. Hodge's account after the draft had been negotiated. Mr. Smith testified that his remit did not include conducting a forensic audit of the account of the person purchasing the draft. He was asked whether he was able to ascertain the location where the draft was negotiated. He testified that the bank's records would not show the location where the draft was negotiated.
- [43] In response to a question, put to him in re-examination, Mr. Smith testified that the person who is entitled to negotiate the bank draft once issued would be the payee; and if the collecting bank chooses to deal with the item to the benefit of a third party they would be doing so at their own peril.
- [44] Having heard the evidence in relation to the issue of whether there was in fact an agreement for the transfer of a $\frac{1}{4}$ share in Parcel 29 made between Mrs. Webster and Mr. V. Hodge, and/or Mr. K. Hodge, the court is of the considered view that the question of whether there was in fact an agreement or contract for the transfer of a portion of Parcel 29 does not arise. This is simply because under a registered system of conveyancing there need not necessarily be in existence an agreement or contract for the sale of land where the purchase price or consideration for the sale is paid up in full prior to or at the time when the transfer is executed or completed.

- [45] The only way this issue can be of significance in resolving the real issues in dispute between the parties is in relation to the stipulated price for the transfer of the ¼ share in Parcel 29 and whether the consideration was in fact paid by or on behalf of the transferee. The present case does not seem to involve issues related to the rights, duties and obligations of either of the parties under an agreement for sale where a stipulation or the terms of that agreement are in dispute. Therefore, there can be no question in relation to the validity of an agreement or contract for the sale of land upon which the court is called upon to decide.
- [46] The real issue, from which the court ought not to be distracted, is whether in fact Mr. V. Hodge paid the consideration for the transfer of the ¼ share in Parcel 29 to his son Mr. K. Hodge. This issue is intimately connected to the resolution of the issue of whether the registration of Mr. K. Hodge as proprietor of Parcel 29 in common with Mr. Webster was obtained by fraud or mistake warranting a rectification of the land register.
- [47] In the circumstances, the court will consider only the question of whether there was a total failure of consideration on the transfer of a ¼ share in Parcel 29 by Mr. V. Hodge.
- [48] The claimant's arguments in relation to this issue may be summarised in the following manner. Mr. Forde QC submitted that the court ought not to accept the testimony of Mr. V. Hodge that he paid Mrs. Webster at various times the sums of US\$5,000.00 in cash, US\$30,000.00 in cash and US\$35,000.00 by way of banker's draft made out to Mr. Jose Riley as payee. According to Mr. Forde QC, Mr. V. Hodge has failed to produce any receipts for these payments; and, that the court should disregard in its entirety Mr. V. Hodge's explanation for the plight and destination of the receipts evidencing the several payments to Mrs. Webster.

- [49] In relation to the FCIBBL Bank Draft (the 'Draft') in the sum of US\$35,000.00, Mr. Forde, QC implored the court to discount in its entirety the notion that this evidence can stand as proof of payment. The court understands the basis of Mr. Forde, QC's argument to be that neither has any evidence been presented nor can it be inferred from the evidence that the Draft had been received by Mr. Riley, Mrs. Webster or Mr. Ramos. Furthermore, he submitted that the circumstances surrounding the purchase of the Draft with Mr. Riley as payee is inexplicable given the absence of any evidence that either Mrs. Webster or Mr. Riley requested that the Bank Draft be issued to Mr. Riley.
- [50] Mr. Forde, QC made the point that no evidence has been presented to prove that the Bank Draft had been negotiated by Mr. Riley. He argued that any finding that the Bank Draft had been received and negotiated by Mr. Riley would only be based on speculation and circumstantial evidence. He submitted that any circumstantial evidence relied on in relation to the receipt and negotiation of the Bank Draft by Mr. Riley ought to point invariably to that single conclusion.
- [51] On the forgoing premises, Mr. Forde, QC contended that the circumstantial evidence fails to accomplish the desired objective because (1) there was no proof that Mr. Riley received the Bank Draft, (2) there is no proof that Mr. Riley negotiated the Bank Draft. Mr. Forde, QC contended that the evidence of Mr. Glenford Smith is inconclusive with respect to the identity of the person who cashed the Bank Draft.
- [52] In addition, Mr. Forde, QC referred to paragraph 37 of Mr. V. Hodge's affidavit where he sets out the circumstances surrounding the payment of US\$30,000.00 in cash to Mrs. Webster. Mr. Forde, QC argued that this alleged payment was made subsequent to the execution of the transfer form. The court understands Mr. Forde, QC to be saying that this also substantiates Mr. Webster's assertion that there was no consideration for the alleged transfer of a ¼ share in Parcel 29 to Mr. V. Hodge or Mr. K. Hodge.

- [53] On the other hand, Mr. Carrington, QC appearing for the defendants contended that if there was a failure of consideration as alleged by Mr. Webster, then, this would have amounted to a debt which the estate of Mr. William Joseph Niles would have been entitled to recover.
- [54] Mr. Carrington argued that furthermore, if Mr. Webster had paid for Mr. K. Hodge's share of Parcel 39 he may very well have a claim in restitution for the debt paid on Mr. K. Hodge's behalf.
- [55] In addition, Mr. Carrington, QC quite rightly argued, that an alleged total failure of consideration does not give rise to a claim for rectification of the Land Register on the grounds of fraud or mistake pursuant to section 146 of the Registered Land Act.
- [56] According to Mr. Carrington, QC, Mr. Webster has failed to prove that he had paid the full amount of the purchase price. He argued that Mr. Webster had relied exclusively on undated documents which he held out as being receipts for payments made out to Mrs. Webster for the purchase of Parcel 29.
- [57] Mr. Carrington, QC says that the alleged receipt relied on by Mr. Webster in support of his claim was made out in the sum of US\$320,000.00 whereas the purchase price stated on the transfer form was US\$300,000.00. Furthermore, he submitted that Mr. Webster failed to present any proof of payment or payments to Mrs. Webster or the estate of Mr. William Joseph Niles.
- [58] In relation to the testimony of Mr. Glenford Smith, Mr. Carrington, QC argued that the evidence was not challenged and was not contradicted in any respect by the affidavit of Ms. Stacey Bernier-Richardson which was admitted into evidence at the trial by consent.

- [59] Mr. Carrington, QC also relied on the testimony of Dr. Ramos in cross-examination, where he testified to having received a cheque from what he recalled and described as a “Caribbean Bank or something like that” to support the argument that it was more than mere coincidence that Dr. Ramos would have recalled details similar to what was contained on the Bank Draft purchased by Mr. V. Hodge.
- [60] In his submissions Mr. Carrington, QC made the point that Mr. V. Hodge’s account of the plight and destination of the receipts that he received from Mrs. Webster was, to a large extent, corroborated by Mr. Webster’s testimony in cross-examination.
- [61] Therefore, in light of his submissions, Mr. Carrington, QC concluded that Mr. Webster had failed to establish a total failure of consideration on a balance of probabilities or to the requisite standard of proof.
- [62] Based on the evidence presented, the court is constrained to find that Mr. V. Hodge did in fact pay the purchase price for a $\frac{1}{4}$ share in Parcel 29. The court also finds, that Mr. Webster has failed to establish his case that Mr. V. Hodge had failed to pay any consideration for the transfer of a $\frac{1}{4}$ share in Parcel 29 to the requisite standard of proof. The court is in agreement with Mr. Carrington, QC that, in any event, the allegation of a total failure of consideration would not amount to any ground for the rectification of the Land Register for Parcel 232.

Rectification

- [63] Mr. Webster seeks to impugn the transfer of a $\frac{1}{4}$ share in Parcel 29 in several respects. First, he alleges that the registration of Mr. K. Hodge as proprietor in common with a $\frac{1}{4}$ share was obtained by fraud and/or mistake. Second, he challenges Mr. K. Hodge’s capacity to contract or to hold title to land because of his age. Third, he contradicts Mr. V. Hodge’s assertion that he paid both

Mrs. Webster and Mr. Ramos a contribution equivalent to $\frac{1}{4}$ share of the purchase price of Parcel 29. In addition, Mr. Webster denies the existence of any agreement, either between himself and Mr. V. Hodge or between Mr. V. Hodge and Mrs. Webster.

- [64] The court is of the view, that if Mr. Webster succeeds in vitiating the transfer to Mr. K. Hodge then obviously there will be no need to consider any question related to the partition of Parcel 29. Therefore, the court will consider the question of whether there was fraud or mistake in the registration of the transfer of Parcel 29.

Fraud

- [65] Mr. Webster avers, that sometime during the year 2005 Mr. V Hodge agreed to purchase from his wife, Mrs. Webster, a parcel of land comprising two (2) acres (Parcel 29), at the purchase price of \$320,000.00. According to Mr. Webster, having paid the purchase price in full, he and Mrs. Webster attended Mr. V. Hodge's Law Office where they both signed the transfer form to complete the sale. Mr. Webster insists that he delivered the transfer form to Mr. V. Hodge for registration and thereafter for safe keeping. Mr. Webster's assertions are intended to raise the presumption that during the time between execution of the transfer form and depositing the same with Mr. V. Hodge for registration, that the signature of Mr. K. Hodge was affixed to the transfer form without his knowledge and consent. A fact which he alleges amounts to fraudulent conduct on the part of Mr. V. Hodge.
- [66] According to Mr. Webster, at the time that he executed the transfer form he was the only person named as transferee therein. He says that his name was typewritten in capital letters which he says he did not type himself. He further claims that at the time he executed the transfer form, it contained no certification by Mr. V. Hodge. It appears that this was meant to convey that Mr. Hodge's certification of Mr. Webster having executed the transfer form was not performed

by Mr. V. Hodge in Mr. Webster's presence after Mr. Webster had executed the transfer form.

[67] Mr. Webster also asserts that on or about the month of February 2006, with the assistance of Mr. V. Hodge, he applied to the Registrar of Lands for the subdivision and partition of Parcel 29. He says in support of his claim that at the time when he signed the application for subdivision and partition of Parcel 29 only his name appeared on the application form. Mr. Webster alleges that when he executed the application form for subdivision and partition it contained no certification by Mr. V. Hodge.

[68] Mr. Webster alleges that it was only after the execution and delivery of the Transfer Form to Mr. V. Hodge and after he had executed the partition application, which was about December 2007, that he discovered that Mr. K. Hodge's name had been inserted on the transfer form and that Mr. K. Hodge had been registered as proprietor of Parcel 232 by what he alleges to be fraud and/or mistake.

[69] In the circumstances, Mr. Webster contends that the registration of Mr. K. Hodge as proprietor in common with respect to a $\frac{1}{4}$ share in Parcel 29 and the subsequent registration of Mr. K. Hodge as proprietor of Parcel 232 on account of the partition were obtained by fraud and/or mistake.

[70] To support his allegation of fraud, and/or mistake in the registration of Mr. K. Hodge as proprietor in common with a $\frac{1}{4}$ share in Parcel 29 and his subsequent registration as proprietor of Parcel 232, Mr. Webster relies on the following facts, which he considers to be relevant. Firstly, he contends that neither Mr. V. Hodge nor Mr. K. Hodge provided any consideration for the transfer of a $\frac{1}{4}$ share in Parcel 29 to either of them.

- [71] Secondly, Mr. Webster says that the transfer form discloses that it was signed by him, Mrs. Webster and Mr. K. Hodge on 28th December 2005 whereas, on the contrary, Mr. Webster contends that he appeared before Mr. V. Hodge on 27th December 2005 when Mr. V. Hodge acknowledged his signature thereon.
- [72] Thirdly, Mr. Webster contends that when he executed the transfer form only his name appeared as transferee on the document and only his signature was affixed thereto.
- [73] Mr. Webster also alleges that the transfer form also contained a certification by Mr. V. Hodge that Mrs. Webster appeared before him on 27th December 2005 when in fact he and Mrs. Webster appeared before Mr. V. Hodge on 28th December 2005.
- [74] Essentially, Mr. Webster alleges that after he and his wife had signed the transfer form, he left it in Mr. V. Hodge's custody for the purpose of having the transfer form registered at the Land Registry. At this time, Mr. K. Hodge's name did not appear on the Land Register and could only have been inserted without his knowledge after he had executed the transfer form. Therefore, he says this amounted to fraud on Mr. V. Hodge's part. This version clearly implies that Mr. Webster must have left the funds necessary for the payment of the Stamp Duty with Mr. V. Hodge.
- [75] Contrary to Mr. Webster's version of events surrounding the execution and subsequent registration of the transfer form, Mr. V. Hodge contends that the transfer form with respect to the conveyance of Parcel 29 was prepared by persons unknown to him and was executed by Mrs. Webster in her capacity as personal legal representative to the estate of Mr. William J. Alfred, as transferor, by Mr. Webster and Mr. K. Hodge as transferees and proprietors in common in the presence of each other and himself.¹¹ This transaction, Mr. Hodge says, occurred

¹¹ Paragraph 5 amended defence

on 28th December 2005 at the Land Registry. In fact, Mr. V. Hodge insisted that the transfer form was notarised by him at the Land Registry.

- [76] In a nutshell, Mr. V. Hodge contends that save for clerical error or accidental slip in the verification of the transfer form, particularly as it relates to the date on which the transfer form was executed by the parties, he denies that there was any fraud or mistake in the execution of the transfer form or the registration process.
- [77] To buttress this point, Mr. V. Hodge appears to have relied on the following factual contentions. Firstly, that he never signed the transfer form in his capacity as Notary Public for any of the parties after Mrs. Webster and Mr. Webster had affixed their respective signatures thereto; and at no time did he act in the capacity as attorney-at-law for Mr. Webster or Mrs. Webster.
- [78] Secondly, both the transfer form and the Application for Partition were prepared by Mr. Webster and lodged at the Land Registry by Mr. Webster.
- [79] Thirdly, Mr. Webster was well aware of the transfer of a $\frac{1}{4}$ share in Parcel 29, he having received from Mr. K. Hodge the sum of US\$4,000.00 which was equivalent to the contribution of a $\frac{1}{4}$ share of the Stamp Duty payable on the conveyance of Parcel 29.
- [80] Fourthly, Mr. Webster must have been aware of the transfer of $\frac{1}{4}$ share in Parcel 29 to Mr. K. Hodge, since he had retained Mr. John Rogers ('Mr. Rogers') a Licensed Land Surveyor to execute the survey that resulted in the subdivision of Parcel 29.
- [81] Fifthly, the defendants Mr. V. Hodge and Mr. K. Hodge, appear to be relying on their uninterrupted and undisturbed use and occupation of Parcel 232 for a significant number of years and the exercise of rights of ownership thereon without any interruption from Mr. Webster subsequent to the conveyance and partition of Parcel 29. In fact, they rely on the circumstances related to the right of way over

Parcel 232 given to Mr. Webster. They also rely on their exercise of rights of ownership over Parcel 232, which they say was never challenged by Mr. Webster until the dispute over Mr. Webster's use of the right of way over Parcel 232. In addition, they rely on averments made by Mr. Webster to Delta Petroleum (Anguilla) Limited ('Delta') concerning the right of way over Parcel 232.

[82] All of the above-mentioned matters, they say, is substantive proof capable of dispelling Mr. Webster's assertions that title to Parcel 232 was acquired by Mr. K. Hodge by fraud, mistake or otherwise.

[83] Each party involved in the execution of the transfer form, with the exception of Mrs. Webster, gave their version of the series of events that were attendant upon the signing of the transfer form.

[84] Mr. V. Hodge testified that when he made the certification on the transfer form his son was present. He said that the transfer form was certified by him on 27th December 2005. He gave his account for the discrepancies in the dates appearing on the transfer form. Mr. V. Hodge testified that he certified Mr. Webster's signature on 27th December 2005 and attributed the other date stated on the form to the inelegance of his handwriting.

[85] Mr. V. Hodge denied falsifying the date on the transfer form and explained that the date appearing therein, that is, 28th December 2005, which incidentally was typewritten, was the date on which it was intended that the document would have been executed. He explained that due to Mr. Webster being in a hurry the form was executed on 27th December 2005 instead.

[86] Mr. K. Hodge also testified about the execution of the transfer form. According to him, he saw his father sign the transfer form. He said that he did not see his father insert the other information on the form. In his testimony, he also said that Mr. Webster had the document prepared and he brought it to Mr. V. Hodge's office. He testified that he, Mr. Webster and Mrs. Webster all met at Mr. V. Hodge's office

together. It was intended that the document would have been executed there but there were some discrepancies. He said that his father did not know how to deal with the division of the shares on the transfer of the property in joint ownership.

[87] According to Mr. K. Hodge, Mr. Webster had brought the form to the office already prepared. There were no signatories on the form when Mr. Webster brought it to the office. At that time no shares were stated on the form. The shares, he said, were inserted at the Lands and Surveys Department by one of the employees there. He said he went to the Lands and Surveys Department along with Mr. Webster and Mrs. Webster. The reason for going there was to execute the transfer form. Mr. Webster signed the transfer form after the respective shares had been inserted.

[88] It appears that Mr. Webster's claim that title to Parcel 232 was acquired by fraud is premised on the following assertions that can be distilled from the pleadings and Mr. Webster's testimony at the trial. Firstly, that there was no agreement between Mr. V. Hodge and Mrs. Webster for the transfer by Mrs. Webster to either Mr. V. Hodge or Mr. K. Hodge of a $\frac{1}{4}$ share in Parcel 29. Secondly, that Mr. V. Hodge never paid the consideration for the transfer of a portion of Parcel 29 to either himself or his son. Thirdly, that the transfer of a $\frac{1}{4}$ share in Parcel 29 to Mr. K. Hodge was done without the consent of either himself or Mrs. Webster. Fourthly, that Mr. V. Hodge, in whose custody he had deposited the Transfer Form for registration and safe keeping, had, without his knowledge and consent, inserted Mr. K. Hodge's name as transferee with $\frac{1}{4}$ share in Parcel 29 on the Transfer Form. Fifthly, that Mr. V. Hodge had used his position as his and Mrs. Webster attorney-at-law, to effect the unauthorised insertion of his son's name on the transfer form and therefore, Mr. V. Hodge had acted in breach of his duty of care, trust and confidence reposed in him as their attorney-at-law.

- [89] The issues arising from the evidence in relation to Mr. Webster's assertion of fraud are (1) whether any of the aforementioned assertions had been established on the evidence presented at the trial; (2) if any of these assertions are established, whether they amounted to fraud for the purpose of section 146 of the Registered Land Act, entitling Mr. Webster to succeed on his claim for rectification of the Land Register for Parcel 232.
- [90] The resolution of these issues will depend on the credibility of the witnesses called to testify at the trial and the law as it relates to rectification under a system of registered conveyancing.
- [91] Mr. Forde, QC relies heavily on what he describes as the undoubted credibility of Mr. Webster and Mr. Ramos. He contends that the version of events related to the execution and registration of the transfer form given by Mr. V. Hodge and Mr. K. Hodge is incredible and thwarted by inconsistencies.
- [92] According to the claimant, the false certification of the transfer form was in essence a fraudulent act on the part of Mr. V. Hodge which entitled the claimant to rectification of the Land Register for Parcel 232 pursuant to section 146 of the Registered Land Act.
- [93] The claimant also submitted that Mr. V. Hodge was under a duty of care arising out of the attorney-client relationship that he shared with Mr. Webster and Mrs. Webster. It was also submitted that if this relationship is proven, then clearly Mr. V. Hodge had breached his fiduciary duty of care when he falsely certified the transfer form and according to the claimant, when he altered the transfer form by inserting Mr. K. Hodge's name thereon.

Mistake

- [94] It appears, that the mistake that the claimant relies on relates to the errors in the dates of execution and certification of the transfer form. The issue that arises is

whether this is the kind of mistake that is contemplated by section 146 of the Registered Land Act that is capable of triggering the court's jurisdiction to order the rectification of the Land Register with respect to Parcel 232. The court has formed the view that these matters cannot amount to mistake for the purposes of section 146 of the Registered Land Act. Mr. Webster has relied on the same matters in support of his allegation of fraud and mistake. The court will deal with the two issues touching and concerning fraud and mistake later on in this judgment.

Incapacity

- [95] It is not in dispute that at the time the transfer of Parcel 29 occurred Mr. K. Hodge was but 17 years old. In cross-examination Mr. K. Hodge testified that he entered into an agreement to purchase a part of Parcel 29. However, he qualified that statement by stating that his father had an agreement with Mrs. Webster on his behalf. He also testified that his father, Mr. V. Hodge, in purporting to enter into the agreement on his behalf, did not act pursuant to any power of attorney wherein Mr. V. Hodge was constituted attorney to act on his behalf.
- [96] Essentially, Mr. K. Hodge testified that Mr. V. Hodge acted as agent on his behalf in relation to the transfer. According to Mr. K. Hodge, he and Mr. V. Hodge purchased the property together and that Mr. V. Hodge paid the money on his behalf. It appears that this qualification was intended to convey what he meant by 'purchase it together'.
- [97] Mr. K. Hodge testified that, at the material time, his father, Mr. V. Hodge, was not acting in his capacity as a lawyer on his behalf but rather as his parent. He said that his father purchased the property for him or rather that his father purchased the property and put it in his name.

[98] Mr. Forde, QC appearing for Mr. Webster contended that, since at the time of the alleged agreement for sale, Mr. K. Hodge was 17 years old, as such he had no capacity to enter into an agreement. In support of this contention, he relies on the provisions of the Age of Majority Act¹² which sets out the age of majority as 18 years. Therefore, Mr. Forde, QC contends, that at the material time, Mr. K. Hodge lacked the capacity to contract and hence any agreement for the sale of a portion of Parcel 29 was null and void. He says, therefore, a party to such a contract can be invested with no rights and that any money paid thereunder is recoverable in a claim for quasi-contract. It appears that this aspect of the case was not featured in the defendants' submissions to the court.

[99] Section 117(1) of the Registered Land Act deals with the registration of a minor as proprietor to land and provides the short answer to Mr. Forde, QC's argument. The section provides:

“(1) For the avoidance of doubt, it is hereby declared that the name of a person under the age of 18 years may be entered in the register either on first registration or as a transferee or on transmission.”

[100] The court has examined this issue in relation to whether Mr. K. Hodge was legally entitled to become registered as proprietor under the Registered Land Act separate and apart from his capacity to contract. In the court's view, the latter consideration does not arise for discussion in the present case. The evidence does not lead inexorably to the conclusion that Mr. K. Hodge entered into an agreement for the sale of ¼ share in Parcel 29 to him. Therefore, the issue clearly does not arise.

[101] The provisions of section 117(1) of the Registered Land Act clearly answers the point raised by Mr. Forde, QC. Based on the statutory provision the registration of Mr. K. Hodge as proprietor of Parcel 29 in common with Mr. Webster did not render his proprietorship of a ¼ share of Parcel 29 null and void.

¹² R.S.A. c. A45

[102] In any event, the provisions of section 117 subsections (1) and (2) merely deal with the legal position once a minor has become registered as proprietor under the Registered Land Act. Section 117 subsections (2) and (3) of the Registered Land Act provide:

“(2) Nothing in this section enables any such person to deal with land or any interest in land by virtue of such registration, and, where to his knowledge a minor is registered, the Registrar shall enter a restriction accordingly.

(3) Where a disposition by a minor whose minority has not been disclosed to the Registrar has been registered, the disposition may not be set aside only on the grounds of minority.”

[103] It appears that none of the eventualities contemplated by the provisions of subsections (2) and (3) of section 117 of the Registered Land Act arise in the present case. Therefore, Mr. Mr. Forde, QC’s contentions with respect to Mr. K. Hodge’s minority is of no moment in deciding the present case. Consequently, the court will disregard Mr. Forde, QC’s representations with respect to this point in the context of the present case.

[104] Mr. Webster has also challenged the registration of Mr. K. Hodge as proprietor in common with Mr. Webster, on the basis that at the time that Mr. V. Hodge purported to act on Mr. K. Hodge’s behalf he held no power of attorney for Mr. K. Hodge. The question is really whether Mr. V. Hodge acted as agent for Mr. K. Hodge which would have required Mr. V. Hodge to be the donee of a power of attorney donated by Mr. K. Hodge pursuant to section 118 of the Registered Land Act. This issue clearly does not arise for consideration based on the evidence presented in the instant case. It does not appear from the evidence led at the trial, that Mr. V. Hodge executed any transfer or disposition of land on behalf of Mr. K. Hodge. Both the transfer form and the partition form were executed by Mr. K. Hodge.

Breach of Fiduciary Duty

- [105] This point was not specifically raised by Mr. Webster, it arises inferentially but not tangentially from the pleadings and the testimony given in the course of the trial. It appears that Mr. Webster has asserted throughout that at all material times Mr. V. Hodge acted as his attorney-at-law; a fact which Mr. V. Hodge denies. According to Mr. Hodge, he was only doing Mr. Webster a favour as a friend, and at no time did he act in his capacity as an attorney-at-law where the transfer of Parcel 29 was concerned.
- [106] In view of the issues raised, and based on the evidence presented at trial, it becomes necessary to examine the question of whether at the material time an attorney-client relationship existed between Mr. V. Hodge and Mr. Webster. It seems that Mr. Webster is alleging that Mr. V. Hodge breached his fiduciary obligation to him as his attorney and also Mr. Hodge had breached his obligations both as an attorney-at-law and a Notary Public. In the circumstances, it appears that, in light of the allegations made by Mr. Webster regarding Mr. V. Hodge's conduct in the conveyance of Parcel 29, that Mr. Webster considers that the transfer of a $\frac{1}{4}$ share to Mr. K. Hodge ought to be set aside.
- [107] If on the basis of the evidence presented at the trial, it can be said that Mr. V. Hodge acted or so conducted himself in relation to the conveyance in a manner otherwise in keeping with his obligations as a Notary Public and an Attorney-at-Law for Mr. Webster, it may very well be that the entire transaction may be set aside. Therefore, this seems to have arisen as a fallback position to the extent that in the event Mr. Webster does not succeed on the basis of fraud or mistake, that this allegation in relation to Mr. V. Hodge's professional conduct may very well serve to vitiate the entire sale of Parcel 29 of the transfer of $\frac{1}{4}$ share to Mr. K. Hodge. Nonetheless, the court thinks that it is important to understand the nature of the relationship between Mr. V. Hodge, Mr. Webster and Mrs. Webster in the context of the circumstances surrounding the transfer of Parcel 29 and the subsequent partition of the same.

- [108] A resolution of this issue will depend on the view which the court takes of the evidence touching and concerning the execution and subsequent registration of the transfer documents and the role that Mr. V. Hodge played therein.
- [109] Throughout these proceedings, Mr. V. Hodge has denied that he acted in his capacity as an attorney-at-law for Mr. Webster. Mr. V. Hodge also denies any of the undertakings which Mr. Webster alleges that he made in relation to the registration of the transfer form and the subsequent custody and safekeeping of the same.
- [110] Mr. V. Hodge testified at the trial, that after the year 1998 when he represented Mr. Webster in a litigious matter he never represented him again as his lawyer. Mr. V. Hodge's representation to this effect was qualified by him when he testified that he never represented him again "in respect of work under a retainer agreement".
- [111] Mr. V. Hodge was asked in cross-examination, whether he had held a retainer from Mrs. Webster. He answered cryptically that the retainer was with respect to present payment for future work. According to Mr. V. Hodge he was "always working for Mrs. Webster". He said that he did the probate matter and when she came into money she always told him that she would make him an offer. He said that there was no retainer agreement with Mrs. Webster "as such".
- [112] Mr. V. Hodge was questioned regarding the payment by Mrs. Webster in the sum of US\$10,000.00 to his law practice. Mr. V. Hodge stated in his affidavit evidence that Mrs. Webster gave his law practice the payment in recognition of past work and for future sales. In other words, the payment was made gratuitously. He explained that by future sales he was referring to future sales of land that Mrs. Webster was expected to come into at West End. Mr. V. Hodge made the solemn disavowal that the payment made by Mrs. Webster related to the transfer of Parcel 29. According to Mr. V. Hodge, he did not complete the sales at West

End. He also testified that he did not reimburse this money or invoice Mrs. Webster for it. In fact he testified that: "I did not send her a bill for the \$10,000.00. She gave it to me in recognition of all my assistance to her, her family and everybody else. She did not ask for reimbursement." By this, the court understands Mr. V. Hodge to be saying that the US\$10,000.00 was a gift from Mrs. Webster.

[113] Mr. V. Hodge testified, that after 1998 he always assisted Mr. Webster but did not act formerly as his attorney-at-law. Essentially, he said that it was gratuitous assistance. He denied that he was ever paid by Mr. Webster for his services. However, this fact seems qualified by his testimony that, according to him, Mr. Webster made a promise to him that if any of his projects did come to fruition he would have been paid for his assistance. None of the projects came to fruition. Mr. V. Hodge denied that this situation created a contractual relationship between himself and Mr. Webster.

[114] A substantial amount of the evidence in relation to this issue came from the testimony of other witnesses who were called to testify at the trial by the defendants. Having regard to the testimony of these witnesses, both in chief and in cross-examination, the court was able to draw the following inferences of fact.

[115] One of the court's primary findings of fact is, that Mr. Webster and Mr. V. Hodge shared a long existing friendship, a fact that Mr. Webster has readily accepted in his testimony at the trial. It appears from the evidence, that Mr. Webster spent a considerable amount of time at Mr. V. Hodge's law practice where he would frequently seek assistance with clerical work and benefit from gratuitous advice and services from Mr. Hodge related to his many business affairs.

[116] The court does not accept that Mr. V. Hodge owed any duty of care to Mr. Webster or Mrs. Webster for that matter. Furthermore, Mr. Webster has not adduced any evidence of undue influence as a ground for rescinding the transfer of a ¼ share

of Parcel 29 to Mr. K. Hodge. Mr. Webster has vaguely insinuated that Mr. V. Hodge might have used his position as his attorney-at-law, a fact that the court finds that Mr. Webster has failed to establish, to engineer the transfer of a ¼ share in Parcel 29 to Mr. K. Hodge. It is on this basis that he also seeks to establish fraud as a ground for rectification pursuant to section 146 of the Registered Land Act. However, it does not appear from the evidence presented by Mr. Webster at the trial that a claim for undue influence can be maintained. Neither can a claim for fraud succeed on this basis.

[117] It appears that Mr. Webster alleged, although somewhat tangentially, that Mr. V. Hodge in his capacity as his attorney-at-law owed him a duty of care, which he alleges that Mr. V. Hodge breached, in relation to the execution and certification of the Transfer Form. Although the court has already found that at the material time Mr. V. Hodge was not acting in his capacity as an attorney-at-law when Mr. Webster and his wife executed the transfer form, it would be prudent to examine the question of whether, what Mr. Webster alleges to be a mistake in the certification of the transfer form, amounted to a breach of any duty of care owed to Mr. Webster by Mr. V. Hodge; and further, by implication whether such mistake in the certification was sufficient to warrant rectification of the Land Register for Parcel 232.

[118] The court is satisfied by the evidence presented at the trial, that when Mr. V. Hodge certified the transfer form he was not acting in the capacity as attorney-at-law for either Mr. Webster or Mrs. Webster. Instead, Mr. V. Hodge was acting as a Commissioner of Oaths or a Notary Public when he certified the transfer form. The court is fortified in this view by the fact that, when Mr. V. Hodge certified the transfer form he clearly endorsed and stamped the same with his Commissioner of Oaths or Notary Royal seal. In other words, Mr. V. Hodge was

acting as a public officer pursuant to section 114 of the Registered Land Act and Rule 5 of the Registered Land Rules¹³.

- [119] Mr. Webster has not alleged anywhere in his claim that the Transfer Form was not executed by him. It appears that the allegation made by him refers to the variance between the date when the instrument was signed and the date when the certification was in fact made. It is also noteworthy that Mr. Webster relies on this aspect of the case to substantiate the allegation of fraud.

Execution and Verification

- [120] All Land Registry transfers are required to be signed and their execution must be verified by a public officer. The definition of a public officer is found in Rule 5 of the Registered Land Rules made under the Registered Land Act. Section 113 of the Registered Land Act reads:

“(1) Every instrument evidencing a disposition shall be executed by all persons shown by the register to be proprietors of the interest affected and by all other parties to the instrument, but the Registrar may dispense with execution by any particular party (other than the donee under a disposition by way of gift) where he considers that such execution is unnecessary

(2) Subject to section 126(2), an instrument is deemed to have been executed only—

(a) by a natural person, if signed by him;

- [121] In the present case, there is no dispute that the transfer form had been signed by Mrs. Webster as transferor, and Mr. Webster and Mr. K. Hodge as transferees. None of the parties have alleged that their execution of the Transfer Form was not their voluntary act and deed. Therefore, this is not a basis upon which fraud can

¹³ 5. (1) A judge, a magistrate, a justice of the peace, a commissioner for oaths, a notary public, a bank manager and an officer authorised under the Oaths Act are public officers for the purposes of section 114(1) of the Act.

..... and the Public Officer certifying as above shall write his name in block capitals below his signature and, if he has a seal or a stamp of office, affix an impression of it to the certificate.

be established. The difficulty in the present case, arises from the fact that it is not disputed that the certification was not done in the presence of all signatories, particularly Mr. Webster and Mrs. Webster, at the time that the transfer form was executed by them. The question that arises is, whether by virtue of the failure to certify the transfer form in the presence of all the signatories thereto, amounted to fraud that would necessitate the rectification of the Land Register pursuant to section 146 of the Registered Land Act.

[122] The answer lies in section 114 of the Registered Land Act which deals with the verification of documents and provides as follows:

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

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

(4) The Registrar may dispense with verification under this section—

(a) if he considers that it cannot be obtained or can be obtained or can be obtained only with difficulty and he is otherwise satisfied that the document has been properly executed; or

(b) in cases in which to his knowledge the document has been properly executed;

and shall record on the document his reasons for dispensing with the appearance of the parties.

[123] The question that arises is, whether there was compliance with section 114 of the Registered Land Act by Mr. V. Hodge; and if not, whether this would amount to grounds for rectification of the Land Register of the disputed land.

- [124] If the evidence of Mr. V. Hodge and Mr. K. Hodge surrounding the execution of the transfer form and certification of the same is accepted, then clearly there was no infringement of the provisions of section 114 of the Registered Land Act.
- [125] In the court's view, the fact that the instrument of transfer was certified in the absence of Mr. Webster and Mrs. Webster is inconsequential. What section 114 requires is that the public officer certifying the instrument is satisfied as to the identity of the persons executing the instrument and that they do so of their own free will and accord. There is no dispute that the parties were all well known to Mr. V. Hodge. Therefore, Mr. V. Hodge was not required to certify the transfer form in the presence of the parties. What was required was that they executed the same in the presence of Mr. V. Hodge.
- [126] Therefore, based on the evidence led at the trial regarding the execution of the transfer instrument, I find that the provisions of section 114 of the Registered Land Act had been complied with. For that reason,, this ground upon which Mr. Webster relies is incapable of amounting to fraud for the purposes of section 146 of the Registered Land Act.

Rectification

- [127] The court now turns to consider whether Mr. Webster is entitled to an order for rectification on the grounds advanced by him in the present claim.
- [128] It was the defendants' submission that, although Mr. Webster pleads fraud as a ground for setting aside the transfer of a ¼ share in Parcel 29 to Mr. K. Hodge and his subsequent registration as proprietor of Parcel 232, Mr. Webster has not led or presented evidence to prove the allegation of fraud or mistake in the registration process.

- [129] In support of this argument, the defendants rely on the decision of **Skelton and Others v Skelton**¹⁴ for the proposition that the fraud to which section 146 of the Registered Land Act contemplates is actual fraud, that is dishonesty and not merely equitable fraud.
- [130] The defendants also rely on the case of **Assets Management Limited v Mere Roihi and Others**¹⁵ for the proposition that the fraud which must be proved in order to invalidate the title of a registered purchaser for value, is actual, not constructive fraud, 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.
- [131] In addition, they say, that Mr. Webster having relied on mistake as a ground for impugning the transfer relies on the same particulars that he uses to support his allegation of fraud. The defendants challenge the factual and legal basis for so doing, on the grounds that, the evidence of mistake relied on does not fall within the definition of mistake under the Registered Land Act which said definition alludes to a “mistake in the registration process”.
- [132] According to the defendants, Mr. Webster has failed to discharge the requisite burden of proof in relation to these issues. In support of this argument the defendants rely on the decision in **Santiago Castillo v Quinto**¹⁶ which they say sets out the principle that fraud or mistake can only lead to rectification under section 146 of the Registered Land Act if the fraud or mistake occurred in the registration process. The defendants also rely on the decision of **Sylvina Louisen v Joachim Rodney Jacob**¹⁷ as it relates to the definition of “fraud” or “mistake” in

¹⁴ (1986) 37 WIR 117

¹⁵ [1905] A.C. 176

¹⁶ (2009) 74 WIR 217

¹⁷ Privy Council Appeal No. 93 of 2007

the registration process. Other authorities were also referred to by the defendants in their arguments, namely, **James Ronald Webster v Beryl St. Clair Fleming**¹⁸.

[133] In **Skelton v Skelton** the Court of Appeal had to decide the issue of whether the court in its original jurisdiction had the right to alter or amend a final decision of the Adjudication Officer pursuant to section 140 of the BVI Registered Land Ordinance. A similar issue had to be decided in **Webster v Fleming**. However, the court does not think that these authorities will render much assistance in resolving the present issues in this case, save and except in relation to the interpretation of the general scheme of the Registered Land Act and the principle of indefeasibility of title enshrined thereunder. The court does not think there is any dispute on this point.

[134] Section 146 of the Registered Land Act reads:

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

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

[135] The provisions of section 146 are in similar terms to other statutes in jurisdictions that employ a registered system of conveyancing. Therefore, an examination of the case law from these jurisdictions would be helpful.

[136] There is no comprehensive definition of the word ‘mistake’. Perhaps a useful illustration of what would qualify as a mistake for the purposes of section 146 of

¹⁸ [1995] ECSCJ No. 32

the Registered Land Act can be found in the case of **Chowood Ltd. v Lyall**¹⁹ cited in **Webster v Fleming**²⁰ where **Lawrence LJ** said:

"The other point was that the case has not been brought within s.82, because the registration of the plaintiffs' title was not a mistake within the meaning of sub-s. 1[h] of that section. I disagree with that contention. I see no reason to limit the word 'mistake' in that section to any particular kind of mistake. The court must determine in every case whether there has been a mistake in the registration of the title, and if so, whether justice requires that the register should be rectified. Here I think there has been an obvious mistake by the erroneous inclusion in the plan filed in the register of this and of the two other strips of land which did not belong to their vendors. The evidence is clear that the predecessors in title of the plaintiffs had in fact no title and did not claim to have any title to the strip in question, and obviously therefore never intended to convey it to the plaintiffs. I have no reason to doubt that the plaintiffs thought that they were purchasing the land delineated on the plan, but in getting their title registered in the Land Registry they were acting on the mistakes which had been made in that plan, and the entry made in the Registry in derogation of the right of the true owner who was in possession was an entry made by mistake within the meaning of the section."

[137] This point was again made in the case of **Louisien v Jacob**, and the judgment gives a vivid illustration of what can amount to mistake as contemplated by section 140 of the Registered Land Act. In **Louisien v Jacob** their Lordships said²¹:

"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.

"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

¹⁹ [1930] 2 Ch. 156 at 157

²⁰ At para. 47

²¹ At paras. 41 – 43

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*."

- [138] The meaning of the word mistake in section 98 of the Land Registration Act (Saint Lucia), which has similar wording to section 146 of the Registered Land Act, was recently examined in the case of **Prisca Sharon Irving v Geest Industries (Estates) Limited and others**²², a decision of **Cenac-Phulgence J**, where Her Ladyship said:

"Was there a mistake in the registration process? The Act does not define 'mistake' and it is an area which is evolving and there is much academic discussion in the UK as to what is contemplated by the term 'mistake'. In *Sylvina Louison*, the court spoke of the term which had been coined by the judges-'mistake in the registration process' and indicated that this is a judge-made and not a statutory term. They highlighted that the scope of what is a mistake in the registration process must depend on a careful evaluation of the facts of the particular case.

In the instant case, the mistake being alleged is that the defendants knew that no monies were paid by the second to sixth defendants and that they were not entitled as heirs of the Deceased and yet executed a deed of sale which stated that they had paid monies to the first defendant when they had not. The question is whether this is the kind of mistake contemplated by section 98 of the LRA. I am of the opinion that it does

²² ECSCJ No. 263

not. The evidence does not reveal any mistake in the registration process. The evidence reveals that Geest executed a deed of sale in favour of the second to sixth defendants on the basis that they were the Deceased's children. Geest was clearly wrong to have simply just accepted this without more but there is no evidence that the second to sixth defendants knew that they were not entitled to the Property as the Deceased's children.

Whilst I can accept that one may say that a mistake was made as to who the deed of sale should have been executed in favour of and further whether it should have been executed at all given that the second to sixth defendants had not obtained LA, there is no evidence to support a finding that there was any mistake in the registration process (which is what is required) to entitle the deed of sale to be cancelled or set aside. Put differently, it may be the case that the disposition of the Property was made by mistake but that does not render its entry on the register a mistake.

My view is further substantiated by the English Court of Appeal decision of *NRAM Ltd. v Evans*.⁷ In that case the Court of Appeal gave guidance as to the circumstances that will govern when the land register may be rectified referring to Ruoff & Roper, Registered Conveyancing loose leaf ed. There will have been a mistake where the registrar (i) makes an entry in the register that he would not have made; (ii) makes an entry in the register that he would not have made in the form in which it was made; (iii) fails to make an entry in the register which he would otherwise have made; or (iv) deletes an entry which he would not have deleted; had he known the true state of affairs at the time of the entry or deletion. The mistake may consist of a mistaken entry in the register or the mistaken omission of an entry which should have been made. Whether an entry in the register is mistaken depends upon its effect at the time of registration.⁸ These scenarios to my mind apply to situations post first registration and not to first registration and highlight that the mistakes refer to the registration process.

According to the UK Court of Appeal this means that an entry made in the register of an interest acquired under a void disposition is a mistake and may be rectified, because it should never have been made, whereas an entry made in the register of a voidable disposition is not a mistake if at the date of its entry there has been no election to void the disposition. 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 and adds to the debate as to what 'mistake' really means."²³

²³ At paras 26 - 31

- [139] The defendants have made a valid point for the purposes of section 146 of the Registered Land Act. They say, and the court shares in their view, that it is incomprehensible that Mr. Webster was unaware for a period of about eleven years that Mr. K. Hodge was registered as the proprietor of Parcel 232; and, at the time of the subdivision of Parcel 29 he was also unaware. In the court's opinion this not only defies comprehension but also logic.
- [140] Having regard to the evidence led at the trial, it appears that Mr. K. Hodge was in actual possession of Parcel 232 and had exercised rights of ownership over Parcel 232. Even more surprising are Mr. Webster's contentions when one examines Mr. Webster's complaint regarding the right of way over Parcel 232. This begs the question regarding why Mr. Webster would have required a right of way over Parcel 232 from Mr. K. Hodge in the first place.
- [141] Possession for the purposes of section 146 of the Registered Land Act is not an elusive concept. The term has been given clear judicial interpretation in decided cases. In the case of **Computron Limited v Adelaide Joseph**²⁴, **Cenac-Phulgence J** cited the relevant case law on the subject of possession. Her Ladyship cited the cases of **JA Pye (Oxford) Ltd v Graham**²⁵ and **Powell v McFarlane**²⁶ which clearly sets out the principle that there are two elements, the existence of which are necessary to constitute possession. Firstly, there must be a sufficient degree of physical custody and control; and secondly, an intention to exercise such custody and control on one's own behalf and for one's own benefit. Furthermore, in order to constitute possession, it must be shown that the possessor has dealt with and has been dealing with the land in question as an occupying owner, might have been expected to deal with it and that no one else has done so.

²⁴ [2019] ECSCJ No. 170

²⁵ [200] 1 AC 419

²⁶ (1978) P & CR 452

- [142] The court has also considered whether based on the evidence presented at the trial one can conclude that Mr. K. Hodge had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default. The court does not accept that that is a plausible conclusion to arrive at in the present case²⁷.
- [143] Having made the foregoing observations, the court sought guidance from the case of **Santiago Castillo Ltd v Quinto** which sets out the point succinctly. Section 143 of the Belizean Registered Land Act employs similar wording as section 146 of the Anguillian Registered Land Act.
- [144] In that case the appellants and the Registrar of Lands commenced proceedings seeking rectification of the register on the grounds of fraud or mistake, pursuant to section 143 of the Registered Land Act. The appellants were successful and the court ordered rectification of the register. The court held, inter alia, that first registration by W had been obtained 'at the very least by mistake'; that that mistake was 'substantive and enduring' and 'ineluctably coloured the subsequent registration of' the respondent as proprietor of parcel 869, thereby rendering both the first and the subsequent entries in the land register subject to rectification by the court under s 143(1); that the respondent had had knowledge of the prior ownership or at least a claim to ownership by the appellants, the disregard of that knowledge had facilitated and caused or substantially contributed to the mistake that resulted in the first registration of W as proprietor of parcel 869; that W had acted fraudulently in procuring first registration and that the respondent had had actual knowledge of that fraud.

²⁷ See also: *Spiricor Saint Lucia Limited v The Attorney General of Saint Lucia and another*, Per Byron CJ at paras. 44 – 48

[145] This decision was reversed on appeal by the Court of Appeal of Belize and the appellants appealed to the Privy Council. Inter alia, two issues of law arose for the Board: (1) the circumstances in which the court was given power to order rectification of the register under s 143(1) and, in particular, whether use of the words 'any registration' covered not only current registration but any earlier registration, so that the discretionary power of the court to rectify the current registration arose if any registration in the chain of title had been obtained or made by fraud or mistake; and (2) the meaning of 'in possession' in s 143(2).

[146] Allowing the appeal their Lordships held:

“(1) Upon a proper construction of s 143(1) of the Act, the registration in respect of which there had been a mistake or error need not necessarily have been the registration in respect of which rectification was sought. Whilst that construction significantly diminished the element of indefeasibility of registered title that was a feature of the Torrens system that was the manner in which the legislation of Belize had decided to balance the desirability of a simple system of land transfer with the interests of justice. The remedy of rectification lay within the discretion of the court and was subject to the protection given to the bona fide purchaser in possession by s 143(2).

(2) 'In possession' for the purposes of s 143(2) meant actual physical possession. Were this not so, the addition of 'or is in receipt of the rents or profits' would make little sense.

(3) In all the circumstances, both the initial registration in favour of W and the subsequent registration in favour of the respondent had been obtained as a result of both mistake and fraud. The mistake was that of the Registrar and consisted in the erroneous belief that W, rather than the appellants, had had title to parcel 869 at the time of the initial registration in W's favour. The causative effect of that mistake persisted up to and resulted in the second registration in favour of the respondent, and was augmented by a further mistake in that the Registrar was unaware that an application in respect of parcel 869 had been made on behalf of the appellants before registration in favour of the respondent had been completed. But for those mistakes, the Registrar would not have completed the registration in favour of the respondent, but would have placed a restriction order on the land until the position had been clarified by the court. W's fraud also had causative effect on the obtaining of both

registrations. Moreover, the judge had been correct to hold that the respondent had had knowledge of W's fraud, and of the mistake that that had induced in relation to both registrations and the Court of Appeal ought not to have reversed that finding. Having regard to the belief of C, the managing director and chief executive of the respondent, that the appellants had owned the land that W had offered him, he could not safely abstain from making proper inquiries into the propriety of the transaction and in those circumstances a simple search of the Registry would not suffice to protect the respondent. The most charitable conclusion that could be drawn about C's conduct was that, knowing that there was serious doubt as to the propriety of the original registration by W, he had decided not to clarify the position but to proceed with the transfer regardless. In such circumstances W's fraud fell to be ascribed to him.

(4) The respondent had not entered into possession of parcel 869 at the material time. The evidence demonstrated that it was not until after the Registrar had placed a restriction order on dealings with the land and both she and the appellants had commenced proceedings for rectification of the Register that the respondent commenced erecting a fence on parcel 869 preparatory to placing building materials on the land.

(5) Accordingly, the judge had had jurisdiction under s 143(1) to order rectification of the Register and was not precluded from exercising that discretion by s 143(2). The judge had correctly appraised the relevant facts and made the appropriate order.”

[147] There has been no evidence presented by Mr. Webster to substantiate his allegation of fraud against either Mr. V. Hodge or Mr. K. Hodge. What is required is actual fraud. This is plainly set out in the case law.

[148] In the case of **Asset Company Limited v Mere Roihi**²⁸ the Privy Council held in relation to transfers under the Land Transfer Acts of 1870 and 1885, 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, is actual, not constructive fraud, 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.

²⁸ [1967] 1 AC 569

- [149] The case of **Asset Company Limited v Mere Roihi** was applied in the case of **Frazer v Walker** where the Privy Council held that registration was effective to vest title in a registered proprietor notwithstanding that he acquired his interest under an instrument that was void.
- [150] Applying these principles to the present case, the court cannot order rectification merely because the document giving rise to Mr. K. Hodge's registration as proprietor may have contained errors or what has been described by Mr. Forde, QC as containing a "faulty certification". Therefore, the court finds that Mr. Webster's allegation of fraud has not been made out. It will be recalled that the court made the earlier finding that the certification of the Transfer Form did not infringe the provisions of the Registered Land Act as it relates to the certification of instruments.
- [151] The court is fortified in this view by the decision of the Court of Appeal of the Eastern Caribbean Supreme Court in **Phillip Brelsford and others v Providence Estate Limited and another**²⁹, where the principles enunciated in the cases of **Asset Company Limited** and **Frazer v Walker** were applied.
- [152] In **Brelsford**, the appellants all purchased lands from the first-named respondent, Providence Estate Limited ("PEL"), which was the registered proprietor of lands at Providence, Montserrat, with absolute title. In these transactions, PEL was purportedly represented by Mr. Warren Cassell ("Mr. Cassell"), an attorney-at-law, as its sole director. Mr. Cassell's law firm acted as legal representative for PEL in the transactions which all culminated with the registration of the appellants as proprietors of the lands in question under the Registered Land Act ("RLA").

²⁹ ECSCJ No. 30

- [153] Subsequently, Mr. Cassell was convicted in the Montserrat High Court for conspiracy to defraud PEL. The appellants brought individual claims against PEL and Mr. Owen Rooney, a director of PEL, for *inter alia*, declarations that they are the absolute owners of the lands which had been transferred to them from PEL.
- [154] The respondents, in their defence, alleged that the transfer instruments were not executed in compliance with the provisions of the RLA; Mr. Cassell was never a director or officer of PEL; the appellants were on notice of the fraud perpetrated on PEL, as *inter alia*, the consideration was considerably less than the market value; the registrations of the appellants as proprietors of the lands were obtained by fraud and the appellants at all material times had knowledge of and/or contributed to the fraud; and that the appellants were unjustly enriched as PEL never received any of the consideration for the transfer.
- [155] They also counterclaimed for various declarations including that the appellants were not *bona fide* purchasers for value of the parcels; the appellants have been unjustly enriched at the expense of PEL; the parcels transferred to the appellants are held on constructive trust for PEL; for rectification of the land register to reflect PEL as the proprietor of the parcel in issue; and for restitution of the amount by which they were unjustly enriched at the expense of PEL.
- [156] The learned judge found that neither the appellants, nor their lawyers had conducted any due diligence searches on PEL, prior to concluding the purchases of the land from it. He further noted that the land transfer instruments had not been executed in accordance with section 107 of the RLA. He found that the appellants relied merely on Mr. Cassell's representations of his authority to act for PEL. The learned judge concluded that the appellants, having failed to make proper inquiries to ascertain the authority of Mr. Cassell to represent PEL, acquired the lands subject to PEL's rights and were not *bona fide* purchasers of the lands for value without notice. He dismissed the appellant's claim with costs and declared that PEL is the owner of the various parcels in question and gave directions for the

rectification of the land registers in relation to each of the parcels by removing the appellants as registered proprietors and substituting PEL as registered proprietor.

[157] On appeal, it was held, allowing the appeal in part; dismissing the counter notice; setting aside the declarations made by the learned judge on the claim and counterclaim below, that the appellants are not the absolute owners of the various parcels of land and that PEL is the absolute owner of these parcels; granting the declarations sought by the appellants in their claims in the court below that they are the absolute owners of the various parcels of land for which they are respectively registered as proprietors, but with the *proviso* that in each case the land is held subject to the equity in favour of PEL to apply to the court for an order to compel each proprietor to re-transfer the parcel to PEL; on the counterclaim, ordering that each of the appellants shall execute an instrument transferring title to the parcel held in his or her name to PEL and setting aside the orders for rectification of the various registers; and ordering that each party bear his own costs, both in the court below and before this Court, that:

[158] Firstly, applying **Frazer v Walker**, the registration of any person as the proprietor with absolute title of a parcel vests in that person the absolute ownership of that parcel, together with all rights and privileges belonging or appurtenant thereto, free from all other interests and claims whatsoever. The system of land registration confers (in broad terms) indefeasibility of title on the registered proprietor, that is, immunity from attack in respect of the land or interest of which he is registered as proprietor. Immunity, however, is not absolute as there are circumstances in which the registration may be cancelled or corrected and the proprietor remains subject to claims brought *in personam* against him.

[159] Secondly, even if noncompliance with the Registered Land Act's requirements as to registration may involve the possibility of cancellation or correction of the entry, registration once effected must attract the consequences which the Act attaches to registration, whether that was regular or otherwise. It is the registration and not its

antecedents which vests and divests title. As such, once the appellants were registered as proprietors of the various parcels, they acquired title to those parcels, notwithstanding any irregularity that may have occurred with respect to the vendor, PEL. Registration, based on a void instrument, is still effective to vest and divest title. It follows as well that the failure by PEL to execute the land transfer instruments in accordance with section 107 of the RLA also did not affect the title which the appellants derived by virtue of their registration.

- [160] Thirdly, 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, that is, either cancellation or correction, of the land registers. The learned judge, having made no finding of fraud, there was no basis on which he could have ordered rectification of the register.³⁰

Right of way

- [161] With respect to the right of way located on Parcel 232, the use of which was alleged to have been granted to Mr. Webster by way of license, Mr. Webster vehemently asserts his full rights of ownership of Parcel 232 to the exclusion of the defendants without there being need for their permission from the defendants. It appears that Mr. Webster's contention is that notwithstanding the defendants' use and occupation of Parcel 232 he was entitled to uninterrupted access over Parcel 232 because he was the proprietor thereof; and that any allegation of trespass against him ought to fail since the defendants had no right to the use and occupation of Parcel 232.

³⁰ See: per Carrington JA (Ag.) at paras 33 – 45

- [162] Alternatively, Mr. Webster denies the defendants' allegation that the license to pass over Parcel 232 had never been revoked by neither Mr. V. Hodge nor Mr. K. Hodge. Therefore, he contends that the defendants had no right to interrupt the use of the right of way in the manner in which they did; and accordingly he is entitled to damages for the said interruption.
- [163] Mr. Webster maintains that on or about the month of December 2005 he created an access over Parcel 232 in contemplation of his intended development of Parcel 236; and the access was used during the development of Parcel 236. Mr. Webster also says that he caused certain improvements to be made to the access to facilitate ingress and egress to the commercial centre and gas station located on Parcel 236.
- [164] However, the defendants aver that subsequent to the transfer and partition of Parcel 29, and prior to the commencement of the present proceedings, Mr. Webster acquiesced in and accepted their exercise of rights of ownership, use and occupation of Parcel 232. They say that Mr. Webster did not enter upon Parcel 232 without the expressed permission of Mr. K. Hodge and Mr. V. Hodge. According to Messrs. Hodge, Mr. Webster sought and obtained a license from them for the use of a portion of Parcel 232 during and after his development on Parcel 236.
- [165] The defendants also alleged that at all material times and on numerous occasions represented to other persons that he had sold Parcel 232 to either the defendants or Mr. V. Hodge in particular. In so doing, they say that Mr. Webster confirmed Mr. K. Hodge's ownership of Parcel 232.
- [166] The court is of the view that Mr. Webster cannot succeed on his claim for a declaration of his entitlement to an access over Parcel 232 and for damages for the interruption of the same.

- [167] The court, having found that Mr. Webster is not the registered proprietor of Parcel 232 and not entitled to the rectification of Parcel 232 in his favour, it stands to reason that Mr. Webster's assertion that he is entitled as of right, owing to his undisputed ownership of Parcel 232, to the right to the peaceable and interrupted enjoyment of a right of way over Parcel 232 without permission from the defendants fails.
- [168] Furthermore, it seems more than passing strange that Mr. Webster would have sought permission from the Land Development Control Committee ('LDCC') to construct an access over Parcel 236 at the same time that he sought the LDCC's permission to construct a commercial project on Parcel 236. It seems even more than passing strange that the LDCC would have granted permission to Mr. Webster for such a development without there being in place adequate provision for ingress and egress over Parcel 236.
- [169] The evidence presented at the trial points directly to the fact that the defendants were at the material time in actual possession of and occupation of Parcel 232; a fact which Mr. Webster must have been more than aware of given the proximity of his commercial enterprise on Parcel 236 to Parcel 232.
- [170] The court having accepted the evidence presented in relation to the various activities carried on by the defendants on Parcel 232, including the erection of a sign and the placement of a container thereon and the lease agreement entered into by Mr. K. Hodge, is satisfied that the defendants were in actual use and occupation of Parcel 232 and exercised rights of ownership thereto. The rights of ownership engaged in by the defendants were never challenged by Mr. Webster while they were extant. Mr. Webster, apart from the bare denial that the defendants did exercise such rights of ownership, has not presented any evidence to contradict this fact.

- [171] The court has determined that the dispute regarding the access over Parcel 232 only arose near in time to Mr. Webster's negotiation with Delta Petroleum over the lease arrangements concerning the gas station on Parcel 236. The inference to be drawn from the surrounding circumstances is that Mr. Webster may have become disgruntled by the fact that he could not obtain the lease as he was unable to satisfy Delta Petroleum that he in fact could provide ready access to the gas station which was exacerbated by the defendants' denial to grant him use of the access.
- [172] Furthermore, the court found that Mr. Webster, by his conduct, as shown by the evidence presented at the trial, confirmed not only the defendants' ownership of Parcel 232 but also their right of use and occupation of the same. In particular, the court is fortified in this view by the very fact of Delta Petroleum's email to Mr. Webster.
- [173] Therefore, the court is inclined to accept the defendants' evidence that they had granted permission to Mr. Webster to use an access over part of Parcel 232. The totality of the evidence presented at the trial clearly favours this inference.
- [174] In the circumstances, the court is inclined to find that Mr. Webster was granted a gratuitous license by the defendants which was determinable upon notice to Mr. Webster. The court also finds that such notice had in fact been given to Mr. Webster.
- [175] Mr. Webster claims to have made certain improvements to the right of way over Parcel 232. However, no evidence has been presented by Mr. Webster to prove that he made these improvements at the behest of the defendants or in consideration or as a condition precedent for the right to use the access.

[176] In any event, even if Mr. Webster were to succeed on his claim related to a right of way over Parcel 232, Mr. Webster has presented no evidence of the loss or damage that he has sustained as a result of any interruption to a right of way enjoyed by him over Parcel 232.

[177] Accordingly, the court makes no declaratory order with respect to Mr. Webster's claim to an entitlement to a right of way over Parcel 232. The court finds that Mr. Webster has an alternative access over Parcel 236 which is just as convenient as that which exists over Parcel 232. Therefore, Mr. Webster's claim to injunctive relief in relation to the access over Parcel 232 is dismissed, the court having found that the license granted to him by the defendants had been revoked.

Trespass

[178] In the course of the evidence given at the trial, Mr. Webster testified to the effect that neither did he seek permission from Mr. K. Hodge nor did he need to obtain permission from him in order to pass over Parcel 232, because Parcel 232 was his land since he had bought it³¹.

[179] It appears that if the issue of title to Parcel 232 is resolved in Mr. Webster's favour then the only issue that needs to be resolved is whether the defendants can maintain an action in trespass solely on the basis of their use and occupation of Parcel 232. The court is reminded of the fact that at no time prior to this claim did Mr. Webster object to the acts of ownership exercised by the defendants over Parcel 232. The court is also mindful of the fact that notwithstanding the question of title to Parcel 232, Mr. K. Hodge was, for all intents and purposes, in actual possession of Parcel 232 and therefore, was entitled to claim damages for any interruption to his possession, use or occupation of the same.

³¹ At pages 19 - 20 Transcript – Part 1B – 3rd April 2019

- [180] Also, if the court finds that the right of way had been revoked, then clearly Mr. Webster's actions in enforcing his use of the right of way would have been unlawful and may very well have resulted in acts of trespass committed by him.
- [181] The defendants contend that on or about December 2017 Mr. K. Hodge terminated the oral license granted to Mr. Webster over Parcel 232. The reasons given for the termination of the license was Mr. Webster's purported use of the access for purposes other than for his customers gaining access to the fuel pumps at the gas station, which was the original purpose for which the right of way over the access on Parcel 232 had been granted. The defendants claim, that contrary to the purpose for which access had been granted, Mr. Webster permitted the access to be used as a means of egress and ingress to the commercial premises located on Parcel 236 which involved the use of parts of Parcel 232 being used for customer parking.
- [182] The defendants say that on or about December 2017 they were carrying on certain works on Parcel 232. The defendants deny that they unlawfully interrupted Mr. Webster's access over Parcel 232 in the manner alleged by him, or at all, thereby interrupting his access to Parcel 236.
- [183] They further contend that, in any event, there is an alternative access to Parcel 236 as evidenced by the planning permission for Mr. Webster's development on Parcel 236.
- [184] Therefore, the defendants say that they are entitled to maintain the interruption to Parcel 232 since Mr. Webster is no longer entitled to the benefit of the said license, the same having been lawfully terminated. Therefore, they say that Mr. Webster is not entitled to recover any damages for any interference with the right of way by the defendants.

[185] In their counterclaim the defendants allege that Mr. Webster, on or about 12th December 2017 trespassed onto Parcel 232 along with his servants and/or agents and removed a barricade erected by the defendants and proceeded to refill a trench that was dug up at the instance of Mr. K. Hodge. As a result, Mr. K. Hodge has suffered loss and damage by having been made to incur the expense of excavating the trench all over again and re-erecting the barricade. Therefore, they claim damages against Mr. Webster in respect of the trespass and the resulting loss.

[186] On the contrary, Mr. Webster denies that he trespassed on Parcel 232 in the manner alleged by the defendants, or at all. According to Mr. Webster, he was entitled to the use, occupation and absolute possession of the portion of Parcel 232 over which he was granted a license by Mr. K. Hodge. Therefore, Mr. Webster contends that his actions in relation to Parcel 232 were within his rights to perform and within the general ambit of the license granted to him.

[187] The court having concluded that the license granted to Mr. Webster had been revoked, is of the view that the defendants are entitled to succeed in their claim for trespass on the basis of their possession and occupation of Parcel 232. However, the court is not of the view that the defendants have established a case for an award of exemplary damages on account of the acts of trespass committed by Mr. Webster.

Order

[188] For the reasons stated herein the court makes the following order: -

1. The claimant's statement of claim is dismissed in its entirety.
2. Judgment for the defendants on their counterclaim.
3. Judgment is entered for the defendants on their counterclaim in the sum of US\$1,500.00 as special damages with interest thereon at the rate of 6% per annum.

4. Damages is awarded to the defendants in the sum of US\$2,500.00 for trespass to land with interest thereon at the rate of 3% from the date of claim to the date of payment in full.
5. Costs to the defendants in the sum of EC\$7,500.00 being prescribed costs in accordance with CPR 65.5.
6. Costs is also awarded to the defendants on their counterclaim in the sum of EC\$600.00.

Shawn Innocent
High Court Judge

By the Court

Registrar