

ST VINCENT AND THE GRENADINES

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CIVIL)



CLAIM NO SVGHCV2005/0215

BETWEEN:

GERTRUDE JEANE SEWELL
(Executrix of the Estate of
Sydney Edgerton Theophilus Harry, deceased)

Claimant

AND

[1] RONALD PROVIDENCE
[2] DORIS LOUISE PROVIDENCE
[3] CURTIS LEWIS
[4] STEPHERN LEWIS
[5] HANAN ANTOUN
[6] EDGAR CHAHDA
[7] ADIB CHADHA
[8] ISAAC ANTOUN
[9] FIRST CARIBBEAN INTERNATIONAL BANK LTD
(Formerly CIBC CARIBBEAN LTD)

Defendants

Appearances:

Mr Richard Williams and Mr Sargeant for Claimant

Mr Jomo Thomas for Third and fourth Defendants

On written submissions of:

Mr Stephen Williams for Claimant

Mr Jomo Thomas for the Third and Fourth Defendants

.....
2010: October 02

2011: June 3
.....

Introductory

[1] **LANNS, M:** Gertrude Sewell (the Claimant) has applied to the Court for an order that summary judgment be entered against the Third and Fourth Defendants on the ground that they have no real prospect of successfully defending the claim brought against them.

[2] The application was filed on 29th May 2009, and it was supported by the affidavit of Stephen Williams sworn to and filed on even date.

[3] The application was set for hearing on 10th July 2009 at 9:00am. However, it appears that it came on for hearing before Master Mathurin on 14th October 2009. At that hearing Mr Stephen Williams appeared, holding for Mr Richard Williams for the Claimant; and Ms Vestricia Llewellyn held for Mr Jomo Thomas for the Third and Fourth Defendants.

[4] At the conclusion of the hearing, Master Mathurin made an order in the following terms:

“Upon consideration of the application to strike out defence and for summary judgment against the 3rd and 4th defendants;

It is hereby ordered:

1. That the 3rd and 4th defendants are given leave to amend the defence to comply with part 10 of the CPR and to include material particulars on or before November 13, 2009.
2. [Claimant] [t]o reply if necessary by December 4, 2009.
3. That cost to the claimant in the sum of \$500.00 to be paid before the Case Management Conference.
4. That the matter is adjourned to Case Management Conference on December 15, 2009 at 10:00 [a.m.].
5. That the parties are to be present.

[5] The Claimant did not file any Reply.

[6] At the Case Management Conference held on 15th December 2009, Master Mathurin ordered the Claimant to file and serve submissions with authorities in support of the application for summary judgment on or before 8th January 2010. The 3rd and 4th Defendants were ordered to respond to the application for summary judgment with submissions and authorities by 29th January 2010. The matter was adjourned to 10th February 2010 for consideration of the submissions.

[7] The parties duly complied with the Master's order; and on 10th February 2010, they agreed that the summary judgment application be considered on the written submissions as filed.

[8] However, it is apparent that the matter fell into abeyance. The file/submissions were only passed to me on 10th October 2010.

Background

- [9] The case concerns an allegation of fraudulent declaration and registration of a Possessory Title to property registered by a prior instrument in the name of its true owner. It also concerns the effect of the registered Deeds of Conveyance in respect of property subsequently purchased from the fraudster, on the registered property of the true owner whose property is affected by the fraudulent declaration and registration of Possessory Title. As well, it concerns the effect of a Deed of Conveyance, registered out of a registered Deed of Conveyance which has since been cancelled by court order. Finally, it concerns the effect on a mortgagee who takes a mortgage of disputed property, unaware of any fraudulent activity, but relying on the mortgagor's title as it stood at the time it accepted its mortgage/security.
- [10] Sydney Edgerton Theophilus Harry, (the deceased; or the testator) departed this life on the 30th day of July 1995, after having made and duly executed his Last Will and Testament dated the 26th day of July 1994, appointing Gertrude Jeanne Sewell (the Claimant) to be the executrix thereof. By Clause 2 of his Will, the deceased devised his estate to "Martin Edward, Brothers and Sisters; and Martin Harry", subject to the payment of his debts and funeral expenses.
- [11] Probate of the Will was granted by the High Court of Justice, (Saint Vincent and the Grenadines) on the 30th day of June 1997 to the Claimant.
- [12] At the date of his death, the deceased was the owner of 6,532 square ft of land with dwelling house thereon situate at Prospect. He was also the owner of approximately 3 acres of land situate at Prospect. This land was, and still is, registered as Deed No. 687 of 1975 in the name of the deceased, is said to form part of the estate of the deceased.
- [13] The deceased was the sister of the Second Defendant. The First Defendant is the grandson of the Second Defendant.
- [14] The joining of the other Defendants to the action will be explained below.
- [15] On 28th April 2005, the Claimant instituted proceedings against all the Defendants. The Statement of Claim alleges that the First Defendant, Ronald Providence fraudulently conveyed lands which form part of the Estate of the deceased Sydney Edgerton Theophilus Harry, to the Third, Fourth, Fifth, Sixth and Seventh Defendants.
- [16] The Ninth Defendant, First Caribbean International Bank Ltd (the Bank) registered a mortgage (numbered 1780 of 2004) against the lands purchased by the Fifth Defendant (Hanan Antoine). The Eighth Defendant (Isaac Antoine) co-signed the Mortgage.
- [17] Hence, the reason for joining the Third to Ninth Defendants as parties to the action.

- [18] The Second Defendant, Doris Louise Providence (Doris Providence) is alleged to have executed a Declaration of Possessory Title in her favor registered as No 182 of 2004. It is said that she simultaneously executed a Deed of Gift to Ronald Providence - her grandson. This Deed of Gift is registered as No 183 of 2004. The Claimant claims that Doris Providence made false statements in her Declaration, and as such she and Ronald Providence set up an elaborate scheme to defraud her. Ronald Marks (Mr Marks) is alleged to have been the solicitor acting for both Ronald Providence and Doris Providence in the preparation of the Declaration of Possessory Title and the Deed of Gift.
- [19] The Claimant say that the Deed of Conveyance of the First to Seventh Defendants should be set aside because those Defendants were not bona fide purchasers for value without notice. The Claimant alleges that Mr Marks was impressed with the knowledge that Ronald Providence did not have a legitimate right to the title, and that someone else is, in fact the true owner, and as such, the Third, Fourth, Fifth, Sixth and Seventh, Eighth and Ninth Defendants will be deemed to have been impressed with this knowledge.
- [20] In particularizing the issue of knowledge, the Claimant alleges that all the Defendants were fully aware and had notice that Ronald Providence had recognized the Claimant's title when he, Ronald Providence caused Mr Marks to prepare a Power of Attorney which he sent to the Claimant for execution; and which the Claimant refused to sign.
- [21] In the Statement of Claim, the Claimant prayed for the following reliefs:
1. A Declaration of ownership of the lands described in Deed No 687 of 1975;
 2. A Declaration that the lands described in Deed No 687 of 1975 form part of the estate of the late Sydney Harry;
 3. An Order cancelling the Statutory Declaration No 182 of 2004 in favour of Doris Providence;
 4. An order cancelling the Deed of Gift numbered 183 of 2004 in favour of Ronald Providence;
 5. An order cancelling the Deeds numbered 284 of 2004 in favour of the Third and Fourth Defendants; 385 of 2004 in favour of the Fifth Defendant; 3545 of 2004; and 4667 of 2004 in favour of the Sixth Defendant; 162 of 2005 in favour of the Seventh Defendant.
 6. An order cancelling the Deed of Mortgage 1780 of 2004 in favour of the Bank.
- [22] As well, the Claimant claims general damages for trespass as against all the Defendants.
- [23] Finally, the Claimant claims costs, and such further or other reliefs.
- [24] On 29th July 2005, there being no Acknowledgment of Service or Defence by Ronald Providence and Doris Providence, judgment was granted in favour of the Claimant against them under the procedure under CPR12.10 (4) and (5). Consequently, the Possessory Title in favour of Doris Providence and the Deed of Gift in favour of Ronald Providence were cancelled by court order dated 29th July 2005.

- [25] It is of note that no further cancellation orders have been made. It is also of note that Curtis Lewis and Stephern Lewis are the only Respondents in the present application for summary judgment; since they are the only Defendants who have filed a Defence.

The Amended Defence and Counterclaim of the Third and Fourth Defendants

- [26] In their Amended Defence, the Third and Fourth Defendants Curtis Lewis (Curtis) and Stephern Lewis (Stephern) admit that in January 2004, they bought two parcels of land from Ronald Providence for the sum of \$200,000.00, but assert that they were bona fide purchasers for value without notice. They admit too, that Mr Marks prepared the transfers and that he, Mr Marks was acting as their solicitor, as well as well as the solicitor for Ronald Providence in the negotiations, and in the execution of the purchase documents.
- [27] They deny that they had any knowledge of any impropriety on the part of Ronald Providence. They say that they bought the lands from Ronald Providence based on the register which showed that he, Ronald Providence was the owner of the lands. They say that the alleged knowledge or notice of the alleged fraud by their solicitor - Mr Marks, who was also solicitor for Ronald Providence - the alleged fraudster, cannot be imputed to them. They assert that it is improper to impugn notice because, if the allegation of fraud is true, Mr Marks, will have all reason to keep them from the true state of affairs regarding the land.
- [28] They say further, that the claim against them cannot stand because it is statute barred by virtue of sections 24 and 25 of the **Possessory Titles Act**.
- [29] Finally, they assert that they have made a good faith bona fide purchase, and as such, their purchase cannot be seen to be null and void.
- [30] They counterclaimed for an order that the conveyance registered as No 284 of 2004 in their favour be upheld as valid, since they were bona fide purchasers for value who acted without fraudulent intent. They also counterclaimed for an order that any challenges made to the purchase by Curtis and Stephern are null and void for failing to comply with Sections 24 and 25 of the Possessory Titles Act of 2004.
- [31] No Reply to the Amended Defence and no Defence to the Counterclaim has been filed.

The evidence

- [32] The court is faced with some difficulty here. The evidence to support the application for summary judgment is sparse. Stephen Williams swore to a short affidavit in support of the application to strike out the original Defence and for summary judgment. The affidavit did not set out the case in any detail against Curtis and Stephen. No documents were exhibited to the affidavit, although documents which the Claimant thought necessary to support her case were annexed to the Statement of Claim. The extent of the affidavit is shown below.
- [33] Stephen Williams deposed that:

“ ...

1. I am a partner in the chambers of Williams and Williams, the solicitors on record for the Claimant in this matter and I am duly authorised to swear this affidavit on behalf of the Claimant.
2. The Third and Fourth named Defendants filed a Defence in the aforesaid suit on the 17th day of October 2009.
3. By virtue of an Order of the Court dated 3rd day of April 2009, the Court permitted the Third and Fourth named Defendants Defence to be deemed duly filed.
4. The said Defence is wholly without merit.
5. As a result of the aforesaid the Claimant is requesting that the Third and Fourth named Defendants Defence be struck out and summary judgment be entered against the Third and Fourth named Defendants.”

[34] As I see it, Mr Williams’ affidavit is vague. There is no indication as to how the Defence is unmeritorious.

[35] In their joint responding affidavit filed on 25th September 2009, Curtis and Stephern deposed:

- “1. ... That on January 13, 2008 we purchased two parcels of land, lots 1 and 2 on survey plan number G/37/60 being 32,332 sq. ft and 43,569 sq. ft for the advertised selling price of \$200,000.00.
2. Before making the purchase, we were shown court documents by the seller’s attorney Ronald Marks which indicated that the seller of those lands were the owner of records and there were no encumbrances to the sale of these lands.
3. Throughout the negotiations that led to the purchase of these lands we always thought and maintain to this day that we are the legitimate and bona fide purchase for value of these lands.
4. At no time during the negotiations for the purchase of these lands did we know of, intended, planned or otherwise participated in an enterprise, joint or otherwise to defraud anyone of their property.
5. The information alleging that the seller was not the legitimate owner of these lands and might have engaged in a fraud to gain title to the lands came as a complete shock and surprise to us.
6. The foregoing is true, factual and correct to the best of our information and knowledge.

[36] No documents were exhibited to that affidavit.

Issues

[37] In their submissions, counsel for both parties placed much emphasis on the issue as to whether or not knowledge of one’s Solicitor can be imputed to a bona fide Purchaser.

- [37] Ultimately, the real issue for determination is whether or not Curtis and Stephern were bona fide purchasers for value without notice of any right, title and interest of the Claimant in the subject lands; Whether or not that issue can be determined on an application for summary judgment, or whether the matter should proceed speedily to trial for a determination of the issues of knowledge, fraud and limitation raised in the pleadings.

The submissions

- [39] The gist of Mr Williams' submission is that it is not disputed that Mr Marks, Solicitor for Curtis and Stephern, had the relevant **notice** that the property in question did not belong to Ronald Providence, and further that he, Mr Marks **knew** that neither Ronald Providence nor Doris Providence were the fee simple owners of the property and therefore had no proper title to the property purportedly sold to Curtis and Stephern.

- [40] Mr Williams has placed reliance on **Halsbury's Laws of England Vol. 16 (2) 4th Ed** where, at paragraph 577 it is stated:

"Where ... under a contract for sale or other disposition of any estate or interest in land the title to which is not registered, any question arises whether the purchasers had knowledge at the time of entering into the contract, of a registered land charge, that question must be determined by reference to his actual knowledge and for these purposes, any knowledge acquired in the course of a transaction by a person who is acting as counsel or as solicitor or other agent, for another is treated as knowledge of that other."

- [41] Mr Williams has also placed reliance on S 5 (1) and (3) of the Registration of Documents Act (the Act) which reads:

"5. (1) Every document relating to real estate required to be registered under this Act shall, on registration, operate both at law and in equity according to priority of time of registration and the right, title and interest of the person conveying, incumbering or otherwise dealing with such real estate, against every other document subsequently registered with respect to such real state.

(2) Every such document that shall not be registered, shall be deemed fraudulent and void as to the real estate affected by such document, against any subsequent purchaser or mortgagee for valuable consideration without notice whose document shall be first registered, or against any person who may have, subsequently to the date of such unregistered document, obtained a judgment operating as a charge against such real estate.

(3) ... The registration of documents required to be registered under this Act shall be deemed due notice of their contents to all persons whomsoever claiming any estate or interest in, or incumbrance on, any real estate comprised in, connected with or affected by the document registered."

- [42] Having quoted from those two sources of Law, Mr Williams concluded his submissions by pointing out that the Claimant's title to the land is registered pursuant to the provisions of S 5 (1) of the Act. Mr Williams concluded his submissions by stating "Having regards to the aforesaid principles, the Defendant's Defence lacks merit and does not disclose a reasonable ground for defending the claim."
- [43] Mr Thomas, on the other hand, while not disputing that the general principles regarding actual or constructive notice is settled and reflected in **Halsbury's Laws of England**, submitted that the practical application of the principles set out in **Halsbury's Laws** has always depended on the facts of the particular case.
- [44] Mr Thomas relied on the principles set out in four cases, namely:
1. **Kennedy v Green** (1834), 3 Mylne & Keen 699; 40 E.R. 265.
 2. **Halifax Mortgage Services Ltd v Stepsy and Another** [1996] Ch 207;
 3. **Vincent Pickering v Jerry Wilkins**, Claim No BVIHCV2007/008.
 4. **Ecedro Thomas v Augustine Stout et al**, Civil Appeal No 1 of 1993.
- [45] Having summarized the facts and principles in the above cases, Mr Thomas submitted, that when the principles in the above cases are applied to the instant case, the court would conclude that Curtis and Stephern were bona fide purchasers for value without notice, and the court would therefore deny the Claimant's application to strike out the Amended Defence.

The Principles Governing Summary Judgment

- [46] Neither party addressed the principles governing summary judgment. As stated before, they concentrated their submissions on the issue of knowledge or notice.
- [47] The principles to be applied are based on Rule 15.2 of the Eastern Caribbean Supreme Court Civil Procedure Rules 2000 (CPR); also Rule 26.3.
- [48] Under CPR 15.2 the court may give summary judgment on the claim or the issue if it considers that the Claimant has no real prospect of succeeding on the claim or the issue; or if it considers that the Defendant has no real prospect of successfully defending the claim or issue.
- [49] Under Rule 26.3, the court may strike out the whole or part of a statement of case if it discloses no reasonable grounds for bringing or defending the claim.

Discussion and Decision

[50] In the important case of **Swain v Hillman** [2001] 1 All ER 91 Lord Woolf stressed that a judge could summarily dispose of a claim or defence under part 24 (the equivalent of CPR15) if it did not have a realistic, as opposed to a fanciful prospect of success. In deciding whether to exercise such power, a judge should not conduct a mini trial of issues which should be investigated at full trial. Lord Woolf warned that summary judgment hearings should be kept to their proper role. They are to enable the court to dispose of cases where there is no real prospect of success. The court has to be cautious against the exercise of a preliminary trial of the matter without discovery, oral examination and cross examination. The point of Part 24 was to enable the court to give effect to the overriding objective in Part 1 and to save expense and achieve expedition. If a claimant had a case that was bound to fail, it was in the claimant's interest to know that as soon as possible; likewise if a claim was bound to succeed, the claimant should be entitled to know that also.

[51] More recently in the case of **Alpha Telecom Turkey Limited, v Cucorova Finance International Limited et al**, BVI Civil Appeal 2009/001, Gordon JA delivering the decision of the Court of Appeal stated at paragraph 20:

“... if the pleaded case of the parties indicates that there is a factual issue to be tried, which if proved, in favour of the respondent to the application might result in a decision in the latter's favour, then the preemptive power [summary judgment] of the of the court should not be used”

[52] In dismissing the appeal against the learned trial judge's refusal to grant summary judgment, Gordon JA upheld the trial judge's conclusion that there were “many conflicting facts and in depth issues to be dealt with in this matter.”

Actual or Constructive Notice

[53] The Claimant's case raises the issue of notice or knowledge. The Claimant's case is that Curtis and Stephern were not bona fide purchasers for value without notice because their solicitor was aware as to who was the true owner of the land and as such, they are affected with actual notice.

[54] Curtis and Stephen contend that they were bona fide purchasers for value without notice. This averment is foreshadowed in their Amended Defence as well as in their responding affidavit. These averments have not been contradicted in a reply to the Defence or in a reply to the responding affidavits.

[55] The question as to what is actual notice is discussed and summarized in the case of **Fort Gary Trust Company v Sutherland et al** (1983), 59 NSR (2d) 298 at page 307, and **Mayor v Bruning** 2001 NSSC 35 (Canlii) at paragraph 6, page 7:

“... Actual notice means knowledge not presumed, as in the case of constructive notice, but shown to be actually brought home to the party to be charged with it, either by proof of his own admission, or by the evidence of witnesses, who are able to establish that the very fact of which notice is to be established, not merely something which would have led to the discovery of the fact if an enquiry had been pursued, had been brought to his knowledge.

What is required is actual notice of the other person's adverse claim. There must be actual notice of the legal right claimed, though not necessarily actual notice of the instrument, if any creating the right. “Taking with actual notice” means taking with such knowledge of another person's right that the attempt to take in defeasance of that right would amount to fraud. The onus of proof is upon the person alleging that he is a purchaser or mortgagee for valuable consideration, without actual notice.”

- [56] It would seem from the above quote that only actual knowledge on the part of Curtis and Stephern, of the true registered owner of the subject property can defeat their title to the lands they purchased from Ronald Providence.
- [57] By the operation of Section 5 of the Registration of Documents Act Cap 93, it would appear that the registration of Deed No 687 of 1975 in the name of the deceased constitutes constructive notice to Curtis and Stephern. If they did have actual and constructive notice of a prior equitable right or interest then the Defence of no notice is not open to them.
- [58] The learning seems to reveal that while the equitable doctrine of notice has very little relevance to registered land, this is not the case with unregistered land. Purchasers of unregistered land are required to be vigilant and enquire as to prior rights, interests or incumbrances on the land. If they ignore making such inquiries, then they do so at their own peril. The motto of conveyancing is “caveat emptor” - Let the purchaser beware.
- [59] Having said all of that, I am of the opinion that whether Curtis and Stephern had actual or constructive notice that the property in question did not belong to Ronald Providence; is a question of fact to be decided by a tribunal of fact with the aid of evidence. As noted in the cases, the burden of proving the absence of notice is on the person alleging that he or she is a purchaser for valuable consideration without notice. As stated before, I am not required to conduct a mini trial of issues which should be investigated at full trial.

[60] The Claimant has annexed to her Statement of Claim copies of documents which she considers necessary to her case. These documents are marked "JS 1" to JS 14". These documents include the unsigned **Power of Attorney**, which is said to have been prepared by Mr Marks, for the Claimant's signature and by which Mr Marks is said to have acquired the knowledge of the true owner of the subject lands.

[61] The Grant of Administration, obtained by the Claimant on 13th June 1997 and the Deed of Conveyance from Ronald Providence to Curtis and Stephern numbered 284 of 2004 have been pleaded and copies thereof are also annexed to the Statement of Claim. However, I do not agree that it is for me to determine whether any of those documents in and of themselves contains any sufficient proof which sustains the averment that Curtis and Stephern were not bona fide purchasers for value without notice. How those documents are interpreted is a question of fact for the fact finder.

[62] In relation to the allegation contained in the Particulars set out in paragraph 24 of the statement of Claim, that Curtis and Stephern knew or deemed to have known that Doris Providence's Possessory Title and Ronald Providence's Deed of Gift were ploys to obviate the need for the Claimant's consent and authority to deal with the subject lands; whether Curtis and Stephern knew that Ronald Providence and Doris Providence were involved in a ploy to avoid the need for consent of the Claimant is also a question of fact for the fact finder. The factual matrix of this situation can only be gleaned at the stage of evidence.

[63] In my judgment, there are in depth issues to be determined that cannot be resolved on the application for summary judgment, all revolving around the central issue as to whether Curtis and Stephern were bona fide purchases for value without notice:-

- (a) Whether Mr Marks, acting as solicitor for Ronald Providence, the Vendor, as well as solicitor for Curtis and Stephen, the Purchasers, knew that the Claimant was the true owner of the subject land; and if so, whether that knowledge is to be imputed to Curtis and Stephern as purchasers on the faith of a Deed of Conveyance duly registered in the name of the Vendor;
- (b) Whether Curtis and Stephern gave value for the property purchased; and if so whether they acted in good faith in that their conscience were unaffected by knowledge or notice of any prior legal or equitable interest of the Claimant.
- (c) Whether Curtis and Stephern's Deed of Conveyance bearing registration number 284 of 2005 should be cancelled or whether it is to be regarded as giving Curtis and Stephen a legal fee simple that defeats the interest of the Claimant.

[64] **Conclusion**

To my mind, this is not a suitable case for summary judgment. The issue of notice or knowledge is a question of fact to be decided by a tribunal of fact. I am of the view that this case should go to trial for a determination of all the issues raised in the Pleadings. I

come to this determination bearing in mind that Mr Marks is not a party to these proceedings, and has not given affidavit evidence in this application. I also bear in mind that the affidavit in support of the application for summary judgment is very bare; and that there has been no Reply to the averment in the Amended Defence or in the responding affidavit that Curtis and Stephern were bona fide purchasers without notice for valuable consideration. I have considered the sources of Law cited by Mr Williams. As well, I have considered the cases cited by Mr Thomas. I note that those cases, in particular **Vincent Pickering v Jerry Wilkins et al**, supra, concerned registered land, and were decided after full investigation on the evidence at trial, and all persons who were alleged to have participated in the fraud were made parties. In my judgment, the pleaded case of the parties indicates that there are factual issues to be tried, which if proved in favour of Curtis and Stephern, might result in a decision in their favour. Therefore, I am unable to accede to the application for summary judgment.

[65] No arguments were advanced in relation to the issue of Limitation under the Possessory Titles Act. As such, I make no finding thereon.

[66] IT IS HEREBY ORDERED that

1. The application by the Claimant for summary judgment is denied.
2. The matter is to be set for case management conference on a date to be fixed and notified by the court office.
3. Given the nature of the proceedings, there shall be no order as to Costs.

[67] I am grateful to counsel for their submissions and their patience.


Pearlitta E Lanns
Master