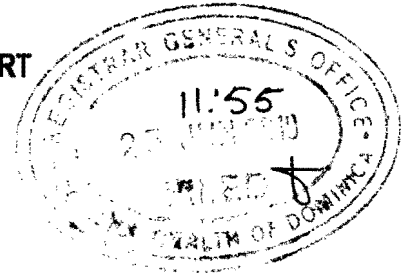


**IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
COMMONWEALTH OF DOMINICA
(CIVIL)**



Claim No. DOMHCV 2009/292

BETWEEN:-

IRENA ELCOCK

Claimant

-and-

**DARIUS WILTSHIRE as Personal Representative
of the estate of FLETCHER WILTSHIRE**

Defendant

Appearances: Mrs. Hazel Johnson for the Claimant

No appearance of counsel for the defendant or the defendant

2010: 30th April
11th June

DECISION

- [1] **STEPHENSON-BROOKS J.:** This matter commenced by Fixed Date Claim Form filed with Statement of Claim attached against Fletcher Wilson, seeking to have a Declaration that the Claimant is the beneficial owner of a parcel of land located at Marigot, in the parish of St Andrew, in the Commonwealth of Dominica, containing 3331 square feet of land and that the Defendant holds the said land in trust for the Claimant. For an order setting aside a Certificate of title which has been issued for the said land (the disputed parcel) and for an injunction preventing the Defendant whether by himself his servants and or agents for otherwise dealing with the land in a manner that would be prejudicial to the Claimant and for an order that the said land be transferred to the Claimant.
- [2] The named Defendant, Fletcher Wiltshire is deceased and the Claimant applied for and obtained an order from the Court for Darius Wiltshire, the son of Fletcher Wiltshire to be appointed as Personal Representative of the estate of Fletcher Wiltshire on the grounds

that Fletcher Wiltshire's estate had not been administered. There after Darius Wiltshire was duly added to the proceedings as Personal Representative of his father's estate. The duly amended proceeding was personally served on him and he failed and or neglected to enter an appearance or file a defence in the matter. This matter therefore proceeded as an undefended matter.

[3] Pursuant to Part 27.3 of CPR 2000 I considered that this matter could be dealt with summarily and accordingly directions were given that the matter would be tried by affidavit evidence and written submissions which were also ordered and both were filed as ordered. I will now render my decision in the matter.

[4] The Claimant in her pleaded case states that she moved onto the piece of land the subject matter of this case with the permission of Fletcher Wilson deceased and subsequent to her moving onto and living on the land in 1978 she purchased it from Fletcher Wiltshire and that the sale of the land was witnessed by one Mc Cloud Bristol and Joseph Newton. The Claimant contends that due to financial constraints she did not immediately apply for the land to be registered in her name immediately and that subsequent to her purchase Mr Wiltshire fraudulently had the said parcel of land that he sold to her included in a parcel of land which he registered in his own name.

[5] Miss Elcock, the Claimant further contends that she only became aware of the fraudulent registration of title to her land in 2005 when she attempted to have herself registered as the owner. The Claimant submits that the Defendant obtained title to his land by fraud, and as such the registration should be set aside.

[6] The Claimant particularised the Defendant's fraud as follows:

"That the Defendant swore to an affidavit of long possession on the 25th day of January 1989 and stated therein as follows " I have seen the plans of the said land surveyed and drawn by Alphonse Pascal Licenced Surveyor and that

they correctly set forth the boundaries and extent of the said land, the said portion of land belongs to me."

It is the Claimant's contention that when the Defendant made that averment he made it with the full knowledge that he sold her a portion of the said land and that he made the statements fraudulently knowing them to be false or not believing them to be true or recklessly not caring whether they were false.

[7] The Claimant further claims that she is entitled to the said parcel of land by virtue of the provisions of the Real Property Limitation Act in that she has been in continuous possession of the said land as owner for a period in excess of twelve (12) years.

[8] I will now set out a summary of the facts as gleaned from the affidavit evidence sworn in this matter on behalf of the Claimant.

- (i) The Claimant Irena Elcock, who can be described as a senior citizen, in the 1960's moved from Grand Bay where she was originally from, to Marigot. When she moved there, she proceeded to look after the mother of Fletcher Wiltshire and after her demise she looked after Fletcher's wife.
- (ii) That she bought a small wooden house from Fletcher Wiltshire and one Mr Nicholas and with their permission put it on a piece of land belonging to them located at Weirs, Marigot.
- (iii) That having put the house on that piece of land she made it her home and she lived there and raised her son James Charles there.
- (iv) That in 1978 she purchased the said piece of land from Fletcher for \$300.00 and that she paid him and received a receipt which stated the boundaries of the land as:

On the East by land of the heirs of Stanford Wallace

On the West by the land of Watson Matthew

On the North by the land of Unworth K. Andrew

On the South by the said property

- (v) That the receipt was signed by Fletcher Wilson and also by two witnesses, Mc Cloud Bristol and Joseph Newton. A copy of the receipt was produced as an exhibit along with an affidavit of due execution sworn to by Mc Cloud Bristol. .
- (vi) The Claimant says that she lived in her house until Fletcher's wife died and then she moved into Fletcher's house to take care of him and that during that time her son and his girlfriend continued lived together in her house.
- (vii) That after Fletcher's death in 1993 she moved back into her home and that her son later migrated to the USA from Dominica.
- (viii) The Claimant says that after she purchased the land from Fletcher she did not register it in her name as she did not have the money to do so and in 2005 her son sent her the money and she attempted to do so only to find that when the land was surveyed in the process of applying to register the land, it was found and she was informed that Fletcher had applied for and obtained title to a parcel of land which included the said land and that she could not get title to the land.
- (ix) Her discovery prompted the Claimant to take action having sought legal advice on the matter.
- (x) Miss Elcock says that she was never informed of or received notice of the land being surveyed neither did she see anyone surveying the land.
- (xi) The Claimant exhibited the affidavit sworn by Fletcher from when he was applying for his first certificate of title and noted that he identified the piece of land for which he was applying for title was bounded by the land of Urias Wallace (*who is the son of Stanford Wallace*) which is bound was described on the receipt as "bounded on the east by the lands of the heirs of Stanford Wallace".
- (xii) The Claimant's case is that Fletcher had to know that that piece of land, for which he was apply for title, was not bounded by the Wallace land as stated and that the boundaries were not correct as he was stating and that that was the piece of land that he sold to her and in doing so he perpetuated a fraud.

(xiii) The Claimant alleges that Fletcher knew that having sold her the parcel of land that he did in 1978 that his land no longer bounded the Wallace land.

(xiv) The Claimant is also claiming that she has been in continuous and undisturbed position of the land and has not been disturbed or interfered with and that she has not paid rent to anyone for the land since 1978.

[10] Licenced Surveyor, Lionel Laville in his affidavit submitted on behalf of the Claimant, spoke to being engaged by the Claimant Irena Elcock to carry out the survey on the disputed parcel of land as part of the process of her applying for first Certificate of Title for the land. That in October 2005, he carried out a search at the Titles Registry in respect of the land and found that the parcel formed part of land that was registered in the name of Fletcher Wiltshire.

[11] Mr Laville states that he informed the Claimant of his findings and he also prepared a survey plan for the said parcel being claimed by the Claimant and confirmed that the parcel formed part of the land registered in the name of Fletcher. Further that he advised her that because the parcel formed part of another parcel for which a Certificate was already issued she could not obtain a certificate for the piece that she was claiming.

Counsel's Submissions:

[12] Learned Counsel Mrs. Johnson in her written submissions states that the title recorded in favour of Fletcher Wiltshire should be set aside on the ground that it was recorded as a result of a fraud perpetrated by the said Fletcher Wilson and that because of this fraud the title which is indefeasible could be set aside.

[13] Learned Counsel submitted that "Fraud is proved when it is shown that a false representation has been made (i) knowingly or (2) without belief in its truth or (3) recklessly, careless, whether it is true or false" ... and that "if fraud is proved the motive of the person guilty of it is immaterial. It matters not that there was no intention to cheat or injure ..." Counsel relied on the Locus Classicus on fraud Derry -v- Peak¹

¹ 14 Appeal Cases 337

- [14] It was submitted that the Claimant bears the onus to submit sufficient evidence to satisfy the required measure of proof and Learned Counsel Mrs. Johnson noted that "in civil actions the general rule is that an uncontested case may be established by a minimum proof and a contested issue may be established by a balance of probabilities"²
- [15] Learned Counsel Mrs. Johnson further stated that in respect of fraud cases the standard of proof applicable is the civil standard of balance of probability and not the criminal standard of proof beyond reasonable doubt and that the degree of probability required to establish proof may vary according to the gravity for the allegation to be proved.³ Learned Counsel contends that the case at bar is uncontested therefore the minimum standard of proof is required to successfully establish the Claimant's case.
- [16] Essentially in the case at bar, I understand the main thrust of the Claimant's case is that the Fletcher Wilson's title as recorded in Certificate of Title T8 at folio 96 was obtained by Fraud and should be set aside based on the fact. That, when Mr Fletcher Wiltshire swore in his affidavit in support of his application for first Certificate of Title that the land set out and described in the survey plan of Alphonse Pascal correctly set out the boundaries and extent of the land it was not truthful based on his previous sale some 11 years earlier to the Claimant as proved by the existence of the receipt and buttressed by the affidavit of due execution and that the name Urias Wallace which appears on the survey is the heir of Stanford Wallace as appears on the receipt.
- [17] However, before the Court could properly determine any of the main issues that arise, it must be ascertained whether Miss Elcock can properly bring this claim. Counsel in her written submissions contends *inter alia* that the title to the said parcel of land by Fletcher Wiltshire was obtained by fraud, and in essence that because this is a case of fraud it would attract a postponement of the Limitation Period which she contends does not begin to run until the fraud has been discovered by the Claimant and in support of her point she made the following quotation:

² Halsbury's Laws of England Vol 15 Para 496

³ Halsbury's Laws of England Vol 26 Para 1572

*"The cases in which the running of time is postponed are cases where either the action is based upon the fraud of the defendant ..."*⁴

[18] It is the Claimant's evidence that she was unaware of the fraud and only became aware of it in 2005 when she, having received funds from her son to register the title and was in the process of having the parcel surveyed to apply for registration did she know that the parcel of land which she purchased was included in a parcel of land which was subsequently registered in the name of the person who sold her the said parcel previously and she became aware of his affidavit where he falsely stated that the parcel of land he applied to register in her name was bounded by the land of Urias Wallace and that she took steps which ultimately led to the filing of this action. That in the circumstances her application is not statute barred.

[19] I agree with Counsel's submission in this regard and rule that because the claim at bar is based on the allegation of fraud it is not statute barred in that the Claimant only first became aware of the fraud in 2005.

COURTS FINDINGS:

[20] I have given deliberate consideration to the submissions of learned Counsel. Also, I have paid regard to the evidence that was adduced on behalf of the claimant and finds the following:

- (i) I accept the evidence of Mr Laville the Licenced Surveyor that the parcel of land that Fletcher Wiltshire applied for and obtained First Certificate of Title for includes that piece and parcel of land that the Claimant says she purchased from him in 1978.
- (ii) I accept the evidence of The Claimant that she purchased the piece described in the receipt. I also accept the contents of the affidavit of due execution sworn to and signed by McCloud M Bristol verifying that he was present on the 10th May 1978 at Marigot in the parish of St Andrew and that he did see Fletcher Wiltshire sign and seal and for his act and deed deliver the said receipt and that the

⁴ Para 629 of Vol. 24 of the Halsbury's Laws of England

signature on the receipt is his. That this receipt proves the purchase by the Claimant and also identifies the parcel of land with particularity by the bounds as stated.

- (iii) I accept the Claimant's contention that when Fletcher Wiltshire on 25th January 1989 stated in his affidavit that *"I have seen the plans of the said land surveyed and drawn by Alphonse Pascal, Licenced Surveyor and they correctly set forth the boundaries and extent of the said land"* he said so knowingly, or without belief in its truth, or recklessly, careless in this regard whether it be true or false. That at the time Fletcher had to have known that the land which he retained was not bounded to the lands of the heirs of Stanford Wallace as the portion of land that was bounded to the Wallace Land was sold by him to the Claimant as is evidenced by the description contained on the Receipt. I find that when Fletcher Wiltshire made that statement he perpetuated a fraud.
- (iv) I must state that that in order to prove that a fraud was committed, it is incumbent on the claimant to specifically lead credible and reliable evidence of the exact nature of the fraud and how it was perpetuated and I find that the Claimant has met that requirement in this case.
- (v) I find that the fraud committed by Mr Wiltshire was a fraud on the registration process and that his being registered as the owner of the entire parcel of land is tainted by this fraud. I find that the falsehood contained in the affidavit was a deliberate one from which Mr Fletcher Wiltshire benefited. And accordingly the resulting registration should be set aside.

[21] The Claimant seeks to have a declaration that she is the beneficial owner of the parcel of land comprising 3,331 sq. feet, which she purchased in 1978 and for which she has a receipt and which is shown in the survey map prepared by a Licenced Surveyor described as being bounded as follows:

On the North: by the Estate of Unworth F Andrew

On the East: by the Estate of Urias Wallace

On the South: by the lands of Linda Burnette, Hannah Suzanna Joseph and a foot path

On the South West: by the land of Fletcher Wiltshire

[22] The Claimant also seeks a declaration that the Defendant holds the said piece and parcel of land in trust for her and an order that the memorandum of transfer be executed, effecting the transfer of the said land to the her or to such person or persons as she may direct.

[23] I wish to touch just briefly on Learned Counsel, Mrs. Johnson's submission that the Claimant having been in undisturbed exclusive possession of the land for the past 32 years is entitled to title by prescription and that the title of Fletcher Wiltshire would be ousted by her title. To say that the Claimant cannot succeed in this regard as from her own evidence she entered upon the land of Fletcher Wilson with his consent, and it is trite law that where the occupier's possession of the land is by permission of the owner, that possession cannot be adverse.⁵

CONCLUSION:

[24] In view of the foregoing premises I therefore enter Judgment for the Claimant against the Defendant and hereby make the following declarations and orders:

(i) That the Claimant Irena Elcock is the beneficial owner of the parcel of land comprising 3,331 sq. feet, which she purchased in 1978 and for which she has a receipt and which is shown in the survey map prepared by Licenced Surveyor, Lionel Laville described as being bounded as follows:

On the North: by the Estate of Unworth F Andrew

On the East: by the Estate of Urias Wallace

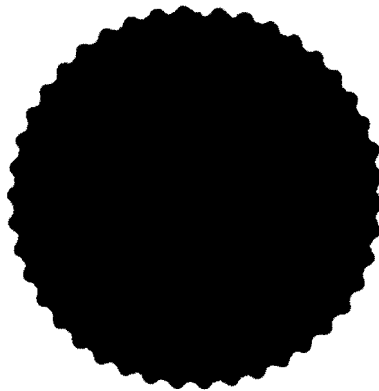
On the South: by the lands of Linda Burnette, Hannah Suzanna Joseph and a foot path

On the South West: by the land of Fletcher Wiltshire

⁵ Halsbury's Laws of England 4th ed. Vol. 28 paragraphs 977-981. para 977 :

- (ii) That the Defendant holds the said piece and parcel of land in trust for her.
- (iii) That the Title recorded at T8 folio 96 in favour of the Fletcher Wiltshire is ordered set aside.
- (iv) That the Defendant whether by himself, his heirs or assigns are prohibited and forbidden from selling, mortgaging or otherwise dealing with the said land in a manner prejudicial to the Claimant's rights thereto.
- (v) That a memorandum of transfer be executed by the Defendant effecting the transfer of the said land to the Claimant or to such other person as she may direct and in the event that the Defendant fails and or neglects to comply with this order within 30 days hereof that the Registrar of Titles be directed to execute the transfer herein.

[25] No order as to costs.




Birnie Stephenson-Brooks
High Court Judge