

**BRITISH VIRGIN ISLANDS**

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

**Claim No. BVIHCV2007/0008**

**IN THE MATTER OF SECTIONS 140 & 117 OF THE REGISTERED LAND ACT  
CAP. 229 OF THE REVISED LAWS OF THE VIRGIN ISLANDS, 1991**

**AND**

**IN THE MATTER OF PARCELS 25 & 35 BLOCK 2640B WEST CENTRAL REGISTRATION  
SECTION OF THE LAND REGISTER OF THE VIRGIN ISLANDS**

**AND**

**IN THE MATTER OF AN APPLICATION FOR REGISTRATION AS PROPRIETOR BY  
TRANSMISSION OF PARCELS 25 & 35 FILED AT THE LAND REGISTRY OF THE VIRGIN  
ISLANDS AS INSTRUMENT NO. 3009 OF 2006**

**AND**

**IN THE MATTER OF A TRANSFER OF PARCELS 25 & 35 FILED AT THE LAND REGISTRY OF  
THE VIRGIN ISLANDS AS INSTRUMENT NO. 3019 OF 2006**

**AND**

**IN THE MATTER OF A TRANSFER OF PARCEL 25 DATED 9 JANUARY 2007**

**BETWEEN**

**(1) VINCENT PICKERING  
(2) CEDRIC PICKERING**

**Claimants**

**-And-**

**(1) JERRY WILKINS  
(2) THE REGISTRAR OF LANDS**

**First Defendant**

**Second Defendant**

**Appearances:**

Ms. Hazel-Ann Hannaway of Harney, Westwood & Reigels for the Applicant

Ms. Cheryl Richards of C.E. Dawson & Co for the Claimants

Mr. Baba Aziz, Senior Crown Counsel, Attorney General's Chambers for the Second Defendant.

-----  
2007: March 30, April 02  
2007: June 19, 20  
-----

## **JUDGMENT**

- [1] **HARIPRASHAD-CHARLES J:** On 7 February 2007, GCS Development Limited (“the Applicant”) applied to the Court for a variation of the Order of the Court dated 19 January 2007 to remove the stay in paragraph “iv” from the said Order and for the Registrar of Lands (“the Second Defendant”) to register the transfer of Parcel 25 to the Applicant forthwith. The Applicant is a BVI Company. It is not a party to the substantive claim.

### **History of the matter**

- [2] On 18 January 2007, Vincent Pickering and Cedric Pickering (“the Claimants”) applied to the Court on an ex parte basis for the following orders:
1. a freezing order restraining Mr. Jerry Wilkins (“the First Defendant”) whether by himself, his servants and agents or otherwise from:
    - a. dealing with the proceeds of the sale of Parcel 25 whether located within the jurisdiction or not;
    - b. removing from the jurisdiction the proceeds of the sale of Parcel 25;
  2. an Order directing the First Defendant to provide information about the location of the proceeds of the sale of Parcel 25, which are the subject of the application for the freezing order;
  3. an injunction restraining the First Defendant whether by himself, his servants, workmen and agents or otherwise from entering onto Parcel 35, or from constructing or causing to be constructed any building on Parcel 35; and
  4. an Order for the Second Defendant to stay of registration of the transfer of Parcel 25 until the determination of the claim.

- [3] The grounds of the application are contained in an affidavit of Cecil Dawson sworn to on 18 January 2007. Briefly, they are as follows: the Claimants are two of ten lawful children of Ernest Pickering, deceased (“the testator”). The testator made a will dated 22 July 1970 wherein he appointed two other lawful children, Mavis Wilkins and Frederick Pickering as executors of his will. The First Defendant is the lawful child of Mavis Wilkins. The testator gave to Frederick Pickering a Power of Attorney to act as executor on his behalf. Frederick Pickering died intestate on 1 February 2000 and Mavis Wilkins died intestate on 28 February 2004 without administering the estate of the testator which comprised Parcels 25 and 35 of Block 2640B of West Central Registration Section, Tortola. In his will, the testator directed that his trustee convert to money all his real and personal property and the net proceeds of the sale subject to the sums that was needed to enable the sale and conversion to his ten children which included his Executors and the Claimants.
- [4] On 17 August 2005, the Claimants applied for a Grant De Bonis Non Administratus (with the Will annexed) to the estate of the testator which was granted on 15 November 2006. On 24 October 2006, the First Defendant obtained Letters of Administration to the estate of his mother’s estate. On 23 October 2006, the First Defendant made an application to the Land Registry to be registered by transmission as proprietor in place of Mavis Wilkins, deceased, of her interest in the land comprised in Parcels 25 and 35 of Block 2640B.<sup>1</sup> On 3 November 2006, the Second Defendant registered the First Defendant as the personal representative of Mavis Wilkins on the entire Parcels 25 and 35 when in actual fact, he was entitled to be registered as proprietor in place of his mother 1/10 share of the said properties. On 6 November 2006, the Second Defendant also registered transfers of both parcels to the First Defendant personally for love and affection.
- [5] The Claimants discovered that the First Defendant had caused himself to be registered as the proprietor of Parcels 25 and 35 and had transferred Parcel 25 to the Applicant on 15 January 2007. They brought this matter to the attention of the Second Defendant on the said day and to the attention of the Applicant on the following day.

---

<sup>1</sup> See paragraph 10 of the affidavit of Cecil Dawson in support of the application.

- [6] On 18 January 2007, the Court granted, among other things, an Order for the stay of registration of Parcel 25. The Order was extended on two subsequent occasions and is currently subsisting. In the interim, the Claimants also applied for and obtained an order for service out of the jurisdiction on the First Defendant in St. Thomas, United States Virgin Islands. However, it appears that the First Defendant is on the move and is no longer in St. Thomas. In addition, the Claimants have filed a Claim Form and a Statement of Claim in the matter. Since the filing of this claim, there have been several amendments to the Claim Form as well as the Statement of Claim.

### **The claim**

- [7] The claim is brought pursuant to sections 117 and 140 of the Registered Lands Act, Cap.229 ("the Act") against the Defendants seeking among other relief, the remedy of rectification or cancellation of the registration of the name of the First Defendant, in the title register, as proprietor of Parcels 25 and 35. The Claimants have alleged fraud against the First Defendant and mistake on the part of the Second Defendant in registering the name of the First Defendant as proprietor of the said Parcels.

### **The present application**

- [8] The present application arises out of a purported transfer of Parcel 25 to the Applicant on 9 January 2007. On the same day, the Applicant paid the First Defendant the full consideration of \$125,000.00 for Parcel 25. Ms. Sheila George, sole director of the Applicant averred that on the same day, the Applicant applied for an official search of the register and for a stay of registration in accordance with section 42 (1) of the Registered Land Act due to expire on 22 January 2007. The Applicant received a Certificate of Official Search from the Registry of Lands which revealed that there were no registered charges or any notation of encumbrances or adverse claims against the title. On 16 January 2007, the Applicant duly paid the stamp duty on the property and submitted the transfer to the Second Defendant for registration. On 26 January 2007, the solicitor for the Applicant visited the Land Registry to inquire on the status of the matter when she was provided with a copy of the Order of the Court.

- [9] Ms George stated that the Applicant was served with the Order on 29 January 2007 and had no prior knowledge of any dispute in respect of the title on the date of completion. She alleged that as a result of the ex parte Order, the Applicant has been deprived of both its money and the property bought with valuable consideration without any notice of an adverse claim.
- [10] The Second Defendant, although a party to the substantive claim is not a party to this application and therefore has no interest (propriety or otherwise) in the outcome of the interlocutory proceedings. However, Learned Senior Crown Counsel for the Second Defendant, Mr. Baba Aziz held a watching brief and was urged by the Court to make submissions as a neutral party.

### **Applicable legal principles**

- [11] It seems to me that upon a thorough reading of the Act, I agree with Mr. Aziz that the High Court has no power to stay registration of an instrument of transfer. Instead, a stay of registration (an administrative act) is reserved to the Second Defendant in cases where an application for an official search has been submitted to the Second Defendant under the circumstances specified under section 42 and not otherwise. The Claimants' application for stay of registration did not fall within the purview of section 42. It follows, therefore, that the Order for stay of registration cannot be justified in the circumstances of the case.
- [12] However, pursuant to Section 124 of the Act, the High Court has power to make an inhibitory order, in appropriate circumstances, precluding registration. Section 124 provides as follows:
- “The court may make an order (hereinafter referred to as an inhibition) inhibiting for a particular time, or until the occurrence of a particular event, or generally until further order, the registration of any dealing with any land, lease or charge.”
- [13] Additionally, the High Court has power, pursuant to section 24(1) of the West Indies Associated States Supreme Court (Virgin Islands) Act, Cap. 80 to grant an interlocutory injunction in all cases in which it appears to the Court or Judge to be just or convenient that the order should be made.

- [14] An inhibition order is a special order directed at the registration of any dealing in respect of land. It is analogous to an order of injunction. Accordingly, the principles which inform the granting of an order of injunction, must of necessity apply to the making of an inhibitory order.
- [15] It is a well-established principle that the right to obtain interlocutory relief is merely ancillary and incidental to a pre-existing cause of action. In the classic speech of Lord Diplock in **Siskina (Cargo Owners) v Distos Compania Naviera S.A. ("the Siskina")**<sup>2</sup> (with whom the other members of the House of Lords agreed), he explained (at 254) that section 45(1) [identical to our section 24 (1)] presupposes the existence of an action, actual or potential, claiming substantive relief which the High Court has jurisdiction to grant and to which the interlocutory orders referred to are but ancillary. He enunciated the basic understanding of an interlocutory injunction more generally at 256:
- "A right to obtain an interlocutory injunction is not a cause of action. It cannot stand on its own. It is dependent upon there being a pre-existing cause of action against the defendant arising out of an invasion, actual or threatened by him, of a legal or equitable right of the plaintiff for the enforcement of which the defendant is amenable to the jurisdiction of the court. The right to obtain an interlocutory injunction is merely ancillary and incidental to the pre-existing cause of action. It is granted to preserve the status quo pending the ascertainment by the court of the rights of the parties and the grant to the plaintiff of the relief to which his cause of action entitles him, which may or may not include a final injunction."
- [16] In **American Cyanamid Co. v Ethicon Ltd**,<sup>3</sup> Lord Diplock laid down the guidelines on how the court's discretion to grant interim injunctions should be exercised in the usual types of cases. He stated that the use of such expressions as "probability", "a prima facie case", or "a strong prima facie case" as a criterion for the grant of an interlocutory injunction leads to confusion as to the object sought to be achieved thereby because at this stage, the Court is not concerned with resolving conflicts of evidence on Affidavits. The Court is not concerned either to decide difficult questions of law because these are matters that are to be dealt with at a trial. Lord Diplock stated further that the Court should refrain from expressing any opinion on the merits of a case until the trial and it is only necessary for the

---

<sup>2</sup> [1979] A.C. 210.

<sup>3</sup> [1975] 3 All ER 510.

court to be satisfied that the claim is not frivolous or vexatious, so that there is a serious question to be decided.

[17] Another way of stating the test is whether the claimant has a “good arguable case.”<sup>4</sup> In **Rasu Maritima v Perusahaan Pertambangan**<sup>5</sup>, Lord Denning observed that this test was “in conformity with” the test for granting injunctions laid down by the House of Lords in the **American Cyanamid** case. In **Ninemia Maritime Corporation**[supra], Mustill J described a “good arguable case” as “one which is more than barely capable of serious argument, but not necessarily one which the judge considers would have a better than 50 per cent chance of success.”

[18] In summary, the guiding principles in exercising the discretion to grant or refuse an application for an injunction are:

- a. Whether there is a serious issue to be tried or put another way, whether the claim is frivolous or vexatious.
- b. Whether damages will be an adequate remedy.
- c. In whose favour is the balance of convenience.

[19] The first issue is whether the documentary evidence filed in this case, viewed against the backdrop of the applicable law, discloses a viable or reasonable cause of action against the Defendants, which ought to be protected by an injunction or an inhibitory order. The Claimants have pleaded fraud on the part of the First Defendant and mistake on the part of the Second Defendant. It is common ground that if the Claimants can prove the fraud and the mistake at the trial, they may be entitled to the remedy of rectification.<sup>6</sup> But, a court cannot be satisfied in any case that registration has been obtained by mistake or fraud unless and until there is a full hearing. However, in order to grant an inhibitory or injunctive order, the court, even at this interlocutory stage, must determine whether the allegations of fraud or mistake are frivolous or vexatious. This, I shall attempt to do.

---

<sup>4</sup> *Ninemia Maritime Corporation v Trave GmbH* (The Niedersachsen) [1983] 1 WLR 1412, at 1415-1417.

<sup>5</sup> [1978] Q.B. 644 at 661

<sup>6</sup> Section 140 of the Act states that the Court may order rectification of the register by directing that any registration be cancelled ...where it is satisfied that any registration including a first registration has been obtained by fraud or mistake.

### **Whether the transfer of Parcel 25 is subject to the overriding interests of the Claimants**

[20] Learned Counsel for the Applicant, Ms. Hazel-Ann Hannaway submitted that the Act is based on the Australian Torren's System for the cadastral registration of property. She submitted that the Privy Council decision of **Gibbs v Messer**<sup>7</sup> outlines the objective of this system as:

“The object is to save persons dealing with registered proprietors from the trouble and expense of going behind the register, in order to investigate the history of their author's title, and to satisfy themselves of its validity. That end is accomplished by providing that everyone who purchases, in bona fide and for value, from a registered proprietor, and enters his deed of transfer or mortgage on the register, shall thereby acquire an indefeasible right notwithstanding the infirmity of his author's title.”

[21] She submitted that section 38 of the Act provides for this indefeasibility principle. She next submitted that whilst the position differs with respect to voluntary transfers without valuable consideration, who take property subject to unregistered interests, the Registered Land system specifically protect the interests of bona fide purchasers for value.

[22] Learned Counsel for the Claimants, Ms. Richards submitted that section 38 has long been said to confer indefeasibility of title to a specified parcel of land upon the registered proprietor and dispenses with any need on the part of persons dealing with him to investigate any further his rights to that land. However, the section does not protect the registered proprietor against any claim whatsoever, as there are other provisions in the Act by which the entry on which he relies can be cancelled or corrected or he may be subject to a claim in personam. She referred to Sections 27 and 28 and submitted that a purchaser for value without notice acquires land free from any interests that are not registered, except for the overriding interests listed in section 28 of the Act. She next submitted that the land or any legal interest in land which is subject to such overriding interest when transferred or leased is encumbered with those interest notwithstanding that the purchaser or tenant did not have actual or implied knowledge of the overriding interest.

---

<sup>7</sup> [1891] A.C. 248 at 254

[23] She argued further, that one such overriding interest is the rights of a person in actual occupation of land or in receipt of the rents and profits from the land. She submitted that the Act does not define 'actual occupation' and case law suggests that it is not desirable to attempt to lay down the situations in which a person other than the vendor is deemed to be in actual occupation. She further submitted that actual occupation is a question of fact and does not necessarily require the physical presence of the person claiming to occupy but does require some degree of permanence and continuity.

[24] To substantiate her point, Ms. Richards relied on the authorities of **FBO 2000 (Antigua) Limited v Vere Cornwall Bird and others**,<sup>8</sup> **Spiricor of St. Lucia Ltd v Attorney General of St. Lucia and another**,<sup>9</sup> and **Halsbury's Law of England 4<sup>th</sup> edition, Reissue, Volume 26, para 784**. She forcefully argued that what is protected is the 'rights' of a person in actual occupation and not the 'actual occupation' and that the overriding interests include the rights of a beneficiary behind a bare trust or trust for sale and the right to have a registered title rectified under the Act. On this premise, she asserted that as personal representatives of the estate of the testator, the Claimants have the rights for themselves and the other beneficiaries as trustees of Parcels 25 and 35 and therefore have overriding interests over those parcels of land that are protected by section 28. She argued that in addition to their rights as beneficiaries, the Claimants also have a right to rectification of the land register consequent upon the fraud of the First Defendant and the mistake of the Second Defendant.<sup>10</sup>

### **Relevant statutory provisions**

[25] Section 38(1) of the Act provides "no person dealing or proposing to deal for valuable consideration with a proprietor shall be required or in any way concerned –

- a) to inquire or ascertain the circumstances in or the consideration for which such proprietor or any previous proprietor was registered; or
- b) to see to the application of any consideration or any part thereof; or
- c) to search any register kept under the Registration and Records Act."

---

<sup>8</sup> High Court, Antigua and Barbuda, no. 0130 of 2003

<sup>9</sup> [1997] 55 WIR 123

<sup>10</sup> This is dealt with below.

[26] Section 23 states as follows:

“Subject to the provisions of section 27, the registration of any person as the proprietor with absolute title of a parcel shall vest 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, but subject -..... (b) unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register:....”

[27] Section 27 concerns voluntary transfers. This is not what is alleged. Section 28 lists the overriding interests. In effect, it states that “all registered land shall be subject to such of the following overriding interests as may for the time being subsist and effect the same, without their being noted on the register –

.....

(g) the rights of a person in actual occupation of land or in receipt of the rents and profits thereof save where inquiry is made of such persons and the rights are disclosed.”

### Case Law

[28] In **Strand Securities Ltd v Caswell**<sup>11</sup>, Lord Denning in dealing with a section similar to section 28 (g) stated:

“Section 70 (1) (g) is an important provision. Fundamentally, its object is to protect a person in actual occupation of land from having his rights lost in the welter of registration. He can stay there and do nothing. Yet, he will be protected. No one can buy the land over his head and thereby take away or diminish his rights. It is up to every purchaser before he buys to make inquiry on the premises. If he fails to do so it is at his own risk. He must take subject to whatever rights the occupier may have. Such is the doctrine of *Hunt v Luck* [1901] 1 Ch. 45 for unregistered land. Section 70 (1) (g) carries the same doctrine forward into registered land; but with this difference. Not only is the actual occupier protected, but also the person from whom he holds. It is up to the purchaser to inquire of the occupier, not only about the occupier's own rights, but also about the rights of his immediate superior. The purchaser must ask the occupier: ‘To whom do you pay your rent?’ And, the purchaser must inquire what the rights of that person are. If he fails to do so, it is at his own risk for he takes subject to the “rights of every person in actual occupation or in receipt of the rents and profits thereof.”

---

<sup>11</sup> [1965]Ch 958

[29] In **Abbey National Building Society v Cann and another**<sup>12</sup> the House of Lords had to decide the relevant date for ascertaining the existence of an overriding interest under UK section 23 (1) and 70 (1) (g) of the Land Registration Act 1925, (which is identical to section 28 (g)). Their Lordships held that the relevant date for determining whether an interest in registered land was protected by actual occupation and had priority over the holder of a legal estate by virtue of section 70 (1) (g) was the date when the legal estate was transferred or created and not the date when it was registered. It also held that a person having a beneficial interest in the property who entered into occupation of it after the creation of a charge but before it was registered could not claim the benefit of section 70 (1) (g) and therefore since the appellants were not in actual occupation of the property at the date of completion of the purchase, which was when the building society's charge was created, they were not entitled to claim the benefit of section 70 (1) (g). At page 1101, Lord Oliver of Aylmerton declared:

"It is, perhaps, dangerous to suggest any test for what is essentially a question of fact, for 'occupation' is a concept which may have different connotations according to the nature of the property which is claimed to be occupied. It does not necessarily, I think, involve the personal presence of the person claiming to occupy. A caretaker or the representative of a company can occupy, I should have thought, on behalf of his employer. On the other hand, it does, in my judgment involve some degree of permanence and continuity which would rule out mere fleeting presence. A prospective tenant or purchaser who is allowed, as a matter of indulgence, to go into property in order to plan decorations or measure for furnishings would not, in ordinary parlance, be said to be occupying it, even though he might be there for hours at a time."

[30] In the Saint Lucian case of **Spiricor of Saint Lucia Ltd v The Attorney General of Saint Lucia and Hess Oil St. Lucia Limited**<sup>13</sup>, Byron C.J. (Ag) [as he then was] dealt with a section of the St. Lucia Registered Land Act which is identical to section 28 (g). At page 132 of the judgment, his Lordship stated:

"A careful perusal of the words of section 28(g) would indicate that the 'actual occupation' is not the protected interest. What is protected are the 'rights' of a person in actual occupation. The word 'rights' is not limited by any definition.."

---

<sup>12</sup> [1990] 1 All ER 1085

<sup>13</sup> [1996] 55 W.I.R. 128.

- [31] He later found that in that case the issue as to the nature of the rights must be subordinated to the question of actual occupation. He stated that it is only if the appellant was in actual occupation or in receipt of the income from the property that section 28 (g) would operate to protect any rights he may have had.

### **Prima facie finding on the issue of overriding interest**

- [32] It is not disputed that the Claimants have a beneficial interest in the property. The question however, is whether the Claimants were in actual occupation. In her submissions, Ms. Richards identified the rights that the Claimants have but did not elaborate on how the court can conclude that the Claimants were in actual occupation. As Byron C.J. stated in **Spiricor** "it is only if the appellant is in actual occupation or in receipt of income from the property that section 28 (g) would operate to protect any rights he may have. The person must be in actual possession for that is the only way that the inquiry referred to in paragraph 28 (g) could trigger."

- [33] There is no evidence to prove who was living on the land at the time of the purported transfer to the Applicant. There is also no evidence whether anyone was collecting the income from the land. The evidence before the Court is that the Claimants live in New York, United States of America and that the First Defendant lives somewhere in the United States. It seems to me that there is clear prima facie evidence to find that the Claimants were not in actual occupation and therefore their rights that they allege cannot be considered an overriding interest. There is also no dispute that the transfer to the Applicant was for valuable consideration. In my judgment, the purported transfer of Parcel 25 to the Applicant was not subject to any overriding interest.

### **Indefeasibility Principle**

- [34] Another issue which arises for consideration relates to the indefeasibility principle. Mr. Aziz submitted that the emphasis in the indefeasibility principle lies in protecting a person whose name is registered on the register, whether on first registration or as a bona fide purchaser for value whose name is subsequently registered. According to him, the bona

fide purchaser for value whose name is not yet registered in the register does not enjoy the protection afforded to registered proprietors.

[35] Ms. Hannaway challenged the submission of Mr. Aziz that indefeasibility of title does not apply to purchasers whose interest is awaiting registration. In so doing, she relied on the decision of **Equipment Rental and Services Limited v Texaco (West Indies) Limited**<sup>14</sup>. She submitted that the Court of Appeal rejected a similar contention that the principles of priority under the Title by Registration Act did not apply to an option to renew an interest presented but not yet registered. She next submitted that the protection of the Act applies equally to a registered purchaser as it does to a purchaser whose transfer has been filed but is awaiting registration. According to Ms. Hannaway, the rule is he who applies first has the stronger right, and since the Applicant submitted its title first, it has the stronger right. Counsel contended that the Applicant has done everything to perfect its rights and the delay of the Second Defendant is no bar to the protection of the interest holder.

[36] In this context, section 23 is relevant.<sup>15</sup> It deals with the effect of registration of any person as the proprietor with absolute title. However, it must be read in conjunction with section 38 which provides as follows:

- “(1) No person dealing or proposing to deal for valuable consideration with a proprietor or shall be in any way concerned-
  - (a) to inquire or ascertain the circumstances in or the consideration for which such proprietor or any previous proprietor was registered; or
  - (b) to see to the application of any consideration or part thereof; or
  - (c) to search any register kept under the Registration of Records Act
- (2) Where the proprietor of land, a lease or a charge is a trustee he shall, in dealing therewith, be deemed to be absolute proprietor thereof, and no disposition by such trustee shall be defeasible by reason of the fact that such disposition amounted to breach of trust.”

---

<sup>14</sup> Civil Appeal No. 16 of 1997, Dominica, Judgment delivered on 26 October 1998

<sup>15</sup> See paragraph 26 above.

[37] In **Frazer v Walker**<sup>16</sup>, Lord Wilberforce who delivered the judgment of the Board stated that the expression “indefeasibility” was not used in the Act itself but it is a convenient description of the immunity from attack by adverse claim to the land or interest in respect of which he is registered, which a registered proprietor enjoys. He further stated:

“This conception is central to the system of registration. It does not involve that the registered proprietor is protected against any claims whatsoever; as will be seen later, there are provisions by which the entry on which he relies may be cancelled or corrected, or he may be exposed to claims in personam. These are matters not to be overlooked when a total description of his rights is required. But as registered proprietor, and while he remains such, no adverse claim (except as specifically admitted) may be brought against him.”<sup>17</sup>

[38] In **Racoon Limited v Harris Turnbull**<sup>18</sup>, a case from this jurisdiction which went all the way to Her Majesty’s Privy Council, Lord Jauncey of Tullichettle stated:

“The philosophy underlying a system of registration of title is that it confers indefeasibility of title to the specified parcel of land upon the registered proprietor and dispenses with any need on the part of persons dealing with him to investigate further his right thereto.

[39] The Board was confronted with issues which necessitated the application of sections 23 and 38 of the Act.

[40] Ms. Hannaway relied heavily on the case of **Equipment Rental and Services Limited v Texaco (West Indies) Limited**<sup>19</sup> to justify her submission that the protection of the Act applies equally to a registered purchaser as it does to a purchaser whose transfer has been filed but is awaiting registration. She referred to pages 7 and 8 of the judgment where Byron CJ [Ag] said:

“This broader definition of land including any interest in land, must include equitable interests in accordance with all established principles. The contrary position was unarguable even a century ago. See Lord Macnaughten in *Williams v Papworth (1900) A.C. 563 at 568* who said it could not of course be disputed that the expression “interest in land” unless there was something to restrict the meaning must include equitable as well as legal interests.”

---

<sup>16</sup> (1967) A.C. 569

<sup>17</sup> See page 580 of the judgment.

<sup>18</sup> [1997] A.C. 158 at 163.

<sup>19</sup> Civil Appeal No. 16 of 1997, Dominica, Judgment delivered on 26 October 1998

[41] She also relied on a passage of His Lordship that “the respondent’s interest in the land, namely the right to have a new lease as a result of the exercise of the option to renew was an equitable interest that could be enforced against the proprietor of the land held under the Act.” At page 8, Byron CJ (Ag) continued:

“...Simply stated, where the legal estate is outstanding [as is here] the priority of equitable interests is *prima facie* governed by the rule *qui prior est tempore, potior est jure* [he who is first has the strongest right]. In this case, the respondent exercised its option to renew, before the appellant agreed to purchase the land. The respondent should therefore have the stronger right.”

[42] It is to be observed that in **Equipment Rental**, the option to renew was a part of the lease which was noted on the register and was protected to the same extent as the lease itself by registration<sup>20</sup>. Indefeasibility was conferred to this option to renew because the lease (that contained the option) was registered and the existence of such rights of renewal will be apparent upon any inspection of the register. But it is the option to renew which is indefeasible and not its exercise. The right to exercise that option to renew was an equitable interest.

[43] With all due respect to Ms. Hannaway, I think that she has misconstrued the ratio decidendi in **Equipment Rental**. In that case, the option to renew was registered and as such, indefeasible. In the instant case, the Applicant’s interest in the land is not registered. It is awaiting registration. The Applicant cannot enjoy the protection afforded to registered proprietors under section 23. However, the Applicant may still benefit from certain protections by virtue of section 38 if it is found to be a bona fide purchaser for value without notice since the First Defendant is registered as proprietor of Parcel 25.

[44] It appears to me that both the Claimants and the Applicant may have equitable interest in Parcel 25. But, it is still left to be determined whether the Applicant is a bona fide purchaser for value without notice before the issue of priority of equitable interest even arises. In my judgment, these are matters to be determined at trial.

---

<sup>20</sup> See pages 9 and 10 of the Judgment

## **Section 140 and its Application**

[45] The Claimants initiated their claim pursuant to sections 140 and 117 of the Act. In effect, section 140 confers jurisdiction on the High Court to rectify the register in instances of entries or omissions made by fraud or mistake. Subsection (2) provides that the register cannot be rectified as to affect the title of a proprietor who is in possession unless such proprietor either had knowledge of the omission, fraud or mistake or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default. "Proprietor" in the Act means the person registered under the Act as the owner of land or a lease or a charge.

[46] Section 141 (1) is enlightening. It provides that:

"Any person suffering damage by reason of-

- a) any rectification of the register under this Act; or
- b) any mistake or omission in the register which cannot be rectified under this Act, other than a mistake or omission in a first registration; or
- c) any error in a certificate of official search issued by the Registrar or a copy of or extract from the register or in a copy of or extract from any document or plan, certified under the provisions of this Act,

shall be entitled to be indemnified by the Government out of moneys provided by the Legislative Council".

[47] Subsection (2) provides that "no indemnity shall be payable under this Act to any person who has himself caused or substantially contributed to the damage by his fraud or negligence, or who derives title (otherwise than under a registered disposition made bona fide for valuable consideration) from a person who so caused or substantially contributed to the damage." Essentially, a bona fide purchaser for value will be entitled to be indemnified by the Government by virtue of section 141 (1) so it seems to me that for Ms. Hannaway to suggest that the Applicant will be deprived of the fruits of its consideration is a premature submission.

[48] In my opinion, two discrete issues need to be examined here: (i) Whether the Claimants' allegations of fraud and mistake are spurious and (ii) whether the Applicant had knowledge

of the fraud and/or the mistake. As I understand the Claimants' case, they are not alleging that the Applicant caused the fraud or mistake or substantially contributed to the fraud or mistake but that it had knowledge of such fraud.

### **Allegations of Fraud**

- [49] In a nutshell, the particulars of fraud as pleaded in the amended Statement of Claim are as follows: On 25 August 2006, the First Defendant applied for and obtained a Grant of Letters of Administration to the estate of his mother, Mavis Wilkins. In the declaration of value of the estate, the First Defendant dishonestly stated that her estate comprised of Parcels 25 and 35 of Block 2640B. On 23 October 2006, he also deliberately and dishonestly made an application to the Land Registry to be registered as proprietor of Parcels 25 and 35 in place of his mother. At the time, his mother and Frederick Pickering were registered as personal representatives of the testator. His mother was only entitled as a beneficiary under the Will of the testator to a one-tenth share of Parcels 25 and 35. She was not entitled to the whole of them. Consequently, the application by the First Defendant to be registered as proprietor by transmission of Parcels 25 and 35 entirely in the place of his mother was fraudulent. The First Defendant then fraudulently transferred both parcels to himself for love and affection as owner with a view to deprive those entitled under the Will of the testator of their interest. He deliberately and dishonestly transferred Parcel 25 to the Applicant for a consideration of \$125,000.00.
- [50] The Claimants alleged that at the time of the making of all the above applications, the First Defendant knew that the said Parcels 25 and 35 were not his mother's estate but in fact the estate of the testator and that his mother's nine other siblings are equally entitled to share in the estate.
- [51] The Claimants obtained leave to serve the Claim and Statement of Claim outside the jurisdiction on the First Defendant. They have also caused two advertisements for substituted service in a newspaper circulating in this Territory. To date, the First Defendant has not acknowledged service nor filed a defence. From all indications, it appears that he will not defend the claim.

[52] Mr. Aziz argued that the Claimants have to overcome certain provisions of the Act in order to successfully litigate their claim for rectification by cancellation on the basis of fraud namely:

- a) a person whose name is registered as the proprietor of land with absolute title is vested with absolute ownership subject only to certain unregistered interest.
- b) The title of a bona fide purchaser for valuable consideration from a trustee cannot be defeated by reason of the fact that such deposition amounted to breach of trust;
- c) A person dealing or proposing to deal with land for valuable consideration shall not make the necessary enquiries stipulated under section 38;
- d) Rectification would not be ordered unless a proprietor had knowledge of fraud or mistake, or caused such fraud or substantially contributed to it by his act, neglect or default.

[53] Ms. Hannaway did not make any submissions on the allegations of fraud.

[54] As already stated, section 140 confers jurisdiction on the Court to order rectification in cases of fraud. In **Gwendolyn Wynter v Joan Joseph (as personal representative of the estate of Pearlina Luke-Wynter)**<sup>21</sup>, the High Court of Antigua & Barbuda had to consider an identical provision to our section 140. The Court held that Ms. Pearlina Wynter defrauded the claimant, her daughter who was entitled to the order for rectification. The Registrar of Lands was ordered to rectify the land register.

[55] In the BVI case of **Ecedro Thomas, the lawful Attorney for Alice Thomas and Alphonso Thomas, the Administrators of the Estate of Caesar Augustus Thomas**,

---

<sup>21</sup> High Court Civil Case No. 0326/2003, Antigua and Barbuda –per Mitchell J.

**deceased v Augustine Stoutt and others**,<sup>22</sup> Byron C.J (Ag) stated the requirements when fraud is pleaded. At page 6 of his judgment, he stated:

“The mere averment of fraud in general terms, is not sufficient for any practical purpose in the prosecution of a case. It is necessary that particulars of the fraud are distinctly and carefully pleaded. There must be allegations of definite facts, or specific conduct. A definite character must be given to the charges by stating the facts on which they rest.”

[56] It is plain from the Will of the testator that Mavis Wilkins is beneficially entitled to a one-tenth share of his estate. As already stated, Mavis Wilkins was registered along with Frederick Pickering as the personal representative of the estate of the testator. Frederick Pickering died before her so she was the last surviving executor of the testator’s estate. She was not registered as a proprietor in her **personal** capacity. She held Parcels 25 and 35 for the beneficiaries of the estate of the testator. The allegation is that the First Defendant was aware of this fact but he fraudulently represented on the declaration of value that the estate of Mavis Wilkins comprised the entire of Parcels 25 and 35. Not only did he apply to be registered as personal representative of his mother on Parcels 25 and 35, but in a space of three days after he was registered in such capacity, he transferred Parcel 25 to himself personally for love and affection. He is still the proprietor of the two parcels and it is the allegation of the Claimants that he caused the fraud. In my considered opinion, the allegations of fraud are distinctly and specifically pleaded and on the evidence so far presented, there is a good arguable case that the actions of the First Defendant were fraudulent. Put differently, there is a serious issue to be tried in respect of the fraud.

[57] In light of the affidavit evidence and contemporaneous documentary evidence presented thus far, it is my view that the Claimants have made out a prima facie case of fraud against the First Defendant. Of course, at trial, they will have to specifically prove the fraud which they have pleaded.

### **Allegations of Mistake**

[58] The particulars of mistake as pleaded in the amended Statement of Claim are as follows:  
The Second Defendant, by mistake registered the First Defendant as the personal

---

<sup>22</sup> Civil Appeal No. 1 of 1993, Judgment delivered on 12 May 1997

representative of Mavis Wilkins on Parcels 25 and 35 for the entire parcels instead of a one-tenth share of the estate of the testator. Mavis Wilkins was never registered as the sole proprietor of those parcels of land. She was registered along with Frederick Pickering as personal representative of the testator. In a matter of days, the Second Defendant, by mistake registered a transfer of both parcels by the First Defendant as personal representative of Mavis Wilkins to himself for natural love and affection.

[59] In support of the allegations of mistake, Ms. Richards relied on section 117 (1) of the Act which in effect provides that if a sole proprietor dies, the Registrar shall be entitled to be registered by transmission as proprietor in place of the deceased **with the addition after his name of the words “as executor of the will of ..... deceased” or “as administrator of the estate of .... deceased” as the case may be** [emphasis added].”

[60] Counsel submitted that pursuant to section 117, one can only be placed on the Land Register in place of a proprietor. She next submitted that Mavis Wilkins was not the proprietor of Parcels 25 and 35. She was placed on the register for those parcels as one of the personal representatives of the estate of the testator and was placed there only for the purpose of administering property.

[61] Ms. Richards argued that the Act does not address how transmission is to be effected on the death of a personal representative of a deceased's estate so one has to turn to the common law for guidance. She relied on the Learned Authors of Parry and Clark, The Law of Succession.<sup>23</sup> Counsel submitted that the last executor in an unbroken chain of representation is the executor of every preceding testator...but the chain of representation is broken by certain circumstances, one being intestacy.

[62] She intimated that the chain of representation of executors to the estate of the testator was broken when Mavis Pickering died intestate and therefore the chain of representation was not continued when the First Defendant was granted letters of administration to his mother's estate. According to Ms. Richards, to be registered by transmission, the First

---

<sup>23</sup> 10<sup>th</sup> edition Sweet & Maxwell, pages 298 and 299

Defendant would have had to apply for grant of letters of administration *de bonis non administrates* to the estate of the testator since Mavis Pickering, as the last surviving executor of the estate did not make a will.

[63] Ms. Richards asserted that it logically followed that the First Defendant could not and should not have been registered as personal representative of Mavis Wilkins on the entire Parcels 25 and 35 as she was never registered as sole proprietor of those parcels. He could only have been registered as personal representative of her one-tenth share of those parcels.

[64] Mr. Aziz forcefully argued that the allegation of mistake and belatedly, negligence on the part of the Second Defendant is groundless on the application of the relevant provisions of the Act to the undisputed facts. He submitted that rectification or cancellation of the name of the First Defendant on the ground of mistake is unsustainable and he relied principally on sections 117, 118, 122 and 127 of the Act. Learned Counsel stated that the First Defendant was granted Letters of Administration by the Court which he produced to the Second Defendant in his application for registration. He quizzically inquired: how could that ever amount to a mistake on the part of the Second Defendant?

[65] It is common ground that rectification will be permitted where there has been a mistake. The Act does not specify the types of mistake for which rectification may be ordered. But, in **John Alfred Kirnon (deceased on 6 April 2000) by his Executrices Mary Kathleen Kirnon and Sarah Roslind Kirnon and others v Charles Kirnon**<sup>24</sup> Edward J. [as she then was] cited with approval a passage from the judgment of Lawrence L.J. in **Chowood Limited v Lyall**<sup>25</sup> where he stated:

"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 that register should be rectified."

---

<sup>24</sup> High Court, Montserrat Suit No. 27 of 1995, Judgment delivered on 8 June 2004.

<sup>25</sup> [1930] Ch. D (No. 2) 156 at page 168

- [66] Edwards J. found that the just and correct approach would be to rectify the register by cancelling the registration wholly. She declared that the Court also has the power to order cancellation of the registration under Part 8.6 (2) of Civil Procedure Rules 2000.
- [67] In **Skelton and others v Skelton**,<sup>26</sup> the Court of Appeal reversed the decision of the trial judge who ordered rectification of the register on the ground that the adjudication officer mistakenly came to his findings and that the subsequent registration was done by mistake. The Act provides for appeals to the Court of Appeal within 90 days from the date of the certificate of adjudication if anyone is aggrieved by the act, decision or omission of the adjudication officer.<sup>27</sup> The Court of Appeal held that section 140 of the Act can be applied if the expression of the final decision of the adjudication officer was incorrectly recorded on the Land Register but cannot be applied in the original jurisdiction of the High Court to alter in a material particular, the adjudication officer's finding of fact since the Judge was of the opinion that his findings were erroneous. The Court of Appeal opined that it is not the type of mistake contemplated by section 140.
- [68] It further held that the respondent not having exercised his right to petition the adjudication officer, and not having exercised his right of appeal to the Court of Appeal, nor sought an extension of time within which to appeal and not having done anything for a period of nine years, cannot now impeach the finding of the adjudication officer by an ingenious action for rectification.
- [69] The question to be answered here is whether the name of the First Defendant as personal representative of Mavis Wilkins could, by law have been registered on the Register of Lands for the two parcels of land. Mavis Wilkins was the last survivor of the two executors appointed by the testator to administer his estate whose estate comprised Parcels 25 and 35. By his will, his executors were directed to sell and convert into money his real and personal property and the proceeds of the sale or conversion (excluding sums used to

---

<sup>26</sup> 37 WIR 181

<sup>27</sup> Section 23 of the Land Adjudication Act 1970 (BVI)

enable his executors to complete the sale or conversion) divided among his 10 children including the executors. Mavis Wilkins died intestate.

[70] It is trite law that an executor of a sole or last surviving executor of a testator is the executor of that testator so that the interest vested in the original executor by probate of the will of the testator is continued and kept alive without a new probate of the original will by probate of the will of the executor. This is called the chain of representation and so long as this chain is unbroken, the last executor in the chain is the executor of every preceding testator.

[71] The chain is broken, however by an intestacy. The Learned Authors of Halsbury's Laws of England,<sup>28</sup> states that "the chain of representation is broken by an intestacy....Accordingly the office does not devolve upon the administrator of an executor." The Learned Authors further stated: (at para 984)

"Where a sole or last surviving executor dies intestate without having fully administered the testator's estate, the deceased executor's administrator does not become the representative of the original testator, and is accordingly necessary to appoint an administrator to administer the goods of the original testator left unadministered. This is a grant of administration cum testamento annexo de bonis non administratis (that is "with the will annexed for unadministered estate")"

[72] The First Defendant was granted Letters of Administration by the Court. Since Mavis Wilkins died intestate, it means that the chain of representation was broken. The First Defendant could not be the executor of the estate of the testator. Parcels 25 and 35 belong to the estate of the testator; not Mavis Wilkins. She was never registered as proprietor in her personal capacity.

[73] Prima facie, I find it difficult to conceptualize how the First Defendant could have been registered on the entire Parcels 25 and 35 as personal representative of Mavis Wilkins. If Mavis Wilkins had died leaving a will and made him executor, then the entry would read "Jerry Wilkins personal representative for the estate of Ernest Pickering on Parcels 25 and 35 because of chain of representation and not "Jerry Wilkins personal representative of

---

<sup>28</sup> 4<sup>th</sup> edition at paragraphs 750

Mavis Wilkins' estate because Parcels 25 and 35 belong to the unadministered estate of the testator. She died intestate so there is no chain of representation. The First Defendant presented to the Second Defendant Letters of Administration in respect of Mavis Wilkins' estate. I think that the Second Defendant should have ascertained what comprised the estate of Mavis Wilkins. Since she died intestate, the First Defendant could only have been registered on Parcels 25 and 35 as "Jerry Wilkins as personal representative of the estate of Ernest Pickering" on the production of the grant of administration cum testamento annexo de bonis non administratis or a grant of administration de bonis non. In the latter grant, an administrator is appointed to administer the unadministered assets of an estate. He is not within the chain of representation. He is however entitled, subject to, the terms of his grant, to such real and personal estate as remains in specie and has not been administered by the first executor or administrator.<sup>29</sup>

- [74] Evidently, there seems to be an arguable case that the Registrar made a mistake in the relevant entries on Parcels 25 and 35.

#### **Personal Representative is deemed to be 'proprietor'**

- [75] Mr. Aziz relied on section 118 of the Act as well the House of Lords decision in **St. Aubyn and Others v Attorney General**<sup>30</sup> to substantiate his submission that Mavis Wilkins was a proprietor of the two parcels as she was deemed a proprietor by the Act. At page 53 of the judgment, Lord Radcliffe stated:

"The word "deemed" is used a great deal in modern legislation. Sometimes it is used to impose for the purposes of a statute an artificial construction of a word or phrase that would not otherwise prevail. Sometimes it is used to put beyond doubt a particular construction that might otherwise be uncertain. Sometimes it is used to give a comprehensive description that includes what is obvious, what is uncertain and what is in ordinary sense, impossible."

- [76] Ms. Richards argued that Mavis Wilkins was not the proprietor of Parcels 25 and 35. She submitted that a personal representative is only deemed or considered to be the proprietor of the land in order for him to carry out his duties to distribute the land in accordance with a

---

<sup>29</sup> Williams Mortimer and Sunnucks, on Executors Administrators and Probate at page 47

<sup>30</sup> [1952] A.C. 15

will, if he is an executor, or to administer the property in accordance with the law, if he is an administrator. She next submitted that he is considered to be a proprietor in order for his actions to be valid. She argued that Mavis Wilkins, as a personal representative of the estate of the testator was considered proprietor so that she could properly administer the estate which includes Parcels 25 and 35 and for no other purpose.

- [77] The submissions advanced by Ms. Richards are indeed more attractive. The Act deemed the personal representative a proprietor because although he is not actually the proprietor of the property, he is deemed to have been registered as proprietor for the purpose of any dealing. The Act therefore crystallizes that the personal representative has all rights that are conferred on a registered proprietor in his personal capacity and that the property is not only vested in him beneficially. The Learned Authors of Williams Mortimer and Sunnucks on Executors Administrators and Probate stated:

“The interests vesting in the personal representative do not vest in him beneficially. Although he is not necessarily a trustee he is said to hold “in auter droit” so that his interest is different from the absolute and ordinary interest which everyone has in his own property. ....It has been said that he has his estate merely as the minister or dispenser of the property of the dead.”

- [78] The Act clearly states that this is subject to any restriction on his power of disposing of the property contained in his appointment. Implicit in his appointment is the duty to carry out the wishes of the testator or to distribute the property of the deceased according to law and not to act in breach of his duty. Put another way, a personal representative is only so deemed to allow him to carry out the wishes of the testator and properly administer the deceased's estate. The deeming provision does not magically convert the property of the estate to the personal representative in his personal capacity.

- [79] On a careful perusal of Section 140 (2) it appears that the only time rectification should not be ordered if mistake or fraud is proved is when rectification affects the title of a person who is registered as proprietor, who is in possession or is in receipt of the rents or profits and who had acquired the land for valuable consideration. Any other person would have to rely on section 141 for relief. In the instant case, the First Defendant, though the registered proprietor, is not in possession and further did not acquire the land for valuable

consideration. The transfer from himself as the personal representative to himself personally was for the consideration of love and affection. The allegations of fraud were pleaded against the First Defendant so if it is proved or the mistake, as alleged on the part of the Second Defendant, the Claimants will be entitled to the remedy of rectification. The Court cannot refuse to rectify the register on the ground that rectification will affect the title of a proprietor as the Applicant is not a proprietor as defined by the Act. It is not registered as the owner of the land and is not in possession. Therefore, the Court cannot take its interest into consideration when deciding whether to rectify the register. The Court could however order that the Applicant be indemnified if it finds that it did not cause or substantially contributed to the damage by his fraud or negligence.

[80] In my considered opinion, I find that the allegations of fraud and mistake are not spurious and there are serious issues to be tried on those allegations. If fraud and/or mistake are proved, the court may have no other alternative but to order a rectification of the register in favour of the Claimants. The Applicant is not seeking indemnification. It is asking the Court to vary the Order dated 19 January 2007 by removing the stay in provision numbered “iv” from that Order. To do what the Applicant seeks would be to give it a relief at the interlocutory stage of the proceedings which it may not be entitled to after a trial.

[81] In the event that I am wrong to come to this conclusion, for completeness, I will deal with the issue of bona fide purchaser for value without notice.

**Is there an arguable case that the Applicant is not a bona fide purchaser for value?**

[82] Ms. Hannaway submitted that although section 140 confers jurisdiction on the High Court to rectify the register in instances of entries or omissions made by fraud or mistake, the Act also specifically protect the interest of a bona fide purchaser for value. According to her, section 140 (2) provides that the register cannot be rectified unless the purchaser for value either had knowledge of or substantially contribute or caused the fraud or mistake.

[83] Counsel contended that there is not an iota of evidence to suggest that the Applicant substantially or in any way contributed or caused the alleged fraud or mistake or had any

knowledge of the fraud as required by Section 140 (2). She submitted that the Claimants was granted a Grant De Bonis Non Administratus (with Will annexed) on 15 November 2006 but there is no evidence that their adverse claim was ever placed on the Register of Lands by way of caution, restriction application or otherwise. She argued that as a result, there is no evidence of any of these matters being brought to the attention of the Second Defendant and there is also no evidence of any 'fraud' being evident on the face of the Land Register so as to put the purchaser on notice. She also argued that there is no evidence of any claim being made by Frederick Pickering's or the estate of the testator between 2000 and 2007 to put any party on notice.

- [84] Learned Counsel insisted that the Applicant has done every conceivable thing in compliance with the law. The Applicant carried out an official search (which has not been disputed by the Claimants) on which all purchasers are entitled to rely. That search revealed no encumbrances or adverse claims on the title. Without notice of an adverse claim, the only inference to be drawn from the register is that the right of survivorship operated to allow the First Defendant to possess through his mother.
- [85] Ms. Hannaway relied on **Skelton v Skelton**, and submitted that it was the duty of the Claimants, even whilst awaiting the Letters of Administration with Will Annexed, to make a caution application to secure their interest in the estate. She argued that the Claimants failed to make any such application to the Registrar of Lands for 7 years and are now seeking to impute knowledge upon the Applicant who had no notice actual or implied of any fraud on the registration of title.
- [86] She submitted that the Court of Appeal in **Ecedro Thomas v Augustine Stout et al** held that particulars of fraud must be distinctly and specifically pleaded and in the same way that the court imposes a very high standard for a claim of fraud, the court imposes an equally high standard for denying a bona fide purchaser the fruit of his consideration by his or her purported knowledge or contribution to the fraud. She next submitted that it is not sufficient for the litigant to merely say inter alia that "it is evident on the face of the Land

Registers for Parcels 25 and 35, that the said parcels were never the estate of Mavis Wilkins, deceased.”

[87] Ms. Richards submitted that if a purchaser is diligent and acts in a reasonable and sensible manner, making all the investigations which the purchaser of land normally makes, then he is affected only by actual notice. However, if he omits to conduct the usual investigations, then he might be affected by constructive notice. She relied on the Learned Authors in Cheshire and Burn’s Modern Law of Real Property<sup>31</sup> that “a purchaser is deemed to have notice of anything which he has failed to discover either because he did not investigate the title properly, or because he did not enquire for deeds relating to the land, or because he did not inspect it.”

[88] Ms. Richards next submitted that a prudent purchaser should ensure from the face of the land register that the seller, mortgagor or lessor derives his title from a valid deed. She argued that it is evident on the face of the land register that the First Defendant is not the proprietor of Parcels 25 and 35. She further argued that Mavis Wilkins is registered along with Frederick Pickering on the said parcels as personal representatives of the testator. It follows therefore, that Parcels 25 and 35 must be for the estate of the testator.

[89] There is no doubt in my mind that a prudent purchaser should ensure from the face of the land register that the seller derives title from a valid deed. If there is a mistake on the face of the register, then a prudent purchaser should make checks and ensure that the person selling is the actual proprietor. If the Applicant had looked carefully at this register, it might have observed the mistake (if any) but I do not think that I should come to any firm conclusion that this interlocutory stage of the proceedings.

[90] It is undisputed that the Claimants failed to place a caution on the property for 7 years. Section 127 states that “a person may lodge a caution forbidding the registration of any disposition of the land”. The section is discretionary, not mandatory. It seems to me that the Claimants could only have lodged a caution after the death of the last surviving

---

<sup>31</sup> Fifteenth edition Butterworths, 1994, at page 61

executor, Mavis Wilkins and that was not until the 28 February 2004, three years ago. The case of **Skelton v Skelton**, relied on by Ms. Hannaway is inapplicable. In that case, the Respondent had failed to exercise a right to appeal within the time specified in the Land Adjudication Act and had failed to apply for extension of time to appeal and was trying to circumvent the appellate process by taking the action for rectification in the High Court. In the instant case, after the death of Mavis Wilkins, the Claimants applied for grant of administration de bonis non administrates which was eventually granted. There are no time limits within which to register a caution and the Act did not say that a person with an adverse claim has to do that.

- [91] This issue was considered in the case of **J. & H. Just (Holdings) PTY. Ltd. V Bank of New South Wales**<sup>32</sup> Barwick CJ considered whether a failure to lodge a caveat is such an act or default to make it inequitable for a prior equitable owner to retain his initial priority against a subsequent equitable owner. He said:

“To hold that a failure by a person entitled to an equitable estate or interest in land under the Real Property Act to lodge a caveat against dealings with the land must necessarily involve the loss of priority which the time of the creation of the equitable interest would otherwise give, is not merely in my opinion unwarranted by general principles or by any statutory provision but would in my opinion be subversive of the well recognized ability of the parties to create or to maintain equitable interests in such lands.... Of course, there may be situations in which such failure may combine with other circumstances to justify the conclusion that ‘the act or omission proved against’ the possessor of the prior equity ‘has conduced or contributed to the belief on the part of the holder of the subsequent equity, at the time when he acquired it that the prior equity was not in existence.’”

- [92] Barwick CJ concluded that the failure to lodge a protective caveat cannot properly be said necessarily to be such an act or default and that in the case before him it could not properly be said to be so.
- [93] Placing a caution on the property would have been the prudent thing to do as it gives notice to anyone searching the register of their claim. However, the failure to place a caution should not debar the Claimants from obtaining the relief sought. They have a good arguable case and they must not be shut out from prosecuting their claim.

---

<sup>32</sup>(1971) 125 CLR 546

### **Adequacy of Damages**

[94] Having found that there are serious issues to be tried on the merits of the substantive claim, the court should now consider whether the Claimants will be adequately compensated by an award of damages at trial. Lord Diplock in **American Cyanamid** stated the test thus:

“If damages in the measure recoverable at common law would be an adequate remedy and the defendant would be in a financial position to pay them, no [interim] injunction should normally be granted.”

[95] For my part, it appears that damages may not adequately compensate the Claimants as they have stated that they have strong sentimental attachment to the property. To add to that, the First Defendant cannot be located.

### **Balance of Convenience**

[96] Lord Diplock in **American Cyanamid** said that the extent to which the disadvantages to each party would be incapable of being compensated in damages is always a significant factor in assessing where the balance of convenience lies. He also stated that it would be unwise to attempt to list all the various matters which may be taken into consideration in deciding where the balance lies or the weight to be attached to them. These matters will vary from case to case.

[97] In my opinion, the balance of convenience lies in favour of the Claimants. They hold a strong and sentimental attachment to the lands and would like the Land Register to be rectified so that the properties are returned to their father’s estate so that they (who are the personal representative of their father’s estate) can distribute the properties in accordance with the terms of the testator’s will. On the other hand, the Applicant could be indemnified or refunded its money.

### **Inhibition or Stay**

[98] Mr. Aziz was extremely helpful to the Court in this regard. This issue has already been discussed in this judgment and needs no further elaboration. The Order of the Court will be corrected accordingly to reflect the word “inhibit” instead of stay.

[99] In the premises, I will continue the Order that was initially granted on 19 January 2007 and subsequently extended. I will remove the word “stay” from paragraph (iv) and replace it with the word (“inhibit”).

### **Conclusion**

[100] To my mind, the justice of this case requires a speedy trial which I so order. My Order will be as follows:

- i. The word “stay” appearing in paragraph iv of the Order dated 19 January 2007 is removed and replaced by the word “inhibit”.
- ii. The Claimant is to file and serve reply to defence by 4 July 2007.
- iii. The matter be referred to Case Management during the month of July 2007.
- iv. A trial window be set for the month of September 2007.
- v. Costs of this application are reserved save that there will be no order for costs against the Applicant in this application.

[101] Lastly, I am immeasurably grateful to all Counsel particularly Mr. Aziz (who was not a party to this application) for their industry.

**Indra Hariprashad-Charles**  
High Court Judge