[2016] JMSC Civ. 192

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2011 HCV 01127

BETWEEN	**BANCROFT BROWN**	**CLAIMANT**
AND	**DAVETON WILLIAMS**	**1ST DEFENDANT**
AND	**DEAN WILLIAMS**	**2ND DEFENDANT**
AND	**LUKE WILLIAMS**	**3RD DEFENDANT**
AND	**DEBBIE WILLIAMS**	**4TH DEFENDANT**
AND	**ANDY WILLIAMS**	**5TH DEFENDANT**

IN OPEN COURT

Mr. Donovan Williams instructed by Mr. Sylvester C. Morris for the Claimant

Mr. Garth Taylor for the Defendants

Heard: 31st October, 1st, 2nd and 4th November 2016

Recovery of possession - Sections 68, 70 ,71 Registration of Titles Act - Fraud - Purchaser for Value Without Notice - Beneficiaries Under Will - Letters of Administration - Legal and Equitable Interest.

CORAM: JACKSON-HAISLEY, J. (AG.)

[1] The value of land in Jamaica cannot be overestimated. The means by which land can be acquired is quite varied, some acquire it by purchase, some by gift and others through a devise in a will. Regardless of the means by which it is acquired its value is undeniable. Proof of ownership is a necessary facet to

establishing the right to possession. Under the system of land registration that operates in Jamaica a registered title is proof to the world of ownership of a property.

[2] The Claimant Bancroft Brown alleges that he is the registered owner of property located at 31A Riverside Drive, Kingston 19 in the parish of Saint Andrew and that he acquired this land with dwelling house thereon through a cash purchase from Joan Brown-Grant. He further alleges that having served a notice to quit on the Defendants from as far back as 2011, he is still without the benefit of this property.

[3] The Defendants are all siblings. They are Daveton, Dean, Luke, Debbie and Andy Williams and have remained in possession of this property despite being served with a notice to quit. This is because they believe that they are entitled to remain on this property as they are the beneficiaries of an interest in the property bequeathed to them by way of the Last Will and Testament of their late grandmother Sylvia Brown. They are also seeking to assert their rights to this property by way of a counterclaim.

[4] This Claim herein is one primarily for recovery of possession of premises located at Havendale in the parish of St. Andrew. By way of Claim Form filed March 11, 2011 Mr. Bancroft Brown claims the following:

1. An Order that the Defendants, DAVETON WILLIAMS, DEAN WILLIAMS, LUKE WILLIAMS, DEBBIE WILLIAMS AND ANDY WILLIAMS all of 31A Riverside Drive, Kingston 19 in the parish of Saint Andrew are in unlawful possession of the said property despite being given a proper notice to quit by the Claimant;

2. An Order that during the currency of this matter and until the Court makes a final determination with regard to the Order for possession the Defendants do pay the amount of ONE HUNDRED THOUSAND DOLLARS ($100,000.00) into an interest bearing account at the Bank of Nova Scotia Jamaica Limited. The said account to be maintained in the joint names of the Claimant's and the Defendant's Attorney-at-Law and there is to be no withdrawal therefrom;

3. An Order restraining the Defendants, their agents and/or servants and/or any person under the direction or instruction of the Defendants or any or all of the Defendants from undertaking any act which shall cause damage to the property during the currency of these proceedings and until the Court shall finally dispose of this matter;

4. Damages;

5. Mesne Profits;

6. Interest at such rate and for such period as this Honourable Court shall think fit;

7. Costs and Attorneys' costs;

8. Such further or other relief and order as this Honourable Court shall think fit.

The Orders sought at paragraphs 2 and 3 were not pursued at the trial of the matter.

[5] The Claim Form is accompanied by a Particulars of Claim in which the Claimant indicates that at all material times he is the registered proprietor of property located at 31A Riverside Drive, Kingston 19 in the parish of Saint Andrew and that at all material times he purchased the property from Joan Brown-Grant, Administratrix of the Estate of Sylvia Brown. The Defendants, he indicates, are all in unlawful possession of the said property despite being given a proper notice to quit by the Claimant. He pleads that the Defendants are not entitled to the property and have no interest in the said property in the face of the clear endorsement of his name on the Certificate of Title registered at Volume 1075 Folio 527.

[6] By way of evidence gleaned from his witness statement and testimony in court the Claimant outlines the circumstances under which he came to purchase the property. According to him, he received information from a real estate agent that the property was up for sale and then he made enquiries as to the sale price and was informed that it was $6,000,000.00 and so he made arrangements to purchase it. He indicated that he subsequently entered into an agreement for sale through attorney-at-law Mr. Kevin Williams, following which he paid a

deposit and subsequently the balance purchase price, as a result of which the property was transferred to him on the 22nd day of November 2010 and his name registered on the title. He indicated that he did not know the vendor Joan Brown-Grant or any of the Defendants before he purchased the property and denies being related to her in any way either by family or otherwise. He also denies being related to the Defendants.

[7] Further, contrary to what has been alleged by the Defendants, he said that he was not present when any Will was destroyed and therefore he had no knowledge of any Will which devised said property to the Defendants. In fact he alleged that he saw the Defendants for the first time when he took a police officer to visit the premises and advise them to vacate same. Further, that it was through the attorney-at-law with conduct of the sale that he found out that the vendor was the daughter of Sylvia Brown, deceased and that she was the Administratrix of her mother's estate. According to him he had no knowledge that the property was left for the benefit of the Defendants. He denies the allegations of fraud and avers that he was not a party to any fraud.

[8] As a result of his failure to gain possession of the premises and because of the continued occupation of the premises by the Defendants he indicates that he has had to pay rent of $60,000.00 per month and has been deprived of the chance to rent the premises and obtain any other economic benefits.

[9] He was subject to cross-examination during which other bits of evidence were elicited. He pointed out that he had first been to the premises in around 2009 to view it but did not enter the premises. His plan, he expressed, was to renovate it so he wasn't so concerned about what was inside but rather its potential based on its location and size. When asked about his relationship with the vendor he insisted that he had no prior relationship with her or with the Defendants and that he did not know them and wasn't related to them and also that he was never present when any Will was allegedly destroyed. He said he found the suggestions made almost ridiculous.

[10] He asserted that he was initially of the impression that he would have been given vacant possession and was promised that the persons in occupation would have vacated when the sale was completed. He indicated that he commenced the matter of recovery of possession of the premises in the Sutton Street Resident Magistrate's Court on the 3rd February 2011.

[11] It was suggested to him that whilst the transaction was proceeding he did not want the occupants of the premises to be aware of it. He pointed out that that was not his business and it had nothing to do with any fear on his part that they would jeopardize the sale. He strenuously resisted all suggestions put to him about any impropriety or fraud on his part or of him having any knowledge thereof.

[12] In the Amended Defence filed on the 21st October, 2016 the Defendants set out the circumstances under which they are resisting this claim. They plead that even if the Claimant's name is reflected on the Certificate of Title, he is not the lawful proprietor of either the legal or equitable interest thereof because the title was obtained by the Claimant as a result of fraud. They alleged that the Grant of Administration ad Colligenda Bona was of a limited nature and doesn't allow the Administratrix to lawfully dispose of the said property so the Claimant does not own the legal and equitable interest in the property because it was sold to him pursuant to this limited Grant of Administration. They asserted that since the Administratrix held the equitable interest on trust for the beneficiaries of the estate of Sylvia Brown then the property is held on trust by the Claimant for the benefit of the beneficiaries. Further, that in all the circumstances the sale itself along with the Administratrix's knowledge of the limited Grant constitutes a part of the fraud.

[13] Although the Defendants have been served with a notice to quit they are of the view that it is not valid because the property was devised to them by their late grandmother Sylvia Brown in her Last Will and Testament. The Defendants alleged further that the Claimant is a relative of theirs and so he knew the Grant

was limited, moreover he knew that the late Sylvia Brown devised the property by Will to the Defendants who are her grandchildren. Further, that any Grant of Administration obtained by the said Joan Brown-Grant in relation to the estate of the deceased Sylvia Brown was obtained by fraud because the will of Sylvia Brown was torn up by Joan Brown-Grant in the presence of and encouraged by the Claimant. The Defendants maintain that as a result, their possession is lawful and they are entitled to ignore the notice to quit. They deny that the Claimant is entitled to the relief sought and allege that he is not a bona fide party in the transaction and was at all material times in collusion with Joan Brown-Grant.

[14] The Defendants have also filed a Counterclaim seeking the following orders:

1. A Declaration that there was a Will left by the testatrix Sylvia Brown and that the testatrix's intention from her said Will was for the property located at 31A Riverside Drive to devolve to her grandchildren, including the Defendants herein.

2. A Declaration that the Grant of Administration Ad Colligenda Bona granted to Joan Brown-Grant on the 16th day of February was obtained by fraud.

3. A Declaration that the Grant of Administration Ad Colligenda Bona granted to Joan Brown-Grant on the 16th day of February 2007 restricted her ability to dispose of the aforementioned property.

4. An Order that the Grant of Administration Ad Colligenda Bona granted to Joan Brown-grant on the 16th day of February 2007 be set aside.

5. A declaration that the Registration on Transmission of the property registered at Volume 1075 and Folio 527 more commonly known as 31A Riverside Drive, Kingston 19 in the parish of Saint Andrew to Joan Brown-Grant was obtained by fraud.

6. An Order that the Registration on Transmission of the property registered at Volume 1075 and Folio 527 more commonly known as 31A Riverside Drive, Kingston 19 in the parish of Saint Andrew to Joan Brown-Grant be set aside.

7. An Order that the sale of the property registered at Volume 1075 and Folio 527 more commonly known as 31A Riverside Drive, Kingston 19 in the parish of Saint Andrew to the Claimant was procured by fraud.

8. A Declaration that the sale of the property registered at Volume 1075 and Folio 527 more commonly known as 31 A Riverside Drive, Kingston 19 in the parish of Saint Andrew to the Claimant be set aside.

9. An Injunction restraining the Claimant either by himself, his servants and/or agents from entering or otherwise interfering with the property located at 31A Riverside Drive, Kingston 19 in the parish of Saint Andrew

10. General Damages for fraudulent conversion.

11. Interest.

12. Cost

[15] Three witness statements were filed in support of the Defendants' case. These were provided by Luke Williams, Dean Williams and Andy Williams. Dean Williams and Luke Williams also provided supplemental witness statements and these were allowed to stand as their evidence-in-chief as well as the original witness statement of Andy Williams. All three witnesses were subjected to cross-examination.

[16] Luke Williams alleged in his evidence that on the 24th July 2005, Sylvia Brown, his maternal grandmother died leaving premises at 31A Riverside Drive to all of the Defendants by way of her Last Will and Testament dated September 11, 1996. Further, that he and other family members found this Will in a tin can in the testator's closet. The Will, he alleged, was photocopied and the original kept by his sister Debbie Williams, the 4th Defendant. Further, that sometime during 2006 to 2007 Joan Brown-Grant (his mother) visited the premises accompanied by the Claimant, who is allegedly "the son of Jasper Brown's brother who is his mother's father". According to him Joan Brown-Grant searched and found the original Will and then proceeded to rip it apart with her hands and threw the pieces to the ground and that this was done in the presence of the Claimant and other family members.

[17] He further alleges that prior to destroying the Will he had observed his mother and the Claimant reading it and that the Claimant also had it in his hand at some point whilst reading it. Further, that at the time he did not realize the seriousness

of his mother's act because they still had a copy and that it was not until 2011 that he was served with documents from the Claimant seeking recovery of possession of the said property. Prior to this he indicates that he did not know that his mother was administering the property.

[18] The Claimant, he alleged, had visited on previous occasions but not during 2010 to 2011 to inspect the premises. He found it strange that a person could legitimately buy premises without first inspecting it. He indicated that the Claimant at all material times knew that the Will of Sylvia Brown had named him and his siblings as the persons to inherit the property and that a valuation of the premises done in around 2002 reflected a value of $18,000,000.

[19] He further alleged that it was as a result of his mother's act in destroying the Will and then applying for and being granted Letters of Administration that she was then able to sell the premises to the Claimant. According to him this was an act of fraud because his mother at the time was aware that Sylvia Brown had left a Will. Further, he claimed that the Claimant is not innocent and that he is part and parcel of the fraud. This is because according to him, the Claimant was present when Joan Brown-Grant ripped up the Will and in fact uttered words to the effect that he would have done the same.

[20] In cross-examination he insisted that the Claimant had been to the house on several occasions, first in 2003 or so and then in 2006 and 2007. Further, that the Claimant accompanied his mother to the house and that he even drove her there and had even met his grandmother. He said he understood what it meant to administer a will. He said he knew it was his grandmother's Will that was destroyed because he knew her handwriting and signature. Later he retracted this and said that he meant it was in her own words and was not speaking the truth in his earlier statement. He denied the suggestion that he and his brothers had made up this story.

[21] The evidence of Andy Williams bears some similarity to that of his brother Luke. He too alleges that he and his siblings searched and found the Will and that in

2006 or 2007 Joan Brown-Grant came to the premises accompanied by a man but he did not pay much attention to the man. He expresses that it was later that he realized it was the Claimant but that he had observed when Joan Brown-Grant found the Will and proceeded to rip it apart and that he came out of his room and saw the torn pieces of the Will on the ground. Further, he alleges that it was in 2011 that he realized that the Claimant was seeking recovery of possession. He expressed that the Claimant had visited on previous occasions but not during 2010 to 2011 and that the Claimant is the cousin of Joan Brown-Grant by her father's side.

[22] In cross-examination he pointed out that it was actually at the Sutton Street Court that his sister and brother told him about the Claimant and then he remembered that he had come to his house and met his grandmother. He was at pains to explain that his grandmother said she didn't want to meet any "Brown" because they were criminals. Towards the end of his cross-examination he said that he could never say that he "deliberately" saw the Claimant and that it was when he went to Court he saw him and "they" (seemingly his siblings) told him he was the man for the house and his name is Bancroft.

[23] Dean Williams also indicated an awareness of the Will of his grandmother being found and that sometime later Joan Brown-Grant came to the house and found the Will and ripped it to pieces. He however made no mention in his witness statement that the Claimant was present. Further, that it was not until 2010 that he realized the seriousness of what had happened when he followed his mother to the bank and she withdrew $100,000.00 from the account of Sylvia Brown's estate. He alleged that in 2011 he received the claim for recovery of possession. He mentioned that the Claimant had visited on previous occasions but not during the 2010 to 2011 period to inspect the premises. This he also found to be strange. He was not subjected to much cross-examination.

[24] The other two Defendants Debbie and Daveton did not give evidence.

CLAIMANT'S SUBMISSIONS

[25] Mr. Williams submitted that the first issue for the court to decide is whether or not the Defendants have any standing in circumstances where they are counter claiming as beneficiaries under a Will that has not been proven and where no application has been made for a grant of probate or a limited grant for the purpose of pursuing their claim. He submitted that although the Will names the Defendants as beneficiaries the Will has not been probated. In fact the argued that the Defendants have done nothing to assert their rights or to prove the copy Will although the Law permits the proving of a Will in circumstances where the original is not available upon the application of an interested party. He highlighted that the Defendants have not pursued that course and even after receiving this Claim for recovery of possession they made no such application. This would have been necessary, he submitted, especially in light of the fact that they are contending that the Grant of Administration Ad Colligenda Bona that was issued to their mother was a limited grant. Further, that they have however provided no evidence as to why they say it is a limited grant.

[26] Mr. Williams also asked the court to consider whether or not it has jurisdiction to determine the validity of the copy Will which was admitted into evidence. Further, that had they been successful in proving the Will they would have had some standing and that in the absence of that they have no standing in this matter and that they are basically squatters, not even licensees or tenants in common. Further, that had they proven this Will they could have asked for a stay of the proceedings pending the grant of probate. He also submitted that in any event though the Will is wrought with deficiencies and that no evidence was led from any attesting witness to verify that it was signed by the testator.

[27] Mr. Williams submitted also that the court would have to consider the provisions of sections 68, 70 and 71 of the Registration of Titles Act which speak to the paramouncy of a registered title. He directed the Court's attention to section 68 which establishes the conclusivity of title, section 70 which establishes the

paramouncy of the registered proprietor's interest to prior rights except in the case of fraud and section 71 which provides protection to parties dealing with the registered proprietor with fraud also as an exception. He argued further that a registered title can only be defeated by fraud and pointed out that if fraud is to be relied upon it must be specifically pleaded and particularized as it is not allowable to be inferred from the facts. Mr. Williams relied on the case **Davy v Garrett** (1877) 7 CH.D. 473 which was approved of in the case **Leroy McGregor v Verda Francis** [2013] JMSC Civ. 172.

[28] Mr Williams submitted further that the allegations of fraud in the Amended Defence are not sufficiently particularized as they are only general assertions and do not contain the required specificity. Further, that the standard required to establish this is a high one and that on an examination of the Amended Defence it would fail as it does not meet the high standard required by the law. He advanced that the counterclaim does not take the case any further.

[29] Additionally, he submitted that the evidence elicited is not sufficient to prove fraud and that in any event the Claimant was never discredited, but rather was forthright and firm and his demeanour was such that this court should find him credible. Further, that he was not shifty and he stood up under cross-examination and additionally that he showed proof of the sums paid by him. On the other hand he submitted that the Defendants were shaken and that there are several discrepancies and inconsistencies in their testimony. He asked the court to examine carefully the evidence given on the Defendants' case and to find that they cannot be believed and so the evidence lacks the cogency required to substantiate their case.

DEFENDANT'S SUBMISSIONS

[30] Mr. Taylor on the other hand submitted that the Amended Defence sufficiently particularizes the fraud and sumbitted that reliance should be placed on the evidence that the Will was destroyed by Joan Brown-Grant and that she subsequently applied for Letters of Administration which constitutes an act of

fraud. The Claimant, he urged knew about the contents of the Will and that it was devised to the Defendants and colluded with Joan Brown-Grant in committing this fraud. It is not necessary or required, he advanced, to put every detail of the fraud in the Defence.

[31] In terms of the evidence, he pointed out that fraud can be inferred and that it is common knowledge that fraud can be proven from inferences drawn from the evidence. Fraud, he advanced can be inferred on the part of the Claimant from the fact that he was present when the Will was destroyed, from the fact that he bought the said property mentioned in the Will, and from the fact that he bought this property without first inspecting it in circumstances where he could have done so. He asked the court to draw the inference that the Claimant did not want to alert the Defendants, who were the occupants, of this pending sale for fear that they would try to assert their rights and prevent the sale to him.

[32] He submitted further that the Claimant bought this property without having full knowledge of what would be required to renovate it. Further, that this fact shows that the Claimant had an ulterior motive and that from this the court can be satisfied that the evidence of the Defendants, that the Claimant had previously entered the property, must be true because why else would he purchase it. This, he submitted lends credence to the Defendants' account that the Claimant is in fact related to the Defendants.

[33] What is also strange, Mr. Taylor submitted, is the fact that the first thing the Defendant did in asserting his rights was to engage the police. He submitted that this demonstrated on the part of the Claimant that he had knowledge that there would have been resistance as the Defendants would have wanted to assert their rights pursuant to the Will. In light of all of that he submitted that the Claimant's evidence should be rejected.

[34] In considering the Defendants' case he asked the Court to bear in mind that where discrepancies arise it is open to the Court to accept some parts and reject others and also to consider the seriousness of the discrepancy or inconsistency.

He submitted that the Defendants have not been significantly discredited and pointed out that although two of the Defendants gave two original witness statements, those do not form a part of the evidence and the Court should not make much of what is contained therein.

[35] He asked the Court to find that the Defendants have standing by virtue of the fact that they are in physical possession of the property and that they do not need anything beyond that to defend the claim. Further, that if the court finds fraud on the part of the Claimant it would mean that he would have no rights over the premises. He argued further that in terms of the counter claim a beneficiary under a Will has such a right regardless of whether or not the Will is proved. The Defendants in those circumstances, he submitted, cannot be squatters as they are there with permission and in fact they are more akin to tenants in common.

[36] In closing he made reference to the provisions of section 9 of the Larceny Act which provides that the destruction of a will is a crime and submitted that an offence would have been committed.

THE LAW

[37] Sections 68, 70 and 71 of the Registration of Titles Act (ROTA) afford an armour and protection to a party in whom registered lands are vested. Save and except in the case of fraud, the Act confers an indefeasible interest upon a registered proprietor of land. The concept of indefeasibility of title is seen in section 68 of ROTA but a clear understanding of the term is provided in Section 70 which provides as follows:

> *"Notwithstanding the existence in any other person of any estate or interest, whether derived by grant from the Crown or otherwise, which but for this Act might be held to be paramount or to have priority, the proprietor of land or of any estate or interest in land under the operation of this Act shall, except in case of fraud, hold the same as the same may be described or identified in the certificate of title, subject to any qualification that may be specified in the certificate, and to such incumbrances as may be notified on the folio of the Register Book constituted by his certificate of title, but absolutely free from all other incumbrances whatsoever, except the estate or interest of a proprietor*

claiming the same land under a prior registered certificate of title, and except as regards any portion of land that may by wrong description of parcels or boundaries be included in the certificate of title or instrument evidencing the title of such proprietor not being a purchaser for valuable consideration or deriving from or through such a purchaser."

Section 71 provides:

"Except in the case of Fraud, no person contracting or dealing with, or taking or proposing to take a transfer, from the proprietor of any registered land, lease, mortgage or charge, shall be required or in any manner concerned to enquire or ascertain the circumstances under, or the consideration for, which such proprietor or any previous proprietor thereof was registered, or to see the application of any purchase or consideration money, or shall be affected by notice, actual or constructive, of any trust or unregistered interest, any rule of law or equity to the contrary notwithstanding; and the knowledge that any such trust or unregistered interest is in existence shall not of itself be imputed as fraud."

[38] In the case of **Harley Corporation Guarantee Investment Company Limited v Estate Rudolph Daley** [2010] JMCA Civ. 46 at paragraph 30 the following is said in reference to sections 70 and 71:

"The foregoing clearly demonstrates the conclusive character of ownership under the Act. In the absence of fraud, an absolute interest remains vested in a registered proprietor. All rights, estate and interest prevail in favour of the registered proprietor. Harley Corporation being registered as the proprietor of the land holds a legal interest therein which can only be defeated by proof of fraud."

The learned judge went on to say this at paragraph 50:

"As earlier indicated, sections 70 and 71 of the Registration of Titles Act, confer on a proprietor registration of an interest in land, an unassailable interest in that land which can only be set aside in circumstances of fraud. In Fels v Knowles (1906) 26 NZLR 604 the New Zealand Court of Appeal in construing statutory provisions which are similar to sections 70 and 71 said at page 620: "The cardinal principle of the statute is that the register is everything, and that except in cases of actual fraud on the part of the person dealing with the registered proprietor, such person upon registration of the title under which he takes from the registered proprietor has an indefeasible title against all the world. Nothing can be registered the registration of which is not expressly authorized by the statute." ("By statute" would be more correct.) "Everything which can be registered gives, in the absence of fraud, an indefeasible title to the estate or interest or in the cases in which registration of a right is authorized, as in the case of easements or incorporeal rights, to the right registered." The true test

of fraud within the context of the Act means actual fraud, dishonesty of some kind and not equitable or constructive fraud."

[39] The learned trial judge in the **Hartley** case came to a finding that Mr. Hartley's actions amounted to contrived ignorance or wilful blindness and consequently fraud because of his failure to make enquiries. The Court of Appeal in allowing the appeal, formed the view that the learned trial judge was no doubt oblivious to the fact that a purchaser is under no obligation to take notice of any interest in property other than that which is recorded on the title deed. At paragraph 63 of the judgment Harris JA went on to say that prior to the purchase of land, a buyer is under no obligation to disclose to a vendor the value of the land and further that there would have been no obligation on Mr. Hartley's part to have embarked upon any inquiry before purchasing the property.

[40] In order to rely on fraud this must be specifically pleaded. This principle was indicated by Thesiger, L.J. in **Davy v Garrett** (1877) 7Ch. D. 473 at 489 in these terms:

"In the Common Law Courts no rule was more clearly settled than that fraud must be distinctly alleged and as distinctly proved, and that it was not allowable to leave fraud to be inferred."

[41] This principle was applied in the Jamaican decision of **Leroy McGregor v Verda Francis** [2013] JMSC Civ. 172. in which Simmons J pointed out at paragraph 46 of the judgment, the need to not only sufficiently particularize the method by which the alleged fraud was allegedly committed but also the need to present clear evidence to the court that the Defendant acted in the ways that have been alleged.

ISSUES

[42] The main issue that I have to determine is whether or not the Claimant is entitled to recovery of possession of the property. In order for him to recover possession the court has to be satisfied that he is the rightful owner. I accept that his name is registered on the title so that is notice to the world that he is the owner. However this title can be defeated if it is proven that he has committed a fraud.

[43] It is clear from the authorities cited that in order to establish fraud two things must be done. Firstly, the fraud must be specifically pleaded and secondly, the fraud must be proven, that is to say actual fraud, dishonesty of some kind, not equitable or constructive fraud. The determination of this issue will depend on the law as it relates fraud and also the credibility of the witnesses. Based on the submissions made by both counsel and an assessment of the relevant law and the facts which I have to determine, the issues set out below arise for my determination:

1. Whether the Defendants have any locus standi?
2. Whether the Defendants have specifically pleaded fraud?
3. Whether fraud against the Claimant is proved?
4. Whether the Claimant was a bona fide purchaser for value without notice?
5. Whether the Claimant now holds the property on trust for the beneficiaries of the estate?

WHETHER THE DEFENDANTS HAVE ANY LOCUS STANDI

[44] Counsel for the Claimant has submitted that the Defendants have no locus standi in light of the fact that the Will was not proven. It is not denied that the Defendants are currently in possession of the premises. In fact, according to them they have lived there since childhood. They have been served with a notice to quit which they have ignored. Their reason for remaining there is that they claim to be entitled to the property by way of the Will of their grandmother. I have accepted that the original Will is unavailable and so two copies of this Will were tendered into evidence as exhibits. The Court has perused them and has observed that the Will purports to give a life interest in the property to the grandchildren of the testator Sylvia Brown, who are the Defendants herein.

[45] Letters of Administration have already been granted in the estate of Sylvia Brown. The Civil Procedure Rules (CPR) contains provisions about proving a copy Will. Although there is nothing to preclude the Defendants from applying to

prove the copy Will that appears not to be their first recourse. Their first recourse is to seek that the Letters of Administration granted be set aside. This and other orders sought are contained in their Counterclaim. If they are successful in the Grant being set aside, it would then become crucial to apply to prove the copy Will and thereafter to apply for probate. Although they might have been able to get the copy Will proven they would not have been able to obtain a Grant of Probate unless the Letters of Administration is first set aside.

[46] I accept that several facts provide them with locus standi, namely the fact that they are in possession of the property and the fact that they are beneficiaries under the Will of their grandmother in respect of this property (this is despite the fact that they have no Grant of Probate and is independent of a determination as to whether or not they have a beneficial interest in the property.) I am unable to agree with counsel for the Claimant that they have no locus standi. I accept that they do in fact have locus standi in respect of the Defence and the Counterclaim.

WHETHER THE DEFENDANTS HAVE SPECIFICALLY PLEADED FRAUD

[47] The law requires that fraud be specifically pleaded. If this is not done the Defendant's Defence and Counterclaim would fail at the very inception. In order to determine this I have to conduct an examination of the pleadings in particular the Amended Defence and Counterclaim. Rule 10 of the CPR sets out what must be contained in a Defence as follows:

> *"Rules 10.5 (1) says that the defendant must set out all facts on which it relies to dispute the claim. Rule 10.5 (3) says that the defendant 'must [that word again] say which (if any) of the allegations in the claim form or particulars are admitted; which (if any) are denied; and which (if any) are neither admitted nor denied, because the defendant does not know whether they are true, but which the defendant wishes the claimant to prove' Rule 10.5 (4) specifically states that where the defendant denies any of the allegations in the claim form or particulars of claim the defendant 'must state the reason for doing so; and if the defendant intends to prove a different version of events from that given by the claimant, the defendant's own version must be set out in the defence' (my emphasis). Rule 10.5 (5) specifically states that where a defendant does not admit an allegation or does not admit the allegation and does not put*

forward a different version of events, 'the defendant must state the reasons for resisting the allegation."

[48] The case **Akbar Limited v Citibank NA** [2014] JMCA Civ. 43 sets out the principles that should guide the drafting of a Defence. At paragraph 64, Phillips J.A. opined that while there is no longer a need for extensive pleadings, pleadings are not superfluous and are still required to mark out the parameters of the case of each party and to identify the issues in dispute, but the witness statements and other documents will detail and make obvious the nature of the case that the other party has to meet.

[49] The Amended Defence at paragraph one first mentions that the title was obtained by the Claimant as a result of fraud. At paragraph two it is indicated that the sale itself along with the Administratrix's knowledge of the limited grant constitutes a part of the fraud. At paragraph four it is indicated that the Claimant at all material times knew that the Grant of Administration was limited and restricted the disposition of the property and that the property was for the benefit of the Defendants. In paragraph six it is indicated that the Grant was obtained by fraud because the Will was torn up in the presence of the Defendants, a fact which was known and encouraged by the Claimant. Paragraph six is the only paragraph that outlines any fraud in respect of the Claimant, everything else seems to be directed at Joan Brown-Grant. It is the fraud of the Claimant that is relevant here.

[50] The specificity of the fraud of the Claimant as indicated in the Amended Defence is somewhat lacking but is just sufficient to satisfy the requirements that fraud must be specifically pleaded. I form this view because of the principle that there is no need for extensive pleadings.

WHETHER FRAUD AGAINST THE CLAIMANT IS PROVED

[51] This is the most substantial issue to be determined. The determination of this issue will depend largely on an assessment of the evidence in this case and will require me to examine it closely and come to some specific findings of fact. The

resolution of this issue will also be determined by an assessment of whether the actions of the Claimant would in fact constitute fraud.

[52] If the Defendants' case were to be fully accepted this would be the evidence. The Claimant visited their house with their mother. Their mother searched and found the Will. Their mother then proceeded to rip the Will to pieces. The Claimant was present when that took place and did nothing to prevent this but rather encouraged it. He was their mother's cousin. He had read the Will and he knew that the Defendants were the beneficiaries. Despite this knowledge he purchased the property for a sum way below the value without inspecting it.

[53] However there is no evidence that before the Will was ripped the Claimant did or said anything to encourage this, but rather the evidence is that it was only afterwards that he allegedly voiced his approval. The act of the mother seems to have been a unilateral one. I would also have to be able to say that the Claimant knew what were the implications of the mother destroying the Will. In addition according to the Defendants the Claimant was not the only person present. They too were present but did nothing about this Will that was torn to bits, nothing at least until now despite being the children of this person who tore up the Will.

[54] The presence of the Claimant when the Will was destroyed and his alleged approval of its destruction may be evidence in respect of the destruction of a will which is a criminal offence but the existence of actual fraud will be dependent on the actions that he took following the destruction of the Will. Although the destruction of the Will is an offence by itself it is not proof that a fraud has been committed. There is no evidence that the Claimant participated in or encouraged the application for the Grant of Letters of Administration by Joan Brown-Grant.

[55] Even if the Claimant were found to have purchased the property with the knowledge that the Will was destroyed, that may not be sufficient to prove fraud on his part without more. These facts as outlined bear some resemblance to the facts in the **Hartley** case. The Claimant in that case was no innocent bystander nor did he disclose the true value of the property. The Court of Appeal found that

he had no obligation to disclose to the vendor the true value of the property. What is clear from that case is that the threshold to cross to establish fraud is high. The duty of a buyer seems to be minimal.

[56] Even if the Defendants were believed, it is not abundantly clear that the actions of the Claimant would be at the standard required to prove fraud. The only person who is implicated to that extent is Joan Brown-Grant and there may well have been sufficient evidence to infer fraud on her part but not on the part of the Claimant. The Claimant only surfaces again when the property is bought. The duty to prove fraud rests squarely on the Defendants. In all these circumstances I would have been hard pressed to say that those actions of the Claimant constitute fraud.

[57] The main issue though for me is which version is more credible. The issue of credibility looms large on my mind as it relates to the veracity of the Defendants. I have to say they were substantially discredited. There were several inconsistencies and discrepancies that arose on the Defendants' case. The first witness called was the Third Defendant Luke Williams. His evidence was wrought with inconsistencies. Firstly, he indicated that he knew it was his grandmother's Will as he recognized her handwriting, but the Will when read contains words to the effect that the testator dictated the Will to one Glen Williams and that it was written by him. The witness had no choice when confronted by this but to admit that when he said he recognised the Will by virtue of his grandmother's handwriting, that this was untrue.

[58] In his witness statement he says he did not know about any Administration yet in oral evidence he speaks about his aunt's name being on the title and the fact that the family was trying to administer the property and to remove her name from the title. He gave two witness statements. In the first there is no mention of the Claimant being present when the Will was shred to pieces. It is only in the supplemental witness statement that he provides this information. It is only in oral evidence that he gives evidence about how the Claimant was introduced to his

grandmother from as far back as 2003 and that the Claimant had been to his house on several occasions. It would have been very important for Mr. Luke Williams to provide this information at the first opportunity he had. I would have expected that to be in his first witness statement as well as the fact that the Claimant was present when the Will was destroyed. His demeanour in the witness box left much to be desired. I have formed the impression based on an assessment of his demeanour and the inconsistencies that he is not a truthful witness. In fact I am of the view that this allegation about the Claimant being a relative is made up and that this account of the Claimant being present when the will was destroyed is also a concoction.

[59] The second witness called was the Second Defendant, Dean Williams, who gave evidence that the Claimant had visited his house on a previous occasion. Curiously although he gives evidence of being present when his mother tore up the Will, he made no mention of the Claimant being present at that time or that he was a relative. He maintained that the Claimant had previously been to the house.

[60] The third witness called was the Fifth Defendant, Andy Williams. In addition to the evidence contained in his witness statement he gave evidence that it was at the Sutton Street Court that he realized that it was the Claimant who had come to his house. When specifically asked if it was then that he recognised him he indicated that his sister and brother told him that it was the Claimant who had come to the house. It is also quite curious that in his supplemental witness statement he said he observed the Claimant was present at his house at the time his mother destroyed the Will. When further pressed in cross-examination he said that he was in his room and he didn't even want to see the person as his grandmother rejected all the "Browns" as criminals. He then went on to say that he could never say that he "deliberately" saw him and that it was when he went to court he saw him and his siblings told him that the man for the house was the Claimant. Although he is saying he could never deliberately (presumably he meant actually) say he saw him that was exactly what he did in his supplemental

witness statement. In light of that his credibility has been eroded. It is also clear that he too has concocted this account of the Claimant being present at his house when the Will was destroyed at the hands of his mother.

[61] On an assessment of the totality of the Defendants' case I found the Defendants not only proned to exaggeration but also proned to prevarication. I found them devoid of credibility as it relates to the Claimant being present when the Will was destroyed, as it relates to the Claimant visiting the house before he had bought the property, and as it relates to him being a relative.

[62] Having assessed the Claimant's case I am even more fortified in the belief that the Claimant is not related to the Defendants, that he had never been to their house prior and that he was not present when the Will was destroyed. This is because despite vigorous cross-examination and firm suggestions he was consistent, in fact throughout he seemed quite startled by the suggestions of prior knowledge and sinister motives in purchasing the property. I found him forthright and reliable. He called one witness, his uncle, to speak about his family. This witness indicated that the Claimant was not related to the Defendants or their family. However, he seemed somewhat unsure as to whether or not he had met Sylvia Brown and in fact clarification had to be sought. He responded when asked pointedly that he did not know this Sylvia Brown. Although this witness seemed somewhat tentative, he did not strike me as a liar. I found him credible.

[63] On a balance of probabilities I believe the Claimant and his witness. My findings of fact are as follows. I find as a fact that the Claimant only found out about the premises at 31A Riverside Drive through a real estate agent. I find that the vendor was Joan Brown-Grant who was registered on the title by way of transmission. I find as a fact that he purchased it using several deposits of cash amounting to $6,000,000.00. I accept that the property was transferred to him on the 22nd of November 2010 and that his name was registered on the title. I accept that he is not related to the Defendants' family and did not know them prior to the

sale. I accept that he was not present nor witnessed the destruction of any Will and that he is not a party to any fraudulent acts with the vendor, nor has he himself committed any fraud. In the circumstances, the Defendants claim of fraud fails. I accept that there is no fraud present to defeat the registered title.

WHETHER THE CLAIMANT WAS A BONA FIDE PURCHASER FOR VALUE WITHOUT NOTICE

[64] Although it is not strictly required that I determine this issue since fraud has not been proved, I will nonetheless consider it briefly. Having accepted that the Claimant had no prior knowledge of the Defendants or their family members and that he is not related to them in any way, I am of the view that he was merely trying to capitalize on what seemed like a viable investment opportunity and that the circumstances concerning the Grant of the Letters of Administration were never brought to his attention before. I accept also that he did not know of the Defendants before learning that this house was up for sale. In the circumstances, I accept that he is a bona fide purchaser for value without notice.

WHETHER THE CLAIMANT NOW HOLDS THE PROPERTY ON TRUST FOR THE BENEFICIARIES OF THE ESTATE

[65] Although the pleadings referred to this no submissions were advanced on this issue although raised in the Defence. However I find it necessary to deal with it since it was not abandoned. The case **George Mobray v Andrew Joel Williams** [2012] JMCA Civ. 26 provides guidance in this area. At paragraph 17 of the judgment the following was said:

> *"….a registered title is immune from challenge except on the ground of fraud. Despite the provisions in the Registration of Titles Act relating to indefeasibility, a defendant in an action for recovery of possession may raise an issue as to a claim in personam. However, a defendant may only do so if any of the following factors presents itself: 1. that he has an unregistered equitable interest in the land by virtue of which the claimant is estopped from denying such interest; or 2. that the certificate of title was fraudulently obtained; or 3. that subsequent to the issue of the title he acquired adverse possession of the land. A claim to an interest in land must be valid. Such claim must be anchored on secure*

> *foundation. Where a bona fide dispute as to title is advanced, a defendant cannot merely raise the issue. He must go further. There must be adequate evidence in support of his contention to show that the issue as to title raised by him is sustainable. It follows that an issue as to equitable interest can only be determined after cogent evidence is adduced to satisfy the court that, on the balance of probabilities, the defendant is entitled to such an interest."*

[66] Harris J.A. found that the learned Resident Magistrate was wrongly of the view that the respondent had an equitable interest in the land which accorded him a right to an interest which ranks paramount to that of the appellant. At paragraph 23 of the judgment she had this to say on the issue of trusts and equitable interest:

> *"In specifying that the assets of the estate shall be held on trust for sale, the law contemplates that the residue would not come into existence until all liabilities of the estate, as stipulated by the Act, are satisfied. On the death of an intestate, his estate devolves on and vests in his personal representative upon a grant of letters of administration and remains so vested until the completion of the administration process: see* ***Commissioner of Stamp Duties (Queensland) v Livingston*** *[1964] 3 All ER 692. So then, what is the nature of the interest of a beneficiary of an estate prior to or during the administration process? There are a number of English authorities, dealing with testate and intestate succession, which show that although a beneficiary is entitled to share in the residuary estate, he/she has no legal or equitable interest therein."*

[67] The Defendants in this case are said to be beneficiaries. Even in the case where they are alleging that they have an equitable title they would still have to present cogent evidence of this. The Defendants being mere beneficiaries have no legal or equitable interest in the property. In the absence of proof of fraud and the absence of any equitable interest the Claimant could not be said to hold this property on trust for them.

DECISION

[68] In light of the fact that the Defence fails the Counterclaim also fails. It does appear that there is some evidence of fraud on the part of Joan Brown-Grant and so the Defendant's recourse would be against her. It is ironic that since she is no longer alive, in the normal course of things their recourse would be against her estate.

[69] In the circumstances I am prepared to make an order for recovery of possession. In determining the date on which this should take effect I bear in mind the fact that the Defendants have lived at the premises all of their lives and so a period of somewhere in excess of three month would be sufficient time for them to find alternative accommodation.

MESNE PROFITS

[70] Where an individual has been deprived of or has suffered loss of use and possession of his property because of wrongful occupation, damages are often awarded which are referred to as mesne profits. In **Goodtitle v Tombs, 2 Wils** 121 page 121 Wilcomot C.J. had this to say:

> *"You have turned me out of possession and kept me out ever since the demise laid in the declaration, therefore I desire to be paid the damages to the value of the mesne profits which I lost thereby: this is just, and reasonable."*

[71] Mesne profits are usually calculated according to the fair value of the premises, when rent represents that fair value the assessment is according to the amount of the rent. Hoffman J in **Ministry of Defence v Ashman** (1993) 66 P. & C.R. 195 and in reliance on **Woodfall on Landlord and Tennant** at paragraph 19.013 stated:

> *"The amount of mesne profits for which a trespasser is liable is an amount equivalent to the ordinary letting value of the property in question. This is so even if the landlord would not have let the property in question during the period of trespass".*

[72] Based on the foregoing the Claimant would have been unlawfully kept out of his property by the Defendant and is therefore entitled to a sum for mesne profits from the time the notice to quit would have expired. There is no evidence of that date however the Claimant says he filed his Claim in the Sutton Street Court on February 3, 2011. Mesne profits would have to be calculated from that time. He is claiming that the rental would have been in the sum of $60,000.00 per month but he has brought no evidence to substantiate that. I have no information on which to ground that except to say that that information was not challenged by

the Defendants. The Claimant has not brought any evidence to substantiate why he says he should get this figure or what is the market value. Mesne profits is akin to special damages which ought to be strictly proven. There is no evidence to substantiate the ordinary letting value of the property or that the property would have been let for the entire five years. These are variables that the court would have to consider. In the circumstances a nominal sum is what the court is prepared to award. I find that the sum of $10,000.00 per month is an appropriate sum for mesne profits.

[73] In the circumstances I make the following Orders:

1. An Order for recovery of possession by the Claimant Bancroft Brown of premises situated at 31A Riverside Drive, Kingston 19 in the parish of Saint Andrew, on or before February 28, 2017.

2. An Order that the Defendants, DAVETON WILLIAMS, DEAN WILLIAMS, LUKE WILLIAMS, DEBBIE WILLIAMS AND ANDY WILLIAMS all of 31A Riverside Drive, Kingston 19 in the parish of Saint Andrew are in unlawful possession of the said property despite being given a proper notice to quit by the Claimant;

3. An Order that Mesne profits be awarded at a sum of $10,000.00 per month from March 1, 2011 to the date on which the Defendants vacate the property.

4. Cost to the Claimant to be agreed or taxed.