



[2018] JMSC. Civ 195

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2013 HCV 02087

BETWEEN	ALEXANDER BAILEY	CLAIMANT
AND	HAZEL BAILEY	2ND CLAIMANT
AND	OLIVER MYERS	1ST DEFENDANT
AND	DONALD DeCORDEVA CARR	2ND DEFENDANT
BETWEEN	DONALD DeCORDEVA CARR	ANCILLARY\CLAIMANT
AND	THE REGISTRAR OF TITLES	1ST ANCILARYCLAIMANT
AND	OLIVER MYERS	2ND ANCILLARYCLAIMANT
AND	ANDREW SANGSTER	3RD ANCILLARYCLAIMANT

IN OPEN COURT

Miss. Judith Clarke, Miss J. Thomas and Miss. K. Bowen instructed by Gloria Brown & Co. for the Claimants.

Dr. Mario Anderson instructed by Dian Watson for 2nd Defendant /Ancillary Claimant. Mr. Michael Howell instructed by Knight, Junor & Samuels for the 3rd Ancillary Defendant.

Heard: 6th, 7th, 8th, November, 2017 and 19th January and 2nd February, 2018

Fraud – Registration of Titles Act s. 5, 68, 70 &161 – Adverse possession – Limitations of Actions Act s. 30 – Proprietary estoppels - Agency

CALYS WILTSHIRE J.

BACKGROUND

- [1] In June 1996 the Claimants purchased 2 lots of land, lots 111 and 112 Boxwood, Santa Cruz, in the parish of St. Elizabeth), from the 1st defendant, Oliver Myers.
- [2] The Claimants started construction of a house on lot 111 in 2002 and began landscaping and cultivation on lot112. They returned to Jamaica permanently to their unfinished home in 2010 and construction was completed in 2012.
- [3] The Claimants remained in constant communication with the first Defendant regarding the status of their titles. In 2012 the Claimants finally received the title for lot 111 registered in their names at Volume 1450 Folio 334. The title for lot 112 was not forthcoming. Registration of the Claimants as proprietors of lot111 took place on the 18th day of January, 2012.
- [4] The second Defendant was also registered on certificate of title registered at Volume 1341 Folio 187 as the proprietor of lot 111. This registration took place on the 16th May, 2011. The said certificate of title registered at Volume 1341 Folio 187 was cancelled on the 6th May, 2011 as a result of a lost title application made by the first Defendant. It was this lost title that the second Defendant submitted to the Titles Office as a result of which a transfer was effected from the first Defendant to the second Defendant and endorsed on Volume 1341 Folio 187.
- [5] The 1st Defendant's application for lost title resulted in the issue of a new title for lot 111 which said title, the 1st Defendant transferred into the names of the Claimants. The second Defendant has also been registered on certificate of title registered at Volume 1444 Folio 831 as the proprietor of lot 112. This registration took place on the 16th May, 2011.

- [6]** Sometime in 2012 the 2nd Defendant attended at the Claimants' home asking about property which he had bought in the area. He produced to them titles for the properties registered in his name at Volume 1341 Folio 187(lot 111) and Volume 1444 Folio 831 (lot 112) .
- [7]** The Claimants subsequently brought a claim against the Defendants, Oliver Myers, and Donald Carr jointly and severally to recover damages for fraud, contending that in or about the year 2011 the Defendants whether together or separately fraudulently secured for the benefit of the 2nd Defendant a transfer of the Claimants' property being the lots numbered 111 and 112 and being part of Boxwood in the parish of St. Elizabeth and now registered at Volume 1450 Folio 334 (Lot 111) in the names of the Claimants and Volume 1444 Folio 831 (lot 122) in the name of the 2nd Defendant, both Defendants well knowing that the Claimants were and are the owners in possession of the said properties
- [8]** Further or in the alternative, the Claimants have claimed against the Defendants for a declaration that the entitlements (if any) of the Defendants or either of them in the said properties have been extinguished under and by virtue of the provisions of the Limitation of Actions Act and the Claimants have, in any event acquired title thereto having regard to the said Act. That is to say the Claimants have acquired title to the subject properties by adverse possession.
- [9]** The Claimants are also seeking the following:
- (1) A declaration that the Claimants are the legal and beneficial owners of the properties bearing lot numbers 111 and 112 aforesaid.
 - (2) A declaration that the registration of transfer number 1704879 on the certificate of title registered at Volume 1444 Folio 831 in respect of the lot numbered 112, registered on May 16, 2011 in the name of second Defendant was fraudulently procured by or through the actions of the Defendants and /or their agents and is therefore invalid.

(3) An order that the certificate of title issued at Volume 1444 Folio 831 in the name of the 2nd Defendant and the said transfer to the 2nd Defendant be cancelled and new certificates of title issued in the names of the Claimants and/or their nominees.

THE FIRST DEFENDANT'S CASE: (OLIVER MYERS)

[10] By way of defence, the 1st Defendant, Oliver Myers acknowledged that he sold the properties to the Claimants and denied that he sold them to the 2nd Defendant. He denied that he executed the transfers resulting in the titles being registered in the name of the 2nd Defendant and that he entered into any agreement with the 2nd Defendant.

[11] However, Oliver Myer's statement of case was struck out pursuant to orders made at the Pre Trial Review for failure to comply with Case Management orders. His witness statement was admitted as hearsay evidence hence I must determine just how much weight I should attach to same in light of all the other evidence before me.

[12] In said witness statement he said that he did sell lots 111 and 112 to the Claimants. He asserts that he did not authorise Andrew Sangster to sell the said lots, he is not aware of any such sale, has not received any money or proceeds of sale and Andrew Sangster was the sole beneficiary of the proceeds of sale.

THE SECOND DEFENDANT'S CASE: (DONALD CARR)

[13] The 2nd Defendant, in answer to the claim, avers that he entered into an agreement with the 1st Defendant and purchased the properties from him. He denies any fraud on his part. He later filed an ancillary claim against the first Defendant and Andrew Sangster, 3rd Ancillary Defendant, asserting that he purchased the lots from the 1st Defendant through Andrew Sangster, an agent for the 1st Defendant.

[14] Mr. Carr in his Ancillary Claim named the Registrar of Titles as the first Ancillary Defendant and claimed that,

(a) As keeper of Registrar Book of Titles the cancellation of Certificate of Title registered at Volume 1341 Folio 187 of Register Book of Titles pursuant to an application for Lost Title by the 1st Defendant 2nd Ancillary Defendant should not have been facilitated given that the Ancillary Claimant had by virtue of transfer endorsed on the said Certificate of Title on the 16th day of May 2001 become the duly registered owner of the land. In which case either one or both endorsement should have been refused when submitted.

(b) An indemnity and reimbursement from the said 1ST Ancillary Defendant of the amounts expended for purchase of the properties and costs associated therewith should the Claimants in the substantive action prevail against the 2nd Defendant /Ancillary Claimant who in that situation would be severely prejudiced as a result of the negligence of the 1st Ancillary Defendant and would suffer significant financial loss through no fault of his own.

(c) In the alternative an Order that the 1st Ancillary Defendant failed to discharge its Statutory Duties to persons doing transactions with its office in the instant case which said failure resulted in significant financial loss to the 2nd Defendant/Ancillary Claimant and which said amount if not accepted in the amount of **TEN MILLION DOLLARS (10, 000, 000. 00)** claimed should be assessed by this Honourable Court.

[15] The 2nd Defendant claimed against the 2nd and 3rd Ancillary Defendants jointly and severally on the grounds:

(a) *That the 3rd Ancillary/Defendant* acting in the capacity as agent for the 2nd Ancillary Defendant induced the 2nd Defendant / Ancillary Claimant to enter into an agreement for the purchase of the proprieties subject of the Claimant claim served herewith when he knew or ought to have known that the 2nd Ancillary Defendant was in the process of replacing the said Title under an Application for Lost Title made to the office of the 1st Ancillary Defendant herein.

- (b) That the said 2nd Ancillary Defendant having entered into an Agreement for sale of the subject properties herein should not have completed the Application for Lost Title as the said Duplicate Certificate of Title which was allegedly lost is the said one provided to the 2nd Defendant /Ancillary Claimant to facilitate the transfer to him. In that situation the 1st Defendant/2nd Ancillary Defendant engaged in conduct designed to perpetrate a fraud against 2nd Defendant/Ancillary Claimant and obtain his money by virtue of the said fraud.
- (c) That the 2nd and 3rd Ancillary Defendants acting jointly and or severally in collusion with persons employed in the office of the 1st Ancillary Defendant did take steps to cancel Duplicate Certificate of Title registered at Volume 1341 Folio 187 of the Registrar Book of Title after having the transfer of land to the 2nd Defendant/ Ancillary Claimant endorsed thereon and knowing that the said Duplicate Certificate of Title was not lost and even if it had been lost was now quite found.
- (d) That in the circumstances outlined above the 2nd and 3rd Ancillary Defendants conspired together to defraud the 2nd Defendant/Ancillary Claimant of the amount paid for the subject property in the amount of Ten Million Dollars (\$10,000,000.00).

[16] Mr. Carr by his ancillary claim is seeking the following:

- (a) For an order that the cancellation of Certificate of Title registered in the name of the 2nd Defendant/Ancillary Claimant at Volume 1341 Folio 187 of the Registered Book of Title be reversed as the endorsement thereon of the transfer to the 2nd Defendant/Ancillary Claimant was properly obtained or in the alternative should not have been completed given the pending Application for Lost Title that was being processed by the office of the 1st Ancillary Defendant;*
- (b) In the alternative for an Order that 1st Ancillary Defendant indemnify and pay to the 2nd Defendant /Ancillary Claimant the amount of Ten Million*

Dollars (10,000.000.00) being the amount paid and lost by him for the property registered at Volume 1341 Folio 187 of the Registrar Book of Titles as a result of the cancellation of the Duplicate Certificate of Titles referred to above.

(c) For an order that the property registered at Volume 1341 Folio 187 of the Register Book of Titles was properly transferred to the second Defendant/Ancillary Claimant.

(d) In the alternative for ten million dollars (\$10,000,000.00) being the amount paid by him for the property subject of this claim.

[17] Mr. Carr in his evidence in chief stated that it was Mr. Sangster purporting to be an agent of Oliver Myers who told him about the lots being for sale. He said that Mr. Sangster told him that other persons had entered into an agreement for the sale of the lots but had failed to complete. He therefore entered into an agreement to purchase the lots and paid all the monies for same to Mr. Sangster.

[18] The properties were eventually transferred into his name and he sought to take possession. He was aware that the house was occupied and was told by Mr. Sangster that the occupant was a relative of the purchasers who had failed to complete.

THE THIRD ANCILLARY DEFENDANT'S CASE- ANDREW SANGSTER:

[19] By way of defence to the ancillary claim, Mr. Sangster, the 3rd ancillary Defendant denies that he acted as agent for Oliver Myers and states that he introduced Mr. Carr to Oliver Myers. In his evidence, Mr. Sangster indicated that he had entered into an agreement with Oliver Myers and paid \$3,000,000.00 to buy the lots from him. He discovered that there was a building on the property and Oliver Myers then demanded an additional \$7,000,000.00.

[20] As he could not afford this additional sum, he asked Mr. Carr to make the payment of the additional sum to Oliver Myers, with the intention of getting a refund of his

\$3,000,000.00. He maintained that he did not act as an agent for Oliver Myers, and did not induce Mr. Carr to enter into an agreement to purchase any property. He denied knowledge of any activities leading to the registration of Mr. Carr's name on the titles and the lost title application by Oliver Myers.

[21] Claimants Submissions

Miss. Clarke submitted that the only valid transfer for lot 111 was the transfer registered at Volume 1450 Folio 334 to the Claimants. She noted that certificate of title registered at Volume 1341 Folio 187 was, based on the endorsement, cancelled on 6th May, 2011 and replaced with a new certificate registered at Volume 1450 Folio 334.

[22] The transfer to Mr. Carr was registered on the 16th May, 2011. She therefore argued that the certificate of title registered at Volume 1341 Folio 187 was cancelled before the transfer to Mr. Carr was registered on it and therefore said registration was ineffective or invalid.

[23] Miss. Clarke contended further that if the transfer to and registration of Mr Carr as the proprietor of lots 111 and 112 are found to be valid, then it was the result of fraud on the part of Oliver Myers and Mr. Carr. She referred to sections 68, 70 and 161 of the Registration of Titles Act which made it clear that fraud is an exception to a registered title being indefeasible.

[24] Miss. Clarke relied on the Privy Council decision of **Assets Co. Ltd v Mere Roihi** [1905] A.C. 176 at page 210 where Lord Lindley states:

“.....that by fraud in these Acts is meant actual fraud, i.e., dishonesty of some sort, not what is called constructive or equitable fraud – an unfortunate expression and one very apt to mislead, but often used, for want of a better term, to denote transactions having consequences in equity similar to those which flow from fraud.....”

[25] Miss. Clarke submitted that the evidence of the second Defendant was rife with such admissions, discrepancies, inconsistencies, and incredulity that he could not

be accepted as a witness of truth and the only conclusion to be drawn from the totality of his evidence is fraud on his part.

- [26] Miss Clarke further submitted that the first and second Defendants are estopped from denying that the Claimants are the owners of the lots. Reference was made to the Court of Appeal decision of **Iris Lungrin v Paul Monelal** et al RMCA No.8/003 decided April 2, 2004 where the court examined the doctrine of proprietary estoppel. In that case the court found that an equity had been created in favour of Miss Lungrin as she had expended money in building a house on the land with the knowledge of the registered proprietor. The beneficiaries of the registered proprietor were fully aware of her presence and occupation of the land and the respondents were also fully conscious of her presence.
- [27] Miss Clarke contended that in the case at bar, the Claimants paid the full purchase price for the lots, were put in possession by Oliver Myers and encouraged to build thereon. The Claimants relied on this and acted to their detriment by building their house without any interference from Oliver Myers. Thus an equity was established in the Claimants' favour and it would be unconscionable for Dr Myers to deny same. Further the transfer to Mr Carr does not defeat the Claimants' equity.
- [28] Counsel also contended that Mr Carr did not exercise the requisite care before concluding the purchase of the properties. Despite his knowledge that persons had been purchasing the property, that the house on the property was under construction and the property was occupied he proceeded to purchase the properties as if the persons occupying and building the house did not exist.
- [29] It was submitted that the extent of the equity of the Claimants was such that they were entitled to hold the lots in fee simple. They had been in possession of the lots since 1996, built their house thereon, and had been living there since 2010, all with the knowledge and at the sufferance of Oliver Myers and Mr Carr.
- [30] Miss Clarke also submitted that the Claimants acquired title to the properties by adverse possession, any entitlements of the Defendants to the properties having

been extinguished under and by virtue of the provisions of the Limitation of Actions Act. The Claimants took possession of the lots in June 1996 and remained in peaceful and undisturbed possession to date. Their possession was by virtue of their execution of an agreement for sale, their payment of the full purchase price and Oliver Myers telling them to take possession and start building if they wanted to.

- [31] Oliver Myers intended to discontinue possession of the lots and this was borne out by his letter to the National Water Commission that the Claimants were the rightful owners of the lots. Therefore, the Claimants had the requisite legal possession of the property to have obtained possessory title before Mr Carr was registered on the titles. Reliance was placed on the case of **JA Pye (Oxford) and Anor v Graham and Anor** [2002] UKHL 30.
- [32] Counsel stated that as the Claimants had already paid the full purchase price at the time they took possession of the lots, Oliver Myers would have been a bare trustee. She submitted that **Vida Bowes v Allan Spencer** [1976] 14 JLR 215 enunciated the principle that in the case of a bare trust, ‘a cestui que trust may by adverse possession bar the title of his trustee’.
- [33] It was therefore submitted that Oliver Myers’ title to or interest in the lots was extinguished before the purported transfer to Mr. Carr – time having begun to run from 1996 when they took possession. Dr Myers thus had no interest which could have been lawfully transferred to Mr. Carr. Miss. Clarke further cited the decision of the Privy Council in **Recreational Holdings 1 (Jamaica) v Lazarus** [2016] UKPC 22 where it was said at page 34,

“..... notwithstanding the near paramouncy under it of the registered title and the often favoured status under it of the bona fide purchaser for value, the Act does nothing to disturb this obvious conclusion: that, if the vendor’s title has been “extinguished” under section 30 of the Limitations Act, there remains no title for the vendor to pass..... and none for his purchaser to receive;”

Submissions – 2nd Defendant

- [34] Dr. Watson submitted that the registration of the 2nd Defendant as the proprietor of Lot 111 was not invalid. Counsel contended that although there appeared to be a cancellation of the certificate of title, registered at Volume 1341 Folio 187, before the registration in Mr. Carr's name, the date of the 6th May, 2011 was handwritten on said entry. Counsel argued that since the transfer effected to Mr. Carr on the 16th May, 2011 was noted on the said title above the cancellation entry then it must have been an error on the part of the Registrar.
- [35] Counsel also submitted that there was no evidence of fraud on the part of Mr. Carr and it was Oliver Myers who sold Lots 111 and 112 on a number of occasions. It was further contended that Mr. Carr could only have come into possession of the titles to the lots from either Oliver Myers or the 3rd Ancillary Defendant. It was also contended that the Claimants had failed to specifically plead or give any evidence of fraud against Mr. Carr.
- [36] Dr. Watson referred to **Aubrey Faulknor v PearJohn Investments Ltd. et al C. L. 1994/F-097** and submitted that said case determined that where there was no evidence of dishonesty or fraud, then knowledge of an unregistered interest shall not of itself be imputed as fraud. Counsel further submitted that the circumstances in the case at bar were similar and there was no dishonesty or fraud on the part of Mr. Carr.
- [37] On the claim of proprietary estoppels Dr. Anderson submitted that the **Iris Lungrin case** (supra) could be distinguished from the case at bar. Counsel argued that in that case the court had determined that the appellant was a tenant at will and the Claimants herein were not. Dr. Anderson went on to state that there was doubt as to when the relationship between the Claimants and Oliver Myers became one of cestui que trust and trustee as the receipts exhibited for payment had no dates and they took some 15 years to protect their interest.
- [38] Dr. Anderson submitted also that it did not seem that the Claimants were in possession of the open lots until construction began in 2002/2003. Counsel argued

that the Claimants did not return home until 2012 and hence had not met the criteria laid down in **Recreational Holdings** (supra) to acquire title by adverse possession. Counsel also argued that the Claimants had not met the criteria based on the definition of possession given in **JA Pye (Oxford) Ltd.** (supra).

[39] Counsel's final submission was that the Claimants were barred by the Limitations of Actions Act from bringing any suit to recover the lots in question, as although they had an equitable interest in the property from 1996, they filed an action 17 years later to obtain legal title.

Submissions - 3rd Ancillary Defendant

[40] Mr. Howell submitted that Mr. Sangster was not an agent for Oliver Myers. Counsel referred to Mr. Carr's evidence that there was an agency agreement since Mr. Sangster was a bailiff and did the footwork for Oliver Myers, and submitted that it was not sufficient to confirm an agency and should be rejected.

[41] It was further submitted that Mr. Carr had not provided any evidence to substantiate the claim of fraud against Mr. Sangster. Counsel pointed out that the agreement for sale was signed by Mr. Carr and Oliver Myers and included a clause that spoke to the full payment of the purchase price being acknowledged, yet Mr. Carr testified that he made the payments to Mr. Sangster. Also Mr. Carr failed to produce any documentation to show payments made to Mr. Sangster.

Issues of Fact

[42] I must determine the following:

- (i) Whether Mr. Carr is a bona fide purchaser for value without notice
- (ii) Whether there was fraud on the part of Mr. Carr in the transactions leading to the transfer of titles to the properties into his name

- (iii) Whether Mr. Sangster was an agent for Oliver Myers
- (iv) Whether Mr. Sangster received payments for the purchase of the lots in question from Mr. Carr
- (v) Whether Mr. Sangster conspired with Oliver Myers to defraud Mr. Carr

Issues of Law

[43] The following are also to be determined:

- (vi) Whether the Claimants are entitled to rely on the doctrine of proprietary estoppels.
- (vii) Whether the nature and quality of the Claimants' occupation and possession entitle them to claim absolute right to property under the Limitation of Actions Act.

Law and Analysis of Evidence

[44] The Claimants' evidence has largely been undisputed. Counsel for the 2nd Defendant conceded that the Claimants had purchased the lots in question and did not challenge their evidence on the events which unfolded after they had completed the purchase. The only challenge raised was whether the Claimants could identify any act of fraud committed by Mr. Carr.

FRAUD

[45] In response to Miss Clarke's submission that the certificate of title registered at Volume 1341 Folio 187 was cancelled before the purported transfer to Donald Carr and therefore the registration of said transfer was not valid, Dr Anderson countered that there was an error on the part of the Registrar of Titles. He noted that the date of the 6th May, 2011 on the entry cancelling the title was written by hand and the replacement certificate of title registered at Volume 1450 and Folio 334 has an issue date of May 20th, 2011.

[46] Dr. Anderson also referred to Exhibit 10, the letter from the office of the Registrar of Titles, as support for his argument that there was an error. This letter however is a serious indictment against the said office and it does not assist Mr. Carr. It alleges that Dr. Myers executed a lost title application to cancel Mr Carr's title and register the transfer in the names of Alexander and Hazel Bailey. The undisputed evidence however is that a lost title application, (Exhibit 11), was made by Oliver Myers, the registered proprietor, in February 2011, and subsequent notices were placed in the newspaper by the Registrar in March 2011 about said lost title application. While this application was being processed at the Registrar of Titles, Mr Carr on the 12th May 2011 submitted said "lost" title and successfully had the property transferred and registered in his name. Contrary to Exhibit 10, the lost title application did not seek to cancel Mr Carr's title.

[47] The court finds it alarming that despite the lost title application not being withdrawn, the very title, on being presented by someone other than the registered proprietor, was transferred to someone else. It does not bode well for Mr Carr to find solace in this letter or in a handwritten date. What transpired at the Registrar of Titles was a gross irregularity and should have resulted in criminal investigations.

[48] It is settled law that the registration of title confers on the proprietor indefeasibility of his title except in cases of fraud. It is conferred upon the registered proprietor by virtue of sections 68, 70 and 71 of the Registration of Titles Act which state as follows:

No certificate of title registered and granted under this Act shall be impeached or defeasible by reason or on account of any informality or irregularity in the application for the same, or in the proceedings previous to the registration of the certificate; and every certificate of title issued under any of the provisions herein contained shall be received in all Courts as evidence of the particulars therein set forth, and of the entry thereof in the register Book, and shall, subject to the subsequent operation of any statute of limitations, in conclusive evidence that the person named in such certificate as the proprietor of or having any estate or interest in, or power to appoint or dispose of the land therein described is seized or possessed of such estate or interest or has such power.

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 in 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 qualifications that may be specified in the certificate, and to such incumbrances as may be notified on the folium 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.

Except in the case of fraud no person contradicting 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 to 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 of any such trust or unregistered interest is in existence shall not of itself be imputed as fraud.

[49] Dr Anderson submitted that “the act must be dishonest and the dishonesty must not be assumed solely by reason of knowledge of an unregistered interest”, in reliance on the dictum of Lord Buckmaster in **Waimihawmilling Co. Ltd v Waione Timber Co. Ltd.** (1926) L.R. 101 at page 106, who also said.

“If the designed object of a transfer be to cheat a man of a known existing right, that is fraudulent and so also fraud may be established by a deliberate and dishonest trick causing an interest not to be registered and thus fraudulently keeping the register clear.....each case must depend on its own circumstances.”

Counsel argued that no evidence of fraud had been specifically pleaded or proved by the Claimants.

[50] Counsel further dismissed Miss Clarke's reliance on **Aubrey Faulkner** (supra), and submitted that the decision therein favoured Mr. Carr as the judge found that there was no evidence of fraud as knowledge of possession and the fact that the plaintiff had expended money was not evidence of fraud or collusion based on the standards set in the Privy Council case of **Waimiha Sawmilling Co. Ltd.**(supra).

[51] It is not in dispute that the Claimants purchased the properties from as far back as 1996. They say the properties belong to them and have levelled allegations of fraud against Mr. Carr. Fraud must be strictly pleaded and strictly proved and the onus to do same lies on the person who sets it up. On the Claimants' case the allegations of fraud are very general. Dr. Anderson is correct that on their evidence, actual fraud has not been imputed to Mr. Carr and they have provided no evidence of fraud.

[52] I must also examine the case for the defence. It appears to this court that based on the evidence that was elicited from Mr. Carr, Miss Clarke submitted that the court should make a finding of fraud. Counsel cited the **Aubrey Faulkner case** (supra) as authority for the position that knowledge of an unregistered interest shall not of itself be imputed as fraud but one may however rely on such knowledge along with other knowledge or actions of the person to impute fraud. What Smith J. actually said at page 26 of **Faulkner (supra)** was that,

"Such knowledge may be an element in the building up of a case of fraud, but it does not of itself constitute fraud. 'Fraud' in the Act imports something in the nature of personal dishonesty or moral turpitude."

The case supports s.71 of the Registration of Titles Act which specifically provides that mere knowledge of any trust or unregistered interest shall not be imputed as fraud

[53] By amended Defence filed on November 26, 2015, Mr. Carr stated that he entered into an agreement for sale with Oliver Myers. He further stated that he was provided with the Transfer of Land, Duplicate Certificates of Title registered at

Volume 1341 Folio 187 and volume 1444 Folio 831 of the Register Book of Titles by Oliver Myers.

- [54]** In an earlier affidavit, sworn to by Mr. Carr on the 21st November, 2013, he said Andrew Sangster, as agent for Oliver Myers, told him about the availability of Lots 111 and 112 for sale. He pursued their purchase and executed an agreement for sale. He stated further that Oliver Myers told him before completion of the transaction that the properties were occupied by a person who was a relative of persons who had made a deposit to purchase the properties but failed to complete. He also reiterated that the Duplicate Certificate of Title registered at Volume 1341 Folio 187 was handed to him by Oliver Myers.
- [55]** However, Mr. Carr in his witness statement dated the 18th May, 2017 stated that Andrew Sangster was provided with the titles to the properties to sell and liquidate sums owned by Oliver Myers. He also said that Andrew Sangster advised him that the properties were to be sold even though persons had entered into agreements for sale for same but had failed to complete in time or at all. Finally, he stated that it was Andrew Sangster who advised him that the occupant of the properties was ill and under treatment resulting in access to the properties being unachievable.
- [56]** Under cross examination Mr. Carr stated that he got the agreement for sale through Mr. Sangster from Mr. Myers and when he signed it, he did not, at that time know Mr. Myers. It is also worthy of note that when asked to explain what paragraph four of his witness statement meant, Mr. Carr explained it as follows, "at the time, the person who was building did not complete their agreement of purchase". Mr. Carr also said that in 2010 when he looked at the lots there was an unfinished house, ninety percent finished, on one of the lots. Further that by 2012 the house was finished.
- [57]** In further answers to Miss Clarke he said he was concerned that someone was finishing the house that he was buying and he raised said concern with Mr. Sangster. He indicated that he did not know whether Mr. Sangster did anything

about it and he didn't do anything about it. But he went on to say that he "went and check, there was no title for the property under anybody else's name. I couldn't find anybody to talk to". Therefore, he continued to pay the \$10 million purchase price.

[58] Mr. Carr then went on to say that, he couldn't find Oliver Myers and when he asked Mr. Sangster to take him to Oliver Myers, Mr. Sangster told him that he did not want to see anybody. Mr. Carr also stated that he did not know Oliver Myers at the time he signed the agreement for sale. Further that both the agreement for sale and the transfer documents came with a signature, so he did not see Oliver Myers sign the documents. He said Mr. Sangster did all the foot work and the paperwork between him and Oliver Myers. He stated that he had never met Oliver Myers and then under cross examination from Mr. Howell he admitted that before the transaction was completed he had conversation with Oliver Myers.

[59] Thereafter Mr. Carr's evidence became very bewildering, bizarre and extremely incredulous. Despite paragraph 8 of his affidavit, he denied taking the transfer documents to the tax office, then later he agreed that he must have taken them there. This switch occurred as a result of his acceptance that he placed his initials beside changes made on the transfer documents (Exhibit #18).

[60] These changes he stated were not made by him but were likely "done at the titles office and I sign to it" He then went on to say that "the Registrar of Titles would change the numbers and I signed to it". He was then referring to the volume and folio numbers. The court notes that there are no other initials where the changes to the volume and folio numbers were made.

[61] Mr. Carr stated that he received titles for both lots in 2011 and was trying to recall whether they were delivered to him or whether he picked them up from Mr. Sangster. This was in contradiction of his amended Defence where he had stated that he had received the titles from Oliver Myers.

- [62]** Regarding the agreement for sale, (Exhibit #15), Mr. Carr acknowledged that the figure of \$1 million had been crossed out and replaced with \$10 million. First he accepted that his initials were the only ones beside the changed figure but when asked whether he had made the changes, he suddenly did a right about turn and declared that, in looking at the "D" he didn't make his "D" like that. When asked by Miss Clarke to compare it with "D" on the transfer document he said they looked alike.
- [63]** Regarding the payment of \$10 million Mr. Carr agreed with Miss. Clarke that he had not in fact paid that sum in total at the time he went and effected the transfer of the properties. His explanation for doing so was that he wasn't going to pay any more until he had something in his hand to show what he was paying for. Mr. Carr however has not produced any evidence of these payments which he stated he made to Mr. Sangster. Neither has he produced the two receipts which he said Mr. Sangster gave him acknowledging receipt of the sums.
- [64]** Based on the evidence I have constructed a timeline of the events as they unfolded. From his cross examination, Mr. Carr on the 9th March, 2010 paid an undeclared sum of money for the properties in question. He thinks it was the first payment. But from paragraph 2 of his Affidavit filed on the 21st November, 2013, it was September 2010 that he was first made aware of the availability of the said lots 111& 112, Part of Boxwood Subdivision, St. Elizabeth.
- [65]** On the 18th February, 2011 Oliver Myers by way of statutory declaration, (Exhibit 11), made an application to replace the lost title for Lot 111 and submitted same to the Registrar of titles. The office of the Registrar of titles issued a memo, (Exhibit 11), on the 24th February, 2011 acknowledging receipt of the statutory declaration and expressing satisfaction that by virtue of same the duplicate certificate of title registered at Volume 1341 Folio187 had been lost. On the 22nd & 29th March, 2011 the office of the Registrar of titles placed advertisements in the Daily Gleaner regarding the application to replace the lost title and the Registrar's intention to replace same (Exhibit 11).

- [66] On the 12th April, 2011 an Agreement for sale was purportedly executed between Mr. Carr and Oliver Myers (Exhibit15). Mr. Carr stated under cross examination that he made a payment by cheque for the properties on the 9th May, 2011 and on the 12th May, 2011 transfer documents were also purportedly executed between the parties and the transfer tax paid. (Exhibits 16 & 18). It is on the same 12th May, 2011 that Mr. Carr turned up at the offices of the Registrar of titles with both the “lost” certificate of title for Lot 111 and the certificate of title for Lot 112 and was able to effect a transfer of the properties to himself as registered proprietor.
- [67] Under cross examination Mr. Carr said that he made three more payments for the properties, on the 27th May, 2011, 8th July, 2011 and 11th October, 2011. He was not able to say what sums were paid on the various occasions.
- [68] Dr. Anderson submitted that based on the evidence, Mr. Carr had no knowledge of the claimants’ unregistered interest, having been told that the previous sale had not been completed, the occupant was a relative of those previous would be purchasers and said occupant was ill and overseas and hence the property was inaccessible. Counsel submitted that Mr. Carr made the necessary checks at the titles office and satisfied himself that only Oliver Myers was registered as proprietor. He argued that the Claimants had failed to lodge a caveat to evidence their interest in the properties and when Mr. Carr made visits to the property to speak to the occupants, he was never able to find anyone there.
- [69] In **Assets Co. Ltd. v. Mere Roihi** (supra) at page 210, Lord Lindley expounded on how fraud was to be interpreted as follows:

“.....that by fraud in these Acts is meant actual fraud, i.e., dishonesty of some sort, not what is called constructive or equitable fraud – an unfortunate expression and one very apt to mislead, but often used, for want of a better term, to denote transactions having consequences in equity similar to those which flow from fraud..... Further, it appears to their Lordships that the fraud which must be proved in order to invalidate the title of a registered purchaser for value,, whether he buys from a prior registered owner or from a person claiming under a title certified under the Native Land Acts, must be brought home to the person whose registered title is

impeached or to his agents. Fraud by persons from whom he claims does not affect him unless knowledge of it is brought home to him or his agents. The mere fact that he might have found out fraud if he had been more vigilant, and had made further enquiries which he omitted to make, does not of itself prove fraud on his part. But if it is shewn that his suspicions were aroused and then he abstained from making inquiries for fear of learning the truth, the case is very different, and fraud may be properly ascribed to him. A person who presents for registration a document which is forged or has been fraudulently or improperly obtained is not guilty of fraud if he honestly believes it to be a genuine document which can be properly acted upon."

- [70] Based on Mr. Carr's evidence when he became aware of the presence of persons on the land and having been told certain things about the occupants he made enquiries. When his suspicions were aroused, he made enquiries. Further while there was evidence of monies being expended on construction and upkeep of the properties, there is no evidence that Mr. Carr knew that it was being undertaken by a purchaser in possession. It is undisputed that the Claimants and Mr. Carr met each other in 2012, after title had been transferred into his name. There is no evidence that Mr. Carr had knowledge that the Claimants had an unregistered interest and fraudulently planned to improperly deprive them of their interest. The Claimants have therefore failed on a balance of probabilities, to prove fraud against Mr. Carr.
- [71] While on the evidence I cannot find that the conditions necessary to meet a finding of fraud have been made out against Mr. Carr, I find however that he is not a witness of truth. It is very clear on the evidence that a person or persons intended to deprive the Claimants of the properties they had purchased. Mr. Carr in his Defence in 2013 and his Affidavit in 2015 stated clearly that he received the certificate of title for Lot 111 from Dr. Myers. He changes his mouth in his witness statement in 2017 and stated that he got the titles from Mr. Sangster.
- [72] The hearsay evidence of Oliver Myers, which was admitted in the form of his witness statement, made very little sense on the question of who had these titles.

Oliver Myers stated therein that he gave the title for Lot 111 to the Claimants and instructed his lawyer to recover the title for Lot 112 which was lost. Mr. Carr however had both titles in his possession and, under cross examination, he could not give a clear answer as to how and when he came into possession of them, having already contradicted himself on the identity of the person who gave them to him.

[73] The Claimants' undisputed evidence is that they were awaiting the titles from Oliver Myers who was waiting on the subdivision of the lots to obtain said titles. Oliver Myers does not deny having possession of the titles and he does not admit giving them to Mr. Sangster. The court rejects Mr. Carr's evidence that he received the titles from Mr. Sangster.

[74] Dr. Anderson has argued that there is no questionability about the transfer, to Mr. Carr, of Lot 111 which was registered at Volume 1341 Folio 187. I must disagree with Counsel. It is very questionable not only in light of the transfer being effected on a "lost" title, but also because the Volume and Folio number was handwritten on the transfer forms and initialled by Mr. Carr alone.

[75] By way of the ancillary claim filed by Mr. Carr, he is crying "foul". He is saying he is a bona fide purchaser for value caught in a fraud perpetrated by Oliver Myers, Andrew Sangster, unnamed persons at the titles office and facilitated by the mistakes of the office of the Registrar of Titles. Having observed his demeanour and listened to him, he presented as one who was deliberately misleading the court. His evidence lacked veracity and was riddled with inconsistencies and contradictions. Many of his answers were rambling and evasive and created confusion and doubt in the court's mind regarding his version of the events in this saga.

[76] Mr. Carr's unconvincing evidence has also been significant in the court's assessment of his ancillary claim. He asserted that Mr. Sangster was an agent for Oliver Myers but when the court sought to ascertain the basis for such a belief, Mr.

Carr stated that he had made enquiries and confirmed that he was a bailiff. On the definition of an agent, Halsbury's Laws of England, 2008, Volume 1, 5th edition, paragraphs 29 and 30 state:

"The terms agency and agent in popular use, have a number of different meanings, but in law the word agency is used to connote the relation which exists where one person has an authority or capacity to create legal relations between a person occupying the position of principal and third parties. The relation of agency arises whenever one person called "the agent" has authority to act on behalf of another, called the principal, and consents so to act.

The authority of the agent may be derived expressly from an instrument, either a deed or simply in writing, or maybe conferred orally. Authority may also be implied from the conduct of the parties or from the nature of the employment. It may in certain cases be due to the necessity of circumstances, and in others be conferred by a valid ratification subsequent to the actual performance. In addition, a person may appear to have given authority to another, and acts within such apparent authority may effectively bind him to the third party."

Mr. Carr has failed to produce any cogent evidence of a relationship of agency between Oliver Myers and Mr. Sangster.

[77] He initially stated that he received information about the occupants from Oliver Myers and then changed his story and said the information came from Mr. Sangster. Most significant is his allegation that he paid the purchase price of \$10,000,000.00 to Mr. Sangster.

[78] Under cross examination it became clear that the first payment allegedly made to Mr. Sangster would have been before Mr. Sangster even told him about the availability of the lots for sale. Eventually the court heard from Mr. Carr that he had not in fact paid the whole \$10,000,000.00 before having the lots registered in his name. Finally, Mr. Carr has failed to produce any evidence of any payment of this \$10,000,000.00 for the properties in question.

[79] I reject Mr. Carr's evidence that he paid \$10,000,000.00 or any money at all for the purchase of the lots and that any monies were paid to Mr. Sangster. Mr. Carr's

failure to provide cogent evidence that he paid for these lots, means that he has not satisfied one of the requirements of a bona fide purchaser for value. On the ancillary claim I find that Mr. Carr has not proved his case on a balance of probabilities.

ADVERSE POSSESSION

[80] The Claimants do succeed in their claim that by adverse possession the rights of the Defendants have been extinguished. Lord Browne-Wilkinson in **JA Pye (Oxford) Ltd v Graham** (supra) said at page 40,

“..... there are two elements necessary for legal possession, (1) a sufficient degree of physical custody and control (factual possession); (2) an intention to exercise such custody and control on one’s own behalf and for one’s own benefit (intention to possess).....” “Factual possession signifies an appropriate degree of physical control. It must be a single and [exclusive] possession, though there can be a single possession exercised by or on behalf of several persons jointly. Thus an owner of land and a person intruding on that land without his consent cannot both be in possession of the land at the same time. The question what acts constitute a sufficient degree of exclusive physical control must depend on the circumstances, in particular the nature of the land and the manner in which land of that nature is commonly used or enjoyed..... Everything must depend on the particular circumstances, but broadly, I think what must be shown as constituting factual possession is that the alleged possessor has been dealing with the land in question as an occupying owner might have been expected to deal with it and that no-one else has done so.”

[81] I accept the Claimant’s evidence that they paid the full purchase price for lots 111 and 112 from 1996 and at that time took possession. From then they were purchasers in possession with a bare trust. The relationship became one of a cestui que trust and trustee. Watkins JA (Ag) in the **Vida Bowes** case (supra) reviewed the case of **Bridges v. Mees** [1957] 2All ER 577 where the plaintiff purchased a strip of land from the registered proprietor. He paid the deposit and entered into occupation of the land and retained possession without any interference from the vendor. Payment of the purchase was completed thereafter but the land was never transferred to him. The court there held that on payment of

the full purchase price the vendor became a bare trustee and from that date the period of limitation could and did run in favour of the beneficial owner.

- [82] I find merit in the Claimants' contention that Oliver Myers' title to or interest in the lots was extinguished before the purported transfer to Mr. Carr, as time began to run from 1996 when they took possession. Dr. Anderson submitted that the Claimants did not seem to be in possession, as the land was open, unfenced and undeveloped and construction did not begin until 2002/2003. I must respectfully disagree with Counsel. The Claimants gave undisputed evidence that in the said 1996 they had the lots bushed and continued doing so from time to time until they commenced building in 2002.
- [83] Dr. Anderson referred to the Jamaican Court of Appeal decision of **Thomas Anderson V. Gaian Thompson** [2015] JMCA Civ. 51, which assisted the Claimants more than Mr. Carr. In said case Phillips JA considered whether the respondent was precluded from claiming adverse possession where he had also purported to be the owner of the property in dispute. Phillips J A referred to the analysis of the said issue by Morrison JA in **Recreational Holdings** (supra), and that court's decision that a person can claim to have acquired land by adverse possession even where that person has a legal title or has purported to hold a legal title to the land in question.
- [84] Phillips JA proceeded to express the following at paragraph 50 of the **Thomas Anderson case**(supra)

".....in my view, there is no inconsistency in the position of the respondent where he purported to be the owner of section C and likewise claimed to have acquired title by adverse possession, with regard to the same land, since the crucial issue is that possession is not derived from the title of the person against whom adverse possession is claimed, for example, by way of a licence which has not expired, or with the consent of the owner. What is important is whether the respondent had a sufficient degree of physical control and custody of the land claimed which excluded all the world including the paper owner, and whether he possessed an intention to exercise such control and custody on his own behalf and for his benefit,

independently of anyone else except someone engaged in a joint enterprise on the land.”

- [85] I find that the Claimants had physical control and custody which excluded all the world including Oliver Myers. Further by virtue of the agreement with Oliver Myers, they were in open, exclusive, peaceable and undisturbed possession, with the requisite intention to possess from 1996. Oliver Myers’ title having been extinguished, he had no interest which could have been lawfully transferred to Mr. Carr.

PROPRIETARY ESTOPPEL

- [86] I find that the Claimant also succeeds under this claim. Dr. Anderson has submitted that the case of **Iris Lungrin v Paul Monelal** (supra), on which Miss Clarke relies, can be distinguished from the case at bar. In the **Lungrin** case (supra), the appellant was given a square of land by the registered proprietor. The gift failed because the deed was never stamped or registered. The appellant entered into possession of the land and built a house thereon. The registered proprietor died and title was transferred to the beneficiaries of her estate. The beneficiaries sold the land to the respondents and title was transferred to them. They sought to recover possession from the appellant.
- [87] On appeal Miss Lungrin contended that she had acquired an equity in the land and the respondent was estopped from recovering same. The court found that an equity had been created in favour of the appellant as she had expended money in building a house on the land with the knowledge of the registered proprietor. On proprietary estoppels, Cook J.A. in his judgement at page 57, quoted from Hanbury and Martin Modern Equity (16th Edition) page 893 as follows:

“ This doctrine is applicable where one party knowingly encourages another to act; or acquiesced in the other’s actions to his detriment and infringement of the first party’s rights. He will be unable to complain later about the infringement, and may indeed be required to make good the expectation which he encouraged in the other party. Unlike other estoppels,

therefore, this doctrine may, in some circumstances, create a claim and an entitlement to positive proprietary rights.”

Dr. Anderson has sought to distinguish the Lungrin case from the case at bar on the basis that the court had determined that Miss Lungrin was a tenant at will but the Claimants are not.

[88] It appears that Dr. Anderson is contending that the principle of proprietary estoppels would not be applicable because the Claimants are not tenants at will but are purchasers in possession with a bare trust. I cannot agree with Counsel. The applicability of the doctrine does not turn on the status of the parties affected. It turns on the terms of the agreement, if any, between the parties. In **Lopez v. Brown & Anor** [2015] JMCA Civ 6, Morrison JA at paragraph 68 set out the modern law of proprietary estoppels as summarised by the authors of Gray & Gray at paragraph 9.2.8:

“A successful claim of proprietary estoppels thus depends, in some form or other, on the demonstration of three elements:

- *Representation (or an “assurance” of rights)*
- *Reliance (or a “change of position)*

and

- *Unconscionable disadvantage (or detriment)*

An estoppels claim succeeds only if it is inequitable to allow the representor to overturn the assumptions reasonably created by his earlier informal dealings in relation to his land. For this purpose the elements of representation, reliance and disadvantage are inter-dependent and capable of definition only in terms of each other. A representation is present only if the representor intended his assurance to be relied upon. Reliance occurs only if the representee is caused to change her position to her detriment. Disadvantage ultimately ensures only if the representation, once relied upon, is unconscionably withdrawn”

[89] In the instant case, although no transfer had been made to the Claimants, there has been representation (or assurance) given by Oliver Myer. He allowed them to take possession of the lots, bush and maintain them and provided them with the requisite letter to facilitate the connection of the water supply in their names. Based on Oliver Myer's conduct, the Claimants had a valid expectation that he would not insist on his strict legal rights.

[90] The Claimants relied on this representation as evidenced by the building of their retirement home on one lot and the extensive planting up of the other. The withdrawal of the representation would be detrimental to the Claimants. In this court's view, an equity has been established, entitling the Claimants to the legal and beneficial interest in lots 111 and 112. The only appropriate relief would be to declare that they are the legal and beneficial owners of said lots.

[91] On the claim the orders are made as follows;

(viii) The registration of transfer no. 1704879 registered on 16th May, 2011 at Volume 1342 Folio 187 in the name of Donald Carr is invalid.

(ix) The title registered at Volume 1450 Folio 334 in the names of the Claimants is valid.

(x) The registration of transfer no. 1704879 registered on title at Volume 1441 Folio 83 in the name of Donald Carr is set aside.

(xi) The 1st Defendant Oliver Myers is to complete the transfer to the Claimants of Lot 112 registered at Volume 1444 Folio 831.

(xii) The Claimants are the legal and beneficial owners of the properties at Lot 111 and 112, Boxwood, in the parish of St. Elizabeth.

(xiii) On the claim, costs are awarded to the Claimants against the first and second Defendants to be taxed, if not agreed.

(xiv) On the ancillary claim, judgment for the 3rd ancillary Defendant and costs are awarded to the 3rd ancillary Defendant to be taxed, if not agreed.