



[2016 ]JMSC CIV. 102

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**CIVIL DIVISION**

**CLAIM NO. 2016HCV01462**

<b>BETWEEN</b>	<b>FABIAN LEE BRADSHAW YEAZMIN KATHERINE STEWART- BRADSHAW</b>	<b>CLAIMANTS</b>
<b>AND</b>	<b>JONATHAN ELLIS</b>	<b>1<sup>st</sup> DEFENDANT</b>
<b>AND</b>	<b>JULIE ANN KENEISHA ELLIS-BRADLEY</b>	<b>2<sup>nd</sup> DEFENDANT</b>
<b>AND</b>	<b>DIANA FORRYONE ALEXANDER</b>	<b>3<sup>rd</sup> DEFENDANT</b>
<b>AND</b>	<b>THE REGISTRAR OF TITLES</b>	<b>4<sup>th</sup> DEFENDANT</b>

**IN CHAMBERS**

Mr. Anthony Pearson instructed by Pearson and Company for the claimants

Mr. Kevin Williams instructed by Grant, Stewart, Phillips and Company for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants

June 14 and 17, 2016

**INJUNCTION– REGISTRATION OF TITLES ACT- FRAUD – POSITION OF A BONA FIDE PURCHASER FOR VALUE WITHOUT NOTICE**

**SIMMONS J**

[1] This is an application by the claimants who are the registered owners of all that parcel of land registered at Volume 1086 Folio 220 of the Register Book of Titles

(the property) for an injunction to restrain the first, second and third defendants (the defendants) by themselves or their servants and/or agents from carrying out any construction work on the property until the hearing of the claim.

[2] The defendants are the registered owners of the property which is now registered at Volume 1483 Folio 992.

[3] In January 2016 Mr. Bradshaw who resides overseas visited the Island and observed that works were taking place on the property,

[4] They subsequently filed an action in which they have seek the following:-

(i) An order for recovery of possession of premises situated at no. 1 West Great House Circle, Havendale Heights in the parish of Saint Andrew (the property) against the first, second and third defendants (the defendants);

(ii) An order for the cancellation of Certificate of Title registered at Volume 1483 Folio 992 in the Register Book of Titles;

(iii) An order for the issuance of a new Certificate of Title in the names of Fabian Lee Bradshaw and Yeazmin Katherine Stewart-Bradshaw both of 70 Flintmill Crescent, London SE3 8LY, England, truck driver and housing officer respectively as joint tenants;

(iv) Costs

They have also claimed damages and costs against the 4<sup>th</sup> defendant.

[5] The Particulars of Claim state that the claimants acquired the property on or about the 2<sup>nd</sup> September 2008 from Leonard Keith Anthony Hall and Lorna Mercedes Hall.

[6] It is alleged that on or about October 2014 "*unknown persons/fraudsters*" who pretended to be the claimants, made an application for the issuance of a new

Certificate of Title on the basis that the Duplicate Certificate of Title for the property was lost.

- [7] The original Certificate was cancelled and a new Certificate of Title registered at Volume 1483 Folio 992 was issued in respect of the property in the names of the claimants. The claimants have stated that they did not make the application or sell the property and are still in possession of the Duplicate Certificate of Title registered at Volume 1086 Folio 220.
- [8] The Particulars of Claim also state that the property was transferred to the defendants on the 31<sup>st</sup> August 2015 by those “*unknown persons/fraudsters*”. There is no allegation of fraud against the defendants although it is alleged that they have been registered as the proprietors of the property through fraud.
- [9] The application is supported by the affidavit of Mr. Anthony Pearson, the claimants’ Attorney-at-law. The affidavit states that persons pretending to be the claimants made an application for a new title on the basis that the Duplicate Certificate of Title for the property was lost. The property was subsequently sold to the defendants who have since begun to carry out “works’ on the property.
- [10] The first defendant filed an affidavit in response, in which he stated that neither he nor the other defendants who are his daughters, knew anything about the application for a new title until approximately three (3) months after the completion of the sale.
- [11] He denied taking part in any fraud and stated that he learnt that the property was being sold through an advertisement in the ***Sunday Gleaner*** newspaper of May 3, 2015. A copy of the advertisement which was exhibited to his affidavit states that an unfinished house in Kingston 19 was being offered for sale by the owner. Mr. Ellis indicated that he called the telephone number in the advertisement and spoke to a man who identified himself as the owner, Mr. Bradshaw.

- [12] They agreed to meet at the property but when Mr. Ellis arrived he got a call from the same gentleman who indicated that he could not get there in time. He went ahead and viewed the property which was open..
- [13] Mr. Ellis subsequently went to the National Land Agency on May 5, 2015 and obtained a copy of the title. A copy of the receipt for cost of the copy was exhibited to his affidavit.
- [14] The defendants purchased the property and the transfer was registered on the 31<sup>st</sup> August 2015. Both parties were represented by counsel. The defendants subsequently began to carry out construction works on the property.
- [15] On about December 2015, Mr. Ellis says that a man approached him whilst he was at the property and asked him what was his reason for being there. When he indicated that he was the owner, the man informed him that the owner lived in England and had not sold the property.

#### **Claimants' submissions**

- [16] Mr. Pearson submitted that the defendants' title was procured through fraud against the true owners and that the matter should be resolved in accordance with section 158 of the *Registration of Titles Act (the Act)*. That section he said, gave the court the power to direct the Registrar of Titles to cancel the defendants' title after an order was made in favour of the claimants for the recovery of possession.
- [17] He directed the court's attention to paragraphs 2 and 3 of the particulars of claim in which it was stated that in 2008 the claimants had acquired the property which was now registered in the names of the defendants. Counsel submitted that in light of the allegations there is a serious issue to be tried and the injunction ought to be granted.
- [18] Mr. Pearson indicated that there is no dispute that "works" are being executed on the property and that the defendants were informed that there was an issue with

its sale. He further submitted that the defendants' title had been procured by the fraud of persons who had pretended to be the claimants. He also stated that the balance of convenience rests with forbidding the continuation of the "works". Counsel also submitted that the grant of injunctive relief would preserve the status quo until the trial of the matter.

[19] In conclusion, it was submitted that the court could make the order sought if it was convinced that the claimants did not transfer the property to the defendants.

### **Defendants' submissions**

[20] Mr. Williams submitted that the issues for the determination of the Court regarding the grant of an interlocutory injunction are set out in the decision by the House of Lords in *American Cyanamid Co. v Ethicon* [1975] AC 396.

[21] It was submitted that the application ought to be refused as there is no serious issue to be tried between the claimants and the defendants. Counsel argued that the claimants in seeking to obtain the injunctions have not made any allegation of wrongdoing on the part of the defendants which would give rise to any cause of action against them. He contended that a careful review of the particulars of claim discloses that whilst there are allegations of fraud against unknown parties, none has been made against the defendants. Additionally, there is no evidence that the defendants had any knowledge that the actual owners were not the vendors.

[22] Counsel also submitted that it is apparent that whatever may have occurred between the claimants and those alleged "unknown fraudsters", third party rights in the person of the defendants have accrued as they are now bona fide purchasers for value who are duly registered on the Certificate of Title. It was further submitted that the defendants purchased the premises with the assistance of a firm of attorneys who interfaced with an attorney who represented the vendor and there is evidence that the defendants paid for the premises and properly received title duly registered in their names.

- [23] Therefore, it was submitted that the defendants' actions do not amount to personal dishonesty or moral turpitude.
- [24] Counsel argued that in most instances the dishonesty which is complained is attributed to the registered proprietor in his bid to secure his registration. It was contended that this has not been said in respect of the defendants and cannot be said in the circumstances of this case. He submitted that the court would therefore be precluded from finding that the principle of indefeasibility is capable of being displaced.
- [25] It was further submitted that section 158 of **the Act** is administrative in nature and cannot be used to ground the claimants' application. He stated that sections 153 to 160 are encompassed under the section of **the Act** which is headed "*Procedure and Practice*". Reference was made to the case of **Pottinger v Raffone** [2007]UKPC 22 (17 April 2007) in support of that submission.
- [26] Mr. Williams also submitted that the principle of indefeasibility of title is fundamental to the system of ownership by registration and is protected by sections 70 and 71 of **the Act**. He contended that section 70 enables preferential and prior rights to be defeated in favour of the registered proprietor except in the case of fraud and section 71 gives protection to parties dealing with registered proprietors of land except in the case of fraud. Counsel also referred to section 161 (d) and submitted that the section provides protection for the registered proprietor from actions of ejectment or recovery of land. However, it does not preclude persons who have been deprived of their land by fraud from bringing an action.
- [27] Mr. Williams stated that in order to ground an action to defeat the title of a registered owner proof of actual fraud by him must be alleged. Counsel indicated that there is no complaint in the particulars of claim that the defendants did anything fraudulent in order to obtain title. In this regard, reference was made to the case of **Morrison v Phipps and others** (unreported), Supreme Court,

Jamaica [2015] JMSC Civ 219, judgment delivered 10 November 2015. Counsel also directed the court's attention to the advertisement in the ***Sunday Gleaner*** newspaper to which the first defendant indicated he had responded. He argued that in the absence of any allegation that the defendants knew that the property was not being sold by the claimants the pleadings are not sufficient to pass the first hurdle in ***American Cyanamid v Ethicon*** (supra).

- [28] It was Counsel's submission that section 163 of ***the Act*** preserves the protection of a bona fide purchaser for value of registered land against actions even in instances where he acquired from a person who obtained his interest by fraud. Accordingly, even if the vendor of the property was a fraudster the defendants being bona fide purchasers for value without notice of any fraud acquired the title free and clear of any fraud which may have been perpetrated by the alleged unknown persons in obtaining the new certificate of title. Reference was made to the case of ***Frazer v Walker*** [1967] 1 All ER 649 in which the Privy Council held that even where the registered proprietor acquired his interest under an instrument that was void his title could not be defeated.
- [29] Mr. Williams submitted that the prospects of success on the claim are virtually nil as the claimants do not even have a hope of success. He argued that they have no case which exists in substance and in reality against these defendants and their claim is bound to fail. This, it was submitted ought to be a consideration in deciding whether there exists a serious issue to be tried. In support of this submission Counsel cited the case of ***Mothercare v Robson*** [1979] FSR 466.
- [30] Where the issue of the adequacy of damages is concerned, it was submitted that as there is no proper claim against the defendants that issue would not arise.
- [31] It was argued that in the instant case damages would be an adequate remedy for the claimants if they were able to prove any loss at trial as any loss they may possibly suffer is easily quantifiable by virtue of being pecuniary in nature.

[32] Counsel argued that the uncontested evidence is that the value of the defendant's fixed assets in Jamaica, apart from the premises in issue, is approximately ten million dollars (J\$10,000,000.00). Additionally, the premises which is the subject of the dispute remains in the hands of the defendants who purchased it. Therefore, it is patent that in the event that the claimants were to proceed to trial and be successful the defendants will be in a position to satisfy such damages that could be awarded.

[33] It was also submitted that the claimants have given absolutely no undertaking in damages. The claimants are alleged to live in England and they have given no financial statements or other evidence as to the nature of their fixed assets in Jamaica to support an undertaking. In the circumstances an injunction ought not to be granted.

### **Claimants' response**

[34] Mr. Pearson stated that the evidence in the instant case shows that the genuine owners have been deprived of the property by fraud. He stated that section 161 (d) of **the Act** allows the claimants to bring the action on the ground that they have lost their interest as a result of fraud.

[35] He also submitted that section 158 of **the Act** is not administrative and as such the claim can proceed under that section. He also stated that section 161 (d) does not speak to who the perpetrators of the fraud must be. As such even though no fraud is alleged against the defendants in this case the claim can proceed against them.

### **Discussion**

[36] In order to ground a claim for an injunction the claimant must first satisfy the court that there is a cause of action - **Fourie v. Le Roux** [2007] 1 WLR 320. The substantive claim in this matter is for recovery of possession of the property.



- [37] The principles which guide the court when considering whether or not to grant injunctive relief are to be found in the case of ***American Cyanamid v. Ethicon*** (supra). In that case, Lord Diplock stated that before granting an injunction the court must be satisfied that the claim is not frivolous or vexatious and that there is a serious issue to be tried.
- [38] Where the court finds that there is in fact a serious issue to be tried, it must then be determined whether damages would be an adequate remedy. In the event that damages would not be an adequate remedy, it must be determined whether the defendant would be adequately compensated under the claimant's undertaking as to damages.
- [39] Where there is doubt as to the adequacy of damages and whether the claimant's undertaking would provide enough protection for the defendant the court must then decide where the balance of convenience lies. These principles were approved and applied in ***National Commercial Bank Jamaica Ltd. v. Olint Corporation Ltd.*** [2009] 1 WLR 1405.
- [40] In this matter, the claimant has alleged that the defendants have obtained title through fraud. It is however important to note that, no fraud is alleged against them or anyone acting on their behalf.
- [41] The question as to how the court should approach the application at this stage of the proceedings, where the evidence is incomplete was addressed by Lord Hoffman in ***National Commercial Bank Jamaica Ltd. v. Olint Corporation Ltd.*** (supra). The learned judge said that the purpose of an injunction is "*to improve the chances of the court being able to do justice after a determination of the merits at trial*" and the court is required to "*...assess whether the granting or withholding an injunction is more likely to produce a just result*".
- [42] His Lordship referred to the ***American Cyanamid*** case and stated that where damages would provide an adequate remedy, the injunction ought not to be granted.

**Is there a serious issue to be tried?**

[43] It is accepted that where a court is making an assessment under this head, it should not embark on an exercise which is akin to a trial. In fact, the claimant is not required to demonstrate that he has a prima facie case. Lord Diplock in the **American Cyanamid** case expressed the rule in the following terms:-

*“It is no part of the court’s function at this stage of the litigation to try to resolve conflicts of evidence on affidavits as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at trial”.*

[44] However, in the case of **Series 5 Software v. Clarke** [1996] 1 All ER 853 it was held that where a judge is able to form a clear view as to the relative strengths of the parties’ cases that view is relevant to the issue of whether or not the injunction should be granted. Laddie, J. stated:-

*“(1) The grant of an interim injunction is a matter of discretion and depends on all the facts of the case. (2) There are no fixed rules as to when an injunction should or should not be granted. The relief must be kept flexible. (3) Because of the practice adopted on the hearing of applications for interim relief, the court should rarely attempt to resolve complex issues of fact or law. (4) major factors the court can bear in mind are (a) the extent to which damages are likely to be an adequate remedy for each party and the ability of the other party to pay, (b).....and (d) any clear view the court may reach as to the relative strength of the parties’ cases.”*

[45] Lord Hoffmann in **National Commercial Bank Jamaica Ltd. v. Olint Corporation Ltd.** (supra) also expressed the view that the court’s opinion as to the strength of each party’s case is relevant to the determination of this issue.

[46] The claim in this matter represents a challenge to the title of the defendants who are the registered proprietors of the property. Section 68 of **the Act** which establishes the indefeasibility of registered title states:-

*"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, be 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 seised or possessed of such estate or interest or has such power.*

[47] That section should however be read in conjunction with section 161 of **the Act** which clearly states that where a party obtains a registered title by fraudulent means, this constitutes an exception to the rule of "*paramountcy or priority..*"<sup>1</sup> of title.

[48] Section 161 of **the Act** states:-

*"No action of ejectment or other action, suit or proceeding, for the recovery of any land shall lie or be sustained against the person registered as proprietor thereof under the provisions of this Act, except in any of the following cases, that is to say—*

*(a) the case of a mortgagee as against a mortgagor in default;*

*(b) the case of an annuitant as against a grantor in default;*

*(c) the case of a lessor as against a lessee in default;*

*(d) the case of a person deprived of any land by fraud as against the person registered as proprietor of such land through fraud, or as against a person deriving otherwise than as a transferee bona fide for value from or through a person so registered through fraud;*

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<sup>1</sup> The Law and Practice relating to Torrens Title in Australasia by E.A. Francis Volume 1 (1972) at pp. 597

*(e) the case of a person deprived of or claiming any land included in any certificate of title of other land by misdescription of such other land, or of its boundaries, as against the registered proprietor of such other land not being a transferee thereof bona fide for value;*

*(f) the case of a registered proprietor with an absolute title claiming under a certificate of title prior in date of registration under the provisions of this Act, in any case in which two or more certificates of title or a certificate of title may be registered under the provisions of this Act in respect of the same land,*

*and in any other case than as aforesaid the production of the certificate of title or lease shall be held in every court to be an absolute bar and estoppel to any such action against the person named in such document as the proprietor or lessee of the land therein described any rule of law or equity to the contrary notwithstanding."*

It is clear from the above section that the system of registration is designed to ensure that the title of a registered proprietor is secure and indefeasible unless any of the circumstances enumerated above exist. This was confirmed by the Privy Council in the case of **Pottinger v Raffone** (supra) where Lord Rodger of Earlsferry stated:-

*"The basic rule is that, if any proceedings are brought to recover land from the person registered as proprietor, then the production of the certificate of title in his name is an absolute bar and estoppel to those proceedings, any rule of law or equity to the contrary notwithstanding. The only situations where a certificate of title is not a complete bar to proceedings are those listed in paragraphs (a) to (f)".*

[49] This view was also expressed by Phillips JA in **Ilene Kelly and Errol Milford (Executors of Estate of Evelyn Francis, Dec'd) v Registrar of Titles** (unreported) Court of Appeal, Jamaica [2011] JMCA Civ 42 judgment delivered 2 December 2011, who said:

*“Section 163 provides protection for a bona fide purchaser of registered land for valuable consideration against actions for recovery of land or for recovery of damages”.*

[50] By virtue of sections 70 and 71 of **the Act**, the registered proprietor of land is conferred with what has been described as “*an unassailable interest*”<sup>2</sup> in that land. They state as follows:-

*“70 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 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.*

*71 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.”*

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<sup>2</sup> Harley Corporation Guarantee Investment Company Limited v Daley and others (supra) at paragraph 51

Harris JA in **Harley Corporation Guarantee Investment Company Limited v Estate Rudolph Daley and others** (unreported) Court of Appeal, Jamaica [2010] JMCA Civ 46 judgment delivered 20 December 2010, described these provisions as a clear demonstration of the “*conclusive character of ownership under the Act*”. She also stated that “*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*”

[51] Where a claimant is successful in his bid to defeat the title of the registered owner, section 158 of **the Act** “*would furnish the court with the necessary powers*”<sup>3</sup> to deliver the fruits of that victory.

[52] In **E.A. Francis , The Law and Practice relating to Torrens Title in Australasia Volume 1** at pp. 602 the principles as they relate to fraud and their effects on the paramountcy of the registered title were stated in the following terms:-

*“With regard then, to the general exception from indefeasibility in cases of fraud, the position, it seems, may be summed up as follows-*

- 1. No definition is given, either by statute or by judicial decision of what constitutes fraud, nor, it seems, is any such definition possible.*
- 2. Fraud, for the purposes of these provisions, must be actual and not constructive or equitable fraud.*
- 3. Fraud must involve an element of dishonesty or moral turpitude.*
- 4. Notice of the existence of any trust or registered instrument does not of itself constitute fraud but may be an element in the establishment of the existence of fraud.*

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<sup>3</sup> Pottinger v Raffone at paragraph 21

5. *Abstaining from inquiry, when suspicions have been aroused, may constitute fraud.*

6. *The presentation for registration of a forged or fraudulently obtained instrument does not constitute fraud if the person presenting it honestly believes it to be a genuine document.*

7. ***The fraud to which the sections refer is that of the registered proprietor or his agent.***

8. *Gross negligence without mala fides will not be regarded as fraud in New Zealand, or, it seems in Australia.”*

[My emphasis]

[53] Lord Lindley in his definition of fraud in the case of **Assets Co Ltd v Mere Roihi** [1905] A.C. 176 at p. 210 stated:-

*“...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 inquiries which he omitted to make, does not of itself prove fraud on his part. But if it be shewn that his suspicions were aroused, and that 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.*

- [54] This principle was endorsed by the Jamaican Court of Appeal in **Harley Corporation Guarantee Investment Company Limited v Estate Rudolph Daley and others** (supra) where Harris JA said:-

*“The true test of fraud within the context of the Act means actual fraud, dishonesty of some kind and not equitable or constructive fraud. This test has been laid down in Waimiha Sawmilling Company Limited v Waione Timber Company Limited [1926] AC 101 by Salmon LJ, when at page 106 he said:*

*“Now fraud clearly implies some act of dishonesty. Lord Lindley in Assets Co. v. Mere Roihi (2) states that: ‘Fraud in these actions’ (i.e., actions seeking to affect a registered title) ‘means actual fraud, 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.’”*

*The test has been followed and approved in many cases including Stuart v Kingston (1923) 32 CLR 309; and Willocks v Wilson and Anor (1993) 30 JLR 297”.*

- [55] The claimants have alleged that the third defendant’s title was obtained by fraud. Rule 8.9 (1) of the **Civil Procedure Rules 2002 (CPR)**, imposes on a claimant a duty to set out his case. The rule states:-

*“The claimant must include in the claim form or in the particulars of claim a statement of all the facts on which the claimant relies”.*

- [56] There is however no provision in the **CPR** which makes it mandatory in cases where fraud is being alleged for such allegations to be expressly pleaded. This represents a departure from that which obtained under section 170 of the **Judicature (Civil Procedure Code) Law**. That section encapsulated the principle which was expressed by Thesiger, L.J. in **Davy v. Garrett** (1877) 7 Ch D 473 at 489 where he stated:-



*“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 from the facts”.*

[57] Section 170 provided as follows:-

*“In all cases in which the party pleading relies on any misrepresentation fraud shall be stated in the pleading.”*

[58] Under the new regime, it is clear from the case law that a claimant is still required to set out the facts and the circumstances that are being relied on to prove that a defendant had or was motivated by a fraudulent intention. It has also been established that the court should not be asked to infer such an intention from general allegations. In ***Harley Corporation Guarantee Investment Company Limited v Estate Rudolph Daley and others*** (supra) Harris JA stated:-

*“In placing reliance on an allegation of fraud, a claimant is required to specifically state, in his particulars of claim, such allegations on which he proposes to rely and prove and must distinctly state facts which disclose a charge or charges of fraud.*

*...to raise fraud, the pleading must disclose averments of fraud or the facts or conduct alleged must be consistent with fraud. Not only should the requisite allegations be made but there ought to be adequate evidentiary material to establish that the interest of a defendant which a claimant seeks to defeat was created by actual fraud”.*<sup>4</sup>

[My emphasis]

[59] In ***Harley*** the court also stated that where fraud has not been expressly pleaded, it may be inferred from the acts or conduct of a defendant. The learned Judge of Appeal then proceeded to examine the pleadings in order to ascertain whether it

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<sup>4</sup> Paragraphs 53 and 57

could be inferred that the issue of fraud had been raised. The Court of Appeal found that there was no material from which that inference could be made.

[60] It cannot be overemphasized that fraud is a very serious matter. The above rules and principles are both designed to ensure that a defendant is fully informed of the nature and extent of the case being made against him. In this case, the claimants have clearly stated that they have no grouse with the defendants. How then are the defendants supposed to respond to the allegations? They are the ones are before the court. The “*fraudsters*” are not.

[61] The approach of the court in a case such as this was outlined to by Sykes J in *Morrison v Phipps & others* (supra). The learned Judge having referred to the case of *Half Moon Bay Limited v Crown Eagle Hotels Limited* [2002] UKPC 24 stated:-

*“Therefore when the Privy Council Half Moon said that under the Torrens system ‘everyone who acquires title bona fide and in good faith from a registered proprietor obtains an indefeasible title’ their Lordships were simply saying that **unless there is actual dishonesty on the part of the new registered proprietor his title cannot be impeached.** It would seem to this court that the bona fide and good faith in the context of the ROTA really means absence of actual dishonesty on the part of the registered proprietor”<sup>5</sup>.*

[My emphasis]

[62] In this matter, there is no allegation that the fraud was committed by the either defendants or a person or persons acting on their behalf. In fact, there is no allegation that the perpetrator is even remotely connected to the defendants. It would seem therefore that they have a relatively strong case.

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<sup>5</sup> Paragraph 71

[63] In light of the foregoing, I find that there is no serious issue to be tried. The application is refused with costs to the defendants to be taxed if not agreed.