



[2021] JMSC Civ. 181

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

**IN THE CIVIL DIVISION**

**CLAIM NO. 2018 HCV 00236**

**IN THE MATTER OF THE  
LIMITATION OF ACTIONS ACT  
AND THE REGISTRATION OF  
TITLES ACT**

<b>BETWEEN</b>	<b>SHARCA BROWN</b>	<b>CLAIMANT</b>
<b>AND</b>	<b>FIRST UNION FINANCIAL COMPANY LIMITED</b>	<b>1<sup>ST</sup> DEFENDANT</b>
<b>AND</b>	<b>EUTON SMITH</b>	<b>2<sup>ND</sup> DEFENDANT</b>

**IN CHAMBERS**

**Garnett Spencer, instructed by Robinson, Phillips and Whitehorne, for the claimant**

**Dr Delroy Beckford, instructed by Samuel and Beckford, for the defendant**

**Heard: April 28 and December 10, 2021**

**Application to strike out the claim as one which discloses no reasonable case against the 1<sup>st</sup> defendant – Claim for fraud – Bona fide purchaser for value – No actual fraud is being alleged against the current registered owner who is the 1<sup>st</sup> defendant – Alleged actual fraud on the part of the 2<sup>nd</sup> defendant – Application for summary judgment – The distinction between an application to strike out the claim and summary judgment – Claim for limitation rights – Adverse possession and registered title – Claim not served on the 2<sup>nd</sup> defendant – Application to**

**dispense with mediation – Costs – The appropriate costs order to be made in respect of this application**

**ANDERSON, K.J**

**BACKGROUND**

[1] The 1<sup>st</sup> defendant was registered as the title holder of the property located at 13-15 Stennett Street in the parish of St Mary comprised at Volume 1502 Folios 329 and 555 in the register book of titles (hereinafter referred to as, '*the disputed property*') in August of 2017. It obtained title from the 2<sup>nd</sup> defendant who obtained ownership by adverse possession in October 2016, dispossessing former owners, possessed of registered title to the disputed property, namely: Gertrude McKay and Lily Oiley.

[2] The claimant filed this claim against the defendants seeking:

- a. A declaration that she is the title holder for the disputed property based on her having been in open and undisputed possession from 1994 until 2017, when she was made aware of the 1<sup>st</sup> defendant's interest.
- b. A declaration that the 1<sup>st</sup> defendant is not a bona fide purchaser for value without notice as it was, or ought to have been aware of her possession.
- c. A declaration that she is entitled to defend her possession against a claim from the 1<sup>st</sup> defendant.
- d. A claim for fraud against the 2<sup>nd</sup> defendant.

[3] The 1<sup>st</sup> defendant has filed a defence and counter-claim, denying any allegation of wrongdoing on its part and seeking orders of recovery of possession and mesne profits. The claimant has filed a defence to that counter-claim.

**This application**

[4] The 1<sup>st</sup> defendant filed this application on August 14, 2020, seeking the following orders:

- (i) That mediation of the matter herein be dispensed with or discontinued;
- (ii) That the claim form and particulars of claim filed by the claimant on January 22, 2018, and the amended claim form and particulars herein be struck out for disclosing no reasonable grounds for bringing the claim against the 1<sup>st</sup> defendant;
- (iii) Alternatively, that summary judgment in favour of the 1<sup>st</sup> defendant be entered against the claimant on the ground that there is no real prospect of succeeding on the claim herein against the 1<sup>st</sup> defendant;
- (iv) Costs to the 1<sup>st</sup> defendant to be agreed or taxed; and
- (v) Such further and other relief as this Honourable Court may deem just.

[5] The grounds on which the 1<sup>st</sup> defendant has sought those orders, are as follows:

- a. Attempts at mediation have been unsuccessful thus far.
- b. The position of the claimant and the 1<sup>st</sup> defendant are diametrically opposed as to make mediation of the matter superfluous.
- c. The claimant has not set out its case sufficiently against the 1<sup>st</sup> defendant per **Rule 8.9(1) of the Civil Procedure Rules**, (hereinafter referred to as, '*the CPR*').
- d. The claimant's claim discloses no reasonable grounds for bringing this claim per **Rule 26.3.(1)(c) of the CPR**.

- e. The claimant has no real prospect of succeeding in the claim herein pursuant to **Rule 15.2(a) of the CPR**.
- f. The claimant seeks a declaration that she is the owner of the disputed property by adverse possession from the original title owners when title to the said premises has already been obtained by those means and transferred to the 1<sup>st</sup> defendant who is now the registered owner of the disputed property.
- g. **Rule 1.1 of the CPR** states that the court should be guided by the overriding objectives.
- h. The overriding objectives and the interests of justice, favour the court hearing the application and resolving the issues raised at this point, to save time and expense.

**[6]** In support of the application, Mr Lloyd Campbell, managing director of the 1<sup>st</sup> defendant, led evidence by affidavit, outlining the following:

- a. The disputed property was purchased on August 8, 2017 from the 2<sup>nd</sup> defendant;
- b. At the time of purchase, the 1<sup>st</sup> defendant was unaware of the claimant's alleged interest;
- c. The 2<sup>nd</sup> defendant obtained title by adverse possession from the previous registered owners;
- d. The claim does not indicate any wrongdoing against the 1<sup>st</sup> defendant. There is no allegation of fraud against the 1<sup>st</sup> defendant nor any stipulation of the particular circumstances of fraud by the 1<sup>st</sup> defendant; and
- e. There were attempts to have the matter mediated but those were not forthcoming.

## **The position of the 2<sup>nd</sup> defendant**

[7] It is to be stated at this juncture, that the 2<sup>nd</sup> defendant has not been served with this claim and since, as far as the court is presently aware, there was no order of this court, within the six (6) months' life of this claim, before the service of same on the 2<sup>nd</sup> defendant, this claim against the 2<sup>nd</sup> defendant has now expired. See **Rule 8.14 (1) of the CPR** in that regard.

[8] The application was heard, 'on paper' and based on the submissions received as regards same, the following issues are now before the court for adjudication:

(i) Whether the grant of an interim injunction prevents the 1<sup>st</sup> defendant from pursuing an order for summary judgment and/or striking out.

(ii) Whether the claim against the 1<sup>st</sup> defendant is viable in circumstances where no actual fraud is being alleged against it.

(iii) Whether the interest being claimed by the claimant, is enforceable as against the 1<sup>st</sup> defendant.

(iv) Whether the claimant's claim should be struck out.

(v) Whether summary judgment should be granted in the circumstances.

## **LAW AND ANALYSIS**

### **Interim injunction and application of this nature**

[9] Counsel for the defendant in his written submissions, filed on April 23, 2021, raised the preliminary issue as to whether the court can entertain the application for summary judgment and/or striking out, where there was an interim injunction granted earlier in these proceedings. Counsel for the claimant in his written submissions, filed on April 28, 2021, noted that on the grant of the interim injunction, the court had already concluded that there was a serious issue to be

tried, and that accordingly, the matter is not suitable for summary judgment and/or striking out.

[10] That application for interim injunctive relief was filed by the claimant on January 20, 2020 and was granted to the claimant, restraining the defendants from interfering with, destroying or damaging the disputed property. That injunction was sought, as the 1<sup>st</sup> defendant had allegedly made attempts to demolish a building on the disputed property.

[11] The court believes that the fact of an interim injunction being granted to the claimant earlier, does not serve to preclude this court from either granting summary judgment on this claim, or striking out the claim. The court is aware that on the grant of an interim injunction, the court had to satisfy itself that there was a serious issue to be tried and that damages would not be an adequate remedy. Those considerations do not arise properly for a court, considering whether summary judgment ought to be granted, or whether a party's statement of case, ought to be struck out.

[12] Additionally, more evidence is now available to the court from the parties, than was available, at the earlier stage of the course of this claim, before the court. It is this court's conclusion on this point therefore, that the claimant's counsel's submission as to same, is without merit.

### **Striking out**

[13] **Rule 26.3(1)(c) of the CPR** provides that:

*'In addition to any other powers under these Rules, the court may strike out a statement of case or part of a statement of case if it appears to the court that the statement of case or the part to be struck out discloses no reasonable grounds for bringing or defending a claim.'*

[14] In **Gordon Stewart v John Issa, SCCA 16/2009**, Cooke J.A. opined at paragraphs 14 and 23 that:

*'At this stage, the genesis of the proceedings, the consideration under rule 26.3(1)(c) is whether or not the claim as pleaded satisfies the legal requirements for the prosecution of its alleged cause. A trial judge ought not to attempt to divine what will be the outcome of a properly filed claim...'*

*I would be loth to give our judges discretion to- under the banner of the overriding objective- shut out prospective litigants from having their viable causes heard. The overriding objective is to deal with cases justly and not to throw them out on the basis that the effort (financial or otherwise) is not worth it. There are provisions within the CPR to ensure that 'the court ought not to be a source of profligacy and waste.'*

## Summary judgment

[15] **Rule 15.2 of the CPR** states as follows:

*'15.2 The court may give summary judgment on the claim or on a particular issue if it considers that –*

*(a) the claimant has no real prospect of succeeding on the claim or the issue; or*

*(b) the defendant has no real prospect of successfully defending the claim or the issue.'*

[16] Additionally, **rule 15.6 of the CPR** outlines the court's powers in granting summary judgment. That rule reads as follows:

*'15.6 (1) On hearing an application for summary judgment the court may-*

*(a) give summary judgment on any issue of fact or law whether or not such judgment will bring the proceedings to an end;*

*(b) strike out or dismiss the claim in whole or in part;*

*(c) dismiss the application;*

*(d) make a conditional order; or*

*(e) make such other order as may seem fit.'*

[17] In **Fiesta Jamaica Ltd. v National Water Commission [2010] JMCA Civ. 4**, Harris JA, at paragraph 31 stated, as regards the jurisdiction of the court to grant summary judgment:

*"A court, in the exercise of its discretionary powers must pay due regard to the phrase "no real prospect of succeeding" as specified in Rule 15.2. These words are critical. They lay down the criterion which influences a decision as to whether a party has shown that his claim or defence, as the case may be, has a realistic possibility of success, should the case proceed to trial.*

*The applicable test is that it must be demonstrated that the relevant party's prospect of success is realistic and not fanciful. In Swain v Hillman [2001] All ER 91, 92 at paragraph [10] Lord Woolf recognized the test in the following context: The words 'no real prospect of being successful or succeeding does not need any amplification, they speak for themselves. The word "real" distinguishes fanciful prospect of success or, as, Mr Bidder QC submits, they direct the court to the need to see whether there is a realistic as opposed to a fanciful prospect of success*

[18] Further, at paragraph 34, Harris JA, referred to the House of Lords' judgment in the case: **Three Rivers District Council v Governor and Company of the Bank of England [2001] 2 All ER 513**, where Lord Hutton, at paragraph 158, stated the approach, a judge should adopt when dealing with the applicable test. Lord Hutton stated the following:

*'The important words are "no real prospect of succeeding." It requires the judge to undertake an exercise of judgment. He must decide whether to exercise the power to decide the case without a trial and give summary judgment. It is a 'discretionary' power, ie one where the choice whether to exercise the power lies within the jurisdiction of the judge. Secondly, he must carry out the necessary exercise of assessing the prospects of success of the relevant party. If he concludes that there is "no real prospect," he may decide the case accordingly.'*

### **The distinction between an application for striking out and summary judgment**

[19] Morrison JA. (ret'd) in the **Gordon Stewart case (op.cit)** at paragraph 31, explained the difference between an application for striking out and summary judgment, in that an application to strike out under **Rule 26.3(1) of the CPR** raises what is describes as a '*pleading point*,' that is, the pleading must give rise to that cause of action, in the statement of case. He then quoted from a dictum by Eady J in **B v N and L [2002] EWHC 1692 (QB)** at paragraphs 21 and 22 as regards the distinction as follows:

*'I must focus on the claimants pleaded case in first instance. That is all I am permitted to do for the purposes of the strike out application. If I rule against the plea, then it would be the end of the matter.'*

*As for a summary judgment application however, I can have regard also to the evidence for determining whether the claimant's case has no realistic prospect of success.'*

[20] This dictum provides helpful authority on the guidelines which the court should adopt in light of both orders being sought in this application.

### **Indefeasibility of registered title**

[21] The majority of discussion in this case, concerns the circumstances in which a registered title may be defeated. It is thus important for the court to set out the circumstances as stipulated by the relevant statutes and case law, immediately below.



**[22] Section 68 of the Registration of Titles Act (ROTA)** provides that a certificate of title issued under the Act 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.'*

**[23] Section 70 of the ROTA** provides that, except in case of fraud, the proprietor of any estate or interest under the Act shall:

*'...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:*

*Provided always that the land which shall be included in any certificate of title or registered instrument shall be deemed to be subject to the reservations, exceptions, conditions and powers (if any), contained in the patent thereof, and to any rights acquired over such land since the same was brought under the operation of this Act under any statute of limitations, and to any public rights of way, and to any easement acquired by enjoyment or user, or subsisting over or upon or affecting such land, and to any unpaid rates and assessments, quit rents or taxes, that have accrued due since the land was brought under the operation of this Act, and also to the interests of any tenant of the land for a term not exceeding three years, notwithstanding the same respectively may not be specially notified as incumbrances in such certificate or instrument.'*

**[24]** The indefeasibility of a registered title is made subject to a finding of adverse possession and fraud. The court will examine the operation of both exemptions below and apply same to the facts of this case, in deciding whether the claimant's claim is suitable for summary judgment or striking out, on the basis that the same discloses no reasonable cause of action or whether it is a case which has a realistic prospect of success.

**[25]** The 1<sup>st</sup> defendant is seeking that the claimant's case against it, be struck out, on the basis that while fraud is being alleged against the 2<sup>nd</sup> defendant, no fraud has been alleged nor particularized against it, such as would serve in law to defeat its title. Given the nature of the submissions before the court, the court

ought now to assess the claimant's case, to ascertain whether there is a claim for fraud against the 1<sup>st</sup> defendant, and if so, to determine whether it discloses any reasonable grounds for being brought against the 1<sup>st</sup> defendant and whether it has any realistic prospect of success.

### **Proof of a claim of fraud**

- [26] Fraud is always very difficult to prove. It has to be proved if it can be, at trial, on a balance of probabilities, but in that regard, the evidence led in proof of same needs to be cogent. In that regard, see the particularly helpful reference to an exposition of same by Morrison P. (ret'd) in the case: **Winston Leiba and Others v Beverly Warren [2020] JMCA Civ. 19**, at paragraphs 75 to 88.
- [27] To succeed on a claim of fraud, it must be specially pleaded and specially proven. In **Donovan Crawford and Others v Financial Institutions Services Ltd. [2005] UKPC 40**, Lord Walker of Gestingthorpe, on the Board's behalf, at paragraph 13, noted that: it is well settled that actual fraud must be precisely alleged and strictly proved. It is explicitly stated in that case that the particulars of fraud that have been alleged must be proven.
- [28] Given that fraud has to be proven based on its particulars, the court must now examine the particulars of fraud that have been set out in the claimant's statement of case, which she is bound by, should this claim proceed to trial. In this case, the particulars of fraud that have been averred against the 1<sup>st</sup> defendant must be of such nature, that if proven at a later stage, the claimant will be successful.
- [29] From the claimant's statement of the case, the court notes that the claimant has not stated that she is bringing a claim for fraud against the 1<sup>st</sup> defendant nor has she particularized any fraud she intends to prove against the 1<sup>st</sup> defendant. The averments which she has made indicating any wrongdoing against the 1<sup>st</sup> defendant are as follows:

- a. *'Falling to carry out necessary checks and enquiry as to the nature of the claimant's occupation;'* and
- b. *'Not being a bona fide purchaser for value.'*

[30] From an examination of the statement of case of the claimant, it is evident that the claimant has not explicitly stated that she is bringing a claim for fraud against the 1<sup>st</sup> defendant. Based on that which was made clear by the Privy Council in the **Crawford case (op.cit)** that ought to have been done, since fraud ought always to be precisely alleged. Though fraud has not been expressly alleged, the court observes that the nature of the declaration being sought as to the 1<sup>st</sup> defendant not being a bona fide purchaser for value without notice of her interest is, in the opinion of this court, undergirded by an allegation of wrongdoing on the 1<sup>st</sup> defendant's part. For this reason, even though it may be that, as a matter of legality, it is for the purposes of this written ruling unnecessary to do so, this court nonetheless, deems it prudent, to examine the total implication of such allegation, on the 1<sup>st</sup> defendant's title.

[31] The court will discuss below, the implication of the alleged neglect of the 1<sup>st</sup> defendant to conduct checks on the disputed property, in order to ascertain whether anyone had obtained any possessory title to same, on the title of the 1<sup>st</sup> defendant to that disputed property, if that issue were to have to be addressed and resolved by a trial court, should same be proven at trial.

#### **Alleged actual fraud of the 2<sup>nd</sup> defendant**

[32] The court observes that from the amended claim form, the claimant has alleged actual fraud against the 2<sup>nd</sup> defendant. The court deems it prudent at this juncture, to determine the implications, in law, which such actual fraud, would have, on the 1<sup>st</sup> defendant's title to the disputed property, even if same could be proven against the 2<sup>nd</sup> defendant.

[33] Fraud, within the context of the ROTA, means actual fraud, committed by the present title holder, not constructive or equitable fraud. In **Assets Company Ltd. v Mere Roihi [1905] A.C. 176**, their Lordships, at page 210, had this to say on the question of fraud, as it relates to a registered title:

*‘Sects. 46, 119, 129 and 130 of the Land Transfer Act, 1870, and the corresponding sections of the Act of 1885 (namely, ss. 55, 56, 189, and 190) [these sections are substantially similar to the Registration of Titles Act in relation to the indefeasibility of a certificate of title] appear to their Lordships to shew that by fraud in these Acts is meant actual fraud, i.e. dishonesty of some sort, not what is called constructive or equitable 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.’***

*[Emphasis added]*

- [34] In that case, the registered owner’s title was sought to be defeated on the basis that the title holder took property from someone who had committed fraud. That is similar to the facts of this case. As stated above, the court opined that fraud on the part of the person from whom the registered owner obtained title without more, could not serve to defeat the title, of the then registered title holder.
- [35] It is an unequivocal position at law, in Jamaica, that the fraud which is necessary to displace registered title, is actual fraud on the part of the current title holder, or its agents. See: **Half Moon Bay Limited v Crown Eagles Hotel Ltd [2002] UKPC 24.**
- [36] The claimant has asserted that the 1<sup>st</sup> defendant obtained title from a person who claimed ownership through fraud. She has not however, led any sufficient allegation in support of that assertion, in her statement of case, which could implicate the 1<sup>st</sup> defendant. In the absence of such allegation, the court is unable to find, without more, that the claim can be successful based on the 1<sup>st</sup> defendant’s alleged notice of her possession. Even if it should be proven at trial, that notice without more, cannot be proof of actual fraud against the 1<sup>st</sup> defendant.

- [37] Further though the claimant has averred in her statement of case, that by notice, she was on the disputed land in open possession, there is no evidence that the 1<sup>st</sup> defendant's suspicions were aroused and that the 1<sup>st</sup> defendant failed to conduct further checks, out of fear of learning the truth.
- [38] The conclusion as regards this issue is clear, the claimant's claim against the 1<sup>st</sup> defendant on any allegation of fraud, other than actual fraud, cannot suffice to render her statement of case against the 1<sup>st</sup> defendant, as being one which discloses a reasonable ground for the claim of fraud, having being brought against the 1<sup>st</sup> defendant, to defeat the 1<sup>st</sup> defendant's title to the disputed property on the ground of fraud.
- [39] In the event though, that I may be wrong about that conclusion, at the very least, there can hardly be any doubt that, based on evidence that is expected to be put forward at trial by the claimant, in terms of the 1<sup>st</sup> defendant's alleged fraud, that case has no realistic prospect of success. She has brought no evidence to refute the 1<sup>st</sup> defendant's contention that enquiries were made of the 2<sup>nd</sup> defendant as to her perceived occupation of the property, and were told that she had once been a tenant of the 2<sup>nd</sup> defendant but had fallen into arrears into the payment of the rent, which would be legally, a condition of the tenancy.
- [40] Mere notice of her interest without more, is insufficient to mount a successful case concerning fraud. The claimant would have to show that the person whose suspicion was aroused, abstained from making enquiries for fear of learning the truth or abstained from making further enquiries for fear of learning the truth. The claimant has brought no such evidence, before this court at this stage. In the circumstances, it is properly open to this court to conclude that if the claimant's claim against the defendant for fraud, were to proceed to trial, the claimant would also then have, no such evidence available to be brought before the trial court.
- [41] Whilst it is not typical that the court will grant summary judgment in cases where fraud is alleged, it is to be noted that in a recent judgment of the Privy Council, in **Sagicor Bank v Taylor-Wright [2018] UKPC 12**, the Privy Council concluded that the fraud which was being alleged, could not properly be proven,

based on the evidence before the judge who heard an application for summary judgment in that case. This case, taken at its highest, falls into that same situation.

### **Claim for rights obtained under the statute of limitation**

[42] Counsel for the 1<sup>st</sup> defendant has submitted that the claimant's claim for adverse possession cannot succeed, as the disputed land was already made subject to adverse possession, in the form of the application by the 2<sup>nd</sup> defendant. In that light, it is contended that the 2<sup>nd</sup> defendant having obtained title, and the claimant not having shown that twelve (12) years have elapsed, since the said title was obtained, her claim for adverse possession cannot subsist against the 1<sup>st</sup> defendant. Further, the 1<sup>st</sup> defendant also submits that the success of the claimant's claim for adverse possession is contingent on proof of fraud against the 2<sup>nd</sup> defendant. That fraud, it is contended, cannot serve to defeat the 1<sup>st</sup> defendant's title, as it was not fraud on the 1<sup>st</sup> defendant's part.

[43] Counsel for the claimant has indicated that the claimant has been in open and undisputed possession since 1994 and that the previous owners' title was extinguished, twelve (12) years subsequently, in her favour. Accordingly, she maintains that the 2<sup>nd</sup> defendant could not have properly obtained title for any period after 1994, as she was the one that was in open and undisputed possession. Also, it is contended that even if the 2<sup>nd</sup> defendant had obtained title by adverse possession, that possession should have been made against the claimant's interest and that the requisite period was not in existence when the 2<sup>nd</sup> defendant made such an application and was granted title in 2016, which was subsequently transferred to the 1<sup>st</sup> defendant in 2017.

[44] **Section 3 of the Limitation of Actions Act (LAA)**, bars the right to recover land, either by entry or by action, after 12 years:

*"No person shall make an entry, or bring an action or suit to recover any land or rent, but within twelve years next after the time at which the right to make such entry, or to bring such action or suit, shall have first accrued to some person through whom he claims, or, if such right shall have not accrued to any person through whom he claims, then within twelve years next after the time*

*at which the right to make such entry, or to bring such action or suit, shall have first accrued to the person making or bringing the same.'*

- [45] The consequence of the expiry of the limitation period prescribed by **section 3 of the LAA** is set out in **section 30 of the LAA**:

*'At the determination of the period limited by this Part to any person for making an entry, or bringing an action or suit, the right and title of such person to the land or rent, for the recovery whereof such entry, action or suit respectively might have been made or brought within such period, shall be extinguished.'*

- [46] These provisions make it clear that after twelve (12) years, where one has enjoyed open and undisputed possession, a registered owner's title is extinguished.

- [47] The Privy Council in its unanimous judgment of **Recreational Holdings v Lazarus [2016] UKPC 22**, has concretized the principle concerning the interrelation between the limitation rights and a registered title. That decision followed its earlier decision in **Chisholm v Hall [1959] AC 719**. The following is stated as regards **section 70 of the ROTA**, by their Lordships at page 739:

*'The scheme of section 70 is reasonably plain. The registration of the first proprietor is made to destroy any rights previously acquired against him by limitation, in reliance, no doubt, on the provisions as to the investigation of the title to the property and as to notices and advertisements, which are considered a sufficient, protection to anyone claiming any rights of that description. But from and after the first registration the first proprietor and his successors are exposed to the risk of losing the land or any part of it under any relevant statute of limitations to some other person whose rights when acquired rank as if they were registered incumbrances noted in the certificate, and accordingly are not only binding upon the proprietor against whom they are originally acquired but are not displaced by any subsequent transfer or transmission.'*

- [48] From the authorities above, the Privy Council has noted that 'subsequent' as used in **sections 68 and 70 of the ROTA** is to be interpreted as subsequent to the first registration, as opposed to being subsequent to the registration of the respective registered owner. The evidence has disclosed that the first registration of the title to the disputed property occurred on November 18, 1982.

- [49] For the claimant's case to be successful, as regards her alleged open and undisputed possession, the onus would be on her, to prove her adverse possession against the title of the previous owners. This is a finding of fact, which would need to be determined, upon the trial of this claim.

[50] If she can prove same, the effect of that, would have been that the 1<sup>st</sup> defendant could not have obtained a valid registered title to the disputed property. In that circumstance, the 1<sup>st</sup> defendant could not have obtained a valid registered title to same, because the party who would have transferred that purportedly valid title to them, that being the 2<sup>nd</sup> defendant would have had, at that time, no valid title to transfer, as she was the person who by virtue of her possession, the owner of disputed property which title was extinguished in her favour.

### **Can the claim subsist against the 1<sup>st</sup> defendant only**

[51] The court ought to address its mind to the fact that this claim as is, no longer subsists against the 2<sup>nd</sup> defendant. In the circumstances, the court must decide whether it can be said that as is, this claim is one, which has a realistic prospect of success, if it should proceed to trial.

[52] Counsel for the claimant has contended that the 1<sup>st</sup> defendant, as the present title holder, took its interest subject to any claim of adverse possession, and that, as such, the claim may subsist against the 1<sup>st</sup> defendant only. Counsel for the 1<sup>st</sup> defendant contends however that a claim of this nature cannot persist against the 1<sup>st</sup> defendant, in the absence of the 2<sup>nd</sup> defendant being made a party.

[53] Given the nature of this claim, this court disagrees with that particular contention of the 1<sup>st</sup> defendant.

[54] In the **Recreational Holdings case** (op.cit), the alleged adverse possessor who dispossessed the former title owner of the disputed parcel of land that was the subject of that claim, was not made a party to that claim. Every case is different and whilst therefore, that **Recreational Holdings** judgment may not be a useful precedent as to who should be parties in a claim such as this, nonetheless, the claim at hand does not have to be pursued by the claimant as against anyone than the registered title holder, to the disputed property at present.

[55] In a case of this nature, the court ought to satisfy itself as to whether the requisite period of adverse possession exists in the claimant's favour. If it does,



then, based on the law as earlier referred to, the claim should succeed. The 2<sup>nd</sup> defendant does not need to be made a party to this claim. At most, he could be made an interested party, but such does not need to be done, in order for this claim to be properly resolved.

[56] Counsel for the claimant, in his written submissions to the court, has indicated that a claim was filed on May 14, 2021. That claim number is SU2021CV02334 and that claim was filed against the named 2<sup>nd</sup> defendant, by the claimant. The claimant's counsel had referred to same and had indicated that after that claim is served, an order will be sought, to have the claims consolidated. From a perusal of the court's file, there is no indication that the same has been served by the claimant. Based on this written ruling, it would not be necessary for that claim to be joined to this one, nor is it necessary for the named 2<sup>nd</sup> defendant to be a party to this claim, for it to proceed against the 1<sup>st</sup> defendant.

[57] If the 1<sup>st</sup> defendant wishes to have the named 2<sup>nd</sup> defendant who has never been served with this claim, joined as an interested party then they should make an application to this court for same to be ordered. Ultimately though, it is not a requirement for this claim to succeed that such order must be made by this court. If the 1<sup>st</sup> defendant wishes indemnification from the 2<sup>nd</sup> defendant if they are found liable to the claimant, then it is for them to seek to join that party. See in that regard: **Rule 18(3) of the CPR.**

[58] Up until now, the court has not been presented with any expected evidence from the 2<sup>nd</sup> defendant. Also, it will be open to the claimant to consider whether the named 2<sup>nd</sup> defendant should be relied on, as a witness for the 1<sup>st</sup> defendant, in an effort to refute the claimant's claim

[59] Striking out cannot be granted to the claimant on the basis that the 2<sup>nd</sup> defendant has not been served. In dealing with striking out, the court has to examine whether, on the face of it: Does the claim disclose a reasonable cause of action against the 1<sup>st</sup> defendant? The court is so satisfied. The 1<sup>st</sup> defendant has to be made a party to this claim because it is now the title holder. There is no doubt that the claimant has a cause of action against the 1<sup>st</sup> defendant, as it is being alleged that that title which was obtained by the 2<sup>nd</sup> defendant, could

not have been lawfully obtained. As such, an order for striking out of this claim is not suitable given the legitimacy of the claimant's remaining cause of action, on the grounds of adverse possession against the 1<sup>st</sup> defendant.

[60] The court is also of the opinion that the 1<sup>st</sup> defendant has not demonstrated to this court that the claimant's case is one that does not have a realistic prospect of success. Summary judgment also, is not suitable in the circumstances.

### **Application to dispense with mediation**

[61] The 1<sup>st</sup> defendant has sought an order dispensing mediation. This is sought based on the opposing positions of the parties and that also, same is inconvenient.

[62] Whilst the positions of the parties, before this written ruling, appeared to have been diametrically opposed, it is expected that upon receipt of this written ruling by the counsel and proper consideration having been given as to same, that the parties will recognize that it will be in their best interests to have this claim resolved without the need for a trial. That is so because of the costs, time and stress associated with any trial and the fact is that, the outcome of an expected future trial, is always uncertain.

[63] The 1<sup>st</sup> defendant's position vis-a-vis the claimant's claim for adverse possession is of course, strongly going to be dependent on any assistance that may be obtained by them from the named 2<sup>nd</sup> defendant, whose whereabouts at this time may very well be unknown, to both the claimant and 1<sup>st</sup> defendant. Of course, on the other hand, it is always important for the claimant to bear in mind, that she is the one who will have the burden of proving her claim at trial. In the circumstances, mediation between the claimant and the 1<sup>st</sup> defendant, is to my mind, a viable option, and ought to be pursued vigorously.

### **Costs**

[64] Part 64 of the Civil Procedure Rules outlines the general rules concerning costs orders. **Rule 64.6 (3)** and **64.6 (4) (b) and (d)**, read as follows:

*'(3) In deciding who should be liable to pay costs the court must have regard to all the circumstances.*

*(4) In particular it must have regard to –*

*a. ...*

*b. whether a party has succeeded on particular issues, even if that party has not been successful in the whole of the proceedings;*

*c...*

*d. whether it was reasonable for a party - (i) to pursue a particular allegation; and/or (ii) to raise a particular issue;'*

**[65]** The 1<sup>st</sup> defendant brought this application seeking three (3) substantial orders. Based on the court's assessment above, only one aspect of that application is successful. In that light, the claimant is awarded two-thirds (66 <sup>2</sup>/<sub>3</sub> %) of the costs of this application.

## **CONCLUSION**

**[66]** In the final analysis, the claimant claim against the defendant for fraud discloses no reasonable ground to be brought against the 1<sup>st</sup> defendant, as the allegations against it are not actual fraud. As regards the extant claim against the 1<sup>st</sup> defendant, that claim in the opinion of the court has a realistic prospect of success given the nature of the allegations as brought by the claimant, accordingly, summary judgment cannot be granted, with respect thereto.

## **DISPOSITION**

**[67]** In the circumstances, the court's orders are as follows:

- (1) The 1<sup>st</sup> defendant's application to strike out the claimant's claim on the ground of fraud, is granted.
- (2) The 1<sup>st</sup> defendant's application to strike out the entirety of the claim, is denied, in part.
- (3) The 1<sup>st</sup> defendant's application for summary judgment is denied.
- (4) Mediation between the parties is to proceed and the same shall be completed within ninety (90) days of the date of this order and if

mediation is unsuccessful, a case management conference should be scheduled by the Registrar, without any undue delay.

(5) The claimant is awarded two-thirds (66 2/3%) of the costs of this application and such costs shall be taxed, if not sooner agreed.

(6) Leave to appeal is granted.

(7) The claimant shall file and serve this order.

.....

**Hon. K. Anderson, J**