



[2022] JMSC Civ 195

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

**IN THE CIVIL DIVISION**

**CLAIM NO. SU2022CV01378**

<b>BETWEEN</b>	<b>ANDREW BUDDAN</b>	<b>1<sup>ST</sup> CLAIMANT</b>
<b>AND</b>	<b>SARAH BUDDAN</b>	<b>2<sup>ND</sup> CLAIMANT</b>
<b>AND</b>	<b>BETHEL CHAPEL APOSTOLIC FOUNDATION LIMITED</b>	<b>DEFENDANT</b>

**IN CHAMBERS**

Mrs. Simone Mayhew KC and Ashley Mair instructed by Mayhew Law for the Claimants

Ms. Stephanie Williams and Ms. Charah Malcolm instructed by Henlin Gibson Henlin for the Defendant

Heard: June 15, 2022, July 27, 2022 and November 11, 2022

**Interim Injunction - Factors to be considered in granting an interim injunction - Whether there is a serious issue to be tried - Whether damages are adequate - Balance of convenience - Norwich Pharmacal Order - whether Norwich Pharmacal Order should be granted**

**THOMPSON-JAMES J**

**Background**

[1] The Claimants, Andrew Buddan and Sarah Buddan sought the following orders against the Bethel Chapel Apostolic Foundation Limited that:

- (i) The Defendant be restrained until the determination of this action, whether by itself, its servants, agents or otherwise, from disposing,

transferring, mortgaging, charging or pledging or making any permanent change to or construction on the land now comprised in Certificates of Title registered at Volume 1553 Folio 557 and Volume 1552 Folio 530 of the Register Book of Titles.

(ii) The Registrar of Titles be directed to disclose to the Claimants' Attorneys-at-Law copies of all documents submitted in support of its application for title by way of re-registration of parts of the land formerly comprised in Certificate of Title registered at Volume 940 Folio 214 and now comprised in Certificates of Title registered at Volume 1553 Folio 557 and Volume 1552 Folio 530 of the Register Book of Titles within 14 days of the date hereof.

(iii) Costs of this application be costs in the claim.

(iv) Such further and other relief as the court deems fit.

### **Claimants' evidence**

[2] Sarah Buddan gave affidavit evidence on behalf of the claimants. She deposed that in August 2017, she and her husband bought land comprised in Certificate of Title registered at Volume 940 Folio 214 being land part of St. Ann's Vale in the parish of St. Catherine from Asha Vaswani and Rosa Vaswani (the vendors). She stated that it was expressly agreed and was a special condition of the Agreement for Sale that a section of the property on which a church has been built was not included in the land purchased. Further, that the section on which the church has been built was described in the Agreement for Sale as the "church section" and was delineated in red on a copy of the sketch plan which was attached to the agreement for sale. She exhibited the Agreement for Sale with the sketch diagram. According to Mrs Buddan, it was also agreed that the claimants at their expense would obtain subdivision approval for the property in order to execute a transfer of the church section to the church and/or its nominee. She stated that the process to obtain subdivision approval has commenced but is yet to be completed.

- [3]** Ms Buddan gave further evidence that the church occupied approximately one acre of land which was enclosed by a concrete wall which separated it from the rest of the land comprised in the title. However, she highlighted that at the time of the Agreement for Sale, the claimants observed that the area occupied by the defendant differed in shape from the area demarcated on the sketch plan in red. She however, indicated that the claimants did not consider it to be a significant issue because the church section was still approximately one acre and was at the same section of the land along its border with St. John's Road.
- [4]** It was Mrs Buddan's further evidence that after the completion of the sale, Mr. Buddan declined the church representatives' request of a gift of an additional section of the land comprising approximately half-acre. She said the claimants reiterated that they would honour the terms of the Agreement for sale to transfer one acre of land to the church or its nominee. Further, Mrs. Buddan stated that the church was not in possession of any other part of the property except the land enclosed by the concrete wall on which the church was built. She expressed that upon becoming registered owners of the land the claimants exercised acts of ownership over the remaining sections of the land comprised in Certificate of Title registered Volume 940 Folio 214. These acts she said included enclosing other sections of the land, frequent bushing, paying taxes and other outgoings.
- [5]** Mrs Buddan averred that in February 2022, the claimants discovered that the church had successfully made an application to the Registrar of Titles (the Registrar) by way of adverse possession in respect of two sections of the land comprised in the Certificate of Title registered at Volume 940 Folio 214. She said the defendant obtained two Certificates of Title, one registered at Volume 1552 Folio 530 comprising 4044 sq meters (approximately one acre) and the other registered at Volume 1552 Folio 557 comprising 2659.38 sq meters (approximately ½ acre).
- [6]** Mrs. Buddan expressed her belief that the defendant by making an application to the Registrar by way of adverse possession made false and/or fraudulent

statements to obtain the Certificate of Title in its name and accordingly the titles were obtained by fraud.

- [7] Additionally, she informed the court that in order to further particularise the fraud and fraudulent representations made to the Registrar on the application and/or proceed with the claim, the claimants require disclosure of the documents submitted to the Registrar in support of the application for re-registration of the sections of the land that were formerly comprised in Certificate of Title registered at Volume 940 Folio 214. The claimants gave their undertakings not to use the information disclosed pursuant to the order sought in any other proceedings except the proposed claim or any related claim.
- [8] Mrs. Buddan expressed her concern that pending the determination of the claim, the defendant may engage in further dealings in the property which would prejudice the claimants interest, in particular the half-acre. She stated that the claimants undertake to abide by any order that the court may make as to damages if it is later determined that the order for injunction sought should not be granted. Further, that the claimants have the means to pay any such damages as they are the owners of property to include the property remaining in Certificate of Title registered at Volume 940 Folio 214.
- [9] Mrs Buddan, in her response to Mrs. Thomas-Clarke's affidavit, averred that although the claimants were not privy to the arrangement between the vendors and the church, the claimants' information was that the defendant is only entitled to one acre. Further, Mrs Buddan stated that there was no wire fence around the half-acre at the negotiation stage when the property was inspected and up to the time when the claimants took possession of the property as new owners. She said it was in or around February 2022 that the claimants observed the construction of wooden posts for a fence on the property around the half-acre. The claimants, she said, made enquiries of the church's representatives and they produced the registered titles that they had obtained for the 1 ½ acres of the land. Mrs. Buddan said the claimants objected to the construction and it ceased thereafter.

- [10] Further, that Mr. Buddan has been in contact with Millicent Thomas-Clarke about the title for the one acre of land since the claimants became registered owners and Mr. Buddan has explained the delays in the process for the sub-division. She stated that text messages between Mr. Buddan and Mrs. Thomas-Clarke indicate that the church wants to do expansion because its congregation has grown and that a title is necessary for the process. Conversations between Mr. Buddan and Mrs. Thomas-Clarke were exhibited.
- [11] In her third affidavit, Mrs Buddan confirmed that the survey diagram marked M.T.C. 2 exhibited to Mrs. Thomas-Clarke's Further Affidavit is the diagram that the claimants received from Mr. David Brown who the claimants commissioned to prepare a survey report for lands registered at Volume 940 Folio 214 and Volume 1326 Folio 795. She stated that she is unaware of a draft report from Mr. Brown prior to his final report as the claimants did not receive a draft report. Further that Mr. Brown has advised that he only issued a final report, and that the diagram exhibited at M.T.C. 1 in Mrs. Thomas-Clarke's Further affidavit is an unsigned diagram which was texted to Mrs. Thomas-Clarke and there is no indication of when and by whom the diagram was prepared.
- [12] Mrs. Buddan stated that as far as the claimants are concerned, persons from the wider community who are not associated with the church play ball on the undeveloped section of the land not enclosed by the concrete wall from time to time.

### **Defendant's case**

- [13] Mrs Millicent Thomas-Clarke, gave affidavit evidence on behalf of the defendant. She stated that she has been a member of the defendant since 1981. In her affidavit, she deposed that the lands registered at Volume 1552 Folio 530 and Volume 1552 Folio 557 are owned by the defendant which was incorporated on October 10, 2013. She stated that Volume 1552 Folio 530 is the physical area of

the church building that is enclosed by a concrete wall and fence and the land registered at Volume 1552 Folio 557 is a play field contiguous to the church grounds.

- [14]** Further, that in 1973, the former pastor of the church entered into an agreement with Mr. Vaswani to purchase a portion of the land comprised in Volume 940, Folio 214 measuring approximately 1½ acres on behalf of the defendant for thirty-thousand dollars (\$30,000.00). She said that the defendant is unable to locate the receipt evidencing payment. However, after the purchase, the defendant took immediate possession of the land and later built a concrete fence around one acre of the property and a wire fence around the other half acre. Mrs. Thomas-Clarke said that since 1973, the defendant has enjoyed open, continuous, undisputed and undisturbed possession of the 1 ½ acres of land.
- [15]** She said that the transaction was never registered on the Certificate of Title registered Volume 940 Folio 214 despite the several requests for same to be done. In or about 2019, Mrs. Thomas-Clarke stated that the defendant again requested for the registration of its interest and was directed to contact Mr. Buddan in relation to any queries regarding the land as the claimants had purchased the land from 2017.
- [16]** Mrs Thomas-Clarke refuted the claimants' allegation that the defendant requested the claimants to gift the defendant any land. She asserted that the defendant has always maintained that it is entitled to the land now registered in its name and has exercised all acts of ownership in respect of the land since 1973. The only request, she said, that was made of the claimants was for the transfer to be effected to the defendant.
- [17]** Mrs. Thomas-Clarke gave further evidence that since August 2019 she has personally made several attempts on behalf of the defendant to secure transfer of the land now registered in the defendant's name. She said that from 2019 to date, the claimants have failed and/or neglected to effect the transfer. Accordingly, she

said, in order to protect the defendant's interest, steps were taken to have the property registered.

- [18]** She further contended that the defendant made no false or misleading statements in its application for registration and that the defendant disclosed all relevant facts to the Registrar including that the defendant purchased the property from 1973 and they have continued in possession. Further, the defendant has exercised several acts of ownership over the land including building a church, clearing the land, using the land for recreational activities, payment of property taxes and fencing the land.
- [19]** In her Further Affidavit, Mrs. Thomas-Clarke, stated that in July 2019, she approached a surveyor, Mr. Llewelyn Allen to survey the church's property with a view to making their own application having regard to the delay and refusal of the claimants to effect the transfer. However, Mr. Allen informed her by telephone that he was acquainted with Mr. David Brown the surveyor who was conducting a survey of the same property on behalf of the claimants and would be unable to conduct the survey for the defendant. To confirm what he said, Mrs. Thomas Clarke said Mr. Allen sent her a draft of the survey diagram which was being done for the claimants. She stated that the draft survey diagram shows the church's play area and a section of the wire fence that has deteriorated over time. She exhibited a copy of the WhatsApp message between herself and Mr. Allen which displayed the draft survey diagram and marked it as M.T.C.1
- [20]** However, Ms Thomas-Clarke said that in September 2019, when she sought Ms Ivally McDonald's assistance to acquire title for the defendant, Ms McDonald provided her with a survey plan and survey report showing land registered at Volume 940 Folio 214 and Volume 1326 Folio 795 and stated that she was working on the claimants' behalf. Mrs. Thomas-Clarke said that the survey plan did not have the church's play area nor feature the partial wire fence that has broken down over the years. A copy of the diagram Ms McDonald provided to Mrs. Thomas-Clarke was exhibited as M.T.C 2.

[21] Ms Thomas-Clarke stated that the survey plan sent by Mr. Allen shows that the defendant is in possession of the half-acre for the play area and that this would have come to the knowledge of the claimants.

### **Claimants' Submissions**

[22] The claimants relied on the principles laid down in **American Cyanamid v Ethicon Ltd** [1975] AC 396. Queen's Counsel further relied on paragraphs 71 and 72 of Batts J's decisions in **Iris Anderson v Thomas Anderson and the Registrar of Titles** [2014] JMSC Civ 62 which was relied on by Hutchinson J in **Sylvester Lindo et al v Angella Brown** [2019] JMSC Civ 153 to ascertain the conduct which amounts to fraud. Paragraphs 71 and 72 demonstrate that fraud under the Registration of Titles Act (RTA) is dishonesty or dishonest intent. Further, that dishonesty includes contrived ignorance or wilful blindness and, that fraud committed in securing registration of a title is included under the RTA.

[23] Queens Counsel argued that the injunction sought is necessary to stop and/or minimise any harm caused by the alleged breaches. She maintained that there is sufficient evidence before the court to establish a serious issue for trial as to whether the defendant obtained the titles by fraud and whether the defendant is beneficially entitled to 1½ acres of land comprised in the original title. She highlighted that the claim discloses that the defendant was given one acre of land by way of a gift pursuant to the Agreement for Sale between the claimants and the vendors. Furthermore, the defendant was never in occupation of the half-acre. In the circumstances, she submitted, there can be no adverse possession and there is a serious issue to be tried as to whether the defendant obtained the title by fraud. She further highlighted that the defendant said that it bought 1½ acres of land and has been in possession of it. She, therefore submits, that having bought 1½ acres of land issues of adverse possession cannot arise.

[24] She argues, that damages would not be an adequate remedy as the case concerns land, and if the property is transferred the claimants would have lost what cannot be restored as damages do not provide an adequate remedy when dealing with



land. For this argument, Queens Counsel relied on **Tewani Limited v Kes Development Co. Limited** et al 2008 HCV 2729

- [25] It was Queens Counsel's further submission that the balance of convenience lies in favour of granting the injunction because without an injunction restraining any further dealing with the property until the determination of this claim, the claimants are at risk of losing the land. Furthermore, Mrs. Mayhew argued, there is a real risk of the defendant dealing with the land in a way that is prejudicial to the claimants. She highlighted that the church plans to do expansion and if this is done the physical make-up of the land will be changed. Also, third parties may gain interest in the land. She submitted that the injunction should be granted to preserve the status quo until a determination of the matters at a trial and there is no prejudice to the defendant if the injunction is granted.
- [26] Mrs. Mayhew further submitted that while the defendant is entitled to one acre of land, they secured the registration of the title by fraud and the claimants take issue with the Certificate of Title relating to the one acre of land in terms of its root of title. She argued that the title should be cancelled and the defendant obtain the title by the proper root. Further that, there is a dispute about the wire fence and the burden is on the defendant to show that they had been in possession since 1973.
- [27] Queens Counsel submitted that the claimants have given an undertaking as to damages should it be later determined that the injunction should not have been granted, and the claimants have indicated the ability to satisfy such an undertaking in the event they are called upon to do so.
- [28] Mrs. Mayhew further advanced that greater prejudice will be occasioned to the claimants than the defendant if the defendant is allowed to deal with the land pending the determination of the ownership of same, especially the half-acre comprised in volume 1552 Folio 557. She argued that at the very least there should be a restraint on the half-acre.

- [29] In relation to the order for disclosure, Queens Counsel relied on section 42 of the Registration of Titles Act the effect of which she says is that the Registrar cannot provide a defendant or counsel with copies of documents submitted for application for a title without a court order. She submitted that the Registrar is not a necessary party to the application. In this respect reliance was placed on paragraphs 29 and 30 of **Sylvester Lindo et al v Angella Brown** (Supra) where she said Hutchinson J when considering whether to grant an order for disclosure by the Registrar pursuant to section 42 of the RTA held that where it was the contention of the applicant that false representations would have had to be made to the Registrar, which was denied by the other party, it would benefit the court to make the order requiring the disclosure.
- [30] It was further submitted that the court's jurisdiction to make an order for discovery against a person who is not a party to a claim was confirmed in **Harold Morrison and Robert Woodstock Associates Limited v Marjorie Morrison and Others** [2020] JMCA Civ 55. Further that, the court reiterated that the Norwich Pharmacal order is required not only in cases where the identity of the wrongdoer was not known but also in cases where the applicant requires disclosure of crucial information in order to be able to bring its claim or where the applicant requires a missing piece of the jigsaw. The court also recognised the flexibility of the order.
- [31] Queens Counsel submitted that the conditions for the grant of a Norwich Pharmacal Order have been met in this case. She maintained that a wrong has been carried out against the claimants by the defendant. The allegation is that the defendant made fraudulent statements to the Registrar in order to obtain a title for the said property. The documents submitted by the defendant which are necessary for proof of the applicant's claim are necessary for the pursuit of the claim brought by the claimants and without the order, the claimants have no other way of obtaining the documents. The claimants must specifically particularise the allegations of fraud and only upon a review of the statements made can the claimants fully particularise the fraudulent misrepresentations made by the defendant to the Registrar. The claimants have no other way to secure the

documents except by an order of the court. At trial, the court will be asked to determine whether the defendant made false representations to the Registrar in its application for titles. As such, in order to make this determination the documents must be made available for use in the litigation.

### **Defendant's Submissions**

- [32] Counsel for the defendant, Ms. Williams, also relied on the **American Cyanamid** principles. She argued that the test is applied in stages and each factor stands on its own. Counsel argued that whether or not the court considers the next question depends on the answer to the last question. Further, if the claimants fail at any stage, there is no need to go to the next question. Counsel relied on **National Commercial Bank v Olint Corporation Limited** [2009] UKPC 16 in support of this submission.
- [33] Ms. Williams submitted that there is no serious issue to be tried and as such the injunction should not be granted. Counsel proffered that in deciding whether there is a serious issue to be tried, the court should look to the pleadings and not the affidavits as it is the pleadings that set out the claimants' case and set the scope or parameters of the issues that will be joined and proved or and disproved by the available evidence.
- [34] Counsel further submitted that the main aim of the Torrens system of registration of title used in Jamaica is to ensure that once a person is registered as proprietor of the land in question, his title is secure and indefeasible except in certain limited circumstances which counsel says is identified in section 161 of the Registration of Titles Act. Counsel argued that 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. To support this submission, Ms. Williams directed the court to Sections 68 and 70 of the RTA. Counsel relied on the test for fraud as quoted by Hutchinson J in **Henry Charles Johnson v Sagicor Bank Limited** et al [2020] JMSC Civ 240 that fraud

means actual fraud and not equitable or constructive fraud. Further, that fraud must be distinctly alleged and distinctly proved.

[35] Counsel further directed the court to sections 3 and 30 of the Limitation of Actions Act the operation of which she says extinguishes a registered proprietor's interest in properties. Ms. Williams argued that where sections 3 and 30 are found to be applicable, the applicant may make an application pursuant to section 85 of the RTA. Counsel outlined that in order to succeed in extinguishing the title of the registered proprietor, the claimants must have entered into possession without the knowledge or consent of the registered proprietor for 12 years. Counsel directed the court to **Chisholm v Hall** (1959) 1 WIR 413 where the Privy Council found that a bona fide purchaser for value of land took it subject to the unregistered rights acquired by adverse possession which had accrued prior to registration of the purchaser's title. She argued that in determining whether the applicant has fulfilled the requirement of adverse possession, the court will look at what constitutes possession She proffered the definition of possession set out in **Farrington v Bush** [1974] JMCA 41.

[36] Counsel argued that there is no serious issue to be tried as the defendant has an indefeasible title which it acquired by reason of adverse possession. She argued that the claimants have failed to put before the court any evidence that they have successfully extinguished the defendant's title in the subject properties. Counsel further argued that the claimants in their pleadings and affidavit have alleged fraud which is one of the exceptions under section 161 of the RTA. However, according to counsel, the statement of case does not disclose any evidence or adequate evidentiary material to establish that the interest of the defendant was created by fraud. Counsel asserted that the claimants having specifically pleaded fraud, the onus is on them to show evidentiary proof of fraud.

[37] She relied on **Johnson v Sagicor Bank Ltd et al**, where Hutchinson J stated, that the party raising the issue of fraud bears the responsibility of providing specific evidence of the fraudulent conduct or actions alleged and cannot merely invite a

court to infer this from the evidence presented. Counsel argued that in this case the claimants in their pleadings have not shown or proven any evidence of fraud and are inviting the court to facilitate a fishing expedition to garner evidence of alleged fraud.

- [38] Ms. Williams submitted that the defendant did not acquire title by false representation and in any event the Registrar would have noted the claimants' interest on the certificate of title when registering the defendant's interest. Further, that the defendant has been in open exclusive possession of the properties for over 30 years since purchasing the property from Mr. Vaswani and has continued to do so since his death. Further, that the defendant has carried out acts of ownership and that the defendant's evidence raises a strong inference that the defendant has not relinquished possession of the properties as it continues to be in possession of the land and continues to carry out acts of possession. She argued in reliance on **Recreational Holdings (Jamaica) Ltd v Lazarus** [2016] UKPC 22, that the defendant's interest would not be transferred to the claimants as the previous owner's interest had been extinguished.
- [39] She urged the court to treat the Certificate of Title registered at volume 1552 Folio 530 separately from the Certificate of Title registered at volume 1552 Folio 557 and argued that there is no dispute on either case that the defendant is the rightful owner of the one acre of land. The defendant is asserting an interest and entitlement. Further that equity does not act in vain therefore it is unjust to cancel title to the one acre and reissue; the court would be acting in vain. The claimants have to show that the misrepresentation affects the claimants' interest.
- [40] In relation to the half-acre, Ms. Williams submitted that there is a dispute as to its ownership. She argued that the defendant has been in possession since 1973 and the claimants cannot disprove this as they have not put any evidence before the court to contradict that assertion. Additionally, the agreement for sale between the vendors and the claimants is not binding on the defendant as it is not a party to it.

- [41]** Continuing her submissions Counsel argues that in the event that the court finds that there is a serious issue to be tried, damages would be an adequate remedy for the claimants. The claimants evidence suggests that the defendant would have been entitled to a portion of the land measuring approximately one acre. In the circumstances, the applicant would be able to be adequately compensated for the loss that they aver they would suffer if the property measuring approximately half acre is sold. It was her further submissions that damages are an adequate remedy and section 162 of the RTA provides the mechanism whereby a person so deprived of an interest in land may seek redress by bringing an action for damages against the person by whose application such land was brought under the operation of the Act.
- [42]** Further, counsel advanced that the balance of convenience lies in favour of the injunction being refused on the basis that there is no serious question to be tried such that it would be prejudicial to the interest of the defendant to be precluded from disposing of the properties or dealing with the property in their best interest and according to their needs. The defendant, submitted counsel, needs to make an expansion as the church membership has significantly grown since 1973 and the physical building can no longer serve the number of members.
- [43]** Ms. Williams also submitted that there is no basis for requiring the Registrar to produce any documents. She argued that even if the disclosure is granted the claimants would be no further than they are now. Further that, there being no serious issue to be tried the order for disclosure should be refused. Counsel advanced that there is no evidence to support the disclosure that the claimants are seeking from the Registrar. She submitted that the grounds for the grant of a Norwich Pharmacal order are not present in this case.

## Law and Analysis

### Injunction

[44] The law relating to the grant of an interim injunction is stated in **American Cyanamid v Ethicon Ltd** [1975] AC 396 as follows;

- (i) Is there a serious issue to be tried?
- (ii) Is damages an adequate remedy and would the defendant be adequately compensated by the undertaking as to damages?
- (iii) Whether the balance of convenience favours the granting or refusing of the injunction

[45] In **National Commercial Bank Jamaica Ltd v Olint** [2009] UKPC 16 Lord Hoffman stated at paragraph 16, *“At the interlocutory stage, the court must therefore assess whether granting or withholding an injunction is more likely to produce a just result.*

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

[46] Lord Diplock at page 510 of **American Cyanamid v Ethicon** dealt with this issue which he equates to the court being satisfied that the claim is not frivolous or vexatious. He further stated that:

*“It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit 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 the trial. One of the reasons for the introduction of the practice of requiring an undertaking as to damages on the grant of an interlocutory injunction was that 'it aided the court in doing that which was its great object, viz abstaining from expressing any opinion upon the merits of the case until the hearing' (Wakefield v Duke of Buccleuch ((1865) 12 LT 628 at 629)). So unless the material available to the court at the hearing of the application for an interlocutory injunction fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction at the trial, the court should go on to consider whether the balance of*

*convenience lies in favour of granting or refusing the interlocutory relief that is sought.”*

**[47]** The claimants submitted that there is a serious issue to be tried. Even though it is not in dispute that the defendant is entitled to one acre of the land, the claimants take issue with the root of title used to register the defendant as the proprietor of this one acre of land and argued that it is fraudulent. The claimants’ evidence is that the defendant should have followed the terms of the agreement between the claimants and the vendors, for the claimants to obtain subdivision approval for the one acre of land and secure title for the defendant. On the other hand, the defendant submitted that there is no serious issue to be tried on the basis that the defendant’s title is indefeasible and the claimants have provided no evidence of fraud.

**[48]** The effect of sections 68 and 70 of the RTA is that a certificate of title is indefeasible but may be defeated by fraud. The fraud the claimants need to show is actual fraud, that is dishonesty or dishonest intent. The dishonesty that the claimants rely on, is the defendant’s dishonesty in securing title to the land. The Certificate of Title registered at Volume 1552 Folio 530, shows that it was obtained by adverse possession. The claimants’ allegation of fraud was particularised in the particulars of claim as follows:

*(e) the defendant failed to advise the Registrar of titles that the defendant had obtained title to the land registered at volume 1552, Folio 530 by gift and that the defendant’s possession of the said land was not adverse to the interest of the defendant and*

*(f) failed to advise the Registrar of Titles that the claimants were willing and contractually entitled to obtain subdivision approval and transfer of land delineated in red on the sketch plan annexed to the Agreement for sale and which comprised approximately one acre to the defendant by part of land transfer.*

**[49]** However, to obtain a possessory title the defendant would need to disclose that it has been in factual possession of the property for 12 years and that it had an intention to possess. Accordingly, there was no need for the defendant to disclose to the Registrar that its possession of the one acre was not adverse to the



claimants' interest and that it obtained the property by gift. In fact, the defendant's evidence is that it purchased the land. Further, the defendant gave evidence that it disclosed all relevant facts to the Registrar. In any event, the uncontradicted evidence is that defendant has been in possession of the property from 1973. The Registrar would therefore notice that the defendant had been in possession of the property for over 40 years up to the time of the application and before the claimants were registered as proprietors in 2017.

**[50]** Further, the ultimate aim of alleging fraud is to defeat the defendant's title. The parties agree that the defendant is entitled to one acre of land. Even if, it was to be found at trial that the defendant obtained title to the one acre by fraud, the defendant would still be registered as owner of that portion of land. An injunction is an equitable remedy and as submitted by Ms. Williams, equity does not act in vain. Further, the purpose of the root of title is to show that an owner of land has good title to the land. Both a deed of conveyance and possessory title are good roots of title. Based on the foregoing, I am of the view that there is no serious issue to be tried in relation to the one acre of land.

**[51]** Lord Diplock in **American Cyanamid** stated that where there is no serious issue to be tried the injunction should be refused. The injunction should therefore be refused in relation to the one acre of land. However, if I am wrong in my assessment of this threshold, I will, at the appropriate juncture, consider whether damages would be an adequate remedy in relation to the one acre of land.

**[52]** As regards the half-acre of land, the claimants also contended that there is a serious issue to be tried in relation to fraud. The claimants disputed the defendant's entitlement to this parcel of land on the basis that the defendant has never been in possession of the land. The defendant accepted that there is a dispute in relation to the half-acre of land and argued that the defendant's possession of the land from 1973 would have extinguished title to the half-acre prior to the claimants' purchase of the land in 2017.

**[53]** The claimants in the particulars of claim particularised fraud as follows: that the defendant

*(a) falsely represented to the Registrar of titles that the defendant had been in open and undisturbed possession of the 2659.38 sq meters of land now comprised in certificate of title registered at volume 1552 folio 557.*

*(b) fraudulently and falsely represented to the Registrar of Titles that the defendant had been in possession of the 2659.38 sq meters of land for upwards of 12 years and exercising acts of ownership thereover.*

*(c) falsely reported to the Registrar of Titles that the defendant was entitled to be registered as proprietor of land now comprised in the certificate of title registered at volume 1552 Folio 557*

*(d) failed to disclose to the Registrar of Titles the claimants' possession and occupation of the land now comprised in the certificate of title registered at volume 1552 Folio 557 and that the claimants are entitled to an interest thereon*

**[54]** The defendant's evidence is that it purchased 1½ acres of land and has been in possession of same since 1973. The claimants assert that the defendant is only entitled to one acre of land. The claimants dispute the defendant's assertion that it has been in possession of the half-acre of land and has carried out all acts of ownership of the half-acre since then. The claimants dispute the defendant's assertion of the existence of a wire fence around the half-acre of land. The claimants deny that they are aware of the defendant's ownership of the half-acre as it was included in a draft survey diagram prepared for the claimants. The claimants say they were only given the final survey diagram. It is also in dispute whether the half-acre is used by the defendant as a playground or whether members of the wider community use the undeveloped land to play ball. Further, the defendant challenges the claimants' assertion that it requested a gift of half-acre of land. The evidence also shows that the defendant commenced construction of a wooden fence around the half-acre after it was given title to it but ceased after the claimants objected to it.

**[55]** The foregoing evidence raises for the courts determination whether the defendant satisfied the requirements of a possessory title to the half-acre of land prior to the

claimants purchase of same in 2017 so as to defeat the claimants title to the property and if not, whether the defendant's title can be defeated by fraud. It is for the trial court to determine whether the defendant was dishonest in its application to the Registrar based on the evidence the claimants provide at the trial at that stage. There is no evidence from the defendant that the vendors were dispossessed or discontinued possession before they sold the property to the claimants. Neither has the defendant provided any proof of its purchase of 1½ acres of land. However, these are matters to be ventilated at the trial if presented. It is my view therefore that there is a serious issue to be tried in relation to the half-acre.

### **Whether the balance of convenience lies in favour of granting the injunction?**

[56] The next issue to be considered is the adequacy of damages. Lord Diplock in *American Cyanamid* stated

***As to that, the governing principle is that the court should first consider whether if the plaintiff were to succeed at the trial in establishing his right to a permanent injunction he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the defendant's continuing to do what was sought to be enjoined between the time of the application and the time of the trial. If damages in the measure recoverable at common law would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff's claim appeared to be at that stage. If, on the other hand, damages would not provide an adequate remedy for the plaintiff in the event of his succeeding at the trial, the court should then consider whether, on the contrary hypothesis that the defendant were to succeed at the trial in establishing his right to do that which was sought to be enjoined, he would be adequately compensated under the plaintiff's undertaking as to damages for the loss he would have sustained by being prevented from doing so between the time of the application and the time of the trial. If damages in the measure recoverable under such an undertaking would be an adequate remedy and the plaintiff would be in a financial position to pay them, there would be no reason this ground to refuse an interlocutory injunction.***

[57] The question therefore is; would the claimants be adequately compensated by damages if they were to succeed at trial for the loss they would suffer if the injunction is refused? The claimants relied on **Tewani Limited v Kes Development Co. Limited and another**, where Brooks J, as he then was stated at page 3 that

***“The significance of the subject matter being real property, raises a presumption that damages are not an adequate remedy, and no enquiry is ever made in that regard. The reason behind that principle is that each parcel of land is said to be “unique” and to have “a peculiar and special value”. The principle seems to apply even if the land has been bought as part of a commercial venture.”***

[58] As regards the one acre of land, while there is a presumption that damages is not an adequate remedy for land and no enquiry is ever made in that regard, the claimants would suffer no loss if they were to succeed at trial in establishing that the defendant obtained title to the one acre of land by fraud. This is so as the claimants have agreed that the defendant is entitled to the one acre of land. Consequently, the claimants would not be entitled to compensatory damages.

[59] In relation to the half-acre Ms Williams has argued that the half-acre can be sold to adequately compensate the claimants for their loss. The presumption that damages is not an adequate remedy for land and no enquiry is ever made in that regard is sufficient to counter this argument. I find that the claimants would be prejudiced if the injunction is refused and there is no evidence from the defendant nor on the evidence put forward so far to rebut the presumption.

[60] Ms Williams also argued that damages would be an adequate remedy because section 162 of the RTA provides a mechanism whereby persons deprived of an interest in land may seek redress. By section

***162. Any person deprived of land, of any estate or interest in land, in consequence of fraud, or through the bringing of such land under the operation of this Act, or by the registration of any other person as proprietor of such land, estate or interest, or in consequence of any error or misdescription in any certificate of title, or in any entry or memorandum in the Register Book, may***

***bring and prosecute an action for the recovery of damages against the person on whose application such land was brought under the operation of this Act, or such erroneous registration was made, or who acquired title to the estate or interest through such fraud; error or misdescription:***

***Provided always that, except in the case of fraud or of error occasioned by any omission, misrepresentation or misdescription, in the application of such person to bring such land under the operation of this Act, or to be registered as proprietor of such land, estate or interest, or in any instrument signed by him, such person shall upon a transfer of such land bona fide for valuable consideration, cease to be liable for the payment of any damage beyond the value of the consideration actually received, which damage but for such transfer might have been recovered from him under the provisions herein contained; and in such last mentioned case, and also in case the person against whom such action for damages is directed to be brought as aforesaid shall be dead, or shall have been adjudged bankrupt, or cannot be found within the jurisdiction of the Supreme Court, then and in any such case, such damages, with costs of action, may be recovered out of the Assurance Fund by action against the Registrar as nominal defendant :***

***Provided that in estimating such damages, the value of all buildings and other improvements erected or made subsequent to the making of a contract of sale binding on the parties thereto, or subsequent to the deprivation shall be excluded.***

**[61] In Registrar of Titles v Melfitz Ltd v Keith Donald Reid SCCA No. 9 of 2003 Smith JA at page 9 provided the interpretation of section 162. He said;**

***“It sets out the circumstances under which a person deprived of land may bring an action for damages and identifies the person to be made defendant.***

***By virtue of this section, one of the circumstances in which a person deprived of land may bring an action for damages is where such deprivation was in consequence of fraud. In so far as it is relevant to this case, such action for the recovery of damages may be brought in the first instance against the person on whose application the land was brought under the operation of the Act or who acquired the title to the land through fraud.”***

- [62] This therefore shows that if the claimants were to succeed at trial in establishing fraud against the defendant, the claimants could recover damages from the defendant for deprivation of the half-acre of land.
- [63] Another question to be considered is; would the defendant be adequately compensated by damages for the loss it would suffer if the injunction is granted and it is successful at trial? Mrs. Mayhew argued that there is no prejudice to the defendant if the injunction is granted. The evidence shows that the defendant intends to expand the church. In the WhatsApp message from Millicent Clarke to Mr. Buddan on 03/10/2019 at 5:50:03am, Mrs. Thomas-Clarke states “*We have been waiting from 1974 for the title and the church congregation has grown and we would like to do an expansion but we are unable to because the title is a requirement*”. While the message does not definitively disclose the reason the title is required, one inference that may be drawn from the message is that the defendant intends to obtain a mortgage to finance the expansion. If the defendant intends to obtain a mortgage, or some other source of funding it would be delayed in doing so. The defendant would likewise be delayed in commencing the expansion of the church. The court could, however, for the period of the injunction, assess damages for the inconvenience to the defendant occasioned by the delay.
- [64] The prejudice to the defendant may be adequately compensated by damages. The claimants have expressed their willingness to pay the defendant for the loss it would suffer if the injunction is refused by giving their undertakings in damages. The claimants have indicated that they have two parcels of land that are not the subject of this injunction. Notwithstanding the absence of the value of the land remaining in Certificate of Title registered Volume 940 Folio 214, the remaining land measures over 5½ acres. The value of this land can be taken into consideration when determining whether the defendant would be adequately compensated for any loss suffered.
- [65] Lord Diplock sets out at page 511 of **American Cyanamid** that;

*“It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or to both, that the question of balance of convenience arises. It would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them. These will vary from case to case.”*

[66] In **National Commercial Bank v Olint** Lord Hoffman stated the following at paragraphs 17 and 18

***“In practice, however, it is often hard to tell whether either damages or the cross-undertaking will be an adequate remedy and the court has to engage in trying to predict whether granting or withholding an injunction is more or less likely to cause irremediable prejudice (and to what extent) if it turns out that the injunction should not have been granted or withheld, as the case may be. The basic principle is that the court should take whichever course seems likely to cause the least irremediable prejudice to one party or the other.***

***18. Among the matters which the court may take into account are the prejudice which the plaintiff may suffer if no injunction is granted or the defendant may suffer if it is; the likelihood of such prejudice actually occurring; the extent to which it may be compensated by an award of damages or enforcement of the cross-undertaking; the likelihood of either party being able to satisfy such an award; and the likelihood that the injunction will turn out to have been wrongly granted or withheld, that is to say, the court’s opinion of the relative strength of the parties’ cases.***

[67] If the injunction is refused, the claimants will be prejudiced if they succeed at trial. The defendant’s evidence is that it wishes to expand the church. An expansion to the church as Mrs. Mayhew submitted will result in a change to the physical features of the land and deprive the claimants of the purpose for which they purchased the land. Further, if the property is mortgaged, the claimants will be deprived of the land as third party interests will accrue. On the other hand, if the injunction is granted and the defendant succeeds at trial it will be delayed in obtaining a mortgage and commencing the expansion of the church. In the final analysis however, I find that the prejudice to the defendant is easier to remedy if the injunction is granted to the claimants than if the injunction is refused. It is therefore my view that the injunction should be granted in relation to the half-acre of land.

## Norwich Pharmacal Order

[68] ***Norwich Pharmacal Co & Others vs Customs and Excise Commission*** 1973 2 WLR established that the court is empowered to make orders for disclosure against a person who is not a party to the proceedings (Norwich Pharmacal orders)

[69] Foster-Pusey JA in **Harold Morrison and Robert Woodstock Associates Limited v Morrison and others** [2020] JMCA Civ 55 adopted the principles set out in **Mitsui and Co Ltd v Nexen Petroleum UK Limited** [2005] EWHC 625 for the grant of a Norwich Pharmacal Order. The principles are as follows:

- (i) A wrong must have been carried out or arguably carried out by an ultimate wrong doer;
- (ii) There must be the need for an order to enable action to be brought against the ultimate wrong doer;
- (iii) The person against whom the order is sought must: (a) be mixed up in so as to facilitate the wrong doing (b) be able or likely to provide the information necessary to enable the ultimate wrongdoer to be sued.

[70] However, it must first be considered whether the court is permitted to grant a Norwich Pharmacal order against the Registrar who is not a party to the application for the order.

***By Halsbury's laws of England 5<sup>th</sup> edition paragraph 135 Common law jurisdiction to make order against non-parties for pre-action disclosure etc in order to identify wrongdoers.***

*Where the court has no power under statute to order pre-action disclosure and production of documents, a potential claimant may, in certain circumstances, commence proceedings for an order for disclosure and production against a person who is not likely to be a party to the main proceedings but who has in his possession or control documents of potential relevance to those proceedings. If such a person (against whom the claimant has no cause of action as a wrongdoer)*



*can be shown to have become involved, whether voluntarily or not (albeit innocently), in the wrongdoing of others to an extent which has facilitated that wrongdoing, he comes under a duty to assist the victim of the wrongdoing by giving full information, by disclosure of documents or otherwise, which will identify the wrongdoers to the victim or assist the recovery of missing funds. A victim of a tort may also obtain such information from such a person innocently involved in the wrong, even though the victim cannot show that the third party had committed a tort against the victim without that information.*

*The essential purpose of the remedy is to do justice; this involves the exercise of discretion by a careful and fair weighing of all relevant factors, and the court will order disclosure only if it considers that such an order is necessary and proportionate in all the circumstances of the case. A court may not, however, in exercise of its residual disclosure jurisdiction, order the disclosure of such information if the information sought is sensitive information.*

- [71] The Norwich Pharmacal jurisdiction requires that the action for disclosure be brought against the third party who has the information to be disclosed, in this case the Registrar. The application does not name the Registrar as respondent. Section 160 of the Registration of Titles Act states as follows:

***The Registrar shall not, nor shall the Referee or any person acting under the authority of either of them, be liable to any action, suit or proceeding, for or in respect of any act or matter bona fide done or omitted to be done in the exercise or supposed exercise of the powers of this Act.***

- [72] In **The Registrar of Titles v Melfitz Limited and Keith Donald Reid** SCCA No. 9 of 2003, Smith JA, stated at page 7 “[section 160] exempts the Registrar of Title from suit in respect of any action done, pursuant to the provisions of the Act without fraud, collusion or complicity in wrong doing.”

- [73] The claimants have made no allegation of fraud or wrongdoing on the part of the Registrar. The purpose of the order against the Registrar is to obtain the documents that the defendant used to procure new titles for the 1 ½ acres of land so that the claimants can pursue their case against the defendant. The defendant made an application under section 85 of the RTA to be registered as proprietors

of the 1½ acres of land. By registering the title as a result of the application, the Registrar was acting in accordance with the powers granted under the RTA. Accordingly, the Registrar is exempt from being a party to this application.

**Whether a wrong was carried out or arguably carried out by the Defendant?**

[74] At paragraph 71 of the **Harold Morrison Case**, Foster-Pusey JA referred to **Orb ARL and others v Fiddler and another**, where Popplewell J at paragraph 84 noted:

***“The first condition is that there must have been a wrong carried out, or arguably carried out, by an ultimate wrongdoer. The ‘wrong’ may be a crime, tort, breach of contract, equitable wrong or contempt of court. It is not necessary to establish conclusively that a wrong has been carried out; it will be sufficient if it is arguable that a wrong has been carried out. The strength of the argument will be a factor in the exercise of the discretion, but an arguable case is sufficient to meet the threshold condition. The wrongdoing must be identified by the applicant at least in general terms: see Ashworth Hospital Authority v MGN Limited [2002] 1 WLR 2033 per Lord Woolf CJ at paragraph [60].***

[75] Section 161 (d) of the RTA provides;

***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-***

***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;***

[76] The defendant may be ejected from land for which he possesses a certificate of title if it is shown that same was obtained by fraud. The claimants’ claim is for recovery of possession of 1½ acres of land. They allege that the defendant made fraudulent statements to the Registrar in order to obtain certificates of title in relation to the 1 ½ acres of land. The claimants’ evidence shows that the defendant’s sole entitlement was to one acre of land, and its title to the one acre was to be procured by the claimants after they obtained a subdivision of the land. In relation to the half-acre, the claimants dispute the defendant’s entitlement on

the basis of adverse possession as the claimants allege that the defendant has never been in possession of the half-acre of land. Their evidence further discloses that after they purchased the land the defendant requested a gift of half-acre from them. The claimants allege that since their purchase of the land in 2017, they have exercised acts of ownership over all the land except the one acre of land which is in the possession of the defendant. The foregoing in my view shows that it is arguable that the defendant have fraudulently procured title in relation to the 1 ½ acres of land and as such has shown that arguably a wrong has been committed. These are issues for the tribunal at trial.

**[77] Whether there is a need for the Norwich Pharmacal order to enable the claimants to pursue the claim against the defendant?**

**[78]** Foster-Pusey JA's assessment of this threshold requirement in the **Harold Morrison case** shows that in making a determination under this head, the court should have regard to whether it is necessary and proportionate to grant the order sought having regard to all the circumstances of the case. That is, whether justice requires the third party to disclose the information which is sought.

**[79]** The claimants' evidence is that the documents are necessary to further particularise their claim. It was argued that the documents are necessary to determine issues that will arise at the trial. The defendant argued that the claimants have alleged Fraud in its particulars of claim. However, they have submitted that the claimants statement of case does not disclose any evidence or adequate evidence or evidentiary material to establish that the interest of the defendant was created by fraud. Although the claimants have specifically pleaded, the onus is on the claimants to show evidentiary proof of fraud. In **Harley Corporation Guarantee Investment Co. Ltd v Estate Rudolph Daley and others**, [2010] JMCA Civ 46 Harris JA at paragraph 56 cited Davy v Garrett [1878] 7 Ch D 473, where Thesiger L.J at page 489 acknowledged that:

***“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 ... It may not be necessary in all cases to use the word "fraud" ... It appears to me that a Plaintiff is bound to shew distinctly that he means to allege fraud. In the present case facts are alleged from which fraud might be inferred, but they are consistent with innocence."*

[80] At paragraph 57 Harris JA said

*"The Civil Procedure Rules however do not expressly provide that fraud must be expressly pleaded. However, rule 8.9 (1) prescribes that the facts upon which a claimant relies must be particularized. It follows that 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.*

[81] The documents the claimants require the Registrar to disclose are crucial to the case as it is the evidence the claimants need to further particularise and prove fraud against the defendant. The documents will show whether the defendant made omissions or false statements to the Registrar and would provide the court with tangible proof of the defendant's dishonesty, if any. The information requested is therefore necessary to enable the claimants to pursue their claim. Furthermore, the principle from the **Harold Morrison case** shows that the Norwich Pharmacal jurisdiction is flexible and can be exercised even where the claim had already been brought. Accordingly, the court is permitted to exercise the jurisdiction in these circumstances where the claimants require the disclosure of information to assist in particularising and proving its claim.

[82] **Whether the Registrar of Titles is mixed up in so as to have facilitated the defendant's wrongdoing and is able or is likely to be able to provide the information necessary to pursue the claim against the defendant.**

[83] At paragraph 108, of the **Harold Morrison Case** Foster-Pusey JA stated in relation to the requirement of whether the third party is mixed up in the wrong doing that:

*"The authorities establish that the pre-condition that the person from whom the information is sought had to be mixed up in or to have*

*facilitated the wrongdoing, has evolved to a minimum requirement of involvement. Thus, the individual against whom the order is sought should, at the very least, have become involved in some transactions or arrangements as a result of which he has acquired the required information. Furthermore, in certain circumstances, an individual may become actively concerned if they can assist in locating the whereabouts of assets which are in issue in the proceedings. In such circumstances, the individual could not be seen as a 'mere witness'.*

**[84]** The Registrar facilitated the defendant's registering the titles in its name. If the Registrar had not accepted the application submitted by the defendant, the defendant could not have been registered as proprietor of the 1 ½ acres of land by way of adverse possession. The Registrar became involved in the defendant's issuing of the titles. Her involvement in my view is innocent. However it is for the trial tribunal to determine whether she is innocently mixed-up in wrong doing in the issuing of the titles..

**[85]** Further, section 4 of the RTA states that the Registrar is the person appointed to investigate and deal with applications for bringing land under the operation of the Act. Section 42 of the RTA sets out:

*42. Upon registering a certificate of title, the Registrar shall retain in his custody and possession all deeds, instruments and documents, evidencing the title of the person registered, and shall endorse upon the last of them, if there be more than one, a memorandum that the land included in the certificate has been brought under this Act, and shall sign such memorandum:*

*Provided always that if any such deeds, instruments or documents, relate to any property other than the land included in such certificate, the Registrar shall cause such deed, document or instrument (if unrecorded) to be copied at the expense of the applicant, such copy to be retained by the Registrar, and shall return such deed, instrument or document to the person from whom he received the same, having first endorsed upon the same a memorandum signed by him to the effect that the land included in the certificate has been brought under the Act.*

*No person shall be entitled to inspection of any such deeds, instruments or documents, except upon the written order of the persons who originally deposited the same, or of some person claiming through or under him, or upon the order of a Judge.*

...

[86] Section 4 indicates that the Registrar is the person empowered to deal with the registration of documents and by section 42 the Registrar is mandated to retain in her custody and possession all deeds, instruments and documents, evidencing the title of the person registered. The information necessary to prove the fraud comes from the documents submitted to the Registrar. These documents were submitted in 2019 and would show whether the claimants failed to disclose information that was relevant to the application or whether it provided information that is false. Consequently, the Registrar is the only source of the information that the claimants wish to obtain. The foregoing also shows that the Registrar should be able to provide the information the claimants require to further particularise the fraud to prove their case.

[87] The claimants have demonstrated that an arguable wrong has been committed, that there is a need for the grant of the Norwich Pharmacal order, and that the Registrar became involved and is able to provide the information requested. The learned Justice of Appeal in the **Harold Morrison case** adopted the following principles which she sets out at paragraph 55 of her judgment:

*“In Orb ARL and others v Fiddler and another [2016] EWHC 361 (Comm), another first instance decision in the Queen’s Bench Division of the High Courts of Justice, England and Wales, Popplewell J stated, at paragraph [89] of the decision, that, even where the three threshold conditions are met, there is still a discretion to be exercised, which involves weighing a number of relevant factors and determining whether disclosure should be ordered ‘in order to do justice’. He referred to paragraph 17 of Lord Kerr’s judgment in Rugby Football Union v Consolidated Information Services Ltd (formerly Viagogo Ltd) (in liquidation), which states:*

*“The essential purpose of the remedy is to do justice. This involves the exercise of discretion by a careful and fair weighing of all relevant factors. Various factors have been identified in the authorities as relevant. These include:*

- (i) the strength of the possible cause of action contemplated by the Applicant for the order...;*
- (ii) the strong public interest in allowing an Applicant to vindicate his legal rights;*

- (iii) *whether the making of the order will deter similar wrongdoing in the future: Ashworth at para 66 per Lord Woolf CJ;*
- (iv) *whether the information could be obtained from another source: ...;*
- (v) *whether the Respondent to the application knew or ought to have known that he was facilitating arguable wrongdoing: British Steel per Lord Fraser at 1197A-B, or was himself a joint tortfeasor, X Ltd v Morgan-Grampian (Publishers) Ltd [1991] 1 AC 1, 54, [1990] 2 All ER 1, [1990] 2 WLR 1000 per Lord Lowry;*
- (vi) *whether the order might reveal the names of innocent persons as well as wrongdoers, and if so whether such innocent persons will suffer any harm as a result: Norwich Pharmacal at 176B-C per Lord Reid; Alfred Crompton Amusement Machines Ltd v Customs and Excise Commissioners (No 2) [1974] AC 405, 434, [1973] 2 All ER 1169, [1973] 3 WLR 268 per Lord Cross;*
- (vii) *the degree of confidentiality of the information sought: Norwich Pharmacal at 190E-F per Viscount Dilhorne;*

The claimants have given their undertaking not to use the information disclosed to them except in the proposed claim or any other related claim. There is a strong public interest in persons not losing their properties through fraud therefore the public's interest favours the Registrar disclosing the documents used by the defendant to obtain the title.

### **Conclusion**

**[88]** The claimants have demonstrated that there is a serious issue to be tried in relation to the half-acre of land. The defendant has failed to rebut the presumption that damages is not an adequate remedy for land or provided any evidence that if damages were an adequate remedy, that it would be in a financial position to pay same. The prejudice to be suffered if the injunction is refused is greater for the claimants than it is for the defendant if the injunction is granted. Accordingly, the balance of convenience favours the granting of the injunction in relation to the half-acre. In relation to the one acre, there is no serious issue to be tried and even if there were one there would be no loss to the claimants if the injunction were to be granted. The injunction sought in relation to the one acre of land is therefore refused.

It was not necessary to bring the proceedings against the Registrar as the RTA exempts her from proceedings of this nature. The Norwich Pharmacal jurisdiction is flexible and therefore can apply in these circumstance where the applicant requires disclosure of documents to assist further particularising and proving its case. The claimants have satisfied the requirements for the grant of a Norwich Pharmacal order having shown that there is an arguable case, a need for the grant of the order and that the Registrar became involved although innocently in the alleged wrongdoing and is likely to provide the information required. She facilitated the issuing of the titles.

Orders:-

1. The defendant is restrained until the determination of this action whether by itself, its servants, agents or otherwise from disposing, transferring, charging or pledging or making any permanent change to or construction on land now comprised in Certificate of Title registered at Volume 1552 Folio 530 of the Register Book of Titles.
2. The Registrar of Titles is directed to disclose to the claimants, attorney-at-law copies of all documents submitted in support of its application for title by way of re-registration of parts of the land formerly comprised in Certificate of Title registered at Volume 940 Folio 214 and now comprised in Certificate of Title registered at Volume 1552 as amended to delete 1553 Folio 557 and Volume 1552 Folio 530 of the Register Book of Titles within 14 days of the date hereof.
3. Costs of this application to the claimant to be agreed or taxed.
4. Applicant's attorney-at-law is to prepare, file and served orders herein.

.....  
**S. Thompson-James**  
**Puisne Judge**