



[2016] JMSC Civ 245

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2015HCV05366

BETWEEN	BEVERLEY DECORDOVA (In her personal capacity and as the Administrator of the estate)	1st CLAIMANT
AND	PAULA WILLIAMS-PHINN	2ND CLAIMANT
AND	EUNICE BARTLEY	1ST DEFENDANT
AND	THE REGISTRAR OF TITLES	2ND DEFENDANT

IN CHAMBERS

Janet Taylor present for the 1st Defendant/ Applicant

Carla Thomas present for the 2nd Defendant/ Applicant

Margaret Macaulay and Eileen Felix present for both Respondents

June 27, 2016

Application to strike out statement of case as disclosing no reasonable grounds for bringing Claim – Whether Claimants have *locus standi* to bring claim – whether fraud has been adequately pleaded – whether the Registrar of Titles is a proper party to the claim

PALMER, J

Introduction

[1] The Claimants by their Claim form filed on November 10, 2015, sought the following Orders:

1. *A declaration that the 1st named Defendant, Eunice Bartley, obtained the registration of herself as the legal proprietor on the title for the premises located at No. 52 Grants Pen Road, Kingston 8, in the parish of St. Andrew and being all the land previously registered at Volume 611 Folio 91 of the Register Book of Titles and now comprised in the Certificate of Title registered at Volume 1482 Folio 297 of the Register Book of Titles by fraudulent means;*
2. *A declaration that the Claimants are entitled to have the said Certificate of Title for the said premises at 52 Grants Pen Road, Kingston 8, cancelled and a new Certificate of Title issued in their names or in the name of the 1st named Claimant in transmission for herself and for all the surviving beneficiaries of the estate of Verinica Elizabeth Simpson, also known as Veronica Simpson, deceased, testate;*
3. *An order directing the Registrar of Titles to cancel the Certificate of Title registered at Volume 1482 Folio 297 of the Register Book of Titles and to issue a new Certificate of Title in the name of Beverley DeCordova or in such names as the Court otherwise directs;*
4. *An Order that the 1st named Defendant be restrained until the determination of this claim or any further order, whether by herself or by her servants, agents or whomsoever from taking any step to evict the Claimants and their agents, to wit, Owen Reid and Joe Hyman, from the said premises;*
5. *An Order restraining the 1st named Defendant from disposing of or transferring, withdrawing, charging, diminishing or in any way dealing with the said premises or its Certificate of Title as aforesaid so as to affect the Claim and/or the interests of the Claimants whether by herself, or by her servants, agents or whomsoever, until the determination of this claim or any other or further order of the Court;*
6. *Damages for fraud;*
7. *Costs*

[2] The 1st Defendant is the registered owner of lands being 52 Grants Pen Road, Kingston 8 in the parish of Saint Andrew being Volume 1482 Folio 297 of the Register Book of Titles (“the subject property”). The 1st Claimant states that she is the owner of a building at the premises, the subject of the Claim, and a beneficiary

of the estate of Veronica Simpson, who was the registered owner up to the time of the transfer to the 1st Defendant on May 21, 2014, by way of adverse possession. The 2nd Claimant also purports to be a beneficiary under the said estate. Though ordinarily resident abroad, the 1st Claimant states that she would usually leave a tenant in her house at the premises to protect her interest and has done so without interference until her tenant, Owen Reid, was served a Notice to Quit the premises. The 2nd Claimants states that she once occupied a house at the premise until she and her husband migrated, but that there had always been a tenant or occupant left on their behalf to occupy the premises.

- [3] The 1st Claimant alleges that the Defendant, Eunice Bailey, and her family have always occupied the premises as a tenant. She was permitted to occupy a spot to the back of the premises where a 'movable home' was erected. During the life of the deceased the Claimants allege that Ms. Bartley had paid rent to the deceased and thereafter to several generations of the family.
- [4] According to the Claim, Ms. Bailey left the premises in 1988 to live in Mona and never returned, but her daughter came there in about the mid-90s and began to live in a house on the premises that was in disrepair. It seems this was the structure that had previously been occupied by the 1st Defendant. Notwithstanding, the Claimants assert that their tenant, Junior Owen Reid, continued on the premises until he was served a Notice to Quit by the Defendant. The Defendant's granddaughter moved in with one Paul Sibbles, but that Mr. Sibbles paid rent there as well.
- [5] It is alleged in the claim that the 2nd Claimant had paid property taxes for the premises over the years and had not observed on any of the occasions on which she attended for payment, that the Defendant's name was reflected on the tax role. The 2nd Claimant would also travel to the country 2 – 3 times per year when she would stay at the property at the 'middle house'. The 2nd Claimant claims the property was never left unoccupied and that she or her family have occupied the premises undisturbed and peacefully until being served Notice to Quit.

- [6]** The Claimants say in their claim that the Defendant obtained legal title for the subject property by way of fraud in that there was never any legal or factual basis on which it was issued in her name. She had left the premises since 1988 and had not since then exercised any dominion over it in ways such as collecting rent or paying taxes or actual occupation. She also had been in direct contact with the 1st Claimant after the death of aunt, Veronica Simpson, at which point the Defendant did not occupy or have any association with the property, save that her granddaughter lived with her husband there in a rented structure. Furthermore, the 2nd Claimant states that she was at the premises up to July 2014, days before their tenant was served notice to quit by the Defendant. During her stay the 2nd Claimant says she spoke to the Defendant's granddaughter who came to visit her regularly during her stay, and that nothing about the property belonging to her grandmother ever arose. Shortly after her departure she was informed of the notice to quit and that the Defendant had alleged that she had acquired the property.
- [7]** The assertion is that the property was obtained by fraud and that despite knowing their affiliation to the deceased; in particular, that they were beneficiaries of her estate, that the Claimants were not notified about the Defendant's application to bring the claim to ownership of the property, and that any documentation that she produced to that end were false. Further indication of this fraudulent intent is the fact that the actions of the Defendant were done while the Claimants were abroad, and no contact was made with them via any alternate means despite having contact information for them.
- [8]** The Claimants' claim that as a result of the Defendant's fraudulent act that they have been deprived of their interest in the property being beneficiaries of the estates of Veronica Simpson. The Claimants seek declarations that the Defendant obtained title to the property by fraud and for the said title to be cancelled and a new title issued in the name so of the Claimants. Orders were also sought, restraining the Defendant from evicting their tenants and from disposing of the property as well as damages for fraud.

Defence

- [9] In her defence the 1st Defendant stated that the Claimants had no authority or ability to bring the claim herein as they had not established that they were beneficiaries to the estate of the Veronica Simpson there being no proven will or that they were entitled to any rental proceeds for the property. The 1st Defendant also claims to be the partial owner of the property.
- [10] The claim alleging fraud was initiated after the 1st Defendant sought orders in the Corporate Area Civil Court for the eviction of Owen Reid, the servant and/or agent of the Claimants. A stay was obtained in that court pending a determination of the matter herein.

The Applications

- [11] By Notice of Application for Court Orders filed on March 1, 2016 the 1st Defendant sought the following Orders:

(1) That the Claim herein be struck out as the Claimants have no locus standi and/or have failed to particularise their pleadings in respect of fraud;

(2) The 1st Defendant recover possession of lands being all that parcel of land situate at 52 Grants Pen Road, Kingston 8 in the parish of St. Andrew and being registered at Volume 1482 Folio 297 of the Register Book of Titles from the Claimants and/or from anyone claiming through them or to be on the said land with their leave or permission and/or being their servant and/or agent within 30 days of the date of this Order;

(3) Costs;

- [12] One ground on which the orders are sought is that neither of the Claimants are the Executor or Administrator of the estate of the deceased Veronica Simpson, and as such lack the *locus standi* to bring this claim. Both Claimants are beneficiaries under the estate of deceased but have not been given any interest in land, to include the subject property. Another ground is that the Claimants have alluded to

fraud in their pleadings but have failed to particularise it. Also, the 1st Defendant grounded the application on the fact that notice to quit was served on Owen Reid, the Claimants' servant/ and or agent, but he remains on the land, denying the 1st Defendant from exercising the rights over her land that she would wish.

[13] The 2nd Defendant also filed Notice of Application for Court orders in which the following Orders were sought:

(1) The Claim is struck out against the 2nd Defendant as disclosing no reasonable grounds for bring the Claim;

(2) Costs.

[14] The primary ground of the application is that pursuant to Rule 26.3 (1) (c) the Court is empowered to strike out a statement of case which discloses no reasonable grounds for bringing the claim. The 2nd Defendant is immune from the claim pursuant to section 160 of the Registration of Titles Act as no allegations are contained in the Claim against the 2nd Defendant. Pursuant to section 158 of the Registration of Titles Act, the order which is being sought in this claim in respect of the Registrar of Titles may be made by the Court without the Registrar of Titles being a party to the claim.

[15] My decision was given orally on July 16, 2016 with my reasons to follow. The Orders sought by the 1st Defendant were refused, while the 2nd Defendant's application was granted. I must apologise to the parties for the delay in submitting my reasons and any convenience occasioned by such delay.

Submissions

1st Defendant

[16] On the point of *locus standi*, for the 1st Defendant it was submitted that the 1st Claimant in her claim refers to herself as the Administrator of "the estate" but makes no reference to which estate she is referring. In a later paragraph the 1st Claimant indicated a desire to be appointed an Administrator of the deceased

estate, a clear indication that she had not yet been so appointed. The Will of Veronica Simpson makes reference to two executors, both of whom are now deceased and the Claimant does not claim to be the executor of either of those estates. It was therefore submitted that neither Claimant possesses the requisite *locus standi* to file this action.

[17] It was not denied that the both Claimants are beneficiaries under the will of Veronica Simpson but they do not have the standing that an executor, who takes his title from the will and can act before a grant of probate. The Claimants being neither executors nor administrators have no *locus standi*. It was further submitted for the 1st Defendant that the Claimants' reliance on their status as beneficiaries as basis for bringing the Claim, without more, is mistaken. Reliance for the proposition was placed on the authority of ***Masonic and General Life Assurance, In re*** (1886) 32 Ch.D.373 where the Court ruled that an executrix of a creditor of a company was ruled as being entitled to present a winding-up petition before probate had been obtained. Counsel also cited the case of ***Re Crowhurst park, Sims Hilditch v Simmons [1974] 1 All ER 991*** where an Executor appointed a trustee before the grant of probate and it was held to have been lawful.

[18] An administrator is in a worse position than an executor as the administrator's authority is derived from the Grant of Letters of Administration. An Administrator, it was submitted, can do no lawful act in respect of an estate until he has granted the same. The submission was made that Claimants are not in receipt of Letters of Administration in estate of the deceased and consequently as neither Executors nor Administrators they are without *locus standi*.

[19] The submission of the Defendant based on the foregoing was that the Claimant's claim be struck out with costs awarded to the 1st Defendant. The court was invited to make orders in favour of the 1st Defendant that she recovers possession of the property from the Claimants and/or their servants or agents which Owen Reid by admission is. It was submitted that having issued a notice to Quit to the Claimant's agent that the 1st Defendant was entitled to recovery of possession, especially as

the previous proceedings in the lower Court had been stayed pending the result in this case.

2nd Defendant

[20] For the 2nd Defendant it was submitted that the Claim discloses no reasonable ground for having brought the claim as no allegation is made against the Registrar of Titles. Paragraph 3 of the Particulars of Claim only seeks an order directing the Registrar of Titles to cancel the Certificate of Title. It is only alleged that the 1st Defendant deceived the 2nd Defendant.

[21] Further it was submitted that by virtue of section 160 of the Registration of Titles Act the 2nd Defendant is immune from suit and that based on what was pleaded there was no allegation that the Registrar of Titles had acted in bad faith. It was submitted that if an action were to be taken, the Claimant would have to proceed under section 164 of the said Act which outlines the circumstances in which the Registrar of Titles may be added as a party, none of which apply to the circumstance of this case as pleaded. Reliance was placed for this submission on the authority of ***Ilene Kelly and Errol Milford v Registrar of Titles*** [2011] JMCA Civ. 42, where Phillips JA commenting on the import of section 164 stated:

On the true construction of this provision, the appellants could only proceed to bring an action against the Registrar if:

(a) barred by the provisions of the Act from bringing an action for recovery of land; and (b) the action for recovery of damages as provided for under the Act is inapplicable. It is important to note that proceeding under this section is acceptable only if no other alternative remedy is available.

[22] The Claimants had by the filing of this Claim sought the remedy available to them, and that it was a remedy they could attain without joining the Registrar of Titles as a party to the action. The Remedy sought for the Title to be cancelled or amended can be achieved without the Registrar being a party and the Court making the requisite orders. It was submitted that ***Registrar of Titles v Melfitz Ltd & Another***

SCCA No. 9/2003, delivered 29 July 2005 was authority for the proposition that where remedies sought include cancellation of a certificate of title, declarations among other remedies, that there is no requirement for the Registrar to be a party to the action.

Claimants

- [23] For the Claimant it was submitted that the 1st Defendant cannot avail herself of section 3 of the Limitation of Actions Act (“the Act”) as she has not never occupied the subject property in open and undisturbed possession and certainly not for the twelve (12) years required under the Act. Reliance was placed on the authority of **Recreational Holdings (Ja.) Ltd. v. Carl Lazarus and the Registrar of Titles**, SCCA No. 127/2012 per Morrison JA (as he then was):

*With respect, I doubt very much that these statements represent the modern law of adverse possession. For, in **JA Pye (Oxford) Ltd and Another v Graham and Another** [2002] 3 All ER 865 (a decision which was explicitly approved and applied by the Privy Council in an appeal from this court in **Wills v Wills** (2003) 64 WIR 176), the House of Lords held that the two elements necessary to establish possession for these purposes are “(1) a sufficient degree of physical custody and control (‘factual possession’); (2) an intention to exercise such custody and control on one’s own behalf and for one’s own benefit (‘intention to possess’)” (per Lord Browne-Wilkinson, at page 876). As Lord Hope observed (at page 886), “...it is not necessary to show that there was a deliberate intention to exclude the paper owner or the registered proprietor...[t]he only intention which has to be demonstrated is an intention to occupy and use the land as one’s own”.*

- [24] The 1st Defendant, it was submitted, did not meet that requirement when she purported to make a declaration to the Registrar of Titles that she was the owner of the relevant property and had deprived the rightful beneficiaries of the benefit of the deceased’s estate. It was submitted that it is by virtue of this the Registrar of Titles upon the determination of this matter ought to cancel the Duplicate

Certificate of title, and that this is why the Registrar was added as a Defendant to the Claim.

- [25] Reliance was placed on authority of the Privy Council decision in ***Alvic Astor Pottinger vs Traute Raffone*** (2007) UKPC 22 and submitted that the determination of the whole issue of whether or not fraud exists depends on what the 1st Defendant told the Registrar when she made her application to be registered as proprietor of the property. It was submitted that if it demonstrated at a trial, with the weighing of the parties' respective evidence, that the 1st Defendant had been untruthful as is alleged by the Claimants, it would be a matter for the Trial Judge to decide on the weight of the alleged untruths of the 1st Defendant and whether she knowingly made such statements to the Registrar of Titles in her application, whether they amount to fraud or not and make the necessary consequential orders.
- [26] It was acknowledged in the submissions that the 1st Claimant refers to herself in the heading as the Administrator of the estate. To that it was submitted that there is no requirement under the CPR for there to be a heading in a Statement of Case. It was submitted by Counsel for the Claimants (though not in the affidavit in response to the Application), that the insertion of the term "Administrator" in the Claim Form and Particulars of Claim was a typographic error, which in the urgency for the Application to be filed in response to the action being taken at the Sutton Street Court, went unnoticed by the Claimants' Attorney-at-Law. It was submitted that these were merely technical errors; to have it firstly in the heading and secondly in the body of the Claim.
- [27] It was further submitted that the 1st and 2nd Claimants have a right to file their claim on the basis that they are seeking the Court's interpretation of the circumstances of their case and to make declarations thereon and give directions pursuant to the said declarations as to how they are to proceed. Ultimately they desire, to adjudicate on their Claim to the land of which they have been in possession continuously from the dates aforesaid up to and continuing even after the 1st

Defendant's application for Title in contest to the 1st Defendant's Claim and act in having the Registrar of Titles issue a Certificate of Title in her name as the proprietor.

- [28] Curiously, reliance was placed on a provisions in the UK civil procedure rules as commented on in the *White Book Service* 2002 in relation to Rule 19.1.1. The rule requires that for actions for the recovery of land that all persons claiming to be entitled to possession should be joined as Claimants, but that it is the general rule of practice and not a rule of law. It was submitted The 1st Claimant has not claimed to be an executor named in the Will of her deceased aunt Veronica Simpson but she is a beneficiary of a gift in the said Will and as the estate has indeed not been proved, administered and settled for so long, she has a right and can apply to the Court for declarations, directions and orders as she has done. And in addition, it was argued, she can as is referred to in paragraph 11 of the Particular of Claims apply for an order from the Court that she can herself apply for Letters of Administration with Will annexed.
- [29] In addition, it was submitted, a beneficiary has the right to file a Claim in Court against the Executors or Administrators of an estate who have failed, neglected and/or refused to administer, account or settle the estate. Additionally, a beneficiary also has the right to apply to the Court for an order that they themselves be substituted for the named or appointed Executors or Administrators or for another named person to be so appointed or substituted. it was submitted that the 1st Defendant had not established that the Claimant's Claim is frivolous, vexatious, contrary to the Rules or an abuse of the process of the Court but that it has been made clear that there are triable issues which should be left for the determination of a Court by trial.
- [30] As it relates to the submissions of the 2nd Defendant that it was improperly added as a party to the Claim, it was submitted that the 2nd Defendant has mistakenly interpreted the fact that it has been added as an indication that the Registrar of Titles was joined for some wrong doing. This, it was submitted, is not so. It was

opined that section 160 of the Registration of Titles Act does not apply to the Claim and Particulars of the Claimants.

- [31] The 2nd Defendant can, it is submitted be joined as a Defendant to whom orders have been sought to be directed and even if the Court did not take that view, that by virtue of Rule 8.4 (a) of the CPR 2002, a claim will not fail because a person is added as a party to the proceedings who should not have been added.
- [32] Reliance was also placed on *Pottinger vs Raffone* noting that the parties at the trial included the Registrar of Titles, without any censorious comment for this having been done by the Court. In fact, it was submitted, their Lordships referred many times to the Registrar, including referring and dealing in detail with her powers in Section 153 of the Registration of Titles Act in relation to the issue of a certificate wrongly obtained by an applicant.

Law

1st Defendant's Application

- [33] The Civil Procedure Rules, 2002 ("The CPR") provides at 26.3 (1) (c) that:

26.3 (1) 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 -

...

(c) that the statement of case or the part to be struck out discloses no reasonable grounds for bringing or defending a claim; ...

Rule 8.9 (1) and 8.9A state:

8.9 (1) The claimant must include in the claim form or in the particulars of claim a statement of all the facts on which the claimant relies...

8.9A The claimant may not rely on any allegation or factual argument which is not set out in the particulars of claim, but which could have been set out there, unless the court gives permission.

[34] Mangatal J (as she then was) in ***Eureka Medical Ltd v life of Jamaica Ltd*** HCV 1268/2003 delivered on October 12, 2015 relying on the dicta of Lord Woolf in ***Swain v Hilman*** [2001] 1 All E.R. 91, outlined that unlike an application for summary judgment, the application under Rule 26.3 is concerned primarily with contents of the statement of case.

“It would seem to me that in relation to Rule 26.3 (1) (c), unlike Rule 15.2, the Court is not permitted to have regard to anything but the statement of case and is to make its decision on the terms and contents of the Statement of case.”

[35] In ***Biguzzi v Rank Leisure PLC*** [1999] 4 All E.R. 934, Lord Woolf MR outlined the approach to taken be to applications to strike out a claim under the equivalent provision of the United Kingdom Civil Procedure Rules:

Under the CPR the keeping of time limits laid down by the CPR, or by the court itself, is in fact more important than it was. Perhaps the clearest reflection of that is to found in the overriding objectives... it is also to be found in the power that the Court now has to strike out a statement of case under 3.4 that provides:

... The Court may strike out statement of case if it appears to the court (a) that the statement of case discloses no reasonable grounds for bringing or defending the claim; ...

... The fact that a judge has that power does not mean that in applying the overriding objectives the initial approach will be to strike out the statement of case.

Biguzzi has been affirmed locally in the decision of McDonald-Bishop J (as she then was) which though it dealt with an application to strike out a Claim for non-compliance with the Rules, accepted it as a statement of the law in Jamaica on the applicability of Rule 26.3.

- [36] Section 68 of the Registration of Titles Act speaks to the indefeasibility of the Registered Title and provides:

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

Section 70 goes further to state that except in the case of fraud, any person's estate or interest that, but for the Act would have been held to be paramount or to have priority, is defeated in favour of the registered proprietor's title. Section 71 goes on to provide for protections for parties who, except in instances of fraud, contracts with or deals with or takes or proposes to take transfer from the registered proprietor of the land for a myriad of purposes.

- [37] Sections 3 and 30 of the Limitation of Actions Act provide that after the expiration of the Limitation period for bring action for the recovery of property for which possession exists adverse to the right of the registered proprietor:

3. No person shall make an entry or bring an action or suit to recover any land or rent, but within twelve (12) 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 not have accrued to any person through whom he claims, then 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 bring the same...

30. At the determination of the period limited by this Part to any person for making entry, or bringing any 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.

The Registration of Titles Act provides at section 85 that a person who claims to have acquired a title to land by possession may apply to be registered as the proprietor of the said land in fee simple or for such estate as the person may claim.

[38] The case of ***Harley Corporation Guarantee Investment Company Limited v Estate Rudolph Daley*** [2010] JMCA Civ. 46 offers guidance to how section 70 is to be treated and the fraud that is required to be proven to defeat the title of the registered proprietor. Harrison JA at par. 30 and 31 opined in regards to paragraph 70 that:

30. Further, sections 70 and 71 of the Act afford a defensible armour and protection to a party in whom registered lands are vested. It is not without significance that, save and except in the case of fraud, the Act confers an indefeasible interest upon a registered proprietor of land...

31. ... In the absence of fraud, an absolute interest remains vested in a registered proprietor. All rights, estate and interest prevail in favour of the registered proprietor.

[39] It is not disputed that the registered proprietor of the property is Ms Bartley. On the issue of the type of fraud required to defeat the title of the registered Harris JA stated:

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

*“Now fraud clearly implies some act of dishonesty. Lord Lindley in *Assets Co. v. Mere Roihi* (2) states that: ‘Fraud in these actions’ (i.e., actions seeking to affect a registered title) ‘means actual fraud, dishonesty of some sort, not what is called*

constructive or equitable fraud— an unfortunate expression and one very apt to mislead, but often used, for want of a better term, to denote transactions having consequences in equity similar to those which flow from fraud.”

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

[53] In placing reliance on an allegation of fraud, a claimant is required to specifically state, in his particulars of claim, such allegations on which he proposes to rely and prove and must distinctly state facts which disclose a charge or charges of fraud. [54] At the time of the commencement

- [40] The learned judge cited the case of **Davy v Garrett** [1878] 7 Ch D 473, where Thesiger L.J outline the principle to be followed when alleging fraud in pleadings:

“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.”

- [41] While this was the position prior to the advent of the CPR, Harris JA noted:

[57] 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.

2nd Defendant's application

[42] Sections 160 and 164 of the Registration of Titles Act are instructive:

160. 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.

164. Any person sustaining loss through any omission, mistake or misfeasance, of the Registrar, or any other officer or clerk, in the execution of their respective duties under the provisions of this Act or by an error, omission or misdescription in any certificate of title, or any entry or memorandum in the Register Book, or by the registration of any other person as proprietor, and who by the provisions of this Act is barred from bringing an action for the recovery of the land, estate or interest may, in any case in which the remedy by action for recovery of damages as herein provided is inapplicable, bring an action against the Registrar as nominal defendant for recovery of damages

[43] In ***Ilene Kelly and Errol Milford (Executors of Estate of Evelyn Francis. Dec'd) v Registrar of Titles*** [2011] JMCA Civ. 42, Phillips JA outlined the treatment of cases where the Registrar was wrongfully joined as a party.

[36] In my opinion, the appellants have thus far failed to provide any evidence to show that they have suffered loss through any omission, mistake or misfeasance of the Registrar in the execution of her duties under the provisions of the Act. To the contrary, the learned judge found that there was no express duty under the Act to inform the executors of suit no. E 357 of 1997. I agree with him. The appellants have not shown that their alleged loss was due to the entry of any memorandum in the register book or by the registration of any other person as proprietor. They also have not shown that by the provisions of the Act they are barred from bringing an action for the recovery of the said property. In fact, as stated previously, the deceased lost her estate in the said property because of the adjudication on all the circumstances by a competent court of law. There is also no error or misdescription in the certificate of title for

the said property. On the true construction of this provision, the appellants could only proceed to bring an action against the Registrar if:

(a) barred by the provisions of the Act from bringing an action for recovery of land ; and (b) the action for recovery of damages as provided for under the Act is inapplicable. It is important to note that proceeding under this section is acceptable only if no other alternative remedy is available.

*[37] This court has also already held that all the above stated circumstances must be satisfied before a person can bring an action against the Registrar as a nominal defendant pursuant to section 164 of the Act (see **Registrar of Titles v Melfitz Ltd & Another** (SCCA No. 9/2003, delivered 29 July 2005). In my view, the stated circumstances have not been satisfied here*

Issues

[44] The following are the two (2) issues that arose for determination in the 1st Defendant's application:

(i) Do the Claimants have the locus standi to commence the claim;

(ii) Is fraud adequately pleaded and particularized in the Claim;

For the 2nd Defendant's claim the sole issue was as to whether they are a proper party to the claim.

Discussion

Locus standi

[45] I accept the submissions of the 1st Defendant as it relates to the powers of an executor and an administrator in the filing of a claim and that the Claimants are neither. While prospective beneficiaries would have an interest in whether the estate of the deceased, Veronica Simpson, has been depleted of an asset, the 1st Claimant sues in another capacity. She claims that she is the owner of the house

on the property that she refers to as the “middle house”. This she distinguishes from a main house to the front of the premises and the house once lived in the 1st Defendant, which is to the back which she stated was a movable or chattel house.

[46] She stated in her evidence that she exercised rights of ownership over the property. Apart from occupying the property at one stage, she stated that at different stages agents were left there to occupy the premises as either her tenant or that of the 2nd Claimant; that from 1972 until the Notice was served on her tenant there was always someone in the premises on her behalf or as her tenant and that she paid the taxes for the property. It seems however that the title continued until 2014 to be in the name of the deceased Veronica Simpson.

[47] The 1st Claimant and the 2nd Claimant also assert that they are beneficiaries under the estate of Veronica Simpson, which does not seem to have been disputed. At the time of the hearing there was no indication that the Claimants had yet obtained Letters of Administration though in their pleadings they indicated such an intention and that the reference in the heading was an error. I nonetheless find that in their own right as beneficiaries they have a right to seek the declaratory orders they have sought, if even the consequential orders sought would be for the benefit of the estate if they are able to establish the allegation of fraud, as such I find that they do have the requisite *locus standi* to commence the action they did.

Fraud

[48] The 1st Defendant, on the allegation of the Claimants, have obtained title to the entire property by fraud according to the pleadings. The instances in the particulars of Claim in which fraud is pleaded are as follows:

(1) Paragraph 3 - The 1st named Claimant though not resident in Jamaica has been in continuous possession of the said premises receiving rentals from tenants therein and left in place and in occupation... save for the purported Notice to Quit... wrongly served on him by the 1st Defendant in furtherance of her fraudulent act in

registering herself as the proprietor of the said premises as aforesaid;

(2) Paragraph 12 – the 1st named Defendant obtained her registration as the legal proprietor of the premises... fraudulent as there was no factual or legal basis on which she was entitled to ownership of the property as she had not been in possession of the same from 1988 nor has she ever exercised dominion over the same...

(3) Paragraph 14 – The 1st named Defendant... therefore deceived the 2nd named Defendant and fraudulent presented false documents to ground the claim of ownership or her right to ownership of the said property...

(4) Paragraph 15 – The said Defendant made the said application surreptitiously, knowing that the Claimants were abroad and did not utilize the avenues of contact with them open to her or inform the 2nd named Claimant while she was in Jamaica and at the premises up to 7th July 2014 of her intent to apply or of the application to be registered as the legal proprietor of the subject premises thereby denying them the opportunity to object to her said fraudulent application.

(5) Paragraph 16 – as a result of the intentional fraudulent act of the said Defendant, the Claimants have been deprived of their interest in the subject premises... as have the other beneficiaries of the estate of Veronica Simpson...

[49] While one cannot at this stage know how a trial in this matter may turn out in terms of evidence, at this stage it is clear that actual fraud or dishonesty of some kind, the standard set out in **Hartley**, has been pleaded. The Claimants say that they have always exercised dominion over the property and any assertion by the 1st defendant that she was in continuous and undisturbed possession of the property or the portion of the property in a manner adverse to the title of the original title holder would be an act of dishonesty. It would also mean that the 1st Defendant would not have been entitled to avail herself of the provisions of section 3 and 30 of the Limitation of Actions Act or section 85 of the Registration of Titles Act to

acquire title and that therefore the property would devolve to the estate of Veronica Simpson for the benefit of her beneficiaries.

[50] I find that that the 1st Defendant has shown on a balance of probabilities that the Claimants do not have the *locus standi* to bring this claim. As beneficiaries of the estate of Veronica Simpson and asserting ownership of one of the buildings on the property I find that they have an interest in determining whether the estate of Veronica Simpson was depleted by means of fraud. I also accept that the fraud has been specifically pleaded and the 1st Defendant could not be embarrassed in her Defence by not having a clear indication as what the Claimants are saying the act of fraud was. I therefore found that the requirements of rule 26.3 of the CPR had not been met and the 1st Defendant/ Applicants application was refused. No order was made as to costs.

2nd Defendant

[51] I found for the 2nd Defendant in their application as I accepted their submissions regarding the interpretation of section 160 and 164 of the Registration of Titles Act. Like Phillips JA in ***Ilene Kelly and Errol Milford*** I find that the Claimants have not shown they have suffered loss through an omission or mistake or act of misfeasance and that Registrar of Titles. The Claimant does not allege that the Registrar is liable to be sued under the Act for recovery of possession of the subject property and clearly they have sought to exercise that option against the 1st Defendant, although I note in passing that there is a second person named on the exhibited Certificate of Title, that has not been named as a Defendant. I ruled in favour of the 2nd Defendant's application, and awarded them costs which were to be taxed if not agreed.