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SUIT NO. C.L. F 039 OF 2000

BETWEEN	**BERYL ADAMS-FERGUSON**	**CLAIMANT**
AND	**KEITH LEWIS**	**FIRST DEFENDANT**
AND	**EUKLEY LEWIS**	**SECOND DEFENDANT**

IN CHAMBERS

Miss Simone Jarrett instructed by the Kingston Legal Aid Clinic for the claimant

Miss Yvonne Ridguard for the defendants

November 10 and December 2, 2004

Sykes J (Ag)

ABUSE OF PROCESS, ISSUE ESTOPPEL, LIMITATIONS OF ACTIONS ACT, FRAUD UNDER THE REGISTRATION OF TITLES ACT

1. In Tom's Hope, Portland, Keith Lewis and Eukley Lewis are the registered proprietors of land registered at Volume 1087 Folio 619 of the Register Book of Titles. They have been so registered since March 1984. They purchased the land in October 1978 from Charles Adams for $9,000. On August 4, 1988, the claimant filed a plaint in the Resident Magistrate's Court for the parish of Portland. She claimed damages for trespass in respect of part of the land owned by the Lewis brothers. Her claim was

based upon an alleged agreement for sale between herself and the defendants. Keith Lewis, on behalf of himself and his brother, said he was not a trespasser and counterclaimed by asking for recovery of possession of the portion of the land on which she claimed the brothers had trespassed. Mr. Lewis expressly relied on his registered title to resist the claimant's allegation of trespass. No evidence was heard. The case was decided on submissions made before the action commenced. The order made by the Resident Magistrate I believe has some errors. It says that the plaintiff was non-suited and judgment for the defendant on the counterclaim. It then says plaintiff to recover possession from the defendant. This must clearly be an error since the plaintiff was non-suited. The result is not in doubt: the Resident Magistrate upheld the submissions made by the defendants' attorney. Mrs. Adams-Ferguson was represented by counsel before the Resident Magistrate. The claimant did not appeal the order. The submissions were heard on May 15, 2000.

2. One would have thought that that would have been the end of the matter. Mrs. Adams-Ferguson trekked to Kingston where she launched this current action in the Supreme Court. She filed her writ of summons on June 19, 2000, a mere thirty six days later. She found some ingenious lawyers at the Kingston Legal Aid Clinic. Miss Jarrett is one of them. These lawyers, based on their instructions, allege that the Lewis brothers committed a fraud when they purchased the land from Charles Adams. They also say that Charles Adams had given the part of the land, on which it is alleged the brothers trespassed, to Mrs. Adams-Ferguson. Miss Jarrett's ingenuity led her to submit that the matter in the Resident Magistrate's Court was

decided on a preliminary issue and not on the merits. Since there was no trial on the merits, the claimant can now have a trial in the Supreme Court.

3. Mrs. Adams-Ferguson has shifted the basis of her claim in this current action; it is no longer a contract but a gift and fraud on the part of the defendants. She has produced a document that purports to say that Charles Adams, who sold the land to the defendants, gave her the part of the land that is in the parcel of land bought by the Lewis brothers. This was never raised before the Resident Magistrate; neither was the issue of fraud.

4. The defendants, in response, raise two objections to the claim. They say that

a. issue estoppel arises;

b. it is statute barred.

ABUSE OF PROCESS AND ISSUE ESTOPPEL

5. Miss Ridguard endeavoured to show that this was a case of issue estoppel. I do not think that this case falls within that technical doctrine. This is so because it was not legally necessary for the decision of the Resident Magistrate to make any finding regarding any gift or fraud (see Dixon J ***Blair v Curran*** [1939-40] 62 CLR 464, 531-533). This case has to be considered under the broad doctrine of abuse of process (see ***Johnson v Gore Wood*** [2002] 2 A.C. 1). I bear in mind the admonition of Lord Bingham of Cornhill when he said that a litigant should not be shut out from the courts without a scrupulous examination of the facts and issues of the case (see ***Johnson*** at page 22). I should say at this stage that I must not be taken to agree with the way the expression res judicata is used in the cases cited below. It is not necessary for me to say why I disagree

since the cases, despite what I consider to be an incorrect use of the expression, make the essential point concerning abuse of process.

6. Mrs. Adams-Ferguson says that she should be allowed to rely on the document that, admittedly, she had in her possession at the time the preliminary point was being argued before the Resident Magistrate's Court. The courts have consistently frowned upon this sort of behaviour. Not only have the courts frowned, they have expressed their displeasure by stopping the action from proceeding. The submission put forward by Miss Jarrett has been advanced by equally ingenious lawyers of the past and it has received the same reply each time it has occurred. I deliver the same response. The reply is captured by Lush J in ***Ord v Ord*** [1923] 2 KB 423, 443 - 444

> *It remains for me to deal with the other, the wider principle to which I have referred and which is often treated as falling within the plea of res judicata.* ***The maxim "Nemo debet bis vexari" prevents a litigant who has had an opportunity of proving a fact in support of his claim or defence and chosen not to rely on it from afterwards putting it before another tribunal.*** *To do that would be unduly to harass his opponent, and if he endeavoured to do so he would be met by the objection that the judgment in the former action precluded him from raising that contention.* ***It is not that it has been already decided, or that the record deals with it. The new fact has not been decided; it has never been in fact submitted to the tribunal and it is not really dealt with by the record. But it is, by reason of the principle I have stated, treated as if it had been.*** *This is well illustrated in Brunsden v. Humphrey (5), to which I have already referred. Bowen L.J. said (6): "The real test is not, I think, whether the plaintiff had the opportunity of recovering in the first action what he claims to recover in the second. With all respect, I do not see how it can be said that Nelson v. Couch (7) so decides. That case establishes only the converse rule, viz., that the maxim 'Nemo debet bis vexari' cannot apply where in the first action the plaintiff had no such opportunity of satisfying his claim."* (My emphasis)

7. The highlighted text emphasizes the point. It is an abuse of process to seek to put forward a fact that could have been put forward in the previous litigation but was not. These words of Lush J could hardly be improved upon as a statement of the relevant principle. That is just one form of abuse of process. Abuse of process can be found in many situations. Lord Shaw in ***Hoystead v Taxation Commissioner*** [1926] AC 155, 165 – 166, said

> *In the opinion of their Lordships it is settled, first, that the admission of a fact fundamental to the decision arrived at cannot be withdrawn and a fresh litigation started, with a view of obtaining another judgment upon a different assumption of fact; secondly, the same principle applies not only to an erroneous admission of a fundamental fact, but to an erroneous assumption as to the legal quality of that fact. Parties are not permitted to begin fresh litigations because of new views they may entertain of the law of the case, or new versions which they present as to what should be a proper apprehension by the Court of the legal result either of the construction of the documents or the weight of certain circumstances. If this were permitted litigation would have no end, except when legal ingenuity is exhausted. It is a principle of law that this cannot be permitted, and there is abundant authority reiterating that principle. Thirdly, the same principle - namely, that of setting to rest rights of litigants, applies to the case where a point, fundamental to the decision, taken or assumed by the plaintiff and traversable by the defendant, has not been traversed. In that case also a defendant is bound by the judgment, although it may be true enough that subsequent light or ingenuity might suggest some traverse which had not been taken. The same principle of setting parties' rights to rest applies and estoppel occurs.*

8. These two passages, in my mind, have scuttled the submissions of Miss Jarrett. Lord Shaw is adamant that the principle preventing subsequent litigation applies to an erroneous view of the facts by the litigant and his legal advisor. This means that even if Mrs. Adams-Ferguson and her then

legal advisor were in error as to the effect and meaning of the document and that error influenced their decision not to put it forward before the Resident Magistrate they are stuck with that decision. They made the decision in the face of a counter claim for recovery of possession in which Mr. Lewis was saying that he was the registered proprietor. What this meant or ought to have meant from Mrs. Adams-Ferguson's standpoint was that the possibility of fraud was patent. If you are saying that you were given part of the land by the vendor who later sold a portion of land that includes the portion given to you and the purchaser wants you removed from the land, why not speak of the gift or raise the facts that point to the possibility of fraud on the part of the vendor or purchaser?

9. If I am correct, I do not see how Miss Jarrett can resist the inevitable conclusion. She submitted that the Resident Magistrate's Court had no jurisdiction to try issues of title. The Supreme Court is the proper venue. Therefore, even if the claimant had put title in issue the Resident Magistrate would have been obliged to decline to hear the matter. The fact that the issue came to the Supreme Court by another route is of no moment. The flaw in this submission is that is presupposes that there is an automatic ouster of jurisdiction in the Resident Magistrate's Court once an issue of title to land is raised. As I understand the adjudication of land disputes in the Resident Magistrates' Courts, there is no automatic ouster of jurisdiction (see section 96 and 97 of Judicature (Resident Magistrates) Act. If there is a serious issue regarding title to land then the Judicature (Resident Magistrates) Act says that there must be proof of the annual value of the land. If the annual value is above $75,000 then the Resident Magistrate has no jurisdiction. What this means is that once the defendant

proffered his registered title then it was incumbent on the claimant there and then to put in question the title. At that point, the value of the land would arise as an issue. The claimant could have raised issues of fraud and the gift. All these were issues that could have and ought properly to have been raised before the Resident Magistrate. Had this been done, the Resident Magistrate would have proceeded in the manner that I have stated.

10. What the claimant did was to allow the Resident Magistrate to proceed without raising the issues on which she now relies. It seems to me that having gone down the road of contract it would have been difficult for her to raise fraud and a gift. When the claimant and her legal advisers, despite the opportunity to do so, deliberately refrained from seriously challenging the title before the Resident Magistrate, she cannot go to another court under the guise that the Resident Magistrate had no jurisdiction. As I have endeavoured to show, there is no automatic ouster of the jurisdiction of the Resident Magistrate once an issue of title has arisen. Implicit in her apparent concession before the Resident Magistrate was an admission that she could not sustain her claim based on a gift and neither could she rely on fraud. An admission of fact which must have been made cannot be withdrawn merely because the result is inconvenient (see ***Khan v Goleccha International Ltd*** [1980] 2 All ER 259). It cannot be a proper use of court process for a litigant to allow a court to make a decision on what it "knows" to be an incorrect set of facts by withholding information, then go to another court, and try to get a different result by asserting facts that he had at the time of the first adjudication. What the claimant is seeking to do in this action is to subvert, without an appeal, the decision of

the Resident Magistrate. The statute sets out what needs to be done before it is concluded that that court does not have jurisdiction. The claimant withheld information that would have activated the inquiry of which I have spoken and having done that she now has to live with the consequences of her action.

11. The fact that the issue was determined in limine is not a defect. Miss Jarrett cannot derive any assistance from that fact. It has even been held that a party can be barred from reopening a matter that was dismissed without hearing any evidence (see ***Barber v Staffordshire County Council*** [1996] 2 All ER 748). I end with the classic statement of Wigram VC in ***Henderson v Henderson*** [1843 – 60] All ER Rep. 378, 381 – 382

> *In trying this question I believe I state the rule of the Court correctly when I say that, where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have from, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.*

12. All the cases to which I have referred are based upon the idea that a superior court of record has the inherent power to prevent the abuse of its procedure and processes. The power to stop abuses therefore is not to be

found solely in any procedural rules such as the Civil Procedure Rules (2002).

Fraud

13. It is now too late in our legal history to attempt even to suggest that under the Registration of Titles Act one can establish fraud in the registered proprietor without showing actual fraud. Ninety-nine years ago ***Assets Company Limited v Mere Roihi*** [1905] AC 176 established that fraud under the land title registration statute means actual fraud and not equitable fraud. This position has been adopted in Jamaica in ***Enid Timoll-Uylett v George Timoll*** (1980) 17 J.L.R. 257, 261D.

14. The claimant alleges that at the time the defendants purchased the land they knew she was in occupation of the land claimed by her. She alleges that they knew she had a beneficial interest in the land. Finally, she says that the defendants knew that not the whole parcel of land was to be transferred to them. All this Mrs. Adams-Ferguson says amounts to fraud. The cases make it clear that there must be actual fraud on the part of the defendants. The claimant has been unable to identify what fraudulent act the defendants committed.

15. In fact, during the hearing before the claimant admitted that the defendant's version of the events was true. Briefly, the defendants say that they signed a sale agreement with Charles Adams. He died before the transaction was complete. After he died, his daughter, Maud Adams asked the defendants to sell a piece of the land to the claimant. This they agreed to do. There is no allegation that Maud Adams was acting as agent of the claimant. The defendants did not conclude any written agreement with

Maud or the defendant. Based upon this admission and the pleadings of the claimant I do not see how it could be said that the defendants are guilty of fraud. The conduct of the defendants is not fraud for the purposes of the Registration of Titles Act.

Conclusion

16. The conduct of the claimant amounts to an abuse of process. There is no evidence of actual fraud in the defendants. I need not decide whether the claim is statute-barred. The claim is dismissed with costs to the defendants to be agreed or taxed.