IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

COMMON LAW

SUIT NO. C.L. 1977/H150

BETWEEN	ROBERT D. HONIBALL	
AND	GEORGE A. BROWN	PLAINTIFFS
AND	CARDIFF HALL ESTATES LIMITED	DEFENDANT

R.N.A. Henriques Q.C. and Allan Wood instructed by Livingston Alexander and Levy for the Applicant.

Mrs. Janet Morgan and Samuel Harrison instructed by Milholland Ashenheim and Stone for the Plaintiffs/Respondents.

HEARD: OCTOBER 12, 18 and DECEMBER 18, 1989.

WALKER J.

By Notice of Motion dated June 1, 1989 and filed in this Court the applicant, Christian Oritsetimeyin Alele, seeks relief as follows:

> "1. An Order giving the said CHRISTIAN ORITSETIMEYIN ALELE liberty to intervene as an interested party in Suit C.L. H-150 of 1977 commenced by Robert D. Honiball and George A. Brown against Cardiff Hall Estates Limited and to be joined as Second Defendant to the said action, and
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> 2. An Order setting aside the ex Parte Order of the Learned Master dated the 10th day of December 1987 in the said action and also setting aside the cancellation of the Certificate of Title registered at Volume 1072 Folio 413 for the land known as Lot 96 Cardiff Hall Estates in the Parish of Saint Ann, and setting aside the issue of Certificate of Title registered at Volume 1209 Folio 991 for the said land in the names of the Plaintiffs and setting aside the judgment in favour of the Plaintiffs entered in default of appearance on March 29, 1978."

By Writ of Summons dated November 14, 1977 the plaintiffs filed suit against Cardiff Hall Estates Limited to recover the sum of $5,000 being the deposit paid under a contract for the sale of certain lands. The plaintiffs also claimed interest on the sum due. On March 29, 1978 judgment in default of appearance was entered in the matter in their favour for the sum of $9,036.64 and costs taxed at $159.60. Thereafter, the judgment debt not having been satisfied, the plaintiffs resorted to sale of land proceedings pursuant to s. 621 of the Judicature (Civil Procedure Code) Act. On November 7, 1979 they obtained an order of the Court whereunder, inter alia, they were granted leave to issue a writ for the sale of certain lands of which the defendant was the registered proprietor. Pursuing this remedy, on October 28, 1981 the plaintiffs obtained an order of the Court authorising the issuance of a writ for the sale of land registered at Volume 1072 Folio 645 of the Register Book of Titles, one

of the parcels of land falling within the terms of the order of the Court made on November 7, 1979. Subsequently, their attempt to sell or acquire this property having failed, by summons dated March 12, 1986, the plaintiffs applied to the Court for leave to issue a writ for the sale of certain other lands which were owned by the defendant and against which leave to proceed had been reserved to the plaintiffs in the order of the Court dated November 7, 1979. These lands comprised three separate lots of land registered, respectively, at Volume 1072 Folio 413, Volume 1072 Folio 674 and Volume 1103, Folio 394 of the Register Book of Titles. Application was made to sell these three properties since in the words of one of the plaintiffs, George A. Brown:

> " From the response of the public to the auction to that lot (registered at Volume 1072 Folio 645) which is part of the same Cardiff Hall subdivision I verily believed that in order to satisfy the Judgment and further interest which had accrued the Writ for Sale of Land for the 10th December, 1987 would have to comprise at least three lots in the said Cardiff Hall subdivision."

In relation to these properties it was common ground that, at all material times, the applicant held an equitable interest in the lot registered at Volume 1072 Folio 413 having purchased this lot from the defendant in 1968. Hereafter in this judgment I shall refer individually to this property as "Lot 96" as it was numbered on the relevant sub-division plan. To return, however, to the sequence of events, on April 24, 1986 the plaintiffs obtained an order of the Court granting a writ for the sale of Lot 96 and the other two lots registered as aforesaid.

The next significant development in this matter was that on March 10, 1987, pursuant to the order of the Court made on April 24, 1986, the Registrar of the Supreme Court conducted an enquiry the objective of which was to establish whether or not any charges existed against any of these properties. In the Registrar's report of this enquiry which is dated August 4, 1987 it is recorded that a sealed copy of notice of the enquiry was served on the liquidator of the defendant company, Mr. Brian Mair. By summons dated November 10, 1987 the plaintiffs applied to the Court for an order that:

> " The Registrar having certified on Enquiry that the sum owing by the Judgment debt entered on the 29th March, 1978 as being $14,128.43 to the 10th March, 1984 and the defendant having failed to pay any sums in reduction of this judgment debt that -

1. A Certificate of Sale of Land be issued in the names of the plaintiffs against lands registered at Volume 1072 Folio 413; Volume 1072 Folio 674 and Volume 1103 Folio 394 subject to existing encumbrances.

2. That the terms of the Order of the Court dated the 24th day of April, 1987 be accordingly varied.

3. That the Registrar of Titles do cancel Certificates of Title to the lands mentioned above and that new Certificates and duplicates thereof be issued in the names of the plaintiffs or their nominees subject to any existing encumbrances."

Presumably the reference in this summons to an order of the Court dated April 24, 1987 is in error and was intended to read an order of the Court dated April 24, 1986. However this may be, on December 10, 1987, upon the hearing of this summons the Court made an order in the following terms:

"(1) That a Certificate of Sale of Land be issued in the names of the plaintiffs against lands registered at Volume 1072 Folio 413, Volume 1072 Folio 674 and Volume 1103 Folio 394 of the Register Book of Titles subject to existing encumbrances.

(2) That the terms of the Order of the Court dated the 24th April, 1987 be accordingly varied.

(3) That the Registrar of Titles do cancel Certificates of Title to the lands mentioned above and that new Certificates and duplicates thereof be issued in the names of the plaintiffs or their nominees subject to any existing encumbrances."

Subsequently, by Certificate dated January 19, 1988 addressed to the Registrar of Titles the Court certified as follows:

" This is to certify that ROBERT D. HONIBALL of 1 Great House Boulevard, Kingston 6 in the parish of Saint Andrew, Business Executive and GEORGE ALFRED BROWN of 6 Wagner Avenue, Kingston 8 in the parish of Saint Andrew, Attorney-at-Law, have been declared the Purchasers on the 10th day of December, 1987 of the right, titles and interest of Cardiff Hall Estates Limited, a Company duly incorporated in Jamaica with its registered office at 35 Trafalgar Road, Kingston 10 in the parish of Saint Andrew in the land mentioned and described in Certificates of Title registered at Volume 1072 Folio 413, Volume 1072 Folio 674 and Volume 1103 Folio 394 of the Register Book of Titles and that the land aforesaid was sold pursuant to an Order of the Supreme Court of Judicature of Jamaica dated the 10th day of December, 1987."

Finally, in pursuance of this order of the Court the certificate of title to Lot 96 was cancelled by the Registrar of Titles and in place thereof a new certificate of title which registered Lot 96 at Volume 1209 Folio 991 of the Register Book of Titles was issued in the joint names of the plaintiffs. It is in these circumstances that the applicant seeks relief as described in this notice of motion that is now before me.

The main thrust of the arguments advanced by counsel for the plaintiffs is that the applicant has no locus standi in these proceedings. She submitted confidently that the plaintiffs having been registered under the Registration of Titles Act (hereinafter referred to as "the Act") as the proprietors of the lands in question, which included Lot 96, acquired indefeasible titles to those properties in the absence of fraud. Further, she submitted that such titles could only be impeached by a person having the locus standi to do so under the Act. She said that in the case of the applicant, his competence to impeach the plaintiffs' title to Lot 96 was dependent upon whether he could bring himself within the category of persons contemplated by S. 161 (d) of the Act. S. 161 reads as follows:

> " 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 -
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> (a) the case of a mortgagee as against a mortgagor in default;
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> (b) the case of an annuitant as against a grantor in default;
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> (c) the case of a lessor as against a lessee in default;
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> (d) the case of a person deprived of any land by fraud as against the person registered as proprietor of such land through fraud, or as against a person deriving otherwise than as a transferee bona fide for value from or through a person so registered through fraud;
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> (e) the case of a person deprived of or claiming any land included in any certificate of title of other land by misdescription of such other land, or of its boundaries, as against the registered proprietor of such other land not being a transferee thereof bona fide for value;

> (f) the case of a registered proprietor with an absolute title claiming under a certificate of title prior in date of registration under the provisions of this Act, in any case in which two or more certificates of title or a certificate of title may be registered under the provisions of this Act in respect of the same land.
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> and in any other case than as aforesaid the production of the certificate of title or lease shall be held in every court to be an absolute bar and estoppel to any such action against the person named in such document as the proprietor or lessee of the land therein described any rule of law or equity to the contrary notwithstanding."

With these submissions of counsel for the plaintiffs I entirely agree. I consider as settled the law relating to the indefeasibility of title to land registered under the Act. It was recently re-stated by the Court of Appeal in the case of Horace Clinton Nunes (Executor of the estate of Lionel Coke, deceased) and Appleton Hall Limited v Roy Williams et. ors (unreported) (C.A. Nos. 64 and 67 of 1984). There, in the course of his judgment, Campbell J.A. had this to say"

> " The cases establish that the contracts having been made in breach of the statutory provision are per se illegal and void. The cases do not however establish that if the instrument of transfer in relation to the land had been registered to effectuate the contract of sale, the registration would be ineffective because of the legal invalidity of the contract and the instrument of transfer. To the contrary the line of cases mentioned culminating in Frazer v. Walker, supra, establish that whatever the cause resulting in the contract and/or instrument of transfer being rendered void or otherwise invalid, be it due to irregularity in execution or due to breach of statutory provisions the fact of the registration of any such instrument of transfer creates in the person in whose favour the instrument is executed an indefeasible title to the land referred to in the instrument in the absence of fraud. This is so because as has been said by Lord Wilberforce at p. 651 in Frazer v Walker supra the inhibiting effect of certain sections of the New Zealand Land Transfer Act 1952 e.g. sections 62, 63 (which correspond to sections 70 and 161 of our Registration of Titles Act) and the probative effect of others e.g. section 75 (which corresponds to our section 68) in no way depend on any fact other than actual registration as proprietor. "It is in fact the registration and not its antecedents which vests and divests title."

Accordingly, I find it unnecessary to decide whether, as submitted by counsel for the applicant, the procedure by which the plaintiffs came to be registered as proprietors of Lot 96 was irregular, or even void, and, particularly, whether the Order of the Master of the Supreme Court dated December 10, 1987 was made without jurisdiction. But now comes the question whether the plaintiffs fraudulently procured their registration as joint proprietors of Lot 96. If they could be proved to have done so, it was conceded by counsel for the plaintiffs that the applicant, as a person deprived of land by fraud, would fall within the ambit of s. 161 (d) and, therefore, be competent to impeach the plaintiffs' title to Lot 96. Counsel for the applicant argued strenuously that the plaintiff, George A. Brown, was, indeed, guilty of fraudulent conduct in this matter. Broadly speaking, Mr. Henriques submitted that such fraud was to be inferred from the undisputed fact that the plaintiff, George A.Brown, is an Attorney-at-Law, from the form and manner in which this action was commenced and continued, and from the unrealistic valuations of land given by the said plaintiff in place of independent valuations which should have been obtained. As to the form in which this matter was litigated it was not in dispute that at the time of commencement of the plaintiffs' action the defendant company was in voluntary liquidation, and had been so since November 20, 1975 on which date Mr. Brian Mair had been appointed liquidator. There is no evidence to suggest that this state of affairs was known to the plaintiffs, or either of them, when they filed suit. However, it was submitted that by April 6, 1978 the plaintiff, George A. Brown, became aware of the true status of the company, and that thereafter the plaintiffs should have either joined the liquidator as a party to the suit or, alternatively, have amended the pleadings appropriately. In the event this was not done with the result that the Court was misled as to the true status of the company, so it was submitted. I know of no authority and, indeed, none was cited to me to support a proposition that in pursuing civil proceedings against a company in voluntary liquidation a plaintiff is obliged either to join the liquidator as a party to the action, or to commence or continue the action in such a form as will disclose the factual position of the company.

On the contrary, it is the law that a company in voluntary liquidation retains its corporate state and corporate powers until dissolution (see s. 258 of the Companies Act). Again, the terms of 0.65 r. 3 (5) of the Rules of the Supreme Court do not seem to me to support the contention of Counsel for the applicant. 0.65 r. 3 (5) provides, inter alia, as follows:

> " Company in Liquidation - Where an order has been made for winding up leave to commence proceedings must first be obtained from the Court which made the order (Companies Act, 1948, s. 231) and the writ is served personally on the liquidator. In voluntary liquidation no leave is required (Tandberg v. Strand Wood Co., Buckley, J. (unreported), April 10, 1905) and the writ may be served on the liquidator or on the company".

I conclude, therefore, that the plaintiffs acted within their rights, and in no way fraudulently, in instituting and continuing this action in its present form.

Now having obtained their judgment the plaintiffs sought to enforce it, in the process resorting to the employment of sale of land proceedings pursuant to s. 621 of the Judicature (Civil Procedure Code) Act as they were entitled to do. Their efforts are best described in the evidence of the plaintiff, George A. Brown. That evidence which is incorporated in his affidavit dated October 27, 1987, reads as follows:

> " On the 7th day of November, 1979 the plaintiffs obtained leave to issue a Writ for Sale of land pursuant to Section 621 of the Judicature (Civil Procedure Code) Act against lands listed in the said Order owned by the defendant.
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> Pursuant to the terms of the said Order dated the 7th day of November, 1979 an Enquiry was held on the 30th June, 1981 and it was found that all the lands mentioned in the Order save that registered at Volume 1072 Folio 645 were hopelessly charged and encumbered. Accordingly, we proceeded against that unencumbered property with leave to proceed against the other lands listed in the event that we failed to satisfy our Judgment in full against the unencumbered lands.
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> The Final Order for Sale was made on the 28th day of October, 1981 in respect of land registered at Volume 1072 Folio 645 after an Enquiry was held.
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> That between October, 1981 and October 1985 when a Certificate for Sale of Land registered at Volume 1072 Folio 645 was issued in the names of the plaintiffs several attempts at

sale by Public Auction failed and proposed Purchasers by Private Treaty fell through not having reached the reserved price. The plaintiffs having bidbeyond the reserved price purchased the lands by virtue of an Agreement for Sale under Order of the Court dated the 30th March, 1984 which has already been exhibited to this Honourable Court on the 13th March, 1986 under an Affidavit filed herein by the plaintiffs on that date.

All documents necessary to vest Title in the said land registered at Volume 1072 Folio 645 in the plaintiffs' names were lodged at the Titles Office on or about November, 1985. The documents were however returned with the Registrar's note that the Title had already been cancelled and a new Certificate of Title issued therefor in the name of a Third Party.

Unfortunately, between October, 1981 and November, 1985 a Third Party without notice of the plaintiff's interest had acquired the interest in the lands registered at Volume 1072 Folio 645 so as to defeat the plaintiffs interest under the terms of the Court's Order.

That under the leave reserved to proceed against other lands owned by the defendant, the plaintiffs sought to proceed against lands registered at Volume 1072 Folio 413; Volume 1072 Folio 674 and Volume 1103 Folio 394 of the Register Book of Titles.

That leave sought was obtained on the 24th April 1986. Under the terms of that Order the plaintiffs were obliged to proceed to a second Enquiry which was held on the 10th March, 1987. The Deputy Registrar (Ag.) certified that (inter alia) the amount due from the defendant to the plaintiffs to the 10th March, 1987 was $14,128.43.

That it is a further term of the said Order that the lands be disposed of by Public Auction by a private Auctioneer on at least two occasions and that failing disposal of the properties by that method that the lands be disposed of by private Treaty with leave to the plaintiffs to attend and bid at the Auctions.

That the plaintiffs verily believe that under the terms of the previous Order dated the 28th October 1981 when it proved impossible to dispose of the lands registered at Volume 1072 Folio 645 by Public Auction that this exercise shall also be futile and further protract the execution of this Judgment entered nine years ago.

That alternatively, the plaintiffs seek leave for the Court to issue a Certificate for Sale of land in the names of the plaintiffs re lands registered at Volume 1072 Folio 413, Volume 1072 Folio 674 and Volume 1103 Folio 394 subject to the existing encumbrances mentioned thereon."

Eventually as I have already said the plaintiffs sought and obtained an order of the Court pursuant to which they became the registered proprietors of the three properties, including Lot 96, previously referred to in this judgment. In the course of this exercise the plaintiff, George A. Brown, in an affidavit dated December 7, 1987, swore, inter alia, as follows:

> " I beg to refer to my Affidavit filed herein dated the 27th October, 1987 and beg to state further that I verily believe that the said lands registered at Volume 1072 Folio 413, Volume 1072 Folio 674 and Volume 1103 Folio 394 are together worth no more than $10,000.00."

Subsequently, in a declaration dated January 19, 1988, the same plaintiff declared as follows:

> " I am informed and verily believe that the said lands registered at Volume 1072 Folio 413 is valued at no more than $3,500.00."

Counsel for the applicant severely criticized these two valuations of the plaintiff, Brown, and pointed to two valuations of Lot 96 which were furnished on the applicant's behalf. The first of these relates to an inspection of Lot 96 which was done on July 27, 1988 and which resulted in the property being valued as of July 27, 1987 at $180,000.00; the second valuation which was in respect of an inspection done on September 3, 1988 valued the property as at that date at $250,000.00. Both valuations, it is to be observed, post-dated all the steps taken by the plaintiffs to become registered proprietors of Lot 96. It is, therefore, impossible to contend that the plaintiffs, or either one of them, knew or ought to have known of these valuations at the time that they (the plaintiffs) were seeking to acquire Lot 96. It is a notorious fact that in the decade 1970 - 1980 the value of land in Jamaica depreciated greatly and that this phenomenon applied island-wide. Obviously, the Cardiff Hall Estate subdivision in Saint Ann did not escape this general depreciation, hence the difficulty which the plaintiffs encountered in attempting to dispose of the land registered at Volume 1072 Folio 645, and the fear expressed that they would experience similar difficulty in selling Lot 96 and the other lands, all of which formed part of the same sub-division. It is , too, to be remembered that by the time the plaintiffs resorted to sale of land proceedings the total sum of the judgment debt and costs owing to them had increased with the accretion of

interest to an amount of $14,128.43. It is also to be noted that in making the affidavit and declaration above referred to the plaintiff, George A. Brown, prefaced his valuations, in the one by the words "I verily believe" and in the other by the words "I am informed and verily believe ". This suggests that in both instances he was speaking as to information given to him rather than from information within his personal knowledge. The question is, did he hold an honest belief in the statements made in these two documents? In this regard I agree with the submission of counsel for the plaintiffs that an honest belief, no matter how unreasonable, cannot constitute fraud. In the circumstances of this case, and bearing in mind the fact that the onus is on the applicant to prove fraud, I cannot say that the plaintiff, George A. Brown, did not honestly believe the contents of these two documents which he made.

Next it was argued that the applicant has a right to intervene and to be added as a defendant to these proceedings on the basis that he is a person with a proprietary interest in Lot 96 which has been adversely affected by the judgment of the Court. In support of this argument counsel for the applicant relied on the case of Linton Williams v. Jean Wilson et. ors. (unreported) (SCCA No. 73/87). In that case the plaintiff, in an action in negligence, obtained a default judgment against the defendants for damages and costs. All efforts to enforce the judgment having otherwise failed, the plaintiff filed a writ against the respondents, Insurance Company of the West Indies, under the provisions of s. 18 (1) of the Motor Vehicle (Third Party Risks) Act. The respondents then made application to the Court to set aside the plaintiff's default judgment, but the application was opposed when it came on for hearing before Reckord J. (Ag.) (as he then was) on the ground that the respondents had no locus standi to make their application they not having previously obtained the leave of the Court to intervene in the proceedings. The learned trial judge having ruled in favour of the respondents, the plaintiff appealed to the Court of Appeal in C.A. 47/87. On that appeal it was held that an Insurance Company in the position of the respondents had a right to intervene in the action, and not just a liberty to do so. In giving the judgment of

the Court in SCCA No. 73/87 Rowe P. explained the rationale of the Court's decision in C.A. No. 47/87 in this way:

> " This Court considered the course of procedure adopted in the English Court of Appeal in Jacques v. Harrison (1863) 12 W.H.D. 106 and in Windsor v. Chalcraft (1938) 2 All E.R. 751 and being in respectful agreement with the decisions in both cases, decided that an Insurance Company in the position of the respondents had a right to intervene in the action, and not just a liberty so to do. Consequently the respondents could intervene as of right to seek leave to set aside the default judgment. In other words, the Court was of the view that a person in the position of the respondents who had a contractual relationship with the defendant, governed by the Motor Vehicle Insurance (Third Party Risks) Act, could on its own motion and in its own name intervene in a suit, if there was a possibility that such an Insurance Company could be liable on the judgment by virtue of Section 18 (1) of the said Act."

Later on, in elaborating on the principle involved, the learned President went on to say:

> " The stranger, such as the respondents, who obtains an interest by virtue of obligations prescribed by section 18 of the Motor Vehicle (Third Party Risks) Act can apply in the name of the defendant for leave to set aside the default judgment, or can apply in his own name for a similar Order but thereafter can only defend the action in the name of the defendant on the record. But I do not think that the respondents can be permitted to raise a defence peculiar to itself which has absolutely nothing to do with the original action, which is not available to the defendants in the suit, and therefore cannot be raised by such defendants. It is one thing to have a judgment set aside so that the questions in issue between the parties can be fairly tried but quite another thing to contend that collateral issues irrelevant to the plaintiff's claim against the defendants can be litigated as part of the original action. I do not think that a person who has a right to intervene to set aside a default judgment necessarily has the further right to be added as a party to the action, e.g. as a defendant, and in the instant case I can see no basis on which the addition of the respondents as a defendant can be justified. I would therefore think that the Order of Reckord J. (Ag.) ordering that the respondents be joined as a defendant cannot stand."

It will be seen, therefore, that the Court of Appeal was there dealing with the special contractual relationship which exists between insurer and insured under the provisions of the Motor Vehicle Insurance (Third Party Risks) Act. There the case for the respondents would, of necessity, have been identical with the case for the defendants. In this respect it is clearly distinguishable from the instant case in which, quite significantly, the complaint of the applicant has nothing to do with the issues between the plaintiffs and the defendant. More in point was the case of Moser v Marsden (1892) 1 Ch. 487 cited by counsel for the plaintiffs. There the plaintiff, the patentee of a machine, brought an action against the defendant for using a machine which he alleged was an infringement of his patent. Auguste Montforts, the maker and patentee of the defendant's machine, applied to be added as a defendant, alleging that a judgment in the action would injure him, and that the present defendant would not efficiently defend the action. It was held that Auguste Montforts, not being directly interested in the issues between the plaintiff and defendant, but only indirectly and commercially affected, the Court had no jurisdiction to add him as a defendant. In the instant proceedings the applicant is not directly interested in the issues between the plaintiffs and the defendant, but only indirectly affected by the method of enforcement of the plaintiffs' judgment. Admittedly, the applicant does have an equitable interest in Lot 96 but the fact of the matter is that he has no interest whatever in the subject matter of the plaintiffs' claim against the defendant and his intervention is in no way necessary to a determination of the issues between the plaintiffs and the defendant. In this sense he is, in my judgment, a stranger to the plaintiffs' action and, as such, has no legal right to intervene in that action. His application for leave to intervene must, therefore, fail.

The application to set aside the plaintiffs' judgment may, I think, be disposed of quite shortly. Clearly the applicant has no locus standi to bring or maintain such an application. The plaintiffs obtained a monetary judgment in which as I have already observed the applicant has

no interest whatever. His interest lies in Lot 96 to which, as I have found, the plaintiffs have acquired an indefeasible title under the Act. For the reason I have stated the plaintiffs' judgment is not open to being set aside by the applicant and, indeed, it must be said that this particular form of relief was not seriously canvassed by counsel for the applicant.

Finally, before parting with this matter I would pause to observe that the evidence before me casts the applicant in the mould of his own worst enemy. He purchased Lot 96 in the year 1968 and from that time was in possession of a transfer of land duly executed by the vendor (the defendant in these proceedings) as well as the duplicate certificate of title to the property. Thereafter, for twenty years, the applicant did nothing to perfect his title by registration, or even to protect it by caveat, as he might have done. The explanation for the applicant's inaction notwithstanding (the applicant says that he had intended to develop the land and to form a company for that purpose, but was undecided as to whether to transfer the land to himself or to the company), I am of the opinion that he is guilty of unreasonable delay. In a word he has slept on his rights.

In the result this motion is dismissed with costs to the plaintiffs to be agreed or taxed.