



[2020] JMSC Civ 240

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

**IN THE CIVIL DIVISION**

**CLAIM NO. 2018 HCV 04172**

<b>BETWEEN</b>	<b>HENRY CHARLES JOHNSON</b>	<b>CLAIMANT</b>
<b>AND</b>	<b>SAGICOR BANK JAMAICA LTD</b>	<b>1<sup>ST</sup> DEFENDANT</b>
<b>AND</b>	<b>THE REGISTRAR OF TITLES</b>	<b>2<sup>ND</sup> DEFENDANT</b>
<b>AND</b>	<b>VALERIE BROWN-McINTOSH</b>	<b>3<sup>RD</sup> DEFENDANT</b>

**IN CHAMBERS**

**Mr. Lenroy Stewart instructed by Wilkinson and Co for the Claimant/Respondent/Applicant**

**Ms. Christine McNeil instructed by Director of State Proceedings for the 2nd Defendant/Applicant**

**Mr Jason Mitchell instructed by Cruickshank Law Office for the 3rd Defendant**

Heard: July 21, 2020 and December 11, 2020

**Application to strike out – Immunity of Registrar – Relevant date for registration of transfer - Pre-conditions to filing suit against the Registrar of Titles – Requirement for Fraud to be specifically pleaded – True Test for Fraud**

**HUTCHINSON, J**

**INTRODUCTION**

**[1]** There are two applications before me both of which seek orders to have the Fixed Date Claim Form filed in this action on the 29th of October 2018, struck out. The first application was filed by the 2nd Defendant on the 6th of December 2018 and the following orders are being sought;

1. The claim be struck out against the 2nd defendant as being an abuse of the process of the court and disclosing no reasonable grounds for bringing the claim.
2. Costs of this application to the 2nd defendant to be taxed, if not agreed.
3. Such further or other relief as the court deems just in the circumstances.

**[2]** The second application was filed on behalf of the 3rd Defendant on the 21st of January 2019 in which she seeks the following orders;

1. That the Fixed Date Claim Form filed on October 29, 2018 be struck out against the 3rd Defendant pursuant to the Supreme Court of Jamaica Civil Procedure Rules ("CPR") Rule 26.3 (1) (b) in that the Claimant's statement of case discloses no reasonable grounds for bringing the claim.
2. Further and alternatively, that the Fixed Date Claim Form filed on October 29, 2018 be struck out against the 3rd Defendant for an abuse of process of this Honourable Court pursuant to CPR Rule 26.3 (1) (c).
3. That service of the Claimant's Fixed Date Claim Form filed on October 29, 2018 be set aside as against the 3rd Defendant;
4. Further or alternatively, that the 3rd Defendant be granted an extension of time within which to file a Defence or Affidavit in answer and that

requirement for filing such Defence or Affidavit in answer be stayed pending the hearing of this Application.

5. Costs.

6. Such further and other relief as this Honourable Court deems fit.

[3] Although Sagicor Bank is named in the suit as the first defendant, they were not parties to this hearing pursuant to orders made by another Court.

## **BACKGROUND**

[4] The events which resulted in this claim began in or about March 2010 when the Claimant entered into an agreement with RBTT Bank, the predecessor of Sagicor Bank, for mortgage financing in the sum of JMD\$16,000,300. In September of the same year he entered into another agreement with the bank to finance an additional JMD\$2,000,000. In February 2016, the Claimant was informed of the balance outstanding on the accounts and asked to make a full payment to settle the account within 60 days.

[5] On the 6th of June 2016, a letter was sent to him which indicated the balance owed to the Bank as JMD\$29,000,000 and requested payment of same. The property was subsequently listed for sale and on the 24th of July 2017 a caveat was lodged by the Claimant. On the 24th of September 2017, the 3rd Defendant entered into a sale agreement with the 1st defendant for the purchase of the property for the sum of JMD\$27,000,000. The transfer instrument was lodged with the Titles office on the 1st of May 2018 and a warning to caveator was issued to the Claimant by the 2nd defendant on the 8th of May 2018 which was scheduled to expire within 14 days.

[6] The transfer to the 3rd defendant was executed and the 1st of May 2018 was recorded as the date on which it had been effected. In June 2018, the Claimant was served with a notice to quit by the 3rd defendant and on the 29th of October

2018 he filed this Fixed Date Claim Form supported by an affidavit in which he seeks the following orders;

1. A declaration that the 1st Defendant wrongfully, unlawfully and improperly exercised its Power of Sale in relation to mortgage number 1643370 regarding the Claimant's real property known as Lot 30 Maffe Drive, Unity Drive, Pimento Hill, Montego Bay in the parish of Saint James, comprised in Certificate of Title registered at Volume 1 183 Folio 473 in the Register Book of Titles (hereafter referred to as 'The said property');
2. A Declaration that no Notice or, alternatively, no adequate legal or proper Notice, was sent to the Claimant advising him of the 1st Defendant's intention to sell the said property;
3. Further, or alternatively, a Declaration that the said property was sold at a gross undervalue and the Claimant is entitled to be compensated in damages by the Defendants, jointly and/or severally, for any loss suffered as a result of such sale;
4. An Order for the 1st Defendant to account to the Claimant regarding the sale of the said property;
5. An Order that the 1st Defendant account to the Claimant and/or refund to the Claimant all sums with interest placed on deposit with Jamaica Citizens Bank Limited, control of which company was later assumed by the 1st Defendant, such deposits bearing certificate number 01 18894, certificate number 0569050, certificate number 571 21 and debenture number 9000289. respectively;
6. A Declaration that the transfer of the said property by the 1st Defendant to the 3rd Defendant was fraudulently effected and, consequently, is invalid and unenforceable;

7. A Declaration that Caveat Number 20741 59 was still in effect at the time the said transfer was registered;
8. Further, or alternatively, A Declaration that the said transfer by the Defendant to the 3rd Defendant was ineffective as it was unlawfully or wrongly effected or registered on the 1st day of May, 2018 while Caveat Number 2074159 was still in effect;
9. An order that the Certificate of Title for the said property be retransferred by the 3rd Defendant to the Claimant;
10. An Order that the Registrar of the Supreme Court be authorized to sign any transfer or other relevant document on behalf of any party hereto;
11. Liberty to apply;
12. Damages;
13. Interest on any damages awarded at such rate and for such period as this Honourable Court deems just;
14. Costs; and
15. Such further and other relief as this Honourable Court deems just.

## **2nd Defendant's Submissions**

[7] In submissions filed on behalf of the 2nd Defendant, Ms. McNeil indicated that the application was based on two limbs of Rule 26.3 of the CPR, the first being that the bringing of the claim constituted an abuse of process and secondly there was no reasonable grounds for including the Registrar in this suit. She asked the Court to consider the principles laid out in ***Sebol Limited and Selective Homes and Properties Ltd v Ken Tomlinson etal S.C.C.A 115/07*** which outlined the circumstances in which a claim should be struck out and she stated that these were as follows;

- a. Striking out should only be done in a plain and obvious case
- b. The pleadings should be examined to determine if it gives rise to a cause of action against the Applicant.
- c. The action may be struck out if it can be tried without the Applicant.

[8] Ms. McNeil argued that these principles were all applicable to the position of the 2nd Defendant and justified the striking out of the claim against her. She made reference to the remarks of Smith JA in *Registrar of Titles v Melfitz Limited et al S.C.C.A 9/03* and submitted that the Learned Judge had stated that there was no need for the Registrar of Titles to be named as a defendant where the remedies sought are declarations, injunctions, cancellations of certificates of title and the re-transfer of a title.

[9] She invited the Court to take note of the contents of the Claimant's affidavit and contended that it showed no evidence of fraud on the part of the Registrar or any collusion or complicity in wrong doing. The case of *Davy v Garrett [1878] 7 Ch D 473* was highlighted for the Court's attention as authority for the proposition that where fraud is alleged it needs to be specifically pleaded and the Court should not be left to infer this from the circumstances. Ms McNeil argued that in the absence of evidence to prove fraud, the Registrar was immune from suit pursuant to the provisions of Section 160 of the Registration of Titles Act (ROTA)

[10] She asserted that the statutory preconditions for bringing an action against the Registrar found at Sections 165 and 166 of ROTA were not complied with by the Claimant prior to bringing the claim and as such the action should be barred under Section 168. Ms McNeil also observed that any civil suit against the Registrar had to comply with Section 162 and 164 of ROTA and this action did not.

[11] In respect of the actions taken by the Registrar, Counsel highlighted the affidavit of Ms. Walcott which outlined a chronology of events in respect of the instrument of transfer and noted that it was first lodged on the 5th of March 2018 and rejected

several times before being re-deposited on the 1st of May 2018 when it was finally accepted for processing. Ms. McNeil submitted that pursuant to Section 59 of ROTA that last date on which the instrument was lodged would have been deemed the date of registration in order to ensure the issue of priority and this was the reason why the registration appeared to have been done before the caveat had expired.

[12] She submitted that the caveat which had been lodged had delayed the registration of the transfer but once the warning to the caveator had been sent and no Court order was presented to extend its lifespan, the provisions of Section 140 of ROTA would have been complied with and the transfer could lawfully be registered. She argued that in these circumstances there was no dishonesty or moral turpitude on the part of the Registrar.

[13] She asked the Court to note that the provision of Section 2(1)(a) of the Public Authorities Protection Act to which the Claimant's Counsel made reference was entirely distinguishable as that related to the bringing of actions in circumstances where there was a limitation period and the language used in that context was specific to that situation. She argued that the use of the word 'shall' between sections 160 and 170 of ROTA which treated with the bringing of suits against the Registrar made it clear that the requirements outlined were mandatory but they had not been complied with by the Claimant. Ms McNeil also asserted that it was wholly inaccurate to interpret Section 158 of the Act as restricted to situations in which the Court can direct the Registrar in cases where she isn't named as a party and she relied on the decision of the *Registrar of Titles v Melfitz* in support of this argument.

### **3rd Defendant's Submissions**

[14] Mr Mitchell submitted that the application by the 3<sup>rd</sup> defendant was being brought on the basis that the action by the Claimant was an abuse of process and there were no reasonable grounds for filing same against this defendant. He argued that

the 3rd Defendant was a bona fide purchaser for value without notice as having seen the property listed for sale she entered into an agreement with the 1st Defendant and purchased same. He asked the Court to note that his client had suffered great hardship as not only is she being kept out of the property she has purchased but she also has to be paying the sum of JMD\$239,127.85 each month as mortgage.

- [15] In outlining the basis for this application, Counsel made reference to the decision of ***Dennis Atkinson v Development Bank of Jamaica et al [2016] JMCC Comm 37*** where the Learned Judge observed that 'reasonable grounds mean a reasonable cause of action'. Mr Mitchell submitted that in these circumstances this requirement has not been met. He asserted that the 3rd Defendant as a registered proprietor of the property in question had a title which was indefeasible under the Act and could only be called into question where there was actual evidence of fraud.
- [16] He relied on the remarks of Harris JA in ***Harley Corporation Guarantee Investment Co Ltd v Estate Rudolph Daley et al [2010] JMCA Civ 46*** where she outlined that in the absence of fraud an absolute interest remains vested in a registered proprietor and all rights, estate and interests would prevail in favour of the registered proprietor. Mr Mitchell argued that applying these principles to the instant claim, the Claimant's statement of case does not disclose any evidence or adequate evidentiary material to establish that the interest of the 3rd defendant was created by fraud. He asked the Court to note that the particulars of fraud should have been pleaded pursuant to rule 8.9 and noted that in the ***Harley Corporation*** decision, the Court had also cited the importance of such information being provided.
- [17] Counsel insisted that for there to be evidence of fraud, the authorities made it clear that there had to be actual fraud, that is, dishonesty of some kind and not equitable or constructive fraud. He referred the Court to the decision of McDonald Bishop J, as she then was, in ***Bent v Evans C.L. 1993/B115*** and the guidance provided

therein on the evidence required to show fraud which is sufficient to defeat a registered title. He argued that in the Claimant's affidavit while there was reference to alleged fraudulent conduct on the part of the 3rd defendant there were no details provided as to what constituted this conduct.

- [18] The Court was referred to the decision of ***Corrine Minto v David Addison et al 2006HCV03523*** where Sykes J, as he then was, made it clear that Section 70 confers impregnability on the registered owner which could only be defeated by actual dishonesty on the part of the proprietor. Mr Mitchell argued that contrary to the assertions of the Claimant, not only was there no fraud but there was also no actual benefit to the 3rd defendant in being a part of this litigation which had resulted in ongoing fees to cover the cost of representation and a delay in her application for recovery of possession in the lower court.
- [19] In support of his assertion that the filing of the Claim was also an abuse of process, Mr Mitchell relied on the decision of ***Foote v Capital and Credit Bank Ltd et al 2008HCV03328***. He argued that this decision made it pellucid that on a proper exercise of a power of sale, the mortgagor's equity of redemption is forever extinguished once the mortgagee has entered into a binding contract with a prospective purchaser and as such any question of whether there had been a proper exercise of the power of sale was between the Claimant and the Bank only.
- [20] In addition to the striking out of the action, Mr Mitchell submitted that the Court was also being asked to make an order for recovery of possession and mesne profits as the 3rd defendant had been paying a mortgage for over a year for the property which was still occupied by the Claimant. He relied on the decision of ***Johnson v Crooks [2017] JMSC Civ 100*** which he submitted outlined the principle that damages for this deprivation could be awarded by way of an order for mesne profits. He asked the Court to consider the overriding objectives and exercise its powers pursuant to Rule 26.2 to bring all matters involving the 3rd defendant to an end.

## Claimant's Submissions

- [21] In submissions on behalf of the Claimant, Mr Stewart stated that it is settled law that the striking out of a claim should be a last resort and should only be done in plain and obvious cases. He submitted that contrary to the assertions of Ms McNeil, the Registrar did not enjoy blanket immunity from suit and Sections 164 and 166 of ROTA contemplated cases which were being brought against the Registrar in wholly different circumstances.
- [22] Mr Stewart also took issue with the assertion that Sections 165 and 166 of the Act operated as conditions precedent to the filing of an action against the Registrar and submitted that Section 165 merely created a mechanism for the provision of advance notice of a suit to the Registrar whereas Section 166 permits the Registrar to recover in full the costs of actions successfully determined in her favour. He compared these provisions with Section 2(1)(a) of the Public Authorities Protection Act which outlined when an action can be brought and he contended that the mandatory language seen within this provision is absent from Sections 165 and 166 ROTA. He relied on the authority of ***Janet Edwards v Jamaica Beverages Ltd CH2002/E-037*** in support of this point in respect of the language used. He also submitted that section 168 of ROTA was not relevant to this matter or the Court's consideration.
- [23] In respect of Section 158 of ROTA, Mr Stewart submitted that this provision merely outlines the power of the Court to direct the Registrar in cases where she is not a party to a suit and as such is not applicable to the instant claim. He refuted the submission that this suit was an abuse of process and he insisted that there were reasonable grounds for bringing this claim. He relied on the decision of ***Victor Hyde v E Phil & Sons A.S Ltd and the Attorney General of Jamaica (consolidated decision) [2015] JMSC Civ 150*** where the Court had made it clear that reasonable prospect of succeeding on claim should not be equated with a statement of case disclosing no reasonable grounds for bringing the claim.

- [24] He submitted that the Court should be mindful not to be drawn into conducting a mini-trial and the Claimant had presented a case that should be permitted to progress as filed or with amendments which could be permitted by the Court. In respect of the supplemental affidavit of the Registrar and the submissions filed in support of same, Mr Stewart asked the Court to disregard the affidavit and its exhibits as well as the submissions in respect of same. He argued that the documents being computer generated documents, the affidavit should have complied with the requirements of the evidence Act, specifically Section 31G and where it did not, there was no proper basis for same to be admitted and reviewed by the Court. He made reference to the decision of ***The Bank of Nova Scotia v Sovereign Resources (UK) Ltd and Dean Williams [2017] JMCC Comm 29*** where the Learned Judge made it clear at paragraph 29 of that decision that an obligation is placed on the litigant who is intends to rely on computer generated information or information derived from a computer to establish that it has satisfied the conditions as to admissibility. Mr Stewart argued that this requirement had not been met by the Registrar and in those circumstances the documents as well as the affidavit which made reference to them should not be considered by the Court and the application should be dismissed.
- [25] In respect of the 3rd Defendant, Mr Stewart reiterated his position that striking out should be a matter of last resort. He again made reference to the decision of ***Victor Hyde E. Phil and Sons*** and the distinction made between instances involving a reasonable prospect of success and the question whether a statement of case disclosed reasonable grounds for bringing an action. He argued that the Claimant's pleading raises a question to be tried by the Court and the Court can exercise its discretion to allow an amendment of the pleadings instead of striking out such a claim where there is an issue.
- [26] In relation to the assertion that the Claim is an abuse of process, Counsel contended that the 3rd defendant had failed to allege any of the established grounds to aver that there was an abuse of process, such as action estoppel, issue

estoppel or res judicata and in all the circumstances this application should also be dismissed.

## **ANALYSIS/DISCUSSION**

### **Should the claim against the Registrar of Titles be struck out?**

[27] It is not in dispute between the Parties that Rule 26.3 of the CPR makes specific provision for matters to be struck out in certain circumstances, two of which are where there are no reasonable grounds for bringing the claim or the claim itself is an abuse of process. It has also been accepted by both sides that authorities such as **Sebol Limited** have made it clear that while a matter can be struck out, it should only be done in obvious and plain cases and only upon a careful review of the pleadings to determine if there is any merit in allowing the claim to proceed. In determining the application brought on behalf of the 2nd Defendant it is necessary to consider the provisions of the CPR and ROTA to determine the position where claims such as these have been brought.

[28] Rule 26.3(1) of the Civil Procedure Rules, 2002 states as follows:

*“(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 —*  
*(a)*  
*(b) that the statement of case or part to be struck out is an abuse of the process of the court or is likely to obstruct the just disposal of the proceedings;*  
*(c) that the statement of case or part to be struck out discloses no reasonable grounds for bringing or defending a claim.”*

[29] In a discussion on striking out a statement of case, the learned authors of Halsbury’s, Laws of England, 4th Edition, at paragraphs 430-435, stated, inter alia:

*the powers are permissive...and they confer a discretionary jurisdiction which the court will exercise in light of all the circumstances concerning the offending pleading. . . Where a pleading discloses no reasonable cause of action... it would be ordered struck out or amended, if it is*

*capable of amendment. . . No evidence including affidavit evidence is admissible on an application on this ground and since it is only the pleading itself which is being examined, the court is required to assume that the facts pleaded are true and undisputed. However, summary procedure... will only be applied to cases which are plain and obvious, where the case is clear beyond doubt, where the cause of action or defence is on the face of it obviously unsustainable, or where the case is unarguable. . . Nor will a pleading be struck out where it raises an arguable, difficult or important point of law.”*

[30] The effect of these provisions and authorities is, where a statement discloses no reasonable grounds for bringing or defending it, it will be ordered struck out or amended, if it is capable of amendment. Rule 26.3 (1) (c) will however, only be applied to cases which are “plain and obvious, that is, where the cause of action or defence is obviously unsustainable, or unarguable.

[31] In respect of the provisions of ROTA, Section 160 of the Act has been the subject of some discourse in this matter and it states as follows;

*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** (emphasis mine)*

[32] The language used in this section is clear and leaves no doubt that the Registrar is cloaked with blanket immunity against suit when an act or matter was done or omitted to be done in good faith. As such, in order for a party to be able to proceed against the Registrar, he would have to provide cogent evidence that the actions complained of were not done in good faith but pursuant to a fraudulent purpose.

[33] In the **Melfitz** case, the Court of Appeal in addressing the specific instances where a claim could conceivably be brought against the Registrar noted that section 158 of ROTA empowers a Court or Judge to grant remedies to a party such as a declaration of entitlement to land, cancellation of a certificate of title and a re-transfer of land to the original title holder upon the recovery of land from another who had been registered as proprietor thereof all without the need for the Registrar

to be a party to the suit. While this pronouncement by the Court would refute the need for the Registrar to be a party to this claim for such orders to be made, it is noted that the Claimant is also seeking damages.

- [34] It is in those circumstances that Section 162 and 164 would arise for consideration. Section 162 provides as follows;

*162. Any person deprived of land, or 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 land. 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 is 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 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 -age 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.*

- [35] In the **Melfitz** decision, the Court noted that this provision had been described as a confused and ill drafted one. It was observed by Smith JA that section 162 provides an action for damages by any person wrongfully deprived of land in certain defined circumstances. The Learned Judge noted that this section of the Act as well as section 164, provides a remedy for persons who suffer from the effects of the indefeasibility of title under the Torrens. As such under these

provisions a person deprived of land can bring an action for damages 'where such deprivation was in consequence of fraud'. Smith JA stated that '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 such fraud'. He noted that the proviso to this section outlines the circumstances in which a person deprived of land may bring an action against the Registrar as nominal defendant to recover damages and he emphasised that the intention of this provision is not to relieve the wrongdoer of the consequences of his wrongful acts as an action for damages can only be brought against the Registrar where the person liable ceases to be liable by virtue of the proviso or is dead, bankrupt or cannot be found within the jurisdiction.

**[36]** The Court also reviewed section 164 which permits a person wrongfully deprived of land or any interest in land through the mistake, omission or misfeasance of the Registrar or any other officer to bring an action against the Registrar as nominal defendant for the recovery of damages in two situations. These were recognised as follows:

- 1) Where the person deprived of land is barred, by the provisions of the Act, from bringing an action for the recovery' of land; and
- 2) Where the remedy by action for recovery of damages as provided by the Act is inapplicable.

**[37]** These principles specifically address the claim for damages which has been brought by the Claimant. In light of the fact that the parties alleged to have engaged in fraudulent conduct have in fact been named in the suit as the 1st and 3rd defendant, in the absence of actual fraud on the part of the Registrar or her nominee the Claimant would not be entitled to sue her for damages.

**[38]** In relation to sections 165 and 166 of the Act, Smith JA affirmed that Section 165 is a condition precedent to the bringing of a claim against the Registrar as it specifically provides that any person entitled to bring an action to recover damages

under the provisions of sections 162 and 164, before commencing proceedings, was required to make an application in writing to the Registrar for compensation. It was also observed by the Learned Judge that section 166 provides that in respect of a claim where recovery of damages is permitted to be brought against the Registrar as nominal defendant, notice in writing of this action and the cause of action was required to be served on the Registrar at least one month before the commencement of the claim.

[39] Smith JA stated that where such a notice is not served, there would in effect be a failure to comply with the mandatory provisions of section 165 and the Court would have no jurisdiction to entertain the action against the Registrar. In light of the foregoing discourse, it is evident that contrary to the assertions of Mr Stewart, there is a requirement for the procedures outlined to be complied with in order to be able to proceed against the Registrar and in the instant claim this has not been done.

[40] The procedural hurdles faced by this Claimant are not however the sum total of its challenges as Counsel for this Applicant has also asserted that there are no reasonable grounds for bringing this action as there was no fraud. In the decision of **Harley Corporation** Harris JA outlined the relevant considerations on this point as follows;

*[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.’”*

[41] It was also noted by the Learned Judge that in **Davy v Garrett**, Thesiger L.J had acknowledged that fraud must be distinctly alleged and distinctly proved and that it was not allowable to leave fraud to be inferred from the facts. Having outlined the relevant test Harris JA continued;

*[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.*

[42] This reasoning was also followed in the decision of **Bent v Evans** where McDonald-Bishop at paragraph 88 of her judgment observed as follows;

*'It is clear to me that an allegation of fraud ought not to be taken lightly and the evidence to prove it must be as weighty as the allegation of it. I will venture to say therefore that fraud must not only be strictly pleaded but must be strictly proved by those who assert its existence, on the clearest, most cogent and indisputable evidence on a balance of probabilities.'*

[43] Upon a careful review of the principles outlined in these decided cases, it is evident that once fraud has been alleged, the party raising this as an issue bears the responsibility of providing specific evidence of the fraudulent conduct or actions alleged and cannot merely invite a Court to infer that this from the evidence presented. The material presented cannot be spurious or capable of another interpretation as the cases call for cogent and indisputable evidence.

[44] An examination of the pleadings which have been filed in this matter reveal a paucity of details as to the fraudulent acts or omissions of the Registrar. Additionally, no evidence has been provided of any collusion between the Registrar or anyone operating on her behalf and any of the other defendants. The Claimant's main contention in support of fraud is that the Transfer of the property to the third defendant was effected prior to the lapse of the caveat on the 22nd of May 2018. The affidavit of the Registrar however clearly explains that although the transfer was registered on the 1st of May this was in keeping with the provision of

section 59 of ROTA which treats the date of lodgement as the relevant date once the provisions of section 140 had been complied with.

[45] Section 59 of the Act provides as follows;

*59. Every instrument presented for registration may be in duplicate (except a transfer whereon a new certificate of title is required), and shall be registered in the order of, and as from, the time at which the same is produced for that purpose; and instruments purporting to affect the same estate or interest shall, notwithstanding any actual or constructive notice, be entitled to priority as between themselves according to the time of registration, and not according to the date of the instrument. Upon the registration of any instrument the Registrar shall bind up the original in his office in a book to be kept for that purpose and shall deliver the other (hereinafter called the duplicate) to the person entitled.*

[46] On a careful review of this provision, it is evident that contrary to the submission of Mr Stewart that the registration of the transfer on the 1<sup>st</sup> of May is clear evidence in support of fraudulent/ dishonest conduct, there is in fact a statutory basis for same. Additionally, although he has asked the Court ignore this affidavit which the 2nd Defendant had been permitted to file, he has provided no cogent argument as to why this approach should be taken. The affidavit outlined the events in relation to the registration of the Transfer and was clearly relevant to the proceedings. It also made reference to the statutory framework which underpinned the process all of which was of assistance to the Court in determining this issue. As such, I did not agree with the submission of Mr. Stewart on this point.

[47] In relation to his submission that the documents exhibited which show the history of the transfer are inadmissible as they are computer generated document and no evidence has been presented to satisfy Section 31G of the Evidence Act, I note that in this situation, in her capacity as Registrar, the affiant would in fact be the custodian of all records generated by her office and would be in a position to speak to same. It is my view that the case ***The Bank of Nova Scotia v Sovereign Resources (UK) Ltd and Deon Williams [2017] JMCC Comm 17*** can be

distinguished as the circumstances in respect of those records were different and additionally, the trial in open Court required that there be strict compliance with the Act where the documents were being placed into evidence.

- [48] The Claimant having failed to present any evidence of fraud on the part of the Registrar, it is clear that there is in fact no reasonable grounds for bringing this action or even allowing it to continue. In these circumstances it is my view that this matter should be struck out against the Registrar.

**Should the claim be allowed to proceed against the 3rd Defendant?**

- [49] The essence of the claim against the 3rd defendant is found at paragraph 31(e) of the Affidavit of the Claimant which was filed in support of the fixed date claim form there it is stated that 'the 3rd defendant colluded with the 2nd defendant and/or persons working with the 2nd defendant to secure the registration of the said transfer to her.' The ensuing paragraphs provide no additional information and the paragraph itself contains no details as to the evidence being relied on in support of this allegation.
- [50] It is settled law that the holder of a registered title has an indefeasible/impregnable right to ownership of a property. Such a right can only be defeated if this title was obtained by fraudulent means and this position is entrenched in statute as section 70 ROTA states;

*70. Notwithstanding the existence in any other person of any estate or interest, whether derived 'by grant from the Crown or otherwise, which but for this Act might be held to be paramount or to have priority, the proprietor of land or of any estate or interest in land under the operation of this Act shall, except in case of fraud, hold the same as the same may be described or identified in the certificate of title, subject to my qualification that may be specified in the certificate, and to such incumbrances as may be notified on the folium of the Register Book constituted by his certificate of title, but absolutely free from all other incumbrances whatsoever, except the estate or interest of a proprietor claiming the same land under a prior registered certificate of title, and except as regards any portion of land that may by wrong description of parcels or boundaries be included in the certificate of title or instrument evidencing the title of such proprietor not being a*

*purchaser for valuable consideration or deriving from or through such a purchaser: (emphasis supplied)*

[51] In **Harley Corporation** in recognition of these rights Harris JA stated as follows;

*[51] As earlier indicated, sections 70 and 71 of the Registration of Title Act, confer on a proprietor registration of an interest in land, an unassailable interest in that land which can only be set aside in circumstances of fraud.*

[52] The Learned Judge then went on to elucidate the true test for fraud which has already been cited in the course of this judgment but in summary made it clear that this Claimant bears the responsibility of providing evidence of actual dishonesty on the part of the 3rd defendant. This responsibility means that he must provide adequate evidentiary material to establish that the interest of the defendant which he seeks to defeat was created by actual fraud.

[53] These principles have been adopted and applied in a myriad of decisions to include **Linel Bent v Eleanor Evans, Dennis Atkinson v Development Bank of Jamaica** and a number of other authorities on the point which were highlighted by Counsel and have left no doubt that where fraud is alleged the details in respect of same need to be expressly pleaded. In light of this principle, the pleadings assume great significance as while it has been asserted that there was collusion which resulted in the transfer of the property to the 3rd defendant, the details of this collusion and the source from which it emitted have not been provided. Neither has any actual evidence of how, when and where this collusion occurred all of which would be material to show that there is adequate evidentiary material in support of this fraud.

[54] On a careful assessment of the Claimant's affidavit it is evident that what the Court is being invited to do is infer from the vague theories provided that collusion must have occurred because the transfer 'appears' to have been effected before the caveat had expired or speculate that it did. To adopt this approach would not only be wholly inappropriate but it would also involve an incorrect application of the law. It is my view that there is no evidence of fraud and this flaw is one which could not be cured by the Claimant being granted an opportunity to amend his claim. In these

circumstances, I am unable to find that there is any reasonable ground for bringing this matter or that it should be allowed to proceed. Accordingly, I am persuaded that this claim should also be struck out against the 3rd defendant.

**[55]** In relation to the request by the 3rd defendant for an order of the Court granting her recovery of possession and mesne profits, I note that not only is there evidence of an existing claim for recovery of possession already pending before the lower Court but that there was no defence and counterclaim filed to this claim seeking these orders. In circumstances where an application for recovery of possession is a cause of action which would have to be filed and pleaded in keeping with the CPR and that awarding mesne profits are tantamount to an assessment of damages hearing on a cause of action filed, I am not persuaded that this would be the appropriate forum for making these orders. As such, the request for these orders are denied.

## **CONCLUSION**

**[56]** In light of the foregoing reasons the applications of the 2nd and 3rd defendant for the claim to be struck out are granted. The requests for orders of recovery of possession and mesne profit by the 3rd defendant are denied. Judgment entered in favour of the 2<sup>nd</sup> and 3<sup>rd</sup> defendant. Costs are awarded to both Defendants to be taxed if not agreed.