



[2017] JMSC Civ 115

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

**IN THE CIVIL DIVISION**

**CLAIM NO. 2007 HCV 00453**

|                |                                |                                 |
|----------------|--------------------------------|---------------------------------|
| <b>BETWEEN</b> | <b>ERVIN MCLEGGAN</b>          | <b>CLAIMANT</b>                 |
| <b>AND</b>     | <b>DAPHNE SCARLETT</b>         | <b>1<sup>ST</sup> DEFENDANT</b> |
| <b>AND</b>     | <b>THE REGISTRAR OF TITLES</b> | <b>2<sup>ND</sup> DEFENDANT</b> |

**Jamila Thomas and Judith Clarke, instructed by Lilieth D. Lambie-Thomas and Co. for the Claimant**

**Ms. Gillian Burgess, of counsel, for the 1<sup>st</sup> Defendant**

**Ms. Alicia McIntosh and Ms. Hazel Edwards, instructed by the Director of State Proceedings, for the 2<sup>nd</sup> Defendant**

**HEARD: September 17 & 18, 2012 & June 9, 2017**

**FRAUD – DEFINITION OF FRAUD – BURDEN AND STANDARD OF PROOF – REGISTERED TITLE – EFFECT OF SS.70 AND 161 OF THE REGISTRATION OF TITLES ACT – EFFECT OF SS. 164-168 OF THE REGISTRATION OF TITLES ACT – WHETHER 2<sup>ND</sup> DEFENDANT IS EXEMPTED FROM LIABILITY BY VIRTUE OF S.160 OF THE REGISTRATION OF TITLES ACT – NEED TO PROVE FRAUD ON THE PART OF THE PRESENT REGISTERED PROPRIETOR IF CLAIM IS TO BE PROVEN**

**ANDERSON, J**

## **THE BACKGROUND AND UNDISPUTED FACTS**

- [1]** The subject property (hereinafter referred to as 'the property') is all that parcel of land being the lot numbered 208, part of Beverly Hills, formerly part of Tankerville Pen in the parish of St. Andrew, formerly registered at Volume 963 Folio 231 and now registered at Volume 1260 Folio 574.
- [2]** The 1<sup>st</sup> defendant is registered on the said certificate of title as the present proprietor thereof by virtue of a transfer, number 770820, registered on the 2<sup>nd</sup> date of July 1993.
- [3]** Between 1991 and 1992 the claimant – Ervin McLeggan purchased the said land and the property was duly transferred to him.
- [4]** Having obtained the duplicate certificate of title for the said property, the claimant migrated to the United States of America.
- [5]** After obtaining the duplicate certificate of title for the said property, the claimant left it in a safety deposit box in a commercial bank in Jamaica and migrated to the United States of America.
- [6]** The claimant continued to pay taxes for the property while he was residing in the United States of America by sending money to his sister and his sister-in-law to pay the taxes. The claimant exhibited the property tax receipts for the years 1993-2002.
- [7]** The claimant has also sent monies to his sister for her to pay someone to bush the subject property and subsequently sent monies to his sister-in-law to have her brother bush the property. This is corroborated by the witness statements of Beverly Chatterpaul and Delroy Chatterpaul dated October 11, 2009, both of which were admitted as their evidence-in-chief at trial.

- [8] In or about 2002, while on a visit to Jamaica, the claimant went to the property and observed that a 'for sale' sign had been posted thereon by Island Homes Limited, who are real estate dealers.
- [9] Thereupon the claimant made enquires at Island Homes Limited about the said notice and was advised by persons there, that the defendant was the registered owner of the land.
- [10] The claimant had, after that was brought to his attention, made enquires at the Office of Titles and then discovered that another title had been issued for the property and that there existed an instrument of transfer (no. 770820) registered on July 2, 1993 reflecting that the claimant had purportedly transferred the property to the 1<sup>st</sup> defendant.
- [11] The claimant though, had not in fact, transferred the property, to the 1<sup>st</sup> defendant. Instead, what had happened, was that a person who had purported to be the claimant, had in fact, forged the claimant's signature on the documents related to the transfer of the property to the defendant and had, at all material times, purported that he was the claimant.
- [12] The transfer of the property to the 1<sup>st</sup> defendant was registered on the title to the property, on July 2, 1993. The 1<sup>st</sup> defendant has been in 'possession' of the property since July, 1993 and has had the property bushed on several occasions. In addition, she has paid property taxes for the property, since 2003.

### **The significant disputed facts**

- [13] Whilst there were perhaps, other disputed facts, those were all pertaining to the most significant disputed facts of all. Those significant disputed facts solely pertain to whether or not the defendants, either separately or collectively, acted fraudulently, in having caused or facilitated the 1<sup>st</sup> defendant to be registered as the holder of the fee simple estate for the property, or in other words, to be registered as the owner of the property.

### **The claimant's allegations as per his statement of case**

[14] In 2007 this claim was commenced against the 1<sup>st</sup> defendant seeking a declaration to the effect that the court should find that the claimant was the original and legal and beneficial owner of the property and that he is entitled to possession of the property and by extension, that he is the legal owner of the duplicate certificate of title which had been issued by the Registrar of Titles. In 2009, amendments were made to the claim form, adding the 2<sup>nd</sup> defendant as a party to the claim and alleging fraud against both defendants, with that alleged fraud, touching on and concerning the transfer of title to the claimant, by the person who had posed as and thus, purported to be, the claimant.

### **The law as regards the particularization of an allegation of fraud and how the term 'fraud' as used in the Registration of Titles Act is defined**

[15] The particulars of the fraud alleged, are very important. The importance of same, is addressed, further on in these reasons.

[16] As regards the need to particularize allegations of fraud in a party's statement of case, in circumstances wherein that party is alleging fraud, see the judgment of Harris, JA in Supr. Ct. Civ. Appeal No. 31 of 2007 – **Harley Corporation Guarantee Investment Company Limited et al** and Supr. Ct. Civ. App. No. 44 of 2007 – **RBTT Bank Jamaica Limited and Estate Rudolph Daley and ors.**, the neutral citation for those consolidated appeals, being: [2010] JMCA Civ. 46, especially at paragraphs 53-58.

[17] At paragraph 58, the Court of Appeal, by virtue of its judgment in that case did accept that fraud may be inferred from the acts or conduct of a defendant, even if the allegation of fraud, has not been expressly, 'pleaded,' or in other words, set out in that party's statement of case. The case – **Eldemire v Honiball** – [1990] 27 PC 5 of 1990, is cited by the Court of Appeal, in that judgment, in support of that proposition.

[18] The Court of Appeal, in that judgment, at paragraph 57, stated that in order to raise fraud, the pleadings must disclose averments of fraud or the facts or conduct alleged must be consistent with fraud. Also in that paragraph, the following statement is made: *'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.'* This court has, for the purposes of this claim, adopted and applied these principles.

[19] At paragraphs 52 & 51 of its judgment in that case, the Court of Appeal stated 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 stated: 'Now fraud clearly implies some act of dishonesty. Lord Lindley in **Assets Company 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.'*

*'51 As earlier indicated, sections 70 & 71 of the Registration of Titles 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. In **Fels v Knowles** – [1906] 26 NZLR 604 the New Zealand Court of Appeal in construing statutory provisions which are similar to sections 70 & 71 said at page 620: 'The cardinal principle of the statute is that the register is everything, and that except in cases of actual fraud on the part of the person dealing with the registered proprietor, such person upon registration of the title under which he takes from the registered proprietor has an indefeasible title against all the world. Nothing can be registered the registration of which is not expressly authorized by the statute.'*

*(‘By statute’ would be more correct). ‘Everything which can be registered gives, in the absence of fraud, an indefeasible title to the estate or interest or in the cases in which registration of a right is authorized, as in the case of easements or incorporeal rights, to the right registered.’*

[20] It is thus worthwhile at this stage of these reasons for judgment, to refer in more detail, to the definition of fraud as set out in the Privy Council’s judgment in **Assets Company v Mere Roihi and ors.** – [1905] UKPC 11. At pages 27 & 28 of that judgment, Lord Lindley, on behalf of the court, stated as follows:

*‘Passing now to the question of fraud, their Lordships are unable to agree with the Court of Appeal. Sections 46, 119, 129 and 130 of the Land Transfer Act, 1870 and the corresponding sections of the Act of 1885 (viz sections 55, 56, 189 and 190) appear to their Lordships to show that by fraud in these Acts is meant actual fraud, i.e 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. Further, it appears to their Lordships that the fraud which must be proved in order to invalidate the title of a registered purchaser for value, whether he buys from a prior registered owner or from a person claiming under a title certified under the Native Land Acts, must be brought home to the person whose registered title is impeached or to his agents. Fraud by persons from whom he claims does not affect him unless knowledge of it is brought home to him or his agents. The mere fact that he might have found out fraud if he had been more vigilant and had made further inquiries which he omitted to make does not of itself prove fraud on his part. But if it be shown that his suspicions were aroused and that he abstained from making inquiries for fear of learning the truth, the case is very different and fraud may properly be ascribed to him. A person who presents for registration a document which is forged or has been fraudulently or improperly obtained is not guilty of fraud if he honestly believes it to be a genuine document which can be properly acted upon.*

*In dealing with Colonial Titles depending on the system of registration which they have adopted, it is most important that the foregoing principles should be borne in mind, for if they are lost sight of that system will be rendered unworkable. Their Lordships are keenly alive to the necessity of vigilance to protect natives against unfair and oppressive dealings on the part of Europeans but on the other hand it is equally important not to disturb registered titles of bona fide purchasers, especially when accompanied by long possession and large outlays.'*

See also: **Honiball and anor. v Alele** – [1993] 43 WIR 314, esp. at pp. 320-324. This court has, in these reasons for judgment applied the legal principles as quoted immediately above.

**[21]** What then, are the particulars of fraud alleged against the defendants? Those particulars have been separately set out in the claimant's amended particulars of claim, which was filed on October 16, 2009 and are set out, verbatim, below:

*'10. The said purported transfer from the claimant to the defendant has been obtained by fraud.*

**Particulars of fraud of the 1<sup>st</sup> defendant**

- (i) Falsely representing that the claimant had entered into an agreement for sale to sell the land to her.*
- (ii) Falsely representing that the signature on Transfer numbered 770820 was that of the Registered Proprietor, the claimant, Ervin McLeggan.*
- (iii) Falsely representing that the claimant had sold the land to her.*
- (iv) Fraudulently securing the transfer of land to herself.*

*11. The claimant has never applied to the Registrar of Titles for a replacement of the original duplicate certificate of title registered at Volume 963 Folio 231 for the said property.*

*12. The claimant therefore avers that the cancellation of the said duplicate certificate of title registered at Volume 963 Folio 231 and issue of the certificate of title registered at Volume 1260 Folio 574*

*was as a result of fraud on the part of the 1<sup>st</sup> defendant and 2<sup>nd</sup> defendant and/or persons acting on behalf of the 2<sup>nd</sup> defendant.*

**Particulars of fraud**

- (i) Fraudulently cancelling the certificate of title registered at Volume 963 Folio 231 without any application being made by the claimant for same to be cancelled and without any legal authority so to do.*
- (ii) Fraudulently issuing the certificate of title registered at Volume 1260 Folio 574.*
- (iii) Fraudulently securing the cancellation of title registered at Volume 963 Folio 231 and issue of certificate of title registered at Volume 1260 Folio 574.'*

**The reliefs being sought by the claimant**

**[22]** Founded upon those allegations as specifically set out in his amended statement of claim and above-quoted, the claimant has sought, as the primary reliefs for this claim, the following:

- (i) A declaration that he is the legal and beneficial owner of property now registered at Volume 1260 Folio 574 of the Register Book of Titles.
- (ii) A declaration that the registration of transfer No. 770820 registered on July 2, 1993 in the name of the defendant on the said certificate of title was fraudulently procured is therefore invalid and unenforceable.
- (iii) An order that the Registrar of Titles forthwith cancels the said transfer.
- (iv) A declaration that the claimant is entitled to possession of the said land.

**The disputed allegations made by the 1<sup>st</sup> defendant as per her statement of case**

**[23]** The 1<sup>st</sup> defendant's statement of case made two (2) allegations which were, at all times, vigorously disputed by the claimant. At this time though, based on the 1<sup>st</sup> defendant's evidence given at trial, those are allegations which the 1<sup>st</sup> defendant has clearly resiled from, or at the very least, led no evidence in support of.



- [24]** That is firstly, the allegation that the claimant or his agent, apparent or implied, had, just as had the 1<sup>st</sup> defendant, on June 30, 1993, signed the sale agreement pertaining to the property.
- [25]** Secondly, there is the allegation made in the 1<sup>st</sup> defendant's defence, that the claimant or his agent, apparent or implied, had, just as had the 1<sup>st</sup> defendant, signed the instrument of transfer with respect to the property.
- [26]** The 1<sup>st</sup> defendant's evidence at the trial during cross-examination, when she was specifically asked the question as to whether the person named as claimant and who had, by then, already completed his testimony, but who had also been in court throughout the entirety of the trial, had been the one who signed the instrument of transfer, in her presence, the 1<sup>st</sup> defendant' reply was: 'No.'
- [27]** No evidence was led by the 1<sup>st</sup> defendant in support of her assertion that the claimant had signed the agreement for sale of the property to her.
- [28]** What is not disputed is that someone who had purported to be the claimant, had signed that agreement for sale and had thereafter signed the instrument of transfer.
- [29]** There was also led into evidence at trial, an expert report of Carl Major, who is a Consultant Document Examiner and Forensic Analyst, primarily in the field of handwriting and who is also now a retired senior superintendent of police. That expert report of his, has served to confirm that the signature on the land transfer document (otherwise referred to in the claimant's amended particulars of claim, as the 'instrument of transfer),' is of different authorship than the specimen signatures of the claimant which Mr. Major had also used in his analysis, for purpose of comparison.
- [30]** That evidence of Mr. Major as admitted at trial, via his expert report, was undisputed.

- [31] In the final analysis therefore, there are only two (2) other aspects of the 1<sup>st</sup> defendant's defence, which are disputed. The most important of these two (2) aspects, is her assertion that she obtained the transfer of the property in her name in good faith relying on the fact that the certificate of title was produced and the property identified by a surveyor with the result that her registered title is indefeasible by virtue of the provisions of the **Registration of Titles Act**. (paragraph 14 of the defence) This court has treated with this particular aspect of the 1<sup>st</sup> defendant's defence, as being her response to the claimant's amended claim that she acted fraudulently in having obtained the title to the property, in her name.
- [32] There is a second remaining aspect though, to the 1<sup>st</sup> defendant defence, which although pursued by her counsel on her behalf, need not be considered much further, as it is unmeritorious.
- [33] That is as regards her allegation, as set out in paragraph 13 of her defence, that the claimant has never, until November 21, 2002, made any claim against the 1<sup>st</sup> defendant in respect of the property and has permitted the defendant to maintain the property and to expend money in relation thereto, without any protest and is therefore estopped from challenging the 1<sup>st</sup> defendant's proprietary right thereto.
- [34] That aspect of the defendant's defence is unmeritorious, as she is the registered title holder for the said land. She alone therefore, had the legal right to decide as to how that land would be utilized and/or occupied and as to who would occupy same.
- [35] That she has so decided for over twelve (12) years, is neither here nor there. It would have been different, if the claimant had been basing his claim, on the assertion that he had enjoyed free and undisturbed occupation of the property and the defendant had been seeking to counter that, by asserting that that is not so. The law regarding that which is commonly described as, 'adverse possession,' is a basis upon which a person's claim to registered title for

land/property can be defeated, but in such a case, it is not for the registered title holder to raise the issue of, 'adverse possession.'

**The disputed allegations made by the 2<sup>nd</sup> defendant as per their statement of case**

[36] As far as the 2<sup>nd</sup> defendant is concerned, that office's defence has two (2) segments. One (1) segment responds to the fraud claim, by asserting that said office had, at no time, acted fraudulently in having cancelled the claimant's prior title and having issued a new title to the 1<sup>st</sup> defendant, as there was reasonable ground to believe that the application for the cancellation and the issuance of a new title, was done by the claimant.

[37] For my part, I would merely add for present purposes and at this juncture, that as far as this claim is concerned, it matters not, whether there was reasonable ground to believe that the application for the cancellation and the issuance of a new title, was done by the claimant, since the claimant has not alleged negligence against the 2<sup>nd</sup> defendant, but rather, fraud and in any event, our Court of Appeal has made it clear, in their judgment in the case: **The Registrar of Titles v Melfitz Ltd. and Keith Donald Reid** – SCCA No. 9 of 2003, at p. 14, that, *'the common law remedy of negligence is not available against the Registrar and any person acting under the authority of the Registrar.'*

[38] The second segment of the 2<sup>nd</sup> defendant's defence, pertains to that office's contention that this claim against them, discloses no, 'cause of action against the 2<sup>nd</sup> defendant.' (paragraph 5 of the 2<sup>nd</sup> defendant's defence)

[39] That segment of the 2<sup>nd</sup> defendant's defence is, to my mind, entirely without merit. It is, without merit, in my view, because it is premised on that which I believe, is a misunderstanding of the effect of **section 160 of the Registration of Titles Act**, in the present context.

[40] That section reads as follows:

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

[41] **Section 160** when applied in the particular context of this particular claim, should properly be interpreted as allowing for a claim founded on fraud, to be pursued against the Registrar of Titles, in circumstances wherein it is being alleged, that it was as a consequence of fraud committed by the Registrar or the Registrar's servants or agents, that certain steps/actions purportedly done pursuant to the provisions of the **Registration of Titles Act**, were so done.

[42] That is so because, if the Registrar or that officer's servants/agents had acted fraudulently in carrying out that officer's statutory functions, that would not then be anything '*bona fide*' done or omitted to be done.

[43] Fraud is the direct opposite of that which is done, '*bona fide*,' or in other words – in good faith. When one acts fraudulently, certainly, one is not acting in good faith and accordingly, **section 160 of the Registration of Titles Act** would not only serve to provide no protection to the Registrar of Titles, in respect of a claim such as this, but also, would serve to impliedly authorize the making of a claim such as this, against the Registrar of Titles.

[44] As such, this court will not consider any further, the 2<sup>nd</sup> defendant's contention that the claimant's statement of case has disclosed no cause of action against that defendant.

[45] The issue as to whether or not the 2<sup>nd</sup> defendant has been proven as having acted fraudulently, in the particular context as alleged in this particular claim though, remains to be determined.

## **Burden and standard of proof**

- [46] As it is the claimant who has alleged fraud against each defendant, the legal burden is upon him, to prove that allegation as against each defendant, failing which, judgment must and will be entered in the defendants' favour, or at least, in favour of one of the defendants.
- [47] The standard of proof as regards an allegation of fraud, is that of a preponderance of probabilities, and will not be as high a standard, as proof beyond reasonable doubt – which is the standard of proof, in circumstances wherein, an allegation of fraud is made against a defendant, in a criminal case.
- [48] In a civil claim, such as this, since fraud is being alleged and fraud is a very serious allegation, the degree of probability required to prove such allegation against either or both of the defendants, will be that of a preponderance of probabilities, but will, within that framework, be for example, a higher degree of preponderance of probability, than would be required in order to prove negligence. See: **Hornal v Neuberger Products** – [1957] 1 QB 247; and **Bater v Bater** – [1951] p. 35, per Denning L.J, at 37. Thus, there are degrees of probability which have to be adapted to meet the particular allegation which is required to be proven, but nonetheless, the framework of standard of proof required in respect of a claim such as this, is proof on a preponderance of probabilities.

## **The issues**

- [49] In order for this court to properly resolve this claim, it is imperative for this court to properly consider and conclude upon a few legal and factual issues. Those are set out, immediately below:

## **Legal issues**

- (i) What is the nature of the 'fraud' that must be proven on the part of one or the other of the defendants in order for this claim to succeed?

- (ii) Can this claim succeed if no fraud committed by the 1<sup>st</sup> defendant is proven in respect of the property now registered in the name of the 1<sup>st</sup> defendant?
- (iii) Will the fraud of the unknown third party, who fraudulently purported to be the claimant and who forged the claimant's signature on documents related to the transfer of the property to the 1<sup>st</sup> defendant, be sufficient to vitiate the 1<sup>st</sup> defendant's title to the property?

### **Factual issues**

- (i) Has the claimant proven, as against either or both defendants, fraud on their part or on the part of either of them, in relation to the property having become registered on the title, in the name of the 1<sup>st</sup> defendant?

In these reasons, for the sake of convenience only, I will address the legal issues in reverse order and then address the factual issue.

### **Resolution of legal issue no. (iii)**

[50] In order to properly resolve the legal issues pertaining to this claim, it is necessary to refer to the **Registration of Titles Act**. These reasons for judgment will seek to resolve those legal issues in no special order.

[51] **Section 163 of that Act**, when considered, serves to resolve legal issue no. (iii) above. It is necessary for that purpose to quote that section in full. Same is set out immediately below:

*'Nothing in this Act contained shall be so interpreted as to leave subject to an action for the recovery of the land, or to an action for recovery of damages as aforesaid, or for deprivation of the estate or interest in respect to which he is registered as proprietor, any purchaser bona fide for valuable consideration of land under the operation of this Act, on the ground that the proprietor through or under whom he claims may have been registered as proprietor through fraud or error, or may have derived from or through a person registered as proprietor through fraud or error, and this whether such fraud or error shall consist in wrong description of the boundaries or of the parcels of any land, or otherwise howsoever.'*

- [52] Applying that statutory provision to the matter at hand, it is my understanding that even though it is now accepted by all parties concerned, for the purposes of this claim, that the 1<sup>st</sup> defendant became the registered title holder for the property, through the fraud of a third party – whose precise identity is currently unknown to this court and to the claimant and who had, at the material time, while then purporting to be the claimant, forged the claimant's signature to various documentation pertaining to the transfer of the property to the 1<sup>st</sup> defendant and the cancellation of the prior title and the issuance of the new title in the name of the 1<sup>st</sup> defendant, nonetheless, that fraud on the part of that third party, is insufficient, in and of itself, to vitiate the title held now, by the 1<sup>st</sup> defendant.
- [53] If the claimant is to succeed in proof of his claim, he must prove that the 1<sup>st</sup> defendant was registered as, 'proprietor,' of the property, other than as a purchaser, '*bona fide* for valuable consideration.'
- [54] A person who acquires via purported purchase, property, by means of actual fraud, is not a purchaser, '*bona fide* for valuable consideration.' The word, 'proprietor' is defined in that Act as meaning, amongst other things, the owner, solely, jointly or in common with any other person, of land.
- [55] To my mind, the case of **Gibbs v Messer and ors.** – [1891] AC 248 (PC), cannot, in view of the provisions of **section 163 of the Registration of Titles Act**, assist the claimant, in respect of this claim.
- [56] Caselaw subsequent to **Gibbs v Messer**, has made it clear that it is registration of a certificate of title which creates indefeasibility of that title. That indefeasibility is immediate, upon registration, subject only to the exceptions thereto, as specifically set out in the **Registration of Titles Act**, one of which, is fraud. That is certainly how the provisions of our **Registration of Titles Act**, have been interpreted in subsequent caselaw, such as in **Assets Co. v Mere Roihi** (*op. cit.*) and **Frazer v Walker** – [1967] 1 AC 569.

[57] *'That principle, it should be noted, does not defeat the right of a claimant, in a suitable claim, to bring against a registered proprietor, a claim in personam founded in law or in equity, for such relief as a court acting in personam may grant. That this is so has frequently and rightly been recognized in the courts of New Zealand and of Australia.'*

[58] The above quotation was taken from **Frazer v Walker** (*op. cit.*), at p. 585, after the learned author of the text – The Law and Practice relating to Torrens Title in Australia, by E. A. Francis, [1972], Vol. 1, states as follows, in reference to the Privy Council's judgment in **Frazer v Walker**, *'the Privy Council's decision is direct and binding authority laying down that a registered proprietor who acquires his interest under an instrument void for any reason whatever obtains on registration an indefeasible title. This will avail him against all comers unless: -*

*(a) There is a specific basis under the statute rendering him open to challenge; an example of such a specific basis of challenge is actual fraud on his part or on the part of his agent... Thus it seems that the Privy Council has laid the ghost of deferred indefeasibility, and made it clear that, subject to the specified exceptions, registration even under a void instrument, immediately confers indefeasibility of the title upon a registered proprietor.'*

[59] The argument of the claimant's counsel which is directly to the contrary, although attractive in certain respects, is rejected by this court. That argument was set out in the claimant's counsel's written closing submissions. That attractive argument is, in my view, not sustainable, bearing in mind the Privy Council's decision in the **Frazer v Walker** case (*op. cit.*), as well as the view of the majority, in **Boyd v Mayor of Wellington** – [1924] N.Z.L.R 1174, at p. 1223 (Supreme Court of New Zealand); and also – **Clements v Ellis** – [1934] 51 C.L.R 217; and **Breskvar and anor. and Wall and ors.** – [1971] 126 C.L.R 376, esp. at pages 385 and 386, per Barwick, C.J.



## Resolution of legal issue no. (ii)

[60] **Sections 70 and 161 of the Registration of Titles Act**, when considered carefully, are, to my mind, sufficient to resolve legal issue no. (ii).

[61] It will not be necessary to set out the entirety of either of those sections, but it is especially important to note, that that latter – mentioned section, should be the starting point for any consideration by any Jamaican Court, of any claim which is similar to this one.

[62] **Section 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 any 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...’*

[63] To my mind, **section 70 of that Act** operates so as to protect the proprietor of registered land from losing the benefit of that title, save and except in a few circumstances, one of which is where there is proven fraud on the part of that proprietor, in respect of the acquisition of that title. That is specifically referred to in **section 70**, as it is also, in **section 161**.

[64] The relevant portion of **section 161 of that Act**, for present purposes, 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’ – ‘(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' ... '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.'*

[65] In addressing the effect of **section 161 of that Act**, the Privy Council, in the case: **Pottinger v Raffone** – Privy Council Appeal No. 64 of 2005, stated same to be as follows, at paragraphs 20 and 21, per Lord Rodger of Earlsferry, who delivered that court's judgment:

*'20. The basic rule is that, if any proceedings are brought to recover land from the person registered as proprietor, then the production of the certificate of title in his name is an absolute bar and estoppel to those proceedings, any rule of law or equity to the contrary notwithstanding. The only situations where a certificate of title is not a complete bar to proceedings are those listed in paragraphs (a) to (f). For present purposes the only relevant paragraph is (d), proceedings by a person deprived of any land by fraud against the person registered as proprietor of land through fraud. Therefore, assuming in Ms. Raffone's favour that she could claim to have been deprived of the 34 lots, Mr. Pottinger's certificate of title would not be a bar to her proceedings if, but only if, she could show that she had lost the land because Mr. Pottinger had been registered as proprietor of it through fraud.'*

*'21. If the claimant succeeded in her action under section 161 and recovered the land, then section 158 would furnish the court with the necessary powers to give effect to her victory: ... so, here, the court could direct the Registrar to cancel the Certificates of Title in the name of Mr. Pottinger in the Register Book, cancel any duplicate certificates of title in that name, enter certificates of title in the name of the company in the Register Book and issue duplicate certificates of title, also in name of the company.'*

**[66]** Section 71 of that Act is also worthy of note. That section reads as follows:

*'Except in the case of fraud, no person contracting or dealing with, or taking or proposing to take a transfer, from the proprietor of any registered land, lease, mortgage or charge, shall be required or in any manner concerned to enquire or ascertain the circumstances under, or the consideration for, which such proprietor or any previous proprietor thereof was registered, or to see to the application of any purchase or consideration money, or shall be affected by notice, actual or constructive, of any trust or unregistered interest, any rule of law or equity to the contrary notwithstanding and the knowledge that any such trust of unregistered interest is in existence shall not of itself be imputed as fraud.'*

**[67]** To my mind, the net effect of all of these sections of that Act, is that it is the, 'fraud' of the registered proprietor of the property at present, that constitutes such, 'fraud' as would be a basis for challenge to that proprietor's registered title, provided that such 'fraud' is, as defined in caselaw, actual fraud, as distinct from that which is now commonly described in caselaw and some legal texts, as 'equitable fraud.'

**[68]** Accordingly, even if it is proven for the purposes of this claim that the 2<sup>nd</sup> defendant acted fraudulently in having caused the 1<sup>st</sup> defendant to become the registered title holder for the property, then, that alone could and would not be a sufficient basis upon which the 1<sup>st</sup> defendant's registered title for the property, could be successfully challenged before this, or any court.

**[69]** Instead, it would have to be proven by the claimant that the 'actual fraud' of the 2<sup>nd</sup> defendant was carried out with the knowledge of, or connivance in, by the 1<sup>st</sup> defendant, as it is the latter whose title is being challenged and thus, unless 'actual fraud' on her part is proven in so far as the registration of the title in her name is concerned, that title is a bar to any successful claim being made to challenge said title, on the ground of fraud.

- [70] I am reinforced in that expressed view, by dicta of Harris JA, as set out in the **Harley Corporation** case (*op. cit.*), at paragraphs 51 and 52, which made reference to **sections 70 and 71 of that Act**. Those paragraphs were earlier quoted in these reasons, at paragraphs 19 and 20.
- [71] In the event that I may be considered as being wrong, in having drawn that legal conclusion, I do intend to address the factual issue as regards whether or not the claimant has proven as against the 2<sup>nd</sup> defendant, ‘fraud’ in relation to the property having become registered on the title, in the 1<sup>st</sup> defendant’s name.
- [72] I am though, I reiterate, of the view that even if there was actual fraud committed by the Registrar of Titles, or by a member of that office’s staff, in having caused the 1<sup>st</sup> defendant to be registered as the title holder for the property, that would not be a sufficient basis upon which the 1<sup>st</sup> defendant’s title to that property, could successfully be challenged in any court. What has to be shown, if fraud is being alleged, is that actual fraud was committed by the current registered title holder or by someone else, either with the knowledge of that current registered title holder, or with the connivance of that current registered title holder. The wording of the relevant portions of **Jamaica’s Registration of Titles Act**, do not, to my mind, properly permit any other conclusion to be drawn.

#### **Resolution of legal issue No. (i)**

- [73] Earlier on in these reasons, at paragraphs 19 and 20 this court has, addressed the issue as to what is the definition of ‘fraud’ as referred to, in the **Registration of Titles Act**. That definition will make it clear as to what is the nature of the ‘fraud’ that must be proven on the part of the 1<sup>st</sup> defendant, in order for this claim to succeed, or alternatively, what is the nature of the fraud that must be proven against both, or either of the defendants, in order for this claim to succeed.
- [74] That latter-mentioned alternative though, it should be noted, can only properly arise for further consideration, if my expressed conclusion as to legal issue No.

(ii) is disagreed with. For the purpose of resolving legal issue No (i), that conclusion of mine, is of no relevance. What is instead of relevance, is the definition of the word/term – ‘fraud’ as used in the **Registration of Titles Act**. With that definition having already been provided in these reasons, there is no need at this juncture, to address same any further.

**Factual Issue No. (i) as pertains to the 2<sup>nd</sup> defendant**

[75] The claimant gave evidence, during his examination-in-chief, that he did not sign the transfer document pertaining to the property. That evidence was undisputed and this court has therefore accepted it as being truthful. It is, in any event, also confirmed by the expert evidence of Carl Major – whose expert report concerning same, was admitted into evidence.

[76] He also then testified as to how he came to acquire title to the property and how it was that he eventually learnt that the present title holder, is the 1<sup>st</sup> defendant. He gave evidence that he had acquired title to the property in 1991 and at that time, he was resident in Houston, Texas, United States of America. He had been living there from about 1984, but visited Jamaica periodically, while resident overseas.

[77] This court has also accepted his evidence that he paid tax for the property, between 1993 and 2002. He produced to this court, at trial, property tax receipts, evidencing same. Additionally, this court accepts his evidence that he had, from time to time, through the help of his sister-in-law – Beverly Chatterpaul and her brother – Delroy Chatterpaul, had the property bushed by Delroy Chatterpaul. The claimant sent to his sister-in-law – Beverly, the money to pay for that work to be done.

[78] The transfer document is dated June 30, 1993 and purports to be a transfer of the property, by the claimant to the 1<sup>st</sup> defendant. Of course, as is now known by

all parties concerned and by this court, that document was a fraudulent one and the claimant's purported signature on that document, is a forged signature.

- [79]** The title which the claimant had, obtained when he purchased the property, was registered at Volume 963, Folio 231 of the Register Book of Titles. The claimant, upon having conducted enquires at the Registrar of Titles Office, after he had learnt that the 1<sup>st</sup> defendant was possessed of title for the property and was, in late 2002, then seeking to sell the property through her realtors at that time – Island Homes Ltd., discovered that his title for the property had been cancelled and a new title for same issued, bearing Volume 1260, Folio 574.
- [80]** This court accepts the claimant's evidence, also given during examination-in-chief, that he does not know how it is that title in the name of the 1<sup>st</sup> defendant and bearing Volume 1260, Folio 574, being title for the property, came to be issued and also accepts his evidence that he tried to get from the office of the 2<sup>nd</sup> defendant, copies of the documents that were used to obtain the title bearing Volume 1260, Folio 574, but they were unable to produce the said documents. Even at the time of trial, the 2<sup>nd</sup> defendant was unable to locate said documents. The 2<sup>nd</sup> defendant, who appeared in person and testified at trial, confirmed that her office has been unable to locate the said documents.
- [81]** Suspicion of fraud and worse yet, suspicion as to the possibility of fraud, ought never to be equated with proof of fraud. In the final analysis, the claimant's evidence fell woefully short of doing anything more than creating in my mind – as trial judge, a suspicion that there exists the possibility that there may have been fraud at the 2<sup>nd</sup> defendant's office, which facilitated title having been issued in the name of the 1<sup>st</sup> defendant.
- [82]** It certainly does not come anywhere near to proving that the 1<sup>st</sup> and 2<sup>nd</sup> defendants collaborated in committing actual fraud which resulted in the 1<sup>st</sup> defendant having obtained title for the property, in her name.

- [83]** In fact, it does not even come near to proving that the 2<sup>nd</sup> defendant committed actual fraud which resulted in the 1<sup>st</sup> defendant having obtained title for the property, in her name. The mere inability to locate certain documentation related to the cancellation of the prior certificate of title and to the issuance of a new title with a different volume and folio number, cannot possibly, properly be considered as proof of fraud.
- [84]** Clearly too, at trial, the claimant's counsel did not press that allegation against the 2<sup>nd</sup> defendant, to any significant extent. Thus, for instance, during cross-examination of the 2<sup>nd</sup> defendant, the claimant's counsel never once suggested to her, that her office had acted fraudulently in any way, shape or form as regards any aspect pertaining to the underlying reasons for this claim – that being that the title to the property, is now in the 1<sup>st</sup> defendant's name.
- [85]** Having failed to put their client's case to the 2<sup>nd</sup> defendant and thus, having failed to afford the 2<sup>nd</sup> defendant, the opportunity to rebut that case during cross-examination and having not at all suggested to the 2<sup>nd</sup> defendant, that her evidence is either inaccurate, or incorrect, or untruthful, it follows that this court is obliged to accept the evidence proffered to it by the 2<sup>nd</sup> defendant, during her examination-in-chief.
- [86]** Incidentally, it should be noted that the Registrar of Titles (the 2<sup>nd</sup> defendant), who testified, is Sophia Williams and she testified in examination-in-chief, that she has been employed at the Office of Titles, since 1996, as a legal officer, then since 2001 as Deputy Registrar of Titles and 2004 as Senior Deputy Registrar of Titles and since 2006, as the Registrar of Titles.
- [87]** As stated in the text – Cross on Evidence, 6<sup>th</sup> ed. 1985, at page 277, '*Any matter upon which it is proposed to contradict the evidence-in-chief given by the witness must normally be put to him, so that he may have an opportunity of explaining the contradiction and failure to do this may be held to imply acceptance of the evidence-in-chief, but is not an inflexible rule and it has been held to be*

*unsuitable to proceedings before lay justices.* See: **Browne v Dunn** – [1869] 6 R 67.

[88] Under the heading – ‘The Effect of a Party’s Failure to Cross-Examine,’ in the text – *The Modern Law of Evidence*, 2<sup>nd</sup> ed., 1989, authored by Adrian Keane, at pages 120 and 121, the learned author states similarly, but a bit more fulsomely, as follows:

*‘A party may decide that there is no need to cross-examine at all, especially if the witness in question has proven to be unfavourable or even hostile to the party calling him. A party’s failure to cross-examine, however, has important consequences. It amounts to a tacit acceptance of the witness’s evidence-in-chief. A party who has failed to cross-examine a witness upon a particular matter in respect of which it is proposed to contradict his evidence-in-chief or impeach his credit by calling other witnesses, will not be permitted to invite the jury or tribunal of fact to disbelieve the witness’s evidence on that matter. A cross-examiner who wishes to suggest to the jury that the witness is not speaking the truth on a particular matter must lay a proper foundation by putting that matter to the witness so that he has an opportunity of giving any explanation which is open to him. Thus in **Browne v Dunn**, a libel action in which certain witnesses were not cross-examined on a particular matter, it was held by the House of Lords improper subsequently to invite the jury to disbelieve them. The rule is not, however, a hard and fast one in the sense that cross-examination of a witness is always a necessary preliminary to impeaching his credit. Their Lordships acknowledged that in some cases the story told by a witness may be so incredible that the matter upon which he is to be impeached is manifest, and in such circumstances it is unnecessary to waste time in putting questions to him upon it. The most effective cross-examination in such a situation would be, in the words of Lord Morris, ‘to ask him to leave the box.’*

[89] The cross-examination of the Registrar of Titles was very short and very limited in scope. Not one suggestion was put to the 2<sup>nd</sup> defendant during cross-examination. During that cross-examination, the 2<sup>nd</sup> defendant confirmed that



she was speaking based upon the records at the Titles Office, in respect of the cancelled title and that she was not able to produce the documentary data on which her office is relying for the purposes of the assertion made by her during examination-in-chief, as set out at paragraph 4 of her witness statement. When asked the question – *‘what was it that informed your assertion that it was a section 79 cancellation?’*, the Registrar’s answer was: *‘I relied on the certificate of title, which has an entry that stated that the title was being cancelled pursuant to an application under section 79. That entry was signed by the then Registrar herself.’* I have accepted as truthful, that assertion of the Registrar, just as indeed, I have accepted the entirety of her evidence as being both truthful and accurate.

[90] Ms. Williams was also asked whether it is the usual procedure that a title being cancelled under **section 79**, be surrendered and to that question and to my mind, truthfully, Ms. Williams responded that it is the usual procedure that the duplicate certificate of title would have to be surrendered to the Titles Office, if that title is being cancelled.

[91] Of course, the claimant gave evidence, which this court has also accepted as being both accurate and truthful, that the duplicate certificate of title remained in the possession of the claimant, at the very least, up until the date when he gave evidence to this court, for the purposes of this claim, this even though, that title was cancelled and a new title, with a different volume and folio number issued for the property, in favour of the 1<sup>st</sup> defendant, as the named proprietor of that property.

[92] The absence of some of the pertinent documents concerning the property and the failure of the Titles Office – which is led by the Registrar of Titles, to require the claimant’s title to be surrendered, prior to that office having issued a new title for the property, in the name of the 1<sup>st</sup> defendant as proprietor, can hardly be viewed as more than suspicious circumstances. As already stated though,

suspicion of fraud, or worse yet, suspicion of the possibility of fraud, cannot at all, be equated with proof of fraud.

[93] The evidence-in-chief of the 2<sup>nd</sup> defendant, as per her witness statement, was, save and except for her introduction of herself, to the court and the setting out of her work experience and posts held at the Titles Office, from paragraphs 3 to 9, as follows:

*'3 I have examined the records at the Office of Titles in relation to this claim and the records reveal that on the 14<sup>th</sup> August 1992, lands situated at Beverly Hills in the parish of Saint Andrew and registered at Volume 963 Folio 231 of the Register Book of Titles was transferred to Ervin McLeggan the claimant herein.'*

*4 On the 28<sup>th</sup> May 1993 certificate of title registered at Volume 963 Folio 231 of the Register Book of Titles was cancelled pursuant to an application made under section 79 of the Registration of Titles Act and a new certificate of title was issued by the Registrar of Titles registered at Volume 1260 Folio 574 of the Register Book of Titles.*

*5 A search of our recording system at the Office of Titles in 1993 shows that someone purporting to be the registered proprietor, E. McLeggan collected the new certificate of title registered at Volume 1260 Folio 574 in may 1993.*

*6 The practice at the Office of the Registrar of Titles is that instruments and completed titles are only collected by the person lodging the instrument. Based on the system that existed in 1993 persons collecting documents from the Office of the Registrar of Titles were only required to produce the original receipt which was issued by the Office upon lodgement. As such the registered proprietor or someone purporting to be the registered proprietor applied for a cancellation of the certificate of title registered at Volume 963 Folio 231 and presented the certificate of title for cancellation.*

*7 Our records further reveal that on the 2<sup>nd</sup> July 1993 by Transfer No. 770820 the lands situated at Beverly Hills in the parish of Saint*

*Andrew and now registered at Volume 1260 Folio 574 of the Register Book of Titles was transferred to Daphne Scarlett. A reading of the certificate of title and the endorsement of the transfer suggests that the property was transferred directly from Ervin McLeggan to Daphne Scarlett.*

*8 The practice at the Office of Titles is that only duly completed and witnessed Instruments of Transfer are accepted for processing. The duplicate certificate of title together with the Instrument of Transfer signed by both the buyer and seller are lodged at the Office of the Registrar of Titles and the appropriate fees paid. The document is then checked to ensure that the registration fees have been paid, the document has been cross stamped and the name, address and occupation of the seller is consistent with the information held at the Office of Titles. The Instrument of Transfer is also checked to ensure that the consideration is stated and that the transfer document has been duly witnessed in accordance with Section 152 of the Registration of Titles Act. Thereafter the document is signed by the Legal/Signing Officer and then dispatched for collection.*

*9 As such, once the signatures of the transferor and transferee are duly witnessed then the Registrar of Titles would have no reason for believing that the facts as stated in the Instrument are otherwise.'*

**[94]** This court has not found that evidence to be inherently unreliable or unsound, or as worthy of any disbelief whatsoever. This court has accepted that evidence as being entirely truthful.

**[95]** In the circumstances, the claimant's claim against the 2<sup>nd</sup> defendant has failed and judgment on that claim, is awarded in the 2<sup>nd</sup> defendant's favour, with costs to be taxed, if not sooner agreed.

**Factual issue no. (i) as pertains to the 1<sup>st</sup> defendant**

**[96]** Before beginning to address the issue of whether or not fraud, for the purposes of the **Registration of Titles Act**, has been proven as against the 1<sup>st</sup> defendant, it is important to state that it does not at all follow, either as a matter of law or

fact, that because fraud on the part of the 2<sup>nd</sup> defendant has not been proven, therefore, fraud on the part of the 1<sup>st</sup> defendant, also, has not been, or cannot have been proven. The one does not follow from the other. Accordingly, it is open to this court to conclude that it has been proven that the 1<sup>st</sup> defendant committed fraud in obtaining her proprietorship of the property, or in other words, in having obtained title for the property, in her name, even though the 2<sup>nd</sup> defendant has been concluded by this court, as not being liable in respect of this claim, as no fraud on the part of that defendant, has been proven.

**[97]** The 1<sup>st</sup> defendant's evidence-in-chief, when summarized in its most important respects, for present purposes, was as follows: In or around 1993, she was interested in acquiring land in Beverley Hills, for the purpose of building a house. She made contact with a real estate agent – Mrs. Viola Miller, who she had done business with, once before then. Thereafter, she was called by Mrs. Miller who told her that she had found some land and who introduced her to a man by the name of Ervin McLeggan. He (the man purporting to be Ervin McLeggan) indicated that he was selling the property for \$1,050,000.00. He, the 1<sup>st</sup> defendant and Mrs. Miller then went to the office of Eugene Harris, attorney-at-law and that was the attorney who was asked to and who in fact prepared the agreement for sale. That agreement for sale was signed by the 1<sup>st</sup> defendant and the purported Mr. McLeggan in the presence of attorney Harris and Mrs. Miller. On June 3, 1993, the 1<sup>st</sup> defendant drew a cheque in favour of Ervin McLeggan, in the sum of \$190,000.00. Presumably, that was a deposit towards the purchase price, as the property was not purchased by the 1<sup>st</sup> defendant upon a mortgage.

**[98]** The 1<sup>st</sup> defendant made payments to her attorney-at-law – Mr. Harris, until the remainder of the purchase price was paid in full. She produced to this court and there was accepted as evidence, three (3) cheques, inclusive of the presumed deposit cheque and two (2) of those cheques were, as is consistent with the 1<sup>st</sup> defendant's evidence, made out in the name: 'Eugene Harris' and those two (2)

cheques, when aggregated, amount to the sum: \$424,000.00, whereas, the first in time cheque, was made out in the name: 'Ervin McLeggan,' in the sum: \$190,000.00. Thus, the aggregated sum of those three (3) cheques produced to this court, at trial, is: \$614,000.00 (\$424,000.00 and \$190,000.00). No cheque pertaining to the remainder of the purchase price was produced to this court, at trial and no evidence was given, nor was any question posed to the 1<sup>st</sup> defendant at trial, as to why same was/were not then produced.

**[99]** Mrs. Miller did not testify at trial, although a witness statement of hers, was filed. That witness statement of hers though, was admitted as hearsay evidence at trial, as it was proven, by the evidence of her widower, that at the time of trial, she was deceased. The evidence as set out in Mrs. Miller's witness statement was therefore untested by means of cross-examination, but of course, this court has paid due regard to it and given it such weight as this court believes it can properly bear. Her evidence, to some extent corroborates the evidence of the 1<sup>st</sup> defendant, as to how it was that she (the 1<sup>st</sup> defendant) came to know of the person who purported to be Mr. McLeggan and some of what transpired thereafter, leading to the sale and transfer of the property. Suffice it to state in that regard though, that for the purposes of resolving the most important factual issues pertaining to this claim, this court has chosen to rely far more heavily on its consideration of the evidence of the 1<sup>st</sup> defendant and the claimant, than on Mrs. Miller's evidence.

**[100]** Mr. Eugene Harris also did not give any testimony that was, or could properly have been utilized for the purposes of the trial of this claim. An application was filed at court, for him to give evidence prior to the trial of this claim and for him not to attend upon the Supreme Court, for the trial of this claim, as illness would have prevented him from giving evidence in court, during the trial of this claim.

**[101]** This court had allowed for attorney Harris to give affidavit evidence pertaining to this matter and for him not to attend a trial to give evidence and also, for his evidence to be taken, prior to the commencement of the trial. **Part 33 of the**

**Civil Procedure Rules (CPR)** permitted that to have been done and this court ordered that the Court's Registrar was to have facilitated the carrying out of same. It does not appear though, that same was ever done and certainly, at trial, no reference was ever made by either party's counsel, to any evidence given by attorney Eugene Harris, for the purposes of the trial of this claim. Accordingly, this court has given no consideration to Mr. Harris' affidavit evidence, for the purposes of the trial of this claim, since it is not my understanding that the claimant was ever given any, or at least, any proper opportunity, to challenge any assertion made by Mr. Harris, in that affidavit evidence of his.

**[102]** I have noted with interest though, that the initial defence to this claim, was filed by Eugene Harris and Company, Attorneys-at-law, on behalf of the 1<sup>st</sup> defendant and that the law firm represented the 1<sup>st</sup> defendant in respect of this claim, until July 29, 2010, when a Notice of Change of attorney was filed, informing all parties concerned and this court, that as of that date, the 1<sup>st</sup> defendant's attorney would be: Ms. Gillian Burgess. If therefore, that attorney had in any way, been complicit in any fraud regarding the property, then, far from hiding from that assertion, he certainly was, at least up until July 29, 2010, at the front and centre of defending the 1<sup>st</sup> defendant against the allegations of fraud on her part, which were, it should be recalled, made for the first time in this claim, in the claimant's amended particulars of claim, which was filed on October 16, 2009.

**[103]** It is also worthy of note that both the agreement for sale and certificate of title refer to the purchase price for the property, as having been: \$800,000.00. That was not at all, made known to the trial court, via the oral evidence of the 1<sup>st</sup> defendant, albeit that it must at the same time, be noted and accepted that there were admitted, at trial, into evidence, by consent of the parties, the agreement for sale (copy) and the certificate of title (copy) and the instrument of transfer bearing No. 770820 (copy). Each of those three documents reflect that the purchase price for the property, was \$800,000.00.

**[104]** During her evidence-in-chief, as per her witness statement, the 1<sup>st</sup> defendant also testified that Mr. McLeggan had produced the 'purported' (my word) duplicate certificate of title and handed same to attorney Harris, who examined same in her presence. When the transaction was completed, she was duly registered as the owner of the property, which is now registered at Volume 1260, Folio 74 of the Register Book of Titles. That was as of July 2, 1993.

**[105]** She engaged an architect to design a house on the property and sought approval from the Kingston and St. Andrew Corporation for the architectural drawings. When she did the quantity survey on the architectural drawings, according to her, the cost of building the house seemed too expensive, so she listed the property with real estate agents. There was a sale sign on the property, on and off, for about two (2) to three (3) years.

**[106]** The most critical part of her evidence, for the purposes of this claim, is as has been set out at paragraph 10 of her witness statement which was filed on October 22, 2009 and which is part and parcel of her evidence-in-chief. It is worthwhile quoting that paragraph in full. It reads as follows:

*'During the transaction I always believed that I that I was dealing with Mr. Ervin McLeggan the owner of the land because he identified himself accordingly. In addition he produced the Duplicate certificate of title relating to the land and he was able to negotiate the cheque which was drawn in favour of Ervin McLeggan. The duplicate certificate of title Mr. Ervin McLeggan produced was submitted to the office of Titles and in turn they issued a duplicate certificate of title to me. I did not know Mr. Ervin McLeggan before but based on the foregoing I was confident I was dealing with the rightful owner of the land.'*

**[107]** The claimant's evidence was, save and except in one minor respect, not disputed by the 1<sup>st</sup> defendant's counsel and thus, by the 1<sup>st</sup> defendant, at trial. It was suggested to the claimant that he was not bushing the property, as he testified

that he was. The claimant denied that suggestion. This court accepts the claimant's evidence in its entirety.

**[108]** That though, does not mean that the claimant is necessarily, as a consequence of that, to be considered as having proven his claim. His evidence as regards the fraud which is, in any respect, pertinent to this claim, was as regards his signature to various documentation pertaining to the transfer of the property to the 1<sup>st</sup> defendant, having been forged. He was not though, able to provide any useful evidence to this court, as to the identity of the person who forged same, or as to there being any direct link between that person and the 1<sup>st</sup> defendant, specifically as regards those forgeries.

**[109]** The only direct link shown between the forger and the 1<sup>st</sup> defendant, is that the forger received payment from the 1<sup>st</sup> defendant, for the property and that when the property was being transferred, the forger signed the pertinent documents in the 1<sup>st</sup> defendant's presence and in the presence of the 1<sup>st</sup> defendant's attorney at that time and also, purportedly handed over the duplicate certificate of title, to the 1<sup>st</sup> defendant's attorney at that time. I state 'purportedly' in that latter respect, because, while I accept the 1<sup>st</sup> defendant's evidence that same was done, I take the view that it could not have been a valid duplicate certificate of title that was then handed over, because I have also accepted the claimant's evidence that he still retained the duplicate certificate of title for the property, at least up until trial. Indeed, the claimant's evidence in that specific respect was never challenged by any of the opposing parties' counsel.

**[110]** The fact that the forger and the 1<sup>st</sup> defendant interacted during the time period leading up to the transfer of the property to the claimant, by the forger, who had, for that purpose, purported to be Ervin McLeggan, is not at all surprising, since forgery is all about making something, in particular, a document, appear to be what it is, in fact, not, or in other words, making a document appear to be genuine, when it is not. In addition, when one forges a document, one is typically purporting to be someone, that one is in fact, not.



**[111]** It is therefore quite plausible and even likely, that the forger and the 1<sup>st</sup> defendant and her then attorney could have interacted with one another, without the 1<sup>st</sup> defendant or her attorney, ever having been privy to the forgery, or ever having been an active participant in the sense of having acted dishonestly, in having, by means of the forged documents obtained proprietorship of the property. It is actual fraud in terms of dishonesty on the part of the 1<sup>st</sup> defendant in that regard, which must be proven by the claimant, if this claim is to succeed.

**[112]** It follows therefore, that the attorneys for the claimant had a heavy legal burden to bear, if they were to enable the claimant to prove this claim, bearing in mind that essentially, since the claimant's evidence and the evidence of his supporting witnesses, along with the expert report, were wholly insufficient to prove dishonesty on the part of the 1<sup>st</sup> defendant, then the only way in which such could have been proven, especially bearing in mind the very limited scope of the claimant's counsel's cross-examination of the 2<sup>nd</sup> defendant, would be, if during cross-examination of the 1<sup>st</sup> defendant by the claimant's counsel, it were to be revealed, at least fairly clearly, certainly on a fairly high degree of probability in the claimant's favour as regards the allegation of fraud, that such allegation is correct and true.

**[113]** As such, I will now address in these reasons, in some depth, the evidence given in cross-examination, by the 1<sup>st</sup> defendant, particularly while she was being cross-examined by the claimant's counsel. That evidence is referred to, below.

**[114]** Interestingly, during cross-examination, the 1<sup>st</sup> defendant stated that her age was sixty-nine (69) years and that in 1993, she was then fifty-one (51) years old. What that means therefore, is that when she testified, the 1<sup>st</sup> defendant was, in large measure, being called upon to precisely recall events which had occurred up to as long before then, as eighteen (18) years. In the circumstances, that fact, coupled with her age when she testified, would not at all cause this court to have been surprised if she could not, when she testified, correctly recall, or recall at all, certain things. The same would be true as regards that which she certified in her

witness statement as being true, bearing in mind that the same was so certified on October 22, 2009 – sixteen (16) years after 1993. It is at all times to be recalled, that the forgeries pertinent to this claim, took place in 1993.

[115] The 1<sup>st</sup> defendant testified that when she entered into ‘this transaction’ (no doubt referring to the transaction to purchase the property), she owned four (4) properties and that Mr. Eugene Harris was her attorney in one or more of those transactions (that being my interpretation of the understanding to be gleaned from the 1<sup>st</sup> defendant’s answer to a particular question that was posed to her by the claimant’s counsel in that regard).

[116] She further testified that before she purchased the property, she had been in the area - Beverley Hills, looking around at empty land and that it was when she was shown the property by Mrs. Miller, that she decided to purchase same. That was, she testified, about a month or so, ‘before the agreement.’ She also gave evidence that the negotiations to purchase the property took place ‘within a week’, or ‘roughly a week,’ before she decided to purchase the property. According to her, she made several trips to look at the property with ‘friends’ and ‘we discussed the sale as a cash purchase. It would be a short sale, I believe, thirty (30) days.’ When asked, who are the ‘we’ that you are referring to, her answer was: ‘Myself and a friend, Mrs. Miller and Mr. McLeggan.’

[117] When she was asked the following questions, she answered as follows:

*Q. Mr. McLeggan – How long did you engage with him before you entered into the transaction for the land purchase?*

*A. Just that one time when we visited the land.*

*Q. Did you see Mr. McLeggan after that one time when you visited the land?*

*A. Yes, when we signed the documents for the land.*

*Q. At that time, on signing the document, did you and Mr. McLeggan sign at the same time?*

**A.** Yes.

**Q.** *Where did that signing take place?*

**A.** *At Mr. Harris' office on Duke Street.*

**Q.** *You recall signing the agreement and seeing Mr. McLeggan sign the document?*

**A.** Yes.

**Q.** *You recall seeing Mr. Harris witness your signature on that document?'*

**A.** Yes.

**Q.** *Do you recall seeing Mr. Harris witness Mr. McLeggan signature?*

**A.** Yes.

**Q.** *Did Mr. Harris witness your signature and Mr. McLeggan's signature at the same time?*

**A.** Yes.

**Q.** *The gentleman who purported to be Mr. McLeggan, was he the claimant here? Counsel points to claimant, in court.*

**A.** *No, it wasn't this gentleman.'*

**[118]** It was therefore at that stage, that it became clear to me as trial Judge, that all throughout her evidence, the person who she was referring to, as Mr. McLeggan, was not in fact the person who once was the registered proprietor of the property and thus, also, was/is not the claimant.

**[119]** The question now remaining to be answered by this court therefore, is: Was the 1<sup>st</sup> defendant privy to this fraud, prior to her having been registered as the proprietor of the property?

- [120] Having carefully considered this matter, I am not of the view that she was and moreover, I am convinced that it certainly has not been proven that she was.
- [121] The 1<sup>st</sup> defendant was asked the question: *'How soon after you paid the deposit, were you told that the title was ready?'* Her answer was: *'It went well over the thirty (30) days. I know that it wasn't within the thirty (30) days.'*
- [122] She was asked – *'In what circumstances did you make two (2) payments, two (2) separate cheques, towards the purchase price, on the same day?'* Her answer was: *'I don't know why it was done.'* The 1<sup>st</sup> defendant was then, with the court's permission, shown the three (3) cheques which had previously been entered into evidence and she was asked again whether she recalled why she made those two (2) payments, for \$224,000.00 and \$190,000.00. Once again her answer remained: *'I don't know.'*
- [123] When she was asked, which of the cheques represented, the deposit, the first payment, the 1<sup>st</sup> defendant's answer was: *'I don't know.'*
- [124] When asked whether she remembered the basis on which she decided that she would pay the \$190,000.00, her answer was, *'I'm not sure.'* She agreed with the suggestion that \$190,000.00 is well in excess of 15% of the purchase price for the property.
- [125] The evidence discloses that of the three (3) cheques that were produced into evidence at trial, two (2) of them were dated – June 3, 1993 (without the dots, but spatially, clearly separated). One of those two (2) cheques was made out in favour of, 'Ervin McLeggan,' in the sum of \$190,000.00 and the other, in favour of, 'Eugene Harris,' in the sum of \$224,000.00. It will be recalled that the aggregate sum thus paid by cheque on June 3, 1993, was \$414,000.00 and that the purchase price for the property was in fact, \$800,000.00 and not \$1,050,000.00 as the 1<sup>st</sup> defendant had told the court, during her examination-in-chief, as per paragraph 3 of her witness statement. The third cheque was dated

June 14, 1993 (also, without the dots, but spatially separated) and is in the sum of \$200,000.00. The evidence of the bank stamps on those documents satisfies this court, that each of those cheques though, were negotiated on separate dates.

**[126]** When asked why she would have paid half the purchase price on the same day, the 1<sup>st</sup> defendant's answer was that: *'It could be that it was because I was leaving the island, because I was travelling a lot at that time.'*

**[127]** When she was asked why she made a cheque directly payable to Ervin McLeggan, her answer was that she can't remember why it was done like that. Also, when she was asked why she had made a payment to Mr. Harris of \$200,000.00 in the space of ten (10) days later, in a sixty (60) day sale which required her to pay 15% down and pay the remainder at the end of (60) days, her answer was as follows: *'It could possibly have been that I was going away again, on business.'*

**[128]** When asked if she keeps her records very well, her answer was: 'I don't think so.' Immediately prior to that she was asked the same question and stated: *'I just bumped into the cheques by clearing out some stuff – a draw.'* She also testified that the cancelled cheques would come back to her and she would hand over those cheques to her accountant, without looking at them.

**[129]** In continuing her testimony, she testified that she wasn't sure who had paid the transfer tax, stamp duty, or registration fee for the property and that it could have been Mrs. Miller or Mr. Harris, but yet, when she was asked:

**Q.** *'Whose money paid this?'* Her answer was: *'My money.'*

This court understood her therefore as having told the court that it was her money that was used to pay transfer tax, stamp duty and registration fee, although she was not sure as to who actually physically made payment. That is how this court interpreted that particular evidence of hers.

[130] She denied the suggestion that she paid everything in terms of the costs and over and above what she should have paid, because at the time of the transaction, she knew that there was no real vendor to whom any expense would be attributed.

[131] She testified that she paid all of the lawyer's fees pertaining to the sale of the property and that the person referred to as 'Mr. McLeggan' who I have preferred to refer to as, 'the forger,' did not have any lawyer at the time of the transaction. According to the 1<sup>st</sup> defendant, the bill that she got from Mr. Harris, had her paying everything in relation to the sale.

[132] She was asked the following question and gave the following answer:

**Q.** *'Why would you have paid transfer tax and everything else, in light of the clause – special condition and stamp commissioner's endorsement as to transfer tax payable?'*

**A.** *'I don't know. I had a lawyer.'*

[133] I am of the carefully considered view that the 1<sup>st</sup> defendant relied heavily on the advice and/or guidance of the attorney who assisted her in transacting the purchase of the property. Perhaps in some respects, she was misguided and/or naive with respect to same, but those things, even considered collectively, are not proof of fraud.

[134] What is certain, is that there are some questions regarding the particular transaction which are relevant for present purposes, which could best have been answered by attorney Eugene Harris. Those questions though, have not been answered by Mr. Harris, as he gave no testimony.

[135] She did insist at trial, that she had paid taxes for the property, between 1993 and 2002 and that it was her accountant who had paid same on her behalf. This court's view is that she was patently mistaken in that regard, but not that she was deliberately seeking to mislead this court, by having insisted upon that assertion.

- [136]** The 1<sup>st</sup> defendant denied the suggestion that she did not go through with the building on the property, because she needed to make sure that she was in the clear. Instead, she asserted that the water problem on the land and the engineer's report made it clear that it was going to be too costly to build.
- [137]** This court has, in these reasons, referred in a fulsome way, to the 1<sup>st</sup> defendant's evidence under cross-examination, by the claimant's counsel, but has not referred to the entirety of same. Suffice it to state for present purposes, that even if that evidence created some doubt as to truthfulness and/or accuracy of the 1<sup>st</sup> defendant's defence and even though it undoubtedly assisted in confirming the claimant's contention that he never negotiated with the 1<sup>st</sup> defendant as regards the then proposed purchase of the property, it did not cause me to conclude that the 1<sup>st</sup> defendant had dishonestly procured title to the property, or even that she was in any way, shape or form, privy to the fraud which led to the registration of the title to the property in her name.
- [138]** This court has considered all of the evidence, in having come to that conclusion. Furthermore, this court believes that at all times, the 1<sup>st</sup> defendant believed that she was transacting as regards the property, with the claimant, who was the genuine proprietor of the property, at that time. She did not, to my mind, even so much as suspect that she was or may have been transacting as regards the property, with a person who was then purporting to be the claimant and who was, as set out in these reasons, 'the forger.' Accordingly, judgment on this claim will also be entered in favour of the 1<sup>st</sup> defendant, with costs to be taxed, if not sooner agreed.

## **Judgment Orders**

1. Judgment on this claim is awarded in favour of the defendants and the costs of this claim are awarded to the defendants and shall be taxed, if not sooner agreed.
2. The 1<sup>st</sup> defendant shall file and serve this order.

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**Hon. K. Anderson, J.**