



[2022] JSMC Civ 111

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. SU 2020 CV 04313

BETWEEN	MELROSE FINANCE COMPANY INCORPORATED	CLAIMANT/ ANCILLARY DEFENDANT
AND	MIGUEL SUTHERLAND	1ST DEFENDANT
AND	KENNETH MORRIS	2ND DEFENDANT
AND	COAST & LAND PROPERTIES LIMITED	3RD DEFENDANT/ ANCILLARY CLAIMANT
AND	COAST & LAND AESTHETIC DEVELOPMENT LIMITED	4TH DEFENDANT
AND	MAURICE ANTHONY GRANNUM	5TH DEFENDANT
AND	HAROLD OSWALD WILLIAMS	6TH DEFENDANT

IN CHAMBERS

Nigel Jones and chantelle Biersay instructed by Nigel Jones & Co for the 3rd Defendant/Ancillary Claimant, 4th, 5th and 6th Defendants/Applicants

Vincent Chen and McKane Brown instructed by Chen, Green & Co for the Claimant/Ancillary Defendant/Respondent

**APPLICATION FOR SUMMARY JUDGMENT/STRIKING OUT OF STATEMENT OF CASE- SALE OF LAND-
REGISTRATION OF TITLES ACT- FRAUD- POSITION OF A BONA FIDE PURCHASER FOR VALUE
WITHOUT NOTICE**

HEARD: MARCH 16, 17, 2021 and July 11, 2022

HENRY-MCKENZIE, J

BACKGROUND

- [1]** On November 10, 2020, the claimant filed a Claim Form and Particulars of Claim in which it claims against the defendants to recover possession of the lands referred as Lot 1B and Lot 2 and for declarations that as the registered proprietor it has a legal interest in the lands and is entitled to its possession. The claimant further claims that the defendants have no legal or equitable interest in these lands and has sought damages for trespass to the lands.
- [2]** The events giving rise to the claim were set out quite extensively in the Particulars of Claim. I will give a brief summary. The Particulars state that the claimant acquired the lands from Duncan Bay Development Company Limited. However, by adverse possession, the 1st defendant obtained title for Lot 2 and the 2nd defendant for Lot 1B in 2019.
- [3]** Thereafter, the 5th defendant as director of the 4th defendant entered into a sale agreement with the 1st and 2nd defendants for the purchase of the lands by the 4th defendant for the reduced purchase price of US\$960,000.00. The 3rd defendant, however, is registered on the title as the proprietor of both Lot 1B and Lot 2, being nominated by the 4th defendant to take title for them both.
- [4]** It is alleged by the claimant that the conduct of the defendants was fraudulent. The claimant alleges that the 5th and 6th defendants conspired with the 1st and 2nd defendants, who are either unknown or fictitious persons, to have the titles held by the claimant cancelled and new titles registered in the names of the 1st and 2nd

defendants, so as to further a sham sale transaction with the 4th defendant and its nominee taking title.

[5] The particulars of fraud alleged are as follows:

- a) *The defendants fraudulently misrepresented to the Registrar of Titles the extent of their possession, if any, of the Lands.*
- b) *There was no physical entry upon or trespass or possession of the Land by the 1st and 2nd defendants or anyone else prior to the trespass by the 5th defendant in or about the year 2020;*
- c) *The 5th and 6th defendants contrived to have the titles held by the claimant cancelled and new titles registered in the name of unknown or fictitious persons acting in concert with them and to create documentation showing a sale to the 3rd defendant who nominated the 4th defendant to take title to the lands and thereafter to attempt to take possession of the Land in consequence of which the claimant and its servants or agents were unaware of any trespass on the Land or the claim by the defendants that they were entitled to title by adverse possession, until after the 5th and 6th defendants had completed the sham transactions;*
- d) *Commencing to construct a fence around the Lands in or about the month of August, 2020 and to cut down the mangrove trees in or about the month of July, 2020 after title had been issued to the 5th defendant so that there was no physical evidence of encroachment on the Lands during the period of adverse possession alleged such that the claimant its servants and agents were deceived.*
- e) *In the 1st and 2nd defendants advancing their respective Applications to Bring Land under the Operation of the Registration of Titles Law and/or in representing the existence and extent of their interest and development of the lands contained in their Statutory Declarations, the 1st and 2nd*

defendants acted dishonestly and/or fraudulently, as a result of which the claimant has suffered loss and damage as set out below.

f) The 3rd, 4th, 5th and 6th defendants acted in concert with the 1st and 2nd defendants to fraudulently acquire the Lands via adverse possession by concocting a false narrative which alleged that the 1st and 2nd defendants were in possession of the Lands.

g) The 1st and 2nd defendants are fictitious persons who were created by the 5th and 6th defendants to fraudulently declare the existence and extent of their interest and development of the lands contained in their Statutory Declarations in an effort to acquire the Lands via adverse possession.

h) The Statutory Declarations supporting the 1st and 2nd defendants Applications to Bring Land under the Operation of the Registration of Titles Act; namely:

...

are also fictitious persons who were created by the 5th and 6th defendants to support the applications of the 1st and 2nd defendants to fraudulently acquire the lands by way of adverse possession....

i) The Transferors of the Land, namely the 1st and 2nd defendants did not disclose any Tax Registration Number in the transfers but to the knowledge of the 5th and 6th defendants stated an address on the transfer which were in fact empty lands thereby rendering the 1st and 2nd defendant untraceable.

j) The fact that the 1st and 2nd defendants transferred and/or sold the lands to the 3rd defendant who then nominated the 4th defendant to be the registered proprietor with 5th and 6th defendants being directors of both the 3rd and 4th defendant Companies. Had the 5th and 6th defendants made proper inquiries it would have become manifest to them that a fraud was being perpetrated against the claimant.

[6] By way of an Amended Defence filed on December 23, 2020, the 3rd to 6th defendants deny the allegations of fraud and state, *inter alia*:

“...the alleged evidence of the claimant does not connect or substantiate proof of actual fraud or any fraud allegedly committed by the 3rd, 4th, 5th and 6th defendants. Lot 1B and Lot 2 were lawfully acquired by the 4th defendant as a bona fide purchaser for value without knowledge of any fraud or any irregularity...”

The claimant’s absence of evidence to allegedly prove that the 3rd, 4th, 5th and 6th defendants had knowledge of fraud committed by the 1st and 2nd defendants herein and/or their engagement in actual fraud or any fraud, confirms that, in the absence of same, an absolute interest remains vested with the 3rd defendant who cannot be ejected from ownership of Lot 1B and Lot 2”.

[7] The 3rd to 6th defendants also allege that the sale transaction being assisted by authorized agents acting for and on behalf of both the vendor and purchaser, there was no suspicion of any fraud or irregularity or that the 1st and 2nd defendants were unknown or fictitious persons or would be untraceable. Further, that at no point in time did they or anyone connected to them meet or have prior dealings with the 1st or 2nd defendants.

[8] The 3rd to 6th defendants also object to Martin Boston’s conduct of the proceedings on behalf of the claimant on the basis that he does not have the locus standi, he not being a director, manager or secretary with the authority, as required by rule 22.4(1) of the Civil Procedure Rules.

[9] The claimant, on January 4, 2021 filed a Reply in which it joins issue with the defendants and states that Mr. Boston is a duly appointed attorney of the claimant by virtue of the Power of Attorney executed on the September 1, 2020 and holds all the shares in the claimant beneficially and as such has a right to bring this action.

[10] The claimant’s Reply avers further, that no rights or obligations can be created by the nomination of the 3rd defendant as it was not a genuine nomination pursuant

to a contract of purchase in normal conveyance practice, but was a fraud on the Revenue to evade tax and as such is void ab initio.

[11] On December 23, 2020, the same date the Defence to the primary claim was filed, the 3rd defendant/ ancillary claimant instituted an ancillary claim against the claimant. This claim seeks the removal of the caveat lodged by the Registrar of Titles against both lands as well as declarations confirming their interest in the lands. The claimant/ancillary defendant filed a defence on January 4, 2021 disputing the ancillary claim and asserting that the ancillary claimant is not entitled to exercise rights over the lands or to the protection afforded by the Registration of Title Act, as it is not a bona fide purchaser for value without notice of fraud.

APPLICATION

[12] Before this court is an application by the 3rd, 4th, 5th and 6th defendants (also hereafter referred to as 'the defendants') for summary judgment and alternatively for the claimant's claim and ancillary defence to be struck out. The application was filed on January 22, 2021 and the orders sought read as follows:

1. Summary judgment be granted for the 3rd defendant/Ancillary claimant, 4th, 5th and 6th defendants on this claim.
2. Alternatively, the claimant's claim and ancillary defence be struck out.
3. Judgment ought to be entered for the 3rd defendant/ancillary claimant, 4th, 5th and 6th defendants.
4. Costs of the claim and this application to the 3rd defendant/ancillary claimant, 4th, 5th and 6th defendants to be agreed or taxed.
5. Such further and other relief as the Honourable Court deems fit.

- [13] The application is supported by the affidavit evidence of Mr. Maurice Grannum, the 5th defendant in his capacity as director of the 3rd and 4th defendants.
- [14] The 3rd defendant is the registered owner of the properties which is now registered as Lot 1B at Volume 1526 Folio 821 and Lot 2 at Volume 1528 Folio 718.
- [15] The claimant did not file a response by way of affidavit evidence to the application.

SUBMISSIONS

- [16] The parties provided written submissions which were both filed on March 15, 2021. On the date of hearing, counsel supplemented those written submissions with oral submissions. I will condense these submissions below.

Defendants' Submissions

- [17] Mr. Jones on behalf of the 3rd, 4th, 5th and 6th defendants, submits that the issue to be determined by this court is whether the claimant has a real prospect of success in the claim, taking into consideration the defendants' argument that they are bona fide purchasers for value without notice of fraud. He argues that in resolving this issue the court is required to consider five sub-topics. First and foremost, is the particularization of fraud. He submits that where a claimant makes allegations of fraud this must be distinctly alleged/pleaded and distinctly proved. In support of this proposition, he relies on the cases of *Wallingford v The Directors of Mutual Society* (1880) 5 AC 685; *Davy v Garrett* (1877) 7Ch. D. 473 and *Henry Charles Johnson v Sagikor Bank Jamaica Ltd & The Registrar of Titles v Valerie Brown McIntosh* [2020] JMSC Civ 240. He argues that the allegations in the particulars of claim are general in nature and fail to detail any facts surrounding the alleged collusion or even to present any circumstances from which fraud could be suggested. He indicates that on the facts and the evidence, fraud on the part of the 3rd to 6th defendants is absent and as such the allegations are not sufficient to establish this.

- [18] Secondly, is the sufficiency of the evidence of fraud. Counsel submits that in line with authorities such as ***Bent v Evans*** Suit No. C. L. 1993/B 115 and ***Henry Charles***, the evidential burden to prove fraud must be weighty, as the allegation of fraud requires cogent and indisputable evidence. He argues that the claimant has not provided the evidentiary material to discharge this burden. He indicates that the claimant has not established or proved any connection between the 3rd to 6th defendants and the 1st and 2nd defendants, nor is there any evidence to show how, when and where any collusion occurred. Rather, he argued, the evidence has proven that the 3rd to 6th defendants have had no knowledge of fraud or irregularity, if there is any.
- [19] Thirdly, counsel submits that the allegations only speak to mere suspicion of fraud, which does not connote actual fraud as contemplated by the Act. He relied on the authority of ***Ervin Mcleggan v Daphne Scarlett & The Registrar of Titles*** [2017] JMSC Civ 115, where the court held at paragraph 81 that “*suspicious of fraud and worse yet, suspicion as to the possibility of fraud, ought never to be equated with proof of fraud.*”
- [20] Fourthly, is whether the 3rd to 6th defendants are bona fide purchasers for value without knowledge of fraud or irregularity. Mr. Jones submits that the 3rd defendant retains an indefeasible title as it is a bona fide purchaser for value without notice of fraud. In this regard, he drew reference to section 163 of the Registration of Titles Act (ROTA) which establishes that a bona fide purchaser of valuable consideration is protected from actions of recovery of land where he has no knowledge of fraud, even if the registered proprietor from whom he obtained title, was registered through fraud or error.
- [21] Mr. Jones submits further, that it is clearly established that the 1st and 2nd defendants had sold the lands for valuable consideration to the 4th defendant. As regards knowledge of fraud, he submits the 3rd to 6th defendants had no knowledge of fraud on the part of the 1st and 2nd defendants, nor did they engage in any fraud whatsoever. He argues that the sale transaction was at arm’s length. He drew the

court's attention to the conduct of the parties in the sale transaction from the very beginning. He highlighted that the 3rd to 6th defendants became aware of the sale through an advertisement, they then made contact with the agent of the 1st and 2nd defendants and thereafter throughout the transaction, the parties were represented by independent counsel. He argues as such, that the manner in which the transaction was conducted, there was no reason to suspect that the 1st and 2nd defendants were unknown or fictitious persons. He also adds that the 3rd to 6th defendants had no prior relationship with the 1st and 2nd defendants, nor any knowledge of the steps antecedent to the sale to reasonably suspect fraud on the part of the 1st and 2nd defendants.

[22] Mr. Jones also submits that the defendants had no knowledge of the claimant's right or interest in the lands, this being endorsed only on the parent title registered at Volume 1221 Folio 481 and Volume 1105 Folio 170 and not the 1st and 2nd defendants' title relied on for the sale transaction. He submits also, that though the 3rd to 6th defendants were aware the claimant was a predecessor in title to the 1st and 2nd defendants, there is no evidence to suggest that the claimant had a known existing right or an unregistered interest. In any event, counsel submits, if the 3rd to 6th defendants had the knowledge of the claimant's interest in Lots 1B and 2, this would not of itself equate to proof of fraud. Reliance is placed on section 71 of the **Registration of Titles Act** which establishes that actual or constructive notice of any trust or unregistered interest does not constitute fraud. He relied also on the authorities of *Corrine Minto v David Addison & Office Equipment Sales and Service Ltd & Wiltshire Farms Ltd Claim No 2006 HCV 03523* and *Div Deep Limited & Mahesh v Tewani Limited [2011] JMCA Civ 25*.

[23] In referring to section 71 of the Registration of Titles Act, counsel also argued that the 3rd to 6th defendants are not required to enquire into the circumstances under which the 1st and 2nd defendants obtained title to the lands. He argued that the defendants upon seeing the certificate of title in the names of the 1st and 2nd defendants, this would have provided conclusive evidence that they were the proprietors of the lands, thereby eliminating any need to make enquiries. Further,

the manner in which the sale transaction was conducted, being facilitated by the agent of the 1st and 2nd defendants and independent counsel, suspicion would not have been raised so as to make enquiries, nor was vigilance deemed necessary.

[24] In oral submissions, counsel also argues that though the 1st and 2nd defendants had used the empty lots as their addresses in the agreement for sale, there is nothing untoward about this conduct to raise any suspicions necessitating further enquiries. However, despite having the support of the authorities on this, counsel argued that the defendants had been meticulous and had done a due diligence report to ensure there was no bar to registration.

[25] In respect of the apportionment of the purchase price for each property, counsel submits that enquiries were made by the 3rd to 6th defendants, and the response received from the attorney-at-law for the 1st and 2nd defendants, was to their satisfaction, thereby removing any suspicions of fraud being perpetrated. Further, it is counsel's contention, that the Stamp Commissioner had also assessed the value for both lots to be within the same range that it was sold and as such, there was nothing in the sale price to suggest any fraud.

[26] In respect of the issue of nomination, Mr. Jones submits that the nomination of the 3rd defendant to take title was a valid simple trust nomination and does not amount to a sham transaction. In support of this he relied on the Supreme Court case of ***Lookahead v Mid Island Fees (2008) Ltd & Jamaica Livestock Association Ltd & Newport-Fersan (Jamaica Ltd) & The Registrar of Titles & Royal Bank of Canada*** [2012] JMCC Comm. 8, which has endorsed the power of a purchaser to appoint a nominee for the transfer of property in a sale transaction. He submits further that the case of ***Lane v Smith and Hughes-Games*** [1981] 31 B.C.L.R. 304 also establishes that a nominee is not limited to a natural person, but also a juridical person such as a company and as such, the 3rd defendant is under no disability from being so appointed. He further states that though Manindra Garg and the 6th defendant contributed to the purchase price, the principles of company law have long established that shareholders, which Manindra Garg, the 5th and 6th

defendants are, do not own any legal or equitable interest in the assets of the company. See: ***Salmon v Salmon Co Ltd*** [1897] AC 22.

[27] The fifth and last argument has to do with the the locus standi of claimant's representative. Mr. Jones submits that the Power of Attorney which the claimant has relied on to provide its agent with the authority to commence the claim is unenforceable before the court. He contends that the Power of Attorney does not show the seal of the Island Records Office to prove that it has been recorded there in compliance with section 4 of **Records, Deeds, Wills and Letters of Patent Act**. With that said, he argued the agent of the claimant is as such not authorized to bring this claim and the claim should be struck out.

[28] Based on the foregoing, Mr. Jones submits that the claimant has no real prospect of success in proving actual fraud against the 3rd to 6th defendants and as a result, the 3rd defendant should be protected from losing the benefit of its title making this case an appropriate one for summary judgment.

Claimant's Submissions

[29] Mr. Chen on behalf of the claimant, asks this Court to consider the principles laid out in ***Robert Dale Broadber v EW Abraham & Sons Ltd et al*** [2019] JMCA Civ 17, which outlines the long established principles of summary judgment. Further, he reminded the court that the principles are that on an application for summary judgment, the court must be satisfied that:

1. All substantial facts relevant to the claimant's case which are reasonably capable of being before the court must be before the court.
2. Those facts must be undisputed or there must be no reasonable prospect of successfully disputing them.
3. There must be no real prospect of oral evidence affecting the court's assessment of the facts.

[30] Mr. Chen argues that the defendants have failed to satisfy any of the test outlined above. In particular, he states that the affidavit of Maurice Grannum fails to establish that all the substantial facts relevant to their case have been brought before the court as well as to show that there is no real prospect of oral evidence affecting the court's assessment of the facts. Moreover, he submits that there are still matters which are disputed or need to be determined after hearing evidence by a trial court. These he set out as including:

1. The existence of the 1st and 2nd defendants and whether the 3rd to 6th defendants had either met or had direct contact with them or communicated solely through an agent.
2. The picture of the lands with no residential buildings despite the 1st and 2nd defendants listing their addresses as these lands on the agreement for sale.
3. Whether these issues ought to have raised suspicion in the minds of the 3rd to 6th defendants as to the veracity of the 1st and 2nd defendants claim to the properties by adverse possession, which appears on the respective title for each lot.
4. What, if any enquiries, were conducted consequent on the notice given by the application number endorsed on the title that the titles were issued by virtue of an adverse possession application.
5. What were the requisitions raised by the purchaser's attorney and the replies.

[31] Counsel also submits that the claimant has particularised the allegations of fraud in its Particulars of Claim as is required for a matter such as this at the interlocutory stage and should not be expected to produce evidence that it would have to present at the trial. Support for this position was taken from the authority ***Ray Electra Jobson-Walsh v Gilbert Jobson et al.*** [2015] JMSC Civ 89 where Simmons J as she then was held at paragraph 76 and 77 the following:

In this matter the particulars of fraud raised by the claimant are that the third defendant knew Mr. Stevens had forged the signature of Mr. Jobson on the first agreement and that Mr. Jobson had no intention of selling the properties. Counsel for the third defendant has submitted that the claimants have failed to present any evidence to the court from which it could be established that he was guilty of actual fraud.

*I do not agree with Mrs. Gentles-Silvera that more would be needed by way of pleadings. **The evidence to prove actual fraud would have to be presented at trial.***

[32] In his oral submissions, Mr. Chen commented on the defendants' knowledge of fraud. He submits that if given the opportunity at trial to present all the evidence the trial judge would be inclined to conclude that the 5th defendant knew that there was fraud being perpetrated, but turned a blind eye.

[33] He also commented on the issue of the nomination. He submits that the nomination is not a genuine trustee nomination but instead a nomination with valuable consideration. He argues that when Manindra Garg and the 6th defendant bought into the project for the purchase of the Lots a nominee agreement ought to have been done and be assessed by the Stamp Commissioner for duties and duly paid. This not being done, he submits that the nomination is void ab initio. He submits, however, that the determination of this issue should be left to the trial judge.

[34] In conclusion, Mr. Chen submits that there are several matters which demand that further investigation of the facts and law be made and as such, the summary judgment application should be denied with costs to the claimant.

Response by Defendants

[35] Mr. Jones' response was centred on the issue of the nomination. He submitted that if the 3rd to 6th defendants were in breach of the Stamp Duty Act and the Transfer Tax Act as a result of the of nomination and failure to pay duties thereby

causing the Revenue Department to suffer loss, it is still useless for the matter to go to trial to determine that issue as it can be dealt with otherwise.

DISCUSSION

[36] It is not in dispute that it is permissible for the court to enter summary judgment by virtue of rule 15.2 of the CPR. The approach to be used and the factors to be taken into account in summary judgment applications have been laid down in several cases. For instance, **Swain v Hillman** [2001] 1 All ER 91; **Three Rivers District Council v Bank of England (No 3)** [2003] AC 1; **ED & F Man Liquid Products Ltd v Patel and Another** [2003] EWCA Civ. 472; **Fiesta Jamaica Limited v The National Water Commission** [2010] JMCA Civ 4; **Cecilia Laird v Ayana Critchlow and Kinda Venner** [2012] JMSC Civ 157. Some core principles of summary judgment applications were expressed in these cases. I will summarize them as follows:

1. The test for summary judgment is whether there is a real prospect of success, that is, whether there is a case with a realistic as against a fanciful prospect of success.
2. The overall burden of proving that the respondent/claimant has no real prospect of success rests on the applicants/defendants, but an evidential burden is still on the respondent to bring material to prove that he has a case which is better than merely arguable.
3. In a summary judgment hearing, the court is not entitled to conduct a mini trial of the issues to ascertain the prospect of success of a particular case. It is designed for straight-forward cases.
4. However, while a mini-trial is not permissible, the court is not obliged to accept without analysis everything said by a party in his statements before the court. In some cases, the factual assertions have no real substance or merit, especially if contradicted by undisputed contemporary documents. If

so, issues dependent on those baseless assertions may be disposed of at an early stage.

5. Where there are conflicts of facts on relevant issues or where the court is of the view that reasonable grounds exist for believing a fuller investigation would add to or alter the evidence, caution must be exercised in granting summary judgment or in deciding the matter summarily. The pertinent question in deciding such an application is whether there is material which demonstrates that there are issues to be investigated at trial.
- [37] Bearing in mind the above principles, the issue to be determined by this court is whether, summary judgment may be entered against the claimant, on the basis that the claimant has no real prospect of succeeding in its claim of fraud against the 3rd, 4th, 5th and 6th defendants.
- [38] Section 68 of the **Registration of Titles Act** (ROTA) preserves the indefeasibility of a title of a registered proprietor of land. However, the indefeasible nature of this registered title may be defeated in certain given circumstances, one of such is in the case of fraud. (*See: section 161 of the ROTA*). Sections 70 and 71 of the ROTA also confer on a registered proprietor an unassailable interest in that land which can only be set aside in circumstances of fraud.
- [39] Fraud as used in the context of the ROTA has not been defined therein, but guidance can be found in decided cases. Lord Lindley in the case of **Assets Co Ltd v Mere Roihi** [1905] AC 176 at p. 210 in his definition of fraud stated:

...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 shewn 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 be properly 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. (emphasis added)

[40] This definition was adopted in the Jamaican Court of Appeal case of **Harley Corporation Guarantee Investment Company Limited v Estate Rudolph Daley, Walters & RBTT Bank Jamaica Limited** [2010] JMCA Civ. 46.

[41] The 3rd defendant's title is therefore unassailable unless the claimant can show that the 3rd defendant and its agents had acquired the title by acting fraudulently.

[42] In order to do this, the claimant is required to cross certain procedural hurdles. The first of these is that in raising allegations of fraud, the claimant must distinctly set out the facts on which it intends to rely. In the decision of **Davy v Garrett** (1877) 7 Ch D 473 Thesiger LJ acknowledged that fraud must be distinctly alleged and as distinctly proved and that it was not allowable to leave fraud to be inferred from the facts. This statement of law was noted by Harris JA in **Harley Corporation**. Having outlined this, Harris JA went on to observe that:

[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. (emphasis added)

[43] Harris JA also had this to say at paragraph 53:

"In placing reliance on an allegation of fraud, a claimant is required to specifically state, in his particulars of claim, such allegations on

which he proposes to rely and prove and must distinctly state facts which disclose a charge or charges of fraud". (emphasis added)

[44] Applying these principles outlined, it is evident that once fraud has been alleged, the party raising the allegation bears the onus of specifying the fraudulent acts or omissions. The claimant must clearly and specifically set out the facts and circumstances that are being relied on to prove that the defendants acted fraudulently and cannot ask the court to infer this from general allegations.

[45] In **Harley Corporation** at paragraph 55, Harris JA made mention of the case of **Wallingford v Directors of Mutual Society** (1880) 5 AC 685 at 697, where Lord Selbourne defined the principle relating to fraud in this way:

"With regard to fraud, if there be any principle which is perfectly well-settled, it is that general allegations however strong may be the words in which they are stated, are insufficient even to amount to an averment of fraud of which any court ought to take notice. And here I find nothing but perfectly general and vague allegations of fraud. No single material fact is condescended upon, in a manner which would enable any Court to understand what it was that was alleged to be fraudulent. These allegations, I think, must be entirely disregarded..."

[46] Similarly, in the instant case, an examination of the pleadings reveals nothing but general and vague allegations of fraud in relation to the 3rd to 6th defendants. The pleadings are lacking in details as to the fraudulent acts or omissions of the 3rd to 6th defendants. At the heart of the claimant's arguments in relation to fraud, is that the 3rd to 6th defendants had colluded with the 1st and 2nd defendants, who are allegedly fictitious or unknown persons, to cancel the claimant's title and to obtain the title for the property in question in the name of the 3rd defendant.

[46] The claimant has alleged collusion which resulted in the transfer of the lands to the 3rd defendant, but as is submitted by the 3rd to 6th defendants, the details of this collusion, the circumstances surrounding it, the source from which it came, have not been established. I find the arguments of the 3rd to 6th defendants compelling, that there is nothing in the pleadings as to how, when and where this collusion occurred, which would be necessary to show that there is adequate

evidentiary material in support of fraud. The case of ***Bent v Evans*** CL..1993/B115 is particularly instructive in this regard. At paragraph 88 it was stated:

"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."

[47] The claimant alleges as well, that the 3rd, 4th, 5th and 6th defendants acted in concert with the 1st and 2nd defendants to fraudulently acquire the lands via adverse possession by concocting a false narrative that the 1st and 2nd defendants were in possession of the land and further, that the 1st and 2nd defendants are fictitious persons created by the 5th and 6th defendants. Upon an assessment of the pleadings, they are devoid of details in relation to this and amount to bald assertions. There is nothing before the court in the pleadings to substantiate these allegations, or to assist the court in understanding the basis of these allegations.

[47] It is my view that given the details in the Particulars of Claim surrounding the 1st and 2nd defendants obtaining title, and the apparent lack of details in relation to the alleged collusion between the 3rd to 6th defendants and the 1st and 2nd defendants, the claimant is obviously unable to support these allegations.

[48] The claimant has also alluded to wilful blindness on the part of the 3rd to 6th defendants, in that they failed to make enquiries when it was necessary for further investigations to be done, as part of the allegations of fraudulent conduct on their part. The claimant questioned whether any enquiries were made by the 3rd to 6th defendants given the fact that the titles were issued by virtue of adverse possession applications. Further, that the transferors of the land, namely the 1st and 2nd defendants did not disclose any Tax Registration Number (TRN) in the transfers and to the knowledge of the 5th and 6th defendants stated an address on the transfers which were in fact empty lands, that is, the same address as that of the two lots in question. The claimant also alleges that the transfers were artificial and contrived in that the two lots are adjacent to each other and are of a similar

terrain, therefore, there was no good reason for the disparity in the pricing of the lots.

- [49] The case of **Harley Corporation** is particularly helpful and instructive in relation to the issue of wilful blindness and the failure to make enquiries and whether this amounts to actual fraud. In that case, the Court of Appeal reversed the finding of the learned trial judge that Mr Harley deliberately failed to make enquiries and that this amounted to contrived ignorance or wilful blindness and consequentially, fraud. Harris JA in the Court of Appeal expressed that fraud for the purposes of sections 70 and 71 Of the Act must be borne out of acts which are “designed to cheat a person of a known existing right”.
- [50] The court further expressed that the learned trial judge was oblivious to the fact that a purchaser is under no obligation to take notice of any interest in property other than that which is recorded on the title deed. Further, that prior to the purchase of land, a buyer is under no obligation to disclose to a vendor the value of land. Finally, Harris JA expressed that there would have been no obligation on Mr Harley’s part to have embarked upon any enquiry before purchasing the property. Further, that acts of fraud as found by the learned trial judge could not be said to be directly demonstrative of fraudulent or dishonest conduct on the part of **Harley Corporation** within the purview of ROTA, namely, actual fraud. It is apparent therefore that without more, wilful blindness will not amount to actual fraud, neither will the failure to make enquiries.
- [51] Applying the principles enunciated in the **Harley** case to the present case where the 1st and 2nd defendants were endorsed on the titles relied on for the sale transaction, as the registered proprietors of the lots in question, there was no obligation on the part of the 3rd to 6th defendants to make any enquiries into the circumstances under which the 1st and 2nd defendants obtained title. The titles spoke to the fact that the 1st and 2nd defendants had sole interest in the properties. Section 71 of ROTA clearly sets out that there is no requirement for a purchaser to make enquiries into the circumstances of registration of land, except in the case

of fraud. However, the evidence before me is that the 4th defendant's attorney-at-law conducted a title search and produced a due diligence report, which revealed that the 1st and 2nd defendants were the registered owners of the two lots, Lot 1B and Lot 2, and that the claimant was the predecessor in title to the 1st and 2nd defendants. There is no evidence to suggest that the 3rd to 6th defendants knew of any "existing right" or "interest" of the claimant in the lands at the time the lots were purchased. Even so, knowledge of an existing interest without more, cannot amount to fraud.

[52] In relation to the TRNs, the uncontroverted evidence before me by way of exhibits, is that the vendors' TRNs were in fact stated in the Agreements for Sale which were duly stamped by the Tax Administration of Jamaica. The omission of the TRNs from the Transfer instruments is not adequate to prove fraud. Also, the fact that the addresses used by the vendors in the transaction are the same addresses as that of the two lots in question, does not speak to anything out of the ordinary so as to point to fraud. As regards the purchase price, there was no obligation as well on the part of the 3rd to 6th defendants to make enquiries about this. The unchallenged evidence however, is that enquiries were made and that the properties were assessed by the government within the same price range as the purchase price. The evidence before me does not disclose any act of dishonesty on the part of the 3rd to 6th defendants which is required to prove actual fraud.

[53] Although the Particulars of Fraud seem to show that there may have been some suspicious activity on the part of the 1st and 2nd defendants, which may very well amount to fraud, there is an absence of evidentiary material to support the allegations that the 3rd to 6th defendants had any knowledge of fraud, or that the 3rd to 6th defendants were engaged in any fraudulent conduct. As such, I disagree with the claimant that it has adequately particularized its claim of fraud so as to attach fraud to the 3rd to 6th defendants. The threshold to establish fraud is a high one and the pleadings have failed to meet this standard.

[54] The affidavit of Maurice Anthony Grannum filed on behalf of the 3rd to 6th defendants in support of the application for summary judgment, contradicts the claimant's case against them and sets out in details, with supporting documentary evidence, that the transaction was done in good faith at arm's length. The 3rd to 6th defendants indicate that at no point in time had they met the 1st or 2nd defendants, or had any connection or prior dealings whatsoever with them. They indicate that they became aware that the lots in question were for sale by virtue of advertisement and that at all times they interfaced with authorized agents who acted on behalf of the 1st and 2nd defendants. They also alluded to the fact that throughout the entire sale transaction the vendors and purchasers were represented by attorneys-at-law and in the case of the vendors, that is the 1st and 2nd defendants, their attorney-at-law had confirmed instructions from her clients and was in constant dialogue with their attorney-at-law. As such, their suspicion was not aroused that the 1st and 2nd defendants were "non-existent, unknown or untraceable", or that any fraud had been perpetrated upon the claimant. They contend that they are bona fide purchasers for value without notice of fraud.

[55] The claimant has filed no affidavit evidence disputing these assertions of the 3rd to 6th defendants, therefore these assertions remain unchallenged. The claimant has the responsibility of putting before the court the material on which it relies to support its case in response to an application of this nature. As was pointed out by the court in the case of ***Shernett Manning v Twin Acres Development Company Limited*** (2017) JMSC Civ 54 at paragraph 88, in a summary judgment application, the judge is expected to examine and assess the evidence on which each party relies for support of its case. The court went on to say that it is not expected that either party would refrain from putting before the court evidence which would be available at trial. Further, that it is not enough to say that there might be evidence called at trial which could shed a different light on the issues. Reference is made also, to CPR rule 15.5(2) which stipulates that for the purposes of a summary judgment hearing, a respondent who wishes to rely on evidence must file affidavit evidence and serve copies on the applicant and any other respondent to the

application, not less than 7 days before the summary judgment hearing. The claimant has failed to do this.

[56] I have taken note of the arguments by the 3rd to 6th defendants that section 163 of ROTA preserves the protection of a bona fide purchaser for valuable consideration of land against actions for recovery of land or recovery of damages, even in instances where he acquired from a person who obtained his interest by fraud. Accordingly, even if the vendor of the property was a “fraudster”, the defendant, if he is a bona fide purchaser for value without notice of fraud, would acquire the title free of any fraud possibly perpetrated by the vendor.

[57] The concept of a bona fide purchaser for value without notice was explored in ***Glenton Mcfarlane v Hopeton Ferguson*** [2017] JMSC Civ 21. Jackson-Haisley J described the concept as follows:

In order to qualify as a bona fide purchaser for value without notice, the Defendant must have given valuable consideration and must have acted in good faith. He must also have acquired some legal estate in land and he must have had no notice of the Claimant's interest whether actual, constructive or imputed. These requirements are set out by James. LJ in Pilcher v Rawlins L.R. Ch. App. 259. The defence of bona fide purchaser for value without notice is said to be an absolute, unqualified and unanswerable defence, and an unanswerable plea to the jurisdiction of the court. (emphasis added)

[58] The person who asserts that he is a bona fide purchaser for value without notice has the burden of proving all the elements of this plea. The evidence before the court is that the 3rd to 6th defendants have given valuable consideration for their acquisition of the lands. This has not been disputed by any factual evidence on the part of the claimant. As it relates to the requirement for the 3rd to 6th defendants to have acted in good faith, the evidence provided by these defendants supports the fact that they did act in good faith and that they were not aware of any existing interest of the claimant in the properties. The defendants' evidence showcases that it was through an advertisement they became aware of the lands which had prompted them to make contact with the number listed in the advertisement which resulted in an introduction to the agent of the 1st and 2nd defendants. Thereafter

discussions were had where they expressed their interests in the lots and the transaction proceeded to completion with help from their independent counsel.

[59] In all of the circumstances, the unchallenged evidence in the affidavit of the 3rd to 6th defendants is adequate to prove on a balance of probabilities, that these defendants were bona fide purchasers for value without notice of fraud.

[60] The failure of the claimant to particularize fraud, to bring evidence to show actual fraud and the evidence to prove that the 3rd defendant, the fee simple owner of the lots, was registered as proprietor other than as a bona fide purchaser for valuable consideration without notice, is sufficient to dispose of this matter, as it shows that the claimant has no real prospect of succeeding in the claim. However, further arguments were raised by the defendants and the claimant which I will briefly address.

[61] The nomination of the 3rd defendant to receive title for Lot 1B and Lot 2 for instance, was one such argument raised. The claimant in its submissions has acknowledged that the defendants had the power to nominate a nominee, but they have challenged the validity of the exercise of the nomination and has argued it not to be a simple trust nomination, but one with valuable consideration thereby requiring the payment of duties. The evidence however, points to the fact that this was a simple trust nomination with the intended purpose of the nominee holding title on behalf of the 4th defendant. I agree with the arguments posited by the defendants in relation to this and in particular, that it was a simple trust nomination, not requiring the payment of duties. In any event, if this is a nomination which requires the payment of duties, this can be dealt with otherwise and does not justify the matter going to trial in the circumstances where this does not prove actual fraud or any fraud at all being committed by the 3rd to 6th defendants.

[62] Another argument raised, concerns the locus standi of the claimant's agent, Martin Boston, to conduct proceedings on behalf of the claimant. This challenge is two-fold. In the first place, it is submitted by the defendants that Mr. Martin Boston is not an authorized director or officer of the company to represent the claimant in

these proceedings as is the required by CPR rule 22.4 (1) which states that subject to any statutory provision to the contrary, a duly authorized director or other officer of a body corporate may conduct proceedings on its behalf. The defendants have also made reference to Section 2(1) of the Companies Act which defines an officer in relation to a body corporate as including a director, manager or secretary.

[63] It is interesting to note that having reviewed the document reflecting the claimant's legal representatives and their position received from the Public Registry of Panama, Mr. Boston is nowhere identified in the document either as a director or an officer of the company. Neither is the relationship of Mr. Boston to the claimant disclosed in its statement of case. This being said, I find the arguments of the defendants as to whether he has the locus standi to bring the claim to have merit.

[64] The second argument raised is that the Power of Attorney authorizing him to bring this claim is unenforceable as it is unregistered. The defendants have referenced section 4 of the Records of Deeds, Wills and Letters Patent Act which speaks to the effect of documents which are recorded or registered at the Island records Office as also section 2 of the Probate of Deeds Act.

[65] In order for a Power of Attorney to be allowed in a court of law, it must be recorded in the Island Records Office. There is no seal on the Power of Attorney to show that it was lodged there. The document would therefore have no weight in a court of law. I find that the defendant's arguments in this regard also has merit.

[66] In all the circumstances, the factual allegations on which the claimant relies to prove its case cannot support a finding of fraud on the part of the 3rd to 6th defendants. There is no real prospect of oral evidence affecting the court's assessment of the facts, therefore the matter should be disposed of summarily as the claimant has no prospect of succeeding on the claim.

ORDERS

[67] I therefore make the following orders:

- (1) Summary Judgment granted for the 3rd Defendant/Ancillary Claimant, 4th, 5th and 6th Defendants on the claim.
- (2) Costs of the claim and this application to the 3rd Defendant/Ancillary Claimant, 4th, 5th and 6th Defendants to be agreed or taxed.

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G. Henry-McKenzie
Puisne Judge