[2022] JMSC Civ. 31

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. SU 2019 CV 03861

BETWEEN	**ALVAN POWELL**	**CLAIMANT**
AND	**RENFORD CATO**	**1ST DEFENDANT**
AND	**THE REGISTRAR OF TITLES**	**2ND DEFENDANT**

IN CHAMBERS VIA ZOOM

Miss Tamar Dickens instructed by the Director of State Proceedings for the Applicant/Second Defendant.

Mrs. Tameka Jordan and Miss Toni Ann Farquharson instructed by Mrs. Barbara Barnaby for the Claimant/Respondent.

Heard: January 20, 2022 and March 15, 2022.

Application to strike out claim – applicant alleges no reasonable ground for bringing the claim – allegations that Registrar of Title did not act with bona fides – no allegations of fraud made against Registrar – whether claim against Registrar should be struck out.

PETTIGREW COLLINS J

Heading

[1] Before the court, is a notice of Application for Court Orders filed on the 29th of November 2019. By this application, the second defendant is asking the court to say that the claim against her should be struck out as disclosing no reasonable grounds for bringing it. In the alternative, she seeks an extension

of time to file her defence. She is also asking the court to award costs in her favour.

[2] This application is in response to a claim and particulars of claim filed by the claimant on the 30th of September 2019. An amended particulars of claim was filed on the 13th of August 2020. The court observes that no issue was raised by the applicant with regard to the fact of the filing of the subsequent amended particulars of claim. The applicant instead made repeated reference to the contents of the amended particulars in pursuing her application. I considered the words of Mangatal J at paragraphs 44 and 45 of **Index Communication Network Ltd. V Capital Solutions Ltd. Et al** [2012] JMSC Civ. 50. Mangatal J observed as follows:

> *I am of the view that, even if a matter has not reached the case management stage, where an application to strike out the existing Statement of Case is being heard, it is not correct that a party could simply, "pull the rug out" from under the feet of the party applying to strike out on the basis of alleged weaknesses in the pleaded case, or omissions or admissions, by simply turning up with a newly amended statement of case that has been filed without the court's leave. In Jamaican parlance, leaving the applicant to simply "Hug, it (the amendment) up!" or "Love dat!" In my judgment, that would, at the very least, offend the rules of natural justice and the Constitutional right to a fair hearing. Even if the statement of case under attack has not been previously amended, and the case management conference has not yet taken place, once the application under consideration before the court is an application to strike out a party's Statement of Case, the Statement of Case cannot be amended without the leave of the Court. As Mr. Robinson stated in his written submissions, the stage at which the case has reached is distinguishable from "whether or not there has been a case management conference". I find that this application is being made at a late stage in the proceedings as the Defendants have argued, and not an early one as advanced by the Attorneys for Index. This is because, if the true position is that, but for the amendment, Index's claim is in danger of being struck out, then that is a stage at which there could be no more proceedings if the application for an amendment should fail. As put by Brooks J. in the first instance judgment, at page 10 of* ***Pan Caribbean v. Cartade*** *"**If the application to amend the Particulars of Claim is successful, the claim would have been saved from the fate requested by the Defendants in their respective applications to strike out**". (My emphasis). I wish to make it clear that I am not here deciding whether the Statement of Case as it stands now would be struck out. As I understand it, that is not my role at this time. It is only if the application for the*

> *amendment is refused, that I would then have to revert to dealing with the striking out applications on the basis of the present state of Index's Further Amended Particulars of Claim. I am merely making the point that everything is relative. That the stage of striking out is a late stage since one is examining the question of whether or not a claim as pleaded will cease to exist. In other words, in my judgment, lateness of a stage is not limited to examining its closeness to trial or its timing in relation to case management conference. I am here examining the fact that it could without leave being granted, be struck out. This is so even though, as stated in paragraph 16 of Diamantes* ***Diamantides v. JP Morgan Chase Bank et al*** *(2005) EWCA Civ. 1612, referred to by Brooks J,: On an application to strike out particulars of claim on the grounds that they disclose no cause of action the court will normally consider any proposed amendment since, if the existing case can be saved by a legitimate amendment, it is usually better to give permission to amend rather than strike out the claim and leave the claimant to start again. (My emphasis).*
>
> *[45] Alternatively, even if it is not a late stage, it is a stage at which injustice could potentially be done to the party applying to strike out and they may be affected adversely*

[3] She further went on to point out at paragraph 46 that:

> *When the application is made at the stage of a striking out application, the applicant must show a real prospect of establishing the proposed amendments at trial. In other words, not only must the court's permission be sought, but the real prospect of success must be demonstrable on the evidence.*

[4] In Index Communication, an application to strike out was made and during the hearing of the application, an application was filed, seeking permission to file a second further amended particulars of claim. One of the bases of the application to strike out was that there was no reasonable ground for bringing the claim. The matter had not yet reached case management stage. It was in considering the question of whether there was a right to amend without the court's permission in the face of an application to strike out that Mangatal J made the above observations.

[5] In view of the applicant's stance, I will have regard to the contents of the amended particulars in considering the application and the question of whether the claimant has a viable claim against the second defendant.

[6] In part, the grounds on which the application was made are that the statement of case filed by the claimant discloses no case of fraud nor any tortious conduct against the Registrar of titles and therefore discloses no reasonable grounds for bringing the claim. Further, that the claimant has not satisfied the statutory preconditions for instituting the claim against the Registrar of Titles as required by sections 165 and 166 of the Registration of Titles Act.

[7] I note at this stage that an application to strike out was also filed by the first defendant. The time allotted to the case was grossly inadequate to deal with both applications and was in fact insufficient to deal with anyone application. Nevertheless, I proceeded to hear the second defendant's applicant in the interest of not wasting the time allotted. In any event, the applications were made on very different factual and legal bases and so could have been heard separately, although proceeding in that manner was not ideal. The parties have filed submissions supported by authorities for which I am grateful. I will not outline in detail all the submissions, but will instead make reference to the submissions as I find necessary in resolving the application.

[8] In the amended particulars of claim, several allegations have been made against the second defendant. In order to understand those allegations, a brief background to the claim must be set out.

[9] The claimant who was 89 years of age at the time of the filing of the amended particulars of claim, claims to be the equitable owner of land registered at volume 1005 folio 455 of the Register Book of Titles. The subject land is situated at Windsor Castle in the Parish of Portland. The first defendant sought to have himself registered as the proprietor of the said land. The claimant owns adjoining property and purported to purchase the disputed land from the son of the owners who were then deceased. The claimant alleges that he took possession of the disputed lands after he paid the purchase price in the year 2000 and remained in open, continuous peaceful and undisturbed possession for some 19 years and therefore he has acquired the right to a possessory title to the land. He further alleges that in 2013, when he had already been on the land for a period of over 12 years, he received a notice from the Registrar of Titles notifying him that the first defendant was seeking

to acquire title to the land by adverse possession. The claimant objected, lodged a caveat and filed proceedings in the Supreme Court seeking an injunction to bar the registration of the land to the first defendant. That claim was tried. It is fair to say upon a reading of the judgment that although the injunction sought by the claimant was not granted, the claim did not settle the question of the ownership of the land but rather, left that issue to be dealt with by the Registrar of titles.

[10] The claimant alleges against the second defendant in paragraph 14 of his amended particulars that

> "*The said application by the first defendant for registration as owner by virtue of Section 85 of the Registration of Titles Act was inadequate and or incomplete and or negligent and deceptive and ought to have been refused and or declined by the second defendant. The second defendant through its agents and or servants, and in particular the referee did not act bona fide. They were made aware of the claimant's claim and or interest in the land in dispute or who had constructive notice of the claimant's interest in the disputed land as said interest was revealed to them directly and through their agents."*

[11] The Particulars were further detailed as follows:

(i) Having been made aware by the claimant that the first defendant has not been in sole open and continuous possession for the period he stated in his statutory declaration, the second defendant failed to satisfy herself that the first defendant is the person entitled to make the application and therefore in persisting in registering the first defendant as the owner of the land in dispute, the referee is acting in a non bona fide manner to wit, with extreme complicity in her actions.

(ii) Additionally, and or alternatively, incorrectly forming the opinion that the claimant [sic] was the person entitled to make the application for registration pursuant to Section 85 of the Registration of Titles Act.

(iii) Forming or incorrectly forming the opinion that the first defendant was in possession and would be entitled to maintain and defend possession against any other person claiming the same or any part of the land in dispute being sought to be registered despite the evidence of the contrary being presented to the referee.

(iv) Having been made aware by the claimant of his interest in the land in dispute; by virtue of Section 3 of the Limitations of Actions Act, the claimant having purchased the land in dispute and the vendors not providing title within a year of the sale, and the claimant thereafter being in open, sole, continuous, peaceful, undisturbed and undisputed possession; the second defendant still persists in registering the first defendant as owner of the land in dispute and thus acts complicity in the wrong doing.

(v) Alternatively, if intending to issue a Certificate of Title to the first defendant in light of sub-paragraphs (iii) and (iv) above failing to provisionally approve the registration of the title and to specify the nature of the qualifications needed in light of the above.

(vi) In the circumstances issuing the claimant a duplicate Certificate of Titles to the claimant.

(vii) In the circumstances, failing to exercise due diligence, care, and skill in the processing of the applications for first registration and distributions of Certificate of Title but instead has acted irrational and without legal justification with complicity in the wrong doing.

[12] The Registrar of Title at the relevant time was Ms. Cheriese Walcott. She swore to an affidavit which was filed and dated the 25th of June 2021. In that affidavit, she deponed that the records in her office reflects that on or around April 30, 2012, by application number 1759076 Mr. Renford Cato made an application for Title in relation to the disputed property and that the referee Mr. George Brown provisionally approved the application on or around the 17th of December 2012. Consequent on that provisional approval, notice was sent to the claimant in this matter as an adjoining land owner. This is the usual practice she said where there is an application for registration of title by possession. She said that upon notice being served on the claimant, a caveat was lodged on the 25th of February 2013. She pointed out that there was no indication on record of the claimant's interest in the land at the time of the referee's provisional approval. She stated further that she derived knowledge of the claimant's interest by way of the caveat being lodged. She further deponed that she had words with Attorney-at-Law Mrs. Barbara Barnaby and

suggested that she sought resolution of the matter in the Supreme Court. She said subsequent to that, Mr. Powell brought a claim in the Supreme Court. She stated further that the Learned Judge upon trial of the matter discharged an interlocutory injunction which was granted in the proceedings restraining her from taking any action in relation to the title.

[13] She also deponed that to the best of her knowledge, information and belief there is no order of the court barring the Registrar of Title from taking any action in respect to the disputed land. Further, she said that as Registrar of Titles she has not taken any steps to register any interest or effect any transfer of the disputed land. Neither has she made any decision in relation to Mr. Cato's application for title by possession pursuant to sections 86-87 of the ROTA. It is also her affidavit evidence that to the best of her knowledge, information and belief, the claimant has not been deprived of any land and he has not sustained any loss on account of any action taken by her in her capacity as Registrar of Title. She states further that applications for title by possession are referred to the Referee of Titles and that the referee is the sole arbiter of those matters.

[14] She states that the claimant has also made his own application to obtain title by possession and that the claimant's application was also submitted to the Referee. She states further that the Referee's decision is that both applications are to be reported to the Adjudication Committee. Finally, she pointed out that the disputed land is still registered in the names of Eulalee and Rupert McAnuff.

[15] Miss Dickens on behalf of the second defendant contends that there is no cause of action pleaded against the Registrar. Further that there are no allegations of misconduct, collusion or fraud against her. She directed the court's attention to the provisions of section 160 of the RTA and to the case of **Ervin Mc Leggan v Daphne Scarlett and the Registrar of Titles** [2017] JMSC Civ. 115. She asserts that the claimant has merely made bald and bare assertions against the Registrar that she did not act bonafide. Counsel observed further that the issue of ownership of the land in question as pointed out in Miss Walcott's affidavit evidence, is extant.

THE BASIS FOR STRIKING OUT

[16] Rule 26.3 (1) of the Civil Procedure Rules sets out the circumstances when striking out of a party's statement of case may be appropriate. It states:

> *In addition to any other powers under these rules, the court may strike out a statement of case or part of a statement of case if it appears to the court –*
>
> *(a) …*
>
> *(b) that the statement of case or the part to be struck out is an abuse of the process of the court or is likely to obstruct the just disposal of the proceedings*
>
> *(c) that the statement of case or the part to be stuck out discloses no reasonable grounds for bringing or defending the claim.*

[17] The ground on which this application was made is that is that set out at rule 26.3 (1)(c). In **S&T Distributors Ltd v CIBC Jamaica Ltd et al** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 112/2004, judgment delivered 31 July 2007, Harris JA highlighted that the striking out of a claim is a severe measure and the power to do so is to be exercised with extreme caution. She also said that such action should only be taken in plain and obvious cases. F Williams J (as he was then) in the case of **Herbert A Hamilton v Minister of National Security and Attorney General of Jamaica** [2015] JMSC Civil 39 also reiterated that position. Our highest court also made the point in **Peerless Limited v Gambling Regulatory Authority and others** [2015] UKPC 29 where it was laid down that considerable caution and proportionality should be exercised where the draconian power to terminate proceedings without a hearing on the merits is being exercised.

[18] It is also relevant at this stage to observe that the court should not embark on a mini-trial but rather should focus on the pleadings. See **Williams & Humbert Ltd. v W&H Trade Marks (Jersey) Ltd. and Others** (1986) 1 All ER 129 where it was said that if it appears that a prolonged and serious argument would be necessary, it may very well mean that the court time, effort and expense may be lost since the pleadings in question may not be struck out and the whole matter will again be considered at the trial.

[19] In the case of **City Properties Limited v New Era Finance Limited** [2013] JMSC Civil 23 Batts J had the following to say at paragraphs 9 to 11of his judgment regarding the striking out of a statement of case:

> *[9] On the issue of the applicable law, the section is clear and means exactly what it says. There must be reasonable grounds for bringing or defending a claim. These reasonable grounds must it seems to me be evident on a reading of the statement of case. It is well established and a matter for which no authority need be cited, that upon an application to strike out pleading, no affidavit evidence need be filed, the issue is determined by reference to the pleadings.*
>
> *[10] Therefore it seems to me that when the rule refers to "reasonable grounds" for bringing a claim it means nothing more or less than that the claimant has disclosed in the pleading that he has a reasonable cause of action against the defendant. He does this by pleading facts supportive of the existence of a cause of action or defence as the case may be. Having read the judgment of Sykes J in Sebol Ltd., the learned judge appears to have juxtaposed the bare necessity to show a cause of action known to law with the need to show reasonable grounds for bringing the action. He then proceeded to say the rule as it was now had been expanded. However, it never was the case that a claimant needed only to plead a cause of action known to law. Indeed, a claim even under the old rule might be struck out if for example a known cause of action (say negligence) was pleaded but the pleaded facts failed to allege a connection between the defendant and the claimant (by for example not pleading the driver of a motor vehicle was the defendant's servant or agent).*
>
> *[11] I doubt that the new rule invites any further examination than an examination of the statements of case to ensure that the facts as alleged support a reasonable cause of action against a defendant. It seems to me that the new wording more accurately reflects the approach the courts took to the interpretation and application of the old rule. It may be, and Sykes J is respectfully correct in this regard, that occasions may arise when a pleading discloses an unreasonable cause of action or defence on its face. I suppose if for example, it fails the de minimis test as regards quantum. However, as litigants are not to be driven from the judgment seat without a hearing on the merits, it ought to be an extremely rare case indeed where a court will find a cause of action or defence in existence but that it is "unreasonable" for the claimant or defendant to be allowed to rely on it, and to do so at an interlocutory stage of the proceedings.*

THE LAW RELATIVE TO THE APPLICATION

[20] Section 158 of the Act. It provides as follows:

> (1) Upon the recovery of any land, estate or interest, by any proceeding at law or equity, from the person registered as proprietor thereof, it shall be lawful for the court or a Judge to direct the Registrar -
>
> (a) to cancel or correct any certificate of title or instrument or any entry or memorandum in the Register Book, relating to such land, estate or interest; and
>
> (b) to issue, make or substitute such certificate of title, instrument, entry or memorandum or do such other act, as the circumstances of the case may require, and the Registrar shall give effect to that direction.
>
> (2) In any proceeding at law or equity in relation to land under the operation of this Act the court or a Judge may, upon such notice, if any, as the circumstances of the case may require, make an order directing the Registrar -
>
> (a) to cancel the title to the land and to issue a new certificate of title and the duplicate thereof in the name of the person specified for the purpose in the order; or
>
> (b) to amend or cancel any instrument, memorandum or entry relating to the land in such manner as appears proper to the court or a Judge.

[21] Ms. Dickens also adverted to the fact that there are provisions in Rule 42 of the Civil Procedure Rules which dictate that a person may be bound by a court order even where that person was not a party to the proceedings. The assertion of course is that the court may give directives to the Registrar even where she is not a party to the proceedings.

[22] Section 160 of the Registration of Titles Act protects the Registrar against legal action "for or in respect of any act or matter bona fides done or omitted to be done in the exercise or supposed exercise of the powers of this Act." It is evident from the decision in **The Registrar of Titles v Melfiz Limited and Keith Donald Reid** Supreme Court Civil Appeal No. 9 of 2003, that certain remedies which require the Registrar of Titles to do certain acts may be granted to a party, without the necessity for the Registrar to be joined as a party to the suit.

[23] Miss Dickens asked the court to have regard to section 162 of the Registration of Titles Act. It was said of this section in **The Registrar of Titles v Melfitz Limited and Keith Donald Reid** SCCA No. 9 of 2003 that "*the section has been described as being "confused and ill drafted"* but that "*what seems tolerably clear… is that the section creates a statutory cause of action."* Further, that *"it sets out the circumstances under which a person deprived of land may bring an action for damages and identifies the person to be made a defendant."* The court later went on to say that:

> *"The proviso is interesting. It outlines the circumstances in which a person deprived of land may bring an action against the Registrar as nominal defendant to recover damages out of the Assurance Fund. These circumstances seem to indicate that the intention is not to relieve the wrong doer … An action for damages may only be brought against the Registrar where the person liable for the payment of damages cease to be liable by virtue of the proviso or where the person against whom such action is directed to be brought is dead or has been adjudged bankrupt or cannot be found within the jurisdiction."*

[24] The court also explained the essence of the provisions of section 164 of the Act. It was said that "*this section permits a person wrongfully deprived of land or any interest therein through the mistake, omission or misfeasance of the Registrar or any other officer, or by the registration of any other person as proprietor, to bring an action against the Registrar as nominal defendant for the recovery of damages in two situations*". Those two circumstances are where based on the provisions of the act, the claimant is barred from bringing a claim to recover the land and where the remedy of damages is inapplicable.

[25] It was observed that the claimant in **Melfitz** had in fact brought a claim against the person he was saying had deprived him of the land and so he was not in those circumstances permitted based on the provisions of section 164, to bring a claim for damages against the Registrar.

[26] Miss Dickens also relied on the decision of **Ervin McLeggan v Daphne Scarlett and the Registrar of Titles** [2017] JMSC Civ. 115. In that case, the claimant left his certificate of title in a safety deposit box and thereafter migrated. Relatives of his were overseeing the property on his behalf between 1993 and 2002. On a visit to Jamaica in 2002, he saw a 'for sale' sign erected on the land. He afterwards learnt that a transfer had been executed in 1993 by someone purporting to be himself. The first defendant obtained title pursuant to that transfer. He brought a claim in 2007 alleging fraud against the first defendant and sought an order that the second defendant, the Registrar of Titles cancel the transfer to the first defendant.

[27] What this case made clear, was that an action against the Registrar of Titles for fraud can be sustained but there must be sufficient and cogent evidence put forward by he who makes the allegation of fraud. The case does not in my view say that it is only where fraud is alleged that there may be a claim against the Registrar. The court has to determine in a trial whether action that is alleged to be not bonafide and/or improper must amount to fraud in order for the claim to be maintained or whether and allegation of acting in a non bona fide manner is a freestanding cause of action.

[28] The issue before the court in **Ervin McLeggan** was whether the defendants either separately or collectively, acted fraudulently in having caused or facilitated the 1st defendant to be registered as holder of the fee simple estate for the property. In relation to the 2nd defendant's assertion that their office had at no time acted fraudulently in cancelling the claimant's prior title and issuing a new title to the 1st 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, Anderson J said at paragraph 37 "*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 2nd 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*."

[29] As it relates to another aspect of the 2nd defendant's defence that the claim against them discloses no cause of action, Anderson J said at paragraph 39 "*That segment of the 2nd 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."* He went on to consider section 160 of the RTA and said at paragraph 41-43:

> [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."

ANALYSIS

[30] It may be garnered from **Melfitz** also, that where specific allegations of fraud, collusion or complicity is alleged on the part of the Registrar, the Registrar is subject to suit. There are in this instance, allegations that the Registrar's actions were not bona fides. For example, it was alleged that "the referee is acting in a non bona fide manner to wit, with extreme complicity in her actions." The basis for this allegation as grounded in the pleadings was that she was at the relevant time persisting in registering the first defendant as the owner of the disputed property despite having been made aware of the claimant's interest in same and despite the fact that matters were brought to her attention that should have caused her or her agent to critically examine the authenticity of Mr. Cato's claim.

[31] Miss Dickens asserts by way of submissions that in the amended particulars of claim, bald and bare assertions are made against the Registrar that she has not acted bona fide. Further, that these assertions are without basis in fact or in law. Counsel further noted that no allegations of fraud have been made and so the claim against the Registrar amounts to an abuse of process.

[32] A look at the pleadings renders the submission that the claimant has made bald and bare assertions against the Registrar untenable if it is accepted that the referee's actions are the actions of the Registrar. As is evident from the provisions of section 160 of the Registration of Titles Act, a claim may be brought against the Registrar of Titles if it is the case that she did not act in a bona fide manner. The claimant has so asserted. It does not seem to me that that is a bare assertion in the circumstances of this case.

[33] Appended to the amended particulars of claim, are two letters written to the Registrar of Titles detailing the circumstances of the claimant's alleged occupation and possession of the disputed lands. In the correspondences, reference was made to the decision of Rattray J and excerpts from the judgment were also quoted. On the face of it, having regard to the fact that

there were two individuals claiming to have exercised sole possession of the land, the entreaties to the Registrar, could conceivably and reasonably have caused her (or her office through her alleged agent the Referee) to embark upon further investigations in the matter. Certain aspects of the judgment of Rattray J that were quoted in the letter of Mrs. Barnaby contained matters which clearly indicated that the learned judge expected the Registrar to carry out further investigations.

[34] One aspect of the judgment which was quoted was to the following effect. "*Further, if the claimant is determined to prevent the defendant's application from proceeding, he too can make his objections known to the Registrar of Titles, who ought properly to consider same and carry out her investigations in that regard*".

[35] The letters from Mrs. Barnaby and a second letter from the claimant's present attorney at law to the Registrar made it extremely obvious that the claimant was insisting that the Registrar carry out an investigation. The Registrar through her agent made short thrift of Mrs. Barnaby's letter. Her position was simply to indicate that "the matter was referred to the Referees who read the above judgment [and] after considering the same, they are in agreement with that of the learned judge, namely that the son had no locus standi to enter into a contract to sell the land as he was not registered on transmission on the title. This being the case, the Referee is not prepared to withdraw his approval." To have arrived at that conclusion could be considered evidence of the fact that all else that the learned judge had said was being ignored. Miss Dickens retort to this was that the fact that the referee had a different interpretation of the judgment from the claimant cannot be regarded as evidence of mala fides. That is not for this court in these proceedings to decide. Further, it was said that based on the claimant's evidence that it was the Registrar who according to his attorney at law, advised him to bring the present claim and also advised him to mount his own claim to title by possession presumably by way of proceedings before the Registrar) is evidence that she did not act with mala fides. That is a matter for the trier of fact to assess.

[36] Mrs. Jordan asserted in her submissions that the Referee was in the circumstances, the agent of the Registrar and for these purposes, she is responsible for his actions. Ms. Dickens observed that the case was not pleaded in a way to disclose that the conduct being complained of was that of the Referee. Miss Dickens submitted that there is no statute or principle of law that renders the Registrar automatically responsible for the conduct of employees of the office of the Registrar of titles. Whether or not the act of the Referee is the act of the Registrar is a matter to be determined at trial. In the interest of clarity, it would have been ideal that the case was so pleaded but I do not believe that the failure to do so is fatal to the claim.

[37] Miss Dickens referenced the claimant's affidavit evidence that his earliest communication with the Registrar regarding the disputed land, was a letter dated October 28, 2011 regarding the Northern Coastal Highway Improvement project. That letter was exhibited to the claimant's September 8 2021 affidavit. This was a letter from the National Land Agency directed to the claimant advising that the Commissioner of Lands was in a position to make compensation to the legal/registered title owner and that they were advised that he was the person in possession. It was also the claimant's evidence that he advised the Registrar of his interest in the disputed land by his response dated November 7, 2011.

[38] Miss Dickens countered that the correspondence dated October 28, 2011 was from the National Land Agency (NLA), specifically from the director of Corporate Services for the Commissioner of Lands and that the claimant's response was also directed to the NLA and there was no reference to the Registrar of Titles in that letter. She highlighted the difference in addresses of the Registrar of titles and the Commissioner of Lands and submitted that the role and function of the two entities are distinct. She however acknowledged that both entities fell under the National Land Agency.

[39] It was also the contention of the second defendant through counsel that based on the provisions of section 139 of the registration of Titles Act, a letter to the Commissioner of lands cannot be deemed to fix awareness of the context on the Registrar. She observed that it is the lodging of a caveat

against a title that would alert the Registrar to one's interest in land and that a letter to the Registrar would not in any event suffice.

[40] I understood the context and basis of the evidence regarding the claimant's communication with the NLA to be the claimant's way of saying that the Registrar ought to have been aware of his interest in the disputed land. It is an arguable matter whether the Registrar was in those circumstances fixed with constructive notice because another department of the same agency was in communication with the claimant and had acknowledged him as being in possession of the disputed land.

[41] It must be observed that the response to Mrs. Barnaby's letter came from the Manager of Legal Services of the National Land Agency. Mrs. Barnaby's letter was directed to the Registrar of Titles. This without more, is an indication that there is greater integration between the entities than Miss Dickens acknowledges.

[42] Thus the claimant's correspondence with the National Land Agency regarding the land could potentially have the effect contended for by the claimant, that is, fix the Registrar with constructive (even if not actual notice) of his claim to possession, as well as to form evidentiary support of his assertion that he had in fact been the one in possession of the disputed land.

[43] The assertion in the pleadings in part was that the Registrar was acting with complicity in Mr. Cato's wrong doing and her actions were not bona fide. The Registrar averred in her affidavit that there is no order of the court barring the Registrar of Title from taking any action in respect to the disputed land. She is clearly correct in that regard. That is not to suggest however, in light of the aspect of the judgment quoted, as well as other passages in the judgment, that she should proceed without regard to the claimant's assertion of his interest in the property. She erroneously stated that among the orders sought in the claim which was refused, was an order to the effect that Mr. Powell be declared the fee simple owner of the land. I say erroneously because prior to the commencement of the trial, that claim was abandoned by Mr. Powell. It was quite apparent from the judgment that the learned judge did not decide

the question of ownership of the disputed land but left it to the Registrar to determine whose interest she would register.

[44] Miss Dickens alerted the court to paragraph 14 of the Amended Particulars of claim which was quoted in full above. She submitted that this allegation is without merit in fact and in law. She pointed out that the application by the first defendant Mr. Cato was made in 2012 and a provisional decision was made by the Referee on December 17, 2012. The importance of this she says, is that the referee was not aware of any interest being claimed by the claimant then. My assessment in the preceding paragraphs already addressed this point.

[45] She pointed out that no decision has since been made in the matter. That could well be because this claim was brought. She further submitted that in the circumstances where the Registrar has made no decision, it cannot be said that she committed fraud, was complicit or that she colluded with any wrong doing. She said that the claimant would be hard pressed to identify any wrong doing on the part of the Registrar.

[46] In her submissions, Mrs. Jordan expounded that the claim against the Registrar is based on the following:

(a) The reticence of the referee to reject or ignore the caveat (properly lodged and accepted by the Registrar) in light of the fact that the Court in claim **Alvan Powelll v Renford Cato** [2019] JMSC Civ. 108 made no pronouncement on the ownership of the land to the 1st defendant and in fact indicated that it was for the Registrar of Title to resolve that issue (see paragraph 42 of the judgment) was plainly erroneous and irrational.

(b) The fact that on the face of it, the 1st defendant's claim to ownership was discredited by the claimant and the Registrar under her powers ought to have done further investigation to resolve the issue.

(c) The irrational reasoning of the referee that she was not removing her approval and premising same on the judgment **Alvan Powelll v Renford Cato** [2019] JMSC Civ. 108 when in fact the court stated that the discrepancy was to be resolved by her.

(d) The fact that the court in **Alvan Powelll v Renford Cato** [2019] JMSC Civ. 108 denied the injunction, solely on the basis of there being no cause of action (i.e. not on the merit of the case).

[47] In the instant case, the claimant is not seeking to recover damages against the Registrar but is instead seeking a declaration. Mrs. Jordan in her submissions accepted that the conclusion arrived at by the Court of Appeal in **Melfitz** is that where the remedy sought against the Registrar of titles is for inter alia a declaration, there is no need to join the Registrar as a party to the claim. The remedies sought in **Melfitz** were a declaration, cancellation, a re-transfer of the land and damages. The claim against the Registrar was one in negligence which was not maintainable against her. Mrs. Jordan said however that the pronouncement of the Court of Appeal must be looked at in conjunction with section 158 of the Act. I make the observation that an aspect of the claim against the Registrar in this case, is an allegation of negligence. The allegation that the Registrar has failed to exercise due diligence, care and skill in processing the application is in fact an allegation of negligence and is not maintainable and that minor aspect of the claim cannot be pursued ought to be struck out.

[48] I must also have regard to the fact that ultimately, what is sought against the Registrar are orders and declarations. I do not understand **Melfitz** to be saying that in no instance at all may a declaration be granted against the Registrar. Certainly a declaration may be granted to the effect that she acted fraudulently in an appropriate case where there is evidence to support those assertions.

[49] Miss Dickens stated that in any event, the Court has the power based upon the provisions of section of 158 of the RTA to give directives to the Registrar of Titles in instances where the Registrar is not a party to a claim as was recognized in the case of the **Melfitz**. I accept that submission. For reasons that will become obvious, the provisions of this section cannot assist the claimant.

[50] It was also the submission of the respondent that there are ongoing proceedings now before the Registrar and so the issue of ownership of the disputed property is outstanding. From all indications, those proceedings commenced after this claim was initiated. The complaint however is as to the Registrar's conduct prior to the time of the filing of the claim and so developments thereafter do not strictly speaking, undo the existence of a cause of action in the context of this case although in practical terms, may obviate the need to pursue the claim. The basis on which this application was filed was that there was no reasonable ground for **bringing the claim**. It may be questionable whether from a practical position this claim should be pursued in light of the now ongoing adjudication before the Registrar. The claimant may well choose to discontinue the claim if he is so advised at the conclusion of those proceedings but that is an entirely different matter.

[51] This is a case involving competing claims to a parcel of land which the Registrar had indicated would be registered to Mr. Cato notwithstanding the claimant's protestations to the Registrar. The provisions of section 68 and 70 speak to the indefeasibility of a registered title and allows for cancellation on specified bases including fraud and misdescription. Neither fraud nor misdescription nor any of the bases set out in sections 70 or 162 is being alleged. The substantive remedies being sought by the claimant do not require the Registrar to be a party. She is not being asked to refrain from doing any act. She is being asked to do acts which she can be made to do without her being a party to the claim. The order that the certificate of title be cancelled and a new certificate of title issued in the claimant's name is by which the Registrar will be bound if the claimant is successful in his claim against Mr. Cato even where she is not a party.

[52] However, it has not escaped notice that the claimant is also seeking a declaration that the Registrar did not act bonafide. It is my view that such a cause of action exists and the claimant has put forward sufficient pleadings in support of that allegation. The rest will be a matter of evidence at the appropriate time.

[53] To conclude, the claimant has made allegations in his statement of case of lack of bona fides on the part of the Registrar, he has not sought any remedies against her specifically. He has however in his amended claim sought a declaration that her actions were not bonafide. While the declaration that the claimant is the true and rightful owner and the substantive remedy for the certificate of title to be cancelled and a new one issued in the claimant's name are remedies which may be granted to him without the involvement of the Registrar in the claim based on section 158 of the Act, and the Registrar will be bound by any order the court makes, the claimant would also be entitled to have his declaration against the Registrar if the evidence led at the trial supports the making of such a declaration. The claimant cannot however, pursue the aspect of his claim which effectively alleges negligence against the Registrar.

[54] For the above reasons, I decline to strike out the claim in its entirety. The application is dismissed with costs to the claimant.

[55] In order to ensure that the matter is trial ready for the 3rd of May 2022, I also make the following case management orders:

(i) Time is extended until the 25th of March 2022 for the second defendant to file and serve its defence.

(ii) Time is extended until the 15th of April 2022 for all parties to comply with case management orders made on the 26th of January 2021.

(iii) Pre trial review is to be held on the 28th of April 2022 at 3pm for 30 minutes.

(iv) Claimant's attorney at law to prepare, file and serve this order.