IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L.1994/F-097

BETWEEN	**AUBREY FAULKNOR**	**PLAINTIFF**
AND	**PEARJOHN INVESTMENTS LTD.**	**1st DEFENDANT**
AND	**YVONNE CLAUDIUS**	**2nd DEFENDANT**

Mr. Garth McBean for Plaintiff.

Mr. Andre Earle for First Defendant and with him Miss Sheryl Thompsom.

HEARD: 28th, 29th February, 1st,2nd,3rd March,
7th and 10th April, 2000 and 15th September, 2000

F.A. SMITH, J.

The Plaintiff is and was at all material times in possession of premises at Norman Manley Boulevard in Negril in the parish of Westmoreland being the land registered at Volume 965 Folio 617 of the Register Book of Titles ("the said land").

The First Defendant is a company duly incorporated under the Laws of Jamaica with registered office at Negril and is the registered proprietor of the said land.

The Second Defendant is the predecessor in title to the First Defendant for the said land, having sold the land to one Mr. Llewellyn Johnson who nominated the First Defendant as transferee.

By Writ of Summons dated 13 July, 1994 the Plaintiff seeks a declaration that the transfer of title for the said land in the name of the First Defendant is null and void.

Specific performance of an agreement for the sale of the said land and damages for breach of contract in lieu of or in addition to specific performance were sought against the Second Defendant/Vendor. However, Mr. McBean for the Plaintiff told the court that the Second Defendant/Vendor was not served and that the Plaintiff intended to proceed against the First Defendant only.

The Plaintiff's Case in Outline

The Plaintiff, Mr. Aubrey Faulknor, gave evidence on his own behalf. He called as his supporting witness Mr. Israel Stewart, the husband of the Second Defendant/Vendor, Mrs. Yvonne Claudius-Stewart.

The Plaintiff is a businessman and operates a supermarket, bar and restaurant on the Norman Manley Boulevard, Negril, Westmoreland. By an agreement for sale in writing or evidenced in writing and made on the 3 February,

1987 the Plaintiff agreed to purchase from the Second Defendant/Vendor the said land, which is approximately 0.7 km away from the Plaintiff's business place.

The purchase price agreed was $ 220,000.00. The Plaintiff stated that he signed a sale agreement at the offices of Milholland, Ashenheim & Stone, Attorneys-at-law. He further stated that he paid a deposit of $ 56,000.00 to Miss Janet Morgan, Attorney-at-law and associate with the above mentioned firm, who acted for both parties. The agreement was not stamped with the relevant stamp duty.

Over a period of time leading up to 1988 the Plaintiff paid to the Second Defendant/Vendor sums of money amounting to $ 135,000.00. These 'installments' were paid in cash and receipts were obtained.

After the initial deposit was paid, the Plaintiff was put into possession of the said land; he had the land 'dumped up' at his expense and subsequently built three chattel houses thereon. The Plaintiff did not, however, obtain a registered title for the said land.

In January, 1993 the Second Defendant/Vendor agreed to sell the said land to Mr. Llewellyn Johnson who had it transferred to his nominee, the First Defendant.

The First Defendant was registered as proprietor and obtained title for the said land.

The Plaintiff's contention is that the promoters/directors of the First Defendant, Messrs. Llewellyn Johnson and Mr. Washington Pearce, had knowledge

(a) of the Plaintiff's beneficial interest in the said land as purchaser;

(b) that the Plaintiff was in possession of the said land as purchaser, and

(c) that the Plaintiff had expended considerable sums of money on the land.

It is also the Plaintiff's contention that the promoters/directors of the First Defendant not only knew of the Plaintiff's interest in the said land but planned to deprive him of his interest therein by inducing the Second Defendant/Vendor to sell it to Mr. Llewellyn Johnson.

The Plaintiff is asking the court to find that these acts amount to fraud within the meaning of S. 71 of the Registration of Titles Act and accordingly

declare that the transfer of title for the said land to the First Defendant is null and void.

Defence and Counterclaim of the First Defendant

Messrs. Llewellyn Johnson and Washington Pearce gave evidence on behalf of the First Defendant. They are the promoters/directors of the First Defendant.

According to Mr. Pearce, who operates a bike rental place on Norman Manley Boulevard, Negril, sometime in 1992 Mr. Israel Stewart came to his business place and told him that the adjoining property, the said land, was for sale. Mr. Stewart further told him that the registered owner of the property was Ms. Claudius and a meeting was arranged between Mr. Stewart, Ms. Claudius and Mr. Pearce at his business place. At that meeting Ms. Claudius confirmed that she intended to sell the property and informed Mr. Pearce that there was a tenant on the said land, Mr. Aubrey Faulknor, who was the owner of the movable board houses thereon.

On a subsequent occasion Ms. Claudius returned and discussed a purchase price of US$ 67,500.00 for the said land with Mr. Pearce.

Mr. Pearce was unable to meet the full asking price and persuaded Mr. Llewellyn Johnson to contribute the balance required for the purchase.

An agreement was reached and a date was set for the parties to meet in order to sign a sale agreement. Ms. Claudius informed them that her Attorney-at-law in the sale was Mr. Sinclair of Ripton McPherson & Company, while the Attorney-at-law for Messrs. Johnson and Pearce was Ms. Andrea Rattray.

Before the agreement was signed, however, Mr. Pearce left the Island in January 1993 with the understanding that Mr. Johnson would "take care of business".

Mr. Johnson tells the court that a sale agreement was in fact signed between himself and the Second Defendant/Vendor on the 18th of January 1993 for the purchase of the said land. Both parties were represented by their Attorneys.

Mr. Johnson avers that the Second Defendant/Vendor again told him that the Plaintiff was a tenant, in fact, the agreement for sale (Exhibit 5) contained a term whereby the Second Defendant/Vendor was required to serve a notice on the Plaintiff terminating his tenancy at will. This was done.

In its counterclaim the First Defendant states that it has been deprived of the use and enjoyment of the said land by the Plaintiff's wrongful occupation. The First Defendant further avers that the Plaintiff knew of the First Defendant's

intention to use and develop the said land for tourist accommodations as of August 1, 1993, an intention which the First Defendant still seeks to realise.

Accordingly, the First Defendant claims:

(i) Possession of the said land;

(ii) Damages or mesne profits at the rate of US$ 25,000. per month from 1st. August, 1993 until possession is delivered up;

(iii) Interest on such damages or mesne profits pursuant to S.3 of the Law Reform (Miscellaneous Provisions) Act.

The Issues of Law

Both counsel are agreed that the issues are as follows:

1. Whether there is a valid and enforceable agreement between the Plaintiff and the Second Defendant/Vendor for the purchase of the said land.

2. If so, whether there was fraud on the part of Mr. L. Johnson and Mr. W. Pearce, promoters/directors of the First Defendant, and

3. If so, whether fraud on the part of Messrs. Johnson and Pearce may be relied upon to defeat the registered title in the name of the First Defendant, a company incorporated years after the alleged acts of fraud.

The First Issue - Is there a valid and enforceable sale agreement between the Plaintiff and the Second Defendant

Mr. McBean for the Plaintiff conceded that the Plaintiff cannot rely upon the unstamped written agreement since S. 36 of the Stamp Duty Act provides that:

> "No instrument not duly stamped according to law shall be admitted in evidence as valid and effectual in any court proceedings for the enforcement thereof."

However, he contended that the Plaintiff may rely on the following to establish a valid and enforceable agreement:

1. The doctrine of Part Performance

2. The Statute of Frauds - S.4 - Note or Memorandum

Counsel for the Plaintiff referred to Fry on Specific Performance, 6th Edition (1921), p.278 and to **Steadman v. Steadman (1974) 1 All E.R. 977 (H.L.).** Based on these authorities he submitted that the following acts were sufficient to constitute part performance:

(a) Payment of money by the Plaintiff totaling $ 191,000. as evidenced by receipts exhibited;

(b) The entering into possession of the said land by the Plaintiff with the consent of the Second Defendant/Vendor; and

(c) The incurring of expenditure for improvement of the said land and the construction of three board houses thereon.

It is counsel's contention that these acts are unequivocal and referable to and provide proof of the oral contract alleged by the Plaintiff in respect of the sale of the said land to him.

Mr. Earle for the First Defendant argued that for part performance to apply five requirements must be met:

(i) The acts of part performance must be by the party seeking to enforce the contract;

(ii) The terms of the contract must be certain;

(iii) The agreement must be an oral one. Part performance cannot be adduced to supply what is omitted from a written agreement.

(iv) The acts of part performance must be unequivocal.

(v) There must be no other equally effectual remedy open to the Plaintiff such as compulsory purchase or damages.

He referred to Williams - Contract for Sale of Land and Title to Land - 4th Edition, P. 77. Counsel for the First Defendant submitted that based on the Plaintiff's evidence in cross-examination he cannot now seek to rely on the doctrine of part performance.

As I understand it, the basis of the doctrine of part performance is to prevent a party who seeks to rely on the Statute of Frauds from denying that a contract exists.

The court's intervention is based on estoppel. A party who "plainly intimated by his conduct the existence of a contract could not be allowed to shelter behind the statute" - See Cheshire Fifoot and Furmston's Law of Contract, 11th Edition, p.210.

The acts of part performance must be such that it would be a fraud on the part of the other party to rely on the Statute of Frauds.

In light of the foregoing it seems to me that it would be difficult to invoke the doctrine against a defendant who was not a party to the agreement, in this instance the First Defendant.

It has been said that if a contract is sought to be enforced against a person who was not one of the parties to it, there must be evidence both that he permitted the acts of part performance to be done and also that he was at the time aware of the contract. - See Williams (supra), p. 78.

In this case the acts of part performance relied on by the Plaintiff were not in any way permitted by the First Defendant, in other words, there is no evidence

that the First Defendant acquiesced in the acts of part performance. Indeed, the First Defendant has not sought to rely on the Statute of Frauds, which would have to be specifically pleaded - see Halsbury's Laws of England, 4th Edition, Vol. 42 paragraph 27.

Further reason why the doctrine of part performance is not applicable in this case is provided by the fact that one of the requirements referred to at (iii) above stipulates that the agreement in question must be an oral one. Part Performance cannot be adduced to supply what is omitted from a written agreement. - See Williams (supra), p. 77.

I am inclined to the view that part performance cannot be relied on to establish a written agreement which has not been stamped with the relevant stamp duty and within the time specified by the Stamp Duty Act.

In his pleadings the Plaintiff avers that:

> "By an agreement in writing or evidenced in writing or alternatively by an oral agreement as outlined in paragraph 13 herein and made in 1987 between the Plaintiff and the Second Defendant, the Second Defendant agrees to sell and the plaintiff agrees to purchase the aforesaid premises for a price of $ 220,000.00 - paragraph 4 of the Further Amended Statement of Claim."

However, under cross-examination the Plaintiff stated that he signed a sale agreement at his lawyer's offices and at the same time paid a deposit. It is clear therefore that the contract which the Plaintiff alleges between himself and the Second Defendant was in fact in writing. For the reason already stated this contract is not admissible in evidence by virtue of S. 36 of the Stamp Duty Act.

In the circumstances I agree with counsel for the First Defendant that the Plaintiff cannot now rely on acts of part performance to establish the existence of a written contract between the Second Defendant/Vendor and himself.

In respect of the sale of land, the doctrine of part performance was developed by the Courts of Equity to enable a litigant, who is unable to claim damages for breach of an oral agreement by virtue of the Statute of Frauds, to obtain a decree of specific performance in certain circumstances.

The First Defendant has not pleaded the Statute of Frauds as a defence, indeed, it could not do so as there is in fact a written agreement to which the First Defendant is not a party. In these circumstances the doctrine of part performance is not applicable.

Note or Memorandum of Agreement - S.4, Statute of Frauds

Mr. McBean for the plaintiff submitted that by virtue of this statute the agreement itself need not be in writing. A 'note or memorandum" of it is sufficient, provided all the material terms of the agreement are established.

He contended that in the instant case the receipts, particularly Exhibits 7 to 10 constitute a sufficient memorandum in writing for the following reasons:

(a) They contain and identify the parties to the agreement namely Ms. Claudius/Vendor and Mr. Faulknor/Purchaser.

(b) The subject matter of the agreement is adequately described. Further or in the alternative there is oral evidence which clarifies the identity of the property.

(c) Although the total consideration is not stated in the receipts, there is oral evidence from Mr. Faulknor that the purchase price agreed upon was $ 220,000.00.

(d) The receipts were all signed by Ms. Claudius/Vendor or her authorised agents Mr. Israel Stewart or Mr. Lionel Madouri.

(e) Although no completion date was inserted on any of the receipts, the court may imply that completion should be within reasonable time.

Mr. Earle for the First Defendant contended that the receipts in evidence (Exhibits 7-10) do not contain the three essential characteristics of an agreement

for the sale of land - namely the parties, the purchase price and the description of the land.

Here again I must state that the First Defendant has not pleaded the Statute of Frauds as defence.

The Plaintiff avers in his statement of claim that he is in possession of the said land pursuant to an agreement for sale. The First Defendant in its defence does not admit this, thus putting the Plaintiff to proof. The Plaintiff must therefore show that he has

(a) an agreement for sale with the Second Defendant/Vendor and

(b) which is enforceable by an action against the Second Defendant/Vendor.

I do not intend to spend much time dealing with the first point. The Plaintiff's evidence of a written agreement between himself and the Second Defendant/Vendor is not challenged by the First Defendant, indeed, Mr. Earle relied on that evidence in submitting that the doctrine of part performance was not applicable to this case.

In addition to this, the receipts identified by Mr.McBean in my view constitute a sufficient memorandum in writing of the agreement for sale, supplemented by the oral evidence of the Plaintiff in respect of the missing details.

The more important point is whether or not the Plaintiff has shown that the agreement for sale of the said land is enforceable against the second Defendant/Vendor.

The fact that the plaintiff has not pursued his claim against the Second Defendant/Vendor, or ensured her presence in the proceedings as witness seems somewhat strange.

In considering whether or not there was an enforceable agreement between the Plaintiff and the Second Defendant/Vendor, many questions come to mind.

Was the second Defendant/Vendor in a position to sell?

This to my mind is the most important consideration.

Mr. Earle for the First Defendant contended that there is not a scintilla of evidence to demonstrate that the Second Defendant/Vendor had any interest in the said land in February of 1987 when, according to the undisputed evidence presented, the agreement for sale was signed between the Plaintiff and the Second

Defendant/Vendor as she was not registered as proprietor of the said land until the 22nd day of May, 1989.

The certificate of title (Exhibit 4) shows that the predecessor in title was one Margaret McKinnon-Schutz, a resident of the U.S.A. There is no evidence of any sale agreement between the Second Defendant/Vendor and McKinnon-Schutz having been in existence in February 1987.

Mr. McBean argued that there is in fact evidence from which the court may infer that the Second Defendant/Vendor had the necessary capacity to sell the said land prior to her being registered as proprietor. This inference, he contends, may be drawn from the following:

(i) The consideration as stated on page 2 of the title (Exhibit 1) is $ 26,000.00. - this is far less than the Plaintiff agreed to pay in 1987 (i.e. $ 220,000.00). The inference may be drawn that the Second Defendant bought the land in 1983 or long before 1987, as Mr. Stewart said in evidence.

(ii) Mr. Stewart gave evidence that the Second Defendant, his wife, gave him a "Transfer Title Act"- this must mean that he saw a transfer for the said land.

(iii) Mr. Stewart's evidence that there was a caveat lodged against the title for the said land - supported by Exhibits 1 & 2 - shows that there was an impediment to the property being transferred to the Second Defendant, explaining the delay in transfer until 1989.

(iv) Both vendor and purchaser were represented by an Attorney-at-law when they signed the sale agreement. The inference to be drawn is that the Attorney must have made investigations into the title to the said land and satisfied that the vendor was in a position to sell.

Let me reiterate that it is not in dispute that in 1987 the Second Defendant/Vendor had no registered title for the said land in her name and therefore had no legal interest in the said land. Thus it follows that she could only sell to the Plaintiff whatever interest she herself held in the property, in the circumstances, an equitable interest.

Any sale/assignment of the equitable interest to the Plaintiff may only be inferred, however, if the court is satisfied on the balance of probabilities that an enforceable sale agreement existed in 1987 between the Second Defendant and her predecessor in title, thus providing evidence of the acquisition of the equitable interest in the said land.

The combined effect of the points made by Mr. McBean at (i) to (iv) above may well be that it would be reasonable to conclude that the Second Defendant had entered into an agreement for the purchase of the said land before 1987. However, this would by no means provide the court with evidence as to the enforceability of this agreement. Indeed, point (iii) above which deals with the

existence of a caveat against the title for the said land indicates that other person(s) claimed interests in the land.

It is my view that on the evidence before the court I cannot find that on the balance of probabilities the Plaintiff has established that at the time of the sale agreement between the Second Defendant/Vendor and himself the Second Defendant/Vendor was in a position to sell the said land or even that she did in fact have an assignable equitable interest in the said land.

Was the agreement for sale cancelled?

Another question which arises on the evidence, assuming that the Second Defendant was in a position to sell, is whether or not the alleged agreement was cancelled.

A letter from Ms. Janet Morgan, Attorney-at-law acting on behalf of the Second Defendant/Vendor to Mr. Kenneth McLeod & Co., Attorneys-at-law for the Plaintiff dated the 15th day of August 1988 and in reference to "Lands at Negril, Westmoreland, Volume 965 Folio 617" reads as follows:

> "We refer to yours dated June 28, 1988.....Please note that the agreement for sale mentions a deposit of $56,000.00. From that deposit has been deducted $ 5,500.00 (under special condition 2) for which your client must look to our client personally. The agreement makes that absolutely clear, it was on that basis that your client was refunded $ 50,000.00

Since your client's visit to our firm and your letter under reply, we checked with Accounts and discovered that the total payment made by your client was $ 65,500.00, paid as follows:

(1)	3.2.87	-	$ 30,000.00
(2)	10.2.87	-	$ 20,500.00
(3)	10.3.87	-	$ 15,000.00
			$ 65,500.00

The difference of $ 5,500.00 is the same sum for which your client must Look to our client directly.
We therefore enclose herewith our cheque for $ 65,000.00 in replacement of our earlier cheque for $ 50,000.00 drawn in your favour. The Agreement also makes it absolutely clear that completion would take place 30 days as of filing of a Notice of Discontinuance in the captioned suit or, On or before 30 days of a withdrawal of caveat against the lands and that Either caveat would have taken place by the 30th June, 1987 (as per Completion clause and special condition 2).
To date neither of those events have taken place.

Kindly therefore acknowledge receipt of this cheque enclosed herewith On copy letter hereof and return."

This letter clearly indicates that the sale agreement between the Plaintiff and the Second Defendant/Vendor was cancelled presumably because special condition 2 was not fulfilled.

Mr. Israel Stewart, the plaintiff's witness, stated in cross-examination that in 1988 the Second Defendant offered to refund the Plaintiff's deposit, but that the Plaintiff refused to accept it.

That part of Mr. Stewart's evidence supports the view that the alleged agreement might have been cancelled, since, as Mr. Earle contended, a refund normally follows the act of cancellation and it is immaterial whether or not the refund was in fact accepted.

Mr. McBean asked the court not to find that the agreement might have been cancelled. To support his contention he referred to the numerous receipts which comprise Exhibit 10. These, he contended, show that the Second Defendant/Vendor received sums of money from the Plaintiff before and after the 15th day of August, 1988, the date of Exhibit 12.

Her conduct, he contended, shows that she accepted that there was still a subsisting agreement for sale with the Plaintiff, long after the date of Exhibit 12.

It is true that some of the receipts in Exhibit 10 refer to payments made to or to the account of the Second Defendant by the Plaintiff during 1989 and 1990.

It is agreed that 86 receipts comprise Exhibit 10. Of these, 42 cover the period 89/90. It is interesting to note that there is no reference to the sale or purchase of land in any of the 42 receipts. None of them speaks to a deposit for the purchase of land. Indeed, two receipts dated 16.8.89 and 18.8.89, purportedly

signed by the Second Defendant/Vendor, refer to money received "for Israel Stewart".

The following typifies the rest of the receipts:

> Sept. 29,1990
>
> Received from A. Faulknor the sum of Five Hundred Dollars no cents for cash..
>
> $500.00 Per: Yvonne Stewart
> 100

These receipts are not necessarily referable to the alleged agreement for the sale of the said land, as they are not inconsistent with the Plaintiff being a tenant at will at the time. There is no evidence that the receipts were for moneys paid as deposits in the purchase of the said land.

It seems to me therefore that there is no evidence to refute the inference to be drawn from Exhibit 12 that the written agreement between the Plaintiff and the Second Defendant/Vendor was probably cancelled. If there was still a subsisting agreement in place, why then did not the Plaintiff attempt to enforce it by seeking an order for specific performance long before? Specific performance is an

equitable remedy which must be sought without undue delay. It is only after he was taken to the Resident Magistrates Court that he filed a Writ in the Supreme Court. This Writ was not served on the Second Defendant/Vendor even though the Plaintiff was able to reach her in the U.S.A.

Before leaving the issue of the receipts I must mention that some of them refer to a loan, for example, receipts dated December 31, 1987 and February 4, 1988 refer to money received from the Plaintiff "for loan".

Some speak of money borrowed. Approximately 20 receipts were signed by Mr. Israel Stewart or Mr. Lionel Madouri and there is insufficient evidence that these persons were the authorised agents of the Second Defendant/Vendor.

Mr. Stewart admitted that at the time he signed the receipts he did not have power of attorney, which he obtained only in 1989, quite some time after the said receipts were signed by him.

The only evidence in respect to Mr. Madouri comes from the Plaintiff himself, who said that the Second Defendant/Vendor sometimes sent her "boyfriend"' who signed receipts, too.

The importance of making the Second Defendant/Vendor a party to the proceedings is underscored by the foregoing. I would even venture to say that for

the Plaintiff to show that he had an unregistered legally binding interest in the said land he must first show that he is entitled to a decree of specific performance against the Second Defendant/Vendor.

For the foregoing reason I am driven to the conclusion that the Plaintiff has not established on the balance of probabilities that there is a valid and enforceable agreement between the second Defendant/Vendor and himself for the purchase of the said land.

The Second Issue – Fraud

It is now the settled law that the registration of title confers on the proprietor indefeasibility of his title save for fraud. This is the very basis of the Torrens System of registration of land which governs land registration in this country. 'Indefeasibility of title' is conferred upon the registered proprietor by sections 68, 70 and 71 of The Registration of Titles Act. Section 71 reads:

> "Except in the case of fraud, no person contradicting or dealing with or taking or proposing to take a transfer from the proprietor of any registered land, lease, mortgage or charge shall be required or in any manner concerned to enquire or ascertain the circumstances under or the consideration for, which such proprietor or any previous proprietor thereof was registered, or to see to the application of any purchase or consideration money, or shall be affected by notice, actual or constructive of any trust or unregistered interest, any rule of law or equity to

> the contrary notwithstanding; and the knowledge that any such trust or unregistered interest is in existence shall not of itself be imputed as fraud."

One adverse claim only is excepted and that is fraud. Section 71 specifically provides that mere knowledge of any trust or unregistered interest shall not be imputed as fraud.

Against this background Mr. McBean for the plaintiff submitted that the following acts constitute fraud:

(i) Collusion between a vendor or a vendee to deprive a person of an equitable interest. For this he relied on **Robertson v. Keith** [1870] 1VR (Eq.) 14.

(ii) Knowledge of the existence of an unregistered interest coupled with knowledge of the taking of possession of the land by the holder of the unregistered interest and the outlay of money – Merrie v. McKay (1897) NZLR 124.

(iii) Knowledge of the unregistered interest coupled with knowledge that the holder of the unregistered interest is being improperly deprived of it – **Locker Howlett and Others** (1894) 13 NZLR 584 at 595.

(iv) The acquisition of the registered title with a view to depriving the holder of an unregistered interest of his rights.

(v) Failure on the part of a registered proprietor to make

> enquiries into any possible unregistered interest when his suspicion has been aroused, for fear of learning the truth – **Assets Co. Ltd. V. Mere Roihi** (1905) A.C. 176 at p.210 followed in **Lynch et al v. Ennevor et al** (1982) 19 JLR 161 at 174.

Mr. Earle for the First Defendant submitted that the Plaintiff, though making general allegations of fraud, has not sufficiently alleged and proved fraud on the part of Mr. Johnson, Mr. Pearce or the First Defendant.

He further submitted that the authorities clearly show that 'fraud' as used in section 71 of the Registration of Titles Act means 'actual' not 'constructive' or 'equitable' fraud. It means, he contended, "some dishonest act or omission, some trick or artifice, calculated and designed to cheat some person of an unregistered right or interest."

He argued that the actual fraud must be brought home to the person whose title is impeached to or his agent.

His submissions were founded on the following cases – **Boothe and Clarke v. Cooke** (1982) 19 JLR 278; **Waimiha Sawmilling Co. Ltd. v. Waione Timber Co. Ltd.** (1926) L.R. 101 and **Wicks v. Bennett** 30 C.L.R. 80 at pp.87-91 and 94-95; **Assets Co. Ltd. V. Mere Roihi** (1905) A.C. 176 at 210 **Willocks v. George**

Wilson et ux SCCA 53/92 delivered 7th June, 1993 ; **Roberts v. Toussaint** (1963) 6 W.I.R. 431 at 433; **Butler v. Fairclough** 23 C.L.R. 78 at 91.

As I understand the submissions of both counsel there is no dispute that the law is that "where there is nothing but knowledge of an unregistered interest, it is not fraud to buy." Such knowledge may be an element in the building up of a case of fraud, but it does not of itself constitute fraud. 'Fraud' in the Act imports something in the nature of personal dishonesty or moral turpitude.

The question for consideration is whether the evidence establishes a case of "fraud" as defined above against the First Defendant.

The First Defendant was formed after the alleged acts of 'fraud.' The evidence is that the agreement for sale between the Second Defendant/Vendor and Mr. Llewellyn Johnson is dated the 18th January, 1993. One month later on the 18th February, 1993 the First Defendant was incorporated and was nominated by Mr. Johnson as Transferee of the said land. The registered title reveals that a transfer was effected to the First Defendant on the 15th April, 1993. If Mr. Johnson acted fraudulently as alleged, this court would be prepared to hold that such conduct would defeat the first Defendant's registered title. This must be so since

Mr. Johnson could only transfer to his nominee such interest as he himself possessed in the said land.

Was Mr. Johnson guilty of fraud in purchasing the property?

The plaintiff, said, in cross-examination, that he told Mr. Johnson in 1987 that he had bought the land. According to him Mr. Johnson knew that he was a purchaser in possession. He said Mr. Johnson knew that he was building a 10 bedroom house on the land.

Counsel for the Plaintiff submitted that the evidence of the Plaintiff indicates more than mere knowledge on the part of Mr. Johnson of the Plaintiff's unregistered interest.

He contends that the evidence that Mr. Johnson and his Co-director Mr Pearce visited the land before entering into the sale agreement, and had therefore, notice of the presence of buildings and persons other than the Plaintiff discloses fraud on the part of Mr. Johnson.

He relied on a statement of Lord Lindley in **Assets Co. Ltd. v. Mere Roiho** (supra) at 210:

> "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. But if it be shown that

> his suspicions were aroused, and that he abstained from making enquiries for fear of learning the truth, the case is very different, and fraud may be properly ascribed to him."

As I will endeavour to show later, there is no evidence before me that Mr. Johnson's suspicion was aroused and that he abstained from making enquiries. At the highest the evidence of the plaintiff and Mr. Stewart, if accepted, would indicate that Mr. Johnson had knowledge of the Plaintiff's interest in the said land as purchaser. I will return to this.

As mentioned before Mr. McBean for the Plaintiff also submitted that there was collusion between the Second Defendant/Vendor and Mr. Johnson/Vendee to deprive the Plaintiff of the land. This, he submitted amounts to fraud. He relied on **Robertson v. Keith** (1870) 1 VR (Eq.) 14 which was quoted by E.C. Adams in his work "The Land Transfer Act 1952" p:362:

> "Collusion between vendor and vendee to deprive people of their equitable interests is fraud within the meaning of the statute....."

Mr. McBean referred to Mr. Stewart's evidence and asked the court to infer that the transactions between the Second Defendant/Vendor and Messrs. Pearce and Johnson were done without his knowledge and clandestinely. But even if this were so, and I am not saying it was, this would certainly not be evidence of a

collusion between the Second Defendant/Vendor and Mr. Johnson, as the Vendee, to deprive the Plaintiff of his equitable interest.

Another submission of Mr. McBean, and in my view the most weighty, is that there is evidence that Messrs. Johnson and Pearce knew that the Plaintiff was in possession of the land as purchaser, knew of the outlay of money on the land by the Plaintiff, and knew that he was being improperly deprived of it. This, he contended, is fraud. He based this submission on **Merrier v. McKay** (supra) and **Locher v. Howlett** (supra).

In **Merrier v. McKay**, the plaintiff went into possession of, and erected buildings on land, under an agreement with the then registered proprietor under the Land Transfer Act for a lease of it for ten years, the lessor and his successors to take the buildings at a valuation at the end of the lease and the plaintiff to have the option of purchasing in case of the lessor selling. The defendant was the last of three successive registered proprietors of the fee simple in succession to the proprietor who made the agreement with the plaintiff, each of whom purchased with knowledge of the plaintiff's agreement, of his possession and of his expenditure. The plaintiff's interest was never registered.

It was held by the Supreme Court of New Zealand that it was fraud within the meaning of Section 189 (presumably similar to S.71 of the Registration of Titles Act) of the Land Transfer Act, 1885, for the defendant to seek to deprive the plaintiff of his rights under the agreement, and that the defendant must perform the contract entered into by his predecessor in title.

In **Locher v. Howlett** the same court held per Richmond J at 595:

> "It may be considered as the settled construction of this enactment that a purchaser is not affected by knowledge of the mere existence of a trust or un-registered interest, but that he is affected by knowledge that the trust is being broken or that the owner of the unregistered interest is being improperly deprived of it by the transfer under which the purchaser himself is taking."

Mr. Earle for the First Defendant submitted that the decisions of the New Zealand Court in **Merrie v. McKay** and **Locher v. Howlett** must be seen in light of the subsequent decision of the Privy Council in **Waimiha Sawmilling Co. Ltd. v. Waione Timber Co. Ltd**. (supra) on appeal from the Court of Appeal of New Zealand.

In the **Waimiha** case a proprietor of land in New Zealand, who was registered under the Land Transfer Act, 1915 (N.Z.) agreed in 1916 to grant the

right to cut timber on the land to the appellants, who registered a caveat under the Act in respect of the agreement. In 1920 the proprietor sold the land to the respondents who, in June, 1921, obtained registration of their title.

At the date of that registration a court had declared that the agreement had been validly determined by the vendor, but to the knowledge of all the parties an appeal was pending; an order had been made discharging the caveat and from that order there had been no appeal.

The registration of the respondents had been carried through hastily, as it was thought that possibly an injunction would be applied for. In July 1921, the Court of Appeal declared that the respondents had no valid ground for determining the agreement. The appellants now claimed that the respondents' title was subject to their rights under the agreement.

The Privy Council held, affirming the decision of the Court of Appeal, that the circumstances in which the respondents had obtained registration did not constitute "fraud" within the meaning of S.58 of the Act and that the respondents' title was not affected by the pendency of the litigation with regard to the appellants' rights under the agreement.

Lord Buckmaster, who delivered the judgment of their Lordships, said at p.106:

> "If the designed object of a transfer be to cheat a man of a known existing right, that is fraudulent, and so also fraud may be established by a deliberate and dishonest trick causing an interest not to be registered and thus fraudulently keeping the register clear ..... each case must depend upon its own circumstances. The act must be dishonest, and dishonesty must not be assumed solely by reason of knowledge of an unregistered interest."

In their Lordships' opinion "If knowledge of the interest itself does not affect a registered proprietor, knowledge that steps are being taken to assert that interest can have no more serious effect" - p.108.

From the cases referred to above and the others cited by both counsel it is beyond dispute that 'fraud' within the meaning of SS. 70 and 71 of the Registration of Titles Act implies some act of dishonesty which must not be assumed merely by reason of knowledge of an unregistered interest or trust. It must be strictly pleaded and strictly proved.

The onus probandi 'fraud' lies upon the person who sets it up.

I must therefore look at the pleadings and the evidence in an attempt to find out whether or not the Plaintiff has, on the balance of probabilities, proved 'fraud'

on the part of Messrs. Johnson and Pearce in order to invalidate the registered title of the First Defendant.

Having already referred to the evidence of the Plaintiff and his witness, I will now turn to the evidence of the Defence.

Mr. Llewellyn Johnson denied that the Plaintiff told him that he was a purchaser in possession . He also denied having been told by Mr. Stewart that the Plaintiff had bought the land. His evidence is that at the time of purchasing the said land he did not know of anyone else purchasing it. He said he never knew the said land before 1993, when he went there to inspect it before signing the agreement. He enquired of the Second Defendant/Vendor as to whom the buildings on the land belonged. He was told that they belonged to the Plaintiff, but that the Plaintiff was just a tenant. These buildings were not of permanent structure and were movable, according to the Plaintiff's evidence.

I find as a fact that Messrs. Johnson and Pearce were expressly told by Miss Claudius, the Second Defendant/Vendor that Mr. Faulknor, the Plaintiff, was in possession of the land as a tenant. I also find that it was reasonable for them to accept what they were told by Miss Claudius. These findings are based on the following:

(1) The Agreement for Sale (Ex. 5) between the Second Defendant/Vendor and the First Defendant has a 'possession clause' which reads:

> "Possession – On completion subject to the existing tenancy/ occupation by Aubrey Faulknor"

(2) Special condition (f) of Ex. 5 reads:

> "(f) The vendor shall serve or cause to be served upon Aubrey Faulknor a Notice to Quit and deliver up possession of the said property sold hereunder."

(3) The Second Defendant's (Miss Claudius') Attorney on the 20th January, 1993 served the first Notice to Quit on the Plaintiff as a tenant (Ex. 2). This Notice reads: "***I Yvonne Claudius of Belmount, Reading in the Parish of Saint James, the Owner/Landlord of premises situated at Negril in the Parish of Westmoreland HEREBY NOTIFY YOU that the said premises has been sold to LLEWELYN JOHNSON AND/OR HIS NOMINEE.***

I HEREBY GIVE you notice terminating your tenancy of the above premises. I request that you quit and deliver up possession of the said premises by midnight on the 31st day of January, 1993.

This Notice enures for the benefit of the Purchaser, LLEWELYN JOHNSON AND/OR HIS NOMINEE who will assume the ownership upon completion and shall be entitled to exercise all the rights and benefits

of ownership at that time.

The reason for the giving of this notice is that the premises have been sold and the Purchaser requires it for his own use and occupation.

Having received this Notice the Plaintiff did not object to it, neither did his attorney. This conduct is certainly not consistent with his claim to be a purchaser in possession.

(4) A second Notice to Quit (Ex. 3) was served on the Plaintiff as a tenant. Again no objection was taken.

(5) On January 29, 1993, the Attorneys for the Second Defendant/Vendor (Miss Claudius) gave Mr. Llewellyn Johnson a letter of possession in respect of the said land.

The following, in my view, also militate against the Plaintiff's claim:

(1) The Plaintiff did not make any demand on the Second Defendant or file suit prior to July 13, 1994 when the First Defendant filed a Plaint in the Resident Magistrate's Court for recovery of possession. The Plaintiff told the court that no attempt was made to serve the Second Defendant with the Writ.

(2) No caveat was lodged by or on behalf of the Plaintiff.

It was the Plaintiff's duty to protect any equitable interest which he may have had by lodging a caveat on the title to the said land. The absence of such

caveat at the time of the negotiations between the Second Defendant/Vendor and Mr. Johnson may also have led Mr. Johnson and his attorneys-at-law to form a bona fide view that the Plaintiff had no agreement for sale or that, if there was an agreement, that it was not valid – see **Oertel v. Hordern** (1902) 2 S.R. cases in Equity 37 at p.48.

There is no credible evidence that Mr. Johnson knew that the Second Defendant was breaking an agreement between the Plaintiff and herself or that the plaintiff was being improperly deprived of any interest by the transfer under which his nominee, the First Defendant, was taking.

Mr. Stewart's evidence that in 1988 he told Mr. Johnson and Mr. Pearce of the Plaintiff's possession as purchaser is not credible. But even if this were so, the mere knowledge of the unregistered interest "shall not of itself be imputed as fraud." The Plaintiff has not established that Mr. Johnson knew that he "had outlaid or expended money on the said premises as purchaser and fraudulently planned to deprive or cheat the plaintiff of the said interest."

I agree with Mr. Earle that there is not one scintilla of evidence that Mr. Johnson fraudulently induced the Second Defendant to cancel the sale to the Plaintiff and to sell the said premises to Mr. Johnson.

I therefore hold that 'fraud,' as alleged in the plaintiff's statement of claim, has not been established by the evidence.

The Counterclaim

The First Defendant has counterclaimed for:

(i) Possession of the said land and premises;

(ii) Damages or mesne profits at the rate of U.S. $25,000 per month from 1st August, 1993 until possession is delivered up;

(iii) Interest on such damages/mesne profits pursuant to section 3 of the Law Reform (Miscellaneous Provisions) Act.

(iv) Costs.

The evidence of Mr. Johnson and Mr. Pearce, the directors of the First Defendant, is that they had planned to build 20 one bedroom villas with a view to renting them to tourists. The plan was to start renting the villas from the 1st August, 1993 for U.S.$25,000 per month. This figure he said was arrived at by taking into account periods of "low occupancy and slow time."

In 1993, the two buildings on the property could be rented to earn just over U.S.$5,000.00 per month. This, he said, was arrived at as follows: 7

bedrooms at U.S.$25.00 per night per room for 30 nights. He used U.S.$25.00 because that was the lowest rate in Negril in 1993.

They have not yet obtained building approval for the 20 villas; the application for approval, he said, is awaiting the outcome of this case.

Mr. Earle submitted that the First Defendant has been deprived of full possession of the said premises since August 1, 1993, that is, 79 months to date, entitling it to be awarded damages/mesne profits of U.S.$1,975,000.00 (79 x U.S.$25,000.00).

Counsel for the First Defendant also submitted that if the court rejects the above contention, then based on Mr. Johnson's evidence that the lowest hotel rate in the area is U.S.$5,000 per month, the First Defendant would be entitled to an award of U.S.$395,000.00 (79 x U.S.$5,000.00).

In the event that none of the above is accepted, counsel argued that regard ought to be had to the Plaintiff's evidence that he now charges $1000 per room per night.

Mr. McBean for the Plaintiff submitted that the First Defendant has failed to lead evidence to form the basis upon which an award for damages or mesne profits can be made.

I accept as correct the following submissions of Mr. McBean:

(1) When an owner of land is wrongfully kept out of possession the normal measure of damages is the market value or rental of the property occupied or used for the period of wrongful occupation or user – See **McGregor on Damages** 17th Edition Paragraphs 1501-3; Halsbury's Laws of England 4th Edition, Volume 27 para. 255.

(2) If the person in wrongful occupation makes improvements on the land the rental value should be assessed upon the unimproved value – see **McGregor on Damages** (supra) Paragraph 1503, p.985.

(3) When the Defendant is in wrongful occupation or possession of only a part of the land he is only liable to pay the unimproved market rental of the part of the land occupied.

(4) Expenses for the management of the property should be deducted from the market rental of the property and even if there is no precise figure the market rental should be reduced. **Inverugie Investments Ltd. v. Hackett** 46 W.I.R. 1 and Halsbury's Laws of England Vol. 12 paragraph 1170 p.460.

(5) It is not sufficient for the claimant to throw figures at the Court – see **Asheroft v. Curtin** (1971) 1 WLR 1731.

The undisputed evidence is that when the land was bought by Mr. Johnson there were three buildings on it. These were erected by the Plaintiff and are used as dwelling houses and a shop. Mr. Johnson and Mr. Pearce, according to the Plaintiff "moved a bike rental shop onto the premises". This is not denied. They (Johnson and Pearce) also erected a concrete building.

This building is in front of the three chattel buildings erected by the Plaintiff. They use this building in the operation of a grocery store. It is therefore not in dispute that Mr. Johnson and Mr. Pearce are in possession of a part of the said land.

The evidence of the Plaintiff is that the bike rental business was moved to the premises in 1993. The concrete building was begun in February, 1998 and completed in September, 1999.

Accordingly, the Second Defendant cannot be awarded mesne profits in respect of the entire property. The Second Defendant is entitled to be awarded mesne profits only for that portion of the land occupied by the Plaintiff since the 1st August, 1993.

There is however, no evidence as to what portion of the land is occupied by him. Mr. McBean submitted that there is no evidence of the unimproved value of the said land.

In light of the absence of such evidence, Mr. McBean submitted that the court should not award any damages except nominal damages.

In point of law the Plaintiff, Mr. Faulknor, has been a trespasser from the 1st day of August, 1993 since the one month's Notice to Quit served on him by the Second Defendant expired on the 31st day of July, 1993 – see Exhibit 3. It is plain that after that date, the Plaintiff had no right to continue in occupation. The Second Defendant's counterclaim for possession and mesne profits must therefore succeed.

In the absence of the rental value of the premises, how should the court assess the mesne profits?

I am inclined to the view that in these circumstances the court should award nominal damages. This must be distinguished from the usual case of nominal damages awarded where there is a technical liability but no loss – injuria sine damnum.

In the instant case the problem is one of proof – not one of absence of loss but of absence of evidence of the amount of loss – see **McGregor on Damages**.

I agree with Mr. Earle that it is reasonable and fair to use the Plaintiff's evidence that he now earns $1000 per month for each room of the six bedroom house as a basis for arriving at an award for mesne profits.

As I understand the Plaintiff's evidence, this amount reflects the net income per room.

This evidence I must emphasise, is being used only as a basis for an award. Mr. McBean, (in fact) submitted that the only credible evidence of the amount which could form the basis of an award is the evidence of the Plaintiff himself, who has actually rented rooms on the property.

Thus for six rooms, at $1000 per room per month for period 1st August, 1993 to 1st August, 2000, mesne profits would amount to $6,000 x 84 = $504,000.

Conclusion

1. Judgment for the First Defendant in respect of both the claim and counterclaim.
2. The Plaintiff to give up possession of the said land to the First Defendant within 30 days from date of judgment.

3. Mesne profits assessed at J$504,000 with interest at 6% from 20th April, 1995 (the date of service of Counterclaim) to the date of judgment.

4. Costs to the First Defendant to be taxed if not agreed.

Before leaving this matter, I feel constrained to and do thank both Counsel for the great assistance they gave the court and I commend them for the industry and skill and high standard of professionalism they displayed.