IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2004 HCV02245

IN THE MATTER of the **ESTATE OF GILBERT BARON JOBSON,** late of Nineteen Miles, Coopers Hill in the parish of Saint Andrew, Businessman, deceased, intestate.

AND

IN THE MATTER of **ALL THAT** parcel of land known as Orange Grove in the parish of Trelawny, comprised in Certificate of Title registered at Volume 29 Folio 7 of the Register Book of Titles.

AND

IN THE MATTER of an Application for the opinion and direction of the Court under Section 39 of the Administrator-General's Act.

AND

IN THE MATTER of the Administrator General's Act, the Trustee Act, Trustee Attorneys and Executors (Accounts and General) Act, the Real Property Representative Act regarding the

management of the estate of Gilbert Baron Jobson

BETWEEN	**DEMETRI JOBSON**	**FIRST CLAIMANT**
AND	**MAX GILBERT JOBSON**	**SECOND CLAIMANT**
AND	**ADMINISTRATOR GENERAL OF JAMAICA** (Administrator for the Estate of Gilbert Baron Jobson, deceased	**FIRST DEFENDANT**
AND	**NEW FALMOUTH RESORTS LIMITED**	**SECOND DEFENDANT**

Mrs. Denise Senior-Smith instructed by Oswest Senior-Smith & company for the claimants

Mr. Ransford Braham Q.C instructed by Miss Jaqueline Wilcot for the first defendant

Mr. Keith Bishop and Julliet Mair Rose instructed by Riam Esor & Company for the second defendant.

Heard: September 29, October 30, 2015 and 18th December, 2015

Civil Procedure – Application to set aside order - Fraud

SIMMONS, J

[1] This is an application by the claimants who are the children and beneficiaries in the estate of Gilbert Baron Jobson to set aside the order of Rattray J which was made on the 25th April 2005. By virtue of that order, the first defendant was authorized to *"ratify"* the sale of a parcel of land which was owned by Gilbert Baron Jobson (the deceased) who died on the 23rd day of May 1980. The deceased had twenty one (21) children who with the exception of the second claimant were all minors at the date of his

death.

[2] The land which is registered at volume 29 folio 7 of the Register Book of Titles is situated at Orange Grove in the parish of Trelawny (the land).

[3] The order was made pursuant to an application by the first defendant under section 39 of the ***Administrator General's Act (the Act)***. The application was brought by way of a Notice of Application, the grounds of which were stated as follows:-

i) All attempts by the applicant to acquire the requisite receipts evidencing payment of the full purchase price pursuant to the sale have been unsuccessful;

ii) It has been thirty-seven years since the date of the purchase agreement, as a result, it is highly improbable that the required evidence will ever be obtained;

iii) The best available evidence of payment of the purchase price consists of photocopied documents.

[4] The application was supported by the affidavit of the Administrator General, Lona Millicent Brown which was dated and filed on the 22nd September 2004.

[5] In that affidavit, the Administrator General stated that the land was the subject of an Option to Purchase between the deceased and J. Cecil Abrahams who was the second defendant's agent. She also stated that the second defendant which had been in occupation since 1973 had been *"insistently demanding"* that the land be transferred in completion of the sale.

[6] She also indicated that in order to satisfy herself that the second defendant had paid for the land in full, she had requested information from the deceased's Attorneys-at-law, Messrs. Livingston, Alexander and Levy. However, that information was not forthcoming. The Administrator General deponed that she had received a letter from Mr. Raymond Chisholm, a director of the second defendant which stated that the option had been exercised and payment sent to Messrs. Livingston, Alexander and Levy. Mr. Chisholm also provided a copy of a Bill of Costs dated the 5th September 1969 which indicated that the second defendant's Attorneys-at-Law Messrs. Clinton, Hart and Company had paid the sum of twenty six thousand nine hundred pounds (£26,900.00) to the deceased's Attorneys.

[7] The Administrator General ended by indicating that since she did not have "*cogent*" evidence of the payment of the purchase price she was seeking the authorization from the court to ratify and complete the sale.

[8] On the 3rd day of May 2012 the claimants filed a Fixed Date Claim Form in which they have applied to set aside the order in addition to seeking other relief. A Notice of Application was filed by the claimants on the 21st May 2012 in which the claimants applied to be added as parties and to set aside the order of Rattray, J. They were successful in their bid to be added as parties leaving this matter to be determined. The grounds on which the claimants rely are as follows:-

[9] The application is based on the following grounds:-

i) That the applicants were not parties to the matter;

ii) That the applicants were not served with the application by the first defendant to ratify the sale of the land;

iii) The applicants were not present at the hearing of the matter;

iv) That there was a good reason why they did not attend;

v) That the Notice of Application and the order have not been served on them;

vi) That they had a right to be served;

vii) It is likely that had they attended some other order would have been made;

viii) That the section under which the application was made did not entitle the Administrator General to ratify an option which she could not conclude had been exercised;

ix) That the land was transferred to the second defendant in the absence of any proof that it had paid the purchase price.

Issues

[10] The issue which arise are:-

i) Whether the Court has the jurisdiction to set aside the order; and if so,

ii) Whether there is any basis on which the jurisdiction of the Court should be so exercised.

Claimants Submissions

[11] Mrs. Senior-Smith submitted that had the claimants been parties to the proceedings before Rattray, J a different order would have been made. She stated that as beneficiaries in their father's estate they ought to have been served with the Notice of Application filed by the Administrator General, which sought the court's directions regarding the transfer of the land. She also stated that they were never served with the order and only learnt of its existence through Mr. Roosevelt Thompson and as a result sought the Court's permission to intervene in the matter and were added as

parties on the 28th May 2014.

[12] Counsel also stated that the application has been made in a timely manner as time has not begun to run against them as up to this time the claimants have not been served with the order. She referred to the affidavit of Demetri Jobson dated the 21st September 2015 in which he states that in light of the fact that they had no notice of the application, he and his brother Max had a good reason for not attending the hearing.

[13] It was submitted that if they had been present the order would not have been made. Counsel stated that when the matter was heard by Rattray J, the applicants failed to disclose that at the time when the option was signed New Falmouth Resorts Limited was not in existence. She relied on the case of ***Harold Morrision et al v. Hatfiled Developers Limited*** [2012] JMCA Civ. 122 to state that in order for a contract which was entered into by an agent to be valid, his principal must be in existence at the time.

[14] Mrs. Senior – Smith also made the point that the fact that the Option was not exercised by Cecil Abrahams but by New Falmouth Resorts Limited had not been disclosed to the Court. She stated that no receipt was presented to the court as evidence of payment to exercise the option and no documents indicating that Mr. Gilbert Jobson received the money which was itemized in the Bill of Costs. Counsel also indicated that the Option excludes a particular part of the land which is still registered in the name of the second defendant. She stated that that land was still being treated by the deceased as his own after the date of the option. This being, she said, is evidenced by the fact that he granted an easement in 1966 and 1970. It was also submitted that in the circumstances there was actual fraud on the part of the second defendant.

[15] She argued that had the claimants been present they could have challenged the documents that were presented to the court.

[16] It was also argued that section 39 of the ***Administrator Generals Act*** does not permit the making of an application to ratify the option which the Administrator General could not on her own, conclude had been exercised. Counsel submitted that in such circumstances the beneficiaries ought to have been advised. It was also argued that the Administrator General failed to act in their best interest.

[17] Counsel also submitted that the wrong procedure was used by the Administrator General who brought the matter to the court on a Notice of Application instead of a Fixed Date Claim form. She said that where the former method was used a Judge could not insist on service of the documents.

First defendant's submissions

[18] Mr. Braham Q.C submitted that in light of the fact that the Administrator General is the personal representative of the estate, there was no requirement for the beneficiaries to be served with the application. He submitted that they were not parties to the application and there is no legal requirement for them to have been made parties for the purposes of the section 39 application. In the circumstances, there was no requirement for them to be served. Counsel also indicated that the Court could have directed that the beneficiaries be served if such a course was deemed to be appropriate.

[19] Counsel stated that the first defendant was very candid with the court in relation to the information that she had in respect of the exercise of the option. Learned Queen's Counsel also made the point that the identity of the principal was not stated in the option.

[20] Learned Queen's Counsel also stated that in 1967 when the option was signed by the deceased the beneficiaries were very young. Reference was made to the affidavit of Demetri Jobson in which he stated that he was born on the 21st November 1967 which was after the option was signed and was twelve years old when the deceased died.

[21] Counsel also submitted that at all times the first defendant sought the assistance of the Court in the discharge of her duties. Where the use of the term "ratify" in the application is concerned, Mr. Braham Q C stated that the application was, in effect, one for directions under section 39 of ***the Act***. In this regard he made reference to the recitals in the heading of the application which stated that it was an application under section 39 of ***the Act*** for the opinion and direction of the court.

[22] He also indicated that once the order was made the first defendant was bound by that order and in the absence of fraud the subsequent actions of the first defendant could not be faulted.

[23] He argued that although the application under section 39 of ***the Act*** ought to have been made by a Fixed Date Claim Form, the decision of the Court won't be defeated because of a procedural error. Reference was made to the case of ***Eldemire v. Eldemire*** [1990] UKPC 36 in support of that submission.

Second defendant's submissions

[24] Mr. Bishop submitted that there is no legal requirement for adult beneficiaries to be served with an application under section 39 as it was not a trial.

[25] He stated that the Administrator General had placed all of the material which she had before Rattray J. Furthermore, he submitted that if the beneficiaries are not satisfied with the way in which the deceased's

estate was administered they could make an application under section 41 of ***the Act*** which states:-

> *" If the Administrator-General shall at any time improperly neglect, refuse, or delay to apply for or to obtain letters of administration, or to prove any will, or to assume the management of any estate or trust to which he has been appointed, or if he shall improperly act, or omit to act, in the management of any estate or trust vested in or administered by him, or the duties of which he shall have entered upon, or if he shall improperly neglect, refuse or delay to pay forthwith the amount of any judgment, decree or order recovered against him, or if he shall pay the amount of any such judgment, decree or order out of any funds not properly liable to such payment, or if he shall improperly act, or omit to act, in any other matter with respect to any estate or trust vested in or administered by him, or with respect to any duty imposed upon him by this Act, or if there is reasonable ground to think that he is about to improperly act, or to omit to act, with respect to any of the matters aforesaid, any person interested in such estate, trust, judgment, decree, order, or other matter, may apply to the Supreme Court for an order, requiring the Administrator-General to do, or refrain from doing, the act in respect of which such person complains, and the court may thereupon make such order as the court thinks fit".*

[26] Mr. Bishop also pointed out that the option did not disclose the name of the principal and at the time when payment was made the second

defendant had been incorporated. Counsel indicated that the option stated that the person was acting on behalf of a “proposed purchaser” and it was exercised after the second defendant’s incorporation.

[27] He stated that Mr. Chisolm has been very frank in that he provided a copy of the Bill of costs from Messrs. Clinton Hart and company which shows that the sum of £26,900.00 was paid to Messrs. Livingston, Alexander and Levy when the option was exercised. He stated that the adult beneficiaries could neither prove nor disprove that the payment was made. It was also submitted that the sum paid was the approximate amount that was due for 300 acres at £90.00 per acre.

[28] In addition, it was stated that in light of the second defendant being in possession since 1973, the payment and the second defendant being the registered proprietor, actual fraud would have to be proved to defeat its title. Reference was made to the case of ***Assets Corporation Limited v. Mere Roihi*** [1905] A. C. 176 in support of that submission. Mr. Bishop stated that the claimants have not provided any information which is contrary to that advanced by the second defendant and were not in a position as some of them were very young at the time, whilst others had not yet been borne. He argued that the beneficiaries would have to rely on hearsay.

[29] In the circumstances, it was submitted that there should be an end to the litigation and that the order of Rattray J should stand.

Discussion

[30] The application with which the claimants have taken issue was brought by the Administrator General. A grant of Letters of Administration was made to the Administrator General of Jamaica on the 30th December 1982. As at that date and by virtue of section 16 of

the ***Administrator General's Act*** the property of the deceased was vested in the Administrator General. The section states:-

> *"On the grant of letters of administration to the Administrator-General, the property of the deceased shall vest in the Administrator-General, and be assets in his hands for the payment of the debts and liabilities of the deceased, in the same way, and to the same extent in all respects, as such property would have vested in and been assets in the hands of any other administrator, if this Act had not been passed, and the Administrator-General shall discharge the debts and liabilities of the deceased, and shall distribute the surplus, in the same way, and in the same order of priority, and to the same extent, that any other administrator would have been bound to discharge such debts and liabilities, and to distribute such surplus, if this Act had not been passed."*

[31] The fundamental duty of personal representatives is to administer the estate and to distribute it in accordance with the will or under the rules of intestacy.

[32] The law governing the duties of an administrator was set out by Mitchell, J in the case of ***Clifton St. Hill v Augustin St. Hill***, (unreported), St. Vincent, Civil Suit 402 of 1996, 24 May 2001, at para. 13. He said:-

> **"*An Administrator of an intestate's estate is a trustee. It is always the duty of an Administrator to satisfy the beneficiaries that he is properly administering the estate. He is required to act at a higher level even than he would in protecting his own interests. He must report and***

> ***account. More than that, he is well advised to seek consensus and approval. If he tries and fails to secure the approval and consent of a particular beneficiary, he is opening himself up to a lawsuit. He is not well advised if he then relies on the statutory powers given to him by the Act and acts unilaterally. He is expected in such a case to apply to the court for directions on the administration of the estate. He is not safe in acting unilaterally. Only the shield of directions of the court will protect him absolutely from a lawsuit being brought by a discontented beneficiary.***

Does the Court have the jurisdiction to set aside the order?

[33] Rule 11.18 of the ***Civil Procedure Rules 2002 (CPR)*** on which the claimants rely, states as follows:-

> *"(1) A party who was not present when an order was made may apply to set aside that order.*
>
> *(2) The application must be made not more than 14 days after the date on which the order was served on the applicant.*
>
> *(3) The application to set aside the order must be supported by evidence on affidavit showing-*
>
> *(a) a good reason for failing to attend the hearing; and*
>
> *(b) that it is likely that had the applicant attended some other order might have been made."*

[34] Clearly therefore the express provision of the Civil Procedure Rules enables this Court to set aside an order.

[35] It must however be noted that where such an application is being considered the Court is not carrying out an appellate function. That is not and cannot be this Court's role when considering whether an order made by another judge of concurrent jurisdiction ought to be either set aside or varied. (See ***Ray Jobson-Walsh & Anor v Administrator General of Jamaica & Ors*** [2013] JMSC Civ 132).

Whether or not the Claimants can be regarded as parties in accordance with Rule 11.18?

[36] The first step in assessing whether the Court has jurisdiction is to ascertain whether the applicants are parties to the action.

[37] The term *"party"* is described in rule 2.4 of the ***CPR*** as follows:-

> *"...includes both the party to the claim and any attorney-at-law on record for that party unless any rule specifies or it is clear from the context that it relates to the client or to the attorney-at-law only".*

[38] Notably, the section uses the word 'includes' which may be significant in that the word indicates that other possibilities may exist as opposed to the word "means" which is used very often in the same section and which seems a bit more limiting.

[39] Rule 11.18 does not seem to contemplate persons who were later added as parties because generally speaking the order would not bind such persons. The UK ***Civil Procedure Rule*** 40.9 clearly indicates that "a person who is not a party but who is directly affected by a judgment or order may apply to have the judgment or order set aside or varied". Interestingly, there is no corresponding provision in the Jamaican Civil Procedure Rules. Notwithstanding this, in the Jamaican case of **Re Dudley Ian Ward**, Brooks, J stated as follows:-

"once the court decides to hear the without notice application and makes an order in respect of it that order ought to be served on the respondent and any other person directly affected by it".

It seems therefore that if persons directly affected by the order ought to be served then such persons may also apply to set aside an order that has been made.

[40] In ***Abdelmamoud v The Egyptian Association in Great Britian Ltd*** [2015] All ER (D) 117 (Apr) consideration was given to the words 'directly affected' in ***CPR*** 40.9. It was held that in order for a non-party to be 'directly affected' by a judgment or order it was necessary that some interest capable of recognition by the law was materially and adversely affected by the judgment or order or would be materially and adversely affected by the enforcement of the judgment or order.

[41] Although this judgment speaks to a provision of the UK CPR for which there is no corresponding section in Jamaica its usefulness cannot be denied. Indisputably, an order may be made by the court which directly affects a non-party and it would certainly be a denial of justice to bar such persons from access to the court to set such an order aside. However, it must be emphasized that the term 'directly affected' cannot be loosely defined. In the ***Abdelmamoud*** case it was noted that whether a non-party had been directly affected by a judgment or order needed to be carefully scrutinized in light of the general policy that a judgment or order should not easily be set aside.

[42] The claimants were not made parties in the action to obtain the order that was granted. The Administrator General having proceeded

under section 39 of the ***Administrator General's Act*** was not under a legal obligation to serve the beneficiaries because they were not parties, despite this, it would have been prudent if the Administrator-General, as administrator of the estate, had advised them of the application. The judgment of Mitchell J in ***Clifton St. Hill*** is applicable in this regard. The claimants were however added as parties on the 28th day of May 2014.

[43] The claimants are beneficiaries who have an interest in the Jobson estate and though on a strict interpretation of Rule 11.18 they may not be considered parties this court finds that the Claimants have an interest capable of recognition by the law which is materially or adversely affected by the order. Consequently, in the interest of justice they may be said to have locus standi.

Whether or not the time requirements stipulated by Rule 11.18 have been complied with?

[44] Counsel for the Claimant submitted that time starts to run as at the date of the service of the Order. She cited the case of ***Edmore Smith v George Cooper 2009 HCV 00306*** in support of her argument. In this case Sykes, J declared:-

> "The measure of time under rule 11.18 begins when the order is served and not when notice of the order comes to the attention of the affected person".

Counsel contends that as the Claimants were never served with the Order they are more than able to make this application because time would not begin to run. This Court accepts Counsel's submission in this regard.

Whether or not the Claimants have a good reason for not attending the hearing?

[45] It is quite certain that the effect of service is to bring a matter before the court to the attention of an interested or relevant party. Therefore, if service has not been effected then that party would not be aware of the matter and would have a good reason for not attending the hearing.

Is it likely that if the Claimants had attended the hearing some other order would have been made?

Entitlement to Ratify

[46] Counsel for the Claimants submitted that section 39 of the ***Administrator General's Act*** under which the application was made did not entitle the Administrator General to ratify the option which she could not conclude had been exercised.

[47] Section 39 states that:-

> *"The Administrator-General may at any time apply to the Supreme Court for the opinion, advice, or direction of the Court or Judge respecting his rights or duties with regard to applying for, or obtaining administration of any estate, or trust, or probate of any will, or assuming the management of any estate, or trust, or with regard to any estate or trust vested in or administered by him under this Act, or with regard to any matters arising out of the management or conduct of any such estate or trust".*

[48] It is the opinion of this Court that whether or not the Administrator General was entitled to ratify the option was entirely a matter for the Court's determination. The Administrator General by proceeding under section 39 sought the direction of the Court and did not act unilaterally. Furthermore, evidence, though meager, was presented to the Court upon which the court

was free to exercise its discretion as to how it should instruct the Administrator General to proceed.

[49] Also, the ***Administrator General's Act*** does not leave the discontented beneficiaries remediless. The beneficiaries could have proceeded under section 41 if they did not agree with the actions of the Administrator-General. Consequently, Mrs. Senior-Smith's submission in this regard is untenable.

Fraud

[50] Counsel for the Claimant also submitted that the order was obtained as a result of a material non-disclosure that at the date of the option or signing thereof, the second defendant, who ultimately exercised the option, was not yet in existence. This she says amounted to fraud upon the court and demonstrates that had the Claimants been present a different order would have been made.

[51] It is important to reiterate that the court in exercising its jurisdiction to set aside an order cannot be considered to be exercising an appellate function.

[52] "It is settled that any charge of fraud must be pleaded and sufficiently particularized. This principle was expressed by Thesiger, L.J. in ***Davy v Garrett (1877) 7 Ch. D. 473*** in the following words:

> "In the Common Law Courts no rule was more clearly settled than that fraud must be distinctly alleged and distinctly proved, and that it was not allowable to leave fraud to be inferred from the facts".

A Claimant is required to set out the facts and the circumstances that are being relied on to prove that a defendant had or was motivated by a fraudulent intention. It is also clear that the court should not be asked to

infer that intention from general allegation." See ***Leroy McGregor v Verda Francis [2013] JMSC Civ 172.***

[53] The law on setting aside a judgment obtained by fraud has been outlined by the learned authors of Halsbury's Laws of England 2nd Edition Vol.22 page 790 in paragraph 1669. It is as follows:

> "A judgment, which has been obtained by fraud either in the court or of one or more of the parties, can be impeached by means of an action which may be brought without leave and is analogous to the former Chancery suit to set aside a decree obtained by fraud. In such an action, it is not sufficient merely to allege fraud without giving any particular, and the fraud must relate to matters which prima facie would be reason for setting the judgment aside if they were established by proof and not to matters which are merely collateral. The court requires a strong case to be established before it will allow a judgment to be set aside on this ground, and, unless the fraud alleged raised a reasonable prospect of success and was discovered since the judgment complained of, the action will be stayed and dismissed as vexatious."

[54] The decision of the House of Lords in ***The Ampthill Peerage*** [1976] 2 All ER 411, is also relevant. In this case Lord Wilberforce stated:-

> "What is fraud for this purpose? Learned counsel . . . without venturing upon a definition suggested that some kind of equitable fraud, or lack of frankness, was all that is meant, but I cannot accept so anaemic an ingredient. In relation to judgments, and this case is surely a fortiori or at least analogous, it is clear that only fraud in a strict legal sense will do. There must be conscious and deliberate dishonesty, and the declaration must be obtained by it. Authorities as

to judgments make clear that anyone wishing to attack a judgment on grounds of fraud must make his allegation with full particularity, must when he states it be prepared to prove what he alleges and ultimately must strictly prove it. The establishment of the fraud is a condition precedent to reopening the case: see *Jonesco v Beard* [1930] AC 298. Nothing less can be expected in the present case."

[55] Lord Simon of Glaisdale added:-

"To impeach a judgment on the ground of fraud it must be proved that the court was deceived into giving the impugned judgment by means of a false case known to be false or not believed to be true or made recklessly without any knowledge on the subject. No doubt, suppression of the truth may sometimes amount to suggestion of the false: *The Alfred Nobel* [1918] P 293 But, short of this, lack of frankness or an ulterior or oblique or indirect motive is insufficient."

[56] Although this is an application to set aside an order and not a judgment the foregoing principles are relevant. In ***Ong and others v Ping*** [2015] EWHC 1742 (Ch), a case concerning the setting aside of various orders, the court endorsed the case of ***Royal Bank of Scotland plc v Highland Financial Partners*** LP [2013] 1 CLC 596, in which Aikens, LJ outlined the legal principles which apply on an application to set aside a judgment for fraud.

The principles are as follows:-

- First, there has to be a 'conscious and deliberate dishonesty' in relation to the relevant evidence given, or action taken, statement made or matter concealed, which is relevant to the judgment now sought to be impugned.

- Secondly, the relevant evidence, action, statement or concealment (performed with conscious and deliberate dishonesty) must be 'material'. 'Material' means that the fresh evidence that is adduced after the first judgment has been given is such that it demonstrates that the previous relevant evidence, action, statement or concealment was an operative cause of the court's decision to give judgment in the way it did. *Put another way, it must be shown that the fresh evidence would have entirely changed the way in which the first court approached and came to its decision*.
- Thirdly, the question of materiality of the fresh evidence is to be assessed by reference to its impact on the evidence supporting the original decision, not by reference to its impact on what decision might be made if the claim were to be retried on honest evidence.

[57] The particulars of fraud outlined by the claimants are that the second defendant gave evidence to the Court and in writing which convinced the Administrator General that J Cecil Abrahams was acting as the agent of New Falmouth Resorts Limited at the date of the option or signing thereof. The claimants argue that it was not disclosed that at the time of the option New Falmouth did not exist.

[58] It must be proven that the first defendant was consciously and deliberately dishonest in relation to the non-disclosure of the date of the option and the date of incorporation of the company. The first defendant's state of mind must be of primary focus because it was the first defendant who made the application to the court in order to obtain the order. The Administrator-General's affidavit evidence before Rattray, J did not make mention of the variance but the evidence of the company's incorporation

was not unascertainable. In light of this, it is difficult to conclude that the first defendant was consciously and deliberately dishonest. There may have been an oversight but surely her actions were not carried out with an intention to deceive the court.

[59] In the event that I am wrong, and Mr. James Chisholm's state of mind is also of importance then it must be stated that this Court is not persuaded that Mr. Chisholm knew or believed that the information relating to the company's incorporation needed to be disclosed and was therefore dishonestly concealing a matter which he knew ought to have been disclosed. This court is not satisfied that Mr. Chisholm knew or appreciated the effect or consequences of the company's non-existence at the date of the option and would as a result try to prevent disclosure of that information. I am of the view that the payment of the purchase price and the continued efforts to secure the company's interest would more likely have been at the forefront of his mind.

[60] Importantly, the evidence that at the date of the option or the signing thereof the second defendant was not incorporated must be material in that it would have entirely changed the way in which Rattray, J approached the matter and came to his decision.

[61] In ***Harold Morrison et al v Hatfield Developers Limited*** [2012] JMSC Civ 122, statements from Halsbury's Laws of England were endorsed. Particularly,

> "the agent must not be acting for himself, but must profess to be acting for a named or ascertainable principal, and one who is actually in existence at the time when the act…is done" and "in order that the intended principal may be able to effectively ratify a contract, he must

be in existence and ascertainable at the time of the act of the agent to be ratified"

[62] The Harold Morrison case also cited the case of ***Kelner v Baxter & Ors*** (1866) LR 2 CP 174. In that case Erle, CJ observed that:

"When the company came afterwards into existence it was a totally new creature, having rights and obligations from that time but no rights or obligations by reason of anything which might have been done before"

[63] It is important to acknowledge that cases such as ***Kelner v Baxter*** suggest that a purported agent will be personally liable on a pre-incorporation contract if the parties appreciate the non-existence of a principal. The reference to "proposed" in the contract suggests that the parties were aware of the principal's non-existence.

[64] Notably, the revised fourth edition of Black's law dictionary defines fraud in different ways. It defines fraud as:-

"an intentional perversion of the truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or to surrender a legal right;

"a false representation of a matter of fact, whether by words or by conduct, by false or misleading allegations, or by concealment of that which should have been disclosed, which deceives and is intended to deceive another so that he shall act upon it to his legal injury"

[65] The option stated that Mr. Abrahams was acting on behalf of a "proposed purchaser". Having regard to the definition of fraud and the interpretation of the word "proposed" in the relevant case law, it may be said that the vendor appreciated the non-existence of the principal and the

Claimants cannot properly, without more, allege fraud against Mr. Abrahams or New Falmouth Resorts Limited.

[66] That being acknowledged, it cannot be said that the evidence of the second defendant's lack of incorporation at the date of the option or the signing thereof was material in that it would have entirely changed the way in which Rattray, J approached the matter and came to his decision as to whether or not a sale of land, which from the evidence does seem that payment was given, should be ratified.

[67] Furthermore, the question of materiality must be assessed in relation to its impact on the evidence supporting the original decision. The evidence before Rattray, J consisted of letters of administration, certificate of title, copy of a caveat, letters and a bill of costs. Whether the second defendant's lack of incorporation would be so material as to impact the indication that money had been paid over for the purchase of the property and to impact the evidence that the second defendant had lodged a caveat to secure its interest in the property during the lifetime of the deceased is more likely to be decided against the Claimants.

<u>Procedural Irregularity</u>

[68] Counsel for the Claimant also submitted that the procedure adopted by the Administrator General was contrary to statute because the Administrator General commenced the application by way of Notice of Application for Court Order when the matter should have been commenced by way of fixed date claim form.

[69] Section 14 of the 2015 ***Administrator General's (Amendment) Act*** has amended the procedure by which an application by the Administrator General should be commenced. Counsel for the first Defendant submitted that although the claim should have been brought by way of a fixed date

claim form a procedural irregularity should not be used as basis to set aside the Order. The case of ***Eldemire v Eldemire [1990] UKPC 36*** was cited in support of his submission.

[70] In ***Andrew Holness v Arthur Williams [2015] JMCA Civ 21*** the Jamaican Court of Appeal acknowledged the Eldemire case by stating as follows:-

> "In Eldemire v Eldemire [1990] UKPC 36; (1990) 38 WIR 234, the Privy Council ruled that the court has a discretion, where a party had proceeded by means of an incorrect originating process to permit the claim to proceed despite the defect. Substance was preferred over form. That decision was made in the context of the alternative processes being both subject to the rules of the court. Where, however, a particular process has been stipulated by statute, neither rules of court nor the court itself may authorise an alternative process. This has been decided by numerous decisions of this court" [my emphasis]

[71] The Fixed Date Claim Form and the Notice of Application are, in the opinion of this Court, both subject to the rules of the Court. The ***2015 Administrator General's (Amendment) Act*** does not, in section 14, stipulate a particular process that is unique to the statute. Therefore, the procedural irregularity would not be an adequate basis upon which to set aside the order.

[72] It must however be noted that Mrs. Senior-Smith's argument on this point was primarily focused on the requirement of service as regards the procedure used. She submitted that when a Notice of Application is used the Court would not necessarily insist on service. This Court has found that

it would have been best if the beneficiaries were served. Therefore its finding in relation to procedure has not truly impacted the Claimant's case.

CONCLUSION

[73] In light of the foregoing this Court has no basis upon which to exercise its jurisdiction and set aside the order of Rattray J.