



[2022] JMSC Civ. 49

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO.SU 2020 CV 02950

BETWEEN	VICTOR RODRIQUES	CLAIMANT
AND	BYRON MITCHELL	DEFENDANT

IN CHAMBERS VIA ZOOM

Mr Lenroy Stewart and Mr Jhawn Graham instructed by Wilkinson Law for the applicant/defendant.

Miss Petal Brown instructed by Flowjam Legal for the claimant/respondent.

March 28, 2022 and April 27, 2022

Application to strike out - Rule 26.3 – Whether fraud pleaded – Whether provisions of Limitation of Actions Act applicable.

PETTIGREW COLLINS J

THE BACKGROUND

[1] The claimant filed a Fixed Date Claim Form (FDCF) on August 5, 2020. He is seeking orders to the effect that he has been in open, continuous and exclusive possession of a parcel of land for a period in excess of 12 years and is therefore the owner and is entitled to a possessory title. He further claims that the defendant holds the registered title on trust for him. He also seeks an order for delivery up and cancellation of the registered title and a number of other consequential orders.

- [2] The defendant and the claimant are adjoining land owners. The claimant has been the sole owner of lot 34 Patrick Drive since June 1, 2009 consequent on the death of his father with whom he jointly owned the land. The defendant is the owner of lot 32A Patrick Drive.
- [3] The disputed land is now known as 32B Patrick Drive and is located to the rear of both lots 34 and 32A. The defendant applied for and obtained a registered title in his name to the disputed portion of land. The land is now registered at Volume Folio of the Register Book of Titles.
- [4] The claimant avers that he and/or his late father and family members exercised acts of ownership by gardening the vacant lot from about 1979/1980 and that since that time, his late father and the defendant jointly possessed the vacant lot. The claimant said that in or about April 2020, he became aware that the defendant had obtained a registered title to the entire lot. The certificate of title was issued to the defendant on December 4, 2019.

THE APPLICATION

- [5] The present application before the court was filed by the defendant on August 9, 2021. He is seeking to strike out the claimant's FDCF. The bases on which he seeks to do so are that the claim is an abuse of process and that the statement of case discloses no reasonable grounds for bringing the claim. He says the claim is an abuse of process in that the claimant's right to bring a claim in relation to the land is statute barred and any rights which he may have had, have been extinguished by virtue of the operation of sections 3 and 30 of the Limitation of Actions Act.
- [6] The defendant further avers that the claimant's reference to fraud in his pleadings is generalized and no allegations of actual fraud on the part of the defendant has been pleaded. In support of his application, the defendant also relies on evidential assertions which are in conflict with those of the claimant.

[7] The respondent to this application has raised a number of matters which I do not intend to address as I do not consider them necessary to a disposition of this application. This is in large measure because Counsel has sought to answer this application to strike out with her own application to strike out the defendant's application. As I made clear to counsel, I will not address it.

PRELIMINARY MATTERS

[8] Before the main issue is addressed, the claimant sought to say that the defendant should not be permitted to rely on the affidavit filed on June 30, 2021 in defence of the FDCF. The submission is that the affidavit did not comply with section 22 of the Judicature Supreme Court Act. Counsel in her submissions sought to rely on events which transpired during the time that this claim has been on the list. There is no affidavit evidence to support some of what has been asserted. Except to the extent that information is embodied in orders of the court previously made or where there is affidavit evidence, any assertion of fact which is made by way of submissions must necessarily be ignored.

[9] The defendant was required to file a county Clerk certificate which should have been attached to his affidavit on or before August 9, 2021. The applicant filed a second affidavit on that date. It is on this affidavit that he relies to support this application. To that affidavit is attached a certificate titled "Certificate of Appointment of a Notary Public. This document speaks to the date of appointment and the date of expiration of the Notary's commission. It is this document that the claimant's attorney says is not in compliance with section 22.

[10] Section 22 (2) and (3) of the Judicature (Supreme Court) Act provides as follows:

Affidavits, declarations and affirmations concerning matters or proceedings in any Court in this Island may be sworn or taken-

a) In any place which is part of the Commonwealth before any person having authority to administer an oath in such place or before a Jamaican or British High Commissioner, Envoy, Minister, Charge d'Affaires, Secretary of Embassy or Legation, or any Jamaican or British Consul-General, Consul,

Vice-Consul, Acting Consul or Consular Agent, exercising his functions in such place; and (b)

b) In any foreign state or country before any Jamaican or British Ambassador, Envoy Minister, Charge d' Affaires or Secretary of Embassy or Legation or any Jamaican or British Consul-General or Consul or Vice-Consul or Acting Consul or Consular Agent exercising his functions in such foreign state or country, or

c) In any foreign state or country before any person having authority by the law of such state or country to administer an oath in such state or country.

(3) Any affidavit, declaration or affirmation purporting to have affixed, impressed or subscribed thereon or thereto the seal or signature of any person authorized by paragraph (a) or paragraph (b) of subsection (2) shall be admitted in evidence without proof of the seal or signature being the seal or signature of that person or of the qualification or official character of that person.

[11] Subsection (4) of section 22 provides as follows:

“Where any affidavit, declaration or affirmation is sworn or taken in any foreign state or country before any person authorized by paragraph (c) of subsection (2) the signature or seal of such person and his authority to administer an oath in such state or country shall be verified by a certificate of one of the officers set out in paragraph (b) of subsection (2) or by a certificate under the seal of the appropriate person having such power of verification in such state or country.”

[12] Section 22(2) (c) of the act permits an affidavit sworn to in a foreign state before a person who has authority by the law of that state to administer an oath in that state, to be used in proceedings in the Supreme Court. In this instance, the defendant would be required to ensure that the signature or seal and the authority of Auline Tamara Kong (the Notary public) is verified by a certificate of a person named in sub paragraph (b) of 22(2) or a certificate under the seal of the appropriate person having the powers of verification as required by section 22(2)(c). It appears clear enough that the notary’s authority was not verified by any of the persons mentioned in paragraph (b) of section 22 (2). Thus the provisions of section 22(2)(c) would be applicable.

- [13] The claimant's concern as expressed by his attorney at law seems to be with whether the certificate attached to the defendant's affidavit in question is a certificate "under the seal of the appropriate person having such power of verification in such state or country." On the face of it, the document is a certificate issued by the Office of the Secretary of the State of Connecticut and the document is specifically stated to be a Certificate of appointment as a Notary Public, with the further preamble "Pursuant to the authority vested in me", followed by the words "be it known that Auline Tamara Kong" (which is the name of the Notary Public) "has duly been appointed ..." and then it speaks to the appointment of the Notary before whom the affidavit was sworn.
- [14] It must be taken that the secretary of State is a person so authorized. If the claimant sees it to be otherwise, then he must so establish. I am unable to fathom what is the complaint of the claimant regarding the certificate.
- [15] The second preliminary matter may very quickly and easily be disposed of. Ms Brown says the defendant did not file a defence and therefore he cannot pursue this application. The short answer is that the claimant filed a Fixed Date Claim Form and by virtue of the provisions of rule 8.8(2)(c) of the Civil Procedure Rules, the defendant filed his affidavit in response. The claimant chose to file particulars of claim as well as an affidavit. That was his choice.

THE LAW

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 struck out discloses no reasonable grounds for bringing or defending the claim.

[17] 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 posited 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. The judicial Committee of the Privy Council also made a similar pronouncement in **Peerless Limited v Gambling Regulatory Authority and others** [2015] UKPC 29 where it was said 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] 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 11 of 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 pleadings, 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 has now 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.*

Fraud

[20] The law in this area has been expounded time and time again. A registered proprietor of land holds an indefeasible title to such land. This is so by virtue of the provisions of section 68 of the Registration of Titles Act. Section 68 provides as follows:

“No certificate of title registered and granted under this Act shall 'be impeached or defeasible by reason or on account of any informality or irregularity in the application for the same, or in the proceedings previous to the registration of the certificate; and every certificate of title issued under any of the provisions herein contained shall be received in all courts as evidence of the particulars therein set forth, and of the entry thereof in the Register Book, and shall, subject to the subsequent operation of any statute of limitations, be conclusive evidence that the person named in such certificate as the proprietor of or having any estate or interest in, or power to appoint or dispose of the land therein described is seised or possessed of such estate or interest or has such power.”

[21] Sections 70 and 161 of the Act make it clear that fraud is one of circumstances that may defeat a registered title. Where there are allegations of fraud in the process of obtaining a registered title, such fraud is capable of vitiating the title and thereby defeating the interest held pursuant to such registration. See paragraphs 19 and 20 of the judgment of the Judicial Committee of the Privy Council in the case of **Pottinger v Raffone** [2007] UKPC 22. In paragraph 20, it was expounded that:

[20] the main aim of this system of registration of title is to ensure that, once a person is registered as proprietor of the land in question, his title is secure and indefeasible except in certain limited circumstances which are identified in the legislation. This is achieved by section 161 of the Registration Act.

[22] Section 161 provides as follows:

"No action of ejectment or other action, suit or proceeding, for the recovery of any land shall lie or be sustained against the person registered as proprietor thereof under the provisions of this Act, except in any of the following cases, that is to say–

(a) the case of a mortgagee as against a mortgagor in default;

(b) the case of an annuitant as against a grantor in default;

(c) the case of a lessor as against a lessee in default;

(d) the case of a person deprived of any land by fraud as against the person registered as proprietor of such land through fraud, or as against a person deriving otherwise than as a transferee bona fide for value from or through a person so registered through fraud;

- (e) *the case of a person deprived of or claiming any land included in any certificate of title of other land by misdescription of such other land, or of its boundaries, as against the registered proprietor of such other land not being a transferee thereof bona fide for value;*
- (f) *the case of a registered proprietor with an absolute title claiming under a certificate of title prior in date of registration under the provisions of this Act, in any case in which two or more certificates of title or a certificate of title may be registered under the provisions of this Act in respect of the same land,*

and in any other case than as aforesaid the production of the certificate of title or lease shall be held in every court to be an absolute bar and estoppel to any such action against the person named in such document as the proprietor or lessee of the land therein described any rule of law or equity to the contrary notwithstanding."

- [23] Section 70 of the RTA is also reflective of the contents of section 161 in so far as it allows for an attack upon the registered title on grounds that it was obtained by fraud. The section states:

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

- [24] As to the nature of the fraud required, it was made clear in the case of **Assets Company v Mere Roihi and Others** 1905 UK PC 11, that fraud:

"meant actual fraud i.e., dishonesty of some sort; not what is called constructive or equitable fraud... The fraud which must be proved in order to invalidate the title of a registered purchaser for value, whether he buys from a prior registered owner or from a person claiming under a title certified under the Native Land Acts must be brought home to the person whose registered title is impeached or to his agents. Fraud by persons from whom he claims does not

affect him unless knowledge of it is brought home to him or his agents. The mere fact that he might have found out fraud if he had been more vigilant and had made further inquiries which he omitted to make does not of itself prove fraud on his part. But if it be shown that his suspicions were aroused, and that he abstained from making inquiries for a fear of learning the truth, the case is very different and fraud may properly be ascribed to him....”

[25] In paragraphs 78 and 79 of her judgment in **Linel Bent (Administrator of the estate of Ellen Bent deceased and Linel Bent Administrator of the estate of Elga Isaacs v Elenor Evans** C.L. 1993/B 115, McDonald Bishop gave clarification as to what amounts to fraud. She expressed the following:

78. “Again, in *Sawmilling Company Limited v. Waoine Timber Company Limited* [1976] A.C. 101, the Board made the point:

“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 risk causing an interest not to be registered and thus fraudulently keeping the register clear. It is not, however, necessary or wise to give abstract illustrations of what may constitute fraud in hypothetical conditions, for each case must depend on its own circumstances. The act must be dishonest, and dishonesty must not be assumed solely by reason of knowledge of an unregistered interest..

79. These principles have been adopted and affirmed by our Court of Appeal in several cases see for instance: *Enid Timoll Uylett v George Timoll* (1980) 17 JLR 257; *Franklyn Grier v Tavares Bancroft* SCCA no. 16 of 1997 delivered April 6, 2001.

[26] In order for the defendants’ representations/statements to the Registrar of Titles to be impeachable on the ground of being fraudulent, the statements/representations must be demonstrated to be false and must have been made knowing that the statements were false, i.e. they must have been made without an honest belief as to the truthfulness of the statements and with a view to denying the claimant’s rights.

[27] The claimant is required to establish the above by clear and cogent evidence, as fraud must not only be pleaded but must be strictly proven on a balance of probabilities. Although the standard is on a balance of probabilities, case law makes it quite evident that the degree of probability should be “commensurate

with the occasion” (see the Jamaican Court of Appeal case of **Paramount Betting Limited v Brown** (1971) 12 JLR 342). To be commensurate with the occasion simply means that the more serious the allegations are, the more cogent will the evidence have to be in order for the standard of proof to be met. It goes without saying that it is the claimant who has the burden of proving fraud.

[28] It is the defendant’s assertion that the claimant allegations of fraud against him is generalized. However, in his particulars of claim the claimant contends that the defendant obtained the certificate of title fraudulently in that he submitted fraudulent declarations and or supporting documents to the Registrar of titles in order to obtain his title. The particulars of the alleged fraud were detailed. The following are examples of the nature of the fraud alleged:

- (a) The statutory declaration of the defendant stated that he has been in possession of 834.358 square metres of land when in fact he had been in possession of an estimated half of that portion;
- (b) That he had built a house on the lot when in fact the house was built on one side of the land immediately behind his property on an estimated half of the land;
- (c) That he made substantial improvement on the land when in fact the improvements were only to one side:
- (d) The pre checked plan submitted in support of the application showing that a survey was commissioned at the instance of the defendant fraudulently omitted to show a zinc fence that has existed and divided the lot since the 1970s and which zinc fence encloses the house built by the defendant and separates it from the vacant lot behind the claimant’s house.
- (e) That he had exercised ownership over the entire parcel when in fact he had exercised possession over an estimated half of the land;

- [29] The allegation at (c) above is defective for very obvious reasons. It is also of interest that the claimant refers to the area behind his property as the vacant lot. In the context of his evidence however, that may be a matter of poor drafting. Vacant is understood to mean that there is no building or structure on the land. It would also be inaccurate for the claimant to assert that the defendant holds the title on trust for him since based on his pleadings in its entirety it would be more accurate to say that the title is held on trust for himself and the defendant. Those inaccuracies cannot form the basis for a striking out of his claim. Notwithstanding, in essence, the claimant has pleaded that the defendant concealed from the Registrar of Titles that he did not occupy the lot in its entirety. It is therefore incorrect to say that the claimant has not specifically alleged fraud against the defendant.
- [30] The effect of the provisions of sections 3 and 30 of the Act is that a proprietor of land can lose his right to recover possession of the land by the operation of the statute of limitation where another person has acquired a possessory title by virtue of being in possession for a period of 12 years or more.
- [31] This is not a case which in my view turns on the provisions of the stated sections or any aspect of the Limitation of Actions Act. It is accepted that where a claim is brought after the expiration of a limitation period, a defendant will be able to successfully bring an application to strike out that claim as being an abuse of the process of the court. See **Ronex Properties Ltd v John Laing Construction Ltd and Others** [1983] QB 398.
- [32] A perusal of the certificate of title discloses that the land was brought under the Registration of Titles Act by the defendant. This means therefore, that based on the principle to be extracted from the case of **James Clinton Chisolm v James Hall** Privy Council Appeal No. 15 of 1956, the first registration of the land by the defendant defeats any unregistered interest in the land that existed prior to the registration. However, if the registration was procured by fraud, an unregistered

interest in the land would not be defeated and a registered title so obtained would be subject to cancellation.

- [33] The sections of the Limitation of Actions Act which would also be of some relevance where a claimant states that the fraudulent conduct of a defendant resulted in deprivation of land are sections 27 and 28. Those sections say essentially that in the case of concealed fraud, the right to bring a claim in such circumstances first accrues at, and not before the time at which such fraud might with reasonable diligence, have been first discovered. Further, that a suit brought in equity on account of fraud for the recovery of such lands cannot be brought against any bona fide purchaser for valuable consideration who has not assisted in the commission of such fraud and who at the time that he made the purchase did not know, and had no reason to believe, that any such fraud had been committed. The land became registered to the defendant in December 2019 and the claimant said he became aware in April 2020. He brought this claim in 2021. There would hardly be any question of time running.
- [34] The real issue is whether the facts pleaded are capable in law of amounting to fraud. The defendant has not sought to address this issue. The claimant has merely stated that fraud was pleaded. No doubt, the claimant's approach was dictated by the defendant's assertion that fraud was not pleaded and that the claimant's claim is barred by the operation of the Limitation of Actions Act.
- [35] Without getting into the details of the evidence which the claimant has put forward by affidavit, it is sufficient to say that it seems clear enough that an assertion that the defendant did not disclose to the Registrar of Titles that another or other persons were also in occupation of the disputed property, in circumstances where he was well aware of the possession and occupation by another is deceitful. What he was required to show is that he was in sole open continuous and undisputed possession and occupation of the property. The representations were said to have been made for the sole purpose of acquiring a registered title and he did acquire title based on those representations. If those

assertions are established by evidence, to the required standard they are capable of amounting to fraud.

[36] It is not for this court in the present application to examine the details of the evidence. That will be a task for the trial judge. In the circumstances, the application cannot be sustained. It is dismissed with costs to the claimant to be taxed if not sooner agreed. Having regard to that conclusion, case management orders are hereby made:

1. Order for reference to a surveyor is made.
2. The attorneys at law for the parties are to settle the terms of reference within 21 days of this order.
3. The parties are to agree on a Commissioned Land Surveyor within 21 days of today's order.
4. If the parties fail to agree on a surveyor, then the Registrar of the Supreme Court is empowered to appoint a Commissioned Land Surveyor.
5. The survey is to be conducted within 3 months of the date on which his services are engaged.
6. The findings of the surveyor are to be compiled in a report which is to be submitted within 30 days of the completion of the survey.
7. The cost of the survey is to be borne equally between the parties.
8. The parties are permitted to file and serve further affidavits on or before the 19th of September 2022.
9. Any affidavit in response must be filed and served within 14 days of service of the affidavit. Costs of the first hearing of the Fixed Date Claim Form to be costs in the claim.
10. The claimant's attorney at law is to prepare file and serve this order.

11. The adjourned First Hearing of the Fixed Date Claim Form is fixed for the 13th of October 2022 at 10 am for 1 hour.

**A. Pettigrew-Collins
Puisne Judge**