[2019] JMSC Civ 1

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2015 HCV 05729

BETWEEN	**SONIC LIMITED**	**CLAIMANT/ RESPONDENT**
AND	**COURTNEY RICHARDS**	**1ST DEFENDANT**
AND	**ROSE HALL**	**2ND DEFENDANT/APPLICANT**
AND	**FITZROY MCPHERSON**	**3RD DEFENDANT**
AND	**TUMPA WILSON**	**4TH DEFENDANT**
AND	**GRETEL DOYLE**	**5TH DEFENDANT/APPLICANT**
AND	**GWENDOLYN RICHARDS**	**6TH DEFENDANT**
AND	**NAUGHBERT JONES**	**7TH DEFENDANT**
AND	**DAMIAN BROWN**	**8TH DEFENDANT/APPLICANT**
AND	**MARVIN NORRIS**	**9TH DEFENDANT**
AND	**GERALD WEST**	**10TH DEFENDANT**
AND	**JOHN BURKE**	**11TH DEFENDANT**
AND	**JOHN CAMPBELL**	**12TH DEFENDANT**
AND	**ANDRE NORRIS**	**13TH DEFENDANT**
AND	**VINCENT LINDSAY**	**14TH DEFENDANT**
AND	**CONSTANTINE DOYCE**	**15TH DEFENDANT**
AND	**DORRAN MERCHANT**	**16TH DEFENDANT**
AND	**GRANVILLE MERCHANT**	**17TH DEFENDANT**

AND	**LEON MUIR**	**18TH DEFENDANT**
AND	**FITZROY MERCHANT**	**19TH DEFENDANT**
AND	**VERA HARRIS**	**20TH DEFENDANT**
AND	**SUNNY HALL**	**21ST DEFENDANT/APPLICANT**
AND	**FITZROY DUNN**	**22ND DEFENDANT**
AND	**DOREEN WHYTE**	**23RD DEFENDANT**
AND	**HUBERT MINOTT**	**24TH DEFENDANT**
AND	**PERSONS UNKNOWN**	**25TH DEFENDANT**

IN CHAMBERS

Martina Edward Shelton instructed by Shelards for the Claimant

Marcus Goffe and Diana Andrade for the Defendants

November 30, 2016 and April 4, 2017. Judgment delivered January 3, 2019.

Application to set judgment aside – Maroon ancestral rights – Adverse possession – Stay of Execution of Writ of Possession – Appointment of representative Defendants – Interim injunction – Contempt of Court – Consolidation of Claims – Dispensing with mediation.

PALMER, J

[1] The claim concerns property known as Golden Vale and Foxs Run in the parish of Portland which is registered at Volume 1379 Folio 401 of the Register Book of Titles ("the property"), for which the Claimant is the registered owner. According to the claim, the property was previously owned by Lascelles Panton who leased it to the Government of Jamaica, which leased portions of the property to several individuals, to include the Defendants, through a Land Lease Programme. The lease permitted the Defendants and their families to carry out farming activities on the property.

[2] It is alleged that when the lease was surrendered by the Government of Jamaica, the Defendants remained in possession of the property, which is where they were when

the property was transferred to the Claimant company. Notices were served on the Defendants in March of 2015 to quit the premises by April 2015, and when they refused to leave the Claimant filed its claim on November 27, 2015 seeking recovery of possession and damages for trespass to the property. The Defendants resist the claim on the basis that the property is Maroon land and they being the descendants of Maroons accordingly have ancestral rights to remain there. In the alternative, they claim a right of possession by virtue of adverse possession.

[3] The Claimant says that it served the Defendants/Applicants with the Claim. No Acknowledgment of Service or Defence were filed prior to these several applications and judgment was entered in default against them on April 11, 2016, as follows:

> *(i) Personal service on the Defendants of the Claim Form and the Particulars of Claim with other supporting documents filed on November 27, 2015, and all other subsequent documents to be filed in these proceedings is dispensed with;*
>
> *(ii) The Claimant/Applicant is permitted to serve the Defendants by way of alternative service by one Newspaper Advertisement in the Daily Gleaner or the Daily Observer and by affixing the Claim Form and the Particulars of Claim with other supporting documents all filed on November 27, 2015 on the property being all that parcel of land situated in the parish of Portland commonly called Golden Vale and Foxs Runs registered at Volume 137 Folio 401 as well as affixing same of the notice board of the Port Antonio Police Station and the Port Antonio Post Office;*
>
> *(iii) Default judgment granted against the 2nd, 5th, 8th, 21st and 23rd Defendants/Respondents for recovery of possession with damages to be assessed and costs.*

[4] A formal order was served on the named Defendants, but they remained on the premises, with the consequence being that on August 10, 2016, the Claimant sought Writs of Possession against them, which this Court issued. The Writs of Possession were duly executed by the Bailiff for the Parish Court of Portland on August 18, 2016, but the named Defendants, it seemed, promptly returned to the property. Following their ejection and return, a number of Applications were filed by the Defendants/Applicants named in

the order, and the Claimant also sought orders. It is hoped that no injustice is done to the respective applications by summarising them as follows:

A. *Defendants' Application for Court Orders filed on May 24, 2016, applying for the Default Judgment to be set aside.*

B. *Defendants' Application filed on August 30, 2016 (as amended) seeking the following:*

   (i) *A stay of execution of the Default Judgement entered on April 11, 2016;*

   (ii) *Suspension of execution of the Writ of Possession signed on August 10, 2016;*

   (iii) *An Order that Wallace Sterling of Moore Town, in the parish of Portland, be appointed under CPR 2002, Part 21 as a representative Defendant in the Claim herein;*

   (iv) *An Order that Rudolph Brown of Golden Vale District, Fellowship P. O. In the parish of Portland, be appointed under CPR 2002, Part 21 as a representative Defendant in the Claim herein.*

C. *Defendants' Notice of Application for Court Orders filed on August 19, 2016, seeking the following:*

   i. *To set aside the writ of possession; and*

   ii. *An interim injunction to restrain the Claimant, its servants, agents and employees including Mr. Ransford Bennett from interfering, harassing, threatening, intimidating and violating the rights and property of the Defendants until the final determination of this claim by this Honourable Court.*

D. *Claimant's Application for Court Orders filed on September 2, 2016, seeking the following, that:*

   (i) *The orders sought by the Defendants in the Applications above be refused;*

(ii) A Declaration that the 2nd, 3rd, 5th, 8th, 21st and 23rd Defendants be found to be in contempt of Court;

(iii) The said Defendants be ordered committed to prison for contempt for being in breach of this Court's orders;

(iv) This claim be consolidated with six (6) other claims against other residents of Golden Vale;

(v) Mediation be dispensed with in each claim;

(vi) A date be set for case management conference.

[5] For the 2nd, 5th, 8th and 21st Defendants in their application to set the judgment aside, it was submitted that the criteria set out in Rule 13.3 of the CPR have been met. It was submitted firstly that their application was made as soon as reasonably practicable after finding out that a judgment had been entered against them. Secondly, it was submitted that there was a good explanation for their failure to file an acknowledgment of service and finally that they have a good prospect of successfully defending the claim. The application was made on May 24, 2016; just about a month after the formal order was served on them.

[6] As it relates to the reason for failing to file an acknowledgment of service, the 2nd Defendant, Rose Hall, stated that when she received the Claim Form she did not know what to do with it as to her knowledge there were several pending Court matters involving the said property and there was an association formed to defend similar claims. Ms. Hall said that she forwarded the Claim Form to the president of that association for advice on the matter as she was without the financial resources to get an Attorney-at-Law. It was the association that later obtained the services of Counsel to defend the several claims. Gretel Doyles, the 5th Defendant, gave a similar reason for her failure to act sooner.

[7] Damion Brown, the 8th Defendant, stated in his affidavit that his reason for not filing an acknowledgment of service had to do with the fact that he was never personally served the Claim. He stated that sometime in November 2015 he returned home from work when he discovered the Claim Form stuck in his door at home. He said he did not at first know what the document was but that a neighbour informed him that someone by the name of

Ransford Bennett entered the land and without asking for Mr. Brown, entered the portion of the land he occupied and pushed the documents under the door. Like the 2nd and 5th Defendants, he said after he became aware of the Claim prior to judgment but did not act because he did not know what to do and was aware of the several matters in Court concerning the said land. Eventually, he handed the claim to the president of the Golden Vale Association and was later assisted in securing representation.

[8] The 21st Defendant is referred to in the Claim as Sunny Hall but stated in his affidavit that his correct name is Anthony Bryan. Mr. Bryan stated that he was not personally served the documents but, as with Damion Brown, came home to see documents left there. Unsure what to do he did nothing until he handed them to the president of the Association which later helped to secure representation for him.

[9] All of the Applicants describe the circumstances in which their homes were bulldozed on August 18, 2016, and property damaged in the execution of a Writ of Possession. At that time there was a pending application seeking *inter alia* orders to set aside the default judgment filed on May 25, 2016. Though no date was set for the hearing of the application, Notice of Application for Courts orders in the application was served on Counsel for the Claimant prior to the bulldozing.

[10] As it relates to whether there is a reasonable prospect of successfully defending the Claim, though each gives different accounts of how they came to occupy the property, they each make the same three (3) assertions regarding their right to remain in possession of the property: (i) That the land belongs to the Maroons and they each have the respective right to occupy the lands by virtue of being descendants of the Maroons; (ii) that the Claimant's title is fraudulent; and (iii) that in any event, they have a right of possession by Adverse Possession.

[11] Damion Brown stated that generations of his family are Maroons who have farmed land at the Golden Vale property and though his grandparents have resided at different places in Portland, they always maintained their farm at Golden. Mr. Brown was not born at the property and did not grow up there but states that some 18 years prior to the

Claimant's action he moved to the area that he claims had been occupied by his grandparents and great-grandparents. He claimed that due to a hurricane 15 years prior, he moved to premises he later bought and renovated though he continued to grow assorted crops at the property. In addition to his Maroon heritage, Mr. Brown stated that the registered title for the property was registered with notice to the Claimant of his and his family's possession of the property in excess of twelve years. He claims to be a descendant of 'the Browns' who were among the original Maroon families at the property and exhibits to his affidavit a diagram which he claims shows that they were among the Maroon families to have occupied the property long before a Certificate of Title was ever generated for that property.

[12] Gretel Doyles claims to have been living at Golden Vale since she was 17 when she came to take care of an older cousin who had lived at the property for years with her family, the Wilsons. She states that she has been in open, continuous, and quiet possession of the property for the time of her occupation. The section of the property on which she and her family live houses two 3-bedroom structures with a plot of about ¾ acre on which they farm assorted crops. She claims to be related to the Wilsons, who are one of the original Maroon families that lived on the property long before there existed a Certificate of Title for the property and long before it was acquired by the Claimant. She further asserts that when the Claimant's title was registered it was with notice as to her ownership and possession of the portion of the property she has occupied for in excess of twelve years. Ms. Doyles also exhibited to her affidavit a diagram showing that the Wilsons were among the Maroon families to originally occupy the property.

[13] Rose Hall, the mother of Gretel Doyles, stated that she lives at the property with her family and is also related to the Wilsons, whose possession of the property pre-dates the issuance of a Certificate of Title for the property and the Claimant's acquisition. The area on the property she occupies has two 3-bedroom buildings and an area on which they farm assorted crops. She says that she came to the property to live with her daughter when she became ill in order for her daughter to care for her. She later renovated the dilapidated structure that was there and claims that she remained in continuous, quiet and undisturbed possession for in excess of twelve years.

[14] Anthony Bryan (referred to in the claim as Sunny Hall) is also a child of Rose Hall and claims to be a descendant of the Maroon Wilsons. He lives in the same section of the property occupied by his mother and claims to have come to the property for his sister to care for him when he fell ill, after which he remained for in excess of twelve years. He stated and that the Claimant had notice of him and his family's occupation and possession of the property before it acquired title and exhibited a copy of the said Maroon ancestry diagram referred to ealier.

[15] Counsel for the Defendants argued that the Maroons have existed in Jamaica since the 17th century and are indigenous peoples entitled to enjoy a particular relationship with the lands and resources occupied and used by them. These rights, it was argued, have received recognition due to advancements in indigenous rights under international law. It was submitted that these rights can only be properly ensured when viewed in the context of international law as a whole. As a party to the American Convention on Human Rights, it was submitted that Jamaica has an obligation to adopt special measures to recognise, respect, protect and guarantee the communal property rights of its indigenous communities; in this case the Maroons.

[16] It was further submitted that under the U.N. Declaration on the Rights of Indigenous People 2007, the occupation and use of the traditional lands and resources of Indigenous People is protected and has been enforced in relation to the Mayan people's communal property. For the Maroons of Golden Vale, their concept of family and religion within the context of indigenous communities is intimately connected with their traditional land especially when one considers that they have their ancestral burial grounds, places of religious significance and kinship patterns linked with the occupation and use of their physical territories.

[17] The submission is that the Inter-American Court of Human Rights recognises indigenous people who have occupied ancestral land in accordance with their customary practices and that their mere possession of the land suffices to obtain official recognition of their communal ownership of said lands; even without them ever having possessed registered title. The recognition of such rights of possession is a 'special measure' to be

enacted by States to preserve the traditional way of life and distinct cultural identity of the particular indigenous people. The Court has enforced those rights in judgments in favour of the Moiwana Community and Saramoka people of Surinam in decisions given in 2005 and 2007 respectively.

[18] Reliance was placed on the landmark case of ***Aurelio Cal and Manuel Coy v the Attorney General of Belize and the National Environment and Planning Agency (2007) WIR 110***, a decision from the Supreme Court of Belize, in which the Court ruled that the "Communitarian property" rights of the Maya were recognizable and protected by the Belizean Constitution. Accordingly, the Crown was ruled as having breached their rights by allowing third parties to utilise the property and resources of Mayan lands without their consent. In his judgment, Chief Justice Conteh found that by the discriminatory way in which the Mayan people and their customary rights were treated, their right to equality and their right to property were breached, and amounted to a breach of their right to life. The Chief Justice held that the acquisition of sovereignty over Belize first by the Crown and then by subsequent governments since their independence had not displaced or extinguished their pre-existing rights to land.

[19] On appeal by the Government of Belize, the Court of Appeal in a majority decision given by Justice Dennis Morrison JA (as he then was) affirmed the decision of Chief Justice Conteh. The Court found that the Mayan customary land tenure existed in all the Mayan villages in Toledo District of southern Belize and was protected by the Constitution of Belize. It also found that a test for entitlement to the customary title to property which focused on the position at the moment of the assertion of European sovereignty rather than on the importance of the rights of the current day Mayan people living there was a discriminatory remnant of colonialism. A test therefore that required tracing of genealogical roots back to the 1500s was considered unreasonable. Morrison JA stated that there was no need to show an unbroken chain in the continuity of occupation or conclusive evidence of pre-sovereignty occupation to establish the right, but that the current occupation by the Maya may establish proof of prior occupation. The proper approach, the Court opined, was to give regard to the way in which the rights of

Indigenous People are characterised and protected in international instruments. The decision of the Court of Appeal was later affirmed by the Caribbean Court of Justice.

[20] Applying it to the case at bar, it was submitted that for the purpose of determining the indigenous rights of the Maroons in the Golden Vale area, that a similar approach be taken, especially as the relevant sections of the Jamaican Constitution are similar to the equivalent sections of the Belizean Constitution. The affidavits of the Defendants supported by affidavits obtained from Wallace Sterling and Rudolph Brown, all assert that the Applicants have a strong Maroons heritage and their occupation of Golden Vale dates back generations.

[21] It was also argued for the Defendants that pursuant to sections 70 and 161 of the Registration of Titles Act, that the Claimant's Registered Title is defeated as it was obtained by fraud. In the affidavit of Ainsworth Dick, he claimed to have observed defects in the approval process for the Survey Plan and stated that based on his experience it was not genuinely certified by the Survey and Mapping Division of the National Land Agency. He, therefore, formed the view that it was doubtful that the Plan could have passed inspection and appeared to be fraudulent. The same allegations are made in the affidavit of Rudolph Brown about the validity of the Survey Plan and further that the Land Surveyor alleged to have prepared the plan did not exist.

[22] Despite the orders indicating that personal service was dispensed with, the 2nd and 5th Defendants do not deny being served with the claim but allege that the there was a good reason for failing to file their respective acknowledgments of service. The 8th and 21st Defendants claim that they were not personally served at all, and asserted that the default judgments against them were irregularly entered. All Applicants/ Defendants argue that they have a good prospect of successfully defending the claim. In ***Marcia Jarrett v South East Regional Health Authority*** 2006 HCV 00816, there was a discussion of the right of a defendant to make an application to set aside a judgment given in default. The power of the court to entertain such an application falls within the provisions of Rule 13.3 of the Civil Procedure Rules 2002 **("CPR")**. The section reads:

Rule 13.3 (1)

"The court may set aside or vary a judgment entered under Part 12 if the Defendant has a real prospect of successfully defending the claim."

Rule 13.3 (2)

"In considering where to set aside or vary a judgment under this rule, the court must consider whether the defendant has:

Applied to the court as soon as is reasonably practicable after finding out that judgment has been entered.

Given a good explanation for the failure to file an acknowledgment of service or a defence, as the case may be."

Marcia Jarrett is also authority for the principle that the primary test for setting aside a default judgment regularly obtained is whether the defendant has a real prospect of successfully defending the claim. The defence must be more than arguable to be such as to show a real prospect of success.

[23] The 8th and 21st Defendants who assert that they were not personally served in accordance with Rule 5 of the CPR, say that the default judgment obtained against them was irregular. The relevant portions of Rule 5 state:

Rule 5.1

"The general rule is that a claim form must be served personally on each defendant."

Rule 5.3 reads –

"A claim form is served personally on an individual by handing it to or leaving it with a person to be served."

Rule 13.2, which deals with judgments irregularly obtained, states:

(1) The court must set aside a judgment entered under Part 12 if the judgment was wrongly entered because –

> *(a) in the case of a failure to file an acknowledgment of service, any of the conditions in rule 12.4 was not satisfied;*
>
> *(b) in the case of judgment for failure to defend, any of the conditions in rule 12.5 was not satisfied;*
>
> *(c) the whole of the claim was satisfied before judgment was entered.*
>
> *(2) The court may set aside judgment under this rule on or without an application.*

[24] Firstly, the Claimant/Respondent wholly rejects the assertion raised by the Applicants/Defendants and insists that service was personally effected upon the 2nd, 5th, 8th, 21st and 23rd Defendants. In the affidavit evidence of Canute Sadler filed September 29, 2016 and Bindley Sangster filed on September 29, 2016 they claim to have effected service as stated by the Respondent/Claimant.

[25] The relevant portions of the Affidavits of Canute Sadler and Bindley Sangster filed on September 29, 2016 read as follows**:**

> *7. I observed Mr. Bennett walking towards each of the said (5) Defendants named above. That is, Rose Hall, the 2nd Defendant, Gretel Doyle, the 5th Defendant, Damian Brown, the 8th Defendant, Sunny Hall, the 21st Defendant and Doreen Whyte, the 23rd Defendant and hand-delivered the documents to them.*
>
> *8. For the sake of clarity, I witnessed Mr. Bennett putting the Claim Form and Particulars of Claim filed herein in the hands of Rose Hall, the 2nd Defendant, Gretel Doyle, the 5th Defendant, Damian Brown, the 8th Defendant, Sunny Hall, the 21st Defendant and Doreen Whyte, the 23rd Defendant.*

[26] In the Affidavit of the 8th Defendant, Damian Brown, he speaks to the service of the documents and states:

> *"12. I was never personally served with a Claim Form in this case. Sometime in November 2015 at approximately 1:00 am when I was returning home from my*

work in Kingston I discovered the said Claim Form had been stuck under the door of my home."

The Affidavit of the 21st Defendant, Anthony Bryan, states:

"10. I was not properly served with a Claim Form in this case. I returned home one evening and I heard that a document was left for me at home."

[27] I find that the Claim Form was personally served on all the Applicants/ Defendants and that in any event there is sufficient evidence on the accounts of the Applicants/ Defendants that the content of the Claim was brought to their attention at a very early stage. I find that service was indeed proper and that all the default judgments were regularly entered. Therefore, the application to set aside the default judgment is left to the discretion of the court, which is only properly exercisable if it is satisfied that there is a real prospect of successfully defending the claim, among the other considerations.

[28] According to ***Marcia Jarrett***, in arriving at a decision as to whether or not to set a default judgment aside, there should be an assessment of the nature and quality of the defence, the period of delay between the judgment and the application to set it aside, the reason for the respondent's failure to comply the Civil Procedure Rules to file an acknowledgment of service or defence and the overriding objectives which would require a contemplation of any prejudice the claimant might suffer as a result of the judgment being set aside.

Period of Delay

[29] There is no issue as to the promptness in which the Applicants made their Application to Set Aside the Default Judgment. The Default Judgment was entered on April 11, 2016, and the Applicants were served on April 26, 2016. Thereafter, Notice of Application for Court Orders to Set Aside Default Judgment was filed on May 24, 2016. Therefore, I find that in all the circumstances the application was made promptly.

Good Explanation for Failure to File

[30] At the time of filing the Default Judgment, the Acknowledgment of Service and Defence were out of time. The Applicants/ Defendants have all stated that they were financially unable to obtain legal advice and representation when they either received or became aware of the Claim, and were unaware of what to do in defending the claim. While I do not accept that an inability to afford an Attorney without more would absolve a party from the responsibility of filing the required documents or shield them from the consequence of not so doing, the authorities make it clear that the absence of a good explanation does not necessarily defeat an application to set aside the judgment.

[31] For parties who claim to have been occupying the premises for the period of time that the Applicants/ Defendants do, being of meagre means, not well educated and without the benefit of Counsel at the time, their tardiness in acting was not surprising. Though the Claim would have been served with the requisite prescribed notes to enable an unrepresented or self-representing litigant to understand the next steps, that the Applicants/ Defendants did not know what to do, was understandable. It is clear that the true gravity of the proceedings was not appreciated until their eviction, which no doubt accounts for the urgent steps taken shortly after that event. The fact that they did not understand the gravity of the proceedings and the need to file the required documents is not by itself an adequate excuse for failing to do so or basis to grant the remedy they seek, but is a factor I will consider along with whether there is a real prospect of the Applicants/ Defendants successfully defending the Claim.

Real Prospect of Success

[32] Attached to the Application to set aside the default judgment, is a draft defence from which the Defendants/Applicants' likelihood of successfully defending the Claim can be assessed. In ***Furnival v Brooke (1883) LT. 14***, it was said that where judgment is regular, which I have already ruled it was, the court has a discretion and the defendant, as a rule, must show by affidavit evidence that he has a defence to the action on the merits, in order for the Court to exercise its discretion in his favour. According to ***Craig***

Osborn in Civil Litigation, Legal Practice Course Guides 2005-2006 *at p. 364*, the Defendant must file evidence to persuade the court that there are serious issues which provide a real prospect of successfully defending the claim.

[33] The Defendants/Applicants have alleged that the Claimant/Respondent acquired title through fraudulent means. They allege that the Title exhibited to the Claim cannot be correct as it does not possess the usual characteristics of a Title issued within the time period alleged. However, it was submitted on behalf of Sonic limited that the principle of First Registration defeats their claim to the land. The Claimant/Respondent contends that the issue of the title destroyed the Defendants/Applicants rights since they acquired it after 1928.

[34] The case of ***Chisholm v Hall*** was cited for the proposition that "the registration of the first proprietor is made to destroy any rights previously acquired against him by limitation..." The Claimant/Respondent submitted that they have a letter from the Registrar of Titles exhibited and annexed in an Affidavit that the Title issued was a mistake or error on their end. The Affidavit states in paragraph 6:

> *"… The plan which is annexed to the Original Certificate of Title and the Duplicate Certificate of Title registered at Volume 1379 Folio 401 is not the correct plan. The annexed plan referred to in the Original Certificate of Title and the Duplicate Certificate of Title registered at Volume 1379 Folio 401 could not be located and has not been located. This incorrect plan which is annexed to the Original Certificate of Title and the Duplicate Certificate of Title registered at Volume 1379 Folio 401 was erroneously annexed by the Offices of Titles.*

[35] It is trite law that where fraud is alleged it must be a deliberate act with an intention to deceive. By virtue of Section 70, 161 (d) of the Registration of Titles Act, the law requires that actual fraud be proven. In ***Edward Lynch and Dennis Lynch v Dianne Ennevor and Eli Jackson 19 JLR 61***, it was stated that it must be shown on a balance of probabilities that the Applicant for the title or her agents made false declarations/representations to the Registrar knowing them to be false and with intention

that these false assertions be relied upon and result in the issue of a registered title in her favour.

[39] There is no cogent evidence from the Defendants/Applicants to support the contention that the Claimant's title was obtained by fraud. Fraud could only be found where the declarations were not true with the intention of those representations being relied upon for the issue of a title. If the indications in the letter from the Registrar of Titles are correct, and they have not been challenged, the documents examined were incorrectly appended to the Title. I do not find that the Claim could be successfully defended on that ground.

Adverse Possession

[40] The Defendants/Applicants, through counsel, contend that they have acquired the rights to the land by means of adverse possession. It is their case that they have done so through uninterrupted use of the land for in excess of the limitation period of twelve (12) years. At paragraphs 2 and 3 of the affidavit sworn to by the 2nd Defendant/Applicant, Rose Hall, on the 9th May 2016, she explains as follows:

> *"2. I am 59 years old and have been living at Golden Vale for the past 9 years with my daughter Gretel Doyle.*
>
> *3. Since that time I have remained in open, peaceful, quiet, unmolested, uninterrupted, undisputed and continuous possession of land at Golden Vale."*

The 2nd Defendant/Applicant then went on to show how she came to the property:

> *"8. I first came to live at Golden Vale to live with my daughter Grete Doyle, as I was sick and needed her to care for me..."*

[36] The Affidavit of the 8th Defendant/Applicant Damian Brown, sworn to on the 13th day of May 2016, at paragraphs 2 and 3 explained:

> *"2. I am 32 years old and have been living at Golden Vale for the past 18 years.*

> *3. Since that time I have remained in open, peaceful, quiet, unmolested, uninterrupted, undisputed and continuous possession of land at Golden Vale."*

[37] The 5th Defendant/Applicant Gretel Doyle, in response to the claim, swore on affidavit dated the 9th day of May 2016 as follows:

> *"2. I am 33 years old and have been living at Golden Vale for the past 18 years since I was 17 years old.*
>
> *3. Since that time I have remained in open, peaceful, quiet, unmolested, uninterrupted, undisputed and continuous possession of land at Golden Vale."*

[46] Lastly, the 21st Defendant/Applicant Sunny Hall/ Anthony Bryan states:

> *"2. I am 30 years old and have been living at Golden Vale for the past 9 years with my mother Rose Hall and my sister Gretel Doyle.*
>
> *3. Since that time I have remained in open, peaceful, quiet, unmolested, uninterrupted, undisputed and continuous possession of land at Golden Vale."*

[38] In response to these allegations, the Claimant/Respondent's attorney submitted that for any claim of adverse possession to survive, certain points must be established. The relevant statute is the Limitations of Actions Act, of which section 3 is instructive:

> *"No person shall make an entry, or bring an action or suit to recover any land or rent, but within twelve years next after the time at which the right to make such entry, or to bring such action or suit, land or shall have first accrued to some person through whom he claims, or, if such right shall have not accrued to any person through whom he claims, then within twelve years next after the time at which the right to make such entry, or to bring such action or suit, shall have first accrued to the person making or bringing the same."*

The consequence of the expiry of the limitation period prescribed by section 3 is set out in section 30 which states:

"At the determination of the period limited by this Part to any person for making an entry, or bringing an action or suit, the right and title of such person to the land or rent, for the recovery whereof such entry, action or suit respectively might have been made or brought within such period, shall be extinguished."

[39] Counsel for the Claimant/Respondent relied on ***George Beckford v Gloria Cumper Supreme Court Civil Appeal No. 28/86***, page 26, submitting that it is well established that a person claiming adverse possession must show three things including: (i) that he was in factual possession; (ii) that he had the requisite intention to possess, and; (iii) his possession must be adverse to the owner. The Claimant/Respondent alleges, that pursuant to sections 3, 4(a) and 30 of the Limitation of Actions Act, the Defendants/Applicants are restrained from making an entry on to the Land, or bringing any action or suit for its recovery as the Claimant is registered as proprietor of the property.

[40] The 2nd Defendant/Applicant, Rose Hall, said she has lived on the land for a total of 9 years. She would, therefore, be unable to establish that she had acquired any rights to the land since she has not been in uninterrupted possession of the land for 12 years, as required by statute, so as to oust the paper owner. The 5th Defendant/Applicant, Gretel Doyle, asserts in her affidavit that she has been in possession of the land for 18 years and she has been living there since she was 17 years old. 18 years should have put her age at 35 years of age at he time she prepared the affidavit, but she gives her age as 33 years old. The 8th Defendant/Applicant Damian Brown sets out that he has been in occupation of the property for 18 years, which based on his stated age would mean that he has been residing on the land since he was 14 years old.

[56] One important point that counsel for the Claimant/Respondent raised was that it is a requirement in proving adverse possession that there was an intention to dispossess the owner. Counsel relied on the most basic principle of law that minors cannot form the requisite intention to possess. In ***Quamina et al v King VC 2016 HC 60*** where it was to be decided whether the defendant could possess the land adversely before attaining the age of majority. In the instant case, the Claimants averred that the First Defendant was a

minor and therefore could not hold any interest in land. The court found that on the preliminary point that a minor cannot own or acquire any interest in land if that person is a minor they lack the necessary legal capacity to hold any interest in the land. However, in both instances where the issue of the Applicants/ Defendants being minors when they allege they acquired possession, that even deducting the difference would still put the respective periods above twelve (12) years.

[41] In the case of ***Farrington v Bush JM 1974 CA 41***, it was stated that to prove adverse possession there must be the co-existence of two essential elements, namely, the assumption of actual physical possession by, and the presence of a particular mental element directed towards the true owner in, the adverse possessor. Further, the case explains that in order to support a finding of adverse possession there must be positive and affirmative evidence of acts of possession, unequivocal by their very nature and which are demonstrably consistent with an attempt and an intention, to exclude the possession of the true owner. Where alleged acts of possession are intrinsically equivocal they will almost always be found to be mere acts of trespass.

[42] The 5th Defendant/Applicant stated in her affidavit in paragraph 5 as follows:

> *5. The said land my family and I own and occupy has on it 2 buildings which include (two 3-bedroom ply and zinc houses with concrete foundation) and a farm of approximately ¾ acres where we cultivate crops including plantain, banana, dasheen, coco, yam, pumpkin and vegetables.*

The 8th Defendant/Applicant stated in his affidavit at paragraphs 6-8 as follows:

> *6. I now grow pineapples on the said land but no longer live there as the land was adversely affected by a hurricane 15 years ago and so I had to move and live on other land at Golden Vale.*
>
> *7. For the past 15 years, I have been occupying land at Golden Vale of approximately 5 acres where I live in a building that includes 2 bedrooms, a kitchen and a storeroom and where I grow crops including bananas, plantains, dasheen, yam, coco, and peppers.*

> *8. The said building I now live on was in a very bad condition when I first moved in and I purchased materials and renovated the building. The building which includes a concrete foundation was owned by a Mr. Bonnet who sold it to me for $6000."*

[43] The case of ***Broadie v Allen JM 2009 CA 019*** relied on Slade J in Powell's' Case [1977] 38 P & CR 452 at 470-471 where it was his view that two elements are required for effective possession and in considering the meaning of 'possession' as used in its ordinary sense. In ***Powell's Case [1977] 38 P & CR 452*** at 470-471 Slade, J. said:

> *(1) In the absence of evidence to the contrary, the owner of land with the paper title is deemed to be in possession of the land, as being the person with the prima facie right to possession. The law will thus, without reluctance, ascribe possession either to the paper owner or to persons who can establish a title as claiming through the paper owner.*
>
> *(2) If the law is to attribute possession of land to a person who can establish no paper title to possession, he must be shown to have both factual possession and the requisite intention to possess (animus possidendi')."*

He stated that there are two requisite factors in establishing legal possession, confirmed in ***JA Pye (Oxford) Ltd and Another v Graham and Another [2002] 3 All ER 865*** namely:

> *"(1) a sufficient degree of physical custody and control (factual possession);*
>
> *(2) an intention to exercise such custody and control on one's own behalf and for one's own benefit ('intention to possess'). What is crucial is to understand that without the requisite intention, in law there can be no possession."*

[44] At trial, the Defendants would have to demonstrate that these acts were sufficient to dispossess the owners of their title to the land. It is triable as to whether their occupation was with the knowledge and consent of the person then lawfully entitled to possession and thereafter whether these acts are sufficient to dispossess the title owner to the land.

A trial court may well rule in line with the submission made that relied on the case of ***Williams Brothers Direct Supply Stores Ltd [1957] All ER 593*** where the Court ruled that there was not sufficient evidence to make a ruling on adverse possession. This is so even as the Defendant in the case relied on his cultivation of the land without the owner's consent and the erection of a shed. The argument of adverse possession was pleaded somewhat in the alternative to what appears to be the thrust of the Applicants/ Defendants defence, which relates to their Maroon heritage. In fact, since their case is that the reason for moving onto the land was because they acquired a right to the land due to their Maroon heritage, it could be interpreted that they did not believe they entered upon the land as squatters, intending to exercise possession adverse to the paper owner, but that they believed they had a right to be there. Nonetheless as it is pleaded in the alternative, if a Court rejects the claim of ancestral rights, it is conceivable that it could find that they in fact entered as squatters and have met the requirement of adverse possession. I therefore find that this ground is as an alternative ground, at very least good and arguable.

Maroon Land Rights

[45] The last ground on which the Defendants/Applicants seek to rely is that they have a claim to possession by virtue of their Maroon heritage. The evidence to support these allegations are contained in the affidavits of the respective Defendants/Applicants and the affidavits of Wallace Sterling and Rudolph Brown. Counsel for the Defendants/Applicants contends that they are a recognised people because of their ties to the Maroon. In the third Affidavit of Damian Brown, the 8th Defendant, he states:

> *"17. I am reliably informed by my father Mr. Edward Brown and do verily believe that my parents met at Golden Vale. My mother's father was Mortimer Minott. He lived at Bellevue which is another Maroon descendant community. Although my mother does not identify with and recognise our Maroon ancestry, the genealogical fact is that the Minotts. As well as the Browns, who have lived and/or worked at Golden Vale for generations, are Maroon descendants."*

[46] It is at this juncture that I again point out the reasoning on which a judgment in default can be set aside and the main criterion is that the Applicant must present a good

and arguable case. For that reason, there must be evidence presented to this court which supports the Applicants and aids in establishing the criterion of 'real prospect of success' and is not frivolous. In ***Joseph Nanco v Anthony Lugg et al [2012] JMSC Civ 81***, the judge stated that it with the mind that there must be satisfactory evidence of serious issues which prove a real prospect of success that one has to examine the affidavit evidence filed in support of the application to see the substance and quality of the defence. A bald assertion made by the Defendant/Applicant, without more, cannot satisfy this test. The 8th Defendant, Damian Brown, even goes as far as to state that it is a 'genealogical fact' though no evidence has been provided to this court to prove such an assertion.

[47] Moreover, these assertions have not been laid out in any sufficient detail for this court to make a determination that this alleged right exists. The only affidavits which speak to the Maroon rights in any detail are the affidavits of Damian Brown and Wallace Sterling which the Claimant/Respondent has sought to have struck out and which violates Rule 30.3 of the CPR. I find that I must agree with counsel for the Claimant/Respondent that the affidavit of Mr. Wallace Sterling does violate Rule 30.3 of the CPR as it does not state which are statements of information, belief or knowledge.

[48] The case of ***Paulette Rose v The Attorney General of Jamaica C.L. 1999/R-048*** dealt with a similar issue as to what constitutes an affidavit of merit. Although the case was decided using the Civil Procedure Code, the basis for the ruling is similar. McDonald J found that the affidavit, which did not state the source, grounds or whether the affiant had any personal knowledge of the information contained within the affidavit, was deficient. The learned judge also cited ***Ramkissoon v Olds Discount (1961) 4 WIR 73*** at page 74 where it was stated that "in the absence of an affidavit showing that he has a good defence on the merits, the judgment against him ought to be set aside." The Defendants/Applicants cannot rely on an affidavit which does not adhere to the rules of the Civil Procedure Rules. In my estimation, the Defendants have failed to put forth any tangible evidence which supports their contention other than mere naked assertions.

[49] It is Counsel's submission that the Defendants/Applicants are protected because of the recognition of these rights under international law and as a consequence, pursuant

to Article 21 of the Convention, Jamaica who is party to the American Convention on Human Rights, is obliged to respect the special relationship that communities have with their territories which guarantees their social, cultural, and economic survival. The Defendants/Applicants state that they have a claim to the land because their ancestors have been on the land longer than any title registered by the Claimant/Respondent if it is even valid.

[50] However, the Claimant/Respondent asserts otherwise. They state that there is no evidence before this Court from which a determination may be made that the Defendants/Applicants are in fact descendants of the Maroons since there is no cogent evidence contained in the Affidavits. Furthermore, the Claimant/Respondent has submitted evidence in the form of an affidavit of Ransford Bennett filed on November 18, 2016, which states -

> *I have been further informed by the Claimant's Attorneys-at-law and do verily believe that by letter dated June 8, 2015, the National Land Agency wrote to the Claimant's Attorneys-at-Law and advised that in the 1970s, the Government of Jamaica contracted to lease the subject property from Lascelles S. Panton for a project land lease programme. Furthermore, that under the programme, Four Hundred and Eighty-Seven (487) small farmers were leased a portion of the property for agricultural use. As proof thereof exhibited hereto is a copy of the letter dated June 8, 2015 which was received from the National Land Agency marked with the letters "RB-L2"*

[51] Instead, the Claimant/Respondent submits that any title that may have been acquired as a result of their relation to the Maroons has long been extinguished by 'First Registration.' The Claimant/Respondent explains that they are the proper title holders since they are protected by the effect of first registration as supported by the case of ***Chisholm v Hall (1959) 7 J.L.R 164*** at pp. 175, which states "the registration of the first proprietor is made to destroy any rights previously acquired against him by limitation…" The case highlights that the determinant factor is the date of first registration.

[52] The Defendants/Applicants have relied on the ***Maya Leaders Alliance v The Attorney General of Belize [2015] CCJ 15*** to show that a right of possession exists by

evidence of present occupation and land use. I find that the nature of the case cited by counsel for the Defendants/Applicants is inherently different from the case at bar. The Maya Alliance case strictly dealt with the breach of fundamental rights provided under the Constitution. It did not consider the effect of a valid title and land rights. In fact, the Defendants/Applicants have submitted no evidence to show how the land connects to the survival as a people and the continuation of their social, cultural development as a people. The aim of the Convention is to be a safeguard and it is, therefore, the State's duty to ensure the protection and preservation of the way of life of a set of indigenous peoples which have been breached. This same view was held by the Acting Chief Justice in the case of ***The Indigenous Peoples' Alliance of the Archipelago (AMAN) v Government of Indonesia [1985] AC 585***.

[53] Whilst I find that there are issues which may raise questions as to credibility, of which I cannot make a finding at this stage, I find that the issue of whether the Defendants have acquired a right to possess the property, whether by their alleged ancestral rights or by adverse possession are indications of a good and arguable case and show a real prospect of successfully defending the claim. I accept that they did not understand what to do with the documents once they were either handed them or became aware of them, and find that this resulted in their delay in filing the required documents in time. Once they became aware of the default judgment they acted promptly and the requisite applications were filed.

Injunction

[54] The Defendants/Applicants have also sought the relief of a prohibitory injunction in this case. The leading case on this issue is the oft-cited case *of* ***American Cyanamid Co v Ethicon Ltd [1975] AC 396*** and more recently the decision endorsed and explained by the Judicial Committee of the Privy Council in ***National Commercial Bank v Olint Corporation Ltd [2009] UKPC 16*** where the principles were outlined as to how to make a determination as to whether or not to grant an interim injunction. These main issues are: (i) whether there was a serious issue to be tried; (ii) would damages be an adequate remedy; (iii) does the balance of convenience lie in favour of granting the injunction and

if the balance of convenience is even, should the status quo be maintained. The court is tasked with adopting the course which is less likely to cause irremediable harm in trying to determine whether to grant the injunction or withhold the injunction.

Serious Issue to be Tried

[55] There must be a serious question to be tried. This test is not a high threshold. In determining whether there were serious questions to be tried, one must first assess whether the claim was "frivolous or vexatious". The next hurdle is that the applicant must have some prospect of succeeding. The court must not at this stage try to resolve any conflicts of evidence on affidavits as to the facts on which the claims of either party may ultimately depend nor call for detailed argument and mature consideration cited in *Kodilinye's Commonwealth Caribbean Civil Procedure Text* page 98 per the decision of Best J in ***Jockey Club v Abraham (1992) High Court, Trinidad and Tobago, no 2520 of 1990 (unreported).*** The affidavit evidence needs only to show a serious question be investigated, one of substance and reality per the decision of McDonald-Bishop J (Ag), as she then was, in ***Patvad Holdings v Jamaican Redevelopment Foundation Inc. (2007) Supreme Court 2006 HCV 01377 (unreported)***. It is only where a determination is made on whether there is a serious issue to be tried that the other factors are then taken into account.

[56] Counsel for the Defendants/Applicants has submitted that there is a serious issue to be tried based on their prospect of success. The Defendants/Applicants claim that they have title to the Land through adverse possession or acquired via their Maroon land rights. The Claimant/Respondent has submitted that in the circumstances there is no serious issue to be tried since there is no arguable case based on the Defendants/Applicants' case. Counsel for the Claimant/Respondent submitted that if there is no serious issue then the other relevant considerations of a balance of convenience, status quo or adequacy of damages do not arise. Based on my find as to the prospect of success I find that there are serious issues to be determined and the balance of convenience weighs in favour of the Defendants who claim to have been in actual possession for long periods of

time and have erected structures. An interim injunction is granted pending trial of the matter.

Representative Parties

[57] The amended Application for Court Orders also set out the Defendants/Applicants seeking relief of this court for the following orders to be made:

i. The appointment of Wallace Sterling of Moore Town, in the parish of Portland be appointed as a representative defendant in the claim; and
ii. The appointment of Rudolph Brown of Golden Vale District, in the parish of Portland be appointed as a representative defendant in the claim.

There were two grounds for the amended application which reads as follows:

> *"7. Wallace Sterling, Colonel of the Moore Town Maroons and head of the Moore Town Maroon Council, is the custodian of the property of the Moore Town Maroons which includes the lands at Golden Vale and as such represents the collective interest of the Defendants who are resident at Golden Vale, based on traditional Maroon title.*
>
> *8. Rudolph Brown has been in possession of land for farming at Golden Vale for the past 18 years and as such has the same or similar interest as the Defendants herein. Rudolph Brown is also Vice President and Chairman of the Golden Vale Original Residence Defence Association (GORDA) which is an association that was formed to assist the residents of Golden Vale to preserve and protect their land rights to Golden Vale."*

[58] The Defendants/Applicants further submit that Rudolph Brown and Colonel Wallace Sterling can be appointed under Rule 21 for the following reasons:

a. The facts of the claim against the Defendants and the defence is similar in that:
   i. This is a claim for recovery of possession against all Defendants.
   ii. All the Defendants rely on the same defence of Maroon land rights and a defect in the Certificate of Title for the subject matter land. See Affidavit of Ainsworth Dick sworn to and filed on September 12, 2016.

b. The appointment of representative defendants will allow for more efficient management of the claim which involves over 24 defendants.

[59] The Claimant/Respondent contends that any person who is not a trespasser on their property should not be named as a party to the proceedings since they do not have the same interest in the proceedings. Furthermore, they submit that the claim requires each person to personally defend this claim to which no representative can speak to on behalf of the Defendants.

[60] Rule 21.2(1) of the Civil Procedure Rules provides that an application for an order appointing a representative party may be made at any time, including a time before proceedings have been started. Rule 21.2(2) of the CPR states that such an application may be made by any party or by any person who wishes to be appointed as a representative party or by any person who is likely to be a party to proceedings. The Defendants/Applicants assert that it is likely that Rudolph Brown would have an interest, should he be included in the claim. Rule 21.2(3) states that an application such as this must be supported by affidavit evidence and must identify every person to be represented, either individually, or by description, it is not practicable to identify a person individually.

[61] The Defendants/Applicants have not fully complied with Rule 21.2(3) of the CPR, since in respect of the application, the persons to be represented are not adequately described. The application should have set out that it is sought to have the two persons – Colonel Wallace Sterling and Rudolph Brown appointed as a defendant, to represent the interest of the Defendants and affidavit should have been produced to identify each person to be represented or description were not practicable. Therefore, the Defendants/Applicants have not complied with a provision of the Civil Procedure Rules which are conditions which must be complied with before a court can grant this application. That application is not granted at his time.

[62] Briefly, on the issue of the dispensing with mediation, given the number of parties in this matter and the time that has elapsed in the matter, I do not believe the time will be

best utilised with allowing the mandatory mediation to proceed. Even the contentious history of the matter and of the applications point in the direction that time would be best utilised with case management and trial of the hotly contested issues. Accordingly i accept that it is appropriate in the circumstances to dispense with the mandatory mediation process in all the claims.

[63] To summarise, the orders of the Court on the several applications are as follows:

A. On the Defendants' Application for Court Orders filed on May 24, 2016:

(i) The Default Judgment entered on April 11, 2016 against the 2nd, 5th, 8th and 21st Defendants, is set aside;

(ii) Costs of this application are awarded to the Claimant to be taxed if not agreed;

(iii) Leave to appeal is granted to the Claimant.

B. On the Defendants' Application filed on August 30, 2016 (as amended):

(i) Application for stay of execution of the Default judgment is dismissed;

(ii) Application for suspension of the Writ of Possession is dismissed;

(iii) Applications to appoint Wallace Sterling and Rudolph Brown as representative parties are refused at his time;

(iv) Costs in this application to be costs in the claim.

C. On the Defendants' Application for Court Orders filed on August 19, 2016:

(i) An interim injunction is granted to restrain the Claimant, its servants, agents and employees from interfering with the Defendants or the portion of the subject property occupied by the Defendants until the final determination of this claim by this Honourable Court;

(ii) The Defendants must give an undertaking as to damages in relation to the injunction;

(iii) Costs in this application to be costs in the claim.

D. On the Claimant's Application for Court Orders filed on September 2, 2016:

(i) This claim is consolidated with the other claims filed against other residents of Golden Vale;

(ii) Mediation is dispensed with in each claim;

(iii) Case management conference is set in all matters consolidated for

(iv) Costs in this application to be costs in the claim.