THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV2010-04559

BETWEEN

ZANIM RALPHY MEAH JOHN

Claimant

AND

COURTNEY ALLSOP
CLIFFORD KNOLLYS NICHOLAS INNISS
EDWARD WEEKES
GRETA WEEKES
VIJAI JAGLAL
NAZMIN JAGLAL

Defendants

Before the Honourable Mr. Justice V. Kokaram

Appearances:

Mr. Jason Mootoo for the Claimant

Mr. Eric Etienne and Mr. Mervyn Campbell for the second Defendant

JUDGMENT

1. The claims before the Court between the Claimant and the second Defendant concern their respective rights to ownership of a 14 acre parcel of land in

Mayaro[1]. The Claimant seeks declaratory relief that he is the registered freehold owner of the said property on the strength of his certificate of title Volume 2820 Folio 197. The Claimant purchased the said lands for the sum of $1.6m from one Gilbert Secundio Doppia on 12th February 2009. The second Defendant asserts in its Amended Defence and Counterclaim that he is the bona fide owner in possession of the said property by virtue of a deed of assent dated 11th June 1982 registered as no 12273 of 1982. The Defendant further claims that one Cyril Doppia fraudulently registered the said property under the provisions of the Real Property Ordinance (now the Real Property Act "RPA") on 21st October 1983 and recorded in the said certificate of title 2820 Folio 297. He seeks a declaration that a Therese Claudine Christopher and himself are the beneficial owners and entitled to possession of the said property and that the said certificate of title be declared void and be delivered up for cancellation.

2. There are now two procedural applications before the Court. There is the second Defendant's application to re-amend his defence and counter claim. Then there is the Claimant's application for summary judgment on his claim and to dismiss the Defendant's counter claim.

3. I have reviewed the authorities and submissions of both parties in this matter. It appears to me that the second Defendant in his amended Defence is simply asserting a right to ownership of the said lands by virtue of his title registered under the Conveyancing and Property Ordinance. It is accepted that this interest was not registered under the RPA nor was his interest notified on the certificate

[1] The property is more particularly described in the Statement of Case as "situate in the Ward of Guayaguayare in the Island of Trinidad comprising Fourteen Acres Two Roods and Nine Perches be the same more or less delineated and coloured pink in the plan drawn in the margin of the Certificate of Title and bounded on the North, West and South by lands now or formerly of C.A. Pompignan and on the East by the Sea (hereinafter referred to as "the Land")."

of title. In that state of affairs the Claimant's title supersedes that of the Defendant. The allegation of fraud as pleaded as against the Claimant in my opinion cannot be sustained. This allegation is based upon a submission that the suspicion of the Claimant should have been aroused causing him to make further inquires to ascertain the true ownership of the subject property and the interest of the second Defendant in it. Even if this is true it is not sufficient to succeed in a claim of fraud sufficient to defeat the indefeasibility of the RPA title as contemplated under section 141 of the RPA.

4. Further there is no sustainable defence on the facts as pleaded of a claim for adverse possession. In my view the submission that these pleadings make out a claim for adverse possession is an afterthought. The pleading falls short of the requirements of rule 8(10.5) CPR to support a claim that a possessory title is being asserted for the requisite period. Accordingly the application to re-amend to simply refer to the statute of limitation fails on the basis that there is no foundational facts in the pleadings to support the plea, quite apart from the fact that such an application failed to cross the threshold test of rule 20.3 CPR.

<u>The "claims" of the respective parties:</u>

5. The claim is a simple one. The claim is for a declaration that the Claimant is the registered freehold owner of a 14 acre parcel of land, the Esperance Estate. He also seeks injunctive relief again the second Defendant from entering upon or dealing with the land. The facts in support of the claim fall within a narrow compass. The Claimant purchased the said land by way of memorandum of transfer dated 12th February 2009 from Gilbert Secundio Doppia. The memorandum of transfer was registered on 27th March 2009 in volume 5113 Folio 9 and a memorial entered on the Certificate of title. The Claimant subsequently became aware of the second Defendant's interest in the 14 acre parcel and a caveat was lodged by the second Defendant on 14th September 2010.

6. The claim was brought against several Defendants who purportedly acquired title to several portions of the said property under their respective Deeds of conveyance. The second Defendant is the only one of the Defendants who claims ownership to the entire 14 acre parcel. To the credit of the Claimant and the other Defendants they entered into bilateral negotiations and compromised the claims. Indeed the terms of those compromises represented a practical result for those parties and what now remains for determination is the Claimant's claim against the second Defendant and his counterclaim.

7. The second Defendant sets out the essence of his case in paragraphs 4, 5, 6 and 7 of his amended Defence and Counterclaim. Paragraph 4 refers to what I can conveniently refer to as the second Defendant's chain of title as well as several leases granted over the years in relation to discrete portions of the entire 14 acre property. Paragraphs 5 to 7 set out the core of the defence and counter claim as follows:

"5. By virtue of the matters pleaded at paragraph 2, 3 & 4 above, the second Defendant says

a) That he is the bonafide owner in possession of the said property

b) That the grant of the said property to Cyril Doppia, registered under the Real Property Ordinance Chapter 27 No. 11 on the 21st October 1983 and recorded in the Certificate of Title Volume 2820 Folio 197 was obtained by fraud

PARTICULARS

i. Failing to deposit with the Registrar General, all instruments in his possession or in his control constituting or in any way affecting his title.

ii. *Failing to deposit with the Registrar all instruments or copies of instruments in his possession or under his control constituting or anyway affecting his title*

iii. *Failing to state the nature of his estate or interest and of every estate or interest held therein by any other person whether at law or in equity in possession or in futurity or in expectancy and whether the land was occupied or unoccupied and if occupied the name and description of the occupants or whether such occupancy be adverse or otherwise*

iv. *Failing to state the names and addresses of the occupants and proprietors of the land in respect of which the application is made so far as is known to him*

v. *Failing*

a) *To require the Registrar General at his expense to cause personal notices of his application to be served upon any person who's name and address shall for that purpose be therein stated*

b) *To furnish a schedule of the said instruments*

c) *To furnish an abstract of title*

d) *To state in his application the nature of his estate or interest and of every estate held therein by any other person whether at law or in equity in possession or in futurity or expectancy and whether the land is occupied or unoccupied.*

e) *To state the name and the description of the occupants of the said property and the proprietors of all lands contiguous to the said property*

f) *To provide in his schedule all instruments of title to the said property in his possession of which he had knowledge and subscribed a statutory declaration as to the truth of such statements and*

6. The Second Defendant says that

a) By virtue of the matters pleaded at 5 (a) and 5 (b) above

b) The fact that on the said property there are several well constructed and visible dwelling houses dating back to 1957 with market values in excess of One Million Dollars ($1,000,000.00) and, under leases by the heirs of the Second Defendant to the respective lessees as partially outlined in leases referred to in the particulars at paragraph 4 herein above. Photographs of the said properties are hereto attached and marked "A"

c) A perusal of the Application of Cyril Doppia to bring the said property under Real Property Ordinance would show the non-disclosure and irregularities including the alleged plan of the said property which on the face of it appeared to be similar if not identical to the plan attached to a Deed of the Second Defendant, Deed No. 1751 of 1957, a copy of the said Application of Cyril Doppia is hereto attached and marked "B".

The Suspicion of the Claimant should have been aroused causing him to make further enquiries to ascertain the true ownership of the said property and the interest of the Second Defendant.

7. By virtue of the matters pleaded in Paragraph 6 above, the Claimant would be deemed to have or had actual and or constructive notice of the fraud of Cyril Doppia in registering the said property under the provisions of the Real Property Ordinance on the 21st October 1983 and recorded in the Certificate and recorded in the Certificate of Title Volume 2820 Folio 197."

8. I must also make mention of paragraph 6 of the Claimant's Reply which the second Defendant made heavy weather during the course of submissions:

"*6. In answer to paragraph 6 of the Defence the Claimant admits so much of paragraph 6(b) of the Defence as alleges that a few visible dwelling houses are situate on the Lands but makes no admission as to the dates on which such houses were constructed by reason of the fact that he only became aware of the existence of such houses shortly before he purchased the Lands. With respect to the value of such houses, the Claimant is unable to attribute any value thereto as he is not suitably qualified to do so and he has not retained the services of a professional valuator to undertake such a valuation as it has not been necessary for him to incur the costs of so doing."*

9. For the purposes of my analysis I will accept that the allegations of the second Defendant as pleaded in his defence and counter claim can be made out at a trial, and I also take into account the admission of the Claimant in paragraph 6 of the Reply. The question that therefore arises is as follows :Whether this Claimant, a purchaser acquiring title under the registered system in 2009, is entitled to summary judgment where- the Claimant is in possession of the said property; the said property was acquired by the fraud of Cyril Doppia in registering the said property in 1983; the Claimant had knowledge of several leases and houses of substantial value on the said property and had he examined the application of Cyril Doppia he would have realised that the application was deficient and defective.

Summary Judgment

10. Pursuant to rule 15.2(a) CPR, the Court may give summary judgment on the whole or part of the Claimant's claim if the Defendant has no realistic prospect of success on his defence to the claim or part of the claim. In **Western Union Credit Union Co-operative Society Limited v Corrine Amman** CA 103/2006 Kangalloo JA applied the English approach on applications for summary

judgment and gave the following guidance in dealing with applications for summary judgment:

- The court must consider whether the Defendant has a realistic as opposed to fanciful prospect of success: **Swain v Hillman** [2001] 2 AER 91
- A realistic defence is one that carries some degree of conviction. This means a defence that is more than merely arguable: **ED &F Man Liquid Products and Patel** [2003] EWCA Civ 472 at 8.
- In reaching its conclusion the Court must not conduct a mini trial **Swain v Hillman** [2001] 2 AER 91:
- This does not mean that the court must take at face value and without analysis everything the Defendant says in his statements before the court. In some cases it may be clear there is no real substance in the factual assertion made, particularly if contradicted by contemporaneous documents: **ED & F Man Liquid Products v Patel** EWHC 122
- However in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment but also the evidence which can reasonably be expected to be available at trial **Royal Brompton NHS Trust v Hammond** (No 5) [2001] EWCA Cave 550
- Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: **Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd** [2007] FSR 63.

11. Matters should not proceed to trial where the Defendant has produced nothing to persuade the Court that there is a realistic prospect that the defendant will succeed in defeating the claim brought by the client. The defendant cannot say without more that something must turn up that would render the Claimant's case untenable. "To proceed in that vein is to invite speculation and does not demonstrate a real prospect of successfully defending the claim." See **Bank of Bermuda Limited v Pentium** CA 14 of 2003 (A decision of the Court of Appeal of the British Virgin Islands)

12. As Lord Woolf MR pointed out in **Swain v Hillman** [2001] 1 AER 94 the exercise of the powers of summary judgment is consistent with the overidding objective dealing with cases justly:

> "It is important that a judge in appropriate cases should make use of the powers contained in part 24. In doing so he or she gives effect to the overriding objectives contained in Part 1. It saves expense; it achieves expedition; it avoids the court's resources being used up on cases where this serves no purpose, and I would add generally, that it is in the interest of justice. If a Claimant has a case which is bound to fail, then it is in the Claimant's interests to know as soon as possible that that is the position. Likewise, if a claim is bound to succeed, a Claimant should know that as soon as possible."

13. The Claimant in his written and oral submissions argued essentially that the Claimant's registered title is indefeasible and can only be impeached where fraud as meant in the context of section 141 of the RPA is established. He contends that on the pleaded case for the second Defendant no case of fraud within the meaning of section 141 has been made out and in any event there is no evidence which shows a realistic prospect of proving that the Client was guilty of fraud in acquiring his registered title to the land. The fraud that is the real

complaint of the Defendant is that of Cyril Doppia and that has nothing to do with the Claimant.

14. The second Defendant contends that fraud is difficult to define and can manifest itself in a variety of different contexts. It is important therefore when an allegation of fraud is made that the Court investigates the facts to determine how that fraud was perpetuated. The second Defendant also contends that there is an arguable issue of adverse possession raised in the defence and the Claimant cannot therefore be entitled to summary judgment.

Indefeasibility of title

15. The system of registration under the RPA proposes certainty and clarity with respect to land ownership. The core feature of that system is the conclusiveness of the Register. There is no need to search root of title. A purchaser of land under this system is entitled to rely upon the register. All interests in relation to the land are set out on the face of the register.

> **"37.** Every certificate of title duly authenticated under the hand and seal of the Registrar General shall be received, both at law and in equity, as evidence of the particulars therein set forth, and of their being entered in the Register Book, and shall, except as hereinafter excepted, be conclusive evidence that the person named in such certificate of title, or in any entry thereon, is seized of or possessed of or entitled to such land for the estate or interest therein specified, and that the property comprised in such certificate of title has been duly brought under the provisions of this Act; and no certificate of title shall be impeached or defeasible on the ground of want of notice or of insufficient notice of the application to bring the land therein described under the provisions of this Act, or on account of any error, omission, or informality in such application or in the proceedings pursuant thereto by the Judge or by the Registrar General."

16. It is accepted that the general rule is that the title under our system of registration is indefeasible. The register is conclusive

> **“45.** Notwithstanding the existence in any other person of any estate or interest, whether derived by grant from the State or otherwise, which but for this Act might be held to be paramount or to have priority, the proprietor of land or of any estate or interest in land under the provisions of this Act shall, except in case of fraud, hold the same subject to such mortgages, encumbrances, estates, or interests as may be notified on the leaf of the Register Book constituted by the grant or certificate of title of such land; but absolutely free from all other encumbrances, liens, estates, or interests whatsoever, except the estate or interest of a proprietor claiming the same land under a prior grant or certificate of title registered under the provisions of this Act, and any rights subsisting under any adverse possession of such land; and also, when the possession is not adverse, the rights of any tenant of such land holding under a tenancy for any term not exceeding three years, and except as regards the omission or misdescription of any right of way or other easement created in or existing upon such land, and except so far as regards any portion of land that may, by wrong description of parcels or of boundaries, be included in the grant, certificate of title, lease, or other instrument evidencing the title of such proprietor, not being a purchaser or mortgagee thereof for value, or deriving title from or through a purchaser or mortgagee thereof for value.”

There are exceptions set out in the Act.

17. The person named in the certificate is declared to be the registered proprietor. This title is declared to be indefeasible except in case of fraud, subject to the qualifications noted on the title and certain specified statutory qualifications. This case concerns the fraud exception to the indefeasibility of title within the meaning of section 141 of the Act.

The "fraud exception" under Section 141 RPA

18. Section 141 of the RPA is clear in terms on the indefeasibility of title under the system of registration:

> **"141.** 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 estate or interest 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 of the estate or interest in question is or was registered, or to see to the application of the purchase money or of any part thereof, or shall be affected by notice, direct or constructive, of any trust or unregistered interest, any rule of law or equity to the contrary notwithstanding, and the knowledge that any such trust or unregistered interest is in existence shall not of itself be imputed as fraud."

19. In the High Court Action No. 75 of 2000 **Lincoln Dillon v Mary Almandoz and another** Bereaux J as he then was made the following useful observations about the system of registration which is useful in this analysis:

> "It is a fundamental principle of the system of registered convincing that the title of every proprietor registered there under is "*absolute and indefeasible"* and cannot be impeached or affected by the existence of an estate or interest which, but for the registration, might have had priority. The Register is conclusive. All interests are set out on its face. Nothing else is determinative. As Ploughman J. said in **Parkash v Irani Finance Ltd** [1970] Ch.101, 109: ***"… one of the essential features of registration of title is to substitute a system of registration of rights for the doctrine of notice".***
>
> See also Walton J in **Freer v Unwins Ltd** [1976] Ch. 288, 297.

"… The general scheme of the Act is that one obtains priority according to the date of registration, and one is subject, or not subject, to matters appearing on the register according to whether they were there before or after one took one's interest whatever that interest might be".

[2] The system, introduced into Trinidad and Tobago by the Real Property Ordinance, now the Real Property Act Chap. 56:02, (the Act) was designed to produce and has produced, certainty in the grant of title to land registered under the Act. This has motivated many a proprietor of unregistered land to bring such lands within the provisions of the Act.

[3] A purchaser acquiring land registered under the Real Property Act (the Act) need thenceforth be concerned only with such interests as appear in the Register and can ignore all other interests without risk to his title, provided that he is a bona fide purchaser for value. [5] The defendants, having purchased the adjoining lands as misdescribed, for (considerable) value, were guaranteed an indefeasible title under the Act and the plaintiff is left without remedy. His only recourse, that is, pursuing a claim for compensation under section 148 of the Act, is now statute barred pursuant to section 150 of the Act. The plaintiff did have one other avenue and it was to claim adverse possession of the particular portion of land. Indefeasibility of title is subject to certain stated exceptions in the Act. They include any rights of adverse possession subsisting at the time when the lands were brought under the ambit of the Act (see section 45)."

20. The Defendant must therefore make out a cogent case of fraud against the Claimant in the context of section 141 if it is to impeach the registered title of the Claimant. Although there is no definition of the type of fraud contemplated in section 141 and it is not wise nor necessary to give abstract illustration of what may constitute fraud in hypothetical conditions, (**Waimiha Sawmilling Co v**

Waione Timber [1926] AC 101) the section clearly states in terms that knowledge by a purchaser directly or constructively of any trust or unregistered interest shall not itself be imputed as fraud. There must be something more. It is this “something more” which the second Defendant asks this Court to investigate at the trial. The Claimant contends that as the second Defendant is limited to his pleadings, the Court must examine what has been alleged and ask itself the question that even if the facts are accepted as true does it amount to fraud within the meaning of section 141 RPA. Is it that “something more” than just notice of an unregistered interest?

21. An allegation of fraud to defeat the indefeasible title of a purchaser must go beyond a mere notice of an unregistered interest. Indeed in normal circumstances section 141 permits the purchaser to contract and deal or take a transfer from a registered proprietor without being required to enquire or ascertain the circumstances or the consideration for which such proprietor or any previous proprietor of the interest in question was acquired. That is the legitimate starting position of a purchaser under this system of registration of title. In **Stuart v Kingston** (1923) 32 CLR 309 Knox CJ commented:

> “The equitable doctrine of notice actual and constructive is founded upon the view that the taking of an estate after notice of a prior right is a species of fraud...Under the Act, taking property with actual or constructive notice of some trust is not of itself sufficient reason for imputing fraud. The imputation of fraud therefore based upon the application of the doctrines of the Court of Chancery as to notice cannot any longer be sustained in the case of titles registered under the act.”

22. Such a starting point is consistent with section 37 (RPA) where the Registry itself is conclusive evidence that the land was properly brought under the provisions of the RPA. For this system of certainty to work there must be reliance on the

record with the exception of cases of fraud. However as section 141 has been drafted fraud is not at large.

23. Several cases have examined the nature of fraud as contemplated under section 141 to impeach the prima facie indefeasible title of the registered owner. In **Stuart v Kingston** a section 141 fraud must be some "consciously dishonest act" brought home to the purchaser.. See **Stuart v Kinston** and **Dillon**. In **Assets Company Limited v Mere Roihi** [1905] AC 176 the fraud contemplated by these sections is actual fraud that is dishonesty of some sort not what is called constructive or equitable fraud. Equitable fraud in the form of an impingement upon cognisance giving right to an equitable interest is not of itself sufficient to activate the fraud under section 141. There is no room in the statutory context of section 141 in this Act to include any concept of imputed dishonest or imputed moral turpitude unless of course the perpetrator of the fraud acted as the agent of the purchaser who registered title is sought to be impeached.

24. The authorities are not altogether clear on defining exactly what is meant by fraud and the following statement of their Lordships in **Assets** demonstrates that even though there is a minimum bar, the exact nature of the fraud to affect a bona fide purchaser is to be determined on case by case basis:

> "Fraud by a person 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 enquiries which he omitted to make does not itself prove fraud on his part. But if it be shown that his suspicions were aroused and that he abstained from making enquiries for fear of learning the truth the case is very difficult and fraud may be properly ascribed to him. A person who presents for registration a document which is forged or has been fraudulently or improperly obtained is not guilty of fraud if he honestly believes it to be a genuine document which can be properly acted upon."

25. The fraud of a purchaser of property therefore under the system of registration in the context of section 141 means some act of dishonesty. Actual fraud. It is not constructive or equitable fraud. A deliberate, dishonest trick causing an interest not to be registered. An object of the transfer to cheat a man of a known right. Although fraud is fact specific, the litmus test must be an act of dishonesty, moral turpitude which is more than mere knowledge of an unregistered interest.

26. Facts which therefore only amount to mere knowledge by the purchaser of unregistered interests would fail to pass this litmus test. Facts which impute some further act of dishonestly will not. Under this system of registration of title therefore if a purchaser acquires land on which exists clear signs of occupation he is not guilty of fraud. This is the very question which the second Defendant submitted should be determined at a trial. In my view such a narrow question can be decided summarily based upon the facts pleaded and the evidence that the second Defendant contends will be used to support his case.

27. I took careful note of the second Defendant's submission that the facts that the trial "will reveal". "It may come out". There is no firm allegation, there is a suspicion that the Claimant's suspicion was aroused and he deliberately closed his eyes to clear acts of ownership. I got the impression that the second Defendant would prefer to fish for a case of fraud at the trial. However **Munro v Stuart** [1924] 41 S.R 203 is helpful. In that case the purchaser acquired the registered title to the land with knowledge, not only of the existence of unregistered leases, but also their terms and proceeded to buy with the intention to eject the lessees from occupation. Considering section 43 of the Real Property Act, NSW, the question arose as to whether those facts amounted to fraud on the part of the purchaser within the meaning of the Act. Harvey J concluded:

> "In my opinion s 43 draws no distinction between the times at which the notice or knowledge is required which it states is not to be considered as

fraud. It starts out with the initiation of the proceedings between the registered proprietor and the purchaser, because it takes the stage at which he is a personal contractor, and it says that no person contracting shall be affected by notice of unregistered interests, and the knowledge that any such trust or unregistered interest is in existence shall not of itself be imputed as fraud, which seems in other words to say that although when you are contracting with a registered proprietor you know there is in existence an unregistered interest, you are justified in going on and completing your contract and carrying it through to completion..."

28. The Defendant relied upon the judgment of Moosai J in **Orville Boscombe v Ruben Hills and Others** which is very instructive. In that judgment reference was made to Francis', **Torrens Title** in Australasia Vol 1 at p 602 and 603 which provides a neat summary of the nature of the fraud necessary to impeach title. The author confirms that whereas the authorities have not been able to give a definition of what constitutes fraud and that it is case specific, it will always be difficult to draw the line between knowledge or notice that is not to be treated as fraud and notice which under the particular circumstances must be treated as fraud. However I must emphasise that there is a base line. Fraud is not to be imputed to a purchaser under the RPA unless some consciously dishonest act is brought home to him. The authorities are speaking in the same voice that quite apart from knowledge of the existence of unregisterable interests, knowledge of the purchaser of the nature of those interests is not enough to allege fraud for the purposes of section 141. The imputation of fraud based upon the doctrines of notice is gone. Harvey J in emphasising this went so far to say that even if the purchaser has at the time of entering his contract to purchase, knowledge of the existence of an unregistered interest the purchaser "may shut his eyes to the fact of there being an unregistered interest and need not take any consideration of the persons who claim under the unregistered interest." Where there is nothing

but knowledge of an unregistered interest it is not a fraud to buy. See **Wicks v Bennet** [1921] 30 CLR 90.

29. The implications of this section suggests that purchasers under this system of registration are allowed to cast a Nelsonian eye over the property, make no enquiries, and even if they do and proceed with knowledge of adverse interests it makes no difference whatsoever. Such an act cannot on its own be stigmatised with the label of fraud. The Act is designed to facilitate their dealings with land.

30. I understand totally the second Defendant's submission that because the authorities are not altogether clear as to what would constitute fraud and that fraud is a fact to be proven, then this claim must go to trial to test the case of the second Defendant and to hear the evidence. To be fair to the second Defendant I even examined his witness statements filed in this application. Quite apart from the fact that the witness statements are not properly evidence before the Court on this application, they do not build a case of fraud against the Claimant. In any event, the pleadings do not go beyond mere notice. It extends to an allegation that the Claimant should have perused Doppia's application. But there is no legal obligation to do so. There should be something more such as participation with Doppia in bringing the land dishonestly under the Act, Doppia acting as the Claimant's agent in registering the land fraudulently, having actual notice of the Doppia application and acting in a manner so as to cheat the second Defendant of his property. It would not be wise to describe what may qualify as fraud in this case. It is sufficient in this case to conclude that what has been alleged in the pleadings and what can be permitted as evidence to support those material pleas does not pass the litmus test of fraud as contemplated within the meaning of section 141 RPA to impeach the title of the Claimant.

<u>Adverse possession</u>

31. The second Defendant's second line of defence is that he has a possessory title or that the Claimant's title was extinguished by the adverse possession of the Defendant. There are several answers to this defence. First the pleadings are deficient to support a plea of adverse possession. The Defendant is mandated by the Civil Proceedings Rules 1998 (as amended) (herein after "CPR") to set out his case thoroughly. See rules 10.5 (3), (4) and (5). The effect of Rule 10.5 is adequately summarised in *"Civil Procedure"* by Adrian Zuckerman at page 217 as follows:

> *"The old system of bare denials and "holding defences" was wasteful and no longer acceptable. Today, the function of the defence is to provide a comprehensive response to the particulars of claim so that when the two documents are read together one can learn precisely which matters are in dispute".*

32. See also **M.I.5. Investigation Limited v Centurion Protective Agency Limited** Civil Appeal No. 244 of 2008 and **Andre Marchong v. The Trinidad & Tobago Electricity Corporation & Galt & Little page Ltd** CV 2008-04045. The combined effect of part 10.5 and 10.6 is that a Defendant *must*, by its defence, provide a comprehensive response to the claim and state its position on each relevant fact or allegation put forward in the claim in the manner required by the rules. In setting out the reason for resisting the claim notably Mendonca JA in **MI5** observed: "*The reasons must be sufficiently cogent to justify the incurring of costs and the expenditure of the Court's resources in having the allegation proved."*

33. The above passage from ***M.I.5 Investigations Limited*** supra suggests that it is incumbent on a Defendant to comply with the provisions of Rule 10.5. Not only must he do all that is necessary to advance the success of his defence, he must also ensure that the Court's resources are not wasted on trivial reasons for

resisting an allegation in the Statement of Case. The Privy Council in **Bernard v. Seebalack** 77 W.I.R 455 reminds us that "*Pleadings are still required to mark out the parameters of the case that is being advanced by each party. In particular they are still critical to identify the issues and the extent of the dispute between the parties. What is important is that the pleadings should make clear the general nature of the case of the pleader...'*

34. Claims of "adverse possession" must be carefully drafted and the pleader must make it clear that this is the case which is being set up in defence of a claim for possession. In **Lystra Beroog & Anor. v. Franklin Beroog** CV2008-004699 I observed that this claim "pits the rights of persons in occupation against the title owners of the property. It is a short hand expression for the type of possession which can, with the passage of years, mature into a valid right. It is therefore a very serious and significant claim where that type of occupation will trump a legal right. The claim must therefore be carefully scrutinized to determine the character of the land, the nature of the acts done upon it and the intention of the occupier. The onus of establishing the defence of adverse possession is on the Defendant who put it forward": The facts relied upon to establish 'adverse possession' must be cogent and clearly stated in the defence. See **Nelson v. DeFreitas** CV2007-00042 Pemberton J.

35. The pleading must establish that the entry on the land was unlawful; that the possession was for a period of at least 16 years; and the intention to dispossess. Anything short of establishing this will not suffice. See Atkins Court Forms Volume 25(1). The second Defendant's pleading is not sufficient to mount such a claim. The only facts alleged are that the second Defendant is in occupation and that over the years leases were granted for discrete portions of the 14 acre parcel. Second, again taking a glance at the witness statements I am of the view that the evidence sought to be adduced by way of acts of possession would be inadmissible as they do not support a material plea in the Defence and

counterclaim. Third, the second Defendant sought to rely upon the grant of leases as evidence of actual occupation. I see no basis for holding that the grant of leases without any allegation of actual occupation in the Defence can constitute factual possession for the purpose of the law of adverse possession. Fourth, reference is made in the pleadings of a letter demonstrating the appointment of a caretaker, roads on the land, and the presence of houses on the lands. The pleadings are simply insufficient to bring home to the Claimant that it has a case to answer on adverse possession. Fifth, the defence on this issue simply in my view traces the chain of title of the second Defendant and contends that his title is perfect or asks the Court to declare the he is the freehold title owner having regard to the chain of title. It never appeared to me to be raising a case of adverse possession, such a defence seems to have been argued as an afterthought. Had I set this matter down for trial I would have struck out the witness statements as being simply irrelevant to the pleaded case.

The re-amendment

36. The second Defendant wishes to now plead specifically his reliance on section 45 of the Real Property Ordinance and by virtue of which the Claimant's title was extinguished. It is trite law that pursuant to rule 20.3 CPR, the second Defendant must cross the threshold test of promptness and showing a good reason why the re-amendment could not have been made at the first case management conference. The second Defendant fails on both limbs. I made a deliberate note that the first CMC ended on 16th June 2011. The application is made on 13th February 2012 several months after the first CMC and the filing of its amended Defence in May 2011. There is absolutely no explanation by the second Defendant to explain the delay. The submission was however made that the proposed re amendment is merely cosmetic and is needed only for completeness. In fact it was submitted that there is no need to plead the statue as he is entitled to rely on it in any event. If that is the case there is no need to re

amend the pleading. However even if the second Defendant sought to rely on the statue either in argument or by pleading it the difficulty as analysed above, is that there are insufficient facts to mount a claim of adverse possession. Put in a different way there is no real prospect of success of the adverse possession claim as pleaded. Reference to the statute will not help without the foundational facts to support the plea. Even if the second Defendant did cross the threshold, applying the discretionary factors of 20.3.A CPR the re-amendment will not be allowed primarily for the reason that there are simply no facts to support the plea and it will be contrary to the administration of justice to permit such an amendment.

37. The application to re-amend therefore fails.

Conclusion

38. The Claimant therefore succeeds on his application for summary judgment. There is no real prospect of success of the claims of the second Defendant on the amended Defence and counterclaim of adverse possession or that the Claimant is guilty of fraud which will impeach the indefeasibility of his title registered under the RPA. The proposed re amended Defence takes the case no further and in fact fails to cross the threshold of Part 20.3 CPR.

39. The application to re amend is dismissed with costs to be paid by the second Defendant to the Claimant to be assessed in default of agreement.

40. There will be judgment for the Claimant against the second Defendant as follows:

    (a) The court declares that the Claimant is the registered freehold owner and entitled to possession of the land described in paragraph 1 of the

statement of case filed herein and holds same absolutely free from any liens estates or interests whatsoever of the second Defendant

(b) The second Defendant whether by himself his servants or agents or howsoever otherwise is restrained from entering upon and/or in any way dealing with the said land described in 1 above or any part thereof and/or any interest therein; and

(c) The second Defendant do pay to the Claimant prescribed costs of the claim to be quantified in default of agreement and the costs of the application for summary judgment to be assessed in default of agreement.

41. The assessment of costs will be conducted by this Court by the Claimant filing the requisite notice and statement of costs. Further directions will then be given to deal with the assessment of costs.

Dated this 15th June 2012

Vasheist Kokaram

Judge