

THE REPUBLIC OF TRINIDAD AND TOBAGO:

IN THE HIGH COURT OF JUSTICE

Claim No. C.V. 2008-02106

BETWEEN

LENNY MASTAY

(Personal Representative of the Estate of MICHAEL MASTAY
otherwise JOSEPH MASTAY otherwise JOSEPH MICHAEL MASTAY)

Claimant

AND

EGBERT ROSS

First Defendant

AND

ANN WILLIAMS-CARTER

Second Defendant

AND

CECIL WILLIAMS

Third Defendant

AND

ROSALIND HOATING

Fourth Defendant

BEFORE THE HONOURABLE JUSTICE RICKY RAHIM

Appearances:

Mr. R. Kawalsingh instructed by Mr. R. Mungalsingh for the Claimant.
Ms. C. Crevelle for the Defendant.

Judgment

1. For the reasons hereinafter appearing, the judgment of the court is as follows:

- a. The Memorandum of Transfer No. 68 dated 16th November 2005 by the First Defendant to the Second Defendant and the Certificate of title in Volume 4732 Folio 421 are set aside on the ground that the said Memorandum and Certificate were obtained by the Second Defendant through the fraud of the First Defendant.
- b. The Memorandum of Transfer No. 66 dated 16th November 2005 by the First Defendant to the Third Defendant and the Certificate of Title in Volume 4732 Folio 415 are set aside on the ground that the said Memorandum and Certificate were obtained by the Third Defendant through the fraud of the First Defendant.
- c. The Memorandum of Transfer No. 54 dated 16th November 2005 by the First Defendant to the Fourth Defendant and the Certificate of Title in Volume 4778 Folio 279 are set aside on the ground that the said Memorandum and Certificate were obtained by the Fourth Defendant through the fraud of the First Defendant.
- d. It is hereby declared that the Second, Third and Fourth Defendants are not bona fide purchasers for value of the said land.

- e. The Registrar General is directed to cancel the said Certificates of title and register the Claimant as the registered proprietor of the said land pursuant to the Memorandum of Transfer dated the 28th October 1980 (should this not have been done prior to this order) and to issue a new Certificate of Title to the Claimant.
 - f. The Defendants whether by themselves, their servants, agents, or otherwise are hereby restrained from:
 - i. Transferring, dispensing, mortgaging, leasing or otherwise dealing with the said land.
 - ii. Trespassing or entering or quarrying the said land and or interfering with the deceased's estate's peaceful and quiet use and enjoyment of the said land.
 - g. The Defendants shall pay to the Claimant nominal damages for trespass to the Claimant's land in the sum of \$5,000.00.
2. The Defendants' counterclaim is dismissed.
 3. The Defendants shall pay the prescribed costs of the Claimant on the Claim in the sum of \$14,000.00.
 4. The Defendants shall pay the prescribed costs of the Claimant on the counterclaim in the sum of \$14,000.00.

Background

5. This is an action involving land situate at Manzanilla and more particularly described in Memorandum of Transfer dated the 28th October 1980 ("the said land") which Memorandum purported to transfer the said land from the First Defendant to the deceased.

6. The Claimant brings this action against the Defendants in his capacity as Personal Representative of the estate of Michael Mastay, also called Joseph Mastay, also called Joseph Michael Mastay (“the deceased”) having been granted Letters of Administration on the 12th October 2007.
7. The First Defendant was at all material times the registered proprietor of the said land. The First Defendant is the father of the Second, Third and Fourth Defendants.
8. The Claimant’s case is that by virtue of the said Memorandum and for the consideration of \$140,000.00, the said land became vested in the deceased. The Claimant avers that despite the sale to the deceased, the First Defendant subsequently transferred the said land to the Second, Third and Fourth Defendants in an attempt to cheat and defraud the deceased of his interest in the said land.
9. The said transfer to the Second, Third and Fourth Defendants were done by virtue of three Memoranda of Transfer, namely, No. 68 dated 16th November 2005, No. 66 dated 16th November 2005, and No. 54 dated 16th November 2005 respectively. All were duly registered.
10. The First Defendant subsequently filed an application with the Registrar General under **Section 136** of the **Real Property Ordinance Chap 27 No. 11** to have a new Duplicate Certificate of Title issued in respect of the said land in order to endorse the transfers to the Second, Third and Fourth Defendants. A new Duplicate was issued. Ultimately Certificates of Title were issued to the Second, Third and Fourth Defendants (Certificate of title in Volume 4732 Folio 421, Certificate of title in Volume 4732 Folio 415, and Certificate of title in Volume 4778 Folio 279 respectively).
11. Prior to the transfer by the First Defendant to the Second, Third and Fourth Defendants, the deceased mortgaged the said land to the Bank of Nova Scotia Trinidad and Tobago

Limited by virtue of Memorandum of Mortgage dated the 28th October 1980. It is unclear *from the pleadings* whether the said Memorandum of Transfer which purported to transfer the said land from the First Defendant to the deceased was in fact registered. The Claimant avers that the said Memorandum was registered on the 2nd December 1981 and re-registered on the 8th February 1984. However, it was never endorsed on the First Defendant's Certificate of Title. The Claimant claims that prior to the registration and re-registration of the memorandum the deceased lodged a caveat on the 10th July 1981 in Volume 2609 Folio 211, in order to protect his interest.

12. In support of the Claimant's contention that the First Defendant did in fact transfer the said land to the deceased, the Claimant avers that the First Defendant gave the deceased the Certificates of Title relating to the said land (Certificate of Title in Volume 370 Folio 33 and Certificate of Title in Volume 615 Folio 137) with a view that he register the Memorandum of Transfer. The Claimant's case is that the said Certificates of Title were then lodged with the firm M. Hamel Smith & Co. and remain so lodged.
13. The Claimant claims that the deceased carried out a quarrying business on the said land with his assistance. During that time, with the consent of the deceased, the Claimant applied for and was granted permission by the Assistant Conservator of Forest on the 6th October 1983 to fix, maintain and keep in proper condition the Malajo Plantation Road for access to the quarry. Upon the death of the deceased, the Claimant continued to occupy and utilize the said land for quarrying purposes.
14. The Claimant therefore claims as against the Defendants for, *inter alia*, orders that the respective Memoranda of Transfer dated the 16th November 2005 purporting to transfer interests in the said land to the Second, Third and Fourth Defendants be set aside; injunctive relief; damages for trespass; damages for fraud and an account of all receipts and profits derived from the Defendants' trespass.

15. The First, Second, Third and Fourth Defendants contend, *inter alia*, that the First Defendant never signed a Memorandum of Transfer purporting to transfer the said land to the deceased; that the sum of \$140,000.00 was paid by the deceased to the First Defendant for the lease of one parcel of the said land to be used for quarrying purposes; that the First Defendant gave the deceased the Certificates of Title to facilitate the deceased obtaining a mining permit and for the drawing up of an agreement permitting the deceased to mine the said land and to establish the proper boundaries.
16. The Fourth Defendant denies that the First Defendant ever transferred the said land to the deceased, and avers that the deceased paid the First Defendant a deposit and started quarrying the front portion of the said land. This she said was a lease agreement which was ended some eight or nine months after the deceased began quarrying the portion of the said land. The Fourth Defendant further claims that the Claimant's entry on the land was illegal and that he made a fraudulent attempt to deprive the Defendants of the land prior to him being granted Letters of Administration.
17. The Defendants counterclaim for injunctive relief; an order that the Memorandum of Transfer dated the 28th October 1980 be set aside on the grounds of fraud and/or conspiracy; the removal of a Caveat registered as Volume 2609 Folio 211; damages for trespass; damages for fraud; mense profits and an account of all receipts and profits derived from the Claimant's occupation of the said land.

Issues

18. Although an agreed statement of issues was not filed, the Defendants in their submissions identified seven issues to be determined. The Claimant has agreed in his submissions with these proposed issues. However, the court considers that the issues that stand to be determined on the pleaded cases are:

- i. Whether the First Defendant executed the Memorandum of Transfer dated the 28th October 1980 in favour of the deceased;
- ii. Whether the said Memorandum of Transfer was registered;
- iii. For what purpose did the First Defendant give the deceased the Certificate of Title; and
- iv. Whether, on the facts, there is evidence of fraud on the part of either the Claimant or the First Defendant and if so the effect thereof.

The First Issue

19. It is to be noted at the onset that by Notice of Application filed on the 27th October 2011, the Claimant sought leave of the court to refer to the evidence contained in his witness statement without being called as a witness. This application was granted and as a consequence the Claimant was not cross examined on his evidence. The court has therefore directed itself on the need for caution when considering this evidence as the truth of the contents of the witness statement and therefore the credibility and reliability of the witness has not been tested in cross examination.

20. The Claimant's evidence is that by Memorandum of Transfer dated 28th October 1980 and signed by the First Defendant for the consideration of \$140,000.00, the deceased became the owner of the said land. The Claimant testified that prior to this the deceased had been a tenant of the First Defendant and carried on quarrying on the said land with the help of the Claimant.

21. The First Defendant in his evidence denies unequivocally that he signed any Memorandum of Transfer. His evidence in this regard is that he agreed to lease one parcel of land to the deceased for quarrying only at the sum of \$140,000.00 and on a trial basis. The First Defendant testified that the deceased paid him \$40,000.00 pursuant to that agreement and asked for the Certificate of Title. It is the First Defendant's

evidence that he gave the deceased the Certificate of Title to facilitate him in applying for a mining permit and so an agreement could be drawn up between them with the correct boundaries quoted.

22. The First Defendant further testified that in the month of October 1980 the deceased and the First Defendant's son visited the First Defendant at his home with a view to paying him the balance of the money owed on the lease. He was then taken to the Scotia Bank, Tunapuna Branch, where they were met by an attorney. It is the First Defendant's evidence that on receiving the balance he was asked by the attorney to sign a document purporting to be a receipt which he discovered was a document to transfer the said land to the deceased. He claims at that point he refused to sign the document.

23. The Third Defendant testified that she knew for a fact that the First Defendant and the deceased had an agreement to lease a parcel of land for quarrying purposes, but that the First Defendant ended this agreement about eight to nine months after the commencement of the lease.

24. The Fourth Defendant gave evidence that not only did the deceased and the First Defendant have a lease agreement which ended eight to nine months after it commenced, but that she knew as a fact the First Defendant did not sign the Memorandum of Transfer. She testified that she witnessed her brother Anthony La Fon sign the First Defendant's name on the Memorandum and that he gave her money.

25. The court notes at this juncture that it has given little weight to the evidence of the Fourth Defendant on this issue. In the court's view the Fourth Defendant's evidence is not believable. The courts notes with concern that such an important factual assertion that the Memorandum of Transfer was signed by Anthony La Fon and not by the First Defendant was not pleaded by any of the Defendants. The Fourth Defendant was joined in this claim during the testimony of the First Defendant whereby it was disclosed for

the first time in cross examination that the First Defendant had in fact also transferred to the Fourth Defendant. Even then, the court having given directions for the joinder and filing of pleadings the Fourth Defendant chose not to plead this fact which appears to be pivotal to their defence of the claim. This is passing strange. When the court considers the explanation given by the Fourth Defendant for the omission the court remains unsatisfied. The court does not believe that the Fourth Defendant has only now come forward because she was paid to remain silent about what she saw and that a promise was made to her that she would not be taken to court. If there was such a conspiracy, there would have been no need to include the Fourth Defendant as a part of the conspiracy as she had no role to play. It would have been a matter between the deceased and Mr. La Fon.

26. From all of the circumstances, including that of the demeanour of the Fourth Defendant during cross examination and upon which the court has not placed much reliance but which has been considered in the round, it appears that this was a deliberate attempt by the Fourth Defendant to fabricate an explanation for the signature which appears on the said Memorandum. The court believes that this attempt by the Fourth Defendant at the last hour was an effort to bolster the Defendants' case. The court therefore finds her evidence to be highly suspect and has placed no reliance on it.

27. In relation to the assertion that there was never a sale of the said land to the deceased but that the sum of \$140,000.00 was paid by the deceased for the lease of one parcel of the said land to be used for quarrying purposes, the court considers that the contents of the Memorandum of Transfer when given their natural and ordinary meaning speaks for itself that the transaction was in fact a sale. The evidence is that the signed Memorandum of transfer was expressed to be for the consideration of \$140,000.00, the receipt of which the First Defendant has not denied but has in fact accepted in his testimony. Consequently, the court finds that the sum paid was done so pursuant to the Memorandum.

28. Although the First Defendant testifies that he did not sign the Memorandum of Transfer, a signature purporting to be his appears on the said Memorandum. The court must therefore have recourse to the evidence of the handwriting expert Mr. Glen Parmasar.
29. In this regard, Mr. Glen Parmasar was appointed to be an expert witness to produce to the court his expert opinion on whether the signature appearing in Memorandum of Transfer dated 2^{8th} October 1980 was in fact executed by the First Defendant. Mr. Parmasar is a Forensic Document Examiner, a Currency Examiner and a Forensic Accounting Specialist & Fraud Examiner. He possesses over twenty years experience in the field of Forensic Document Examination. In his report dated 8th June 2009, he concluded that from the available material *'it is probable that the questioned signature "Egbert Ross" on Exhibit Q1 was executed by the K1 – K6 specimen writer (Egbert Ross).'*
30. The court notes that Mr. Parmasar was of the opinion that his findings were not conclusive as a full evaluation was limited by the unavailability of a larger number of specimen signatures from the 1980 time period. Mr. Parmasar in evidence indicated, that although he requested further specimen signatures none were provided.
31. The evidence that the signature is probably that of the First Defendant carries much weight with this court when considered in the round together with all the other evidence in the case. It is certainly to be preferred to the evidence that the Memorandum had been signed by the First Defendant's son.
32. In his testimony in cross examination, the expert explained that in conducting a handwriting examination, one compares the features of the disputed signature against the features or characteristics of specimen signatures. The features are assessed to determine if they contain significant similarities which would point in the direction of common authorship or general similarities or variations or differences which would indicate another author. It is in this context that the expert found that it is probable that the First Defendant signed the Memorandum. His finding went beyond that of mere

possibility that it was signed by the First Defendant. His finding ventured into the realm of likelihood. Essentially the expert was in fact testifying that while he could not say as a matter of certainty that the signature belonged to the First Defendant without more samples from the appropriate time period, it was likely that the signature was that of the First Defendant having regard to the similarities between the original signature and the specimens provided. This taken with the evidence of the handing over of possession of the Certificate of Title by the First Defendant and the lodging of the said Certificate with the firm of Hamel Smith and Company and its registration (which shall be dealt with later) leads this court to conclude that the signature appearing on the said Memo was more likely than not that of the First Defendant. The court is fortified in its finding by the Affidavit of execution which appears at the foot of the said Memo and which purports to have been sworn before a Commissioner of Affidavits by George Harrison, the witness to the said execution. This affidavit has not been challenged. The court therefore finds that the First Defendant did in fact execute the Memorandum of Transfer dated 28th October 1980.

The Second Issue

33. In relation to this issue, it should be noted that the Memorandum of Transfer in favour of the deceased was stamped as having been registered on the 2nd December 1981 and re-registered on the 8th February. However, it was not endorsed on the Duplicate Certificate of Title which the Claimant says the First Defendant gave to the deceased in order to have the transfer registered. The issue is important in that should it be found that the transfer was in fact registered, this transfer would take priority over the latter transfer to the Second, Third and Fourth Defendants.

34. In this regard, the following sections of the **Real Property Act Chap 56:02** are important:

32. Every certificate of title shall be in duplicate in Form D of the First Schedule, and shall set forth the nature of the estate in respect to which it is issued, and the Registrar General shall note thereon, in such manner as to preserve their priority, the particulars of all unsatisfied mortgages or other encumbrances, and of any

dower, lease, or rent charge to which the land may be subject, and also easements or other rights to which the land may be proved or admitted to be subject, and if such certificate of title be issued to an infant or other incapable person he shall state the age of such infant or the nature of the disability so far as known to him, and shall cause the original of each certificate of title to be bound up in the Register Book, and deliver the duplicate thereof to the proprietor entitled to the land described therein.

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.

38. Every grant and certificate of title shall be deemed and taken to be registered under the provisions and for the purposes of this Act so soon as the same shall have been marked by the Registrar General with the page and volume as embodied in the Register Book, and every memorandum of transfer or other instrument purporting to transfer or in any way to affect land under the provisions of this Act shall be deemed to be so registered so soon as a memorial thereof as hereinafter described shall have been entered in the Register Book upon the leaf constituted by the grant or certificate of title of such land, and

the person named in any grant, certificate of title, or other instrument so registered as the proprietor of or having any estate or interest shall be deemed to be the proprietor thereof.

42. Every memorial entered in the Register Book shall state the nature of the instrument to which it relates, the day and hour of the production of such instrument for registration, and the names of the parties thereto, and shall refer by number or symbol to such instrument, and shall be signed by the Registrar General.

43. Whenever a memorial of any instrument has been entered in the Register Book, the Registrar General shall, except in the case of a transfer or other dealing effected or evidenced only by endorsement upon any grant, certificate of title, or other instrument as hereinafter provided, record the like memorial on the duplicate grant, certificate of title, or other instrument evidencing title to the estate or interest intended to be dealt with or in any way, affected, whether already in his possession or delivered to him along with the instrument for registration, unless the Registrar General shall, as hereinafter provided, dispense with the production of the same, and the Registrar General shall endorse on every instrument so registered a certificate of the date and hour on which the said memorial was entered in the Register Book, and shall authenticate each such certificate by signing his name thereto, and such certificate shall be received, both at law and in equity, as conclusive evidence that such instrument has been duly registered.

35. Thus, Registration is deemed to have occurred upon an entry of a memorial in the Register Book upon the leaf constituted by the grant or certificate of title of such land. The court interprets this to mean the endorsement of the memorial on the original Certificate of Title held at the Registry. This Certificate of Title in original form is filed in

the Register Book and assigned a volume and folio number. It is only then that the Duplicate, which would have been surrendered for the purpose of registration, is similarly endorsed. It follows that the fact of receipt by the staff of the Registrar General's Department of a document purporting to be a Memorandum is insufficient in law to amount to registration although the document is stamped at the counter. The process of receipt is not to be equated with registration. One indicator in support of this finding is the common occurrence whereby there may be queries on the instrument by the Registrar General which queries would require resolution prior to registration.

36. In any event, the stamp on the Memorandum of Transfer in favour of the deceased bears no signature by the Registrar as is required by the Act and the counter receipt stamp usually does not bear such a signature. This is further confirmation in the court's view that the counter receipt was never intended to be the act of Registration.

37. The Claimant has attached a letter dated 1st November 2007 from M. Hamel Smith & Co. which indicates that the stamp appearing on the said Memorandum is in fact genuine. There is no evidence to the contrary but having regard to the court's findings on this issue proof of the stamp will be of no moment in any event.

38. For these reasons the court therefore finds that the said Memorandum of transfer was not registered within the meaning of the Real Property Ordinance.

The Third Issue

39. The Claimant avers that the First Defendant gave the deceased the Certificates of Title relating to the said land with a view that he register the Memorandum of Transfer. However, it is the evidence of the First Defendant that he gave the deceased the Certificate of Title to facilitate him in applying for a mining permit and so an agreement could be drawn up between them with the correct boundaries quoted.

40. The court considers that the First Defendant is being less than truthful on this point. This is particularly so considering the fact that the First Defendant declared in his Statutory

Declaration dated the 12th September 2002, that “through inadvertence” he misplaced the original Certificate of Title.

41. The court, having found above that the First Defendant did as a fact sign the Memorandum of Transfer in favour of the deceased, finds that the deceased was given the Certificate of Title to facilitate the registration of the Memorandum of Transfer for the following reasons:

- a. A Certificate of Title is of paramount importance to a title holder and possession of it is crucial. The court does not believe that a land owner would simply hand it over to another where the purpose is presumably to retrieve the proper boundaries for a mining lease and the drawing of an agreement. In those circumstances a copy would ordinarily suffice. It is therefore highly unlikely that the First Defendant would have parted with this document in circumstances which do not require the production of the document.
- b. The First Defendant never denied in his evidence having given the Certificate to the deceased. It has always been the First Defendant’s case that he did give the deceased the Certificate of Title. However the First Defendant declared in his Statutory Declaration that “through inadvertence” he misplaced the original Certificate of Title. It is difficult now for the court to believe his evidence that he gave the deceased the Certificate of Title to facilitate him in applying for a mining permit and to draw up an agreement between them with the correct boundaries quoted when his evidence is inconsistent with his statutory declaration. This leads the court to conclude that the First Defendant is being less than truthful. It could not be that the First Defendant is making a mistake as the statutory declaration was sworn to while the fact of the whereabouts of the Certificate of Title were fresher in his mind than they were when he gave his witness

statement and was available at the time he made the said witness statement.

- c. What is more, is that at paragraph 22 of his witness statement, the First Defendant maintains that what he said in his statutory declaration was correct. So that the First Defendant has maintained the inconsistency on his own case without acknowledging its existence or providing an explanation for it.
- d. Additionally, the First Defendant has given no evidence that the Duplicate Certificate of Title was needed in order to obtain a mining permit.

42. The court therefore finds that it is clear that the First Defendant gave the deceased the Certificate of Title relating to the said land with a view that the deceased register the Memorandum of Transfer.

The Fourth Issue

43. The Defendants' Attorney has submitted that the said land is unregistered property and subject in law to the provisions of the **Real Property Act Chapter 56:02**. This appears to be a fundamental misunderstanding of the case as a whole as the said land is in fact **registered** land as evident by the Certificate of Title relating to same in Volume 615 Folio 137. The indefeasibility of title remains therefore a live issue in this case.

Defendants' arguments on fraud

44. In the registered system the register is conclusive evidence of the facts stated therein. The exceptions to this are set out in the **Real Property Act**. Fraud is one such exception.

45. The Defendants have not particularized any allegations of fraud. It is accepted that a party must plead all material fact that he intends to rely upon in support of his claim and the fraud alleged must not only be distinctly alleged but also distinctly proved: ***John v***

Allsop; Inniss; Weekes; Weekes, Jaglal; Jaglal H.C.4559/2010. CV.2010-04559. In the circumstances, the Defendants are not entitled to any relief which is founded in fraud.

46. In any event, having regard to the court's findings in relation to the testimony of the Fourth Defendant and the execution of the disputed Memorandum of Transfer by the First Defendant, the Defendants have failed to prove fraud on the part of the Deceased.

Claimant's allegations of fraud

47. In order for the Claimant to impeach the Defendants' registered title he must make out his case of fraud: **s. 141 and 143 of the Real Property Act**. Although, there has been no definition of fraud it is clear that knowledge by a purchaser directly or constructively of any trust or unregistered interest cannot itself be imputed as fraud. There must be something more that is actual fraudulent actions coupled with a dishonest intention on the part of the title holder, in this case the First Defendant.

48. The Claimant alleges that the First Defendant was fraudulent in that he knew that he had delivered his Certificate of Title to the deceased in order to register the Memorandum of Transfer but made an application for a new Certificate of Title in which he falsely declared under oath that he did not transfer the said land to anyone, and knew not of the whereabouts of the Certificate of Title which he had allegedly given to the deceased.

49. The fraud within the meaning of the Real Property Act must be some consciously dishonest act brought home to the person whose registered title is impeached. The fraud to which the section refers is that of the registered proprietor or his agent. The title of a person acquiring it by dishonesty, fraud, acting fraudulent or being party to fraud, in the plain ordinary and popular meaning of those words, is not protected by reason of registration under the Act: **Stuart v Kingston (1923) 32 CLR 309.**

50. In **Waimiha Sawmilling v Waione Timber [1926] AC 101** the Privy Council iterated that 'if the designed object of a transfer is to cheat a man of a known existing right', or if there is a 'deliberate dishonest trick causing an interest not to be registered' so as to

fraudulently keep the register clear, then fraud will be established. In a similar vein, in **Baby Khan v Farouk Khan et al CV App No 101 of 1997** Hamel Smith, JA explained that it is the intention to take away land from the owner by means that involve some moral turpitude.

51. Therefore having regard to the following findings of the court:

- (i) The First Defendant did sign the Memorandum of Transfer to the deceased;
- (ii) The First Defendant did give the deceased the Certificate of Title in order to facilitate registration of the transfer to the deceased;
- (iii) The First Defendant nevertheless fraudulently made declarations that he never transferred the land to anyone and that he inadvertently “misplaced” the Duplicate Certificate of Title in order to obtain a new Duplicate Certificate of Title in order to register the transfers to his children, the Second, Third and Fourth Defendants knowing the truth to be that he had given the deceased the Duplicate Certificate of Title; and
- (iv) The First Defendant did obtain the new Duplicate Certificate of Title;

the Claimant has proven that the intention of the First Defendant was to cheat a man of a known existing right, (that is, the rights attached to and associated with ownership of the said land) and meant to deprive him thereof. This is fraud within the meaning contemplated by the Real Property legislation.

52. Consequently, the finding of the court is that the Second, Third and Fourth Defendants were registered as proprietors by virtue of fraud on the part of the First Defendant and that the defendants were therefore not bona fide transferees for value under the Real Property Act.

Damages for Fraud

53. Pursuant to **s. 145 of the Real Property Act** a person deprived of land under paragraphs (b) *inter alia* of section 143 (fraud) may bring an action at law against the person upon whose application such land was brought under the provisions of this Act by fraud or misdescription, or such erroneous registration was made, or who acquired title to the estate or interest in question through such fraud, error, or misdescription.
54. In consideration of this section, and considering that the Claimant has not alleged that he was deprived of any substantial use of the said land by reason of the fraud of the First Defendant, the court will not make an award of damages for fraud pursuant to s.145. Further the Claimant has not claimed that he was put out of possession or use of the land at any time. The court takes this as an indication that the Claimant is still in possession of the said land and is able to carry out quarrying works on same notwithstanding the First Defendant's fraudulent transfer of the said land to the Second, Third and Fourth Defendants.

Damages for Trespass

55. The Claimant claims that in or about July 2007, the First Defendant wrongfully trespassed on the said land by sending his servants and/or agents therein to cut valuable logs there from. Following this the First Defendant, his servants and/or agents began excavating and taking away gravel there from.
56. In the Claimant's witness statement, he testifies that the value of the lumber taken was over \$150,000.00 and that the loss of gravel was \$100,000.00 and continuing. However, the Claimant has not proven this sum either by way of valuation or receipts. A claim for special damages must, not only be particularised but also strictly proven. In the circumstances an award of special damages will not be made.
57. The Claimant testifies that by letter dated 22nd March 2004 his Attorney wrote to the First Defendant about his unlawful acts, to which the First Defendant replied by letter dated 26th April 2004 that the said land was his and asked that the Claimant cease

trespassing on the said land. This response letter is annexed to the Claimant's witness statement.

58. The First Defendant's evidence was that he was not aware that the deceased was working the said land and further that he has always done logging on the said land. He testifies that there is a tractor and excavator on the portion of the land he claims belongs to the Fourth Defendant. In fact the Claimant has annexed pictures evidencing the First Defendant's trespass and these pictures show a tractor and excavated land.

59. The court therefore must ascertain the measure of damages to which the Claimant is entitled. The prima facie measure of damages for all torts affecting land is either the diminution in value to the Claimant; or the cost of reasonable reinstatement. No evidence has been proffered in relation to either measure. Neither has adequate evidence been led as to the value of the lost lumber save and except the bald assertion of a total loss value for which there is no supporting evidence by way of a valuation or otherwise. However, as trespass is a tort actionable per se once it is proved, the Claimant is entitled to at least nominal damages.

60. Nominal damages is awarded in two circumstances:

- (a) In recognition of an infraction of a legal right giving the successful party judgment; and
- (b) Where damage is shown but its amount is not sufficiently proved: **Jacob & Polar v Samlal CV 2005-00454**

61. In the circumstances an award of nominal damages is appropriate. In **Jacob & Polar v Samlal CV 2005-00454** the range for an award of nominal damages was stated to be in the range of \$3,500.00 to \$10,500.00. The court considers that in the circumstances, an award of \$5,000.00 is appropriate. This is so particularly because the nature of the work done on the land by the deceased and continues by the Claimant is quarrying. In cross examination, the First Defendant testified that in order to quarry you must first clear the land and then excavate it. Thus, the excavation done by the First Defendant does not

appear to this court in the absence of evidence to the contrary to in anyway harm the business or cause the Claimant any additional cost in restoration of the said land.

62. For the preceding reasons therefore, the court would dispose of this case in manner appearing at paragraph 1.

Dated this 26th day of November, 2012.

Ricky Rahim
Judge