

THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No.CV2010-00292

Between

KEITH BAHADOORSINGH

Claimant

And

CHANDROWTIE MANGRA

First Named Defendant

And

SHUBHASH GOSINE

Second Named Defendant

BEFORE THE HONOURABLE MR. JUSTICE PETER A. RAJKUMAR

APPEARANCES:

Mr. Haresh Ramnath for the Claimant

Mr. Irshaad Ali for the Defendants

ORAL JUDGEMENT

1. The onus of proof lies on the party alleging an equitable interest to establish that the party claiming legal title had notice of the equitable interest.
2. Even if the onus lay on the holder of the legal title, the second defendant, he has discharged it on the evidence of the search clerk, which has not been rebutted.
3. There is no issue of actual notice in this case.

4. Even if a lis pendens has been registered, Section 80 of the **Conveyancing and Law of Property Act** (CLPA), as construed in **Mildred Richards v Nasena Alladeen (1959) 1 WIR 194**, (the Alladeen case), does not impose automatic notice of it or a strict liability on the legal owner.

5. In this case where, as I find,

(i) The lis pendens (though registered at the time of the search by the second defendant, had not been incorporated into the computerised records of the Registrar General), and

(ii) The legal title holder has done all that he could reasonably be expected to do as a prudent purchaser,

6. In the circumstances of this case he is not deemed to be fixed with constructive notice under Section 80 of the **Conveyancing and Law of Property Act**.

DISPOSITION AND ORDERS

7.
 - a. The claimant's claim against the second named defendant is dismissed.
 - b. Costs are to be paid by him in the sum of \$14,000.00 on the basis prescribed by the Civil Proceedings Rules.

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REASONS FOR DECISION

BACKGROUND

Undisputed Facts

1. The Claimant entered into an agreement for sale of the subject property dated **19th October, 2009** (the said agreement for sale) with the First Named Defendant). He paid a deposit of \$5,000.00. The time fixed for completion was **January 19th 2010** when the balance of \$145,000.00 was to be paid.
2. A Lis pendens was filed by the claimant on January **26th 2010** and registered as LP 2010 000065 94D001 at **1.47:22pm**.

3. The First Named Defendant purported to convey the subject property to the Second Named Defendant by Deed of Conveyance dated the **6th July, 2010** and registered as DE201001734765D001 (the deed of conveyance).

4. The Claimant claims that he is entitled to specific performance of the said agreement for sale, and that the deed of conveyance from the First Named Defendant to the Second Named Defendant must be set aside.

5. The Second Named Defendant claims that he is a bona fide purchaser for value, without notice of the rights of the claimant, and that his deed of conveyance must therefore stand.

ISSUE

6. At issue is the effect of the Lis Pendens registered by the Claimant on the claim by the Second Named Defendant to be a bona fide purchaser for value without notice.

CONCLUSION

7. i. As at the date of the conveyance on **July 6th 2010**, though the lis pendens had been registered, it was not detected in a search by the search clerk retained by the second defendant's agent.

ii. The onus of proof lies on the party alleging an equitable interest to establish that the party claiming legal title had notice of the equitable interest.

iii. If the lis pendens registered had not been transferred or entered into the computer system at the Registrar General's Department, it would not have been detected by a search clerk conducting a computerised search. I accept the evidence of the search clerk that appropriate entries in the search fields were made in searching for any lis pendens filed, and accept the suggested inference that no lis pendens was shown by the computer system because the lis pendens had not been entered into the computerised system, despite being promptly registered on January 26th 2010.

I also accept her unchallenged evidence that the option of a physical search, for example, searching a **book** where lis pendens were recorded, did not exist. The only search available therefore would be the computerised search. The registration procedure for a lis pendens contemplates the existence of a physical book. If, as the unchallenged evidence stands, there is no such book, and /or the lis pendens had not been incorporated into the computerised records of the Registrar General which were made available for searching by the public, then a lis pendens, even though registered, would not be detectable by a purchaser, and **would not have come to his knowledge, even if such enquiries and inspections had been made as ought reasonably to have been made by him.**

iv. Even if the onus lay on the holder of the legal title, the second defendant, he has discharged it on the evidence of the search clerk, which has not been rebutted.

v. There is no issue of actual notice in this case.

vi. Even if a lis pendens has been registered, Section 80 of the **Conveyancing and Law of Property Act (CLPA)** , as construed in **Mildred Richards v Nasena Alladeen (1959) 1 WIR 194**, (the **Alladeen** case), does not impose automatic notice of it, or a strict liability on, a purchaser.

vii. Whereas, I find,

(a) The lis pendens (though registered at the time of the search by the second defendant, had not been incorporated into the computerised records of the Registrar General), and

(b) The option of a physical search of a book did not exist,

(c) The legal title holder has done all that he could reasonably be expected to do as a prudent purchaser.

In the circumstances of this case he would not be deemed to be fixed with constructive notice under Section 80 of the **Conveyancing and Law of Property Act** merely by reason of the registration of the Lis Pendens, where the filed and registered lis pendens was not detectable on, and, on a balance of probabilities, had not been incorporated into, the computer search system of the Registrar General.

DISPOSITION AND ORDERS

8. a. The claimant's claim is dismissed.
- b. Costs are to be paid by him in the sum of \$14,000.00 on the basis prescribed by the Civil Proceedings Rules.

ANALYSIS AND REASONING

The case for the second named defendant

9.
 - (a) By virtue of the Agreement for Sale the Claimant asserts an **equitable interest**.
 - (b) The Second Named Defendant has a legal **title** as a bona fide **purchaser for value** by virtue of the conveyance to him by the First Named Defendant, without **notice** either **actual** or **constructive** of the claimant's alleged equitable interest.
 - (c) Accordingly the second named defendant is entitled to rely on the conveyance to him free from any adverse interest and/or encumbrance.

Bona fide purchaser for value

10. The Second Named Defendant purchased the subject property for the sum of \$260,000.00.

Notice

11. At the time he made the purchase he had no notice either actual or constructive of the Claimant's interest in the subject property, having made such enquiries and inspections as ought reasonably to be made.

No Actual notice

12. It is conceded that there is no issue of the second defendant having **actual** notice of the claimant's interest. (Paragraph 1.3 of claimant's written submissions)

Physical inspection

13. The Second Named Defendant undertook an actual physical inspection (through his agent Farman Ramjohn) of the property to inquire as to whether there was any adverse interest that could be uncovered by such inspection found nothing to put him on

inquiry. The claimant accepts that he did nothing physically on the land to show that he had an action pending, as he had a lis pendens filed for that purpose.

Inquiries of vendor

14. The Second Named Defendant made **actual inquiries** from the First Named Defendant as to whether there was any interest adverse to her interest and/or encumbrance and/or matters affecting the said property. **Furthermore the First Named Defendant never revealed any such interest and matters to the Second Named Defendant, and in fact she has taken no part in the trial, leaving the results of her dishonest conduct to be worked out in this litigation contested between the claimant and the second named defendant.**

The search Gillian Rigsby

15. The Second Named Defendant caused a search to be carried on the title to the said property by Search Clerk Gillian Rigsby. That search included a title search, and a follow up judgement and Lis Pendens Search. The result of this search, which was communicated to the Second Named Defendant, was that title to the said property was clear in that there was a good root of title and no encumbrances, judgements or lis pendens affecting the property.

16. The second defendant submitted in effect, and I accept, that in this jurisdiction, searching the registries in which charges on or interests in land and property are lodged or registered, is the only method of detecting charges and encumbrances so registered. Methods of conducting such searches include searching personally or, more usually, retaining the services of a conveyancing attorney or search clerk for this purpose. Even if a conveyancing attorney is retained it is usual for him to retain the services of a search clerk.

17. It is therefore customary and reasonable to rely on an experienced search clerk to conduct a search of the registries to ascertain whether there was any interest and/or charge and/or lis pendens with respect to property, and that was what was done in this case.

18. The issue still remains whether the second defendant can properly be fixed with notice of a *lis pendens*, which though registered, was not detected on a proper search of the records of the Registrar General.

19. I find that the evidence of the search clerk is sufficiently convincing to conclude that in fact a proper computerised search was conducted by her.

20. On the issue of whether a physical search of a book, contemplated by the statute as existing, in which *lis pendens* are recorded, I accept her evidence that no such book was available to her to be searched since the records were computerised, as it was not challenged.

21. Any presumption of regularity has therefore been rebutted by the unchallenged evidence of the search clerk.

22. I am constrained by the evidence to find that the filed and registered *lis pendens* was not detected on, and therefore was not detectable on, the computer search system of the Registrar General.

23. I am constrained by the evidence to find therefore, on a balance of probabilities that, though filed, the *lis pendens* had not been incorporated into the computer search system of the Registrar General.

24. The issue therefore is what is the effect in law of this state of affairs.

LAW

25. **Section 65** of the **Remedies of Creditors Act Chap 8:09** under the rubric “*Lis pendens*” states as follows:

Section 65 (all emphasis added)

No *lis pendens* shall bind a purchaser or mortgagee without express notice thereof, unless and **until a memorandum or minute** containing the name and the usual or last known place of abode, and the title, trade or profession of the person whose estate is intended to be affected thereby, and the title of the cause or

information, and the day when the writ or information was filed, **is left with the Registrar General, who shall forthwith enter the same particulars in a book to be kept by him, in alphabetical order by the name of the person whose estate is intended to be affected** by the *lis pendens*; and the provisions of this Act in regard to the re-entering of judgments every three years shall extend to every case of *lis pendens* which shall be registered under this Act.

26. **Section 80 of the Conveyancing and Law of Property Act Chap 56:01** is as follows:

80. (1) A purchaser shall not be prejudicially affected by notice of any instrument, fact, or thing unless—

it is within his own knowledge, or **would have come to his knowledge, if such enquiries and inspections had been made as ought reasonably to have been made by him; or**

in the same transaction with respect to which a question of notice to the purchaser arises, it **has come to the knowledge of his attorney-at-law**, as such, or of his other agent, as such, **or would have come to the knowledge of his attorney-at-law** or other agent, as such, **if such enquiries and inspections had been made as ought reasonably to have been**

27. In the case of **Mildred Richards v Nasena Alladeen (1959) 1 WIR 194**, an appeal from this jurisdiction heard by the Federal Supreme Court, a similar issue arose for consideration where a *lis pendens* had been filed at 11.00 a.m. on the same day as a conveyance, but there was no evidence as to whether it had been filed before or after the conveyance was executed. If filed after the conveyance was executed there could have been no issue of notice. In the absence of such evidence the court was constrained to consider the alternative possibility that the *lis pendens* had been filed before the conveyance was executed. The court therefore considered the issue of where the burden of proof lay to establish such notice, and whether the mere filing of that *lis pendens* was sufficient to fix a purchaser with constructive notice.

28. It was held:

(i) The respondent was a *bona fide* purchaser for value without notice.

(ii) (Per Hallinan CJ and Archer J) even if the burden of proving want of notice lay on the respondent she had discharged it.

(iii) The respondent was not affected with notice by the registration of the *lis pendens* on the same day on which the conveyance was executed.

(iv) Where a *lis pendens* is registered under the provisions of the Remedies of Creditors Ordinance, Cap 6, No 2 [T], on the same day as a conveyance to a purchaser is made, (per HALLINAN CJ) it cannot be said that the purchaser ought reasonably to have made enquiry and searched the register on the very day on which the conveyance was executed; (per RENNIE J) it cannot be said that the purchaser is guilty of gross or culpable negligence in not obtaining the knowledge that it was registered; (per ARCHER J) it would be unreasonable to require the purchaser to ensure up to the last moment before accepting the deed of conveyance that no *lis pendens* in respect of the property he is buying has been registered.

29. Some of the court's reasoning appears from the extracts of the judgements set out hereunder. The Honourable Hallinan CJ at pages 197 to 199 considered the issue of notice where a Lis Pendens is filed and what was required to establish the assertion of bona fide purchaser for value without notice:

“In these circumstances, a formal statement on oath by the respondent that she had no notice was not necessary. However, counsel for the appellant contends that the respondent had had constructive notice, and has relied on s 80 (1) (a) of the Conveyancing and Law of Property Ordinance, Cap 27, No 12 [T], which is as follows:

‘A purchaser shall not be prejudicially affected by notice of any instrument, fact or thing unless-

(a) it is within his own knowledge, or would have come to his knowledge, if such enquiries and inspections had been made as ought reasonably to have been made by him.’

In this respect the law of Trinidad is similar to the law of England. It is contended for the appellant that had the respondent made proper enquiry she would have had notice of the appellant's prior equity in two ways: first, by visiting the land and seeing the appellant in possession thereof with her husband, and secondly by searching the register of lis pendens. I agree with the learned trial judge that it was reasonable for the respondent to assume that the normal relations of husband and wife existed between the appellant and Horace Richards and that she was residing on the land in dispute by right of her husband's possession.

The legal effect of registering a lis pendens is set out in s 65 of the Remedies of Creditors Ordinance, Cap 6, No 2 [T] Section 65 as follows:

*'No lis pendens shall bind a purchaser or mortgagee **without express notice thereof**, unless and until a memorandum or minute ... shall be left with the Registrar General....' ...*

*For a purchaser to be affected by a notice of lis pendens he must, I think, have had reasonable time before the conveyance to him is executed, of searching the register of lis pendens. **Where a lis pendens is registered on the same day as the conveyance to the purchaser is made, I do not think it can be said that the purchaser ought reasonably to have made enquiry and searched the register on the very day on which the conveyance was executed.***

It was conceded at the trial that the respondent did not have actual notice of the appellant's prior equity and I do not think it can be said that she had constructive notice either. .

30. The Honourable Rennie J at pages 199 to 200 **also** considered the issue of bona fide purchaser and notice in relation to a Lis pendens as follows:

"the question for decision seems to be whether the legal estate which the respondent acquired from the appellant's husband overrode the appellant's equitable interest. It is settled law that it will if the legal estate was acquired by

a bona fide purchaser for value without notice of the equitable interest. There is no suggestion in this case that the purchase was not bona fide and not for valuable consideration.

As to the notice of the appellant's interest, the evidence is that the conveyance was executed on the day on which the lis pendens was registered. The lis pendens was registered at 11 am, but there is no evidence as to the time of the day the conveyance was executed. Proof of that time would be conclusive if it could be shown that the conveyance was executed before 11 am-then there could be no question of notice whether actual or constructive.

If the execution took place after 11 am this must give rise to the question—would the lis pendens have come to the knowledge of the respondent if such enquiries and inspection had been made as ought reasonably to have been made by her? This, in effect, is the provision of s 80 (1) of the Conveyancing and Law of Property Ordinance, Cap 27, No 12 [T], and of s 3 of the Conveyancing Act of 1881 [UK].

*For the respondent to be affected with notice of the lis pendens the circumstances must be such that the lis pendens would have come to her knowledge if such enquiries and inspections had been made as ought reasonably to have been made by her. “Ought’ here,” said Lindley LJ, in *Bailey v Barnes* ([1894] 1 Ch 25, 63 LJ Ch 73, 69 LT 542, 42 WR 66, 38 Sol Jo 9, 7 R 9, CA, 20 Digest 302, 560) ([1894] 1 Ch at p 35), “does not import a duty or obligation, for a purchaser need make no enquiry. The expression ‘ought reasonably’ must mean ought as a matter of prudence, having regard to what is usually done by men of business under similar circumstances.” This was said when dealing with the provisions of s 3 of the Conveyancing Act, 1881 [UK], which are identical with s 80 (1) of the Conveyancing and Law of Property Ordinance [T]. On that same page of the report, Lindley LJ, quoted with approval a passage from the speech of Lord Cranworth in *Ware v Egmont* (Lord) ((1854), 4 de GM & G 460, 3 Eq Rep 1, 24 LJ Ch 361, 24 LTOS 195, 1 Jur NS 97, 3 WR 48, 43 ER 586, LC, 20 Digest 317, 653), in which occurs the following sentence:*

'The question when it is sought to affect a purchaser with constructive notice is not whether he had the means of obtaining and might by prudent caution have obtained the knowledge in question, but whether the not obtaining it was an act of gross or culpable negligence.'

After quoting from the speech, he went on to say:

'Gross or culpable negligence in this passage does not import any breach of a legal duty, for a purchaser of property is under no legal obligation to investigate his vendor's title. But in dealing with real property, as in other matters of business, regard is had to the usual course of business, and a purchaser who wilfully departs from it in order to avoid acquiring a knowledge of his vendor's title is not allowed to derive any advantage from his wilful ignorance of defects which would have come to his knowledge if he had transacted his business in the ordinary way.'

Where, as in the instant case, the conveyance was executed on the same day on which the lis pendens was registered, can it be said that the purchaser was guilty of gross or culpable negligence in not obtaining the knowledge that the lis pendens was registered? I think not. In these circumstances, I would say she might by prudent caution have acquired the knowledge but she was not guilty of gross or culpable negligence. That being so, the respondent would not be affected with notice of the lis pendens.

31. The Honourable Archer J at pages 206 to 207 also considered the issue. *Constructive notice is a doctrine unknown to common law and she could not succeed against the plaintiff-respondent unless she pleaded and proved, in addition to her interest, **knowledge of that interest**. Both elements were essential to constitute her defence and **the onus of proof of both of them lay upon her**. Not only was there no allegation that the lis pendens was registered before the deed of 25 February 1953, was executed, but no attempt was made to prove that that had been so or that the plaintiff-respondent had before she obtained her deed been in*

possession of information which should have put her on her guard. For this additional reason, therefore, I am clearly of the view that the **burden of proof of constructive notice was on the defendant-appellant** and that that burden was not discharged.

“Finally, I consider the matter on the supposition that the onus was upon the plaintiff-respondent to prove that she did not have constructive notice. The lis pendens was registered at 11 am on 25 February 1953. The enquiries which a bona fide purchaser for value is required to make are such as would occur to a prudent purchaser. Section 65 of the Remedies of Creditors Ordinance [T] was certainly intended to be for the protection of persons having claims to property, but it cannot, in my view, be interpreted in such a way as to entrap the unwary.There is no evidence in this case that the plaintiff-respondent made any enquiry about a lis pendens but, even if she had, she might not despite her caution, have obtained any knowledge of it even if it was registered before the deed was executed, because of the short interval between its registration and the execution of the deed. It cannot, therefore, be said that if the plaintiff-respondent had acted prudently she must have learned that a lis pendens had been registered and therefore had constructive notice of it.....

‘Where a person has actual notice of any matter or fact, there can be no danger of doing injustice if he is held to be bound by all the consequences of that which he knows to exist.

But where he has not actual notice, he ought not to be treated as if he had notice, unless the circumstances are such as enable the Court to say, not only that he might have acquired, but also, that he ought to have acquired, the notice with which it is sought to affect him—that he would have acquired it but for his gross negligence in the conduct of the business in question.

*The question when it is sought to affect a purchaser with constructive notice, is not whether he had the means of obtaining, and might by prudent caution have obtained, the knowledge in question, but whether the not obtaining it was an act of gross or culpable negligence.’ (Again quoting **Ware v Edgemont**)*

This passage was quoted with approval in Bailey v Barnes ([1894] 1 Ch 25, 63 LJ Ch 73, 69 LT 542, 42 WR 66, 38 Sol Jo 9, 7 R 9, CA, 20 Digest 302, 560), where Lindley LJ, said ([1894] 1 Ch at p 34):

In Ware v Egmont (Lord) ((1854), 4 de GM & G 460, 3 Eq Rep 1, 24 LJ Ch 361, 24 LTOS 195, 1 Jur NS 97, 3 WR 48, 43 ER 586, LC, 20 Digest 317, 653), Lord Cranworth stated the law on this subject in language which has always been accepted as correct.....

I come to the conclusion, therefore, that even if the plaintiff-respondent had to prove that she had had no constructive notice, the circumstances are such as to show that she discharged that burden of proof.

32. Applying that case to the instant facts I find that the **burden of proof** lies on the claimant to establish that the second defendant was not a bona fide purchaser for value of the subject property without notice of the lis pendens. He has not discharged that onus in light of the evidence that the second named defendant, through his agents, in fact did make physical inspections and inquiries of the vendor, and commissioned the appropriate searches.

33. Even if the burden of proof lies on the second named defendant to establish that he had no notice I find that he has discharged it in establishing that he made such inquiries and inspections as he ought as a matter of prudence, having regard to what is usually done by men of business under similar circumstances . He therefore acted without negligence, and certainly without culpable or gross negligence.

34. I find that the **Alladeen** case establishes that there is no automatic or deemed constructive notice merely by the filing of the lis pendens, and that the statute is not to be interpreted as a trap for the unwary.

35. I find that the Second Named Defendant has therefore established that he is a bona fide purchaser for value of the subject property.

CONCLUSION

36. i. As at the date of the conveyance on **July 6th 2010**, though the lis pendens had been registered, it was not detected in a search by the search clerk retained by the second defendant's agent.

ii. The onus of proof lies on the party alleging an equitable interest to establish that the party claiming legal title had notice of the equitable interest.

iii. If the lis pendens registered had not been transferred or entered into the computer system at the Registrar General's Department, it would not have been detected by a search clerk conducting a computerised search. I accept the evidence of the search clerk that appropriate entries in the search fields were made in searching for any lis pendens filed, and accept the suggested inference that no lis pendens was shown by the computer system because the lis pendens had not been entered into the computerised system, despite being promptly registered on January 26th 2010.

I also accept her unchallenged evidence that the option of a physical search, for example, searching a **book** where lis pendens were recorded, did not exist. The only search available therefore would be the computerised search. The registration procedure for a lis pendens contemplates the existence of a physical book. If, as the unchallenged evidence stands, there is no such book, and /or the lis pendens had not been incorporated into the computerised records of the Registrar General which were made available for searching by the public, then a lis pendens, even though registered, would not be detectable by a purchaser, and **would not have come to his knowledge, even if such enquiries and inspections had been made as ought reasonably to have been made by him.**

iv. Even if the onus lay on the holder of the legal title, the second defendant, he has discharged it on the evidence of the search clerk, which has not been rebutted.

v. There is no issue of actual notice in this case.

vi. Even if a lis pendens has been registered, Section 80 of the **Conveyancing and Law of Property Act (CLPA)**, as construed in **Mildred Richards v Nasena Alladeen (1959)**

1 WIR 194, (the **Alladeen** case), does not impose automatic notice of it, or a strict liability on the legal owner.

vii. Where, as I find,

(a) The lis pendens (though registered at the time of the search by the second defendant, had not been incorporated into the computerised records of the Registrar General), and

(b) The option of a physical search of a book did not exist,

(c) The legal title holder has done all that he could reasonably be expected to do as a prudent purchaser,

in the circumstances of this case he would not be deemed to be fixed with constructive notice under Section 80 of the **Conveyancing and Law of Property Act** merely by reason of the registration of the Lis Pendens, where the filed and registered lis pendens was not detectable on, and, on a balance of probabilities, had not been incorporated into, the computer search system of the Registrar General.

DISPOSITION AND ORDERS

37. 1. The claimant's claim is dismissed.

2. Costs are to be paid by him in the sum of \$14,000.00 on the basis prescribed by the Civil Proceedings Rules.

Dated this day of December, 2012.

.....

Judge