

[2016] CCJ 22 (AJ)

**IN THE CARIBBEAN COURT OF JUSTICE
Appellate Jurisdiction**

ON APPEAL FROM THE COURT OF APPEAL OF GUYANA

CCJ Appeal No. GYCV2016/001
GY Civil Appeal No. 78 of 2011

BETWEEN

RAYMOND JOSEPH

APPELLANT

AND

KAMAL MANGAL

RESPONDENT

**Before The Right Honourable
and the Honourables**

**Sir Dennis Byron, President
Mr Justice Saunders
Mr Justice Wit
Mr Justice Hayton
Mme Justice Rajnauth-Lee**

Appearances

Mr Sanjeev Datadin and Ms Jamela Ali for the Appellant

REASONS FOR THE DECISION

of

**The Right Honourable Sir Dennis Byron, President, and the Honourable Justices
Saunders, Wit, Hayton and Rajnauth-Lee**

Delivered by

**The Right Honourable Sir Dennis Byron
on the 8th day of December, 2016**

Introduction

- [1] Raymond Joseph, (hereinafter “the Appellant”), had agreed to purchase “all the vendor’s rights, title and interest, in and to homestead No. H.S. 55 Yakusari south, Black Bush Polder, with a small house” that Kamal Mangal, (hereinafter “the Respondent”), held on a lease from the State. Subsequently, the Respondent, assisted by officers of the Guyana Lands and Surveys Commission, (hereinafter “the Commission”), a State Agency, obtained a certificate of title for the same land. He issued proceedings to recover possession from the Appellant. Both the trial court and the Court of Appeal found that the Respondent had acted fraudulently and that the officers of the Commission were lax, as held by the trial judge, and deliberately deceitful, as held by the Court of Appeal. However, the courts below held that the Appellant was only entitled to remain in possession for the remaining time on the lease. The Appellant appealed against the order of the Court of Appeal that he surrender possession as the remaining time on the lease had expired. Indeed, he claimed that he and not the Respondent should have title to the relevant land.
- [2] The CCJ agreed with him when it heard and allowed this appeal on 31st October, 2016, undertaking to give formal reasons later. These are our reasons.

Preliminary issue

- [3] The Respondent did not take part in this appeal. The Court satisfied itself that he had an opportunity to be heard. The notice of appeal was served on the counsel who had appeared for him in the courts below. Counsel wrote the Court indicating that he was not retained in this appeal. The notice of appeal was subsequently served on the Respondent, and he acknowledged receipt of service. The Respondent did not file any documents with the Court. The court office served the Respondent with court orders listing the matter for hearing by video conference (giving the Respondent leave to request video conference facilities from a location outside of the Guyana court room) and also with the notice of the hearing. The relevant court officer testified that she obtained confirmation by telephone that the orders and notice of hearing had been received by the Respondent.

Factual background

- [4] The facts found by the trial judge were confirmed by the Court of Appeal. These judicial findings provide the basis for the factual background.
- [5] The Respondent was granted a 25-year lease of homestead site 55 Yakusari South by the Government of Guyana, commencing on 29th June, 1981. Later, he emigrated to the United States. On 23rd April, 1983, he appointed his brother, Inderjit Poonwah, to be his attorney with power to dispose of the property.
- [6] On 16th May, 2003, the Appellant entered into a written agreement with Inderjit Poonwah, in his capacity as attorney for the Respondent, to purchase all of the Respondent's "rights, title and interest, in and to" the homestead site for GY\$600,000.00. In the agreement for sale, there was acknowledgement that GY\$475,000.00 had been paid.
- [7] Both the Appellant and Inderjit Poonwah attended the offices of the Commission and filed all the relevant documents that were required to effect the transfer of the lease to the Appellant. Transfer duty and fees were paid, receipts of which were tendered in evidence. The trial judge found that the sale had been lawfully conducted and that the parties had complied with the required rules to effect transfer of the Respondent's interest to the Appellant. However, the transfer did not take place.
- [8] The Appellant entered into possession of the homestead, cultivated crops, planted trees and developed a dwelling house. During the trial, evidence was tendered that the Appellant had made improvements to the property valued at GY\$3,500,000.00. The Respondent visited Guyana. He confronted the Appellant, who he said was well known to him, and the Appellant showed him the agreement for sale and the receipts for his payment. It may be that the real issue was revealed when the Respondent testified that his brother and attorney had not told him about the sale nor given him any money in respect of the purchase price. Later in 2003, he filed a case against the Appellant for possession of the property. On 6th October, 2006, the case was discontinued and the Respondent was ordered to pay the costs of the Appellant. However, while that case was pending, on 8th February 2005, the

Respondent obtained a certificate of title to the homestead site from the Registrar of Lands, pursuant to section 71 of the Land Registry Act, Cap 5:02.

- [9] The trial judge accepted the evidence of the Land Administration Officer employed at the Commission that it became State policy to issue certificates of title to the last lawful leaseholder of the homestead site and that certificates of title were issued for lands at Black Bush Polder in pursuance of that policy. The trial judge found that it was dishonest and fraudulent for the Respondent to obtain the title when he knew he had sold his interest in the homestead site to the Appellant; and that it was lax of the Commission to effect the issue of title to the Respondent after they had received the relevant documents, duties and fees to effect transfer to the Appellant. The Court of Appeal, accepting the findings of fact, expressed the opinion that the officials at the Commission were deliberately deceitful and dishonest in the role they played in issuing the certificate of title to the Respondent.
- [10] The Respondent commenced these proceedings in the High Court on 8th August, 2005 to recover possession of the land with ancillary claims. The Appellant defended the action on the basis that he had purchased the property and was entitled to possession, but admitted that there was a balance of GY\$125,000.00 due on the purchase price, which he was willing and able to pay. He alleged that the Respondent had obtained the certificate of title to the property by fraud and counterclaimed for specific performance of the purchase and, in the alternative, for a declaration of his entitlement to the property and the cancellation of the Respondent's certificate of title.

Trial court judgment

- [11] The trial court heard the case and delivered judgment on 26th September, 2011. The judge found that the sale was lawful. However, although the intention clearly was that the homestead site was being sold outright, the Respondent's attorney could only have sold what the Respondent had; and that was the remainder of the lease. The court determined that after the Respondent had obtained the certificate of title, the Appellant became a tenant or licensee of the Respondent. The judge found that at the time the action was filed, the

lease had not expired so the claim for trespass was premature, and it would be unconscionable to order the Appellant to vacate the land and, accordingly, dismissed the Respondent's claim. With regard to the Appellant's counterclaim, the judge found that the Respondent had acted dishonestly and fraudulently in acquiring title in full knowledge that the Appellant had bought the remainder of the lease. The trial judge criticised the Commission for the transfer of title to the Respondent after taking the fees to transfer it to the Appellant; and concluded that the fact that the Commission was not a party to the action limited the court's options and dismissed the counterclaim.

Court of Appeal judgment

[12] The Respondent appealed to the Court of Appeal. On 25th April, 2015, judgment was delivered. The court expressed the view that there was no doubt that the Appellant was the victim of deliberate deceit and dishonest dealings by officers of the Commission. However, having accepted the findings of fact and law of the trial judge, it concluded that it would have been more prudent to have awarded possession at the expiration of the period of the lease, and in the circumstances, the relevant time having elapsed, ordered that the Appellant vacate the property. The Appellant obtained a stay of execution and after failing to obtain leave to appeal from the Court of Appeal, applied to this Court for Special Leave to appeal. We ordered that the Application for Special Leave should be treated as the hearing of the appeal.

The interpretation of the agreement for sale

[13] The agreement was to sell "all the vendor's rights, title and interest, in and to homestead No. H.S. 55 Yakusari south, Black Bush Polder, with a small house". Thus the vendor was selling whatever rights he had without stating what they were. Those rights amounted to his leasehold interest coupled with his rights under the lease and his right to apply to have a certificate of title to an absolute interest in the land.

- [14] The ordinary meaning of the words does not allow the creation of a tenancy or licence between the Appellant and the Respondent. The status of the Respondent was that of lessee, with the State being the lessor. The rights that were sold were the rights of a lessee. The lease specified in clause 17 that the transfer of those rights required the permission of the Commissioner and the courts found that the permission was granted. The State did not surrender its rights as lessor to the Respondent, who did not acquire the rights of the State.
- [15] The point is further clarified by an examination of the lease which reveals that the vendor's rights, title and interest were much more than the unexpired term on the lease. As an example, paragraph 18 of the lease provides that on termination or expiration of the lease, the lessee shall be entitled to receive compensation for improvements to the land, including growing crops; fruit trees, and permanent buildings, provided that the Commissioner had agreed in writing to their construction. This is an important right and interest which the Appellant had purchased. On termination or expiration of the lease, he was entitled to compensation for his improvements of crops, trees and buildings.
- [16] Clause 24 of the lease is even more important. It provides for the lessee to renew the lease for further terms of twenty-five years continuously. The State would have been lessor in perpetuity. This clause contained rights, title and interest which were included in the sale. It necessarily implies that the Appellant was sold the right to have the lease renewed.
- [17] The evidence of the Land Administration Officer that the last lawful lessee was entitled to become a registered proprietor confirmed that the grant of a certificate of title was a right of the lessee. The State policy to convert the lease into a certificate of title constituted a major right, title or interest. It was, in effect, an improvement on clause 24 of the lease. It entitled the leaseholder to convert his lease into a registered proprietorship with indefeasible title to the property. This provided many additional benefits to the landholder, including the removal of the obligations contained in the lease and better commercial and developmental options. This was a right attached to the status of a leaseholder and must have been included in the phrase "all rights".

[18] The courts below erred in concluding that the only rights, title and interest the Respondent had at the time the sale was concluded was the remaining term of years on the lease. The rights he had included the right to the value of the improvements on the land conferred by clause 18 of the lease, and the right to continuous renewals of the lease conferred by clause 24, a right which was converted by State policy to a right to become registered as proprietor under the Land Registry Act.

[19] We therefore had to overturn the interpretation of the agreement for sale that was given by the trial court and approved by the Court of Appeal. The phrase “all rights, title and interest” includes the right to receive a certificate of title in accordance with the State policy for lease holders in Black Bush Polder.

The Land Registry Act

[20] Although this was a case where the questions of title to the land were governed by the Land Registry Act, the courts below did not examine the relevant provisions of the Act and apply them to the factual findings that they made. The trial judge fell into error by attempting to emulate the CCJ in the case of *Ross v Sinclair*,¹ a case that was very different. In that case, the Court expressed the hope that an amicable solution could be found to rectify a wrong that had been committed by the Central Housing and Planning Authority (hereinafter “the Authority”). The Authority had been a vendor that had sold the same condominium unit to two purchasers. They proceeded against each other to establish who had the better title and right to possession, making it inevitable that one would fail, yet neither had joined the Authority as a party to the proceedings to enable a compensatory order for breach of the contract of sale or any other appropriate remedy that may have been available against the Authority. Unfortunately, the litigation had taken such a long time through the system that by the time it reached the Court, all periods of limitation had expired and it was too late to file any action against the Authority. The facts in this case are very different. The Commission, a different entity, was not a party to the contractual arrangements in this case. It officially represented the lessor, and it had the authority to give effect to State policies

¹ [2009] CCJ 11 (AJ).

of converting the leasehold interest to the interest of registered proprietor. This warranted the application of the statutory provisions of the Land Registry Act which provides appropriate remedies.

[21] The Land Registry Act provides persons registered as proprietors with an absolute and indefeasible right to title. Section 65(1) provides that the title of every registered proprietor shall be absolute and indefeasible and, accordingly, shall not be impeached or affected in any way by the existence in any other person of any interest, except (a) in the case of fraud; (b) mistaken description of boundaries; or (c) any other case specified in the Act. Section 69(1) reinforces the right to absolute and indefeasible title by making it unnecessary for a person contracting or dealing or taking or proposing to take a transfer in respect of registered land from the obligation to do due diligence searches and inquiries, relating to (a) the circumstances in or under which or the consideration for which the registered proprietor or any previous registered proprietor of the land in question is or was registered; (b) the application of the purchase money or any part thereof; and (c) any notice under the Deeds Registry Act or under any other act, or of any trust, right or interest, unregistered or unprotected by caveat. However, section 69(2) specifically excludes from this protection any person who is privy to or has notice of any fraud relating to the transfer.

[22] Although in this case the Respondent was not in possession, it is useful to recall that the Act also protects the right to possession of the registered proprietor of land. Section 70(1) provides that no action of ejectment or other proceeding for the recovery of such land shall lie or be sustained against the registered proprietor, except in relation to the enforcement of mortgages and similar interests. However, section 70(2) removes that prohibition in favour of “(a) a person deprived of any land by or through the fraud of the registered proprietor... (b) a person deprived of or claiming any land erroneously included in any parcel by misdescription of boundaries: Provided that the claim of such person is not then barred by any law relating to limitation.” The Act clearly intends to protect the title and possession of a person who is registered as proprietor except in cases of fraud or mistake as to the description of boundaries. This is a very important aspect of the statutory

regulation over the ownership of land by ensuring that fraud and mistake do not provide benefits to registered proprietors of land.

[23] In this case, the facts found by the courts below reveal that registration as proprietor was fraudulently obtained by the Respondent when he was not entitled to be so registered. The Act has provisions which allow the court to rectify such a registration. Section 61 provides:

“Rectification of the register may be ordered by the Court in such manner as the Court thinks fit—

(a) where the Court is satisfied that the registration of any person as proprietor of land has been obtained through any error or omission or by reason of any entry procured by fraud or made under a mistake;

(b) in any other case where by reason of any error or omission in the register or by reason of any entry procured by fraud or made under a mistake the Court deems it just to rectify the register:

Provided that as against a proprietor who has acquired the land bona fide for value the Court shall not rectify the register unless such proprietor is privy to the fraud or mistake or has caused or substantially contributed thereto by his act, neglect or default.”

Fraud

[24] The meaning of fraud and its application to the law relating to land in Guyana has been explored in cases before this Court. In order to be classified as fraud, conduct must involve an element of dishonesty. Dishonesty is not to be addressed in a narrow or technical manner and must be looked at in a broad sense. However, dishonesty is not to be assumed merely by knowledge of an unregistered interest in the land. See further: *Ramdass v Jairam*,², *Ramdeo v Herallall*,³ *Ramkishun v Fung-Kee-Fung*;⁴ and *Kwang and Murray v Tsui Yokkei*.⁵ It is also necessary that the fraud must be pleaded with particularity and be a part of the judicial deliberation of the case. This principle was clarified by Bernard JCCJ in *Ramdass*, where although fraud had been pleaded, it had been withdrawn before the trial judge; and by Hayton JCCJ in *Ramdeo*, where the pleading of fraud was vague, and did

² [2008] CCJ 6 (AJ).

³ [2009] CCJ 3 (AJ).

⁴ [2010] CCJ 2 (AJ).

⁵ [2016] CCJ 9 (AJ).

not result in the issue being adequately addressed in the evidence or considerations of the trial court. Further, fraud must be proved with certainty. In *Ramkishun*, while there was proof of dishonest conduct by two of the Respondent heirs (although not with respect to the others), the Appellant had filed the case outside of the one-year statutory period provided for in section 22 of the Deeds Registry Act after discovery of the fraud. In *Kwang and Murray*, the Court was able to find proof of dishonest conduct that allowed it to base its judgment on fraud.

[25] In this case, the conduct of the Respondent was dishonest. That was a clear and certain finding of fact that was well-supported by the evidence. It was particularised in the pleadings, and proven by the evidence. The trial judge found “to my mind, the plaintiff has indeed perpetrated a fraud on the defendant by obtaining title in full knowledge that his interest in the property had been sold” and reiterated “... I am of the view that the plaintiff acted dishonestly and, therefore fraudulently in acquiring title in full knowledge that the defendant had bought the remainder of his lease...”.

[26] These findings demonstrated that the fraud of the Respondent was related to the acquisition of the title itself. The fraud was committed by the Respondent to obtain registration as proprietor of the land, knowing that he had already sold his interest to the Appellant.

Mistake

[27] Neither the trial judge nor the Court of Appeal considered the effect of section 61(a) on their findings. Section 61(a) of the Land Registry Act empowers the court to rectify a registration as proprietor “made under a mistake”. The section is not restrictive and does not impose any procedural requirements. The power of the court arises when it is satisfied that the registration was made under a mistake. Mistake is not defined in the Act and it should carry its ordinary meaning. A mistake of fact, or of mixed fact and law, would be a mistake. In this case, registering the Respondent as proprietor after he has sold all his rights, interest and title as though he remained the substantive lessee was a mistake.

[28] The findings of the courts below reveal that the Appellant, having purchased the rights, interest and title of the Respondent, was to be treated as the lessee. Although the Appellant never became lessee because the contract to transfer his interest had not resulted in a formal lease of State land, given the findings of the courts, it was plainly wrong to allow the Respondent to become registered proprietor of the land. This was a mistake. Although no details were provided of the registration process, the only inference is that it was procured on the basis of documentation emanating from the Commission, mistakenly showing or suggesting that the Respondent was entitled to be registered. The trial judge found that "...the Lands and Surveys Commission having taken the transfer fees from the defendant and his application for the transfer, should not have kept his fees and transferred title into the name of the person who from their records had sold that land..."; and lamented that this government agency was lax in its responsibility and caused undue hardship. The Court of Appeal went further by stating, in the strongest terms, that there was no doubt that the officials of the Commission acted with deliberate deceit and dishonesty. Be that as it may, the effect of their findings is that the entry of the Respondent as registered proprietor was mistaken.

Remedy

[29] The trial judge refused to declare that the Appellant was entitled to be registered as proprietor and to make any ancillary orders, despite the findings on the issue of the fraud of the Respondent, and the findings of the mistake caused by the misconduct of the Commission.

[30] The Commission is not a party in these proceedings. It may be that the Commission may have been liable for breach of its statutory duties if proceedings had been brought against it during the statutory period of limitation. In that sense, there is some similarity with the position of the Court in *Ross v Sinclair*, because the Commission is not being held accountable for the consequences of its misconduct. However, the difference is that in this case, there is a clear finding that the Respondent acted fraudulently, with the facilitation of the Commission. The rectification of the effect of that wrongdoing does not require any

action against the Commission. Moreover, the Commission was not a party to the agreement for sale. The role that the Commission played in the proceedings was that of witness. It had been cited as such and the evidence that its representative adduced contributed to the findings of fact made by the court, and our satisfaction that the land register needs to be rectified. Section 61 empowers the court to order the rectification of the register. The Act specifies that the sole authority to effect such rectification is the Registrar of Lands. There is no requirement for the Commission to be made a party to the proceedings to enable the exercise of the powers conferred by the section.

[31] The learned trial judge erred in failing to apply the facts found to the Land Registry Act. The Court of Appeal did not correct that error and, indeed, by their decision compounded it. In these circumstances, we found that both courts below erred in failing to apply section 61 of the Land Registry Act.

[32] Section 61 empowers the court to rectify the register in such manner as it thinks fit. This case was filed in 2005. We decided that it was in the interest of justice to exercise the powers conferred on the court. The most effective manner to rectify the register is to direct the Registrar of Lands to do so. This requires a declaration that the title currently held by the Respondent is of no effect, and that the Registrar of Lands takes the necessary steps to have the Respondent removed as registered proprietor, and to have the Appellant entered in his place. This would also require the issue of a certificate to the Appellant.

Balance of purchase price

[33] In order to complete the just resolution of the dispute, counsel for the Appellant confirmed that the Appellant stood ready and willing to pay the outstanding balance in the sum of GY\$125,000.00. We did not make any order for the payment of interest since the Appellant had declared himself ready and willing to pay this sum since 2005. We made an order for the payment of costs and ordered that the amount to be paid by the Appellant be set off against the order for costs in this case.

Costs

[34] The non-appearance of the Respondent in these proceedings did not minimise the costs incurred by the Appellant to prosecute this appeal. A reduction of costs could have been achieved by a negotiated arrangement if it was the intention of the Respondent to concede the appeal. We considered that the nature of the case and its history required an order for costs to be made in favour of the Appellant. We ordered the basic costs set out in the Schedule to the Rules of Court for the hearing of an appeal before the CCJ. We also ordered that the sum which the Court of Appeal ordered the Appellant to pay to the Respondent be paid by the Respondent to the Appellant.

Disposal

[35] For these reasons the Court made the following orders:

- (i) The Appeal is allowed and the Orders of the Courts below set aside.
- (ii) The existing Certificate of Title to Land No. 2004/712 in the name of Kamal Mangal for land situate at Zone: 631, Block: 631314, Parcel: 55, portion of South Yakusari, Black Bush Polder, Corentyne, Berbice, Guyana is declared to be of no effect whatsoever on the grounds of fraud and mistake of fact pursuant to section 61, Chapter 5:02, Land Registry Act, Guyana.
- (iii) The Registrar of Lands do, within six weeks from the date hereof, –
 - a. Rectify the Register in relation to the said, Zone: 631, Block: 631314, Parcel: 55, portion of South Yakusari, Black Bush Polder, Corentyne, Berbice by replacing Kamal Mangal, the current title holder with Raymond Joseph as registered proprietor; and
 - b. Issue a new Certificate of Title to Land in respect of the said land situate at Zone: 631, Block: 631314, Parcel: 55, portion of South Yakusari, Black Bush

Polder, Corentyne, Berbice, pursuant to section 71 of Chapter 5:02, Land Registry Act of Guyana.

- (iv) The Appellant do pay the Respondent the sum of one hundred and twenty-five Guyana Dollars (GY\$125,000.00) which sum be set off against the order for the payment of costs by the Respondent to the Appellant.

- (v) The Respondent to pay basic cost in the sum of One Million Seven Hundred and Ninety-Five Thousand and Five Hundred Guyana dollars (GY\$1,795,500.00) to the Appellant in the Caribbean Court of Justice, and in the Court of Appeal the sum of One Hundred and Fifty Thousand Guyana dollars (GY\$150,000.00) awarded to Kamal Mangal is now awarded to Raymond Joseph.

/s/ CMD Byron

The Rt Hon Sir Dennis Byron (President)

/s/ A. Saunders

The Hon Mr Justice A Saunders

/s/ J. Wit

The Hon Mr Justice J Wit

/s/ D. Hayton

The Hon Mr Justice D Hayton

/s/ M. Rajnauth-Lee

The Hon Mme Justice M Rajnauth-Lee