



and others, an order made by the Adjudication Officer Frank C. Henville, Q.C. on 20<sup>th</sup> April, 1978. By that order Parcel 9 Block 3437B of the Long Look Registration Section comprising approximately 13 acres [the disputed land] was ordered to be registered with absolute title in the following shares that is to say:

Caesar Thomas and those claiming through Angela Thomas [the appellant]	26/338
Estate of Richard Stoutt [the respondent]	57/338

Garfield Stoutt	45/338
Essie Stoutt	45/338
Estate Samuel Stoutt	42/338
Ingham Frett	30/338
Anthony Stoutt	24/338
Estate Edmund Stoutt	12/338
Rosamund Malone	15/338
Walter Stoutt	15/338
Victorine Joseph	15/338
Clara Wheatley	6/338
Estate Moses Stephens	6/338.

The matter came on for hearing on 11<sup>th</sup> November, 1992. After the case was opened and testimony was being given on behalf of the appellant the learned trial Judge drew attention to his opinion that there were inadequate particulars for the action to be maintained. He adjourned the matter to allow an application to amend the Statement of Claim. It was on the hearing of this application that he ordered the striking out of the Statement of Claim.

The pleadings indicated that the adjudication process had a long history. On 12<sup>th</sup> October, 1972 an Adjudication Officer had decided the same dispute in favour of the Stoutt family including Richard Stoutt. The Thomas family including Caesar Thomas petitioned for a rehearing of the dispute. There was a partial reversal to the extent that Caesar Thomas [whose mother was a member of the Stoutt family] was awarded one acre of land. The Thomas family appealed to the Court of Appeal and on 18<sup>th</sup> February, 1977 it ordered the rehearing before Mr. Frank Henville, Q.C.

The decision of the Adjudication Officer revealed that the appellant's predecessor Caesar Thomas and other descendants of John Tomar [aka Thomas] claimed the disputed land on the basis that the said John C. Tomar was the grantee of 27 acres conveyed by John C. Fleming in a deed dated 28<sup>th</sup> May, 1911. The respondent and other descendants of the thirteen children of Thomas Stoutt claimed on the basis of a deed of gift dated 5<sup>th</sup> March, 1910 in which John Cunningham conveyed to the thirteen children of his deceased brother Thomas Stoutt by his first and second marriages thirteen acres of land at Paraquita Bay Estate ["the gift land"].

In his reasons for decision the Adjudication Officer stated that there were two issues before him:

1. was the disputed land [ie. Parcel 9] part of the land sold by J.C. Fleming to the appellant's predecessors in title or was it the gift land or part of the gift land?

2. was Samuel Stoutt in peaceful and undisturbed possession of the gift land or did he hold it by leave and license of the appellant?

The first question was unequivocally answered by the declaration that the disputed area was a portion of the gift land, and the second question was answered by finding that "all the Stoutt Family" including Caesar Thomas, Richard Stoutt and Samuel Stoutt used "the gift land" as descendants of the thirteen children in the deed of gift.

The Adjudication Officer partitioned parcel 9 both sides being represented by counsel. It is significant that no findings of fact were expressed on the issue of the entitlement of each claimant and the language of the Adjudication Officer in making his order suggests that this aspect of his determination was not contentious. His order was:

"Mr. Todman for the defendants conceded that if the disputed area were the "gift land" that is to say parcel 9 on Cadastral Survey Sheet 3437B that Caesar Thomas as the son of Angela Thomas [nee Stoutt] would be entitled to his ancestor's share of the disputed land and that the persons entitled to share in his parcel with absolute title as tenants in common would be the following persons who would be entitled to the shares set out opposite their names, that is to say ..... I agree with this and instruct the Registrar of Lands to amend the Land Register accordingly."

### **The Grounds of Appeal**

I will reproduce the grounds of appeal filed by the appellant:

- "1. The learned trial Judge erroneously made a Finding of Law that Fraud was, in effect, an issue before the Adjudicator and, consequently, the Plaintiff/Appellant would be estopped from raising the issue again.
2. The learned trial Judge adjudicated beyond the conclusions of the application to amend the claim, by treating the application as hearing of the Whole Trial without hearing evidence materially relevant to the issues raised on the pleadings even without amendment.

It is respectfully submitted that the learned trial Judge was without the appropriate evidence that the "gift lands" were, in fact, root-titled by Deed of Conveyance by John Cunningham to the thirteen [13] children of deceased brother Thomas Stoutt by his first and second marriages ... thirteen [13] acres of land at Paraquita Bay Estate being a portion of fifty-four [54] acres: And therefore, the principles of *Res Judicata* and issue Estopped referred to by the learned Judge were erroneously misconceived:

There was evidence available to the Plaintiff which "kept alive" the cause of action, which should have been tried and determined, even if the application to amend was refused.

It is therefore still further submitted that the Adjudication Officers decisions, did not ascertain what in fact comprised the thirteen [13] acres of the gift land - after dismemberment from the original fifty-four [54] acres - neither the boundaries of the thirteen [13] acres, Nor the distinct separation of the aforementioned lands from another twenty-seven [27] acres as per Deed No.36 of 1911 dated the 15<sup>th</sup> August, 1911 by John C. Fleming to John C. Tomar and therefore these issues were never finally resolved in relation to the two separate portions of lands.

3. The application for the said amendment was erroneously refused."

These grounds do not do justice to the lengthy, clear and carefully reasoned judgment of the learned trial Judge. Ground 1 is entirely misconceived as the learned trial Judge did not make any finding that fraud was an issue before the adjudicator nor did he rule that the appellant would be estopped from raising the issue again. The *ratio decidendi* was that the allegation of fraud [a] lacked distinct and careful particulars, [b] did not constitute matters that were discovered since the date of the decision and [c] were merely an ingenious device to circumvent the failure to employ the statutory provisions for appeal, which are limited to 90 days by bringing this action some ten years late to relitigate the same issues then determined.

Under ground 2 it is necessary to point out that the learned trial Judge did not rely on any principles of *res judicata* and issue estopped in coming to his decision. He referred, *en passant*, to the pleaded defence and reported the submissions of counsel for the respondent and appellant on that issue without expressing his opinion on them.

The submissions of the respondent as reported were indeed powerful. They amounted to urging that the allegation in the Statement of Claim that it was a fraud to designate the gift land as parcel 9 was intended to have the issue already decided by the Adjudication Officer relitigated. Secondly, although there were no findings of fact as to the entitlement of Richard Stoutt to share in the gift land the order evidenced the conclusions of the Adjudication Officer. The question as to whether he could not share because he was illegitimate could have been raised at the hearing, and therefore this allegation requires litigation of an issue which could have been determined in those earlier proceedings.

However, what was being considered was whether the Statement of Claim raised any issue capable of attracting the attention of the courts. The issue of *res judicata* was not relevant to, and did not form part of the Judge's reasoning. I do not propose to deal with it either.

The issues which this appeal raises can be summarised:

1. Was the issue of fraud properly raised on the pleadings?
2. Was the amendment properly refused?
3. Was there any triable issue on the pleadings?
4. Did the Judge have power to strike out the Statement of Claim?

## **Fraud**

The allegations of fraud in the Statement of Claim were that Augustine Stoutt, Grethel Stoutt and others not named had, at the hearing in 1978, by some means or in some manner not particularised, but nevertheless fraudulent, [I] represented to the Adjudication Officer that Richard Stoutt is entitled to "the gift land" [ii] concealed from the same Adjudication Officer that [a] Richard Stoutt is illegitimate and is not a lawful descendant of one of the 13 children to whom "the gift land" had been donated, and [b] some of those persons to whom the Adjudication Officer granted shares in "the gift land" are descendants of the same person. The appellant described these as "fraudulent actions" which misled the Adjudication Officer, so that his findings thereon were erroneous, and a number of persons were denied what was properly theirs.

The amendments sought to add another fraudulent representation that "the gift land" was the disputed land, when it should have been the land in the 1911 deed.

The appellant's claim had two jurisdictional basis, the common law action to set aside a judgment based on fraud, and the statutory action for rectification of the Land Register on the ground of fraud, under section 140 of the Registered Land Ordinance 1970. The Statement of Claim must have intended that a ruling that the Adjudication Officer's decision was obtained by fraud would invoke the statutory remedy of rectification.

The principles upon which a judgment obtained by fraud may be set aside are referred to in Halsbury's Laws of England 4<sup>th</sup> Ed. Vol.26 para. 560:

*"Setting aside judgment obtained by fraud:* A judgment which has been obtained by fraud either in the court or of one or more of the parties may be impeached by means of an action, which may be brought without leave, and is analogous to the former Chancery suit to set aside a decree obtained by fraud. In such an action it is not sufficient merely to allege fraud without giving any particulars, and the fraud must relate to matters which prima facie would be a reason for setting the judgment aside if they were established by proof, and not to matters which are merely collateral. The court requires a strong case to be established before it will set aside a judgment on this ground, and the action will be stayed or dismissed as vexatious unless the fraud alleged raises a reasonable prospect of success and was discovered since the judgment."

The legal principles which govern the pleadings where fraud is alleged are ancient and well settled, and would apply to both the common law and statutory claims.

I would apply three propositions, which accord with long established rules and practice:

- [i] a court ought to disregard general and vague allegations of fraud;
- [ii] it is necessary to show that the alleged fraud was discovered since the judgment sought to be set aside;
- [iii] the alleged fraud must be shown to relate to matters which *prima facie* would be a reason for setting aside the judgment.

### **Particulars of Fraud Must Be Plead**

The mere averment of fraud in general terms, is not sufficient for any practical purpose in the prosecution of a case. It is necessary that particulars of the fraud are distinctly and carefully pleaded. There must be allegations of definite facts, or specific conduct. A definite character must be given to the charges by stating the facts on which they rest.

The requirement for giving particulars of fraud in the pleadings is mandated in the Rules of the Supreme Court Order 18 rule 12[1][a].

This ancient principle was referred to in **Wallingford v Mutual Society** [1880] 5 App. Cas. p.685 by Lord Selborne, L.C. at p.697:

“With regard to fraud, if there be any principle which is perfectly well settled, it is that general allegations, however strong may be the words in which they are stated, are insufficient even to amount to an averment of fraud of which any Court ought to take notice. And here I find nothing but perfectly general and vague allegations of fraud. No single material fact is condescended upon, in a manner which would enable any Court to understand what it was that was alleged to be fraudulent. These allegations, I think, must be entirely disregarded.”

The allegations of fraud were indeed general and vague. The Statement of Claim did not contain any particulars at all. For example, [a] there was no indication how it was represented that Richard Stoutt was entitled to the land in dispute. Thus, was it simply by making the claim? There was no allegation about what was fraudulent about that save the implication that the claim ought to have failed. [b] There were no particulars about how Richard Stoutt’s illegitimacy was concealed, or what was fraudulent about it? Was the concealment alleged merely

failure to give evidence on the subject? It is difficult to conceive how such concealment could occur when Caesar Thomas the appellant, a relative of Richard Stoutt was a party to the proceedings, and actually gave evidence.

There were no particulars which explained the relevance of his illegitimacy to the order of the Adjudication Officer. The allegations seems to be based on the false assumption that the status of illegitimacy is an absolute bar to benefitting from the order.

There were no particulars of the allegation that it was concealed that some persons were descendants of the same person. The pleadings did not make any attempt to allege the genealogy of the Stoutt family. This allegation as it stands merits the description of being spurious. The fact is that everyone's entitlement was based on being a descendant of the same person, Thomas Stoutt. The shares were factored over 338, a multiple of thirteen. It is clear from the order that some beneficiaries were awarded a fraction of a thirteenth share which without further particulars is capable of rebutting the appellant's allegation. The reasons of the Adjudication Officer did not detail the factual basis on which the apportionment was made. The language in which he expressed his order indicates that it was based on agreement, to which all the parties benefitting from the order including Caesar Thomas, must have been part. It must be significant that these proceedings were not commenced until four years after his death which did not occur until six years after the decision. It supports the learned trial Judge's conclusion that Caesar Thomas accepted the order. There were no allegations in the pleadings of the facts that influenced the apportionment nor that they were false. In my judgment, this allegation of fraud must also be disregarded.

The allegation that it was fraudulent to represent that the "gift land" was parcel 9 was equally unmeritorious as it stood. The pleadings indicated, and the reasons of the Adjudication Officer which were exhibited, also confirmed that one of the issues which had to be decided was whether the "gift land" or the land in deed of 1911 was the disputed parcel 9. In the absence of particulars, the court could not entertain an action by the party who lost that the winning party was fraudulent by making the claim which after a full trial a judicial tribunal accepted.

I conclude therefore that the allegations of fraud lacked distinct and careful particulars. In addition to the failure to particularise how the representations were made or the concealment effected they do not allege definite facts or conduct nor demonstrate any character to the fraud alleged. In

my view, the learned trial Judge was justified in ruling that they should be entirely disregarded for those reasons.

### **Fraud Must Be Based On New Facts**

It is equally well settled that it is necessary to establish that the alleged fraud came to light since the hearing which it is sought to impugn. Such an action would normally be stayed or dismissed as being vexatious, unless it is founded on a discovery of new and material evidence since the judgment.

The requirement that there should be a new discovery was referred to in **Birch v Birch** [1902] L.R. 130 by Vaughn Williams L.J.:

“The question, which in form, has to be decided is whether or not the action ought to be stayed as being frivolous and vexatious, and whether the statement of claim ought to be struck out as disclosing no cause of action. Now, as to the former part of the question ..... one is bound to include as an element to be considered the fact that there has already been a judgment binding the plaintiff ..... And I think that the court ought to treat as frivolous and vexatious any cause of action in support of which the plaintiff does not produce evidence of facts discovered since the former judgment which raise a reasonable probability of the action succeeding.”

In this case, there was no allegation of the discovery of new and material evidence. In fact, I would go so far as to conclude that the fraud alleged (i) Richard Stoutt’s status as an illegitimate child (ii) the genealogy of the Stoutt family and (iii) the location of the gift land did not give rise to any probability of discovery since the judgment.

### **The Alleged Fraud Must Be Material To The Decision**

In the third place, the fraud must relate to some matter which would be a reason for setting aside the judgment. Perjury on a matter which is collateral to the issue would not suffice.

The requirement that there must be a reason other than mere falsehood for setting aside the judgment, was referred to in **Flower v Lloyd** [1879] Ch.D. 327 at pp.333-334:

“Assuming all the alleged falsehood and fraud to have been substantiated, is such a suit as the present sustainable? That question would require very grave consideration indeed before it is answered in the affirmative. Where is litigation to end if a judgment obtained in an action fought out adversely between two litigants *sui juris* and at arm’s length could be set aside by a fresh action on the ground that perjury had been committed in the first action, or that false answers had been given to interrogatories, or a misleading production of documents, or of a machine, or of a process

had been given? There are hundreds of actions tried every year in which the evidence is irreconcilably conflicting, and must be on one side or other wilfully and corruptly perjured..... Perjuries, falsehoods, frauds, when detected, must be punished and punished severely; but, in their desire to prevent parties litigant from obtaining any benefit from such foul means, the Court must not forget the evils which may arise from opening such new sources of litigation, amongst such evils not the least being that it would be certain to multiply indefinitely the mass of those very perjuries, falsehoods, and frauds."

In this case, the pleadings have not shown that the issue of the legitimate status of Richard Stoutt was pertinent to the order of the Adjudication Officer. It has never been the law in the British Virgin Islands that an illegitimate person cannot inherit land.

The only impediment that existed, prior to the passage of the Status of Children Act was that an illegitimate child could not inherit from his father on his intestacy.

Even if Richard Stoutt's claim was based on intestate succession from his father the other members of the family before the court would have been entitled to agree to his inclusion in the benefit. The pleadings do not allege any fact to show that it was improper for Richard Stoutt to be included in the order. There is no allegation in the Statement of Claim that the order was based on an error of fact or of law however induced. The matters complained of were Richard Stoutt's status and the designation of the gift land as parcel 9. It has not been shown that the first was an issue for determination and the second was what the case was all about. In my judgment, therefore, the matters alleged even if accepted do not contain a basis of merit for setting aside the order.

### **The Finality of the Adjudication Order**

In his reasons for decision the learned trial Judge expressed the conclusion that Caesar Thomas accepted the Adjudication Officer's decision given in 1978, and that the High Court had no jurisdiction to alter it in the absence of an appeal in proceedings filed ten years later. Section 23 of the Land Adjudication Ordinance 1971 provides for an appeal to lie against the Adjudication Officer's decision within 90 days. Caesar Thomas did not appeal, although his previous conduct indicated that he knew about the appellate process. He died some six years later, and four years after his death his estate re-opened the matter alleging fraud under the provisions of the Registered Land Ordinance 1970 section 140[1].

The fraud alleged, relates to the issues which the Adjudication Officer had before him. The Statement of Claim in effect invited the court to reverse the Adjudication Officer's finding of fact that the land in dispute was the "gift land" and that Richard Stoutt was a descendant of one of the thirteen children of Thomas Stoutt. The well known case of **Skelton v Skelton** 37 W.I.R. 181 is authority that a High Court Judge sitting in original jurisdiction has no right to alter or amend a final decision of the Adjudication Officer on a question of fact based on his own inquiry in the absence of an appeal following a lapse of nine years, under the guise on an ingenious action for rectification.

### **Refusal of the Amendment**

The conclusion of the learned trial Judge that the amendment did not cure the deficiency of the Statement of Claim was clearly justified. It is well settled that the guiding principle on the question of amendments is that generally speaking, such amendments should be made for the purpose of determining the real question in controversy between the parties to any proceedings or correcting any defect or error in the proceedings. The court's main concern is to decide the rights of the parties and not to punish them for mistakes made in the conduct of the case.

In my view, the conclusion that the proposed amendments did not assist in defining a cause of action which raised a controversy fit for determination by the court justified the disallowance. Since the action was based on fraud, if the pleadings as amended could not ground the action, it would do no more than waste judicial time and litigation expenses to grant the amendment.

### **Was there any other triable issue**

Once fraud was ruled out there was nothing left for determination. Counsel for the appellant argued strenuously that the alternative claim should have been considered. That claim was that subdivisions of parcel 9 on the part of the estate of Richard Stoutt to the exclusion of the other 12 registered proprietors were unlawful, null and void.

The pleadings explained that on 28<sup>th</sup> November, 1979 parcel 9 was subdivided to create parcel 38 being 1.75 acres and parcel 39 being of indeterminate size. The respondents became Registered Proprietors of parcel 38 and the other 12 were Registered Proprietors of parcel 39.

No allegations were made as to what constituted illegality about that transaction. The learned trial Judge acted on the premise that the illegality related to the alleged lack of entitlement of the respondents on the ground of the illegitimacy of Richard Stoutt. This allegation would be unarguable if fraud could not be relied on. The prima facie conclusion is that the subdivision gave effect to the respondents entitlement to 57/338 of parcel 9.

Under the Registered Land Ordinance 1970, subdivisions are made by the Chief Registrar on the application of a proprietor. Any illegality in the subdivision would involve an error of the Chief Registrar. No allegation of any conduct or omission which could amount to an illegality was pleaded.

The other subdivisions were all of parcel 39 and its subdivisions. There was no allegation that the respondent subdivided parcel 38. In my view, the learned trial Judge was justified in concluding that this alternative claim did not raise any triable issue.

### **Judge Can Strike Out On His Own Motion**

It is an ancient principle that the court has an inherent jurisdiction to protect itself from all proceedings which are obviously frivolous or vexatious or an abuse of its process. The Rules of the Supreme Court specifically empower a Judge to strike out any pleading at any stage of the proceedings as is provided by Order 18 rule 19[1]:

“The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that -  
 [a] it discloses no reasonable cause of action or defence, as the case may be; or  
 [b] it is scandalous, frivolous or vexatious; or  
 [c] it may prejudice, embarrass or delay the fair trial of the action;  
 or  
 [d] it is otherwise an abuse of the process of the Court;  
 and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.”

By conferring the power to amend or strike out this rule emphasises that, in a suitable and proper case, the court may exercise its coercive and curative powers at the same time.

The learned trial Judge followed the practice and the spirit of the rule by drawing attention to the failure of the Statement of Claim to disclose a cause of action and entertaining an application to amend it thereby giving the appellant an opportunity to benefit from the court's curative power and save his pleading. The learned trial Judge, however, was clearly justified in concluding that the

proposed amendment could not cure the defect. In those circumstances, he was entitled to use his coercive power to strike out the pleadings.

When the pleading discloses no cause of action or is an abuse of its process the court should strike it out and put a summary end to the litigation. The cases show that this summary procedure should be employed in plain and obvious cases. I agree with the learned trial Judge that this was such a case.

For all these reasons I order that the appeal be dismissed with costs.

**C. M. DENNIS BYRON**  
Chief Justice [Ag.]

I Concur.

**SATROHAN SINGH**  
Justice of Appeal

I Concur.

**ALBERT MATTHEW**  
Justice of Appeal [Ag.]