**ANTIGUA AND BARBUDA**

**IN THE COURT OF APPEAL**

CIVIL APPEAL NO: 7 OF 1995

BETWEEN:

**DONALD HALSTEAD**

Appellant

and

**[1] THE BANK OF NOVA SCOTIA**
**[2] CHARLESWORTH R. HALSTEAD**
**[3] PATRICIA HALSTEAD**
[4] **REGISTRAR & PROVOST MARSHALL**

Respondents

Before: The Hon. Mr. C.M. Dennis Byron Chief Justice [Ag.]
The Hon. Mr. Satrohan Singh Justice of Appeal
The Hon. Albert N.J. Matthew Justice of Appeal [Ag.]

Appearances:
Dr. F. Ramsahoye and Mr. A. James for the Appellant
Mr. J. Simon for Respondent No.1

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1997: November 13;
1998: February 9.
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*Civil Practice and Procedure* – Taking of process against property of appellant for a debt which was already settled – Whether there was fraud and conspiracy to deprive appellant of his property – Appellant at the time not resident in the jurisdiction – Whether there was a proper judicial sale – **Benmax v Austin Motor Co. Ltd.** [1955] 1 AER 325 H.L. referred to – Allegations of fraud – **Derry v Peek** H.L. applied – Use of the constitutionally guaranteed protection from deprivation of property in support of appellant's case – Whether the correct/appropriate remedy in this case ought to be damages in compensation or an order for reconveyance of the property to him – Whether the fact that the bank now had a mortgage on the property or that the property had been sold to a third party precluded the court's ordering a rectification of the land register in favour of the appellant – Land Registered Act section 140 – Quantum of damages – Whether appellant should be awarded punitive and/or aggravated damages; and damages for the contents and replacement costs of three buildings which were on the land – Damages for loss of use of the premises. Appeal dismissed.

# JUDGMENT

## MATTHEW J. A. [AG.]

By suit 117/1975 the Appellant and two Others owed the first Respondent the sum of $17,740.22 and judgment was entered against them on May 19, 1976. The Appellant stated that the debt was paid off by the sale of a parcel of land owned by Antigua Printing Ltd some time in May of 1980. Yet despite payment of the debt, the first Respondent through its solicitor, the late Time Kendall esquire, put process into being whereby his property parcel 444, block number 63 1693F located at the corner of North Street and Wapping Lane, in St. Johns was sold to his brother and sister-in-law, the second and third Respondents who are husband and wife.

It should be stated that the said Time Kendall was a signatory to the deed in respect of the sale of the land belonging to Antigua Printing Ltd.

The Appellant's property is alleged to have been sold in December 1982 consequent upon a Court Order made on November 24, 1982.

The reason why this unfortunate incident took place was because the Appellant was out of Antigua between 1978 when he left for the United States of America and 1986 when he returned home. The second and third Respondents were entered on the register as absolute owners of the property in question on March 13, 1984.

The incumbrances section of the register show two charges dated April 12, 1984 in favour of the Canadian Imperial Bank of Commerce.

The matter is even more complicated for despite these entries last mentioned learned Counsel for the Respondent during the hearing of the proceedings before this Court intimated that the Canadian Imperial Bank of Commerce no longer has interest in the property.

The Appellant instituted an action in the High Court against the Respondents on April 29, 1987 alleging among other things fraud and conspiracy to deprive him of his property. He asked for several heads of relief including an order for possession.

On July 5, 1995, Redhead J. as he then was, ordered compensation to the Appellant for the loss and damage he suffered as a result of the unjustifiable taking of his property at the instance of the first Respondent. The learned Judge itemized damages under three heads which amounted to $565,000.00. The judgment was against the first Respondent and the action against the other three Parties was dismissed. Costs were also ordered to the Appellant.

The Appellant is not satisfied with the judgment and has appealed to this Court on several grounds, the relevant ones summarized being – that the Judge's finding that there was a sale by the Registrar and Provost Marshall was wholly unreasonable and totally unsubstantiated; that the Judge ought to have held that the High Court was cheated and/or defrauded in making the order for sale of the Appellant's property; that the Judge ought to have held that the Constitution of Antigua and Barbuda which supersedes all other laws had in terms of section 3 protected the Appellant from loss or deprivation of his property by judicial process in the events which occurred; the case for punitive and/or aggravated damages was established by the Appellant and the Judge erred in refusing to make an appropriate award; and the damages awarded were inordinately low and the refusal of the Judge to award the loss of the contents of the three buildings on the Appellant's land was wrong.

I shall set out to deal with these matters below.

## THE SALE BY THE REGISTRAR AND PROVOST MARSHALL

In support of this ground of appeal learned Counsel for the Appellant submitted that the Court had no official record of the sale

or of any accounting for the receipt and disposition of the proceeds of the sale. Counsel further submitted that the evidence established that there was a private sale between the lawyer who obtained the order for the sale on behalf of the first Respondent and the second Respondent who concerted with him. In his closing address to the Court at trial stage, learned Counsel for the Appellant stated:

> "I submit that your Lordship should not find that there was an actual sale at the Court House because the evidence at the Court House is too conflicting to enable the Court to make a possible finding that it took place."

When I review the records as to all that took place I tend to agree that the evidence in respect of the sale by public auction at the Court House is conflicting. The learned Judge himself must have had some difficulty in this regard when he remarked-

> "I must confess that sifting through this evidence is like picking one's way through a minefield of confusion."

Nevertheless he specifically set out firstly to determine whether the sale of parcels 150 and 151 which were later consolidated and recorded as parcel 444 was carried out in accordance with the order of the Court. The learned Judge found that the auction sale did in fact take place on December 23, 1982 consequent upon an order made by Bishop J. on November 24, 1982. He found the witness Althea James who testified that she attended the sale, was a reliable, honest and truthful witness and that her testimony supported that of the second Respondent.

The learned Judge after sifting through the evidence, by hearing and seeing the witnesses concluded that there was a proper judicial sale. The case of **BENMAX v AUSTIN MOTOR CO LTD** 1955 1 AER 325 H.L. states that an appellate court, on an appeal from a case tried before a Judge alone, should not lightly differ from a finding of the trial Judge on a question of fact.

The effect of the judicial sale was to transfer the Appellant's property to the second and third Respondents and the land register for the parcel of land so indicated.

An important finding by the learned Judge in that connection was that at the time of the application by the solicitor for the first Respondent, the Appellant had satisfied all his debt obligations to the first Respondent and therefore the application for sale of the Appellant's land ought not to have been made. Before us in these proceedings, learned Counsel for the first Respondent conceded that to be the case.

**THE ISSUES OF FRAUD**

Besides the allegation that the High Court was cheated and defrauded in making the order for the sale of the Appellant's property the Appellant alleged that the Judge ought to have held that there was maximum proof which the law would require that the sale and disposition of the Appellant's property was part of a fraudulent scheme and/or conspiracy to deprive him of his property while he was beyond the seas.

The Appellant in support of his contention that the High Court was cheated and defrauded relied upon the finding of the Judge that the Appellant was not a judgment debtor when the order for sale was applied for and made by the High Court.

According to **DERRY v PEEK 1889 VOL XIV H/L 337,** fraud is proved when it is shown that a false representation has been made knowingly, or without belief in its truth, or recklessly, without caring whether it be true or false.

In his pleadings in the original action the Appellant alleged that the non-disclosure of the fact that a parcel of land at Gambles was sold to pay the judgment debt was a fraud on the High Court and in his final address learned Counsel for the Appellant submitted that the Appellant is entitled to ask the Court to infer that there was

a deception of the Court by the Respondent who alleged that the debt was wholly unsatisfied.

It seems to me there were lots of allegations of fraud made at the trial and learned Counsel for the first Respondent aptly replied that there was not a shred of evidence to support fraud which must be specifically proved.

The learned Judge found that there could be no intention on the part of the solicitor for the first Respondent to deceive the Court and there could be no fraud practiced on the Court. He was of the view that the application for sale in the circumstances was a mistake rather than fraudulent. I am also of that view.

**OWNERSHIP OF LAND CONSTITUTIONALLY ENTRENCHED**

The Appellant contended that the Judge ought to have declared that he still owns his property and that his title was to be reinstated on the land register instead of being awarded damages.

Learned Counsel for the Appellant contended before this Court that his client did not want compensation but wanted the property for his ownership of it was constitutionally entrenched. Counsel submitted that no amount of repetitive sales could cause him to lose his land.

When asked about the charges learned Counsel contended that the charges would go and the Bank would have to press for their money in any other way. Counsel made reference to sections 2, 3, and 9 of the Constitution of Antigua and Barbuda. Section 2 establishes that the Constitution is the supreme law of Antigua and Barbuda and section 3 declares the various fundamental rights and freedoms of the individual in a general way leaving the specific rights such as the one relevant here, protection from deprivation of property, to be spelt out in more detail. It is not insignificant that in respect of property what section 3 protects is "deprivation of property without fair compensation."

Section 9 then deals with protection from deprivation of property in some detail.

Learned Counsel for the first Respondent submitted that there is no automatic right that property lost under section 9[1] of the Constitution is to be restored and this is consistent with the provisions of section 140 of the Land Registered Act which provides for rectification of the land register by the Court. I shall deal with section 140 later on but in view of my observations about section 3 of the Constitution I tend to agree with that submission.

It seems to me that if the sale was not activated or effected in error the Appellant might not have been able to complain about the infringement of his rights under section 9[1] because of the provisions of section 9[4] [IV] of the Constitution and learned Counsel for the Appellant no doubt acknowledges that for one of his submissions before us is that " an illegal judgment cannot fall under section 9[4] [IV]." In that eventuality the Appellant might not have had any remedy.

The error had the effect of selling his property and transferring his title under the Land Registered Act, but because of his constitutional right to his property the Court will do all it can to recognize his right in the same way as if a tortfeasor had unlawfully destroyed his property.

Learned Counsel for the Appellant in his closing address at the trial submitted that it ought to be recognized that since the Constitution came into force the Court has a jurisdiction of a higher notion than that given by Section 141 of the Land Registered Act whereby it can make an appropriate order to secure property rights. I do not disagree with the notion of the supremacy of the Constitution or even with the last submission.

It does not follow that the Court must of necessity in the circumstances make an order declaring that the Appellant still owns the property and that his title should be reinstalled on the land register.

This leads naturally into consideration of the issue of rectification of the register.

## RECTIFICATION OF LAND REGISTER

The learned Judge found that the Appellant was entitled to relief and he took consideration of the fact that learned Counsel for the Appellant argued strenuously that the Appellant is entitled to have the property reconveyed to him. The Judge considered that the new registered owners had charged the property to the Canadian Imperial Bank of Commerce and that while the action was being heard the Bank had sold the property to another person. Learned Counsel for the first Respondent submitted to this Court that it was because Canadian Imperial Bank of Commerce had a mortgage on the property that the Judge did not order rectification. The Judge obviously considered the provisions of the section which gives the Court the power to rectify the register where it is satisfied that the registration has been obtained by fraud or mistake. The section is as follows:

> "**Rectification by Court**
> 140. [1] Subject to the provisions of subsection [2] the Court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration including a first registration has been obtained, made or omitted by fraud or mistake.
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> [2] The register shall not be rectified so as to affect the title of a proprietor who is in possession or is in receipt of the rents or profits and acquired the land, lease or charge for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default."

The learned Judge held that the act of the solicitor in making application for sale of the Appellant's property on the ground that

his debt to the first Respondent was wholly unsatisfied was a mistake and negligent rather that fraudulent. It followed that the Judge had the power to rectify the register and reinstall the Appellant as registered owner but to do so he would need to consider the incumbrances on the register in favour of Canadian Imperial Bank of Commerce It is said that another person now has interest in the property and a Court would wish to ensure that an act of rectification would not leave in its wake a number of related suits.

I think the Judge was correct in the circumstances to award the Appellant damages and to refuse to declare that he still owned the property.

**QUANTUM OF DAMAGES**

The Appellant made several complaints under this ground. Firstly he stated that the principle of calculating the damages was wrong in any event. Then he stated that the Judge erred in refusing to make an appropriate award for punitive and/or aggravated damages. He further stated that the damages awarded were inordinately low and the refusal of the Judge to award damages for loss of the contents of the three buildings on his land was wrong.

I shall first of all deal with the refusal of the learned Judge to make an award for the contents of the three buildings which belonged to the Appellant. Learned Counsel for the Appellant submitted to us that the Judge should not have found Charlesworth Halstead credible, meaning no doubt that he should not have accepted the evidence of Charlesworth that when he took over the buildings they were vandalized and all he found was an old refrigerator in one of the buildings. But that was not the only reason why the learned Judge came to his finding. In his pleadings the Appellant alleged that the value of goods left in the buildings was about $150,000.00. When he gave evidence in chief he put the value at $100,000.00 but that if they had to be replaced it would cost him $600,000.00. It does not appear the Appellant gave a

good account of himself under cross-examination and the Judge referred to that in his judgment. Under cross-examination the Appellant stated that he left Antigua in 1978 leaving the three buildings with his personal effects. He said he left no one in the buildings and he left no one in charge of the buildings. He stated that when he left he had no idea for how long he would have been away but he knew he was not coming back too soon for he was then running for his life. He said before his departure he did not obtain an estimate of the goods he had in the house and he did not arm himself with an inventory of the things he had in the buildings. And since his return in 1986 he had not made a list of what he had left in the buildings.

Learned Counsel for the Respondent before this Court submitted that when the Appellant gave evidence at the trial he could not remember in detail what he had. The learned Judge in as courteous a manner as he could said he did not believe the Appellant had such goods in the house and he went on to give reasons for his disbelief.

This again is a pure question of fact. The learned Judge had the advantage of hearing and seeing the witnesses and therefore I would not interfere with that finding.

The learned Judge made three separate monetary awards. He awarded the Appellant $165,000.00 for the value of the land. Two experts gave evidence in that respect. Wilkin Griffith, a civil engineer for 40 years would have valued the land at $40.00 to $45.00 a square foot. Haynes Smith on the other hand, a property valuer for the Government for the past 20 years, valued the land at $20.00 per square foot. The learned Judge considered their evidence and placed a value of $165,000.00 on the land at the rate of $30.00 a square foot. Although the appeal as regards the quantum is general, I did not perceive that the Appellant was patently challenging this head of damage as in the case of the other

two awards. In any case, here again I would not interfere with the award of the learned Judge.

I now turn to the replacement cost of the buildings. The Judge awarded the Appellant $250,000.00. The Appellant urges that this award was not explained and was arbitrary as well as unreasonable and inordinately low. In his statement of claim and the particulars of special damages the amount for replacement cost of the buildings is put at $500,000.00. However when he gives evidence the Appellant states that if the three buildings had to be replaced they would cost $1,000,000.00.

As the learned Judge found there were three buildings on the Appellant's land. One was a galvanized warehouse; another was a wooden dwelling house; and the third was a two floor building, the ground floor of which was concrete and the upper floor was wood.

The Appellant's brother, Constantine Halstead, gave evidence to the effect that he had constructed a two storey warehouse built of galvanize and red cedar. The Appellant gave evidence that the dwelling house constructed of wood was 40 feet x 10 feet.

The Judge found there was no measurement given for the two-storey building.

Wilkin Griffith said in evidence that as an engineer if he was to build an ordinary concrete structure in St. John's it would cost between $250.00 and $270.00 per square foot on a two-storey; between $150.00 and $170.00 a square foot on a one -storey; and it would cost slightly cheaper in the case of a wooden building.

It seems to me that if one was going to arrive at a more approximate replacement value for the three buildings then there should be evidence in respect of each giving appropriate details and specifications.

The Appellant has simply given two global figures of $500,000.00 and $1,000,000.00 at separate times.

In dealing with this head the learned Judge took the view that no evidence or very little evidence was led for him to make a meaningful calculation of the cost of replacement of the buildings. On the evidence before him he did as best as he could and I would not fault him.

The last financial award by the learned Judge was for loss of use of the premises and for this he awarded the Appellant $150,000.00. The attack on this award is that it was arbitrary, unreasonable and inordinately low in view of the Appellant's claim of $12,000.00 per month.

In his pleadings the Appellant alleges that he returned to Antigua on October 6, 1986 and as a result of the loss of his home he is expending the sum of $300.00 per month for accommodation from that time. Then in his closing address at the trial learned Counsel for the Appellant seems to have indicated the basis for the claim when he said:

> "He is entitled to loss of use of his buildings for seven years to date of trial."

When the Appellant gave evidence at the trial he estimated that the warehouse and the two buildings would bring him an annual rent of $100,000.00.

Learned Counsel for the first Respondent submitted that there was little evidence in this respect and referred us to a report of Mr. Smith on this aspect of the case. The learned Judge dealt with the matter very briefly as follows:

> "The Plaintiff claims $700,000.00 for loss of use of his property. I award $150,000.00 for loss of use."

If as Counsel for the Appellant submits, the award is arbitrary it may well be that the reason is as Mr. Simon says. There was little evidence on this. Although Mr. Simon said he appealed against the award it can hardly be said that he did prosecute the appeal.

The report to which we were directed is one dated September 30, 1994 just before the trial began. There Mr. Haynes Smith valued the parcel of land and the building at approximately $181,000.00 and $150,000.00 in a forced sale situation.

The Appellant is claiming for loss of use for a period 1986 onward. Between 1978 and 1986 he left the buildings unattended. It is common knowledge and all house owners know that the quickest way to encounter deterioration of your premises is to close it and go away. And if it is not closed the elements will do their share of destruction. The Judge believed Charlesworth Halstead that when he took over the buildings were vandalized. It seems in the circumstances the Appellant might not have had anything to rent or to use when he came back in 1986.

In all the circumstances I think the award of $150,000.00 for loss of use was a generous offer and the Appellant has no grounds for complaint.

So I do not consider that the damages awarded by the learned Judge were inordinately low so that I should interfere with his assessment. Neither was I shown where the Judge acted upon some wrong principle of law.

The cause of the unfortunate incident was found to be a negligent mistake by the solicitor for the first Respondent and in such circumstances no award for punitive and/or aggravated damages arises.

I would therefore dismiss the appeal with costs to the first Respondent to be taxed if not agreed.

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

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

**I Concur.** **SATROHAN SINGH**
Justice of Appeal