

SAINT LUCIA

IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE

Claim No. SLUHCV 1002/2004
0041/2005

BETWEEN

REBECCA RACHEL ATKINSON also called
REBECCA RACHAEL ATKINSON (nee Fatal)
acting herein and represented by her Attorney
Noelita Grant

Claimants

AND

1. GERTRUDE MATHURIN Qua Administratrix
of the Estate of the late Vitalienne Wilson
also called Vitalienne Mathurin
2. NATHANIEL THOMAS Attorney by Power
of Attorney for Gertrude Mathurin

Defendants

Appearances:

Mr. Andie George for Claimant
Mrs. Lydia Faisal for Defendants

.....
2005: October 10
November 1, 15, 23
2006: October 13
.....

JUDGMENT

- [1] By Deed of Donation dated 1st April 1981 and registered at the office of Deeds and Mortgages as Instrument No. 132073 in volume 121, Vitalienne Wilson also called Vitalienne Mathurin (hereafter referred to as the Deceased) donated to Rebecca Rachel Atkinson also called Rebecca Rachael Atkinson (hereinafter referred to as the Claimant) a one half share in her property which consisted of three (3) contiguous portions of land at Bois d' Orange in the quarter of Gros Islet and measuring respectively 6000 square feet, 3500 square feet and 2208.6 square feet together with the dwelling house then under construction.
- [2] By Hypothecary Obligation dated 11th April 1983 and recorded on 12 April 1983 at Volume 136a and numbered 139585, the Deceased and the Claimant secured a loan with Barclays Finance Corporation of the Leeward and Windward Islands Ltd (Barfincor) for the sum of \$40,000.00.
- [3] During the Land Registration and Titling Project pursuant to section 6(1) of the Land Adjudication Act, 1984, all persons with interest in land were required to submit their claims.
- [4] At the time both the Deceased and the Claimant were resident in the United States of America and neither filed a claim.
- [5] However, on 5th November 1984, Barfincor on the basis of its registered Hypothecary Obligation, submitted a claim numbered 1A 001 in respect of the property. This claim listed the Deceased and the Claimant as owners of the property and the name of Lorenzo Williams was entered as the person representing the owners.
- [6] On 14th January 1985, a second claim form numbered 1A950 was completed giving Mrs. Carmen Grant as the person representing the owner who in this instance was entered as the Deceased. It was apparent that another name had been written in the Claim Form but that name had been erased. The Court was not able to decipher whose name had been entered nor to conclude that it had been the Claimant's name which had been erased.

- [7] The Adjudication Record for the property was completed on 7th May, 1985 in the sole name of the Deceased. While the Adjudication Record indicates that no documents had been produced to the Recording Officer, there was however reference to the abovementioned Hypothecary Obligation which had been executed in favour of Barfincor.
- [8] The land was subsequently registered on 28th October 1986 in the Land Register as Parcel 1054 B 144 and listed the Deceased as the Proprietor. That title remained unchallenged until November 2003 when it was re-registered in the name of the first Defendant as administratrix of the estate of the Deceased who had died on 1st June, 1997.
- [9] The Land Register was again changed on 15th December 2003 in respect of this property when the first Defendant sold it to the second Defendant whose name was then entered as the proprietor.
- [10] On 27th December 2003, the second Defendant through his Attorney at Law gave notice to quit to the niece of the Claimant who had been residing at the property. On receipt of this notice, the niece contacted the Claimant who immediately placed a caution on the property. The niece continued to live in the premises.
- [11] On 7th December the second Defendant had the water supply to the premises disconnected as a result of which, a Petition numbered SLUHCV 2004/1002 was filed on 23rd December 2004 on behalf of the Claimant by her said niece to whom the Claimant had given a power of attorney.
- [12] An interim injunction was granted by the Court on 24th December 2004 in which an order was made for, among other things, the immediate reconnection of the water supply to the premises and for the status quo in relation to the occupation and use of the premises to be maintained. The injunction was to continue until 19th January 2005 at which time there would be further consideration of the matter.

[13] A subsequent claim SLUHCV 2005/0041 was filed on 18th January 2005 against the two (2) Defendants in which the Claimant claimed inter alia:

1. Burial expenses in the sum of \$17,683.08
2. A Declaration that the Claimant is entitled to a half share in and to the said parcel of land known as Block 1054 B Parcel 144 and the dwelling house erected thereon or the value of the half share.
3. An order that the Letters of Administration be improbated and the Claimant Rebecca Rachel Atkinson also called Rebecca Rachael Atkinson (nee Fatal) be appointed as Administratrix of the estate of Vitalienne Wilson also called Vitalienne Mathurin, deceased.
4. An order mandating the Defendants to cancel without delay Deed of Sale dated 14th November 2003 and registered at the Land Registry on 21st November 2003 as Instrument No. 3574/2003.
5. An Order directing the Registrar of Lands to rectify the register to reflect the Claimant's interests or an Order that the Defendants pay to the Claimant the value of her interest in and to the parcel of land registered in the Land Registry as Block 1054 B parcel 144 and the house erected thereon.

[14] On the returnable date of the interim injunction, 19th January 2005, the Court ordered a continuation of the injunction and that the other claim which involved the same parties be set for 9th February 2005 and for the first Defendant to be served personally with notice of hearing for said 9th February, 2005.

[15] When the two matters came on for hearing on 9th February 2005, the court ordered a consolidation of the matters and the Defendants to file their defence.

[16] On 10th October 2005, before the start of the trial, an application was made by the Claimant for the amendment of the Claimant's Statement of Claim to allow the Claimant to include the particularized issues of mistake and/or fraud and of overriding interest and to plead the existence of a trust.

EVIDENCE

[17] The evidence led was by witness statements on which the witnesses were cross examined: the Claimant and her niece for the Claimant and a Mr. Haynes and the second Defendant on behalf of both Defendants, the second Defendant acting through a Power of Attorney for first Defendant.

The Claimant

[18] The Claimant gave evidence that though she never actually lived in the house, her grand niece occupied the top floor rent free for approximately eight (8) years.

[19] According to her it was her aunt who "brought her up", that the Deceased was "like her mother". She lived with the Deceased from the age of three (3) and at the age of 20, the Deceased took her to live with her in London, England. They lived there for a number of years before the Claimant moved to the United States of America in 1960, and she later sent for the Deceased to live with her. This was late 1970's/early 1980's. They lived together in the United States and the Claimant got the Deceased a job.

[20] It was during her stay in the United States that the Deceased decided to purchase the land in question and to build the house. The Deceased made the purchase of land from her earnings and took out a loan to build the house. This loan was paid entirely by the Deceased but it was not enough to complete the house.

[21] The Claimant and the Deceased then secured a loan from Barfincor which the Claimant agreed to pay because according to her, the Deceased had agreed to give her a half share in the property. This the Claimant states the Deceased did in 1981.

- [22] She was unaware that she had to make a claim for ownership of the property but she never gave up her interest nor agreed to sell that interest.
- [23] Under cross examination, the Claimant admitted receiving money from the Deceased. This she said was to pay the Deceased's bills.
- [24] She admitted applying for Letters of Administration to the estate of the Deceased but never got them. She denied that the lawyer had told her that she could not get the Letters because she was not a close enough relative. She stated that she never tried any further to get the Letters because she was in London.
- [25] The Claimant stated that she was not present when the Deed of Donation was executed. She did not know if the Deceased was present. She stated that she did not know anything about the Deed of Donation until after her aunt's death. It was only after her death that it came to her attention. She stated that it was because she was not aware of the Deed of Donation that she did not know that she had to make a claim of ownership.
- [26] She became aware of the Deed after her aunt was buried. She had no idea why the Deceased did not tell her about the Deed. If she had known about the Deed she could have done what she had to do to put the title right.
- [27] The Claimant reiterated that she was unaware that she had to make a claim and that failure to do so would cause her to lose the property.
- [28] She became aware of all the documents relating to the property after the death of the Deceased. She stated that she didn't think the Deceased did anything to prevent her from getting the land, that she didn't think that the Deceased would cause anybody to do anything to prevent her from getting the land. She could give no reason why her name was not on the "land paper".

[29] She admitted to only becoming involved in the “land issue” after the death of the Deceased because when the Deceased was alive, she had no reason to. She trusted the Deceased – she was “like my mother”.

The Niece

[30] Her witness statement disclosed that she had been living in the disputed property for over eight (8) years, occupying the top floor and paying the utility bills.

[31] It was on the receipt of the Notice to Quit on 23rd December 2003, that she first became aware of the first Defendant’s claim to what she termed her “grand aunt’s share of the property”. She immediately contacted her aunt, the Claimant, in the United States of America. She was then given a Power of Attorney to act on behalf of the Claimant.

[32] Evidence adduced at the trial was that after telling her aunt about the Notice to Quit, she called a friend at the Registry who gave her a copy of the Deed of Donation.

[33] She made reference to a Mr. Haynes who had been a tenant at the house, that he paid rent to the Deceased and at her death to the Claimant through Carmen Grant who is the Claimant’s niece.

[34] Under cross examination, she stated that she came to know of her aunt’s interest through the search that had been made in the Registry by her friend. This was December 2003.

[35] She was of the opinion that the Claimant had authority to give her permission to live in the house.

Mr. Haynes

- [36] This witness in his statement gave evidence of his tenancy at the property before and after the death of the Deceased. Following the death of the Deceased, he paid the rent to Carmen Grant up until 2003.
- [37] He stated that the niece of the Claimant had only lived at the house four and a half years before the trial, that during the lifetime of the Deceased, the niece had lived with the Deceased for some time but the two of them "did not get along" and the Deceased asked her to leave. He had been living in the house continually for eleven (11) years.
- [38] About three (3) years following the death of the deceased, the section of the house occupied by the niece had been rented to someone else and after that tenant left, the niece visited frequently eventually moving in with her parents who were occupying the house while they were renovating theirs. When they left, the niece continued to live there.
- [39] Under cross examination, the witness statement before her death, he paid rent to the Deceased and after her passing to Carmen Grant because she "legitimately presented herself as the person to collect the rent". He stopped paying the rent to Carmen Grant when he received notification from the Attorney at Law. Then he started paying it to the second Defendant. He couldn't remember when he started paying the second Defendant but felt it could have been about May, 2004.
- [40] When reexamined, he recounted that on one occasion when some of his property got damaged in the house, Carmen Grant had told him that she would have to refer it to her aunt in the United States, meaning the Claimant.

Second Defendant

- [41] This witness was the only one about whose veracity I had any doubt. It was quite clear to me that he know very little about the property, the Deceased or any arrangements or circumstances surrounding the property. He was extremely hesitant when being cross examined.

- [42] It was only when he was preparing to purchase it that he had come to visit.
- [43] He purported to know that it was the Deceased who repaid the loan, that it was the Deceased who paid the insurances on the house, that prior to her death that it was the Deceased who paid the bills. He states that his knowledge of such things came from the Deceased who used to visit with his mother when she came from overseas and would discuss such things with her.
- [44] He prevaricated on a number of occasions causing me to question his credibility.
- [45] He claimed to be illiterate and to going to the lawyer to have him prepare the documents for the application for Letters of Administration on behalf of the first Defendant. At that time he did not know of the Claimant's interest in the estate.
- [46] He stated that the first Defendant called him and told him she was going to sell the property to him. He said he was encouraged by the lawyer to purchase the property because it was a "family affair".
- [47] He indicated that it was the lawyer who informed him that there was a loan on the property but that it was already paid and he would have to prepare a "paper" to clear the land. He paid the lawyer to prepare the "paper".
- [48] He was never told by the lawyer that the Claimant had any share in the land.

Issues to be determined

- [49] It has to be decided:
- 1) whether the Claimant is entitled to a one half share of the property known as parcel 1054 B144.
 - 2) Whether the court has jurisdiction to order rectification of the Land Register

Submissions

[50] The submission made by Counsel were set out under various heads.

Mistake

[51] It is contended by Counsel for the Claimant that the Adjudication Officer erroneously entered the Deceased as the sole owner of the property by not complying with the requirements of Section 14 of the Land Adjudication Act in that he failed to consider all the circumstances viz the claim by Barfincor on behalf of the Deceased and the Claimant, the registration of the Deed of Donation, the contents of the hypothecary obligation and the claim by Carmen Grant which claims Counsel submits is a fraud.

[52] Counsel submitted that the Adjudication Record cannot be said to have been completed since in accordance with sections 18 and 19 of the Land Adjudication Act there is no evidence that the Adjudication Officer signed or dated the Record or gave notice of the completion of the record in relation to the property or of the places where the record could have been inspected.

[53] Counsel is of the view that, as a consequence of the non-compliance with the Act, any person affected by the adjudication record could not lose their right to appeal within the 90 day period as stipulated by section 20.

[54] Counsel for the Defendants on the other hand argued that since no documents were provided to the Adjudication Officer during the adjudication process, then no documentary evidence of any title of the Claimant's rights was provided or available for registration. It was the duty of the Claimant alone to secure such registration.

[55] Counsel cited a number of cases which according to her determined that section 98 of the Land Registration Act is not meant to deal with challenges to findings of fact by the

Adjudicating Officer and therefore cannot be entertained by the High Court which has no jurisdiction to order rectification. Thus the Claimant having lost her opportunity to appeal, she cannot now resort to rectification of the register on the basis of mistake.

Civil Appeal No. 11 of 1993 – Heirs of Hamilton La Force v Attorney of Castries et al.

Skelton v Skelton (1986) 37 WIR

Webster v Flemming (Anguilla Civil Appeal) No. 6 of 1993

Fraud

- [56] Counsel for the Claimant suggested that on close inspection of the second Claim Form No. 1A950 dated 14th January 1985, the name of the Claimant had been inked out with “wite out” and no initials having been placed next to the “inking out” raised a red flag and the issues of fraud.
- [57] Counsel argued that the first registration of the property in the sole name of the Deceased whether by the Deceased herself or her agent despite the fact that the Deceased had donated a half share to the Claimant was done with the intention of depriving the Claimant of her half share amounted to fraud.
- [58] Counsel for the Claimant argued that the first registration have been obtained, made or omitted by fraud could be rectified by the Court as provided for in section 98 of the Land Registration Act.
- [59] Counsel for the Defendants also applied section 98 of the Land Registration Act to the issue of fraud raised by Counsel for the Claimant and suggested that the testimony of the Claimant to the effect that “she (the Deceased) would never do anything to prevent me from getting the land “and” I trusted her, she was like a mother to me” is diametrically opposed to the allegation of fraud imputed to the Deceased in the Amended Statement of Claim and that she (the Claimant) clearly divorced herself in her oral testimony from those allegations.

[60] Counsel in citing Justice Indra Hariprashad – Charles in Claim No 286 of 1997: Arthur Verneuil v Eleuthere Severin invited the court to dismiss the allegation of fraud as being vague and general and in so doing to take into account the Claimant's confession of trust in the Deceased which would show that no fraud ever took place or had been proved.

Overriding Interest

[61] Counsel for the Claimant argued that the first registration having been obtained, made or omitted by fraud could be rectified by the Court as provided for in section 98 of the Land Registration Act.

[62] Counsel further submitted that the Deceased who became registered as absolute owner at first registration in 1986 became absolute owner subject to the overriding interest of the Claimant and that the second Defendant who became registered as owner of the property also was subject to the overriding interest of the Claimant.

[63] Counsel quoted sections 23 of the Land Registration Act and section 28 of the Land Adjudication Act to support this submission.

[64] Counsel argued that although the Claimant did not live in St. Lucia when the second Defendant purchased the land, the Claimant was a joint owner and her niece was in actual occupation at the invitation of the Claimant and had been living there rent free for some five to six years.

[65] Counsel made reference to the repayment of the loan by the Claimant and to the Radiation which was prepared by a lawyer who ought therefore to have known of the existence of the Claimant's interest in the property. The preparation of the Radiation would have necessitated a search and in any event, the document which was eventually prepared

contained a reference to both the hypothecary obligation and the Deed of Donation, both of which bore the names of the Claimant and the Deceased.

[66] It was Counsel's opinion that the second Defendant on purchasing the property ought to have known of the Claimant's interest, is deemed to have had notice of it and so could not be a bona fide purchaser for value without notice.

[67] He said that in his evidence the second Defendant stated that he went to the house and saw the niece there, that he knew that she lived there and he made no inquiry as to her presence in the house.

[68] It is the Claimant's case that by reason of the Deed of Donation, by reason of her repayment of the loan, by reason of the payment of utility bills and more particularly by reason of her niece's actual occupation of the property at the Claimant's request, she had an equitable interest in the property.

[69] The equitable interest of the Claimant whose title was not registered in the Land Registry is an overriding interest within the meaning of section 28(g) of the Land Registration Act since she was in actual occupation of the property.

[70] Counsel cited the cases of:

Abbey National v Carr (1990) 1 AER 1085 at 1101 c-d

Spiritor of St. Lucia Ltd v Attorney General of St. Lucia and another (1997) 55 WIR

[71] According to Counsel for the Defendants the niece of the Claimant came to live in the house after the death of the Deceased who at that time had sole proprietary interest and so she could not have been the Claimant's agent for the purpose of actual occupation; her occupation could only be considered to be that of either a tenant at sufferance or a trespasser. In addition up to the date when the niece received the Notice to Quit, the

Claimant knew nothing of the Deed of Donation. By this time the second Defendant had already acquired his legal title and the Claimant's belated knowledge of the Deed of Donation could not serve to reverse the nature of the niece's occupation.

- [72] As in the case of overriding interest the issue of trust arises only if the Claimant did in fact have a proprietary interest in the property that was not reflected on the Land Register. Counsel argues that the Claimant had no such proprietary interest.

Rectification

- [73] Counsel for the Claimant submits that in the issue of rectification, it is necessary to distinguish between the function of the Adjudication Officer and that of the Recording Officer.
- [74] The Adjudication Officer by section 4 of the Land Adjudication Act was empowered to appoint Recording Officers whose duties are to investigate all claims to any interest in land and to prepare records in accordance with section 18 of the Act. The legislation does not confer any power on the Recording Officer to "complete" the adjudication record or adjudicate where there were two or more Claimants to any interest in hand. These powers are reserved specifically to the Adjudication Officer.
- [75] Counsel in quoting section 15 of the Act noted that it mandated that no reference had been made to the Adjudication Officer and so the adjudication by the Recording Officer was ultra vires the section of the Act.
- [76] The Court is empowered under section 98 of the Land Registration Act to ensure that the first registration is based on the final decision of the Adjudication Officer and not on ultra vires adjudication records issued by the Recording Officer or an adjudication record which does not comply with sections 18(2) and 19 of the Land Adjudication Act.

[77] The Court therefore had the power to hold the deed of sale between the first and second Defendant null and void and order rectification of the Land Register.

[78] To support this conclusion Counsel referred to the cases of:

James Ronald Webster, Cleopatra Webster v Beryl St. Clair Fleming (as personal representative of the Estate of Samuel Henry Hodge, deceased)

Civil Appeal No. 6 of 1993 Anguilla,

Raymond Jn Baptiste vs Francis Maureen Esther Miller, Civil Appeal No. 6 of 1993 Saint Lucia

[79] Counsel for the Defendants also referred to section 98 of the Land Registration Act with respect to the question of rectification but submitted that the process of rectification cannot replace the obligation to utilize the appeals procedure provided by section 24 of the Land Adjudication Act.

[80] Counsel contended that since according to the Claimant, she only became aware of the Deed of Donation and related documents after the death of the Deceased and did not in compliance with section 8 (i) of the Land Registration Act make a claim with respect to her alleged rights, she lost her opportunity to appeal against the decision of the Adjudicating Officer and as a consequence such opportunity lapsed at the end of the two month period as stipulated by the Act.

Burial Expenses

[81] On the issue of burial expenses Counsel for the Claimant suggested that on production of the receipts, the Claimant is entitled to repayment of this cost from the estate of the Deceased.

[82] With respect to the burial expenses, Counsel for the Defendants submits that any claim in debt is prescribed within six years and it would be too late for such a claim to be enforced.

Limitation

[83] Counsel for the Defendants also considered the issue of limitation under Article 2112 of the Civil Code. Limitation in recovery of land under the Code is 10 years and so even if the Claimant had acquired a one half interest in the property, any such acquisition has effectively been overridden by the Deceased between the date of the first registration in October 1986 and the death of the Deceased in June 1997. The land continued to be registered in the name of the Deceased until November 2003 when Letters of Administration were granted to the first Defendant.

Non Acceptance of Gift

[84] Counsel for the Defendants further contended that the Claimant having failed or neglected to enforce any interest that she may have had to and in the property meant that, in accordance with Articles 696, 717 and 732 of the Code, she never accepted the donation given to her and consequently her never having registered the Deed of Donation as is required by the Land Registration Act meant that she never became a proprietor to any share in the property and the Deceased remained the sole proprietor until her death.

[85] Counsel referred the Court to the Privy Council Appeal No. 38 of 1998 from St. Lucia: Kenneth Poliniere et al v Lucy Felicien in which a Deed of Donation was challenged; the Donor sought to have it revoked.

Indefeasibility of Title

[86] Counsel for the Defendants argued that the second Defendant's title to the land is indefeasible in accordance with section 23 of the Land Registration Act and also by section 38 (1) of the Act, the second Defendant's duty was merely to check the Land Registry which as it turned out held no registered right in favour of the Claimant.

[87] Counsel submitted copies of the authorities on which they relied which I found most useful and for which I would wish to express my appreciation:

For the Claimant:

Ulina Jennifer George v Hilary Charlemagne Civil Appeal

No. 24 of 2001 (St. Lucia)

Marie Adrural v Veronique Geead and others Civil Appeal No. 22 of 2001 (St. Lucia)

Raymond Jn Baptiste v Francis Miller Civil Appeal No. 6 of 1993 (St. Lucia)

Abbey National Building Society v Carr and Another (1990) 1 AER 1085

Spiricor of St. Lucia Ltd., v Attorney General of St. Lucia and Another (1997) 55 W1R 123

James Webster et al v Beryl Fleming (as pers. rep. of the estate of Samuel Hodge, deceased) Civil Appeal # 6 of 1993 (Anguilla)

[88] For the Defendants:

Heirs of Hamilton La Force etc v Attorney General et al Civil Appeal No. 11 of 1993 (St. Lucia)

Skelton and Others v Skelton (1987) 37 W1R 177

Arthur Verneuil v Eleuthere Severin Claim No. 286 of 1997 (St. Lucia)

Nellia Vitalis v Wallace Sanchez Privy Council Appeal No. 20 of 1991

Kenneth Polinere et al v Lucy Felicien Privy Council Appeal

No 38 of 1998

*Spiricor of St. Lucia v Attorney General of St. Lucia and Another
(Supra)*

Berthelina Ennis v Phyllis Barnes et al Civil No 760/1995 (St. Lucia)

Court's Findings

Mistake

[89] The submissions by Counsel for the Claimant under this head revolve around the interpretation of the land adjudication process pursuant to the Land Adjudication Act 1984.

[90] The Claimant in her Amended Statement of Claim with respect to the particulars of mistake avers:

- a) The adjudicators erroneously entered Vitalienne Wilson, Deceased as sole owner despite the claim by Barfincor in November 1984. They failed to consider or sufficiently consider the contents of the hypothecary obligation referred to in paragraph 4, as well as the claim made on behalf of the Claimant by Mrs. Carmen Grant in January, 1985.
- b) They failed to consider or sufficiently consider the registration of the Deed of Donation registered at the office of Deeds and Mortgages at the time
- c) They failed to consider or sufficiently consider the claim made by Barfincor in December 1984 on behalf of both the Claimant and the Deceased
- d) They failed to give weight or any sufficient weight to the only document produced as evidence of title during the demarcation process and at the registration process.

[91] The Land Adjudication Act was enacted in 1984 to inter alia, provide for the adjudication of rights and interests in land.

[92] The Act by Section 4 provides for the appointment of an adjudication officer who in turn appoints demarcation officers, recording officers and survey officers all responsible to him. The duties of these various officers are set out in the Act.

[93] By section 14 the duties of the recording officer are to “consider all claims to any interest in land and after such investigation as he or she considers necessary to prepare a record in respect of the land”.

[94] Section 16 details the principles of adjudication, that is the rules on which the recording officer must be satisfied when preparing the adjudication record. Included at subparagraph 1 (c) :

“ If the recording officer is satisfied that any land is subject to any right which is registrable as a lease, hypothec or servitude under the Land Registration Act, he or she shall record such particulars as shall enable the right and the name of the person entitled to the benefit thereof to be registered”.

[95] Section 17 sets out the rules which the recording officer must follow in adjudication and section 19 indicates that when the adjudication record is completed, the adjudication officer must sign and date a certificate to that effect and give notice of its completion.

[96] Section 20 allows for appeals against the adjudication record and any person aggrieved by it has within 90 days of the publication of the notice of the final record to give written notice of his intention to petition the adjudication officer in respect of the act, decision, entry or omission concerned and the petition shall be heard and determined by the adjudication officer.

[97] Section 23 speaks to the finality of the adjudication record which is in turn subject to the Land Registration Act:

“After the expiry of 90 days from the date of the publication of the notice of completion of the adjudication record or the determination by the adjudication officerthe adjudication record shall, subject to the provisions of the Land Registration Act, become final and the adjudication officer shall sign a certificate to that effect and shall deliver the adjudication record to the Registrar together with all documents received by him or her in the process of adjudication”.

[98] An appeal against the decision of the adjudication officer may be lodged within two months to the Land Adjudication Tribunal and any person aggrieved by the decision of the tribunal has under section 24 (i), two months from the date of the decision or within such extended time as the court in the interests of justice may allow, to appeal to the High Court.

[99] The uncontroverted evidence in our case is that the Claimant never personally made a claim. The first claim in the adjudication process was made by Barfincor. Through some inadvertence the second claim form omitted the name of the Claimant and it was this form which formed the basis of the application in the adjudication process.

[100] I am of the view that up to this point the fact that the Claimant's name had been omitted was not necessarily fatal to any interest or claim which the Claimant may have had, because section 9(1) of the Act, provides for the safeguarding of the rights of absent persons. It states:

“If the adjudication officer, demarcation officer or recording officer is satisfied that any person who has not made a claim has a claim t any interest in landthe adjudication officer, demarcation officer or recording officer may, in his or her discretion proceed as if a claim had been made, and may call upon the Registrar of Deeds to supply him with a certified copy of any document of letter relevant threats”.

[101] However it is apparent that no documents were produced to the Recording Officer during the adjudication process and that there was only mention made of the Hypothecary Obligation in favour of Barfincor which was duly recorded on the form as is required by section 16 (1) (c). It follows that had the actual document been produced, it would have alerted the Recording Officer to the interest of the Claimant. It is evident therefore that the Recording Officer exercised his discretion under section 9 (i) and proceeded as if a claim had been made - by Barfincor – and did not then request the Registrar to supply him with a certified copy of the Hypothecary Obligation.

[102] The Recording Officer had completed his functions and the rest was left to the Adjudication Officer to authenticate and finalize the document. It is upon his signature and the date affixed by him to the document that it is dependent to make the final as is required by section 19.

“When the adjudication record in respect of any adjudication section has been completed, the adjudication officer shall sign and date a certificate to that effect and shall give notice of the completion thereof and of the place or places at which the same can be inspected together with the demarcation map”.

[103] It is to be noted from a perusal of the adjudication record in the case at bar that it was not signed or dated by the Adjudication Officer. It had been signed and dated only by the Recording Officer thus making it his document. There was no evidence given to the Court that the relevant certificate had been signed or dated.

[104] It is this record bearing only the signature and date of the Recording Officer which was ostensibly produced by the Adjudication Officer which forms the basis upon which the Registrar of Lands under section 10 of the Land Registration Acts depends to compile the Land Register.

“Whenever an adjudication record has become final under section 23 of the Land Adjudication Act and the adjudication officer has delivered the adjudication record to the Registrar, the Registrar shall prepare a register for each parcel shown in the adjudication recordand shall register therein any of the particulars in the adjudication record which requires registration”.

[105] It is this obvious non-compliance with the Act that leads me to conclude that the Land Register was compiled based on a mistake.

[106] This conclusion was reached following the decision in the Anguillan case of James Ronald Webster v Beryl St. Clair Fleming Civil Appeal No. 6 of 1993 where although the facts are dissimilar to the facts in the present case the issue was similar that is whether the acts of the Recording Officer during the adjudication process were null and void and therefore ultra vires. In our case the question must also be asked whether the fact that the adjudication record was not signed and dated by the Adjudication officer meant that the resulting adjudication record became the record of the Recording Officer and as a consequence became null and void and was ultra vires.

[107] The court in the Webster case (supra) opined that the decision of the Adjudication Officer being a judicial decision is not one which is open to the Recording Officer to make because the Act is quite specific regarding the parameters of the duties of the various officers.

Byron J A (as he then was) decided:

“In my judgment any mistake made in the registration process could be rectified. The Court must distinguish between mistakes occurring in adjudication under the Land Adjudication Ordinance and in registration under the Registered Land Ordinance. Section 140 provides relief only for those mistakes occurring in the registration process. A misunderstanding as to what was the real decision of the Adjudication Officer resulting in

registering something that was not his decision as it were, would be a mistake in the registration process”.

[108] He later continued:

*“The documents on which the Registrar of Lands acted in the entries made in the entries made in the register of lands were therefore invalid documents which were used as if they were the genuine orders of the Adjudication Officer. They must be regarded as being null, void and of no effect.
.....In my view the court is empowered by section 140 to ensure that the first registration is based on the final decision of the Adjudication Officer and not on the ultra vires adjudication records issued by the Recording Officer”.*

[109] Byron JA then went on to refer to the well known case of Anisminic Ltd v The Foreign Compensation Commission and Another (1969) 1AER 208 which explains that a “purported” document is a nullity and could have no legal effect and that the court would not protect a nullity without some specific statutory requirement to do so.

[110] I would wish to adopt these statements in coming to the conclusion that the situation in our case was as a result of a mistake in the registration process rather than in the adjudication process.

Fraud

[111] In her Amended Statement of Claim, the particulars of fraud which the Claimant cited were as follows:

- a) Vitalienne Wilson, Deceased, whether by herself and/or her agent, knowingly and or intentionally made a claim in 1985 on the Claim Form No. 1A 950 in

her sole name despite the fact that the Deceased donated a half share in the property in 1981 with the intent to be registered as sole owner.

- b) Vitalienne Wilson, Deceased, whether by herself and or agents compounded the fraud when an application was made in the sole name of the Deceased for an Application of Conversion of Title in 1997.

[112] Section 98 (i) of the Land Registration Act allows the Court to consult or amend a first registration if such registration was obtained, made or omitted by fraud or mistake that section provides:

“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”.

[113] Counsel for the Claimant asked the Court to take into account what transpired with the second claim form.

[114] Inspection of the form reveals that it was prepared by Carmen Grant, on behalf of the Deceased. Carmen Grant was not called as a witness. The court was therefore unable to conclude that the Claim Form was “done with the intention of depriving the Claimant of her half share”.

[115] I shall now state that the Court is unable to conclude that there was any contrivance in the preparation of the form. The Recording Officer appeared to have been satisfied enough with it to cause the subsequent preparation of the Adjudication Record. The Court is therefore not prepared to go behind the form to make any determination as to its authenticity.

[116] In my view there was no evidence that there was any duplicity on the part of the Deceased and I am inclined to agree with Counsel for the Defendants when she states that the oral

testimony of the Claimant is diametrically opposed to the allegations of fraud imputed to the Deceased in the amended Statement of Claim.

[117] Under cross examination the Claimant stated: "She (meaning the Deceased) would never do anything to prevent me from getting the land". Also : "I don't think that she would cause anybody to do anything to prevent me from getting the land". Also: "I trusted her. She was like my mother".

[118] In my view the evidence adduced does not disclose that the Deceased knowingly and or intentionally was party to or herself perpetrated a fraud. In addition, any allegation of fraud has been eclipsed by the declaration of trust in the testimony of the Claimant herself.

[119] In the circumstances, I reject the Claimant's contention regarding fraud.

Overriding Interest

[120] Section 23 of the Land Registration Act provides that:

"Subject to the provisions of section 27 and 28 and the registration of any proprietor with absolute title of a parcel of land shall vest in that person the absolute of that parcel together with the rights and privileges belonging or appurtenant thereto free from all other interests and claims whatsoever....."

[121] Then section 28 provides:

"Unless the contrary is expressed in the register, all registered land shall be subject to such of the following overriding interests as may subsist and affect the same, without their being noted on the register"

[122] And at subparagraph (g);

the rights of a person in actual occupation of land.....

[123] It is evident therefore that section 28(g) of the Act is intended to give legal effect to the rights of anyone in actual occupation but their rights are not registered.

[124] As stated by Lord Denning, Master of the Rolls in Strand Securities Ltd v Caswell (1965) 1 AER 820:

Section 70 (i) (g) is an important provision. Fundamentally its object is to protect a person in actual occupation of the land from having his rights lost in the welter of registration. He can stay there and do nothing yet he will be protected. No one can buy the land over his head and thereby take away or diminish his rights. It is up to every purchaser before he buys to make inquiry of the premises. If he fails to do so, it is at his own risk. He must therefore take subject to whatever rights the occupier may have. If he fails to do so, it is at his own risk. He must take subject to whatever rights the occupier may have”.

[125] Section 70 (i) (g) of the English Act is the equivalent of our section 28 (g).

[126] See also the statement of Byron CJ in Civil Appeal No. 24 of 2001 (St. Lucia): Ulina Jennifer George v Hilary Charlemagne. He stated at page 8:

“I would think that the effect of this statutory provision is to impose an additional duty on the purchasers of registered land. It is not enough to search the land register. They must carry out a search of the land itself to determine whether there is anyone in actual possession. The title that they get will be subject to the rights of the person in actual possession.....it is possible that the legal effect was missed because he did not have a registered interest in the land”.

[127] But what is actual occupation?

[128] According to Lord Oliver of Aylmerton in Abbey National v Carr (1990) 1 AER 1085:

“It is to be noted that it is not the actual occupation which gives rise to the right to determine its existence. Actual occupation merely operates as the trigger, as it were, for the treatment of the right whatever it may be, as an overriding interest. Nor does the additional quality of the right as an overriding interest alter the nature or quality of the right itself. If it is equitable right it remains an equitable right”.

[129] He continues:

“But I see no insuperable difficulty in holding that the actual occupation required to support such an interest as a subsisting interest must exist at the date of completion of the transaction giving rise to the right to be registered, for that is the only date at which the inquiry referred to in para (g) could in practice be made and be relevant. I agree therefore with the conclusion of the Court of Appeal in Rosset’s case that it is at that moment that it falls to be determined whether there is actual occupation for the purposes of para (g)Nicholls LJ analysisin Rosset’s case said “A purchaser or mortgagee inspects and inquires before completion, in the established fashion. Or he fails to do so, at his own risk. He then completes the transaction taking an executed transfer or mortgage. Whether or not an overriding interest under para (g) subsists so far as his freehold or mortgage is concerned falls to be determined at that moment. If an overriding interest does submit, then his estate when registered takes subject to that interest”.

Lord Oliver continued:

“ If then the date at which it falls to be considered whether the Claimant to an interest in the land is an actual occupation is the date of completion of the purchase, what has next to be determined is the nature, extent and effect of the interest claimed by him is an overriding interest”.

Lord Oliver later opines:

“It is perhaps dangerous to suggest any test for what is essentially a question of fact, for ‘occupation’ is a concept which may have different connotations according to the nature and purpose of the property which is claimed to be occupied. It does not, I think, involve the personal presence of the person claiming to occupy. A caretaker or the representative of a company can occupy, I should have thought on behalf of his employer. On the other hand, it does, in my judgment, involve some degree of permanence and continuity which could rule out mere presence”.

[130] And what are the rights referred to in section 28 (g)? Byron acting Chief Justice as he then was in the case of Spiricor of St. Lucia Ltd v Attorney General of St. Lucia and Another (1997) 55WIR 123 et 132 had this to say:

“A careful perusal of the words of section 28 (g) would indicate that the “actual occupation” is not the protected interest. What is protected are the ‘rights’ of a person in actual occupation. The word “right” is not limited by definition”.

[131] In our case when after the death of the Deceased in 1997, the niece of the Claimant entered into the premises, she did so with the permission of the Claimant who while the niece was living there was totally unaware of any claim that she might have had. She lived there undisturbed for a number of years until 2003 when she was given notice to quit.

[132] According to the testimony of the niece, it was on receipt of that notice that she caused a search to be made. It is evident that she was of the belief that the Claimant had "claims to the house". This claim was confirmed when she was given a copy of the Deed of Donation.

[133] However up to that point the Claimant had no knowledge of the Deed. It is apparent that she had a belief that she had an entitlement in the property. In her witness statement at paragraph 23 she says:

"I agreed to pay the entire sum of forty thousand dollars since my aunt Vitalienne Wilson agreed to give me a half share in the property which she did in 1981. I am in possession of all the receipts to prove that I paid the loan".

[134] The Statement that the Deceased give her half share in 1981 is a result of subsequent knowledge, not at the time she agreed to pay the loan because the evidence proves that she only had knowledge of the gift of the half share in 2004.

[135] There was no direct challenge to that statement. Counsel for the Defendants however cross examined on the means of the Deceased. The Claimant admitted that the Deceased worked during her lifetime except for a period when she first went to the United States of America and was without a job for a while. The Deceased was a "lady of means".

[136] From her own submission the Claimant made an attempt to take out Letters of Administration to the estate of the Deceased – it was not revealed in what year – but these attempts were abandoned. She denied in cross examination being told by the lawyer that the reason she could not apply was because, she was not a close relative but stated it was because she had to go to London.

[137] After the death of the Deceased she assumed responsibility for the property and rented out part of it and settled her niece rent free in the top flat.

- [138] I accept that the niece was the agent of the Claimant despite the arguments of Counsel for the Defendants that she only became the agent on receipt of the power of attorney in 2004 subsequent to the Notice to Quit.
- [139] It should be noted that there were no attempts on the part of anyone else to claim the property between the death of the Deceased in 1997 and 2003. No one disturbed the niece while she was in occupation.
- [140] The evidence of the second Defendant shows clearly that he knew nothing of the property despite his familial connection: the Deceased's mother was his mother's sister. He claimed that the Deceased used to visit with his mother when she (the Deceased) came home from England.
- [141] The first Defendant had never visited the property while the Deceased was alive and it was only when invited to purchase it by the first Defendant for \$10,000.00 (a fraction of the value which was put at over \$300,000.00 by a qualified valuer) that he visited. When he went to the property, it was the niece who took him there. He never asked her if she was paying rent because according to him "the house wasn't mine". He said before buying the house he visited about five to six times.
- [142] In my opinion the Claimant became a tenant at will, the holder of an unregistrable overriding tenant and as such had rights - unregistered though they may be - over the property, rights which any scrupulous purchaser ought to have been aware of.
- [143] As a consequence, the Claimants claim to an overriding interest in the property is found to be sustained.

Rectification

[144] The Court's power to order rectification of the land register is to be found at section 98 of the Land Registration Act which provides:

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".*
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 rent and acquired the land, lease or hypothec for 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 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.*

[145] Section 10 of this Act provides for the compilation of the Land Register from adjudication records which had become final in accordance with section 23 of the Land Adjudication Act that is 90 days after the adjudication officer has signed the relevant certificate.

[146] The court must determine whether a mistake in registration of title has been made and if so whether justice requires that the register should be rectified.

[147] In the British Virgin Islands case of Skelton V Skelton (1987) 37 WIR 177, Robothan C J said:

"I would agree that if the expression of the final decision of the Adjudication Officer was incorrectly recorded on the Land Register, section 140 could be resorted to".

Section 140 is identical to our section 98.

[148] Byron J A (as he then was) in the Anguillan case of James Ronald Webster et al v Berly St. Clair Fleming (as personal representative of the estate of Samuel Henry (lodge Deceased) Civil Appeal No. 6 of 1993 opined:

“In my judgment any mistake in the registration process could be rectified. The Court must distinguish between mistakes occurring in adjudication under the Land Adjudication Ordinance and in registration under the Registered Land Ordinance”.

Section 140 provides relief only for those mistakes occurring in the registration process. A misunderstanding as to what was the real decision of the Adjudication Officer resulting in registering something that was not his decision as it were, could be a mistake in the registration process”.

(Emphasis added)

[149] I would humbly wish to adopt that position as mine.

[151] He also stated:

“In my view the Court is empowered by section 140 to ensure that the first registration is based on the final decision of the Adjudication Officer and not on the ultra vires adjudication records issued by the Recording Officer”.

[150] Having declared that the final decision of the Adjudication Officer had not been given in the first place and so any record which would have informed the Registrar would have been a mistake, I am of the opinion that the Court is at liberty to resort to section 98 and order that the register be amended.

Non Acceptance of the Deed of Gift

[151] I must admit to being totally persuaded by the argument of Counsel for the Defendants on this issue which proved to be the deciding factor in the case.

[152] Article 696 of the Civil Code provides

“Gifts inter vivos is an act by which the donor divests himself, by gratuitous title of the ownership of a thing in favour of the donee whose acceptance is requisite and renders the contract perfect. This acceptance makes it irrevocable saving the cases provided for by law, or a valid resolutive condition”.

[153] Article 717 provides:

“Deeds containing gifts inter vivos must under pain of nullity be executed in notarial form and the original thereof be kept of record. The acceptance must be made in the same form”.

[154] Now by Article 728:

Gifts inter vivos do not bind the donor nor produce any effect until after they are accepted. If the donor be not present at the acceptance, they take effect only from the day on which he acknowledges or is notified of it”.

[155] And by Article 732:

The acceptance may be subsequent to the deed of gift; but it must be made during the lifetime of the donor and while he is still capable of giving.
(Emphasis added)

[156] Counsel for the Defendants cited the Privy Council case of Kenneth Polinere et al v Lucy Felicien (No. 38 of 1998) in which a Deed of Donation was challenged and the Donor sought to have it revoked. Their Lordships quoting Articles 696 and 717 concluded that acceptance had already taken place at the time the revocation was sought. Such

acceptance could be effected expressly or implicitly without the necessity of deed, implied acceptance must at the very latest have taken place when the donees were registered as owners of the land.

[157] The Privy Council stated:

“The process of first registration, and in particular the preparation of the adjudication record in accordance with the Land Adjudication Act 1984, would have required the consent of the donees to their registration as proprietors”.

[158] As has been repeated over and over in the case at bar, the Claimant was unaware of the gift until after the demise of her aunt. The Deed of Donation, as was given in evidence was prepared by the Notary and executed on behalf of the Claimant and the Deceased by their attorneys without the knowledge of the Claimant. She never got sight of the document until 2004. Although the Deed was registered, her acceptance was not. Since such acceptance was never registered, the gift now becomes void.

[159] This opinion is reinforced by Byron CJ acting in the above cited case of Spiricor v Attorney General of St. Lucia and Another (supra) when he said:

“A transfer of the registered estate in land or any part of it is completed by entry on the register of the transferee as the proprietor of the estate transferred, but until such entry is made, the transferor or is deemed to remain the proprietor of the registered estate”.

[160] In my opinion therefore the case for the Claimant fails on the principle that non acceptance of a gift during the life time of the donor voids that gift.

Burial Expenses

[161] I accept the contention of Counsel for the Defendants under this head.

[162] Under normal circumstances payment of burial expenses can be considered a charge on the estate of the Deceased and for which a valid claim can be made.

[163] However by Article 2121 of the Civil Code, this debt becomes prescribed by six years and is therefore non refundable.

Fault / Indefeasibility of Title

[164] Counsel for the Defendant submits that the second Defendant's title is indefeasible under sections 23 (already quoted) and 38 of the Land Registration Act, that his only duty was to check the Land Registry because as a purchaser for consideration, he was protected by section 38.

[165] Counsel also quoted from the case of Berthelia Ennis V Phyllis Barnes et al Suit No. 760 of 1995 (St. Lucia) in which Mitchell J stated that a deed is no longer of significance since the coming into operation of the land registration system, that a notary is not required to search the ancient Registry of Deeds to determine whether or not there has been any transaction relating to the property in question, the notary needs only to confine himself to what is in the Land Register.

[166] With this one cannot but agree for such is the situation where all the circumstances and relevant steps have been taken and are found to be correct in the adjudication and registration process.

[167] However our situation is not quite that straightforward.

[168] Section 38 (1) of the Land Registration Act provides for the protection of persons dealing in registered land:

“A person dealing or proposing to deal for consideration with a proprietor shall not be required or in any way concerned :

- (a) to inquire or ascertain the circumstances in or the consideration for which such proprietor or any previous proprietor was registered;*
- (b) to see to the application of any consideration or any part thereof; or*
- (c) to search any register kept under the provisions of Book Eighteenth of the Civil Code*

[169] I do not believe that section 38 was intended to treat to a situation as ours. In our case, before the land could be sold, a Radiation had to be prepared. It is my view that any prudent lawyer ought to have been put on guard by the existence of the Hypothecary Obligation and especially when it names the Claimant and the Deceased as the Mortgagors of the property and only the Deceased is entered on the Land Register as the proprietor. He ought to have asked himself some questions and made the relevant searches.

[170] In cross examination the second Defendant stated “There was a loan on the property but it was already paid. My lawyer told me so. It was then that he told me that he had to prepare a paper to clear the land. I paid the lawyer to clear the land”.

[171] Evidently the lawyer was aware that he had to exercise due diligence in ascertaining the true condition of the land.

[172] In my view it could naturally be concluded that the second Defendant ought to have had knowledge of the circumstances when he purchased the property.

[173] As quoted before in the case of Strand Securities Ltd v Casswell (supra) Lord Denning, Master of the Rolls stated:

“It is up to every purchaser before he buys to make inquiry of the premises. If he fails to do so, it is at his own risk. He must therefore take subject to

whatever rights the occupier may have. If he fails to do so, it is at his own risk. He must take subject to whatever risks the occupier may have”.

[174] But as I have stated before, any conclusion I might make is purely academic having already decided that based on the non acceptance of the gift during the lifetime of the Deceased, the Claimant has lost her entitlement to the property.

Conclusion

[175] The issues which the court found had to be determined viz

- (1) Whether the Claimant is entitled to have half share in the property, and if so
- (2) Whether the Court can order rectification of the Land Register

were considered on the basis of a number of factors namely mistake, fraud, overriding interests, rectification, non acceptance of gift, burial and other expenses, fault of the notary

Mistake

[176] Court found that there was a mistake in the adjudication process in that there was no final adjudication record as contemplated by Section 23 of the Land Adjudication Act upon which final adjudication record the Registrar of Lands is dependent to compile the Land Register under Section 10 of the Land Registration Act.

Fraud

[177] Court was of the opinion that on the facts as adduced, the allegation of fraud could not be sustained.

Overriding Interest

[178] Court decided that in light of the occupation of the property by the Claimant through her niece and the proprietary manner in which she administered the property subsequent to the death of the Deceased, she became a tenant at will and as such had rights, unregistered though they may be, rights which any scrupulous purchaser ought to have been aware of.

Rectification

[179] Court held that the first registration and by extension the second registration having been based not on the adjudication record of the Adjudication Officer as stipulated by the Act but on the ultra vires adjudication record issued by the Recording Officer, an order for rectification could be made under section 98 of the Land Registration Act.

Non Acceptance of the Gift

[180] Court felt that this was indeed the deciding factor of the case thus making all of the previous and subsequent findings merely academic.

[181] Court accepted the submission of Counsel for the Defendants that any entitlement which the Claimant would have had is defeated by her non registration of acceptance of the Deed of Donation in accordance with Articles 696, 717, 728 and 732 of the Civil Code.

Burial and other Expenses

[182] Court is of the view that burial expenses being a debt is prescribed by the Civil Code.

[183] However such other expenses as are ongoing can be claimed namely insurance and upkeep of the premises including utility bills.

Fault of the Notary

[184] Court was not in agreement with the argument of Counsel for the Defendants that the Notary had no responsibility other than to check the Land Register, for given the peculiar circumstances in our case, namely the existence of the Hypothecary Obligation, any prudent Notary should have been alerted. I am therefore concerned that he was not scrupulous enough in his duties.

Order

1. The Claim of the Claimant is hereby dismissed
2. Prescribed costs awarded to the Defendants in accordance with rule 65 CPR 2000

SANDRA MASON QC

High Court Judge