

THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

ANTIGUA AND BARBUDA

(CIVIL)

CLAIM NO. ANUHCV 2003/474

IN THE MATTER OF THE CONSTITUTION OF ANTIGUA AND BARBUDA

AND

IN THE MATTER OF AN APPLICATION OF NOLDER MARTIN
A PERSON ALLEGING THAT THE PROVISIONS OF SECTION 3C, 9 (1), AND
9 (2) OF THE CONSTITUTION HAVE BEEN, ARE BEING AND ARE LIKELY
TO BE CONTRAVENED IN RELATION TO HER AND FOR REDRESS
IN ACCORDANCE WITH SECTION 18 OF THE SAID CONSTITUTION OF
ANTIGUA AND BARBUDA

AND

IN THE MATTER OF THE SUPREME COURT (CONSTITUTION REDRESS –
ANTIGUA RULES 1970) No. 5 OF 1970

BETWEEN:

NOLDER MARTIN

Claimant

AND

THE ATTORNEY GENERAL OF ANTIGUA AND BARBUDA

Defendant

Appearances:

Mr. Vashit Maharaj with Mrs. Georgice Mendes-Blackman for the Claimant
Mrs. Carla Brookes-Harris for the Defendant

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2004: December 15 2005: January 14
2006: September 28 2007: March 22
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JUDGMENT

Constitutional redress - Allegation of breach of section 9 of the Constitution - Other action lawfully available to Claimant under statute - Abuse of process - Power of Court to decline to exercise jurisdiction under the enforcement provision of the Constitution being section 18 (1).

[1] **Thomas J:** By a fixed date claim form by way of originating motion filed on 13th November 2003 the Claimant is seeking the following reliefs against the Defendant:

1. A declaration that the Government of Antigua and Barbuda wrongfully illegally and in violation of the Claimant's Constitutional right as contained in s3 of the Antigua and Barbuda Constitution Order 1981 entered and remain in occupation of the land and have contravened and continue to contravene the fundamental rights of the Claimant to the protection from the deprivation of the following described property to wit:
All and Singular that piece of land measuring 19.8 acres, a portion of that piece of land and more particularly described as Registration Section: South Central, Block 15 2185 B Parcel 71 bounded on the North by parcel No. 361 on the East by the Tyrrels Public Road on the South by parcel No. 72, 280, 281 and 282 and the Swetes Public Road and on the West by parcel Nos. 184 and 123.
2. A Declaration that the Government of Antigua and Barbuda wrongfully, illegally and in violation of the Claimant's constitutional rights as contained in s 9 (1) and (2) of the Antigua and Barbuda Constitution Order 1981 to be protected from the compulsorily taking possession of the property as described in 1 above, have entered and remain in occupation of the lands hereinbefore described and have contravened and continue to contravene the fundamental rights of the Claimant.
3. An order that monetary compensation be made by the Government of Antigua and Barbuda to the Claimant promptly of such compensation as may be assessed by the Court in respect of the contravention of the Claimant's aforesaid Constitutional Rights.
4. An order that the Claimant do recover possession of the lands the subject matter in dispute or alternatively an order for the valuation of the said lands and the payment to the Claimant of their present day value as assessed.
5. An Order for the payment of mesne profits for the use and occupation of the said lands by the Defendant their licensees, servants or agents from March 1988 to the date of judgment.
6. Such further order or orders, writs, directions as the Honourable Court may consider appropriate for the purpose of enforcement of the aforementioned fundamental rights to which the Claimant is entitled.
7. The Government of Antigua and Barbuda do pay to the Claimant her cost of this claim.
8. Interest.

[2] The Application rests on the following grounds:

1. That by virtue of a Deed of Trust registered as No. 1787 of 1950 the Claimant, Nolder Martin, also known as Nolder Clovis Candacie Martin also known as Nalda Martin, together with Eldena Roberta Martin, George Isaac Weldon Martin, Ethel Geraldine Camella Martin and Eleridge Isaac Martin became the beneficial owners of a certain parcel of settled land more particularly delineated and described in Deed 1787 of 1950.
2. That the trust was determined by the youngest reaching the age of 21 years on the 13th day of July 1970.
3. That on the 23rd day of February, 1978 the Claimant Nolder Martin, also called Nolder Clovis Candacie Martin, also called Nalda Martin, together with Eldena Roberta Martin, George Isaac Weldon Martin, Ethel Geraldine Camella Martin, and Eleridge Isaac Martin were registered as the owners in common of a certain piece or parcel of land more particularly delineated in Deed 1787 of 1950.
4. That in March of 1989 the Defendant without the authority of the Claimant went into occupation of the disputed parcel of Land and used it for the expansion of the village of Swetes.
5. That the Defendant has not paid any compensation to the Claimant for the appropriation of her Land.

AFFIDAVIT IN SUPPORT

NICOLE D. MARTIN

[3] The affidavit in support of the originating motion was sworn to by Nicole D. Martin and filed on 13th November 2003. According to the deponent, the affidavit is in support of Ms. Nolder Martin, also known as Nolda Martin, also known as Nolder Clovis Candacie Martin, of 1245 King George Blvd. Ann Arbor, Michigan.

[4] The deponent says that together with her brother, John I Martin, she holds a power of attorney granted by her mother who is the Claimant in this matter. It was granted on 12th February 2002.

[5] The deponent avers that the parcel of land known as Tyrells Estate was conveyed to George Isaac Weldon Martin, as trustee for her mother, together with Eldena Roberta Martin, Ethel Geraldine Martin, Carmella Martin and Elridge Isaac Martin as tenants in

common. The deponent says further that on Geraldine Martin attaining the age of twenty-one the trust deed determined and the property, Tyrells Estate, vested in Nolder Martin, Eldena Roberta Martin, George Isaac Weldon Martin, Ethel Geraldine Camella Martin and Elridge Isaac Martin as tenants in common.

[6] Nicole D. Martin further avers that on 23rd February 1978 the land known as Tyrells was first registered as: Registration Section, Liberta Block and Parcel No. 31 2284 A2; Registration Section: South East Block 56 2084 A Parcel 2; Registration Section: South Central Block 15 2185B Parcel 71; Registration Section: Liberta, Block 31 2284 B Parcel 1. Further still, that in 1988 the Government of Antigua and Barbuda decided to purchase approximately 20 acres of the said Tyrells Estate for the purpose of extending the Village known as Swetes Village. According to the deponent, negotiations for the purchase of the 20 acres were conducted with Ms. Geraldine Martin and the Government of Antigua and Barbuda agreed to pay \$1.25 per square foot. Following these events, by letters, dated 16th March 1989 and 5th June 1992, the Government was given notice to the effect that Ms. Geraldine Martin was not the sole owner of the said land and also that she had no authority to act on behalf of the other owners. She avers that against that background of knowledge the Government proceeded to occupy the parcel of land being approximately 20.0 acres.

[7] It is the deponent's contention that the Government of Antigua and Barbuda has, through its Lands Officer, admitted that the occupation of the said land is a trespass. And to compound matters no money has been paid to the owner Ms. Nolder Martin or her agent but occupation of the land continues.

[8] In another affidavit sworn to by Nicole Martin and filed on 10th April 2004 the deponent avers as follows at paragraph 3:

"That I take issue with and deny the allegations of George Duberry at paragraphs 6 and 7 of his said Affidavit that Nolder Martin, the Claimant, together with Eldena Roberta Martin, Ethel Geraldine Carmella Martin and Elridge Isaac Martin (all hereinafter collectively called ("the Martins")) are not the proprietors of the lands described as Registration Section: South Central; Block: 15 2185 B; Parcel 71) and state categorically that the said lands are owned by the Claimant and "the Martins".

- [9] The deponent contends that Parcel 71 was at all times part of Tyrells Estate – a fact known to the Government of Antigua and Mr. George Duberry. And this is so notwithstanding the Cadastral Survey carried out during the 1970's and the demarcation of a parcel of land measuring approximately 26 acres which was described in the legal description Block: 15 2185 B; Parcel 71.
- [10] It is the further contention of the deponent that at no time prior to George Duberry's affidavit dated 13th February 2004 was ownership of Parcel 71 ever challenged by either the said Mr. George Duberry as Lands Officer or any member of the Government their servants or agents.
- [11] In cross-examination Nicole Martin said that she was aware of the cadastral survey. She also testified that an approach was made by the Government to buy the land in or around 1987 or 1989 at which time Geraldine Martin worked with the Government. She also testified that she did not know if at the time the approach was made the issue of the cadastral survey was raised, but admits that the Land Register does indicate the Crown as the owner of said parcel. She continued thus: "The transaction with the Government was not completed. Payments were made to a co-owner. Ms. Martin did not own the land. It was owned by five children. I have the trust deed which I believe is a deed of ownership. I have seen it. It says from 1977 the Crown owned it".
- [12] In further cross-examination Nolda Martin disagreed with the suggestion that the Crown was always the owner of the land and also denied that the Crown compulsorily took possession of the land.
- [13] In re-examination the witness said that she saw the Land Register and a document connected with the land from George Duberry. The witness also identified it at **TB p. 80 - GD2.**

DENFIELD MATTHEW

- [14] In his affidavit sworn to and filed on 10th March 2004, Denfield Matthew deposes that he is a licensed land surveyor for more than 30 years and was authorized by the Government of Antigua and Barbuda to delineate and demarcate boundaries to parcels of land.
- [15] Denfield Matthew says that among the surveys done are several for the Martin family in respect of lands at Tyrells Estate and that he has verified that they are the owners of the said land consisting of some six hundred acres.
- [16] Denfield Matthew further avers that based on his knowledge of surveys done for the Government of Antigua and Barbuda he can say that the Government does not own the lands known as Tyrells Estate or any part thereof.
- [17] According to the deponent, his services were retained in 1988 by the then Parliamentary representative to conduct a survey of land measuring 19.8 acres and situated within the boundaries of Tyrells which the Government wished to purchase for the extension of the village of Swetes.
- [18] The deponent contends that as a result of his survey a subdivision plan was submitted to the Chief Surveyor at the Lands and Surveys Department and that "on 4th October 1990 M.O 191/90 was entered accepting my subdivision".
- [19] With respect to the affidavit of George Duberry sworn to and filed on 13th February 2004, the deponent says: "I specifically deny his allegation that at all material times the lands on which the village of Swetes Expansion stands, being a portion of Registration Section: South Central, Block 15 2185 B Parcel: 71, belong to the Crown".
- [20] In cross-examination Denfield Matthew said that in carrying out a survey the adjacent owners have to be ascertained and there are several places where this can be found – the Land and Surveys Department and the Land Registry. He contends that the information obtained is conclusive as to ownership.

[21] With respect to Parcel 71 the witness said that he did not check the land to see who owned it. According to him, he used the map of Tyrells as a guide to ownership but the Land Registry was not used because he had other tools at his disposal.

[22] In re-examination the witness testified that in 1988 he had no doubt as to the ownership of the land and was not aware of any other ownership in that year. He also said that the subdivision plan was registered at the Land Registry.

[23] In response to a question by the Court regarding ownership and the Land Registry, the witness said that at all times you are required to check the Land Registry.

GEORGE DUBERRY

[24] In his affidavit sworn to and filed on 13th February 2004, George Duberry deposes that he is the Chief Lands Officer, Ministry of Agriculture, Lands and Fisheries.

[25] The deponent avers that on or around 1988 the then Parliamentary Representative for the constituency of All Saints and St. Luke's approached the alleged owner, Geraldine Martin, regarding the possibility of the Government of Antigua and Barbuda purchasing land occupied by his constituents. The Cabinet agreed to such a purchase of 19.8 acres of land situated at Swetes from the alleged owner, Ms. Geraldine Martin.

[26] At paragraphs 6, 7, 8, and 9 of his affidavit the deponent says the following:

“6. That it is denied that Nolder Martin the Claimant, together with Eldena Roberta Martin, George Isaac, Weldon Martin, Ethel Geraldine Camella Martin and Elridge Isaac Martin are owners of the lands more particularly described as Registration Section: South Central, Block 15 2185B, Parcel 71.

7. That at all material times title in the lands particularly described in paragraph 6 is vested in the Crown absolutely and not the Martin's family. A copy of the Land Certificate is herewith exhibited and marked “GD1”.

8. However, the title in the following parcels of land mentioned in paragraph 6 in the Affidavit in Support of Originating Summons more particularly described as Registrar [sic] in Section Liberta, Bloc 31-2284A Parcel 2 and Registration Section South East Block 56-2084A Parcel is vested in George Isaac Weldon Martin as Trustee for Eldena Roberta Martin, Ethel Geraldine Camella Martin, Elridge Isaac Martin and Nolder Martin. Further title in Registration Section Liberta Block 31-2284B Parcel 1 is vested in the Bishop of St. John. Copies of these Land Certificates are herewith exhibited and marked “GD2”.

9. That it is admitted that the Crown inadvertently paid monies to Geraldine Martin for the land in question”.

[27] On 26th March 2004 George Duberry swore and filed a supplementary affidavit for the purpose of exhibiting a Cabinet decision dated 23rd March 1988 relating to the purchase of 19.8 acres of land at Swetes from Geraldine Martin. The further purpose is to exhibit copies of land certificates relating to the following parcels:

<u>Registration Section</u>	<u>Block</u>	<u>Parcel</u>
South Central	15-2185 B	71 marked “GD2’
Liberta	31-2284 A	2 marked “GD3”
South East	56-2084 A	2 marked “GD4”
Liberta	31-2284 B	1 marked “GD5”

[28] In cross examination George Duberry said that he held the position of Chief Lands Officer from 1999 to 2005 and that prior to that he held the position of Lands Officer from 1984 to 1999. He also said that during the latter period he was involved in the project to expand Swetes Village.

[29] In so far as payment to the Martins for the land, Duberry said that in 2002 it was his Department’s position that the Martins were not entitled to the money. He then added: “I became aware of the change prior to 2002 – sometime in 1996”.

[30] And later in the cross-examination the witness said this:

“I was aware of that position when I swore the affidavit in March 2004. There is no special reason why this fact was not disclosed in the affidavit”.

[31] It is George Duberry’s further testimony that with respect to the land in issue, that titles were given out after the survey by Denfield Matthew. This started after 1996.

[32] George Duberry ended his cross-examination on the question of the ownership of the land in issue:

“My position is that the Government owned the land. The land was registered in 1977 after the cadastral survey. I have no need to show that the Government owned the land prior to 1977. I

saw a document relating to Tyrells. I saw it in a bundle from the Crown Counsel. Prior to that I never saw it. I am aware of the Cadastral survey. I am not aware of the basis on which the Government claimed title. The State went through the adjudication process. It was land owned prior to 1975. The basis would be documents produced to the adjudication process. It was land owned prior to 1975. The basis would be documents produced to the Adjudication Officer. I am not aware of what was presented at the time of adjudication.

FINDINGS OF FACT

- [33] It is a finding of fact that the land in issue is described on the Land Register as Registration Section: South Central, Block 15 2185 B; Parcel 71 ("Parcel 71").
- [34] Based on Government of Antigua and Barbuda's policy to extend the Village of Swetes, negotiations were entered into to purchase Parcel 71 containing approximately 19.8 acres. In this regard negotiations were entered into with Ms. Geraldine Martin pursuant to a Cabinet decision dated 23rd March 1988. The parcel was surveyed and subdivided and persons were allowed to occupy such subdivisions.
- [35] The Land Register also reveals that Parcel 71 was registered as Crown land from 1977.

ISSUES

- [36] The following are the issues for determination:

ISSUE NO. 1

WHETHER IN ALL THE LEGAL AND FACTUAL CIRCUMSTANCES OF THE CASE THE APPROPRIATE PROCEDURE WAS ADOPTED BY THE CLAIMANT.

ISSUE NO.2

WHETHER THE GOVERNMENT OF ANTIGUA AND BARBUDA IS IN VIOLATION OF THE CLAIMANT'S RIGHTS ENshrined IN SECTION 9 OF THE CONSTITUTION BY ENTERING AND REMAINING IN OCCUPATION OF PARCEL 71.

ISSUE NO.1

REGISTERED TITLES

- [37] It is common ground that in Antigua and Barbuda there exists a system of registered titles. Its legislative basis is the LAND ADJUDICATION ACT, CAP. 234 and the REGISTERED LAND ACT, CAP. 374.

[38] The LAND ADJUDICATION ACT allows for the adjudication of all claims for title to land on a systematic basis¹. In this process certain prescribed principles of adjudication² and rules³ are to be followed. The end result of the adjudication process is the adjudication record which itself is subject to a number of safeguards. These include the right of any person named in or affected by the adjudication record or demarcation to petition the Adjudication Officer within the prescribed time limit⁴. The other safeguard is provision for the correction of the adjudication record before it becomes final⁵. The finality of the adjudication record is governed by section 23 which is in these terms:

“23. After the expiration of ninety days from the date of the publication of the notice of completion of the adjudication record or on determination of all petitions presented in accordance with section 20, whichever shall be later, the adjudication record shall, subject to the provisions of the Registered Land Act become final and the Adjudication Officer shall sign a certificate to that effect and shall deliver the adjudication record and the demarcation map to the Registrar together with all documents received by him in the process of adjudication”.

[39] Even outside of the finality of the adjudication record a person, including the Minister responsible for the subject matter, who is aggrieved by a decision of the Adjudication Officer and desires to question it, may within two months from the date of the certificate under 23 or within any time extended by the Court, appeal to the Court.

[40] Under the REGISTERED LAND ACT, the Registrar of Lands (“the Registrar”) is authorized to issue title to land on the basis of the content of the adjudication record. Such a title may either be absolute or provisional. In the case of absolute title the relevant law is contained in section 23 of the Act:

“23. Subject to the provisions of section 27 the registration of any person as the proprietor with absolute title of a parcel shall vest in that person the absolute ownership of that parcel together with all rights and privileges belonging or appurtenant thereto, free from all other interest and claims whatsoever, but subject –

(a) to the leases, charges and other incumbrances and to the conditions and restrictions, if any, shown in the register; and

¹ Part III of the Act, sections 5-15

² Section 16

³ Section 17

⁴ Section 20

⁵ Section 22

- (b) unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register:

Provided that -

- (i) nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee;
- (ii) the resignation of any person under this Act shall not confer on him any right to any minerals or to any mineral oils unless the same are expressly referred to in the register”.

[41] Part X of the REGISTERED LAND ACT deals with “Rectification and Compensation”. Of immediate relevance are sections 139, 140, 141, 142 and 143 which provide for: rectification by Register, ‘rectification by Court, right of compensation, amount of compensation and procedure for claiming compensation, respectively.

[42] In particular sections 140-143 provide as follows:

- “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.
 - (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 mistaken 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.
141. (1) Subject to the provisions of this Act and of any written law relating to the limitation of actions, any person suffering damage by reason of –
- (a) any rectification of the register under this Act; or
 - (b) any mistake or omission in the register which cannot be rectified under this Act, other than a mistake or omission in a first registration; or
 - (c) any error in a certificate of official search issued by the Registrar or in a copy of or extract from the register or in a copy of or extract from any document or plan, certified under the provisions of this Act, shall be entitled to be compensated by the Government out of money provided from the Consolidated Fund.
- (2) No compensation shall be payable under this Act to any person who has himself caused or substantially contributed to the damage by his fraud or negligence, or who derives title (otherwise than under a registered disposition made *bona fide* for valuable consideration) from a person who so caused or substantially contributed to the damage.

142. Where compensation is awarded in respect of the loss of any interest in land, it shall not exceed –
- (a) where the register is not rectified, the value of the interest at the time when the mistake or omission which caused the damage was made; or
 - (b) where the register is rectified, the value of the interest immediately before the time of rectification.
143. The Registrar may, on the application of any interested party, determine whether a right of compensation has arisen under this Part of this Act and, if so, award compensation and may add thereto any costs and expenses properly incurred in relation to the matter”.

SUMMARY

- [43] In summary it may be said that under the **LAND ADJUDICATION ACT** when the adjudication record for any particular area is completed there must be notice to this effect. After that, any aggrieved person may, within a period of ninety days after the notice, petition the Adjudication Record. And even after the adjudication record becomes final an aggrieved person may, within a period of two months after the certification of the Adjudication Officer, appeal to the High Court.
- [44] On the other hand, the Registrar of Lands may rectify the land register. This may also be effected by the High Court. In both instances the rectification can take place after the issue of absolute title by the Registrar.

POSITION OF THE CLAIMANT IN THE LEGAL CONTEXT

- [45] The evidence shows that Parcel 71 was adjudicated and upon first registration on 15th June 1977 the Crown was named as the proprietor. That said, there is nothing in the evidence to suggest that there was non-compliance with the procedures prescribed by the **LAND ADJUDICATION ACT**. This includes the notice of the completion of the adjudication record under section 19.
- [46] Two witnesses for the Claimant gave evidence impliedly and expressly that Parcel 71 forms part of Tyrells Estate. In this connection Nicole D. Martin said in her affidavit that she is familiar with the boundaries of Tyrells Estate. On the other hand, Denfield

Matthew's averment is that he is not only familiar with Tyrells Estate but that he did several surveys of the land comprising the estate; and further after doing surveys for the Government for twenty-five years he knows that the Government does not own land known as Tyrell's Estate or any part thereof.

[47] The purpose of the notice of the completion of the adjudication record for an adjudication area and to petition and the right of appeal is to deal with situations where persons did not attend the adjudication hearing to present new evidence. In both instances a reasonable period is given: ninety days and two months, respectively. The periods are not concurrent so that a total of approximately one hundred and fifty four days are involved.

[48] Therefore, where there is no petition or appeal with respect to any parcel of land, all of the statutory requirements are met and the adjudication record becomes final, the Registrar may issue an absolute title under the REGISTERED LAND ACT. Such a title is by law characterized as an indefeasible title and guaranteed by the State. The right to petition and the right of appeal are part of the equation towards the indefeasibility of title.

[49] In Megarry and Wade, LAW OF REAL PROPERTY (5th ed.) at page 225 the following is the learning in this regard:

“One of the attractions of registration of title is the general principle ... that the registered title proprietor has a title which is indefeasible without compensation. In other words, there is a State guarantee of the title, so that the registered proprietor and those dealing with him may rely upon his title being as it appears on the register”¹

[50] That which characterizes the indefeasibility of title was recently re-stated in BRITISH AMERICAN CATTLE CO. v CARIBE LTD [1998] 1 WLR, 1533 by Lord Browne-Wilkinson who spoke for the Board in these terms:

“Although the details of the Torrens system vary from jurisdiction to jurisdiction, it is the common aim of all systems to ensure that someone dealing with the registered proprietor of title to the land in good faith and for value will obtain an absolute and indefeasible title, whether or not the title of the registered proprietor from whom he acquires was liable to be defeated by title paramount or some other cause. The principle is well stated in relation to the State of Victoria by the Board in *Gibbs v. Messer* [1891] A.C. 248,254:

¹ Gardner v Lewis [1988] 53 WIR 236 (PC)

'The main object of the Act, and the legislative scheme for the attainment of that object, appear to them to be equally plain. The object is to save persons dealing with registered proprietors from the trouble and expense of going behind the register, in order to investigate the history of their author's title, and to satisfy themselves of its validity. That end is accomplished by providing that every one who purchases, in bona fide and for value, from a registered proprietor, and enters his deed of transfer or mortgage on the register, shall thereby acquire an indefeasible right, notwithstanding the infirmity of his author's title'.

That principle has been repeatedly affirmed in the various jurisdictions most recently in relation to the law of New Zealand by the Board in *Frazer v. Walker* [1967] 1 A.C. 569".

- [51] The fact that first registration is recorded as being 'absolute' implies that the adjudication process together with the period for petition and appeal took place prior to that date. Further, the fact that the Crown is recorded as the proprietor implies either that there was no petition or appeal, or if there was, no success arose.
- [52] But the matter does not end under the LAND ADJUDICATION ACT, as there are other statutory provisions for the rectification of the land register by the Registrar or the High Court in respect of which there is no time limit.
- [53] As noted above, the land register may be rectified by the Court by directing that any registration be cancelled or amended where it is satisfied that any registration including first registration was obtained, made or omitted by fraud or mistake.
- [54] The concepts of fraud and mistake are wide in their scope. "Fraud" and "mistake" are defined in the OXFORD DICTIONARY OF LAW (5th ed.) at pages 211 and 317 as follows: "Fraud is a false representation by means of a statement or conduct made knowingly or recklessly in order to gain material advantage"; "mistake - misunderstanding or erroneous belief about a matter of fact".
- [55] If, as contended by the Claimant that she together with other persons are owners of Parcel 71 then even before the date of the filing and now this issue can be addressed by the High Court under section 140 of the REGISTERED LAND ACT. The further point is that provision is made for the payment of compensation in the event that the damage is suffered in a number of circumstances, including rectification of the register or mistake or omission in

the register which cannot be rectified under the Act, other than a mistake or omission in a first registration.

SECTION 18 (1) OF THE CONSTITUTION

[56] The fact that the Claimant has instituted proceedings pursuant to section 18 (1) of the Antigua and Barbuda Constitution (“the Constitution”) has already been noted. But when that fact is juxtaposed with section 140 of the REGISTERED LAND ACT the jurisprudence surrounding the enforcement provision comes into play.

[57] Sections 18 (1) and (2) of the Constitution are couched in the following terms:

“18. (1) If any person alleges that any of the provisions of sections 3 to 17 (inclusive) of this Constitution has been, is being or is likely to be contravened in relation to him (or, in the case of a person who is detained, if any other person alleges such a contravention in relation to the detained person), then, without prejudice to any other action with respect to the same matter that is lawfully available, that person (or that other person) may apply to the High Court for redress.

(2) The High Court shall have original jurisdiction –

(a) to hear and determine any application made by any person in pursuance of subsection (1) of this section; and

(b) to determine any question arising, in the case of any person that is referred to it in pursuance of subsection (3) of this section,

and may make such declaration and orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of sections 3 to 17 (inclusive) of this Constitution:

Provided that the High Court may decline to exercise its powers under this subsection if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other law”.

[58] Section 18 (1) grants a right to seek redress with respect to alleged violations of rights enshrined in the Bill of Rights. But this has been interpreted as ‘sacrosanct’ and as such it is not at large. In particular, emphasis has been placed on this phrase in section 18(1): “... then without prejudice to any other action with respect to the same matter that is lawfully available”.

[59] In the recent case of *JAROO v ATTORNEY-GENERAL OF TRINIDAD AND TOBAGO* [2002] 2 WLR 705 the entire matter was re-visited by the Privy Council. The case refers to section 14 (1) of the Constitution of the Republic of Trinidad and Tobago which is in *pari materia* with section 18 of the Antigua and Barbuda Constitution.

[60] The judgment of the Board was delivered by Lord Hope of Craighead who reasoned as follows at page 716-717:

“Abuse of process

29. Nevertheless, it has been made clear more than once by their Lordships’ Board that the right to apply to the High Court which section 14 (i) of the Constitution provides should be exercised only in exceptional circumstances where there is a parallel remedy. In *Harrikissoon v Attorney General of Trinidad and Tobago* [1980] AC 265, 268, Lord Diplock said with reference to the provisions in the Trinidad and Tobago (Constitution) Order in Council 1962 (SI 1962/1875):

‘The notion that whenever there is a failure by an organ of government or a public authority or public officer to comply with the law this necessarily entails the contravention of some human right or fundamental freedom guaranteed to individuals by Chapter I of the Constitution is fallacious. The right to apply to the High Court under section 6 of the Constitution for redress when any human right or fundamental freedom is or likely to be contravened, is an important safeguard of those rights and freedoms; but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action. In an originating application to the High Court under section 6 (i), the mere allegation that a human right or fundamental freedom of the applicant has been or is likely to be contravened is not of itself sufficient to entitle the applicant to invoke the jurisdiction of the court under the subsection if it is apparent that the allegation is frivolous or vexatious or an abuse of the process of the court as being made solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedom’.

30. Lord Diplock repeated his warning against abuse of the constitutional motion in the context of criminal cases where there was a parallel remedy in *Chokolingo v Attorney General of Trinidad and Tobago* [1981] 1 WLR 106, 111-112: see also his observations in *Maharaj v Attorney General of Trinidad and Tobago* (No 2) [1979] AC 385, 399-400 and *Attorney General of Trinidad and Tobago v McLeod* [1984] 1 WLR 522,530. The same point was made recently in *Hinds v Attorney General of Barbados* [2002] 2 WLR 470, where Lord Bingham of Cornhill said, at p 484, para 24, that Lord Diplock’s salutary warning remains pertinent.
31. For the reasons which their Lordships have just indicated, the applicant may have had sound reasons at the outset for thinking that his constitutional rights were being infringed by the police. This is because they were continuing to detain the vehicle which he had handed over to them voluntarily without giving any reasons for doing so, and because they had declined to answer his requests for it to be returned to him. All the signs were that they were abusing their common law powers in a manner which was no longer lawful and which could properly be described as arbitrary. Section 14 (i) of the Constitution declares that, without prejudice to any other action with respect to the same matter which is lawfully

available, a person may apply to the High Court for redress by originating motion in such circumstances. This procedure enables the person who seeks a quick judicial remedy to avoid the delay and expense which a trial of the case by means of an ordinary civil action will involve. As the applicant had received no reply to his solicitor's letter of 22nd April 1988, their Lordships are disposed to think that he could not reasonably have been criticized at the outset for regarding the constitutional route as the best way to make rapid progress in his efforts to obtain the return of the motor car.

32. There is no doubt however that a parallel remedy was available to the applicant to enable him to enforce his right to the return of the vehicle. As the Court of Appeal observed, the appropriate remedy for him to pursue at common law was an action for delivery in detinue. The question which then arises is this. Was the Court of Appeal right to hold that it was clearly inappropriate for him to proceed by way of an originating motion under section 14 (i) in the circumstances?"

[61] His Lordship then came to this conclusion at page 719:

- "39. Their Lordships respectfully agree with the Court of Appeal that before he resorts to this procedure, the applicant must consider the true nature of the right allegedly contravened. He must also consider whether, having regard to all the circumstances of the case, some other procedure either under the common law or pursuant to statute might not more conveniently invoked. If some other such procedure is available, resort to the procedure by way of originating motion will be inappropriate and will be an abuse of process to resort to it. If, as in this case, it becomes clear after the motion has been filed that the use of the procedure is no longer appropriate, steps should be taken without delay to withdraw the motion from the High Court as its contained use in such circumstances will also be an abuse.
40. For these reasons their Lordships agree with the Court of Appeal that for the applicant to proceed in this case by way of s constitutional motion was an abuse of process. It follows that the applicant is not entitled to a declaration in these proceedings that his constitutional rights have been infringed".

SUBMISSIONS

[62] This issue is not contemplated by Mr. Vashit Maharaj, learned counsel for the Claimant, and as such there are no submissions. However, the following are the submissions by Mrs. Carla Brooks-Harris, learned counsel for the Defendant:

- "9. Section 18 (1) of the Constitution of Antigua and Barbuda provides that if any person alleges that if any of the provisions of sections 3 to 17 (inclusive) of this Constitution has been, is being or is likely to be contravened in relation to him, then, without prejudice to any other action which is lawfully available to him that person may apply to the High Court for redress. The proviso to the section empowers the High Court to decline to exercise its powers under the subsection if it is satisfied that adequate means of redress for the contravention alleged are available to the person concerned under any other law.
10. It is submitted, that it appears that the Claimant is seeking rectification on the land register to show that she and her other siblings are the owners of the land in dispute. Rectification

of the Register is a remedy which is enshrined in the REGISTERED LAND ACT CAP. 374 and it is further submitted that this is an adequate remedy available to the Claimant”.

[63] There is obvious merit in Mrs. Carla Brooks-Harris’ submission as she correctly identifies the fact that an adequate remedy is lawfully available to the Claimant. This is what triggers the exception contained in the enforcement provision of the Bill of Rights.

CONCLUSION

[64] The JAROO case concerned the detention of a motor vehicle which the appellant had purchased in good faith. However, upon application to the licensing authority for reclassification it was detained by the police because it was suspected to be a stolen vehicle. Despite numerous requests the car was not returned to the appellant.

[65] Instead of instituting a common law action for the return of the vehicle, the applicant/appellant applied by originating motion under section 14 (1) of the Constitution of the Republic of Trinidad and Tobago. And as noted above, their Lordships determined, *inter alia*, by instituting an originating motion rather than a common law action constituted an abuse of process.

[66] The Claimant’s case in this instance is even stronger in a negative sense. It lies on the fact that section 140 of the REGISTERED LAND ACT empowers the Court to rectify the Land Register in the circumstances of fraud or mistake. Additionally, where a person suffers damage in a number of circumstances, including rectification of the Land Register, that person is entitled to compensation from the Government out of money provided from the Consolidated Fund¹.

[67] In short, there is a statutory remedy which in effect covers much of the remedies sought by the Claimant. Further, the legal propositions enunciated in the JAROO case are not new, and in jurisprudential reality, are a mere re-statement of the proposition in the

¹ Registered Land Act, Cap. 374, section 141

HARRIKISSOON case¹ enunciated some twenty-five years earlier on the same point – the sacrosanct nature of the enforcement provision of the Constitution.

[68] The action which ought to be taken by a Claimant in the circumstances has already been quoted but given its fundamental importance it bears repetition. This is what Lord Hope of Craighead advised:

“If, as in this case, it becomes clear after the motion has been filed that the use of the procedure is no longer appropriate, steps should be taken without delay to withdraw the motion from the High Court as its contained use in such circumstances will also be an abuse’.

[69] On the narrow point and in terms of the Privy Council rulings alone, the HARRIKISSOON case was decided in 1980, and the JAROO case was decided on 4th February 2002. Further, the Claimant’s fixed date claim was filed on 13th November 2003, the trial of the matter did not begin until 15th December 2004 and, above all, the REGISTERED LAND ACT came into force on 30th December 1975.

[70] The result, therefore, is that in the Court pursuant to the proviso to section 18 (2) of the Constitution declines to exercise its jurisdiction having regard to the remedy available to the Claimant under section 140 of the REGISTERED LAND ACT.

[71] In the circumstances there is no need for the Court to decide ISSUE NO. 2.

ORDER

[72] **IT IS HEREBY ORDERED AND DECLARED** as follows:

1. The Claimant’s action constitutes an abuse of process and as such the Court declines to exercise its jurisdiction under section 18 (1) by virtue of the proviso to section 18 (2) of the Antigua and Barbuda Constitution.
2. There is no order as to costs.

ERROL L. THOMAS
Judge

¹ Harrikissoon v Attorney General of Trinidad and Tobago [1980] AC 265 (PC)