

BRITISH VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE

CLAIM NO. 0008 OF 2007

**IN THE MATTER OF SECTIONS 140 & 170 OF THE REGISTERED LAND ACT
CAP. 229 OF THE REVISED LAWS OF THE VIRGIN ISLANDS, 1991**

AND

**IN THE MATTER OF PARCELS 25 & 35 BLOCK 2640B WEST CENTRAL
REGISTRATION SECTION OF THE LAND REGISTER OF THE VIRGIN ISLANDS**

AND

**IN THE MATTER OF AN APPLICATION FOR REGISTRATION AS PROPRIETOR
BY TRANSMISSION OF PARCELS 25 & 35 FILED AT THE LAND REGISTRY OF
THE VIRGIN ISLANDS AS INSTRUMENT NO. 3009 OF 2006**

AND

**IN THE MATTER OF A TRANSFER OF PARCELS 25 & 35 FILED AT THE LAND
REGISTRY OF THE VIRGIN ISLANDS AS INSTRUMENT NO. 3019 OF 2006**

AND

IN THE MATTER OF A TRANSFER OF PARCEL 25 DATED 9TH JANUARY 2007

BETWEEN:

**(1) VINCENT PICKERING
(2) CEDRIC PICKERING**

Claimants

AND

JERRY WILKINS

First Defendant

THE REGISTRAR OF LANDS

Second Defendant

GCSD DEVELOPMENTS LIMITED

Ancillary Claimant/Third Defendant

Appearances:

Mrs. Hazelann Hannaway-Boreland for the Ancillary Claimant/Third Defendant

Mr. Baba Aziz, Senior Crown Counsel of the Attorney General's Chambers for the Registrar of Lands

2008: Jan.23rd, February 15th

JUDGMENT

(Land Registration Act – ancillary claimant seeking an indemnity from the Government for damages suffered as a result of the presumed rectification of the land register – application to strike out the ancillary claim on the ground that ancillary claimant precluded from

seeking relief from the court as the statute has a prescribed procedure for recovering an indemnity – whether matter simply one of procedure which can be corrected under the provisions of CPR 2000 or whether it goes to the court’s jurisdiction to entertain the claim)

- [1] **Joseph-Olivetti, J.:** Land disputes seldom fail to give rise to interesting issues. The background to this litigation concerns a claim for what I will loosely call family land by relatives, the Claimants and the First Defendant are related, and the effect it has had on an alleged innocent purchaser for value, GCSD Developments Limited. The preliminary application with which I am concerned is one by the Chief Registrar of Lands to strike out an ancillary claim by GCSD Developments Limited.
- [2] To put the application in context, Mr. Wilkins allegedly obtained registration of Parcels 25 and 35 of Block 2640B West Central Registration Section (“the Property”) on 23 October 2006. On 9th January, 2007 he sold Parcel 25 to GCSD Developments Limited (“GCSD”) for \$125,000.00. GCSD submitted their instrument of transfer to the Chief Registrar for registration on 16th January. Messrs. Vincent Pickering and Cedric Pickering (“the Claimants”) say that Mr. Wilkins obtained the registration by fraud or mistake.
- [3] Therefore on 19th January they applied to Hariprashad-Charles J. for and obtained an injunction ex parte against Mr. Wilkins to, inter alia, restrain him from dealing with the proceeds of sale of parcel 25 and an order for the stay of registration of the transfer to GCSD. Then on 2nd February, 2007 they instituted these proceedings against Mr. Jerry Wilkins and the Chief Registrar. They sought among other relief, cancellation of the registration of the Property in the name of Mr. Wilkins and substitution of themselves as the registered proprietors and an order that GCSD be compensated by **the Registrar** for the sums paid or that alternatively that they be compensated by the Registrar in the amount of the market value of parcel 25. GCSD was not an original party to the suit and one wonders how the Claimants could have made a claim for compensation on their behalf.
- [4] Subsequently, GCSD having heard nothing of its registration made inquiries and learnt of the injunction. They were subsequently served with the injunction on the 29th January. They applied on 7th February to have the stay on the registration of their instrument of transfer lifted. Hariprashad-Charles J granted several extensions of the injunction and GCSD’s application was initially fixed for hearing on 8th March. On 8th March directions were given and hearing fixed for 30th March. The application appears to have been

- unsuccessful as the stay on the transfer now termed an inhibition in accordance with the Act was continued.
- [5] On 8th October leave was granted to add GCSD as the Third Defendant and Ancillary Claimant. GCSD then claimed, inter alia, for a declaration that the transfer to them is valid they being innocent purchaser for value with no notice of any defect in Mr. Wilkins' title, and that the Chief Register do register the instrument of transfer and compensate the Claimants or alternatively if an order for rectification is made in favour of the Claimants that they be compensated by the Chief Register for the purchase price and all attendant costs.
- [6] On 9th October 2007, the Claimants applied for default judgment against Mr. Wilkins for damages to be assessed, no defence having been filed by him. On 8th October, Hariprashad-Charles J. gave judgment in default against Mr. Wilkins for fraud. See order of that date filed on the 17th October which simply states: – “2. Judgment in default is granted against the first defendant for fraud.”
- [7] The Chief Registrar in her defence resists the relief sought against her by both the Claimants and GCSD and on 7th December 2007 launched this strike out application against GCSD. This was to the effect that the High Court has no jurisdiction to hear the matter having regard to the provisions of the Act for recovering an indemnity from the government. The Registrar relies in support on her own affidavit (Ms. Scatliffe, Chief Registrar and GCSD on the affidavit of Ms. Sheila George)

The Registrar's submissions

- [8] Mr. Aziz, learned Crown Counsel for the Chief Registrar, premised his submissions on the assumption that having regard to the default judgment of 8th October 2007 this Court had, by implication, ordered the rectification of the Register in terms specified in paragraph 1 of the relief sought in the Statement of Claim¹. We have to assume without deciding the issue that this is so as having regard to the provisions of the Act, the right to indemnification by the Government arises in certain circumstances, one of them being if the court rectifies the Register pursuant to the Act.

¹ The Claim for rectification of the Register of the Parcel by Vincent Pickering et al, there being no grounds within Sections 38 and 140 of the Registered Land Ordinance for the invalidation of the transfer to the Ancillary Claimant GCS Development Limited.

- [9] Mr. Aziz contended as follows. The right of any person to claim an indemnity following upon rectification of the register and the corresponding obligation of the Government to provide such indemnity arise under the Registered Land Act Cap. 229 (“the Act”), Section 141 and is purely statutory with no basis in common law as it is not dependant on the fault of the Government. The section makes provision for indemnification out of public funds of persons suffering damage as a result of the rectification of the register under sections 139 and 140.
- [10] The Chief Registrar, says Mr. Aziz, is given original statutory jurisdiction to determine the right to indemnity to the exclusion of the High Court by section 143. And, where a statute creates a right or an obligation and gives a specific remedy or appoints a specific tribunal for its enforcement, a party seeking to enforce the right must resort to that remedy or that tribunal and not to others. Counsel relied among others on certain dicta in **Passmore and Others v. The Oswaldtwistle Urban District Council**² and **The Attorney General of St. Lucia et al v. Vance Chitole**³.
- [11] Additionally, that section 3 articulates the supremacy of the provisions of the Act in that it provides that no other written law, practice and procedure relating to land shall apply if they are inconsistent with the Act except as is specifically provided under the Act.
- [12] And, finally, that this statutory remedy of indemnification is not available against the Chief Registrar as it is a remedy which lies against the Government of the Virgin Islands and that the appropriate statutory legal representative of the Government for the purposes of legal proceedings is the Attorney General of the Territory. See the Crown Proceedings Act (Cap. 21). Thus it follows that this ancillary claim cannot be made against the Chief Registrar. Under section 143 the Registrar is the person vested with the statutory jurisdiction to determine whether the right to an indemnity has arisen and if so to make an award.

Submissions of GCSD

- [13] The import of Mrs. Hannaway-Boreland’s submissions on behalf of GCSD in a nutshell is as follows. Firstly, the Chief Registrar’s jurisdiction under the Act does not oust the Court’s

² [1898] A.C. 387 at page 394

³ Civil Appeal No. 14 of 2003 (St. Lucia)

- power to deal with GCSD's Ancillary Claim and in particular where the right to rectification and or indemnification was already before the court in the main action.
- [14] Secondly, that in considering the application regard should be had to the matters enunciated in Part 18.10(2) of CPR 2000. Taking those factors into consideration, there is an obvious connection between the facts of the Ancillary Claim and the original claim and the effect of severing the ancillary claim would be to deny GCSD of its proprietary interest in Parcel 25 and also its access to relief.
- [15] Thirdly, that the Ancillary Claim is not a fresh application, it arose by virtue of existing proceedings and it would be contrary to the Court's overriding objective to dismiss a claim, not on the basis of its merits, but on strict procedural points. See **Natasha Francis v. Neil Cochrane, Sonya Roberts, Dornalyn Beazer and the Attorney General of Antigua and Barbuda**⁴.
- [16] Fourthly, that the Court by Part 18.3(1) has an inherent jurisdiction to entertain ancillary claims for contribution or indemnification as this rule allows a *defendant who has filed an acknowledgement of service or a defence to make an ancillary claim for contribution or indemnity against another defendant*. Therefore GCSD is entitled to have the court determine their claim.
- [17] And, the Court's inherent power to deal with the legal and equitable interests of counter claimants and third party proceedings is enshrined in the West Indies Associated States Supreme Court Ordinance, Cap. 80 Section 16(1) (b) and also section 20.
- [18] Finally, if we look at the English court's interpretation of its equivalent provision to section 143 of the Act this provision has not been construed to give exclusive jurisdiction to the Registrar and judicial notice should be taken of the English court's approach as mandated by Cap. 80 section 11.

Court's Analysis

- [19] The starting point as I see it is the Act. This is intended to be a comprehensive system for obtaining title to land by registration and for regulating land registered under the Act. The overarching effect of this statute often has been the subject of judicial pronouncements,

⁴ High Court Civil Suit No. ANUHCV 0306/2004

one of the latest being that of the Privy Council in **Creque v. Penn**.⁵ Lord Walker of Gestingthorpe said at page 5 para. 13:- “The Land Registration Act provides for the British Virgin Islands to have the Torrens system of land registration, named after Robert Torrens, a South Australian MP who promoted the Bill by which the system (actually the brainchild of a German immigrant, Dr. Hübbe) was introduced in South Australia in 1858. Torrens later became Registrar-General of South Australia. The system was described by Barwick CJ in **Breskvar v. Wall [1971] 126 CLR 376, 385** as: “not a system of registration of title but a system of title by registration.”

[20] The Torrens system of which this Act is an example is meant to provide a full scheme for obtaining title by registration and for governing land registered under the Act. An innocent purchaser for value is intended to be able to rely implicitly on a certificate of title issued under the Act subject only to overriding interests as defined by section 28 of the Act. See section 38 in particular which affords certain protection to such persons. They are not required to make inquires or to ascertain the circumstances in which a registered proprietor was registered or to see to the application of any consideration. And, a trustee of land is deemed to be a registered proprietor. And Part X of the Act which deals with rectification and indemnity to my mind recognize that there may be instances when reliance on the register could result in loss and the Legislature has made provision for innocent parties to be compensated by the Government. With this perspective in mind I turn to the relevant sections.

[21] Section 139 of the Act gives the Registrar (properly the Chief Registrar) the power to rectify the register in certain circumstances e.g. formal matters⁶. Section 140 makes provision for rectification of the register by the court for fraud or mistake.

[22] And section 141 gives the right of indemnity. It provides as follows:-

“141(1) Subject to the provisions of this Ordinance 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 Ordinance; or

⁵ Privy Council Appeal No. 36 of 2005, delivered the 27th June 2007.

⁶ Formal matters and errors and omissions not materially affecting the interests of any proprietor; where person has acquired an interest in land by prescription under Part IX; with the consent of the persons interested, as a result of a resurvey and notice is given to all interested or affected persons.

(b) any mistake or omission in the register which cannot be rectified under this Ordinance, 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 Ordinance,

shall be entitled to be indemnified by the Government out of moneys provided by the House of Assembly. (Emphasis added)

(2) No indemnity shall be payable under this Ordinance 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.”

[23] Section 142 provides how the quantum of the indemnity is to be determined. And section 143 sets out the procedure to be followed for claiming an indemnity. It reads: - “The Registrar may on the application of any interested party, determine whether a right of indemnity has arisen under this part and, if so, award indemnity and may add thereto any costs and expenses properly incurred in relation to the matter.”

[24] And, if a person is dissatisfied with the Registrar’s decision or award that person has a right of appeal to the High Court under section 147(1).

[25] Clearly, section 141 entitles any person who has suffered damages as a result of rectification whether effected by the Registrar or as a result of a court order to an indemnity from the Government, **not the Registrar**. And I agree with Mr. Aziz’s submission that this right to indemnification by the Crown arises only by virtue of the Act and is not a common law right.⁷ Furthermore, it is incontrovertible that any suit against the Crown must be brought in the name of the Attorney General. See Section 6 of the Crown Proceedings Act. Therefore, the proper person to be named as the Ancillary Defendant

⁷It is noted however that the Crown has a right of subrogation so to speak by virtue of section 144 as it can recover from any person who has contributed or caused the loss.

was the Government not the Registrar. On this ground alone the Ancillary Claim should be struck out as it discloses no legitimate cause of action against the Chief Registrar.

[26] However, for completeness I will go on to consider the substantive issue argued. This is whether the Court has jurisdiction to consider GCSD's claim in the light of the Act having laid down a procedure for claiming an indemnity in these circumstances from the Government.

[27] On a purposive interpretation of those sections, in particular section 143, it is obvious that Parliament vested the original jurisdiction to hear such claims in the Registrar with a right of appeal to the High Court. This is not surprising having regard to the general scheme of the Act and to the wide powers granted to the registrar to administer the Act. And the argument that Parliament cannot be taken to have ousted the Court's jurisdiction cannot fly. Parliament has not taken away the court's jurisdiction as an aggrieved person has access to the court by way of any appeal under section 147. I find nothing repugnant in those provisions. It is established law that where a statute gives a right or remedy and lays down a procedure for ventilating that right or remedy then the claimant is bound to follow that procedure. There have been numerous judicial pronouncements to that effect and it is more often met with in areas of public law. See **De Smith Woolf and Jowell Judicial Review of Administrative Actions 5th Edn. pg. 407 para. 8-013**. And see also the Court of Appeal in Civil Appeal No. 14 of 2003 – **(1) The Attorney General of St. Lucia (2) Comptroller of Customs v. Vance Chitolie** where Gordon JA said:-

“It is undoubtedly good law that where a statute creates a right and, in plain language, gives a specific remedy or appoints a specific tribunal for its enforcement, a party seeking to enforce the right must resort to the remedy or that tribunal, and not to others. As the House of Lords ruled in *Pasmore v. Oswaldtwistle* U.D.C. (Per Lord Halsbury): **“The principle that where a specific remedy is given by statute, it thereby deprives the person who insists upon a remedy of any other form of remedy than that given by the statute, is one which is very familiar and which runs through the law’... The real answer to the Plaintiff’s contention under this head can be put in several ways: No act of the parties can create in the courts a jurisdiction which Parliament has said will vest, not in the courts, but exclusively in some other body. Nor**

again can a party submit to, so as to make effective, a jurisdiction which does not exist: which is perhaps another way of saying the same thing.”

- [28] Here, the CGSD has a statutory right to seek indemnification from the Government by section 141 of the Act and the Act sets out the procedure for so doing and gave original jurisdiction to the Registrar. This is not a question of procedure but it goes to the question of jurisdiction as was recognized by the Court of Appeal in **The Attorney General of St. Lucia and the Comptroller of Customs**. It is thus not simply a breach of civil procedure which can be cured by the relevant provisions of CPR 2000 as has been urged upon us by Mrs. Hannaway-Boreland hence her reliance on **Natasha Francis**. It follows then that GCSD must comply with the statutory procedure and cannot resort to this court as the court as no jurisdiction at first instance to determine claims for indemnity under the Act.
- [29] Furthermore, the argument that the matter was already before the Court and that the court has inherent jurisdiction to consider all counterclaims and to grant any relief that the Court thinks a Claimant is entitled to does not assist. The mere fact that someone makes a claim does not automatically give the court jurisdiction. Again the dicta of Gordon J.A, cited before is pertinent – parties cannot by their own acts clothe the court with jurisdiction. Counsel’s submissions on the effect of Sections 16 and 20 of the West Indies Associated States Supreme Court Act are only superficially attractive as these sections can only apply to matters which are properly before the court. Likewise, CPR Part 18.3(1) cannot avail the GCSD as this provision can only apply where the Court has jurisdiction to hear the claim in the first place. This provision then must speak to a right of contribution or indemnity arising under common law or in contract not where the right is a statutory one and the procedure for claiming it is governed by statute.
- [30] Much emphasis was placed on **Re Boyle’s Claim**⁸ and **Clark and another v. Chief Land Registrar and Another**⁹ and the approach of the English Court in interpreting a provision similar to our section 143.
- [31] In **Re Boyle’s Claim**, Mr. Boyles claimed an indemnity from the insurance fund set up for that purpose under section 83 of the Land Registration Act 1925 UK. This was for loss suffered by reason of the rectification of the Register. The Attorney General represented

⁸ [1961] 1 All ER 620

⁹ [1993] 2 All ER 936

the trustee of the fund which had been set up under section 85(1) of that Statute. Section 83(1) of Land Registration Act 1925 provides:-

“Subject to the provisions of this Act to the contrary, any person suffering loss by reason of any rectification of the register under this Act shall be entitled to be indemnified.”

[32] Then there are detailed provisions, which I do not find it necessary to read. The rectification of the register was in fact effected by the county court under section 82(1) which states that:-

“The register may be rectified pursuant to an order of the court or by the registrar, subject to an appeal to the court...”

The learned judge, Wilberforce, J explained.

[33] It is therefore moot without looking at the entire Land Registration Act to determine whether the Land Registration Act contains provisions similar to our section 141. Mrs. Hannaway-Boreland says that the Court heard the claim and therefore this Court should adopt that approach and not cede original jurisdiction to the Registrar. Counsel further prayed in aid section 11 of the West Indies Associated States Supreme Court Act.

[34] The short answer to this is that the point as to the court’s jurisdiction was never in issue in those cases and those cases cannot be considered an authority to establish that section 143 should be construed as to give jurisdiction to the court as well as the Chief Registrar. However similar statutes may be, one has to consider the relevant statute in its context as a whole and one cannot import a meaning from a statute in another jurisdiction without unequivocal indication from the Legislature. The reliance placed on the all too familiar **section 11 of West Indies Associated States Supreme Court Act**¹⁰ to persuade us to

¹⁰ The jurisdiction vested in the High Court in civil proceedings and in probate, divorce and matrimonial causes shall be exercised in accordance with the provisions of this Ordinance and any other law in operation in the Territory and rules of court, and where no special provision is therein contained such jurisdiction shall be exercised as nearly as may be in conformity with the law and practice administered for the time being in the High Court of Justice in England.”

adopt this approach is misconceived and would do violence to the very section. This section does not enjoin this Court to adopt or to follow an English court's interpretation of an English statute and apply it to the construction of our own statute. The section speaks to law practice and procedure where a lacuna exists. Here there is no lacuna, we are simply called upon to interpret our legislation and thus there is no need to pray in aid English law practice and procedure. .

Conclusion

[35] For the foregoing reasons the application of the Chief Registrar is well founded. The provisions of the ancillary claim in so far as it seeks an indemnity from the Registrar is struck out. The action must be scheduled for hearing of the issues relating to the claims for rectification before Hariprashad-Charles J. in particular having regard to the order of 8th October at the court's earliest convenience. I will hear counsel on the timetable for so doing and on costs.

Rita Joseph-Olivetti
High Court Judge
British Virgin Islands