

ANTIGUA AND BARBUDA

IN THE COURT OF APPEAL

HCVAP 2006/020A

BETWEEN:

SOUTHERN DEVELOPERS LIMITED

1st Appellant/Defendant

**[1] LESTER BRYANT BIRD
[2] ROBIN YEARWOOD
[3] HUGH C. MARSHALL SNR.**

and

THE ATTORNEY GENERAL OF ANTIGUA AND BARBUDA

Respondent

Before:

The Hon. Mr. Hugh A. Rawlins	Justice of Appeal
The Hon. Mde. Ola Mae Edwards	Justice of Appeal (Ag)
The Hon. Mr. Errol L. Thomas	Justice of Appeal (Ag)

Appearances:

Mr. Hugh Marshall, Ms Rika Bird and Mr. Mark Harris for the Appellant
Ms. Cherissa Thomas holding a watching brief for the Second-named Defendant
Mr. Justin Simon, QC for the Respondent

2007: December 6;
2008: April 7.

Public law – illegality – misfeasance in public office – sufficiency of evidence pleaded – continuity of the office of Attorney General – defence of laches – estoppel – rule 8.6(1) of the Civil Procedure Rules 2000 (CPR 2000)

The Attorney General, the claimant/respondent, instituted proceedings on 12th October, 2005 against the defendants/appellants in which it was alleged that the sale in 1987 of 25 acres of Crown land to the first-named defendant, Southern Developers Ltd., at a time when the second to fourth-named defendants were cabinet ministers was tainted with illegality. It was further alleged that the second to fourth-named defendants had a vested interest in Southern Developers Ltd. which was not disclosed to the cabinet. The claimant sought a number of declarations and

rescission of the transfer to the first-named defendant. The first-named defendant applied to strike out the claim on 28th April, 2006. By Order of 10th October, 2006 the application was dismissed with costs to the respondent, which decision is now appealed against.

Held, dismissing the appeal and awarding costs to the respondent:-

1. Illegality means “that which is contrary to the principles of law as contradistinguished from mere rules of procedure.” The tort of misfeasance is indivisible as a cause of action and there is no need for the particular limbs of the tort to be specifically pleaded. The claimant/respondent’s statement of case does mark out the parameters of the case being advanced against the appellant/defendant in relation to illegality and misfeasance in public office. The pleadings are therefore sufficient.

Dicta of Lord Woolf in **McPhilemy v Times Newspapers et al** [1999] 3 All ER 775 applied; **Wilding v Commissioner of Police for the Metropolis** [2004] EWHC 3042 distinguished.

2. The rights of the public are vested in the Crown and the Attorney General enforces these rights as an officer of the Crown. In the exercise of these rights and powers the Attorney General must act for the public good and not for improper or ulterior purposes. Notwithstanding the continuity in the office of Attorney General therefore, the Attorney General cannot ignore a wrong that offends against the public good. The action by the Attorney General was properly instituted.

Three Rivers District Council v Bank of England [2000] 3 All ER 1, **Jones v Swansea City Council** [1989] 3 All ER 162 and **Gouriet v Union Post Office Workers** [1977] 3 All ER 70 applied.

3. The doctrine of laches cannot apply here as it is a defence whose viability is determined after a full trial. Even if this were not the case, this ground of appeal would fail for the question of delay must be judged from the time when the claimant became aware of the existence of the facts constituting the title to the equitable relief in question. The pleadings suggest that the new Attorney General became aware of sufficient facts from 24th March, 2004. Proceedings were brought on 12th October, 2005. In the circumstances, this would not constitute an unreasonable delay.

Attorney General v Grand Junction Canal [1909] 2 Ch 505 distinguished.

4. Estoppel in pais or estoppel by representation are matters for determination at trial.

JUDGMENT

[1] **THOMAS, J.A. (AG):** This is an appeal by Southern Developers Limited only, against the decision of Master Cheryl Mathurin in Civil Suit No. ANUHCV2005/0512 as contained in the Order of the High Court dated 10th October, 2006.

Background

[2] On 12th October, 2005 the claimant, the Attorney General of Antigua and Barbuda filed a claim form together with a statement of claim in which Southern Developers Limited, Lester Bryant Bird, Robin Yearwood and Hugh C. Marshall Snr. were named as defendants.

[3] Central to the claim is a parcel of Crown land recorded on the Land Register as Parcel 35, Block: 55 1382A Registration Section: South West. It contains 25 acres by measurement and was conveyed to the first-named defendant in or about the year 1987 as a result of a cabinet decision. The second, third and fourth defendants were then Ministers of Government and Cabinet members. At the material time Antigua Aggregates Ltd owned 80% of the shares in Southern Developers and the directors of Antigua Aggregates Ltd were the second, third and fourth defendants.

[4] In the claim, the claimant seeks a number of declarations and rescission of the transfer to the first-named defendant.

[5] By application dated 28th April, 2006 supported by affidavit of even date, the first-named defendant sought an order that:

- “1. The Claim Form and Statement of Claim dated 12th October, 2005 be struck out
2. Summary judgment in favour of the Applicant/First-named Defendant pursuant to the Civil Procedure Rules 2000, Part 15
3. Costs.”

[6] The application was heard by the learned Master on 17th May and 13th July, 2006. The ruling was delivered on 10th October, 2006 in which it was ordered as follows:

- “1. The application filed on 28th April 2006 is hereby dismissed.
2. Costs to the Respondent in the sum of \$5,000.00.”

The Appeal

[7] By application supported by affidavit, both filed on 24th October, 2006, the first-named defendant sought leave to appeal. The leave was duly granted on 6th March, 2007. It was ordered then that:

- "1. The leave is granted to appeal against the decision of Honourable Master Cheryl Mathurin delivered on 10th October, 2006.
2. The Order of the Honourable Master Cheryl Mathurin delivered on 10th October 2006 be stayed pending the determination of [the] appeal in this matter."

[8] The notice of appeal was filed on 21st March, 2007 in which matters of fact and law were in issue.

[9] The findings of fact challenged are:

- "1. That the Claim is pleaded in sufficient detail to meet the necessary requirements to enable the defendants to answer.
2. That the Court should not order the striking out of the Claim on the basis of the Defence of Laches which had not been substantiated any basis either in the defence or in the affidavit evidence in support of the application.
3. The arguments in relation to estoppel are at the very least artificial."

Grounds of Appeal and Relief Sought

[10] The grounds of appeal are as follows:

"(a) The Learned Master erred in law when she found that the Claimant/Respondent has sufficiently pleaded facts and particulars of facts to support its claim for illegality as claimed at paragraph 1 of the Claim form or at all in that no particulars of the type of illegality, its elements and how the defendants had contravened them, were pleaded.

(b) The Learned Master erred in law when she found the misfeasance in public office was sufficiently pleaded by the Claimant/Respondent in the Statement of Case and further information filed on the 10th February 2006 in that the Claimant/Respondent has not set out in detail or any sufficient detail the manner and/or particulars in which the tort of misfeasance in public office was committed by any of the Defendants thereby resulting in

any illegality and occasioning loss to be suffered by the Claimant/Respondent.

(c) The Learned Master erred in law when she held that the Attorney General was not barred from this Action in that the Office of the Attorney General is continuous and it was the Attorney General that effected the disposition of lands to the Appellant upon the representation that it was lawful so to do.

(d) The Learned Master erred in law when she found that the defence of laches has not been substantiated by any basis either in the defence or in the affidavit in support of the application for summary judgment in that the Learned Master paid no regard or no sufficient regard to the fact that the alleged transaction took place in 1987 to the full knowledge and participation of the Claimant that is a continuous Public Office.

(e) That the Learned Master erred in law when she found that the arguments in relation [to] estoppel are at the very least artificial and would undermine the doctrine of misfeasance in public office in that the Claimant was the entity that enabled the transaction complained of and represented to the defendants that it was lawful so to do.

The relief sought from the Court of Appeal is:

- (a) that the Claim Form and Statement of case be struck out;
- (b) that the Applicant be given the cost of the application in the Court

below and in the appeal.”

[11] The grounds of appeal must be analysed.

Ground 1: The lack of facts to support the claim of illegality

[12] On this ground, Southern Developers Limited, the appellant, contends that the respondent at paragraph 7 of its statement of claim avers that the second, third and fourth-named defendants were at all material times shareholders of Antigua Aggregates Limited which in turn owned 80% of the shares of the first-named defendant. Further, that the third and fourth-named defendants are directors of the first-named defendant.

[13] Critically, however, Mr. Hugh Marshall Jr., counsel for the appellant, takes issue with the respondent’s pleading to the effect that the transfer of Parcel 35 to the appellant/first-named

defendant is tainted with illegality without a definition of illegality and without an identifiable cause of action. In this regard, reliance is placed on **Wilding v Commissioner of Police for the Metropolis**.

[14] On the question of pleaded facts in relation to ground 1, Mr. Justin Simon, QC, for the respondent submits that the statement of case consists of the claim form, the statement of claim and the particulars supplied which must all be examined as a whole. It is submitted further that the allegations are that the appellant, Southern Developers Limited, was sold Crown land at a gross undervalue by the cabinet members three of whom had a vested undisclosed interest in the appellant. Further, that the land was never developed as promised and that the appellant has, as a result, substantially benefited to the detriment and resulting loss to the State and now seeks to sell the very underdeveloped land to a third party at its true market value.

[15] The question as to the content of a claim form is governed by rule 8.6(1) of CPR 2000 which provides in part that:

- “The Claimant must in the Claim form:
- (a) include a short description of the nature of the Claim
 - (b) specify any remedy that the claimant seeks....”

[16] Before dealing with the content and requirements of rule 8.6(1) of CPR 2000, I find it unavoidable to refer to what may be referred to as the outstanding dictum of Lord Woolf in **McPhilemy v Times Newspapers Ltd. et al**. This dictum provides a broad overview of pleadings under the new Civil Procedure Rules in England and by extension in the OECS jurisdiction where the new rules were adopted. This is what His Lordship said:

“The need for extensive pleadings including particulars should be reduced by the requirement that witness statements are now exchanged. In the majority of proceedings identification of the documents upon which a party relies, together with copies of the party’s witness statements, will make the detail of the nature of the case the other side has to meet obvious. This reduces the need for particulars in order to avoid being taken by surprise. This does not mean that pleadings are now superfluous. Pleadings are still required to mark out the parameters of the case that is being advanced by each party. In particular they are still critical to identify the issues and the extent of the dispute between the parties. What is important is that the pleadings should make clear the general nature of the case of the pleader. This is true both under the old rules and the new rules.”

[17] It means therefore that the requirement of a short description of the nature of the claim in rule 8.6(1) must be seen in the context of Lord Woolf's dictum. And, in any event, a short description can only mean what it says.

[18] The respondent/claimant's case is that 25 acres of Crown land situate at Cades Bay were sold and transferred to the first-named defendant by instrument filed on 18th February, 1987 at a time when the second, third and fourth-named defendants were ministers of the Government of Antigua and as such members of the Cabinet at the material time. The contention is that the land was sold at an undervalue at \$10,000.00 per acre amounting to a total purchase price of \$250,000.00. It is further contended that five months after the said sale the said land was mortgaged to secure the sum of \$1,000,000.00.

[19] Another aspect of the case is that the third and fourth defendants are directors of the first-named defendant, Southern Developers Ltd.

[20] In the premises, the respondent/claimant's contention is that the whole transaction regarding the 25 acres of land is tainted with illegality and as such is voidable at the instance of the Crown.

[21] In contending that there is no identifiable cause of action, reliance is placed on the **Wilding** case. This case turns on rule 16.2 of the English Civil Procedure Rules, the analogue of our rule 8.6(1) of CPR 2000. It concerned the suspension from office of a police officer which in effect turned out to be the only event identified in the claim form. The question

therefore arose as to whether a cause of action was identified. In those circumstances, this is the way in which Mr. Justice Henriques dealt with the issue at paragraphs 57 to 65:

"57. Turning to the claim form itself. The single event identified in the claim form was the suspension from service. What cause of action was identified? CPR part 16.2 provides that a claim form must:

- a. contain a concise statement of the nature of the claim;
- b. specify the remedy which the claimant seeks;

- c. where the claimant is making a claim for money, contain a statement of value; and
- d. contain such other matters as may be set put in a practice direction.

58. The phrase 'a concise statement of the nature of the claim' in part 16.2(1)(a) is derived from the requirement as to the general endorsement of a writ of summons and of the old rules of the Supreme Court. Both parties agree that the purpose of the statement of the nature of the claim is to inform the defendant in the simplest terms of the case he has to meet. Looked at objectively, I must ask: What cause of action was contemplated in this claim form?

59. Since no single element of the tort of misfeasance is referred to, I cannot find that any defendant receiving this document could realistically believe that an action in misfeasance in public office had been commenced against him, nor indeed an action in malicious procurement, nor trespass to land, nor false imprisonment; or indeed that more than one claim was being brought against him. No single element of any one tort is referred to in the claim form. For example, in relation to misfeasance in public office, neither unlawful abuse of power, intention to injure, acting in bad faith, malice, nor any element of any other tort is specified.

60. Whilst part 7.3 allows a claimant to use a single claim form to start all claims which can be conveniently disposed of in the same proceedings, it is a matter of elementary pleading to specify independently each and every cause of action. This is not adopting a formalistic or technical approach. A defendant should not be left to guess at the cause or causes of action pursued against him. He should be able to read them. He should not be required to divide them. It is the only way in which a defendant can know what cause or causes of action are being pursued against him.

61. The only two clues in the present claim form were the word "Suspension" and the date of issue. The submission that a claimant should not be disadvantaged, merely because his particulars of claim are more wide-ranging than the description of the claim on the claim form, denigrates for the purpose of the claim form.

62. Additional causes of action can be added, subject to the discretion of the court, rule 7.2, and when statute barred, subject to rule 17.4. Whilst the CPR has brought a degree of informality, flexibility and pragmatism to pleadings, a defendant is entitled to know from the claim form the nature of the claim or claims he has to meet, and I find that he was not so informed of any claim in any tort.

63. I find that on the basis of all the surrounding circumstances, not least the date and manner of service of the claim form, and the service of the second claim form, that the claimant intended to bring an action in negligence.

64. To reach any conclusion more favorable to the claimant is simply not possible on an objective reading of the claim form. I also find that the defendant understood this to be a claim in negligence, a finding not disputed by Mr. Beer.

65. Having concluded that this commenced as a claim in negligence, I turn to consider in what circumstances, if it is permissible, either to amend the claim by way of addition of further causes of action, or to include such causes of action in the particulars of claim."

[22] The procedural difficulties in the **Wilding** case are clear. For this reason, I find it difficult to understand the reliance on the case by the appellant. I say this because it is clearly pleaded at paragraph 3 of the claim form that the claimant is seeking a declaration that the second, third and fourth-named defendants as former ministers of Government are guilty of misfeasance in public office and breach of public trust in relation to the sale of Crown lands in their capacity as servants and agents of the Crown. It is also clear from the claim form that the issue in the case relates to 25 acres of Crown land sold at an undervalue to the appellant/first-named defendant and the attendant circumstances involving the same persons.

[23] Regardless of what test is applied to determine whether or not the first-named defendant has an idea as to the case it has to face, the answer will be in the affirmative. And even if there was any doubt, the statement of claim elaborates further on the case.

[24] The contention regarding a definition of illegality can be dealt with in short order.

[25] According to **Blacks' Law Dictionary** "illegal" means "against or not authorized by law" and "illegality" means "that which is contrary to the principles of law, as contradistinguished from mere rules of procedure." Therefore, based on the statement of case, the appellant/first-named defendant must have some idea as to what 'tainted with illegality' means having regard: to the pleading concerning the sale of the Crown land at an undervalue, the subsequent mortgage of the land and the breach by the second, third and fourth defendants of their respective fiduciary and public duties as ministers of the Crown. In all the circumstances, I agree that the claimant/respondent's statement of case does give the appellant/defendant some notion as to the case it has to face. Put otherwise, it marks out the parameters of the case being advanced by the claimant/respondent. I therefore hold that this ground of appeal fails.

Ground 2: Insufficiency of the pleading on misfeasance in public office

[27] For the purposes of this ground the first-named appellant contends that given the gravity of the tort of misfeasance, findings of the learned Master were cursory and an inefficient expression of the law and there is a lack of particulars in the statement of case. It is also submitted by learned counsel for the appellant, Mr. Hugh Marshall Jr., that the appellant has not been apprised as to whether it is being sued as having targeted malice against the people of Antigua and Barbuda or whether it is supposed to have knowingly acted unlawfully.

[28] On the other hand, learned counsel for the respondent, Mr. Justin Simon, QC, submits that the action and participation of the second, third and fourth defendants as Cabinet ministers in the sale of the land to their “alter ego”, Southern Developers, constituted the tort of misfeasance.

[29] It is the further submission of learned counsel for the respondent, that the respondent’s statement of case raises issues sufficiently pleaded that place the appellant on its defence. The submission continues thus: “There is no necessity for the particular limbs of the tort to be specifically pleaded. The tort of misfeasance is indivisible as a cause of action and is constituted once the claimant raises on the face of his statement of case the element of bad faith in the exercise of an executive or administrative power by the defendant.”

[30] In the circumstances, the question is whether the tort of misfeasance is sufficiently pleaded for the purposes of rule 8.6(1) of CPR 2000 and further, whether it is necessary to plead a specific limb of the tort. These are the questions raised under this ground of appeal and the relevant submissions. Insofar as the matter of the pleading is concerned, given the purpose of the pleadings at this stage and using the same reasoning and the related principles, the answer is the same as in relation to the first ground of appeal. In other words, the pleadings are sufficient.

[31] The answer to the second question rests primarily on Lord Steyn’s speech in the House of Lords in the case of **Three Rivers District Council v Bank of England**. In this case His Lordship defined the two different forms of liability with respect to misfeasance in public office. The first is targeted malice by a public officer, being conduct specifically intended to injure a

person or persons. The second is where a public officer acts knowing that he has no power to do the act complained of and that the act will probably injure the [claimant]. Lord Millett, in the same case, expressed the view that these are merely different ways in which the necessary element of intention is established. According to His Lordship: “In the first limb it is established by evidence; in the second by inference.”

[32] I agree with Mr. Simon, QC, that once the element of bad faith is established in the exercise of a power, the tort is constituted and the question of intention may be established either by way of targeted malice or recklessness. This accords with what Lord Millett said as noted above.

Ground 3: Continuity of the office of Attorney General

[33] Learned counsel for the appellant contends in this regard that the current Attorney General cannot impugn a decision taken in Cabinet and guided by the then Attorney General, unless there is legislation which permits such action. This submission has only to be stated to be utterly rejected.

[34] By virtue of section 82(1) of the Constitution of Antigua and Barbuda the office of Attorney General is established. The section goes on to say that he is the principal legal advisor to the Government. Under the **Crown Proceedings Act** where the permitted actions are brought against the Crown, the Attorney General must be the nominal defendant. In like manner, where proceedings are instituted by the Crown, they must be instituted in the name of the Attorney General.

[35] These powers must be exercised for the public good and not for improper or ulterior purposes. This proposition is supported by a number of dicta, including Nourse LJ in **Jones v Swansea City Council** when he said this: “It ought to be unthinkable that the holder of an office of government in this country would exercise a power thus vested in him with the object of injuring a member of that public by whose trust alone the office is enjoyed. It is unthinkable that our law should not require the highest standards of a public servant in the

execution of his office.” Further, in **Gouriet v Union of Post Office Workers** Lord Wilberforce said:

“It can properly be said to be a fundamental principle of English law that private rights can be asserted by individuals, but that public rights can only be asserted by the Attorney General as representing the public. In terms of constitutional law the rights of the public are vested in the Crown and the Attorney General enforces them as an officer of the Crown.”

[36] On these dicta alone and given the pivotal nature of the office of the Attorney General, it is reasonable to infer that the actions of the former Attorney General cannot be binding on the current Attorney General if it is established, as alleged, that he acted in misfeasance or in breach of his fiduciary duties.

Ground 4: Equitable defence of laches

[37] Learned counsel for the appellant, Mr. Hugh Marshall Jr, in seeking to bring the doctrine of laches into the equation submits that the supposed cause of action arose in February 1987 and the claim was filed in October 2005 – approximately 19 years. He contends further that in the circumstances it cannot be doubted that one of the main persons, Anthony Michael, is dead, his business partner has long gone, the evidence has been forgotten or lost and potential witnesses have gone abroad.

[38] In terms of the law, it is argued, on behalf of the appellant, that despite the provisions of the **Limitation Act** which remove the statutory time limits to the commencement of actions in proceedings by the Crown, the equitable doctrine applies to proceedings brought by the Crown. Further, that equity will also prevail over the Act to prevent an abuse of the process of the Court to prevent the Crown from hounding down its citizens.

[39] For his part, Mr. Justin Simon, QC, submits that the doctrine of laches is a defence which ought to be pleaded as such so that its viability can be determined at trial. It is also contended that laches is an equitable defence and therefore applicable only at the discretion of the court based on the overall equities in the case. And with respect to the case of **Attorney General v Grand Junction Canal**, Mr. Simon, QC, says that it is distinguishable

from the case at hand based on the grounds that: (1) the defence of laches succeeded after a full trial; (2) it was a relator action not an ex-officio claim by the Crown; (3) the relief sought was a mandatory injunction; and (4) the judge felt that the public interest had likely not been prejudiced.

[40] My first reaction to the submissions is to say that the doctrine of laches cannot apply in the circumstances since, as Mr. Simon, QC, contends, it is a defence whose viability is determined after a full trial. Indeed, to state the obvious, these are the circumstances in which the full evidence of the delay will be known to the court. Even if I am incorrect in that conclusion, the following learning in I.C.F. Spry, **Equitable Remedies** throws light on the issue:

“The defence of laches arises if two conditions are satisfied: first, there must be unreasonable delay on the part of the plaintiff in the commencement or prosecution of proceedings, and secondly, in view of the nature and consequences of that delay it must be unjust in all the circumstances to grant the specific relief that is in question. Whether absolutely or on appropriate terms or conditions.

In the first place, it must hence be shown that the plaintiff has been guilty of unreasonable delay. Prima facie the time from which the length of delay is judged is the time at which the plaintiff became aware of the existence of the facts that gave rise to a right to the equitable relief in question. So it has been said in the Privy Council, ¹⁴‘In order that the remedy should be lost by laches or delay, it is, if not universally at all events ordinarily – and certainly when the delay has been only such as in the present case – necessary that there should be sufficient knowledge of the facts constituting the title to relief.’ It is ordinarily sufficient that the plaintiff has been put on suspicion, that is, that he is aware of sufficient matters to raise in his mind a doubt whether an infringement of his rights has taken place, but it is not ordinarily sufficient that if he were reasonably diligent in the examination of relevant matters he would have had sufficient knowledge or

[41] This case and the doctrine of laches must be seen in the appropriate context. It is common knowledge that on 24th March, 2004 with a change of Government, the office of Attorney General continued but there was a new holder of that office. This new holder instituted these proceedings on 12th October, 2005.

[42] The learning suggests that the question of delay must be judged from the time when the claimant became aware of the existence of the facts that give rise to a right to the equitable relief in question. That said, it cannot be doubted that the whole matter, as the pleadings show, is tied up in a web of governmental procedures.

[43] There is nothing in the pleadings to suggest that the new Attorney General became aware of sufficient facts of the issue prior to 24th March, 2004. That being the case, the question of delay must be reckoned from that date. In the circumstances the following passage from **Halsbury's Laws of England** must be applied *mutatis mutandis*:

“Acquiescence implies that the person acquiescing is aware of his rights and is in a position to complain of an infringement of them. Hence acquiescence depends on knowledge, capacity and freedom....As regards freedom, a person does not acquiesce while he is subject to such circumstances of undue influence or other pressure as to deprive him of the ability to give a true consent, and laches is not imputed until he is released from the position in which he is placed by these circumstances.”

I would disallow this ground of appeal.

Ground 5: Estoppel

[44] The appellant's submissions on this ground of appeal are: (i) that the Attorney General's right to advise the Cabinet is exercised *ex officio*, (ii) that that right and other relevant ones were exercised in 1985 and since on matters subject to this claim and appeal, and (iii) the Attorney General's office is estopped from proceeding with a claim in which it gave the advice which is the subject of the claim and is estopped from denying the implied statements of fact which were made by the claimant in 1985.

[45] In view of the submission by the appellant that estoppel arises by virtue of the advice given by the Attorney General to the Government and which was followed, learned counsel for the respondent points to the constituents of estoppel. Learned counsel contends that, essentially, the doctrine involves a representation to another and that person acting on such

representation to his prejudice such that it would be unconscionable to allow the maker to resile from his earlier representation. The submission continues thus: “The Respondent denies any such representation as alleged was ever made. This is clear from the Statement of Case that the issue of a valuation of the lands did not arise; the second, third and fourth Defendants are best able to say how the price was arrived [at] and provide evidence of any representation allegedly made, particularly in light of the amount borrowed and secured by the land some ten months later.”

[46] On the whole, I hold the view that the submissions on both sides point to evidence that is not before the court given the purpose of the initial proceedings in the High Court. Therefore, just as with the doctrine of laches, I consider that estoppel in pais or estoppel by representation are matters for trial.

[47] In view of my appeal, this ground also fails.

Result

[48] I would dismiss this appeal. The appellant must pay the respondent two thirds of the costs ordered below in accordance with rule 65.13(b) of CPR 2000.

Errol L. Thomas
Justice of Appeal (Ag)

Hugh A. Rawlins
Justice of Appeal

Ola Mae Edwards

Justice of Appeal (Ag