

ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE

CLAIM NO. 2002/0590

BETWEEN:

ALTHEA JAMES Attorney for
VINCENT BENJAMIN, GEORGE BENJAMIN,
CONRAD BENJAMIN, MEME BEN-WATSON,
HAZLE DOWNES, GORDON BENJAMIN and
KATHLEEN IRVINE

Claimants

And

EVA FORTUNE

Defendant

Appearances:

Ms. Asheen Joseph for the Claimants

Mr. Trevor Kendall for the Defendant

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2008: October 31
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RULING

[1] **Blenman J:** This is a ruling on the preliminary issue as to whether the defendant's defence is sustainable.

[2] **Background**

Ms. Althea James, who is the Attorney for Vincent Benjamin, George Benjamin, Conrad Benjamin, Meme Ben-Watson, Hazel Downes, Gordon Benjamin and Kathleen Irving (the claimants) in that capacity has brought a claim against Eva Fortune.

- [3] In the statement of claim, Ms. James says that the claimants were the registered owners of property situate at English Harbour and described as Registration Section: Falmouth & Bethesda: Block 34 238 D Parcel 71 and that Ms. Fortune has erected a wooden chattel house on the land without obtaining the consent of the owners. Despite requests that Ms. Fortune vacates the land, she has refused to remove the chattel house. Accordingly, the claimants complain that Ms. Fortune is trespassing on the land and seek the Court's assistance in getting Ms. Fortune to vacate the land by removing the chattel house and the concrete pillars from Parcel 71. The claimants also seek an injunction restraining Ms. Fortune from building any structures on the property.
- [4] In her defence, Ms. Fortune contends that the land in question belonged to her grandmother Margaret Benjamin and she is entitled to occupy it since she claims through her grandmother's interest. Ms. Fortune has filed a defence in which she disputes that the claimants were entitled to be registered as the owners of Parcel 71. She says that Mr. Hubert Benjamin, deceased, through whom the claimants are claiming title, had wrongfully and fraudulently and unknown to her, obtained registration of the Parcel 71. Mr. Hubert full well knew that the lands were occupied by his brothers and sisters including Ms. Fortune's mother, the latter who had built a dwelling house on a portion of Parcel 71. Ms. Fortune says that her mother had lived in the house since 1972.
- [5] Accordingly, Ms. Fortune says that Mr. Hubert was not entitled to be registered as the owner. She says that the claimants are trustees of the property for the children of her grandmother.
- [6] In addition, Ms. Fortune denies that she is a trespasser on Parcel 71. She says that both she and her mother have been in peaceful, open and uninterrupted possession of the parcel of land on which her house is, for in excess of 12 years. Any right to possession of the land that the claimants may have had, have been extinguished or barred by reason of her and her mother's occupation of the land for in excess of 12 years. She relies on the acquisition of title to the land through adverse possession.

[7] **Issues**

In determining whether Ms. Fortune's defence is sustainable, the following issues arise for the Court's determination:

- (a) Whether it is open to Ms. Fortune to contend that Mr. Hubert obtained title to Parcel 71 by fraud.
- (b) Whether it is open to the defendant to raise a defence of adverse possession for a period of 12 years.

[8] **Defendant's submissions**

Learned Counsel Mr. Trevor Kendall told the Court that it is Ms. Fortune's case that the material lands were family lands and were never property of the predecessor in title of the claimants, and that the lands were wrongfully and fraudulently claimed by and through the predecessor in title, as his own, (himself being a child of Margaret Benjamin deceased), when he well knew that the lands were occupied by members of the family of the remaining children of Margaret Benjamin, deceased, whom for many years prior to their claim and up to this day continue to reside upon, occupy and control the said lands openly and to the knowledge of the general community and the claimants and his predecessor in title. The defendant contends that the claimants hold same as trustees for the children of Margaret Benjamin, deceased. The defendant further says that she has been in occupation of Parcel 71 for well upwards of 12 years, and her mother before her, in their original family home situated on the same land, and that she erected a dwelling house thereon and exercised other rights of ownership thereon, and that the claimants' right to possession and title thereto, which is denied, is thereby barred and/or extinguished.

- [9] Mr. Kendall said that in fact, the claimants' opening averment is that the defendant entered the subject lands without their knowledge or consent, a matter which is consistent with the defendant's position. No date is stated as to the entry of the defendant. Thus, they cannot now be heard to say that some other construction should be placed on the quality and period of the possession and occupation of the subject lands by the defendant. No

statement by the claimants was made regarding prior Court proceedings or on any purported memorandum of receipt being an acknowledgment of title on the part of the claimants. The Court is being asked in the face of the bare and estranged averments in the statement of case of the claimants to review a bundle of papers and history in the List of Documents on which the claimants have omitted to frame any view or position for the Court to adopt or reject or to give the Court or the parties to the case notice of their intention to adopt or rely on any legal position regarding the several issues purported to be highlighted in their List of Documents and the witness statements.

[10] Learned Counsel Mr. Kendall stated that all claims in the High Court of Justice by order of CPR 2000 must set forth the case of the parties and what they intend to rely on. It is clear that the claimant's case pleaded by the Agent of the claimants and the claimants themselves are two separate cases, and the Court must deliberate upon the statement of case of the claimants before the Court and constitute their claim with the documents disclosed and the statements of the witnesses which together now purport to state facts and circumstances not pleaded, adopted or opined in their statement of case.

[11] Mr. Kendall stated that one other point of note is the disclosure of dubious prior Court proceedings by the claimant, Vincent Benjamin. All the Magistrate Court's proceedings referred to in the claimants' List of Documents and the witness statement of the claimant Vincent Benjamin are and should be deemed under the inherent jurisdiction of this Court as an absolute nullity in law. At the time of filing of the proceedings, he was and had never been and up to present date, in occupation or possession or the proprietor of the subject land, neither was he ever constituted the personal representative of the purported registered proprietor of the subject lands, at any time during the proceedings taken out in the Magistrates Court. At no time was the proper locus standi for the proceeding ever pleaded as a matter of record on the claim by the claimant and neither can it properly be inferred in his favour that it was a matter of evidence in the proceedings.

[12] Mr. Kendall learned Counsel argued that the proceedings were fabricated and a nullity from the onset. The pursuit of such an action before a Court of law was proceeded with

without and locus standi whatsoever vested in the claimant Vincent Benjamin and amounted to a complete misrepresentation of the facts and the legal standing of the claimant Vincent Benjamin and the circumstances regarding the ownership of the claimant Vincent Benjamin and the circumstances must under the inherent jurisdiction of the Court be deemed to be an absolute nullity in law.

[13] Mr. Kendall then referred to the issue of obtaining an ejectment judgment. He referred the Court to the heading, LIMITATIONS OF ACTIONS – Halsbury Laws 3rd Ed. – Vol 24 – 302 Par. 597 “Acknowledgement of the title to land”- “An admission that a person has recovered judgment in an ejectment action is not an admission of title, for it is quite consistent with an assertion that the judgment in ejectment was wrong and that the person had no title at all; nor does an unexpected judgment in ejectment operate as a declaration of title or as an acknowledgment of the plaintiff’s case”.

[14] In order to establish a prescriptive right to the subject lands and in order to invoke the provisions of section 135 (1) of the Registered Land Act and section 17 of the Limitation Act, the defendant must show that she had been in open peaceful possession of the land in question for 12 years without the consent of any person lawfully entitled to the land. The principle of law applicable to claims of perspective rights under the Registered Land Act and the Limitation Act is the principle of adverse possession.

[15] Learned Counsel Mr. Kendall therefore urged the Court to find that Ms. Fortune’s defence is sustainable.

[16] **Claimants’ submissions**

Learned Counsel Ms. Asheen Joseph submitted that all lands within the jurisdiction of the state of Antigua and Barbuda were adjudicated on as prescribed by the Land Adjudication Act Cap 234. Counsel also referred to section 9 (1) of the Registered Land Act Cap 374, that prescribes there will be a register for every parcel of land that has been adjudicated on:

“The Land Register shall comprise a register in respect of every parcel which has been adjudicated in accordance with the Land Adjudication Act”.

[17] The Land Adjudication Act Part III sets out the procedure through which one can claim an interest in land. The Part V of the Act also sets out the procedure through which another can object to a claim. Section 19 indicates that the Adjudication Officer, appointed under the said Act, shall issue a notice on the completion of the Adjudication Record process:

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

[18] On the completion of the Adjudication Record, and the determination of all petitions filed in objection to the record as prescribed in Part V of the Act, the Adjudication Record shall become final, and the adjudication officer must issue a certificate to the effect. However, section 24 allows any affected party to appeal the decision of the adjudication officer to the High Court within two months of the issuance of the certificate.

[19] Ms. Fortune claimed that she was born and raised on the disputed land. She further claimed that the land forms a portion of the estate of her deceased grandmother, Margaret Benjamin. Ms. Fortune refused to file a claim for the land as prescribed in the Land Adjudication Act. When Mr. Hubert filed a claim, Ms. Fortune did not file any objection as prescribed by the Act. Ms. Fortune refused to respond to the notice issued by the Adjudication Officer of Mr. Benjamin’s claim. Ms. Fortune made no attempt to appeal the decision of the adjudicating officer within the two month period prescribed by the Land Adjudication Act. It is clear and obvious that Ms. Fortune did nothing because she knew that she had no interest whatsoever in the disputed land.

[20] The Adjudication Officer has effectively determined in accordance with the Registered Land Act that Mr. Hubert is the owner of the disputed parcel of land; hence the entry made in the Land Register to that effect in accordance with Section 9 of the Registered Land Act

is final. Ms. Fortune is thus estopped in law to dispute Mr. Hubert's title to the land. The issue regarding ownership of the land has already been judicially determined in a final manner by the Land Adjudication Officer as prescribed by the Land Adjudication Act. It is vexatious, frivolous, an abuse of the Court's process as well as the Court's precious resources to make a determination in 2006 as to whether Mr. Hubert is entitled to the disputed land.

[21] The principle of res judicata must be applied. Ms. Joseph submitted that the Court must respect the ruling of tribunals which have been given jurisdiction in particular matter – Halsbury's Laws 3rd Ed. Page 212 paragraph 398:

'As respects the many other tribunals which have by statute been given jurisdiction in particular matters, it seems that the general principle that the law has respect not only to courts of record and proceedings in those courts but also to all other proceedings where the person who gives judgment has judicial authority is applicable'.

Accordingly, Ms. Joseph submitted that paragraph 1 of Ms. Fortune's defence be struck out.

[22] Further, Ms. Joseph said that it is trite law that any allegation of fraud must be furnished with particulars thereof. It is clear that there are no particulars clearly setting out how the alleged fraud has been committed by the claimants. Learned Counsel Ms. Joseph again referred to the petition filed by Mr. George Benjamin in a previous action, disputing the claimant's predecessor's ownership of the parcel of land in question. Ms. Fortune in her list of documents admits that George Alexander Benjamin, deceased, is her uncle. Further, Mr. Huber Benjamin is Ms. Fortune's uncle. Hence, it can be surmised that Ms. Fortune's family knew of Mr. Hubert Benjamin's ownership of the land, and by implication she had full notice of the claim. It is preposterous and unjust for Ms. Fortune to allege that a fraud had been unknowingly perpetrated on her.

[23] Ms. Fortune has been in open, peaceful, and uninterrupted possession of the disputed parcel of land for a period exceeding twelve years whereupon she has erected a dwelling

house and exercised other rights of ownership. For Ms. Fortune's defence to succeed, she must prove that:

- (1) she has been in factual possession of the land and;
- (2) had animus possidendi

for a period of twelve years immediately before the action was commenced. **Powell v McFarlane (1979) CR 452**

[24] The Limitation Act No.9 of 1997 Section 17 (1) makes it clear that a person cannot institute an action for recovery of land after the expiration of 12 years:

“No action shall be brought by any person to recover any land after the expiration of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, that person”.

[25] Learned Counsel Ms. Joseph said that it is true that it would appear that Ms. Fortune has always been in factual possession of the land in excess of 12 years, in that she has lived in a wooden tenement located on the land since 1965. Ms. Fortune is adamant in her belief that the land is family land, belonging to her grandmother's estate. Hence Ms. Joseph submitted that Ms. Fortune does not have the intention to dispossess the true owners of the land, the claimants. See the case of **Pollard v Dick (1977) 2 OECSLR 239**. In that case, there was clear and cogent evidence that the occupier never had any intention to dispossess the rightful owner of the land, but occupied the land under the expectation of purchasing the land from someone who purported to be the true owner. Accordingly, the occupier was unsuccessful in an action based on adverse possession.

[26] Also, the Jamaican Court of Appeal case of **Farrington v Bush (1974) 12 JLR 1492**. It was held that there was no adverse possession as the claimant had taken possession of the land in the erroneous belief that the land was his, and he did not have any intention of excluding the rightful owner.

[27] Ms. Joseph stated that Ms. Fortune's possession of the land was never peaceful as there has been constant litigation on the issue of ownership. Learned Counsel Ms. Joseph submitted that this aspect of Ms. Fortune's defence be struck out.

[28] A judgment in the Magistrate Court cannot and should not be declared a nullity unless it was found to be so by an Appeal Court, and overturned. Again, it appears that Ms. Fortune is asking the Court to believe that the claimant has deliberately misled the Magistrate Court, and thus obtained a judgment by fraud. However, to avoid being estopped by the judgment the party must apply to have the judgment set aside [Halsbury's 3rd Ed. Page 203 paragraph 383]:

"Fraud is an extrinsic, collateral act which vitiates the most solemn of proceedings of courts of justice. A judgment obtained by fraud or collusion, even it seems, a judgment of the House of Lords, may be treated as a nullity. A party to a judgment obtained by fraud, should generally, in order to avoid being estopped by the judgment, have it set aside".

[29] Ms. Joseph stated that Ms. Fortune has also vigorously argued that the claimant's statement of claim is different, and bears little resemblance to the facts outlined in the witness statements and summaries of the claimant. Ms. Joseph stated that the claimants' decision not to file a reply cannot in any circumstances be viewed as being detrimental to the claimants' claim.

[30] Learned Counsel Ms. Joseph also referred to the dicta of Lord Woolf MR in **McPhilemy v Times Newspaper Ltd. [1999] 3AER 775 at 792-793**, wherein he made general comments on pleadings.

"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 that 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. After disclosure and the exchange of witness statements, pleadings frequently become only of historic interest. Unless there is some obvious purpose to be served by fighting over the precise terms a pleading, contests over their terms should be discouraged”.

[31] Finally, Ms. Joseph said that Ms. Fortune cannot allege that she has been taken by surprise since the claimants’ witness statement and summaries, as well as the claimants’ list of documents were filed since February 13th 2004. Ms. Fortune filed her witness statement and list of documents on November 28th 2005. Ms. Fortune had notice of the claimants’ case 1 year, 9 months and 14 days before she filed anything in response thereof.

[32] **Court’s analysis and conclusion**

In the statement of case, the claimants state that they are the registered owners of Parcel 71. They complain that Ms. Fortune has wrongfully entered the land and has erected a wooden house on the land. They also contend that she is trespassing on Parcel 71.

[33] Ms. Fortune, in her defence states that she was raised from childhood in the home of her grandmother Margaret Benjamin on the land. She says that she is upward of 74 years. She does not indicate the date from which the adverse possession commenced nor for what period. That is the state of the pleadings. The matter proceeded to case management.

[34] I pause to note that the claimants did not provide the full details of their claim in their statement of case. It was not until the witness summaries were filed on behalf of Hubert, Vincent, Conrad and George that a full picture of the claimants’ case was revealed. The witness summaries are similar in content. The parties also filed list of Documents. In the

witness summaries, it is stated that on the 17th May 1979 as a result of a claim made under the Land Adjudicator Act Section 4(3), Mr. Hubert was adjudged the registered holder of Parcel 71. The witness summaries stated that Mr. Hubert died on 8th February 1984. On the 16th May 2000, Mr. George and Mr. Vincent obtained Letters of Administration of Hubert's estate. The claimants obtained title to Parcel 71 on 21st May 2001.

[35] The claimants' witness summaries state that Ms. Fortune first rented the chattel house in 1965 and then purchased it on the 23rd August 1987 for \$600. Among other things, the receipt states that the wooden tenement is to be removed from its present location within six months of the date of purchase and not later than the 23rd February 1988. Ms. Eva did not comply with the terms of the agreement. As a result, Mr. Vincent Benjamin later instructed Barrister at Law Mr. Samuel Charles, to write to her and request that she vacate Parcel 71. She did not comply with the lawyer's request. She sought an extension of time to remove the house. Mr. Charles, by letter dated 11th October 1988, granted her a further 14 days to remove the house. She failed to remove the house. As a consequence, Mr. Vincent filed a Writ of Summons Suit No. 50 of 1989 against her for possession. The learned Magistrate, on the 9th October 1989 ordered Ms. Eva to remove the house from Parcel 71. A Warrant of Possession was issued on the 8th December 1989. Despite the issue of the Warrant of Possession, Ms. Fortune had refused to remove her house from Parcel 71.

[36] Ms. Fortune, in her witness statement, says that Parcel 71 never belonged to Mr. Hubert. It was owned and occupied by Margaret Benjamin, who is her maternal grandmother. She grew up living with her grandmother, aunts and uncles on the land in the family home. Her grandmother purchased the top part of Parcel 71 for Mr. Hubert. At no time did Mr. Hubert own or occupy the entire Parcel 71. Originally, she occupied a chattel house on the top part of the land. She bought the house from one of the claimants. She states that the lands are family lands so she simply moved her house from the top part of Parcel 71 to the bottom land portion of the land. Her mother occupied the bottom land since 1972, she says that she has lived and occupied on the bottom land since in or about 1989 and continuing

to date. Ms. Fortune says that she has never acknowledged that the claimants have a right to the bottom part of Parcel 71 or that they own the entire land. In fact she had no prior knowledge that Hubert had wrongfully claimed the bottom portion of Parcel 71 as his.

[37] I have given careful consideration to the very lucid and helpful submissions of both learned Counsel. Having reviewed the pleadings, the witness statement and summaries, I am more attracted to the submissions of Learned Counsel Ms. Joseph for the claimants in preference to those advanced by Learned Counsel Mr. Kendall.

[38] It is the law that the effect of registering a person as first proprietor with an absolute title is to vest in him an estate in fee simple in possession in the land, together with all rights, easements and appurtenances, but subject to the following rights and interests:

- (a) The in cumbrances and other burdens entered on the register;
- (b) Unless the contrary is expressed on the register, the overriding interests (if any) which affect the registered land.

[39] The philosophy underlying a system of registration of title is that it confers indefeasibility of title to the specific parcel of land upon the registered proprietor. It is that title to land which gives the registered owner absolute and indefeasible title to the property. The effect of that is that a certificate of title issued by the Registry cannot be challenged in any Court of law on the ground that some person, other than the person named in the certificate as the registered proprietor, is the legal owner of the certificate except where it is proved that fraud was committed in respect of the issue of the certificate. Also, it is not impregnable from proper claims to adverse possession. In the case at bar, Ms. Fortune has simply pleaded that Mr. Hubert obtained title to Parcel 71 by fraud.

[40] It does not appear to be just to allow a defendant to simply plead that the claimants in obtaining title have committed a fraud. What is worst is that the allegation comes by way of defence to a claim against her for the possession of the property. One would have thought if there was any serious allegation of fraud that the defendant would have sought, at least by way of counterclaim, to have the title set aside on that basis. Quiet apart from the

propriety of such a defence, it seems to the Court that a counterclaim of that nature would have difficulty in getting off the ground in the absence of specific particulars of the alleged fraud. There are no particulars of fraud provided by Ms. Fortune either in the defence or the witness statement. It is my respectful view that that whereas in the case at bar the defendant is seeking to rely on a defence of fraud, she will be debarred from doing so.

[41] With respect, I do not share the view that the defence is available to Ms. Fortune based on the bare pleadings. The Court is of the respectful view that the proper course was for her to bring an action or counterclaim either against the first proprietor Mr. Hubert, or his successors in title, in order to have the certificate of title and more importantly, the registration of Parcel 71 set aside on the basis of Mr. Hubert's alleged fraudulent conduct. Of course, that cause of action would be circumscribed by the limitation period within such an action can properly be brought. Further, there ought to be sufficient particulars in order to ground such a cause of action or counterclaim.

[42] It is the Court's considered view that the defendant, in those circumstances, would be debarred from relying on the alleged fraudulent conduct of Mr. Hubert in obtaining the title to Parcel 71. This is quite apart from the fact that there are no sufficient particulars of fraud provided either in the pleadings or witness statement.

[43] It seems to the Court that the only live issue is whether or not the defendant's plea that she has obtained title to the property on the basis of adverse possession is sustainable.

[44] However, the Court has given further consideration to Ms. Fortune's pleaded defence and to her witness statement. Adverse possession is the only matter which could have been properly ventilated had it not been for the fact that the defendant is contending that the property belongs to her family and not to the registered proprietor. This difficulty is compounded by the fact that Ms. Fortune in her pleadings state that she obtained Parcel 71 by adverse possession, claiming both through her mother from 1972, and then from 1989 in her own right. In so far as there has been a number of litigation and letter writing both on behalf of the defendant and the claimants, through their solicitors, it does not

appear on the face of the pleadings that the defendant could avail herself of the defence of adverse possession for any period prior to 1989. In **J.A. Pye (Oxford) Ltd and Another v Graham and Another [2003] AC419**, it is stated that in order to succeed on a claim for adverse possession, the claimant must prove both the factual possession of the land together with the intention to possess the land to the exclusion of all other persons, including the true owner.

- [45] Based on the defence, as pleaded, together with her witness statement, it is clear that Ms. Fortune is contending that she was in open and peaceful occupation of the property, which is of the view belonged to her grandmother. I agree that Ms. Fortune had the duty to plead and to state in her witness statement that she has been in open and peaceful and uninterrupted possession of the land for a period of 12 years before the action as stated in Section 17 (11) of the Limitation Act referred to above. While she has referred to this, her claim to adverse possession is inconsistent with her claim that the property is family land.
- [46] The claimants filed the action at bar on December 6th 2002 and there is abundant pleadings that the defendant has not been in peaceful possession of Parcel 71. There is a plethora of material based on the defendant's own case, that at some time around 1989 she, having bought the house in which she was residing from Vincent Benjamin, she moved the house from the top land to the bottom land. This raises the issue as to whether she could properly be said to have been in occupation of the portion of land for the entire period as she claims.
- [47] It is the Court's respectful view that Ms. Fortune cannot properly rely on any claim to adverse possession to defeat the title holders for the period of 1972, when allegedly her deceased mother occupied the land. On her own pleadings, she relocated her house in 1989. Importantly, a defence of adverse possession is inconsistent with a claim based on the occupation of lands which belongs to Ms. Fortune's mother. I agree with the Ms. Joseph's submission that in order to rely on the alleged adverse possession there must be pleaded material on which the Court can conclude that if proved, would be sufficient to sustain a defence of adverse possession. It is the Court's respectful view that there must

be pleaded information which points to the intention to dispossess the claimants. In the case at bar, there is no such pleaded information which can sustain such a conclusion. I find the decision of **Pollard v Dick** *ibid* very useful in that regard. Similarly, the decision of **Farrington v Bush** *ibid* is also very helpful. The Court applies those principles in coming to the conclusion that since Ms. Fortune in her witness statement indicates that her claim is based on her allegations that the lands were family lands; this undercuts her ability to rely on adverse possession, in her defence. There is no pleaded fact which speaks to the requisite intention.

[48] In view of the above, I am not of the respectful view that the defence of adverse possession can be sustained.

[49] In view of the totality of circumstances, Ms. Fortune's defence is therefore dismissed as unsustainable.

[50] **Conclusion**

In view of the foregoing premises, there will be judgment on the preliminary point, in favour Althea James, Attorney for Vincent Benjamin, George Benjamin, Meme Ben-Watson Hazel Downes, Gordon Benjamin and Kathleen Irving, against Eva Fortune. The Court rules that Ms. Eva Fortune's defence filed on February 14th 2008 is accordingly struck out on the basis that it is unsustainable.

[51] Costs to be costs in the cause.

[52] The matter is referred to the Court Office for the scheduling of a hearing for the *ex parte* proof.

[53] The Court gratefully acknowledges the assistance of both learned Counsel.

Louise Esther Blenman
High Court Judge