

BRITISH VIRGIN ISLANDS

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CIVIL)

Claim No. BVIHCV2007/0008

IN THE MATTER OF SECTIONS 140 & 117 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 9 JANUARY 2007

BETWEEN

VINCENT PICKERING
CEDRIC PICKERING

Claimants

-And-

JERRY WILKINS

First Defendant

THE REGISTRAR OF LANDS

Second Defendant

-And-

GCS DEVELOPMENT LIMITED

Ancillary Claimant/Third Defendant

Appearances:

Ms. Sheryl Rosan of C.E. Dawson & Co for the Claimants

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

Mrs. Hazel-Ann Hannaway-Boreland of Harney Westwood & Riegels for the Ancillary Claimant/Third Defendant

2009: April 21

2009: November 30

Land - Fraudulent Transfer of Land – Rectification of Land register – Bona Fide Purchaser for Value without Notice – Overriding Interest – Competing Minor Equitable Interests – Transmission on Grant de Bonis Non Administratus (with Will Annexed) – Reliance on Official Search Certificate – Effect of Purchaser's Interest noted in Stay of Registration – Torrens System Title by Registration and Indefeasibility of Title – Duty of Prudent Purchaser or Attorney – Personal Representative's Delay in Administering Estate – Purchaser For Value Causing or Contributing to Fraud Mistake or Omission – Jurisdiction of Court & Duty of Government to Indemnify under Registered Land Act in mistake or omission

Ernest Pickering, deceased ("the testator") appointed his children Mavis Wilkins and Ernest Pickering Jr. as executors under a 1970 will. Beneficiaries were his ten children, including the executors and the Claimants. Ernest Pickering Jr. then appointed another beneficiary Frederick Pickering to act in his place as executor. Between 2000 and 2004 both personal representatives Frederick Pickering and Mavis Wilkins died intestate without administering the estate, comprising of parcels 25 and 35 of Block 2640B of West Central Registration Section ("the property"). On 23rd to 24th October 2006, the First Defendant, Jerry Wilkins (son of Mavis Wilkins) obtained Letters of Administration over his mother's estate and applied for registration by transmission. In November 2006, the Registrar of Lands ("the Registrar") registered the First Defendant as proprietor over the entire property, rather than over of his mother's 10th share. That same month, the Claimants obtained Grant de Bonis Non Administratus (with Will Annexed). On 9th January 2007, the First Defendant executed a Transfer of Parcel 25 to GCS Development Limited ("GCS") for the sum of \$125,000. On 15th January 2007, the Claimants discovered that the First Defendant gained wrongful registration over the entire property and had sold Parcel 25. The Claimants informed the Registrar. On 16th January 2007, GCS stamped the Transfer and submitted it to the Land Registry. On 19th January 2007, the Claimants obtained a stay of registration over Parcel 25 and issued proceedings against the First Defendant and the Registrar for fraud and mistake respectively. On 7th February 2008, GCS applied unsuccessfully for a variation of the 19th January 2007 order. On 8th October 2007, GCS was added as the Third Defendant/Ancillary Claimant and sought a declaration and rectification of the register in its favour or indemnifying compensation from the Registrar. On 15th February 2008, the court, on application by the Registrar, struck out the indemnity claim by GCS holding that applications under Section 141 of the Registered Land Act should be submitted to the Registrar, as the court had no jurisdiction where statute appoints a specific tribunal for enforcement of a right. Default Judgment was entered against the First Defendant. The remaining issues proceeded for trial.

HELD:

- [1] GCS is a bona fide purchaser of the legal estate for valuable consideration without notice and as such, takes Parcel 25 free of any prior equitable rights over the Claimants and as such, the Registrar do forthwith register Parcel 25 in favour of GCS.
- [2] In light of the fraud of the First Defendant and the concession of mistake on the part of the Second Defendant with respect to Parcel 35, the Registrar do forthwith cancel the registration by transmission to the First Defendant and substitute the Claimants as proprietors.
- [3] In respect of the claim of indemnity against the Government, the proper party under the Crown Proceedings Act is the Attorney General and not the Registrar of Lands.

JUDGMENT

Introduction

- [1] **HARIPRASHAD-CHARLES J:** This is an unfortunate land dispute in which a fraudster purportedly transferred family land to an alleged bona fide purchaser for value without notice. The fraudster has since disappeared with the full purchase price leaving the court to decide which of the defendants is to suffer at the hands of the fraudster. The key issue which now confronts the court is who is entitled to Parcel 25 of Block 2640B of West Central Registration Section, Tortola ("Parcel 25").

Background facts

- [2] The background facts of this case are not in dispute. Vincent Pickering and Cedric Pickering ("the Claimants") are two of the ten lawful children of Ernest Pickering, deceased ("the testator"). On 22nd July 1970, the testator executed a will in which he appointed his daughter, Mavis Wilkins and his son, Ernest Pickering Jr. to be the executors and trustees of his will. Ernest Pickering Jr. then appointed Frederick Pickering, another of the lawful children of the testator, to act in his place. Frederick Pickering died intestate on 1st February 2000 and Mavis Wilkins died intestate on 28th February 2004 without administering the estate of the testator which comprised of Parcels 25 and 35 of Block 2640B of West Central Registration Section, Tortola ("the property"). In his will, the testator directed that his trustee convert to money all his real and personal property and the net proceeds of the sale, subject to the sums that was needed to enable the sale and

conversion, be bequeathed to his ten children who included his executors and the Claimants.

- [3] On 17th August 2005, the Claimants applied for a Grant De Bonis Non Administratus (with the Will annexed) to the testator's estate. This was granted on 15th November 2006. On 25th August 2006, the First Defendant, Jerry Wilkins, one of the lawful children of Mavis Wilkins, applied for and was granted Letters of Administration to his mother's estate. On 23rd October 2006, Mr. Wilkins made an application to the Land Registry to be registered by transmission as proprietor in place of Mavis Wilkins, deceased, of her interest in the property¹. On 3rd November 2006, the Second Defendant, the Registrar of Lands ("the Registrar") registered Mr. Wilkins as the personal representative of Mavis Wilkins on the property when in actual fact, he was entitled to be registered as proprietor in place of his mother's one-tenth share of the property. On 6th November 2006, the Registrar also registered transfers of the property to Mr. Wilkins personally for love and affection.
- [4] On 9th January 2007, Mr. Wilkins executed an Instrument of Transfer transferring Parcel 25 to GCS Development Limited ("GCS") in full consideration for which GCS paid to him the sum of US\$125,000. The Instrument of Transfer was duly stamped by the Inland Revenue Department upon payment of US\$5,800 in stamp duty by GCS. On 16th January, 2007, the Instrument of Transfer was submitted to the Registrar for registration.
- [5] On 15th January 2007, the Claimants discovered that Mr. Wilkins had caused himself to be registered as the proprietor of the property and had transferred Parcel 25 to GCS. They brought the matter to the attention of the Registrar the same day.
- [6] On 19th January 2007, the Claimants applied, ex parte, and were granted, among other things, an Order for the stay of registration of Parcel 25.
- [7] By a Fixed Date Claim Form issued on 2nd February 2007 and a Re-Amended Statement of Claim filed on 22nd February 2007, the Claimants instituted these proceedings against Mr. Wilkins and the Registrar alleging fraud against Mr. Wilkins and mistake on the part of

¹ See paragraph 10 of the affidavit of Cecil Dawson in support of the application.

the Registrar in registering Mr. Wilkins as proprietor of the property. The Claimants seek, among other things, an order that the land register relating to the property be rectified by cancelling the registration by transmission of Mr. Wilkins and substituting it with the registration by transmission of the Claimants. They also seek an order for GCS to be compensated by the Registrar, or alternatively, that they be compensated by the Registrar in the amount of the market value of the property and compensation for the loss suffered.

[8] On 7th February 2007, GCS applied for a variation of the Order of the Court dated 19 January 2007 to remove the stay and for the Registrar to register the transfer of Parcel 25 to GCS forthwith. GCS asserts that it is a bona fide purchaser for value without notice and that it is entitled to be registered as proprietor of Parcel 25 as against the Claimants. It asserts that at the time of the transfer on 9th January 2007, it had no knowledge of any dispute or claim against Mr. Wilkins' title and did not know of the claim until about 26th January 2007.

[9] In a written judgment delivered on 20th June 2007², the Court ordered, among other things, a continuation of the Order which was initially granted on 19 January 2007 inhibiting the registration of the transfer of Parcel 25 until determination of this claim. The Court also ordered an expedited hearing.

Significant events since delivery of judgment

[10] On 8th October 2007, leave was granted to add GCS as the Third Defendant/Ancillary Claimant in this matter. GCS then claimed, among other things, for a declaration that the transfer on 9th January 2007 is valid in that it is an innocent purchaser for value with no notice of any defect in Mr. Wilkins' title.

[11] On 7th December 2007, the Registrar issued a strike out application against GCS to the effect that the High Court has no jurisdiction to hear the matter having regard to the provisions of the Registered Land Act³ ("the Act") for recovering an indemnity from the

² BVIHCV2007/0008 – (1) Vincent Pickering (2) Cedric Pickering v (1) Jerry Wilkins (2) The Registrar of Lands (3) GCS Developments Limited –unreported- Judgment delivered on 20th June 2007.

³ Cap. 229 of the Laws of the Virgin Islands, 1997.

government. On 15th February 2008, Joseph-Olivetti J. struck out a claim brought by GCS in so far as it sought an indemnity from the Registrar.⁴

The effect of the Default Judgment

- [12] As mentioned aforesaid, on 8th October 2007, default judgment was given against Mr. Wilkins for fraud, there being no acknowledgement of service or filing of a defence by Mr. Wilkins. But as Principal Crown Counsel, Mr. Aziz correctly pointed out, the default judgment did not expressly indicate that the relief sought in the Fixed Date Claim Form for the rectification of the register had been granted. This ought to have been done on the date that the default judgment was entered. Needless to say, such a procedural error is remediable under CPR 26.9.
- [13] Further, at the trial of this matter, Mr. Aziz submitted that the Registrar, as a neutral stakeholder, does not intend to contest that the Claimants are entitled to rectification of the land register and that the Registrar would abide by any Order of rectification pursuant to section 140(1) of Act. In essence, that section confers jurisdiction on the High Court to rectify the register in instances of entries or omissions made by fraud or mistake. Additionally, Mr. Aziz conceded that the Registrar made a mistake in the registration process. This was also confirmed by Mrs. Ingrid Moses-Scatliffe, Chief Registrar of Lands in her oral testimony when she stated under cross-examination that Mr. Wilkins should not have been registered as the proprietor of Parcels 25 and 35.
- [14] Based on the fore-going, the Court will order that the proprietorship section of the Land register relating to Parcel 35 be rectified by the cancellation of the registration as proprietor by transmission of Mr. Wilkins and substituting by the registration as proprietors by transmission of the Claimants to Parcel 35. With respect to Parcel 25, the Court should make a similar order unless GCS falls within the purview of the exceptions created pursuant to section 140(2) of the Act. The subsection provides that the register cannot be rectified so as to affect the title of a proprietor who is in possession unless such proprietor

⁴ BVIHCV2007/0008 – (1) Vincent Pickering (2) Cedric Pickering v (1) Jerry Wilkins (2) The Registrar of Lands (3) GCS Developments Limited –unreported- Judgment delivered on 15th February 2008.

either had knowledge of the omission, fraud or mistake or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default. "Proprietor" in the Act means the person registered under the Act as the owner of land or a lease or a charge.

The evidence

[15] The evidence in this action is not voluminous. The Claimants called Mr. Cedric Pickering as their sole witness. He testified that he has been living in Brooklyn, New York since 1973. He is one of the lawful children of Ernest Pickering and one of the beneficiaries under his father's will. On 15th January 2007, he and the other claimant, Mr. Vincent Pickering discovered that Mr. Wilkins had caused himself to be registered as the proprietor of Parcels 25 and 35 and had perpetrated a fraud against them by transferring Parcel 25 to GCS for \$125,000. He said that the fraud was brought to the attention of the Registrar on the said day and GCS, the following day. According to him, the family has strong sentimental attachment to Parcel 25. Under cross-examination, he stated that he has not done a valuation for the property but he was going to sell it for \$225,000 because of its location and sentimental value.

[16] Ms. Sheila George, an attorney-at-law and the sole director of GCS gave evidence on behalf of her company. She deposed that sometime in the first week of January 2007, she met Mr. Wilkins who indicated that he had property for sale and as a result, Mr. Wilkins took her to the property. She entered into negotiations to purchase the property from Mr. Wilkins after confirming that he was indeed the registered proprietor of Parcel 25. By an Instrument of Transfer of Land dated 9th January 2007, Mr. Wilkins transferred Parcel 25 to GCS in consideration for which GCS paid the full purchase price of US\$125,000 by cheques of US\$5,000 and US\$120,000. On 16th January 2007, the Instrument of Transfer was duly stamped by the Inland Revenue Department and a stamp duty of US\$5,800 was paid in respect of the transfer. Upon being duly stamped, the Instrument of Transfer was submitted on 16th January 2007 to the Registrar of Lands for registration. On 17th and 18th January 2007, Harneys contacted the office of the Registrar of Lands to inquire of the status of the registration. Later on, she learnt of the fraud. She averred that GCS has

suffered loss and damage and has been deprived of the use and benefit of Parcel 25. She relied on the public register which indicated that Mr. Wilkins is the registered proprietor of Parcel 25.

[17] Ms. Rosan extensively cross-examined Ms. George. The focus of her cross-examination is that as an attorney-at-law, Ms. George, is required to exercise due diligence and more caution and by not investigating Mr. Wilkins' title or the title of the current owners, she did not act in a reasonable and sensible manner as purchasers should do. Ms. George was adamant that there was no need as a prudent purchaser and/or as a lawyer to inquire as to previous owners of the property as those entries are all crossed out. She also confirmed that she did not do a valuation before she purchased Parcel 25. She also testified that she had bought lands before in the BVI, she knows about prices of lands and that was the price she was willing to pay.

[18] Ms. George was also extensively and skillfully cross-examined by Mr. Aziz on behalf of the Registrar. Like Ms. Rosan, he also suggested that GCS did not do the necessary due diligence in purchasing the property. He even suggested negligence on the part of GCS.

[19] The Chief Registrar of Lands, Mrs. Moses-Scatliffe gave evidence on behalf of the Registrar of Lands. She was concise. She acknowledged that Mr. Wilkins should not have been registered as the proprietor of Parcels 25 and 35 and conceded that the then Registrar acted in error and made a mistake in registering Mr. Wilkins as the registered proprietor of both parcels.

The issues

[20] In light of this concession that the then Registrar did act in error when he granted Mr. Wilkins' application for registration by transmission and by mistake, registered him as personal representative of the property, the issues have been narrowed considerably. The parties have identified the following issues:

1. Whether GCS was entitled to rely, without further investigation on the Official Search Certificate which was provided by the Registrar of Lands or were they required to go behind the register?
2. Whether GCS is a bona fide purchaser for value without notice?
3. Whether GCS is entitled to be registered as proprietor of Parcel 25 as against the Claimants?
4. What remedy (if any) is available to GCS in the event that it is not entitled to be registered as the proprietor?
5. What remedy (if any) is available to the Claimants if they are not entitled to rectification of the register?
6. Whether the Claimants or GCS are entitled to be compensated by the Registrar?

[21] Issues (4), (5) and (6) over Actp and for purposes of this judgment, will be subsumed under one head.

Was GCS entitled to rely on the Official Search Certificate?

[22] The issue here is whether GCS was entitled to rely, without further investigation, on the Official Search Certificate which was provided by the Registrar of Lands in relation to the proprietorship of Parcel 25 at the time of the Transfer.

[23] Learned Counsel for the Claimants, Ms. Rosan submitted that GCS is not entitled to rely on the Official Search Certificate and the land register. In any event, she submitted, GCS was not diligent and prudent in its search since it was obvious on the face of the land registers for Parcels 25 and 35 that Mr. Wilkins is not the proprietor of the said parcels.

[24] Counsel referred to **Racoon Limited v Harris Turnbull, Executor of James Turnbull**⁵, where the Privy Council in explaining Section 38 of the Act stated as follows: "*The section is undoubtedly concerned primarily with obviating the need for an individual to go behind the register in order to discover whether the seller, mortgagor or lessor derives his title from valid deed.*"

⁵(1995) BVI Privy Council Appeal No. 33 of 1995.

[25] Ms Rosan argued that by extrapolating from the **Racoon** case, a prudent purchaser should ensure from the face of the land register that the seller, mortgagor or lessor derives his title from a valid deed. She contended that it is evident on the face of the land registers for Parcels 25 and 35 that Jerry Wilkins is not the proprietor and that Mavis Wilkins, deceased, the mother of Jerry Wilkins, is registered along with Frederick Pickering, deceased, on the said parcels as personal representatives of Ernest Pickering, deceased. Thus, Parcels 25 and 35 must be the estate of Ernest Pickering, deceased.

[26] To my mind, the issue of whether GCS was entitled to rely, without further investigation can best be answered by looking at the Act itself. The overarching effect of this legislation has been the subject of judicial pronouncements, the latest being the Privy Council decision of **Nathalie Creque v Cecil Penn**⁶. In that case, Lord Walker of Gestingthorpe said at para. 13:

"The Land Registration Act provides for the British Virgin Islands to have the Torrens system of land registration.... The system was described by Barwick CJ in **Breskvar v Wall**⁷ as "*not a system of registration of title but a system of title by registration.*"

[27] In effect, the Torrens system of land registration is meant to provide a full scheme for obtaining title by registration and for governing land registered under the Act. In **Racoon Ltd v Turnbull**⁸, Lord Jauncey of Tullichettle stated:

"The philosophy underlying a system of registration of title is that it confers indefeasibility of title to the specified parcel of land upon the registered proprietor and dispenses with any need on the part of persons dealing with him to investigate further his right thereto."

[28] As I see it, an innocent purchaser for valuable consideration is under no duty to search behind the entry in the land register pertaining to the relevant parcel to ascertain the circumstances in which title has been obtained or registered subject only to overriding interests as set out in section 28 of the Act. A fundamental characteristic of the registered

⁶ Privy Council No. 36 of 2005. Judgment delivered on the 27th June 2007.

⁷ (1971) 126 CLR 376, 385. See also **Nathalie Creque v Cecil Penn** (Privy Council Appeal No. 36 of 2005, delivered on the 27th June 2007).

⁸ [1997] A.C. 158, 163C-D.

title system is that the land register is intended to act as a “mirror” reflecting accurately and incontrovertibly the totality of estates and interests which at any time affect the registered land. In a sense, the register is everything.⁹ This is provided for in section 38(1) which states that:

“No person dealing or proposing to deal for valuable consideration with a proprietor shall be required or in any way concerned – (a) to inquire or ascertain the circumstances in or the consideration for which such proprietor or any previous proprietor was registered; or (b)... or (c) to search any register kept under the Registration and Records Act.”

[29] In effect, section 38 provides for the indefeasibility principle. In **Frazer v Walker**¹⁰, Lord Wilberforce, referred to the phrase “indefeasibility of title” and continued at pp. 580-581:

“The expression, not used in the Act itself, is a convenient description of the immunity from attack by adverse claim to the land or interest in respect of which he is registered, which a registered proprietor enjoys. This conception is central in the system of registration. It does not involve that the registered proprietor is protected against any claim whatsoever; he will be seen later, there are provisions by which the entry on which he relies may be cancelled or corrected, or he may be exposed to claims in personam. These are matters not to be overlooked when a total description of his rights is required. But, as registered proprietor, and while he remains such, no adverse claim (except as specifically admitted) may be brought against him.”

[30] The overriding object of the Torrens system of land title registration, upon which the Act is based, is to achieve greater simplicity and certainty of title to land by a system not of registration of title but of title by registration. The system confers on the registered proprietor a generally indefeasible title to the property and obviates the need for persons dealing with the proprietor to investigate into the history by which the title had been obtained.¹¹

[31] Therefore, GCS was entitled to rely, without further investigation, on the Official Search provided by the Register of Lands and the land register. GCS was under no obligation to

⁹ **Abbey National Building Society v Cann** [1991] 1 A.C. 56, 78.

¹⁰ [1967] 1 A.C. 569, P.C.

¹¹ **Racoon Ltd v Turnbull** (1997) AC 158 at 163 C-D; **Williams & Glyn's Bank Ltd v Boland** (1981) AC 487 at 504 F-G.

investigate the history or the circumstances of the vendor's title. It was enough for GCS to only look on the face of the register relating to the land, to determine the totality of interests or rights affecting the land at any given time. In addition, GCS was under no obligation to find out whether Mr. Wilkins' title was a good one or a bad one as the Claimants appear to be saying. The land register speaks for itself. Looking at the face of the register, the name "Jerry Wilkins" appears as the registered proprietor. The other names are crossed out. An innocent purchaser for value is not required to make inquiries or to ascertain the circumstances in which Mr. Wilkins was registered. In their written skeleton argument, the Claimants correctly contend that *"it is the Registrar of Lands who should investigate the history of the title to land in order to provide that bona fide purchasers for value acquire an indefeasible right to land."*¹²

[32] Part X of the Act is also instructive in this regard. It deals with rectification and indemnity thereby recognizing, to my mind, that there may be occasions when reliance on the land register could result in loss. Section 141 provides for right of indemnity to innocent parties to be compensated by the Government out of moneys provided by the Legislative Council (now House of Assembly).

[33] I therefore hold that GCS is entitled to rely, without further investigation, on the Official Search provided by the Register of Lands and the land register. I gratefully adopt the dictum of Lord Watson in the Privy Council decision of **Gibbs v Messer**¹³ which outlines the objective of the Torrens system as:

"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 everyone 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."

¹² See paragraph 47 of Claimants' skeleton argument lodged on 1st December 2008.

¹³ [1891] A.C. 248 at 254.

Purchaser for value without notice

[34] Ms. Rosan submitted that GCS is not a bona fide purchaser for value without notice of the fraud of Mr. Wilkins or the mistake of the Registrar. She submitted that if a purchaser is diligent and acts in a reasonable and prudent manner, making all the investigations which a purchaser of land should make, then he is affected only by actual notice. However, if he omits to conduct the usual investigations, then he might be affected by constructive notice. She relied on the treatise, **Cheshire and Burn's Modern Law of Real Property**¹⁴ that *"a purchaser is deemed to have notice of anything which he has failed to discover either because he did not investigate the title properly, or because he did not enquire for deeds relating to the land, or because he did not inspect it."*

[35] Although Counsel has comprehensively set out the relevant provisions of the Act, in my opinion, she was unable to identify any specific fact(s) to demonstrate why GCS is not a bona fide for value without notice. The nearest she gets to this is her cross-examination of Ms. George as to the sale price of Parcel 25, implicitly suggesting that the land was worth more than \$125,000. The other point relates to the search conducted by GCS and/or its solicitors and whether Ms. George herself, as an attorney-at-law should have been more vigilant in her investigation.

[36] However, under the Act, a purchaser for valuable consideration is under no duty to search behind the entry in the land register pertaining to the relevant parcel of land to ascertain the circumstances in which title had been obtained or registered: see section 38. The only notice which is imputed to a proprietor acquiring land is notice of the entries in the land register pertaining to the land. This is provided for in section 30 which states:

"Every proprietor acquiring any land, lease or charge shall be deemed to have had notice of every entry in the register relating to the land, lease or charge."

¹⁴ Fifteenth Edition Butterworths, 1994, at page 61.

[37] So, it is plain that instead of investigating the history of the circumstances of the vendor's title, the purchaser need only look to the entry in the register relating to the land to determine the totality of interests or rights affecting the land at any given time.

[38] In my opinion, GCS is the bona fide purchaser of Parcel 25, because GCS paid money for the land to Mr. Wilkins, who is the registered as the proprietor according to the land register; and as such GCS is entitled to be registered as the proprietor of Parcel 25. It is a fundamental rule of law that a bona fide purchaser of the legal estate for valuable consideration without notice has "an absolute, unqualified, unanswerable defence" against the claims of any person with a prior adverse equitable right or interest¹⁵. However, the equitable doctrine of notice has very little relevance to registered land under the statutory regime which has whittled away the relevance of notice, knowledge and good faith in the common law sense¹⁶.

[39] Section 38 (2) is also appropriate. It provides as follows:

"Where the proprietor of land, a lease or a charge is a trustee he shall, in dealing therewith, be deemed to be absolute proprietor thereof, and no disposition by such trustee to a bona fide purchaser for valuable consideration shall be defeasible by reason of the fact that such disposition amounted to a breach of trust." [emphasis added]

[40] As earlier stated, section 38 has long been said to confer indefeasibility of title to a specified parcel of land upon the registered proprietor and dispenses with any need on the part of persons dealing with him to investigate any further his rights to that land. However, and importantly, the section does not protect the registered proprietor against any claim whatsoever: see section 28 which makes all registered land subject to the overriding interests listed in the section even though they do not appear on the Register.

[41] Learned Counsel, Ms. Rosan submitted that GCS cannot be registered as the proprietor of Parcel 25 because they would be subject to the overriding interests of the Claimants.

¹⁵ *Pilcher v Rawlins* (1872) 7 Ch. App. 259, 269, per James LJ.

¹⁶ *Williams v Glyn's Bank v Boland* [1981] A.C. 487, at 503-504.

According to her, the Claimants are in actual occupation of the Parcel 25, (as mentioned in Section 28(g)) and that they have always been in such occupation, in their capacity of personal representatives of the estate of their father.

[42] It is not disputed that the Claimants have a beneficial interest in the property. The question however, is whether the Claimants were in actual occupation. In her submissions, Ms. Rosan identified the rights that the Claimants have but did not elaborate on how the court can conclude that the Claimants were in actual occupation. As Byron C.J. stated in **Spiricor of Saint Lucia Ltd v The Attorney General of Saint Lucia and Hess Oil St. Lucia Limited**¹⁷ "it is only if the appellant is in actual occupation or in receipt of income from the property that section 28 (g) would operate to protect any rights he may have. The person must be in actual possession for that is the only way that the inquiry referred to in paragraph 28 (g) could trigger."

[43] There is no evidence to show that anyone was living on the land at the time of the purported transfer to GCS. So, no rent could be collected. Also, there is no evidence that it was being farmed or cultivated. The evidence of one of the Claimants is that he has been living in New York since 1973. So, the Claimants were not in actual occupation and therefore their rights that they allege cannot be considered an overriding interest. There is also no dispute that the transfer to GCS was for valuable consideration. Thus, the purported transfer of Parcel 25 to GCS was not be subjected to any overriding interest.

[44] Then, there is no question that fraud can render a title defeasible. However, the purchaser must show that, having given valuable consideration for the legal estate, he acted in good faith in that his conscience was unaffected by knowledge or notice of any prior equitable interest; and that there must not be a mere absence of knowledge or notice but this absence must be genuine and honest.

[45] We remind ourselves that although section 140 confers jurisdiction on the High Court to rectify the register in instances of entries or omissions made by fraud or mistake, the Act

¹⁷ [1996] 55 W.I.R. 128 at page 132.

also specifically protects the interest of a bona fide purchaser for value. In fact, section 140 (2) provides that the register cannot be rectified unless the purchaser for value either had knowledge of or substantially contribute or caused the fraud or mistake.

[46] As I see it, there is no evidence to suggest that GCS substantially or in any way contributed or caused the alleged fraud or mistake or had any knowledge of the fraud as required by Section 140 (2). There is also no evidence of any 'fraud' being evident on the face of the land register so as to put the purchaser on notice. On the contrary, GCS has complied with all the requirements of the Act. GCS carried out an official search (which has not been disputed by the Claimants) on which all purchasers are entitled to rely. That search revealed no encumbrances or adverse claims on the title.

[47] In **Ecedro Thomas v Augustine Stout et al**, the Court of Appeal held that particulars of fraud must be distinctly and specifically pleaded and in the same way that the court imposes a very high standard for a claim of fraud, the court imposes an equally high standard for denying a bona fide purchaser the fruit of his consideration by his or her purported knowledge or contribution to the fraud. It is not sufficient for the litigant to merely say that "it is evident on the face of the land register for Parcels 25 and 35, that the said parcels were never the estate of Mavis Wilkins, deceased."

[48] Applying the law to the relevant facts in this case and considering the well-known observations of Lord Wilberforce in **Midland Bank v Green**¹⁸ on the meaning of the words "bona fide" or "good faith", I find that GCS was a bona fide purchaser for value consideration without notice.

Remedy

[49] I now come to the key issue in this case: do the facts of the case justify a rectification of the land register in favour of the Claimants or the registration of the transfer to GCS?

¹⁸ [1981] A.C. 513

[50] The learned authors of **Megarry and Wade, The Law of Real Property**¹⁹ on the effect of failure to register states:

“Unless and until a transfer of a registered estate or charge is completed by registration the transferor remains the proprietor of the registered estate or charge. In consequence the transferee cannot normally exercise any of the powers of a registered proprietor. Conversely, the transferor may still be able to, at least in some circumstances. Such a transfer is however effective in equity, and takes effect as a minor interest. As such, the rights of the transferee will be defeated by a disposition of the registered land for value unless it is either –

- (i) protected by an entry on the register; or
- (ii) an overriding interest.

[51] This is echoed in sections 27, 28 and 38 of the Act; the effect of which is two-fold. First, as GCS correctly contended, the Claimants' claim as a beneficiary and proprietor of the land was not registered when the transfer to GCS was executed, nor was it registered when GCS' transfer was submitted for registration. This is not an overriding interest²⁰.

[52] Secondly, whilst the registration of GCS's transfer submitted for registration on 16th January 2007 is still pending, on 9th January 2007, GCS protected its interests as purchaser by noting the particulars of the sale in the Stay of Registration application as required by section 42 thereby creating a registered minor interest.

[53] Thus, there are now two competing equitable interests. Section 42(1) is clear that the 9th January 2007 Official Search and Stay of Registration gave GCS' interest priority over any subsequent applications for notation of equitable interests including the Claimants²¹. Therefore, by the 9th January 2007, GCS had acquired the equitable interest by payment of consideration, execution of the transfer and filing a notation of GCS' interest on the register in the Official Search and Stay of Registration, which by section 27 was a noted disposition for valuable consideration (through a minor interest awaiting registration)

¹⁹ 6th Edition, para. 6-032

²⁰ See paragraphs 41 and 42 [supra] and paragraphs 32-33 of judgment delivered on 20th June 2007 in the injunction ruling.

²¹ *Smith v Morrison and another* [1974] 1 All ER 957, 977 (gh).

capable of defeating the Claimants' interest. On the other hand, the Claimants rely on an unregistered equitable minor interest without valuable consideration.

[54] The question now is what is just in the circumstances when they are two competing equitable interests. GCS has correctly identified some important circumstances which are:

- a. The estate claimed in this case is for a voluntary transfer which is not an overriding or an unregistered interest capable of defeating the vesting of an absolute title within section 27 and 28.
- b. The title of a bona fide purchaser for value from a trustee (even if it is an equitable interest) cannot be defeated by reason of the fact that that disposition amounted to a breach of trust: section 122 (3).
- c. A person dealing or proposing to deal with land for valuable consideration are not required to inquire or ascertain the circumstances in which such proprietor or any previous proprietor was registered: section 38.

[55] Another factor for consideration is that the Claimants' claim to their father's estate arose almost 7 years upon his death on 1 February 2000. For five years they did nothing until 17th August 2005. On 15th November 2006, they were granted a Grant de Bonis Non Adminstratus (with the Will annexed). Pursuant to section 30, by 6th November 2006, they had constructive notice of Mr. Wilkins' registration as sole proprietor of both Parcels 25 and 35 but took no steps in the estate until 16th January 2007, by which time Mr. Wilkins, as the registered proprietor, had already sold Parcel 25 to GCS.

[56] The Court is therefore called upon to weigh the equities of the parties and to examine the principles of justice and fairness. It is a fact that GCS took Parcel 25 for valuable consideration at a time when there was no notice of the claim in this action, a notation of their interest was duly registered by 9th January 2007 while the Claimants, as heirs to the estate, being in a position to protect their estate since their father's death never did so, caution or otherwise, until GCS had already expended more than \$125,000 having also paid stamp duties and other taxes. The reality of all this is that the Registrar was under a

duty to register Parcel 25 in favour of GCS when it presented the Instrument of Transfer on 16th January 2007.

[57] The Claimants criticize GCS for not doing a valuation before purchasing Parcel 25. Ms. George says that she has bought land on previous occasions so that was the price she was willing to pay. The Claimants say that the land is worth \$225,000 because of its location and its sentimentality. They themselves have not provided the court with a valuation. Furthermore, sentimentality is not a factor to be taken into account in determining the purchase price. The more serious criticism, though, which is levied at GCS, is its failure to go behind the register to examine the title of the previous owners. This criticism was also supported by Mr. Aziz when he cross-examined Ms. George. He surmised that Ms. George was negligent in not scrutinizing carefully the history of the titles of the previous owners. The simple answer is that GCS is under no obligation to do so.

[58] Suffice it to say, the Claimants themselves have ignored their duty as trustees to actively protect their estate. They failed to do so for over three years. They are also asking the court to impose a higher duty on GCS because of Ms. George's profession as an attorney-at-law. In effect, they are saying that GCS should go behind the Register and examine the Registrar's exercise of his duty in entering Mr. Wilkins as the registered proprietor. This is not the overriding objective of the Torrens system of land registration. This submission is fundamentally flawed.

[59] Although Mr. Aziz has prudently conceded that the Registrar acted in error when he granted Mr. Wilkins' application for registration by transmission and by mistake, registered him as personal representative of Parcels 25 and 35, he insinuated during the cross-examination of Ms. George that GCS was negligent in not doing proper due diligence when she purchased the property. This submission is also fatally flawed because what Mr. Aziz is asking GCS to do is exactly what the Registrar should have done. My understanding of the Torrens system of land registration is that the land register is intended to be the "mirror" reflecting accurately and indisputably the totality of estates and interests which at any time affects the registered land. As such, there is no need on a

purchaser for value without notice to look beyond the face of the land register. On the contrary, it is the Registrar who should carry out that task and as such, it is upon him that the blame should rest.

[60] In light of the fore-going, I find that GCS is a bona fide purchaser of the legal estate for valuable consideration without notice and as such, takes Parcel 25 free of any prior equitable rights over the Claimants.

[61] In those circumstances, I will order that the Registrar forthwith register Parcel 25 in favour of GCS.

Remedy to the Claimants

[62] The issue which also falls for determination is what remedy (if any) is available to the Claimants since it is established that Mr. Wilkins perpetuated a fraud and the Registrar acted in error when he mistakenly registered Mr. Wilkins as the proprietor of Parcel 25. .

[63] Section 141 (1) is enlightening. It provides that:

“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 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 indemnified by the Government out of moneys provided by the Legislative Council”[now House of Assembly].

[64] Subsection (2) provides that “no indemnity 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.” There is no evidence to demonstrate that the Claimants were aware of the

fraud perpetrated by Mr. Wilkins nor were they aware of the mistake made by the Registrar. Mr. Wilkins has disappeared and sadly, the brunt of the burden of indemnification will now fall on the Government since an innocent party has suffered loss by reason of the rectification of the land register. The State guarantees the title of the registered proprietor,²² so that claims for rectification of the register and indemnity from the fund are complimentary²³.

[65] On 15th February 2008, the Court struck out an indemnity claim by GCS when it sought compensation from the Government for damages suffered as a result of the rectification of the land register. In a nutshell, the Court struck out the claim holding that section 141 is clear: any person suffering damage ... shall be indemnified by the Government out of moneys provided by the House of Assembly.

[66] It is plain that the Claimants will now have to bring a suit against the Attorney General by virtue of the Crown Proceedings Act.²⁴ But this is mere formality. As all litigation must come to an end, I urge the Attorney General to resolve this matter cordially and expeditiously as I cannot see how the Government can escape the payment of damages suffered by the Claimants.

[67] As is evident from the judgment of Olivetti J., the court has no jurisdiction to entertain this issue. In the **Attorney General of St. Lucia and Comptroller of Customs v Vance Chitolie**²⁵, Gordon JA had this to say:

"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 enforcement, a party seeking to enforce the right must resort to the remedy or that tribunal, and not to others...."²⁶

²² See, generally, Gray, *Elements of Land Law*, pp. 237 – 238 et seq.

²³ *Chowood Ltd v Lyall* (No. 2) [1930] 1 Ch. 426, 2 Ch. 156; *Re Chowood's Registered Lands* [1933] Ch. 574.

²⁴ See Section 6 of the Crown Proceedings Act, Cap. 21.

²⁵ Civil Appeal No. 14 of 2003 (Saint Lucia) -unreported

²⁶ See also HCVAP 2008/010 -Bryon Smith v British Virgin Islands Electricity Corporation. Judgment delivered on 12th January 2009.[unreported].

Conclusion

[68] In the premises, my order will be:

1. With respect to Parcel 25, I will order that the land register be rectified forthwith by causing GCS to be registered as the registered proprietor.
2. With respect to Parcel 35, I will order that the land register be rectified forthwith by cancelling the registration by transmission of Jerry Wilkins and substituting it with the registration by transmission of the Claimants.
3. The Claimants are at liberty to pursue a claim for indemnity against the Attorney General under the Crown Proceedings Act and not against the Registrar of Lands.
4. Both GCS and the Claimants are entitled to prescribed costs to be paid by the Second Defendant, the Registrar of Lands which will be calculated on the amount of \$125,000. I bear in mind that the Claimants' claim relate to two parcels of land but nothing except a default judgment was obtained with respect to that parcel of land so costs ought to be awarded accordingly and after the market price of that Parcel has been determined. If the parties cannot reach agreement on the latter issue, then they could come back to court.

[69] Finally, I am very grateful to all lawyers and the parties for their forbearance in awaiting this judgment which was long overdue but circumstances beyond my control precluded me from delivering it sooner.

Indra Hariprashad-Charles
High Court Judge