

ANTIGUA AND BARBUDA

IN THE COURT OF APPEAL

HCVAP 2009/016

BETWEEN:

IAN PETERS

Appellant

and

ROBERT GEORGE SPENCER

Respondent

Before:

The Hon. Mde. Janice George-Creque

Justice of Appeal

On written submissions:

Mr. Dane Hamilton, QC for the appellant

Dr. David Dorsett for the respondent

2009: December 22.

Civil Appeal – striking out statement of case – CPR 26.3(1)(b) – reasonable grounds for bringing a claim – whether the pleadings contained allegations of facts which support the cause of action – whether there was a live issue to be tried – transfer of property – fraud – rectification of land register – section 140 of the Registered Land Act –

The learned master made an order striking out the appellant's claim against the respondent on the grounds that it contained no allegations of facts which supported the appellant's case. The appellant's case is that he being an Antiguan national purchased property from the Crown in early 1992. At all material times he lived in New York, USA but in 2008 he returned to Antigua with the intention of building on the said property. The appellant discovered that in October 1992, the property had been transferred to and was now registered to the respondent. The appellant says that he never signed a transfer, did not agree to sell the property or authorise anyone to sell it; neither did he receive the consideration of \$54,000.00 stated in the transfer to the respondent. The appellant says that he has no knowledge of the transaction, or of the respondent. The appellant accordingly alleged that the transfer to the respondent was fraudulent. The appellant seeks to set aside the order of the learned master.

Held: allowing the appeal and setting aside the learned master's order in its entirety. The matter shall proceed before the court below in accordance with **CPR 2000**. The appellant shall have his costs of this appeal in the sum of \$933.00 being two-thirds of the costs as

assessed below:

1. That there are principles by which the court must be guided when exercising the draconian power of striking out a party's statement of case.

Citco Global Custody NV v Y2K Finance INC Civil Appeal No. 22 of 2009 (BVI) followed.

2. That a statement of case is not suitable for striking out if it raises a serious live issue of fact which can only be properly determined by hearing oral evidence.

Bridgeman v McAlpine-Brown [2000] L.T.L Jan. 19, CA followed.

3. "A person who presents for registration a document which is forged or has been fraudulently or improperly obtained is not guilty of fraud if he honestly believes it to be a genuine document which can be properly acted upon." "But if it be shown that his suspicions were aroused, and that he abstained from making enquires for fear of learning the truth, the case is very different, and fraud may properly be ascribed to him."

Asset Company Ltd. v Mere Roihi [1905] AC 176 applied.

4. That such matters as to whether the instruments of transfer were forged are matters of fact to be determined at the trial on the evidence to be adduced. The court is in no position to determine at the pleadings stage the strength or otherwise of the evidence which may be adduced in support of the case and in any event should refrain from so doing on a strike out application of this kind.

JUDGMENT

- [1] **GEORGE-CREQUE, J.A.:** This is an appeal from the order of the Master made on 7th May 2009¹, in which she struck out the appellant's (Mr. Peters, being the claimant below) claim as against the respondent (Mr. Spencer being the first named defendant below) with costs, on the basis that the pleadings contained no allegations of facts which supported a cause of action against the respondent. This order was made pursuant to an application made by Mr. Spencer presumably, pursuant to CPR 26.3(1)(b) which empowers the court to strike out a statement of case where it does not disclose any reasonable ground for bringing a claim. Mr. Peters seeks to have the Master's order set aside.

¹ Entered on 29th May, 2009

The Grounds of Appeal

[2] Mr. Peters has advanced four grounds of appeal. They are that the Learned Master:

(1) erred in law and/or on the pleadings in holding that the pleadings contain no allegation or facts which support a cause of action against the first defendant (Mr. Spencer);

(2) failed to give sufficient weight or any at all to the pleadings in so far as the same made out a case for rectification of the Land Register under Section 140 of the **Registered Land Act**;

(3) failed to give any consideration to Mr. Peters' claim for a declaration;

(4) failed to address her mind or to properly consider the proper application of CPR 26.3 to the pleadings as filed in the claim.

The Background

[3] Mr. Peters, based on his pleaded case, is an Antiguan national, but at the material time was resident in New York, USA. He returned to Antigua in 2008 with the intention of building a house on Parcel 135, Block 45 1795A, Registration Section: Mc Kinnons ("Parcel 135"). He believed himself to be the owner of Parcel 135, by way of purchase from the Crown in early 1992, through the then Minister responsible for Lands. On return to Antigua however, he discovered that Parcel 135 had now been registered to Mr. Spencer on the basis of a purported transfer from him (Mr. Peters) to Mr. Spencer in October 1992 for the sum of \$54,000.00.

[4] Mr. Peters claims that the entire transaction is a fraud as he did not execute such a transfer, has no knowledge of or had any dealings with Mr. Spencer; did not receive the stated consideration contained therein; did not authorise anyone to sell or otherwise deal with Parcel 135; and did not appear before anyone for witnessing his signature on such transfer. He caused a claim to be issued on 21st July 2008 as against three defendants, namely, Mr. Spencer, the purported

Transferee of Parcel 135, named as the first defendant, one Patricia Simon-Forde, a lawyer practising in the state of Antigua and Barbuda named as the second defendant, and before whom he is said to have executed the transfer in favour of Mr. Spencer, and one Hilroy Humphreys, named as the third defendant, being the Minister of Agriculture, Lands and Fisheries at the material time. In so far as is relevant to this appeal Mr. Peters prayed for the following relief:

- (1) damages;
- (2) rectification of the Land Register in respect of Parcel 135, under Section 140 of the **Registered Land Act**²; and
- (3) a declaration that Parcel 135 is owned by him (Mr. Peters) or is held in trust for him.

[5] The third defendant (Mr. Humphreys) unsuccessfully sought to have Mr. Peters' claim struck out as failing to disclose any reasonable cause of action as against him. In the order dismissing Mr. Humphreys' application, leave was granted to Mr. Peters to amend his statement of claim.

[6] An amended claim was filed on 17th December 2008. The amended claim form added a fourth defendant, namely, one Ernest Gilead, a clerk employed in the Land Registry at the material time. The amended claim form specifically claimed damages for fraud.

Mr. Peters' Pleaded Case

[7] Mr. Peters pleaded in essence that:

- (1) he purchased from the Government of Antigua and Barbuda acting through the Ministry of Agriculture, Land & Fisheries a parcel of land which had been shown to him in 1991 corresponding to Parcel 135 on the Land Register, for the sum of \$47,397.00;

² Cap. 374 of the Laws of Antigua and Barbuda

- (2) on 17th July 1992, a purported instrument of transfer under the hand of the then Governor General (Ag.) was recorded at the Land Registry on 23rd July 1992 whereby Parcel 135 was registered pursuant to the said instrument, in his name, as proprietor with absolute title. That Mr. Gilead, the Land Registry Clerk verified Mr. Peters' execution of this transfer and processed this instrument at the Land Registry – all unbeknownst to him. A Land Certificate was also issued on the same date but this certificate was never received by him;
- (3) on 7th October 1992, a further instrument of transfer in respect of Parcel 135, prepared by Messrs. Kendall and Forde, Solicitors, was presented for registration to the Registrar of Lands. This transfer purported to be signed by him (Mr. Peters) as transferor whereby Parcel 135 was transferred to Mr. Spencer for a stated consideration of \$54,000.00 ("the Spencer Transfer"). This is contained in paragraph 6 of his statement of claim;
- (4) he does not know Mr. Spencer, did not sign the Spencer Transfer, did not receive the consideration stated therein, did not instruct or authorise anyone to sell, execute on his behalf the Spencer Transfer, or receive any monies in respect thereof on his behalf. He accordingly says that the Spencer Transfer is false. (para. 7 of the statement of claim);
- (5) he at no time appeared before the second named defendant solicitor for the purpose of executing the Spencer Transfer despite, the second named defendant stating to have witnessed such execution by him. Accordingly, he says this statement is untrue. (para. 8 of statement of claim);
- (6) both instruments – the one from the Crown and the Spencer Transfer procured through Mr. Gilead are fraudulent and void ab initio.

The Particulars of Fraud Pleaded

[8] Mr. Peters, in essence repeated the averments set out above, and set out, among other things that:

- (1) he did not know Mr. Spencer; had no dealings with him whatsoever; nor did he authorise anyone to have any dealings with him on his behalf, in respect of Parcel 135 or at all;
- (2) at the date of the alleged execution of the Spencer Transfer, he was in New York and not in the State of Antigua and Barbuda living or residing at Old Road, in Antigua as the Spencer Transfer stated, and he never did reside at Old Road;
- (3) the second named defendant solicitor, having prepared the said Instrument, acted recklessly in failing to ascertain that the person purporting to sign the Spencer Transfer was in fact Mr. Peters;
- (4) he never instructed, solicited, or recruited the fourth named defendant, Mr. Gilead, the Land Registry Clerk, to process any documentation or to act in any manner or capacity on his behalf neither in respect of the transfer from the Crown or the Spencer Transfer;
- (5) Mr. Gilead had earlier procured the registration of Parcel 177 into Mr. Peters' name and the issuance of a Land Certificate bearing No. 4375/1991 which was represented by the third named defendant as the Land Certificate for Parcel 135 when the third named defendant gave him a copy thereof. Mr. Peters asserts that this representation was false;
- (6) the third defendant procured the registration of Parcel 177 into his name and procured the cancellation of the Land Certificate in respect of Parcel 177 which it appears is now owned by Garfield and Elizabeth Abbott pursuant to a transfer from the third named defendant.

(7) Mr. Gilead fraudulently obtained the Crown Transfer by executing the Certificate of Verification thereon, and having the same processed at the Land Registry, and causing a Register of Title to be opened in the name of Mr. Peters.

The Pleaded Defences

[9] By the time Mr. Spencer's application to strike out came on for hearing the defences of all four defendants were already filed. The pleaded defences of Mr. Spencer and the second and fourth defendants bear mention as they are, in my view, quite remarkable.

Mr. Spencer's (First Defendant) Defence

[10] Mr. Spencer, apart from asserting a general lack of knowledge about the persons concerned in the transaction admits that he does not know the claimant. Quite startlingly however, in paragraph 4 of his defence to the Amended Statement of Claim he pleads as follows in relation to the Spencer Transfer:

"Paragraph 6 of the amended Statement of Claim is denied. The said instrument of transfer was in the prescribed form as mandated by Rule 5 of the Registered Land Rules and was in fact and in law a transfer of parcel 135 **by the claimant to the 1st Defendant (Mr. Spencer)** for the sum of \$54,000.00 the receipt of which was acknowledged.

[11] With regard to the particulars, Mr. Spencer pleads at paragraph 6.2 as follows:

"6.2.1 The First Defendant contends he does not know the Claimant. At all material times the 1st Defendant dealt with the 4th Defendant with respect to the purchase of Parcel 135.

6.2.2 6.2.3.1..... ; 6.2.3.3.

6.2.3.4 The 4th Defendant represented to the 1st Defendant that he had the power of attorney with respect to parcel 135 for the registered proprietor which said proprietor was represented to be resident overseas.

6.2.3.5 Based on the 4th Defendant's representation, the 1st Defendant dealt with the 4th Defendant, paid him a deposit, and over the course of one year paid in full the purchase price for parcel 135."

[12] In his initial defence filed on 9th October 2008 to the original statement of claim Mr. Spencer curiously pleaded as follows at paragraph 4(3) vii:

“During the course of his dealings with respect to the acquisition of the land the 1st Defendant had no personal interaction with Kendall & Forde, Solicitors”.

The Solicitor’s (Second Defendant) Defence

[13] The second defendant does not state anywhere in her pleaded case that she acted for either Mr. Peters or Mr. Spencer or the “Ian Peters” of Old Road, in respect of whose identity she says she satisfied herself with respect to the execution and witnessing of the Spencer Transfer. In fact she denies that the Spencer Transfer was prepared by Kendall and Forde as solicitors³. She also denies any knowledge or dealings with the Claimant. At paragraph 7 she pleads as follows:

- “a) Ian Peters of Old Road, the person registered as the proprietor of the property described as Registration Section Mc Kinnons Block 45 1795 Parcel 135 on 23rd July, 1992 is the same person who executed the Instrument of Transfer on 9th October⁴, 1992 in favour of the First Defendant.
- b) The Second Defendant satisfied herself that the person appearing before her to execute the Instrument of Transfer was in fact the registered proprietor of the aforesaid parcel of land”.

It is to be remembered that Mr. Spencer claims also to not having any personal interaction with the solicitors Kendall and Forde, (and by extension therefore with the second defendant) in respect of the Spencer Transfer.

The Land Registry Clerk’s (Fourth Defendant) Defence

[14] This is set out, in essence, in paragraph 3 of his defence where he denies the allegation of fraud and then goes on to say as follows:

“The Fourth Defendant as a Land Registry clerk processed documentation for thousands of persons dealing with land in the Land Registry as was his duty as a Land Registry Clerk. In so far as he is alleged to have executed a Certificate of Verification in respect of any of the parcels in issue in this instance he did so as was his custom upon being requested by a member of the public to verify his signature. The particular signature on the Instrument alleged to have been verified by the Fourth Defendant was from a person identified to the fourth Defendant by the Chief Lands Officer

³ See; para 6 of 2nd Defendant’s Defence

⁴ The Instrument of Transfer states 7th October, 1992.

of the Government of Antigua as 'Ian Peters'."

- [15] Apart from this, his defence contains mere non-admissions, of the statement of claim save for paragraphs 1 and 2 which are admitted. Curiously, the Spencer Transfer, save for the bare denial of fraud contained in paragraph 3 of his defence, is not addressed by Mr. Gilead at all.

The Law

- [16] CPR 26.3(1)(b) empowers the court to strike out a statement of case if it appears to the court that the statement of case or the part to be struck out does not disclose any reasonable ground for bringing the claim.

- [17] CPR 26.3(1) finds its equivalent in the UK CPR r 3.4(2)(a). The learning in respect of the UK rule is that striking out is appropriate in the following instances: where the claim sets out no facts indicating what the claim is about or if it is incoherent and makes no sense, or if the facts it states, even if true do not disclose a legally recognisable claim against the defendant.⁵

- [18] In **Citco Global Custody NV v Y2K Finance Inc**⁶, Edwards JA, in her judgment, with which I concurred, dealt at length with the principles by which the court must be guided when exercising the draconian power of striking out a party's statement of case. I consider it useful to reproduce paragraphs 13 and 14 of her judgment here:

"[13] On hearing an application made pursuant to CPR 26.3(1)(b) the trial judge should assume that the facts alleged in the statement of case are true.³ "Despite this general approach, however, care should be taken to distinguish between primary facts and conclusions or inferences from those facts. Such conclusions or inferences may require to be subjected to closer scrutiny."⁴

- [14] Among the governing principles stated in **Blackstone's Civil Practice 2009**⁵ the following circumstances are identified as providing reasons for not striking out a statement of case: where the argument involves a substantial point of law which does not

⁵ See Blackstone's Civil Practice 2009 at page 431.

⁶ ECSC Civil Appeal No. 22 of 2009 [BVI]

admit of a plain and obvious answer; or the law is in a state of development⁷; or where the strength of the case may not be clear because it has not been fully investigated. It is also well settled that the jurisdiction to strike out is to be used sparingly since the exercise of the jurisdiction deprives a party of its right to a fair trial, and its ability to strengthen its case through the process of disclosure and other court procedures such as requests for information; and the examination and cross-examination of witnesses often change the complexion of a case. Also, before using CPR 26.3(1) to dispose of 'side issues', care should be taken to ensure that a party is not deprived of the right to trial on issues essential to its case. Finally, in deciding whether to strike out, the judge should consider the effect of the order on any parallel proceedings and the power of the court in every application must be exercised in accordance with the overriding objective of dealing with cases justly."

- [19] "A statement of case is not suitable for striking out if it raises a serious live issue of fact which can only be properly determined by hearing oral evidence"

(**Bridgeman v McAlpine – Brown** [2000] L.T. L Jan. 19, 2000, CA).

- [20] It is worthwhile restating the position regarding the role of pleadings under the new dispensation ushered in by **CPR 2000**. This can be best said by adopting a passage from the judgment of Barrow JA in the now often cited **East Caribbean Flour Mills**⁸ case in which he cited with approval the dictum of Lord Woolf, MR in **McPhilemy v Times Newspapers Ltd**⁹ and the dictum of Lord Hope in **Three Rivers District Council and Others v Bank of England (No. 3)**¹⁰ where Lord Hope had in turn referred with approval to the dictum of Lord Woolf. Barrow JA at paragraph 43 of his judgment put it this way:

"Lord Hope's reproduction and approval of the exposition by Lord Woolf MR in **McPhilemy v Times Newspapers Ltd**²⁸ on the reduced need for extensive pleadings now that witness statements are required to be exchanged, should be seen as a clear statement that there is no difference in their Lordships' views on the role and requirements of

⁷ See also *The Caribbean Civil Court Practice 2008*, page 231: "...a case should not be struck out where the claim is in an area of developing jurisprudence and the facts need to be investigated before conclusions can be drawn about the law: *Farah v British Airways plc and the Home Office* (2000) Times, 26 January CA."

⁸ *East Caribbean Flour Mills Limited -v- Ormiston Ken Boyea – SVG Appeal No. 12 of 2006* (unreported)

⁹ [1993] 3 All ER, 775, 792-793A

¹⁰ [2001] 2 All ER 513

pleadings. The position, as gathered from the observations of both their Lordships, is that the pleader makes allegations of facts in his pleadings. Those alleged facts are the case of the party. The "pleadings should make clear the general nature of the case," in Lord Woolf's words, which again I emphasize. To let the other side know the case it has to meet and, therefore, to prevent surprise at the trial, the pleading must contain the particulars necessary to serve that purpose. But there is no longer a need for extensive pleadings, which I understand to mean pleadings with an extensive amount of particulars, because witness statements are intended to serve the requirement of providing details or particulars of the pleader's case."

[21] Mr. Peters' case is that even though he paid the Crown for Parcel 135, he did not execute the Instrument of Transfer enabling the recording of it in his name. That Mr. Gilead, the Land Registry Clerk procured this and then thereafter, caused the Spencer Transfer to be executed by a person purporting to be Mr. Peters, when in fact this was not the case. Mr. Spencer pleads that he dealt with Mr. Gilead who represented that he had a Power of Attorney to act for Mr. Peters. Yet Mr. Spencer purportedly executes the same transfer purportedly executed by Mr. Peters as Transferor (not by Mr. Gilead, as attorney for Mr. Peters who he understood was 'resident overseas') the same day and in the presence of the same lawyer in respect of whom neither he nor Mr. Peters appear to have had any association or personal contact. Surely, Ms. Simon-Forde's role in the Spencer Transfer requires full investigation. There is also the question whether there is more than one "Ian Peters" or whether "Ian Peters" of Old Road, actually exists. There are also the questions of Mr. Gilead's representations and actions, and Mr. Spencer's knowledge or lack thereof. These are all factual issues arising on the pleadings for determination.

[22] In my view, was there ever a case which cries out for full ventilation by the process of a trial this is such a case. Clearly, serious live issues of fact arise on Mr. Peters' pleaded case. The court is called upon to determine whether the Crown Transfer and the subsequent Spencer Transfer are forgeries. This, in my view, can only be properly determined by a trial with the full benefit, prior to actual trial, of Mr. Peters availing himself of the processes for disclosure, and other court procedures such

as requests for information, so as to enable him to fully flesh out his case thereafter by witness statements, and during trial, the opportunity for examination and cross-examination of witnesses. Mr. Peters, given what has transpired and the nature of the fraud pleaded, can only plead to such matters evidencing the fraud as he is aware of at this stage. The likelihood exists that in utilizing the disclosure procedures and the like, further information may be uncovered which may bolster his case.

[23] Mr. Peters seeks among his remedies rectification of the Land Register pursuant to Section 140 of the **Registered Land Act**. Section 140 allows for rectification of the Land Register in cases of fraud or mistake in respect of any registration including a first registration.¹¹ Section 140(2) goes on to state as follows:

“The register shall not be rectified so as to affect the title of a proprietor who is in possession... and acquired the land for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission fraud or mistake or substantially contributed to it by his act, neglect or default.”

[24] Counsel for Mr. Spencer in his written submissions sought to distinguish the circumstances of this case from the case of **Gibbs v Messer**¹² relied on by counsel for Mr. Peters. That case involved a forged transfer. The transferee turned out to be fictitious. The court held that the transfer was vitiated and thus in essence no legal title could pass. If it is that as Mr. Peters asserts, in essence that a fictitious ‘Mr Peters’ executed the transfer (as transferee) from the Crown, and a fictitious ‘Mr. Peters’ who was not the true owner of Parcel 135 executed (as transferor) the Spencer Transfer thereby allowing Mr. Spencer to become registered as proprietor of Parcel 135, it is quite difficult to discern the features which make the case at bar distinguishable from **Gibbs v Messer**.

[25] Counsel for both sides rely on the Privy Council decision in **Assets Company Ltd.**

¹¹ See the dictum of Lord Phillips at para 39 in *Quinto and Quinto v Santiago* (infra)

¹² [1891] A.C 248

v **Mere Roihi**¹³ in which **Gibbs v Messer** was referred, and the more recent decision of **Quinto and Quinto v Santiago Castillo Ltd.**¹⁴ in which the Privy Council concluded that Conteh CJ was correct in holding that **Santiago** had knowledge of Ann William's fraud, and of the mistake that this induced in relation to both registrations and accordingly ordered that Conteh CJ's order for rectification be restored. In **Quinto's** case the board recited a passage from the opinion of Lord Lindley in **Assets Company** to this effect:¹⁵

"... it appears to their lordships that the fraud which must be proved in order to invalidate the title to a registered proprietor for value, whether he buys from a prior registered owner... must be brought home to the person whose registered title is impeached or to his agents. Fraud by persons from whom he claims does not affect him unless knowledge of it is brought home to him or his agents. The mere fact that he might have found out fraud if he had been more vigilant, and had made further inquiries which he omitted to make, does not of itself prove fraud on his part. **But if it be shown that his suspicions were aroused, and that he abstained from making enquiries for fear of learning the truth, the case is very different, and fraud may properly be ascribed to him**" (my emphasis).

[26] Lord Lindley went on at page 210 in the **Asset Company** case to make the following statement which I consider relevant to the instant case:

"A person who presents for registration a document which is forged or has been fraudulent or improperly obtained is not guilty of fraud if he honestly believes it to be a genuine document which can be properly acted upon."

[27] Such matters as to whether the instruments of transfer were forged are matters of fact to be determined at the trial on the evidence to be adduced. The court is in no position to determine at the pleadings stage the strength or otherwise of the evidence which may be adduced in support of the case and in any event should refrain from so doing on a strike out application of this kind. Similarly, was the court to find that the instruments were forged or fraudulent then the court would be required to go on to consider whether or not Mr. Spencer held the honest belief that they were genuine. This would also involve findings of fact based on the

¹³ [1905] AC 176

¹⁴ [2009] UKPC 15 - an appeal from Belize

¹⁵ At page 210

evidence adduced.

[28] As the matter currently stands, were Mr. Peters to succeed in proving the fraud as it relates to the other defendants (in particular in respect of the fourth defendant), and were the court minded to order rectification, the unfortunate resulting position is that the person whose 'title' would be affected would not be before the court. Such a course would not accord with the overriding objective of **CPR 2000**. It is no doubt in keeping with the objective to deal with cases justly, that CPR 19.2(3) permits the joinder of a party of the court's own motion where it considers that there is an issue involving the new party which is connected to the matters in dispute so as enable a resolution of all matters in dispute in the proceedings.

[29] In my view, for the reasons advanced above, this case is a most inappropriate one for the exercise of the court's power to strike out under CPR 26.3(1)(b). It cannot be said that no reasonable grounds have been disclosed for bringing the claim. I am of the opinion that had the learned master applied or addressed her mind to the relevant principles and properly applied them to the matters as pleaded I have no doubt that she would have concluded that striking out was not the proper course in the circumstances.

Conclusion

[30] The result is that the appeal is allowed, and the learned master's order is set aside in its entirety. The matter shall proceed before the court below in accordance with **CPR 2000**. The appellant shall have his costs of this appeal assessed in the sum of \$933.33 being two-thirds of the costs as assessed below.

Janice George-Creque
Justice of Appeal