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

ANTIGUA AND BARBUDA

CLAIM NO. ANUHCV2011/0736

BETWEEN:

MYRNA NORDE

Respondent/Claimant

AND

JACQUELINE MANNIX

Applicant/Defendant

Before:

Master Charlesworth Tabor (Ag.)

Appearances:

Miss Joy Dublin for the Claimant
Mr. Hugh Marshall for the Defendant

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2012: November 21
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REASONS FOR RULING

[1] **TABOR, M (Ag.)**: This is an application to strike out the statement of case of the claimant and judgment be entered for the defendant or in the alternative summary judgment be given to the defendant. The defendant filed this application on 25th October, 2012 with supporting affidavit and the claimant filed an affidavit in opposition on 6th November, 2012.

[2] After hearing oral arguments on the matter from counsel of both sides, I ordered that the statement of case be struck out and judgment entered for the defendant. I also ordered costs to the defendant of $1500 on the application and costs of $5500 in the proceedings.

[3] On 24th June, 2013 an appeal in this matter was heard before Her Ladyship Dame Janice Pereira, Chief Justice, His Lordship Mario Michel, Justice of Appeal and His Lordship Sydney Bennett QC, Justice of Appeal (Ag.), in the presence of Mr. Ralph Francis for the Appellant and Mr. Hugh Marshall with Miss Kema Benjamin for the Respondent. The Court of Appeal made the following order:

(1) Application by intended Respondent to strike out appeal withdrawn with leave of the Court.
(2) Application for leave to Appeal filed on 5th December, 2012 adjourned pending receipt of written reasons of the learned Master in respect of his decision made on 21st November, 2012.
(3) Upon receipt of said reasons the Application for Leave shall be placed on the chambers list for hearing and determination.

Grounds of the Application

[4] The grounds of the application are as follows:

(1) The Civil Procedure Rules 2000 (CPR) Part 26.3;
(2) Civil Procedure Rules Part 15;
(3) That the statement of case does not disclose any reasonable ground for bringing the claim, in that, the claim is brought in violation of the Limitation Act;
(4) That the statement of case does not disclose any reasonable ground for bringing the claim, in that, the claim is in contravention of the Land Adjudication Act Cap. 234 of the Laws of Antigua and Barbuda;
(5) That the claimant does not have any reasonable ground for bringing the claim, in that, it is in contravention of the Registered Land Act Cap. 374 of the Laws of Antigua and Barbuda;
(6) That the statement of case be struck out as an abuse of the process of the court, in that, the claimant seeks to invoke equity without regard to her delay and in spite of her own actions in failing to effect conveyance of the lands; and
(7) That the statement of case be struck out as an abuse of the process of the court, in that, as a result of actions taken by the claimant it is impossible to convey the lands, as the lands no longer exist.

Background Facts

[5] I will now provide a summary of the pertinent background facts of the matter which will help to provide the context for an understanding of its evolution and the issues which precipitated the claim.

[6] The property in issue is Registration Section: Potters & Belmont; Block: 613 1891D; Parcel: 70 which is currently occupied by the claimant. The claimant's father Henry Alford Mannix, deceased, is the registered proprietor of the said parcel. The claimant and her father and two siblings lived in a wooden tenement on the land owned by their father. After his migration to Canada in 1952, the claimant and her siblings continued to reside in the said property.

[7] The claimant has noted that around 1982 she had discussions with her father and obtained his consent to demolish the wooden tenement on the land, since it had become infested with termites and was beyond repair. The claimant further noted that she secured a loan of $75,000 from the Central Housing and Planning Authority (CHAPA) to construct a

completely new house on the same parcel 70. One of the conditions of this loan was that the land be used as security. To satisfy this condition the claimant obtained permission from her father to use a portion of the land as security for the loan. The claimant also noted that her father decided to have the title of two separate portions of the parent parcel, then registered as Registration Section: Potters & Belmont; Block: 613 1891D; Parcel: 10, transferred to her. To this end, her father on 14th July, 1977 and 1st June, 1978 executed two Voluntary Memorandums of Transfer, transferring to the claimant title to 0.8 acres and 0.5 acres respectively.

[8] The transfers of title to the claimant were not perfected since at the time her father had an outstanding balance on a mortgage secured by the property. Sometime in 1982 the claimant managed to repay the balance outstanding on the mortgage. The claimant's attorney gave an undertaking to CHAPA that he would perfect the titles for both parcels of land and submit them to be retained by the Authority as security for the loan. This was never done and the attorney subsequently died in 1992.

[9] The claimant's father died in September, 1985 and in January, 1997 the claimant was appointed as Administrator of his Estate. However, in September 2005 the claimant was removed by the court as Administrator of the Estate for failure to comply with orders of the court made on 8th December, 2003 and 25th February, 2005. She was replaced as Administrator by the defendant.

[10] Sometime in 2003 the claimant became aware that the Memorandums of Transfer had not been registered and that her deceased father was still the registered proprietor of the property. The claimant also subsequently became aware that the parent parcel of land (Parcel 10) was subdivided into two parcels, namely, parcel 71 measuring 4½ acres and parcel 70 measuring ½ acre. Parcel 71 has since been subdivided into several parcels.

[11] The claimant's contention is that her father had done everything in his power to transfer to her parcel 70 measuring 0.5 acres and another parcel measuring 0.8 acres, and that she had done everything in her power to have these transfers duly filed and registered. It is on this basis that the claimant is now seeking to have transferred to her parcel 70 and Registration Section: Potters & Belmont; Block: 613 1891D; Parcel: 131. The latter measuring 0.86 acres but the claimant contends that this is the closest in size to the portion of land, measuring 0.8 acres, that her father attempted to convey to her.

Principles Governing CPR 26.3 (1)(b) - Applications to Strike Out a Claim and Part 15 - Summary Judgment

[12] The power of the court to strike out a statement of case is provided for by Rule 26.3 (1) of the CPR 2000 which states as follows:

> "In addition to any other power under these Rules, the court may strike out a statement of case or part of a statement of case if it appears to the court that –
> (a) .....
> (b) the statement of case or part to be struck out does not disclose any reasonable ground for bringing or defending a claim;

(c) the statement of case or part to be struck out is an abuse of the process of the court or is likely to obstruct the just disposal of the proceedings; or
(d) the statement of case or part to be struck out is prolix or does not comply with the requirements of Part 8 or 10".

[13] The striking out of a statement of case or defence is a draconian step which a court would only take in exceptional circumstances. In **Baldwin Spencer v The Attorney General of Antigua and Barbuda et al (Civil Appeal No. 20A of 1997)** Dennis Byron CJ (Ag.), as he then was, restated the seminal test that should be applied by the court on an application to strike out when he said:

> "This summary procedure should only be used in clear obvious cases, when it can be seen on the face of it, that a claim is obviously unsustainable, cannot succeed or in some other way is an abuse of the process of the court.... Striking out has been described as 'the nuclear power' in the court's arsenal and should not be the first and primary response of the court".

[14] In his judgment in the interlocutory appeal in **Tawney Assets Limited v East Pine Management et al (BVI High Court Civil Appeal No. 7 of 2012)** Mitchell JA (Ag.) in underscoring the need why the court should proceed cautiously when dealing with an application to strike out noted that:

> "The exercise of this jurisdiction deprives a party of his right to a trial and of his ability to strengthen his case through the process of disclosure, and other procedures such as requests for further information. The court must therefore be persuaded either that a party is unable to prove allegations made against the other party; or that the statement of case is incurably bad; or that it discloses no reasonable ground for bringing or defending the case; or that it has no real prospect of succeeding at trial".

[15] In **Citco Global Custody NV v Y2K Finance Inc. (BVI High Court Civil Appeal No. 22 of 2008)** Edwards JA in dealing with an application to strike out noted that:

> "Striking out under the English CPR, r 3.4(2)(a) which is the equivalent of our CPR 26.3 (1)(b), 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 recognizable claim.

Also, in **Ian Peters v Robert George Spencer (Antigua and Barbuda High Court Civil Appeal No. 16 of 2009)**, Pereira CJ (Ag.), as she then was, indicated that a statement of case is not suitable for striking out if it raises a serious live issue of fact which can only be determined at trial by hearing oral evidence.

[16] The power of the court to give summary judgment on a claim or on a particular issue is provided for under rule 15.2 CPR which states:

"The court may give summary judgment on the claim or on a particular issue if it considers that the –

(a) claimant has no real prospect of succeeding on the claim or the issue; or
(b) Defendant has no real prospect of successfully defending the claim or the issue.

In **Swain v Hillman [2001] 1 All ER 91** Lord Woolf provided some guidance in considering an application for summary judgment when he indicated that what should be shown is that the claim or defence has "no real prospect of being successful or succeeding" and that the word "real" implies that there is a "realistic" as opposed to a "fanciful" prospect of success.

Applicant/Defendant's Submissions

[17] Learned Counsel for the defendant, Mr. Hugh Marshall, has submitted that the claimant has brought the claim simply claiming an "order of transfer" of certain lands without indicating in any detail the precise law or doctrine in law for the basis of the claim. He noted further that although the claimant seeks recovery of property, the claimant has not provided an estimate of the value of the property which is a requirement under Rule 8.7 (4) of the Civil Procedure Rules. More fundamentally, the claimant is seeking to have parcels 70 and 131 transferred to her and these parcels were not in existence when the Memorandums of Transfer were executed.

[18] With respect to the two Memorandums of Voluntary Transfer dated the 14th July, 1977 and 1st June, 1978 which are the basis for the claim; learned Counsel has noted that the claimant has failed to mention or exhibit the limitations placed on the Memorandum of Transfer of 14th July, 1997. In that Memorandum, the transferor Mr. Henry Alford Mannix, expressly stated that the property shall be used solely for the purpose of collateral and that it should not be rented, leased or sold and that in the event of a foreclosure he reserves the first right to redeem the property. Learned Counsel has submitted, therefore, that it is misleading for the claimant to give the impression that it was the intention of the transferor to part with his property.

[19] Learned Counsel has submitted that all lands and in particular the lands falling under the Estate of Henry Alford Mannix are governed and controlled by the Registered Land Act (RLA). She noted that under the RLA Section 83 makes provision for the transfer of lands and what obtained in the case at bar failed to meet the requirements and therefore the Memorandums of Transfer are of no effect as instruments of transfer.

[20] Learned Counsel has noted that there was a process provided for under the Land Adjudication Act (LAA) by which all lands would be placed under the RLA and persons with an interest in land be afforded the opportunity to make a claim. Learned Counsel further noted that on an examination of the records at the Land Registry parcels 70 and 71 were first created in the name of Henry Alford Mannix in 1983, which evidences the fact that he made his claim under the LAA in spite of the Memorandums of Transfer. Learned Counsel has opined, therefore, that if the claimant wanted to establish her interest under the Memorandums of Transfer she should have made her claim upon Adjudication, and having not done so she is not now permitted to circumvent the provisions of the LAA.

[21] Invoking the equitable doctrine of laches, learned Counsel has noted that the claimant has sat upon her rights for an extensive period of time and is now seeking to enforce those rights. Counsel noted that these rights arose in 1977 and 1978 with the Memorandums of Transfer and the claimant has allowed several years to pass by and should now be barred from seeking to proceed on these documents.

[22] Learned Counsel has also submitted that the claimant's claim is statute barred pursuant to Section 17 of the Limitation Act which states that "no action may lie to recover any land or interest in it 12 years after that right arose". In the case of an equitable interest in land, Counsel has noted that the limitation period of 12 years also apply pursuant to Section 20. It is the view of Counsel, therefore, that since the claimant's rights arose in 1977 and 1978, then the limitation period for the claim at bar would have expired in 1989 and 1990 respectively.

[23] Finally, learned Counsel has submitted that the claimant is using equity as a sword. In that regard, learned Counsel has noted that when the claimant applied for Letters of Administration of the Estate of Henry Alford Mannix she stated on oath that she was the only person entitled to a share of the Estate. This was clearly not so and while being the Administratrix of the Estate the claimant never made any dispositions to the other beneficiaries. Learned Counsel further noted that the claimant is now seeking to frustrate the distribution of the Estate by the defendant by not accounting for the lands she has sold and the proceeds applied to her own personal benefit.

Respondent/Claimant's Submissions

[24] Learned Counsel for the claimant, Miss Joy Dublin, has submitted that the Limitation Act does not apply to the case at bar since the claimant already has an interest in the lands and is not now seeking that interest. She noted that the claimant's father by executing the Memorandums of Transfer had done all in his power to deprive himself of the title said parcels of land and to vest title in his daughter.

[25] Learned Counsel has cited the case of **Rose and Others v The Commissioners of Inland Revenue [1951] 2 All ER 959** to support her contention that the *inter vivos* gift of lands of Henry Alford Mannix to his daughter should be perfected by the court since the deceased prior to his death did everything within his power to vest legal title in the claimant. In the case of **Rose and Others** which dealt with the transfer of shares in a company the court held that "the deceased had done all in his power to deprive himself of the title to the shares and to vest it in the donees or their trustees, and therefore, although the transfers were not registered until June, 1943 the gifts were complete on the execution of the transfers so as to pass the beneficial interests to which the court would have compelled to give effect, and the shares were not liable to duty". On the basis of this authority, learned Counsel has submitted that until the gift or trust is completely constituted that equity recognizes a trust enforceable against the settlor and those claiming under him.

[26] Learned Counsel also submitted that the defendant is estopped from raising the limitation defence since the claim is not seeking to recover land, but rather to affirm the claimant's interest in land.

Analysis and Conclusion

[27] Learned Counsel for the claimant has attached much significance to the case of **Rose and Others** in her submissions, to support her contention that the Memorandums of Transfer executed by the claimant's father in her favour created a trust which is enforceable by the court. This fact is certainly not in dispute as can be observed from the statement of Lord Justice Jenkins:

> "In my view, a transfer under seal in the form appropriate under the company's regulations, coupled with delivery of the transfer, and certificate to the transferee, does suffice, as between transferor and transferee, to constitute the transferee the beneficial owner of the shares, and the circumstance that the transferee must do a further act in the form of applying for and obtaining registration in order to get in and perfect his legal title, having been equipped by the transferor with all that is necessary to enable him to do so, does not prevent the transfer from operating, in accordance with its terms as between the transferor and the transferee, and making the transferee the beneficial owner. After all, where duty is concerned the only relevant type of ownership is beneficial ownership, and the situation of the legal estate does not affect the question".

In the case at bar, it is undeniable that the Memorandums of Transfer would make the claimant a beneficial owner of the said lands. This is similar to the situation of the Shares Transfer in **Rose and Others**. However, this is where the similarity between the case at bar and **Rose and Others** ends, since in the latter case the issue was whether duty was or was not payable by the transferee on the transfer of shares on the death of the transferor.

[28] The issue before the court in the present case is whether title of lands can be transferred to the claimant on the basis of the Memorandums of Transfer executed by her father. To effect the transfer of land, section 83 (2) of the Registered Land Act requires that "The transfer shall be completed by registration of the transferee as proprietor of the land, lease or charge and by filing the instrument". Clearly, this requirement has not been satisfied.

[29] With respect to the limitation point, it is clear pursuant to section 17 of the Limitation Act that no action can be initiated to recover any land after the expiration of twelve (12) years from the date of the accrual of the action. Learned Counsel for the claimant has submitted, however, that what is sought by the claim is not the recovery of land but the claimant's interest in the land. This position is untenable since section 2 (1) of the Limitation Act defines land to include:

> "corporeal hereditaments, rent charges and any legal or equitable estate or interest therein, including an in the proceeds of sale of land held in trust for sale, but except as provided above in this definition does not include any incorporeal hereditament".

As Counsel for the defendant has submitted accrual of the action in the case occurred in 1989 and 1990 and bringing the claim in 2011 would fall outside of the twelve (12) years stipulated by the Limitation Act.

[30] Both sides have invoked the principles of Equity to support their case. With respect to the claimant, two of the maxims of Equity that are instructive to her case are "He who comes to equity must come with clean hands" and "Equity will not complete an imperfect gift". Given the circumstances surrounding the present case, I will venture to say that Equity will not provide any aid to the claimant.

Order

[31] In the premises, having reviewed all the pleadings in the case and taking into consideration the oral and written submissions of learned Counsel on both sides, the court orders as follows:

(1) The Amended Statement of Claim of the claimant filed on 8th May, 2012 is struck out and judgment entered for the defendant.

(2) The claimant to pay the defendant costs of this application in the sum of $1500.

(3) The claimant to pay costs to the defendant in the sum of $5500 in these proceedings.

Charlesworth Tabor
uMaster (Ag.)