EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

MONTSERRAT

MNIHCVAP2016/0008
MNIHCVAP2016/0009
MNIHCVAP2016/0010
MNIHCVAP2016/0011

BETWEEN

[1] PHILLIP BRELSFORD
[2] JOEL OSBORNE
[3] INGRID OSBORNE
[4] ALYN RUSSELL KRAUSE
[5] GAIL ANN CIMON-KRAUSE
[6] KENNETH ALLEN
[7] YVONNE DALY-WEEKES
[8] KATHLEEN ALLEN FERDINAND
[9] KHARL MARKHAM

Appellants

and

[1] PROVIDENCE ESTATE LIMITED
[2] OWEN ROONEY

Respondents

Before:

The Hon. Mde. Gertel Thom	Justice of Appeal
The Hon. Mr. Paul Webster	Justice of Appeal [Ag.]
The Hon. Mr. John Carrington, QC	Justice of Appeal [Ag.]

Appearances:

Mr. Kharl Markham for the Appellants
Mr. Owen Rooney in person and as Director of the first named Respondent

---

2017: May 31;
2018: February 15.

Land Law – Registered Land Act – Effect of registration based on a forged document – Indefeasibility of title – Enforcement of personal equities against registered proprietors – Company law – Rectification of the land register – Company law – Effect of actions taken by persons not validly appointed as directors in accordance with the constitutional documents of a company – Whether such a person has ostensible authority to represent the company

The appellants all purchased lands from the first named respondent, Providence Estate Limited ("PEL") which was the registered proprietor of lands at Providence, Montserrat with absolute title. In these transactions, PEL was purportedly represented by Mr. Warren Cassell ("Mr. Cassell"), an attorney-at-law, as its sole director. Mr. Cassell's law firm acted as legal representative for PEL in the transactions which all culminated with the registration of the appellants as proprietors of the lands in question under the Registered Land Act ("RLA").

Subsequently, Mr. Cassell was convicted in the Montserrat High Court for conspiracy to defraud PEL. The appellants brought individual claims against PEL and Mr. Owen Rooney, a director of PEL, for inter alia, declarations that they are the absolute owners of the lands which had been transferred to them from PEL. The respondents, in their defence, alleged that the transfer instruments were not executed in compliance with the provisions of the RLA; Mr. Cassell was never a director or officer of PEL; the appellants were on notice of the fraud perpetrated on PEL, as inter alia, the consideration was considerably less than the market value; the registrations of the appellants as proprietors of the lands were obtained by fraud and the appellants at all material times had knowledge of and/or contributed to the fraud; and that the appellants were unjustly enriched as PEL never received any of the consideration for the transfer. They also counterclaimed for various declarations including that the appellants were not bona fide purchasers for value of the parcels; the appellants have been unjustly enriched at the expense of PEL; the parcels transferred to the appellants are held on constructive trust for PEL; for rectification of the land register to reflect PEL as the proprietor of the parcel in issue; and for restitution of the amount by which they were unjustly enriched at the expense of PEL.

The learned judge found that neither the appellants nor their lawyers had conducted any due diligence searches on PEL prior to concluding the purchases of the land from it. He further noted the land transfer instruments had not been executed in accordance with section 107 of the RLA. He found that the appellants relied merely on Mr. Cassell's representations of his authority to act for PEL. The learned judge concluded that the appellants, having failed to make proper inquiries to ascertain the authority of Mr. Cassell to represent PEL, acquired the lands subject to PEL's rights and were not bona fide purchasers of the lands for value without notice. He dismissed the appellant's claim with costs and declared that PEL is the owner of the various parcels in question and gave directions for the rectification of the land registers in relation to each of the parcels by removing the appellants as registered proprietors and substituting PEL as registered proprietor.

Dissatisfied with the decision of the learned judge, the appellants appealed.

Held: allowing the appeal in part; dismissing the counter notice; setting aside the declarations made by the learned judge on the claim and counterclaim below that the appellants are not the absolute owners of the various parcels of land and that PEL is the absolute owner of these parcels; granting the declarations sought by the appellants in their claims in the court below that they are the absolute owners of the various parcels of land for which they are respectively registered as proprietors, but with the

proviso that in each case the land is held subject to the equity in favour of PEL to apply to the court for an order to compel each proprietor to re-transfer the parcel to PEL; on the counterclaim, ordering that each of the appellants shall execute an instrument transferring title to the parcel held in his or her name to PEL and setting aside the orders for rectification of the various registers; and ordering that each party bear his own costs, both in the court below and before this Court, that:

1. The registration of any person as the proprietor with absolute title of a parcel vests in that person the absolute ownership of that parcel, together with all rights and privileges belonging or appurtenant thereto, free from all other interests and claims whatsoever. The system of land registration confers (in broad terms) indefeasibility of title on the registered proprietor, that is, immunity from attack in respect of the land or interest of which he is registered as proprietor. Immunity, however, is not absolute as there are circumstances in which the registration may be cancelled or corrected and the proprietor remains subject to claims brought in personam against him.

   Alan Frederick Frazer v Douglas Hamilton Walker and others [1966] UKPC 27 applied; Section 23 of the **Registered Land Act**, Cap 8:01, Revised Laws of Montserrat 2008 applied.

2. Even if non-compliance with the Registered Land Act's requirements as to registration may involve the possibility of cancellation or correction of the entry, registration once effected must attract the consequences which the Act attaches to registration, whether that was regular or otherwise. It is the registration and not its antecedents which vests and divests title. As such, once the appellants were registered as proprietors of the various parcels, they acquired title to those parcels, notwithstanding any irregularity that may have occurred with respect to the vendor, PEL. Registration, based on a void instrument, is still effective to vest and divest title. It follows as well that the failure by PEL to execute the land transfer instruments in accordance with section 107 of the RLA also did not affect the title which the appellants derived by virtue of their registration.

   Section 23 of the **Registered Land Act**, Cap 8:01, Revised Laws of Montserrat 2008 applied; **Alan Frederick Frazer v Douglas Hamilton Walker and others** [1966] UKPC 27 applied; **Boyd v Mayor Etc of Wellington** [1924] NZLR 1174 applied.

3. A company can only act through its directors. Where a person has not been appointed a director in accordance with the constitutional documents of the company, the acts of such a person are not acts of the company as he would lack actual authority of the company (acting through its directors) to do such acts. He may, nevertheless, have ostensible or apparent authority to act on behalf of the company, but this will arise only where the company, but not merely the purported director, represents to the third party that the person has the authority to act on its behalf. Where a person purporting to act on behalf of

a company lacked either actual or ostensible authority, the company is not bound by the act of that person in the absence of ratification of the agreement purportedly entered on its behalf. The various land transfers purportedly made on behalf of PEL in favour of the appellants were therefore void for want of authority of Mr. Cassell to act in the name of PEL. Notwithstanding, the effect of the void transfers is that PEL was nonetheless divested of its title to the parcels of land and the titles were vested in the purchasers who acquired indefeasible title to the parcels.
Companies Act, Cap. 11.12, Revised Laws of Montserrat 2008 applied.

4. In the absence of a finding of fraud or mistake, the conditions for rectification of the register under RLA section 140 do not arise and the court has no jurisdiction otherwise to order the rectification, that is, either cancellation or correction, of the land registers. The learned judge, having made no finding of fraud, there was no basis on which he could have ordered rectification of the register.

   Section 140 of the **Registered Land Act**, Cap 8:01, Revised Laws of Montserrat 2008 applied.

5. A registered owner may hold as trustee and be compelled to execute the trusts subject to which he holds. Although trusts are kept off the register, a registered owner may not be beneficially entitled to the lands registered in his name. The representation of authority came only from Mr. Cassell himself; this is sufficient to arrive at the conclusion that these transactions were not the acts of PEL but were forgeries. The void transaction though not giving rise to an equitable interest in the property itself could give rise to the equitable right to sue for recovery of the land, and the appellants, as the new registered proprietors of the land would hold their titles subject to this right.

   Assets Company, Limited v Mere Roihi and Others [1905] AC 176 applied; **Breskvar and Another v Wall and Others** (1971) 126 CLR 376 applied.

JUDGMENT

[1] **CARRINGTON JA [AG.]**: Montserrat, like many of the other Territories and States in the jurisdiction, adopted a system of land conveyancing in the last century that is based on the creation of a land register for each parcel of land in the Territory on which all dealings with such lands are publicly recorded. In these proceedings, claims were made in the court below by purchasers of various parcels of land for declarations that they are the absolute owners of the parcels. The claims were contested by the former proprietor of the parcels, the

first named respondent. The court was therefore called upon to determine how risk is to be allocated as between a proprietor and purchasers of land, where it is claimed that the land has been sold and transfers registered without the knowledge and consent of the proprietor. The court below ruled that the risk lay on the purchasers. The purchasers appeal to this Court from that decision. The appellants all purchased lands in Providence, St Peter's, Montserrat during the period 2007-2008 from the first named respondent, Providence Estate Limited ("PEL"). In these transactions, PEL was purportedly represented by Mr. Warren Cassell ("Mr. Cassell") as its sole director. The law firm of which Mr. Cassell, an attorney-at-law, was a member also acted as legal representative for PEL in the transactions which all culminated with the registration of the appellants as proprietors of the lands in question. PEL was, until the several transfers of land that form the subject of the proceedings in the court below and this appeal, the registered proprietor of lands at Providence, Montserrat with absolute title.

[2] PEL was incorporated in Montserrat in September 1989 but was struck off the register in 2001 for failure to file its corporate returns. On 9th August 2007, while it was struck off, one of the shareholders, Walter Wood ("Mr. Wood"), transferred his shares to Warren Cassell. Mr. Cassell applied to restore the company to the register on the same date and filed an affidavit in support of this application on 4th September 2007. The learned judge below noted that in this affidavit he described himself as the "intended director" of PEL. Mr. Wood filed an affidavit on 21st September 2007 in support of the application to restore the company and the learned judge noted that in this affidavit he described himself as a director of PEL (and not, as a former director as Mr. Cassell had described him in the affidavit of 4th September 2007).

[3] The company was restored on 21st September 2007 and on 24th September 2007, a notice of change of directors from Mr. Wood and Owen Rooney ("Mr. Rooney") to Mr. Cassell was filed. The learned judge noted that this filing

was not in the prescribed form and was not signed by a director or authorized officer of PEL. Some 2½ months later, on 4th December 2007, a shareholders' resolution was passed removing Mr. Wood and Mr. Rooney as directors retroactively with effect from 21st September 2007 and appointing Mr. Cassell as director with effect from 1st July 2007, i.e. a date on which the company was still struck off. There was no evidence or indication in the judgment that a notice of this appointment was filed at the Companies' Registry.

[4] It is implicit in the findings of the learned judge below that Mr. Rooney did not participate in this meeting at which the above resolution and the further resolution ratifying the acts of Mr. Cassell as director were passed nor was he even aware of the restoration of PEL. The effect of the foregoing, however, was that as of at the latest 21st September 2007, Mr. Cassell apparently considered himself to be the sole director of PEL.

[5] Once he has appointed himself as sole director, Mr. Cassell got very busy and caused PEL to enter into various transactions for the sale of its lands: in September 2007, parcel 59 Block 13/10 St Peter's South Registration was sold to Mr. Kenneth Allen ("Mr. Allen") and his family for EC$418,967.25; in October 2007, parcel 56 Block 13/10 St Peter's South Registration was sold to the Osbornes for EC$67,500; in January 2008, parcel 14 Block 13/10 St Peter's South Registration was sold to the Krauses for $537,300 and in February 2008 parcel 15 Block 13/10 St Peter's South Registration was sold to Mr. Philip Brelsford for $216,000. In each case, the transaction was completed by registration under the **Registered Land Act** ("RLA").[1]

[6] Mr. Cassell was convicted in the Montserrat High Court for conspiracy to defraud PEL in February 2012. In April 2012, the appellants brought individual claims against PEL and Mr. Rooney by way of fixed date claim form for declarations that they are the absolute owners of the lands which had been

[1] Cap 8:01, Revised Laws of Montserrat 2008.

transferred to them from PEL and for ancillary orders including injunctions restraining PEL or Mr. Rooney from entering on the various parcels. All claimants in the court below and all appellants before this Court were represented by the same counsel and their claims in the court below were virtually identical. The claims were consolidated and tried in the High Court before Bristol J [Ag.] in April 2016.

[7] Mr. Allen and his co-claimants ("the Allen claimants") below claimed that they entered into agreement with PEL in 2007 for the purchase of parcel 59. Mr. Cassell of the law firm Cassell & Lewis represented PEL in the agreement and executed the relevant land transfer conveying title to the property holding out himself as a director, agent, attorney and/or officer of PEL. These claimants paid the consideration for the sale of the property to the law firm of Cassell & Lewis, which the defendants claimed to be 84% below the market value for the land, and title was registered in their names on or about 31st October 2007.

[8] The Allen claimants pleaded further that at all material times they were bona fide purchasers for value with no knowledge of any omission, fraud or mistake committed by PEL, Mr. Cassell or Cassell & Lewis and that the claimants did not contribute to any such omission, fraud or mistake. They also pleaded (by way of amendment to their statement of claim) that they were not aware of any material irregularity within PEL, that they dealt with PEL, Mr. Cassell and Cassell & Lewis in good faith, relied on the indoor management rule and assumed that all necessary internal approvals of PEL had been satisfied.

[9] The Krause pleadings were materially identical to that of Mr. Allen with the difference being that they paid the purchase price to Tropical Island Real Estate Ltd. and executed the agreement for sale on 9th November 2007 and the transfer on 11th January 2008 for parcel 14 at a price that the defendants stated to be 76% below the market price.

[10] Mr. Brelsford, who also filed a materially identical pleading, entered into the agreement for sale on 7th January 2008, paid the purchase price for parcel 15 to the law firm of Cassell & Lewis and executed the transfer instrument on or about 19th February 2008. The defendants claimed that the purchase price for parcel 15 was 79% below the market rate.

[11] Joel and Ingrid Osborne entered the agreement for sale with PEL for parcel 56 in August 2007 and paid the purchase price, which the defendants claim to be 85% below the market value, to the law firm of Cassell & Lewis. They were registered as proprietors of this parcel on 31st October 2007.

[12] The defendants filed a defence to each of the above claims alleging at a minimum that the transfer instrument was not executed in compliance with the provisions of the RLA; Mr. Cassell was never a director or officer of PEL; the claimants were on notice of the fraud perpetrated on PEL, as inter alia, the consideration was considerably less than the market value; the registrations of the claimants as proprietors of the lands were obtained by fraud and the claimants at all material times had knowledge of and/or contributed to the fraud; and that the claimants were unjustly enriched as PEL never received any of the consideration for the transfer. With respect to the Allen claim, the defendants further pleaded that parcel 59 was not in existence at the time of the agreement for sale and that the acceptance of the offer to sell predated the offer.

[13] The defendants also counterclaimed in each case, inter alia, for a declaration that the claimants were not bona fide purchasers for value of the parcel; for rectification of the land register to reflect PEL as the proprietor of the parcel in issue; for a declaration that the parcel is being held on constructive trust for PEL; for a declaration that the claimants have been unjustly enriched at the expense of PEL; and for restitution of the amount by which they were unjustly enriched at the expense of PEL.

[14] The claimants filed a defence to the counterclaim pleading that the defendants had not provided any grounds on which the reliefs claimed were based and that PEL had not signed a certificate of truth as required by the **Civil Procedure Rules 2000** ("CPR"). There was no indication on the record of appeal that the counterclaims had been struck out.

[15] Mr. Rooney further filed an affidavit in each of the above proceedings in which he denied the agreement between PEL and the claimants and relied on the rulings of the Fairfax County, Virginia Circuit Court that Mr. Cassell was never a shareholder of PEL; the ruling of Liegertwood-Octave J in suit MNIHCV2009/0010 that no agency agreement ever existed between PEL and Mr. Cassell. They also advanced that parcel 59 did not exist until 30th October 2007, when there was a mutation from parcel 16 and so could not be the subject of a transfer on 21st September 2007, and that PEL had been struck from the register from September 2001 until January 2009. The defendants also advanced that PEL had never received any consideration for the transfer of parcel 59, as Cassell & Lewis never had an agency relationship with PEL. The defendants further stated Meredith Lynch had admitted that she was never the company secretary of PEL and the seal of the company had not been affixed so the requirements for execution of an instrument of transfer by a company under the RLA could not have been satisfied. The defendants also stated that Mr. Allen had purported to accept in September 2007 an offer that was not made by Mr. Cassell until 8th October 2007.

[16] Mr. Allen gave a witness statement in his claim. He stated that he entered an oral agreement for sale with PEL to purchase parcel 15. There was no evidence that under the terms of this agreement, PEL authorized him to pay the consideration for the purchase to Cassell & Lewis. During the negotiations for the purchase, Mr. Cassell held himself out as a director, agent and officer of PEL and also presented himself as acting for PEL. He further stated that he had no knowledge of any omission, fraud or mistake on the part of PEL,

Mr. Cassell or, Cassell & Lewis, or any person relating to ownership of the land or any misrepresentation by any person which would have affected his decision to purchase the land and he did not contribute to such omission, fraud or mistake. A copy of the land transfer instrument was put into evidence and this showed that Mr. Allen and his co-purchasers executed the instrument on various dates, both stated and unstated, in September 2007 and PEL executed the instrument on 8th October 2007.

[17] Each of the other claimants filed a witness statement in support of their claim and the statements were virtually identical to that of Mr. Allen save for the particulars of the land purchased, the consideration and to whom it was paid. Strikingly, none of the statements dealt with the allegations made in the defences filed to each claim by the defendants or addressed the reliefs sought in the counterclaims. The defendants did not file witness statements and were not allowed to lead oral evidence at the trial.

[18] The written agreements for sale entered into by the appellants were put into evidence. The Krause agreement stated that the deposit should be paid to the attorneys for PEL and the balance of the purchase price should be paid to its real estate agent. The Brelsford agreement stated that the deposit was to be paid to PEL's attorneys and the balance of the purchase price was to be paid to PEL. Like the Allen claimants, the Osbornes did not enter a written agreement for the purchase of parcel 56.

[19] Bristol J delivered a reserved judgment in writing at the end of the trial of the claims.

[20] The learned judge found that neither the claimants nor their lawyers had conducted any due diligence searches on PEL prior to concluding the purchases of the land from it. He further noted the land transfer instruments had not been executed in accordance with the provisions of section 107 of the RLA and in the case of the Allens, had been executed prior to the restoration

of PEL. He found that the claimants could not rely on the indoor management rule if there had not been recourse to the records of the company. He also found that the claimants relied merely on Mr. Cassell's representations of his authority to act for PEL.

[21] Based on these findings, the learned judge concluded that the claimants, having failed to make proper inquiries to ascertain the authority of Mr. Cassell to represent PEL, acquired the lands subject to PEL's rights and were not bona fide purchasers of the lands for value without notice. He further concluded that the indoor management rule did not avail the claimants as they had no knowledge of PEL's articles of association and so could not rely on them as the doctrine of constructive notice of a company's publicly registered documents could only operate in favour of the company and not against it. Additionally, relying on **Bank of New Zealand v Fibery Pty Ltd.**[2] and **Sixty-Fourth Pty Ltd. v Macquarie Bank**,[3] he found that although the indoor management rule had been enacted by statute in Montserrat, this was a codifying Act[4] and so the exception in section 20 to the statutory rule "where that person has or ought to have by virtue of his position or relationship to the company knowledge to the contrary" did not replace the common law exception where the person seeking to rely on the rule was put on inquiry. The learned judge also concluded that the claimants could not rely on the doctrine of ostensible authority as this must be based on a representation by the alleged principal, i.e. PEL and not merely on representations by the purported agent as had happened in the instant case.

[22] The learned judge also dismissed the claimants' other argument in reliance on section 82 of the **Companies Act**[5] that the acts of Mr. Cassell should be

---

[2] (1994) 12 ACLC 48.
[3] (1996) 14 ACLC 670.
[4] Companies Act, Cap. 11.12, Revised Laws of Monsterrat 2008.
[5] Cap. 11.12, Revised Laws of Montserrat 2008.

deemed valid, finding, in reliance on **Morris v Kanssen**,[6] that that section did not apply where there had been no appointment at all rather than just a defect in an appointment.

[23] The claimants' claims were dismissed with costs and declarations were made that PEL is the owner of the various parcels in question and directions given for the rectification of the land register in relation to each of the parcels by removing the claimants as registered proprietors and substituting PEL as registered proprietor.

[24] The claimants appealed to this Court from the orders made by the learned judge. The notices of appeal were materially identical. There was no challenge to the findings of fact made by the learned judge except the finding that the claims were instituted as a result of Mr. Cassell's conviction for fraud.

[25] Each appellant relies on the following 7 grounds of appeal which allege various errors by the court below:

(a) The trial judge erred in not having any or sufficient regard for the RLA which is the primary source of law governing the principles of (i) absolute ownership of registered land (ii) bona fide purchasers for value without notice of fraud or mistake (iii) rectification of land registers by the court or the registrar of lands.

(b) The trial judge erred in finding that the appellants were not the absolute owners of the land described as Block 13/10 parcel 56 (and other parcels with respect to the other appellants).

(c) The trial judge erred in finding that the appellants were not bona fide purchasers for value without notice.

(d) The trial judge erred in ordering that the register(s) of land in relation to (the various parcels) be rectified by removing the

[6] [1946] AC 459.

names of the appellants and replacing it with the name of the first respondent.

(e) The trial judge erred in relying on the appellants' purported failure to carry out due diligence searches at the land registry as a basis for not granting the declarations prayed for by the appellant.

(f) The trial judge erred in applying the exception to the common law principles of the indoor management rule to (i) deem the appellants not to be bona fide purchasers for value (ii) deem the appellants not to be the absolute owners of (the various parcels); and (iii) rectify the registers of land in relation to (the various parcels).

(g) The trial judge erred in (a) awarding costs to the respondents and (b) awarding costs to the respondents on the prescribed basis.

[26] The main challenges are that the learned judge failed to have regard to the provisions of the RLA; to the reliance by the learned judge on the appellants' failure to carry out due diligence searches at the land registry (for this one should read "corporate registry"); to his application of the exception to the common law principles of the indoor management rule; and to his order that the land register be rectified.

[27] The respondents filed a counter notice of appeal raising various issues of company law concerning the status of PEL; the authority of the companies' registrar and land registrar; and fraud. These, apart from the issue of fraud, do not appear to have been matters raised in the court below and so are not suitable for consideration on the appeal. With respect to the issues of fraud, these were not supported by evidence in the court below and so

were not proven. The respondents are not able to raise them before this Court.

[28] In the counter notice, PEL and Mr. Rooney also purported to appeal to this Court from the decision of the court below on the claims of Clifford West and Clifton Cassell. These claims had been allowed by the learned judge. There is no indication from the court file that this counternotice, was served on Mr. West or Mr. Cassell. Additionally, the counternotice was filed beyond the time limited for appeals and no application was made for an extension of time for its filing. In the light of the above, I do not propose to deal with this aspect of the counter notice.

[29] The other orders sought on the counterclaim with respect to sales of land to the Farrells and the referral of various lawyers to the disciplinary committee of the bar are refused as these were not matters that were raised in the court below.

[30] It is a matter of regret that this extremely long and rambling document did not have the benefit of input from a lawyer practising in the jurisdiction as it appears to be a conglomeration of grounds of appeal, counter notice, unsworn evidence and legal submissions. I have noted the legal submissions made by the respondents so far as they are relevant to the grounds of appeal raised by the appellants.

[31] The appellants were all registered as proprietors of the various parcels that they had purported to purchase from PEL. The RLA is the primary source of law for matters involving the title to land in the Territory. Its long title reveals that the purpose of the Act is to provide a comprehensive system of land registration and other dealings in land. RLA Part III deals with the effect of registration, which may be with absolute title (as in the instant cases) or with provisional title. The material parts of section 23, which deals with registration with absolute title, provide as follows:

"23. Subject to the provisions of section 27 the registration of any person as the proprietor with absolute title of a parcel shall vest in that person the absolute ownership of that parcel together with all rights and privileges belonging or appurtenant thereto, free from all other interests and claims whatsoever, but subject-

(a) …

(b) unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register:

Provided that-

(i) nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee.

(ii) …"

[32] Section 27 refers to the acquisition of land without consideration:

"27. Every proprietor who has acquired land… without valuable consideration shall hold it subject to any unregistered rights or interests subject to which the transferor held it, … but save as aforesaid such transfer when registered shall in all respects have the same effect as a transfer for valuable consideration."

[33] The effect of registration has been considered by our courts on several occasions and the clearest statement of principle is that found in the judgment of Lord Wilberforce on behalf of the Privy Council in **Alan Frederick Frazer v Douglas Hamilton Walker and others:**[7]

"Even if non-compliance with the Act's requirements as to registration may involve the possibility of cancellation or correction of the entry … registration once effected must attract the consequences which the Act attaches to registration whether that was regular or otherwise. … It is in fact the registration and not its antecedents which vests and divests title".

[34] The facts of that case were that Mr. Frazer's signature was forged by his wife on a mortgage in favour of the second respondent. This forged signature was witnessed by a clerk for her solicitors in his absence. The security was

[7] [1966] UKPC 27, p. 28.

registered and the lender eventually sold the property to the first respondent when there had been a default by the borrowers. The first respondent commenced proceedings for possession of the property from Mr. Frazer who counterclaimed seeking declarations that his title was not affected by the creating of the security or the sale and orders for cancelation of the entries made on the land register with respect to the mortgage and sale to Mr. Walker and restoration of his and his wife's names as proprietors on the register. It was conceded by Mr. Frazer that the respondents had acted throughout in good faith and without knowledge of the irregularity on the part of Mrs. Frazer. The Privy Council dismissed the appeal by Mr. Frazer, observing that the central concept in the system of land registration is that it confers (in broad terms) indefeasibility of title on the registered proprietor, i.e., immunity from attack in respect of the land or interest of which he is registered as proprietor.

[35] The Board further held that the immunity, however, is not absolute as (i) the RLA makes provision for the circumstances in which the registration may be cancelled or corrected and (ii) the proprietor remains subject to claims brought in personam against him.

[36] With respect to the former, the Privy Council in **Alan Frederick Frazer v Douglas Hamilton Walker** found that "… the power of the Court to cancel or correct does not extend beyond those cases in which adverse claims against the registered proprietor are admitted by the Act". With respect to the latter, the Privy Council in **Creque v Penn**[8] at paragraph 16 clarified the position in its finding that "the Land Registration Act was not intended to exclude the possibility of a personal remedy which has no effect on the principle of indefeasibility of title".

[8] [2007] UKPC 44.

[37] In **Racoon Limited v Turnbull**,[9] the Board at paragraph 22 indicated that there was yet another exception to the concept of indefeasibility of title in a situation where the land register shows that the titles of two or more proprietors are involved and the error could have been discovered by examining the titles of both proprietors.

[38] Although **Alan Frederick Frazer v Douglas Hamilton Walker** dealt with the system of registration under the **Land Transfer Act** of New Zealand, subsequent decisions of the Board such as **Racoon Limited v Turnbull** and **Creque v Penn** illustrate that the concept of indefeasibility of title and the reasoning in **Alan Frederick Frazer v Douglas Hamilton Walker** apply equally to the land registration system under the RLA.

[39] The Board in **Alan Frederick Frazer v Douglas Hamilton Walker** also considered the position of persons whose registration was based under void instruments and concluded, accepting the reasoning of the New Zealand Court of Appeal in **Boyd v Mayor Etc of Wellington**[10] that registration, based on a void instrument, is still effective to vest and divest title.

[40] This issue was also dealt with by the High Court of Australia in **Breskvar and Another v Wall and Others**.[11] The facts of this case were that the proprietors of land executed a transfer in blank (i.e. without naming the transferee) and handed same to a lender who had provided finance to them as security for the advance. The effect was to render the transfer void under the **Stamp Act**. Later, the lender fraudulently inserted the name of his principal on the transfer and caused the transfer to be registered in the name of the principal. Subsequently, on behalf of this principal, he executed a transfer in favour of a third party, who as a bona fide purchaser for value without notice of the lender's wrongdoing. The High Court held that upon the registration of the

[9] [1997] AC 158.
[10] [1924] NZLR 1174.
[11] (1971) 126 CLR 376.

principal, the title to the land was vested in him. The former proprietors thereafter held only an equitable interest in the land or an equity against the principal to have the land retransferred to them. The third party, upon purchasing the land and obtaining the transfer instrument acquired an equitable interest in the land and therefore the right to be registered as proprietor which took priority over the right of the former proprietors because of their improper conduct in permitting the state of affairs to arise by executing the transfers in blank.

[41] In his judgment, Barwick CJ dealt with the in personam action that can be maintained against a proprietor and stated that:

> "These may have as their terminal point orders binding the registered proprietor to divest himself wholly or partly of the estate or interest vested in him by registration … or in default of his compliance with such an order on his part, perhaps vesting orders may be made to effect the proper interest of the claimants in the land".[12]

[42] The authorities therefore show that once the appellants in these proceedings were registered as proprietors of the various parcels, they acquired title to those parcels notwithstanding any irregularity that may have occurred with respect to the vendor, PEL, as it is the act of registration which confers the title and vested the property in the appellants and divested the property from PEL. It follows as well that the failure by PEL to execute the land transfer instruments in accordance with RLA section 107 also did not affect the title which the appellants derived by virtue of their registration.

[43] The issue really is whether there is any reason whereby the titles acquired by the appellants are defeasible or the land registers in relation to the acquired parcels can be cancelled or corrected under the RLA or whether there are any personal equities that can be established by the respondents against the appellants that may cause orders to be made divesting the appellants of the interests in the lands they acquired by registration.

---

[12] ibid, at pp. 384-385.

[44] Unlike the situation in **Breskvar and Another v Wall and Others**, there has been no finding of fraud in the instant case. The learned judge found, however, that (i) PEL had not consented to the sale of its properties to the appellants; (ii) PEL never independently represented to the appellants that Mr. Cassell was authorized to act on its behalf or ratify his actions with respect to the sale of the parcels of land to the appellants; and (iii) the appellants had never conducted searches of PEL's public records but relied only on Mr. Cassell's representations and acts as evidence that he was authorized to act on behalf of PEL.

[45] In my opinion, it is irrelevant whether the appellants had constructive notice of Mr. Cassell's lack of authority. PEL was being represented by Mr. Cassell who was fully aware of his own lack of actual authority to commit PEL to the transactions in issue. The issue of ostensible authority does not arise because there was no evidence that PEL ever represented to the appellants that Mr. Cassell was authorized to act in its name, or that Mr. Wood and Mr. Rooney permitted Mr. Cassell to conduct, or were even aware of the sale of PEL's lands at the relevant times, or that the appellants relied on any public records of PEL which represented that Mr. Cassell was authorized to act on behalf of PEL. Indeed, the evidence before the court was that the representation of authority came only from Mr. Cassell himself, which is not sufficient to bind PEL. That, in my opinion, is sufficient to arrive at the conclusion that these transactions were not the acts of PEL but were in fact forgeries.[13]

[46] A company can only act through its directors. Where a person has not been appointed director in accordance with the constitutional documents of the company, the acts of such a person are not acts of the company, as he would lack actual authority of the company (acting through its directors) to do such

[13] See: Ruben v Great Fingall Consolidated [1906] AC 439, per Lord Loreburn, at p. 443.

act. He may, nevertheless, have ostensible or apparent authority to act on behalf of the company, but this will arise only where the company, but not merely the purported director, represents to the third party that the person has the authority to act on its behalf. Where a person purporting to act on behalf of a company lacked either actual or ostensible authority, the company is not bound by the act of that person in the absence of ratification of the agreement purportedly entered on its behalf.

[47] The various land transfers purportedly made on behalf of PEL in favour of the appellants were therefore void for want of authority of Mr. Cassell to act in the name of PEL. The effect of the void transfers is that, as discussed above, PEL was nonetheless divested of its title to the parcels of land and the titles were vested in the purchasers who acquired indefeasible title to the parcels. Barwick CJ stated in **Breskvar v and Another Wall and Others** that:

> "It is really no impairment of the conclusiveness of the register that the proprietor remains liable to one of the excepted actions any more than his liability for "personal equities" derogates from that conclusiveness. So long as the certificate is unamended it is conclusive and of course when amended it is conclusive of the new particulars it contains".[14]

[48] The mere fact that the transfers are void, therefore, does not render the title acquired by the appellants defeasible. In **Alan Frederick Frazer v Douglas Hamilton Walker**,[15] the Board accepted that such a conclusion would be contrary the system of title by registration created by the RLA.

[49] RLA section 140 permits rectification by the court only upon the occurrence of two conditions, both of which must be present: (i) where registration has been obtained, made or omitted by fraud or mistake and (ii) the registered proprietor (in the instant case the purchasers) had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought or caused such

[14] At p. 385.
[15] At p. 584.

omission, fraud or mistake or substantially contributed to it by his act, neglect or default.

[50] In **Assets Company, Limited v Mere Roihi and Others**,[16] the Privy Council determined that fraud referred to in section 140 must be actual fraud, i.e. dishonesty of some sort, and not merely equitable fraud arising from an unconscionable act that should affect the conscience of the proprietor. Lord Lindley observed that "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". In the absence of a finding of fraud or mistake, the conditions for rectification of the register under RLA section 140 do not arise and the court has no jurisdiction otherwise to order the rectification, i.e. either cancellation or correction, of the land registers.

[51] As seen from the judgments in **Alan Frederick Frazer v Douglas Hamilton Walker, Breskvar and Another v Wall and Others** and **Creque v Penn**, as between PEL and these purchasers, personal equities could nevertheless arise which could affect the relationships between PEL and the purchasers as no third party interests have intervened with respect to these properties.

[52] The nature of the equity that arises in favour of the displaced proprietor under a void transaction was considered in **Assets Company, Limited** and Lord Lindley concluded that:

> "Then it is contended that a registered owner may hold as trustee and be compelled to execute the trusts subject to which he holds. This is true; for, although trusts are kept off the register, a registered owner may not be beneficially entitled to the lands registered in his name. But if the alleged cestui que trust is a rival claimant, who can prove no trust apart from his own alleged ownership, it is plain that to treat him as a cestui que trust is to destroy all benefit from registration. Here the plaintiffs set up an adverse title and nothing else; and to hold in their favour that there is any resulting or other trust entitling them to the

[16] [1905] AC 176, at p.211.

property is, in their Lordships' opinion, to do the very thing which registration is designed to prevent."[17]

[53] Barwick CJ in **Breskvar and Another v Wall and Others** came to a similar conclusion at page 387:

> "The situation therefore immediately after the registration of the memorandum of transfer of 5th March 1968 by the endorsement of a memorial on the certificate of title was that the fee simple in the land was vested in the first respondent. It follows that it was not and still is not vested in the appellants. But according to the findings of the trial judge that registration was procured by the first respondent by his own actual fraud. Consequently, although the registered proprietor in whom the fee simple was vested, the first respondent did hold his estate subject to the rights of the appellants. He did not hold it on trust for the appellants but as between themselves and the first respondent they had a right to sue to recover the land and to have the register rectified, their ability to make such a claim being within s. 124 (d). But, as the trial judge correctly points out, such a claim is an equitable claim enforceable by reason of the principles of the Court of Chancery. The appellants require the assistance of a court having equitable jurisdiction."

[54] The void transaction therefore does not give rise to an equitable interest in the property itself, but could give rise to the equitable right to sue for recovery of the land and the appellants, as the new registered proprietors of the land would hold their titles subject to this right. The paradigm case of the application of such an equity is **Gibbs v Messer**[18] where the title of third party mortgagees was set aside because the security was created on behalf of a fictitious person whose name had been entered on the land register in place of the former proprietors by a fraudster.

[55] Do the appellants have a superior equity? In **Gibbs v Mercer**, Lord Watson stated:

> "In the opinion of their Lordships, the duty of ascertaining the principal for whom an agent professes to act with the person who stands on the register as proprietor, and of seeing that they get a genuine deed

[17] At pp. 204-205.
[18] [1891] AC 248.

executed by that principal, rests with the mortgagees themselves; and if they accept a forgery they must bear the consequences".[19]

In **Breskvar and Another v Wall and Others**, Barwick CJ stated:

> "If there had been no transaction by the first respondent with the third respondent, the appellants would have been entitled to succeed against the first respondent. Whether or not the Supreme Court could have amended the register need not be decided. Clearly an order for the execution by the first respondent of a memorandum of transfer to the appellants and for delivery to them of the duplicate certificate of title could have been ordered: and that order appropriately enforced."[20]

To similar effect were statements by other members of the court:

at page 391 by McTiernan J, "In my judgment the decision of the Privy Council in *Frazer v Walker* requires the conclusion that Wall's certificate of title was good against all the world, except of course the defrauded Breskvars.";

at page 401 by Walsh J,

> "In my opinion it is clear that if the appellants had taken action against Wall, before there had been any dealing by him with a third party, seeking to have the transfer set aside or seeking a declaration that it was held by way of security only and claiming appropriate consequential relief, Wall would not have been able to rely on his registered title to defeat such a claim.";

and again at page 408 by Walsh J:

> "But in the circumstances of this case, the appellants were not entitled in my opinion to take proceedings on the footing that they remained entitled to the legal estate. They could not assert an unconditional right to recover both possession of the land and the registered title to it. The right that they had was in my opinion of the nature of an equitable right. It was a right to ask a court to compel Wall as the holder of the registered title to deal with it in such a way that he would obtain no benefit from the fraud that had been practised on the appellants. In so far as they sought to have the legal title transferred back to them, that relief (if no right of any third party had to be considered) could no doubt have been granted …"

[19] Ibid, p. 258.
[20] At p. 387.

[56] **Gibbs v Mercer** was, like the instant case, a case of title acquired as a result of forgery.

[57] The learned judge found that because of their failure to verify the authority of Mr. Cassell to act on behalf of PEL, the appellants were not bona fide purchasers for value without notice as they should have made inquiries as to Mr. Cassell's authority. Mr. Markham, who appeared for the appellants, argued that the notice means only notice of fraud and no fraud had been made out. I do not agree. Notice of lack of authority would suffice in the circumstances as this would also affect the conscience of a potential purchaser. If, as stated in **Gibbs v Mercer**, the duty to verify the vendor and to ensure that a valid transfer instrument is executed rests on the purchaser, the learned judge found that the appellants had failed to observe this duty and for this reason were not bona fide purchasers for value without notice.

[58] In any event, the learned judge's finding of fact that the appellants did not conduct the relevant inquiries concerning PEL prior to entering the land transfers was not seriously challenged by the appellants. I agree with the learned judge that this failure would be sufficient to tilt the balance of equity in favour of PEL. The appellants' riposte is that they relied on the indoor management rule. However, the evidence does not support this. The evidence of the appellants is that they relied on their lawyers to make any inquiries. The learned judge found that there was no evidence as to what the lawyers actually did and concluded that neither the appellants nor their lawyers had carried out the necessary due diligence checks on PEL, but merely relied on Mr. Cassell's representations and acts as evidence that he was authorized to act for PEL.

[59] Mr. Cassell had two roles in the impugned transactions, that of director and of legal representative of PEL. As attorney at law, he warranted that he had the authority to act in that capacity on behalf of the company but did not warrant that PEL had complied with the requirements for it to transfer title to the

appellants. This was conceded in argument by Mr. Markham. I agree with the learned judge that merely relying on the fact that Mr. Cassell was the attorney for PEL could not assist the appellants in this case.

[60] The indoor management rule concerns the right of third parties to assume that all acts of internal management of a company have been properly carried out so as to allow the company to conduct its business with the third party. In **Morris v Kannsen**,[21] Lord Simmonds indicated that this may be an example of the more general principle of regularity. However, this rule, to my mind, must start from the premise that the persons who are responsible for the indoor management of the company have the authority to do so, otherwise it will not serve its purpose of enabling the wheels of business to go smoothly around. In **Ruben v Great Fingall Consolidated**,[22] the House of Lords held in any event that this doctrine applies only to irregularities that might affect a genuine transaction. It does not apply to a forgery.

[61] I must finally deal with the **Companies Act** section 21. This states as follows:

> "21. A company …may not assert against a person dealing with the company …
>
> (b) that the persons named in the most recent notice to the Registrar under section 69 or 77 are not the directors of the company; …
>
> except where that person has, or ought to have by virtue of his position with or relationship to the company, knowledge to the contrary."

[62] The appellants did not rely significantly on this provision in their arguments on the appeal. The learned judge below treated this section as a codification of the common law indoor management rule and determined that the common law exception to that rule continues to apply. I find that I do not need to come to a conclusion in the instant case on the correctness of this approach.

---

[21] [1946] AC 459, p.475.
[22] [1906] AC 439, p. 443.

[63] Section 69 deals with the notice of the first directors of a company that is to accompany the filing of the articles of incorporation of the company. This section does not apply here. Section 77(1) states, "Within fifteen days after a change is made among its directors, a company shall send to the Registrar a notice in the prescribed form setting out the change; and the Registrar shall file the notice".

[64] Two points can be made with respect to section 21. First, it requires that the notice be sent in the prescribed form. The learned judge below found that the notice sent by Mr. Cassell in September 2007 was not in the prescribed form. Second, section 77, and by extension section 21, refer to the notice being sent by the company to the Registrar. However, in the instant case, the notice was sent by Mr. Cassell, who was not authorized to so do and so the filing of this notice was not the act of PEL. The purpose of section 21 is to bind a company in certain situations to acts purported to be done by or on behalf of the company. The premise, as is the premise in the indoor management rule at common law, must be that there is an underlying act or representation by the company itself, i.e. by those properly authorized to act on behalf of the company either actually or ostensibly, on its behalf. Therefore, if the initial act is a nullity, e.g. because it is a forgery, then the further acts which depend on this cannot be validated by section 21.

[65] From the foregoing, it follows that I would allow ground (a) of the notice of appeal that the learned judge below had failed to consider sufficiently the provisions of RLA in reaching his conclusions on the claim and counterclaim. With respect to ground (b), I find for the appellants that they acquired an indefeasible title based on their registrations as proprietors of the various parcels but that their ownership was subject to equities in favour of PEL on the ground that the transactions were forgeries and therefore void for want of authority of Mr. Cassell to act on behalf of PEL. With respect to ground (c), I do not agree with the appellants that the learned judge below erred in making a

finding that they were not bona fide purchasers for value without notice. With respect to ground (d), I agree with the appellants that there was no basis on which the learned judge could order rectification of the register. With respect to ground (e), I also agree with the appellants that their failure to conduct searches at the corporate registry did not affect the title they acquired by registration. With respect to ground (f), I agree with the appellants that the exceptions to the indoor management rule could not prevent them from obtaining title to the various parcels.

[66] In light of the above, I therefore propose to set aside the declarations made by the learned judge on the claim and counterclaim below that the appellants are not the absolute owners of the various parcels of land and that PEL is the absolute owner of these parcels. In lieu of these orders, I will grant the declarations sought by the appellants in their claims in the court below that they are the absolute owners of the various parcels of land for which they are respectively registered as proprietors, but with the proviso that in each case the land is held subject to the equity in favour of PEL to apply to the court for an order to compel each proprietor to re-transfer the parcel to PEL. On the counterclaim, I will also make the orders that each of the appellants shall execute an instrument transferring title to the parcel held in his or her name to PEL. I also propose to set aside the orders for rectification of the various registers.

[67] There is another point arising on the evidence, namely that none of the appellants paid the purchase price for the parcels to PEL. This is unsurprising since the agreements were not the acts of PEL. PEL therefore is under no obligation to repay the purchase price to the appellants.

[68] With respect to the remaining matters on the counter notice, I find that the appellants did not seek to disturb the findings by the learned judge that PEL had not consented to the sales so as far as the counter notice advanced that

the transfers were void. The respondents claim that PEL did not at the material time and still does not exist because the Registrar of Companies did not issue a certificate of restoration. This is not a correct position in law. Even if PEL had been struck off, it had not been dissolved and so its corporate existence continued. The **Companies Act**, unlike for example **the British Virgin Islands Business Companies Act**, does not state the effect of striking off, so I am unable to conclude that this divests PEL of its existence. I would therefore dismiss the counter notice.

[69] On the matter of costs, I agree with the appellants that the learned judge erred in awarding prescribed costs based on the purchase price of the various parcels in light of the nature of the relief being sought by the parties to the claim and counterclaim. CPR 65.5 provides that in such cases, the costs should be awarded based on a value of the claim of $50,000.00 There is no bar in law to a person who represents himself being awarded costs.[23] The general rule is that the unsuccessful party should pay the costs of the successful party. However, in these proceedings both parties have had a measure of success, even if the victory of the appellants may be no more than pyrrhic. In the exercise of my discretion, I would therefore order that each party should bear his own costs both in the court below and before this Court.

[70] I must end by thanking the parties for their patience while awaiting the delivery of this judgment. The delay was caused at least in part by the loss of my papers as a result of the passage of Hurricane Irma.

[71] I therefore make the following orders:

1. The appeal is allowed in part.
2. The counter notice is dismissed.

---

[23] See Joseph W. Horsford v Lester Bird et al ANUHCV2000/0400 (delivered 7th March 2000, unreported) where the successful claimant, Mr. Horsford, who represented himself, was awarded costs in the Antiguan courts up to the Privy Council.

3. The declarations made by the learned judge on the claim and counterclaim below that the appellants are not the absolute owners of the various parcels of land and that PEL is the absolute owner of these parcels are set aside.
4. The declarations sought by the appellants in their claims in the court below that they are the absolute owners of the various parcels of land for which they are respectively registered as proprietors are granted, but with the proviso that in each case the land is held subject to the equity in favour of PEL to apply to the court for an order to compel each proprietor to re-transfer the parcel to PEL.
5. On the counterclaim, each of the appellants shall execute an instrument transferring title to the parcel held in his or her name to PEL.
6. The orders of the learned trial judge for rectification of the various registers are set aside.
7. Each party bear his own costs, both in the court below and before this Court.

I concur.
Gertel Thom
Justice of Appeal

I concur.
Paul Webster
Justice of Appeal

By the Court

Chief Registrar