THE EASTERN CARIBBEAN SUPREME COURT
SAINT LUCIA

IN THE HIGH COURT OF JUSTICE
(Civil)

SLUHCV2013/0422

BETWEEN:

GEORGE POLEON
(REP BY PERSONAL REPRESENTATIVE PAULINE POLEON)

Claimant

and

1. **JOSEPH JOSHUA POLEON**
2. **HEIRS OF JOSEPH JOSHUA POLEON**

    a) **Heirs of Paulinise Poleon (alias Mabel)**
    b) **Joseph (alias Rameau) Poleon**
    c) **Heirs of Vincent (alias Barreau) Poleon**
    d) **Rosalina (alias Seagail) Poleon**
    e) **Benoit (alias Roy) Poleon**

3. **GERALD ROGER DAVIS GORING**
4. **NORTH (ST. LUCIA) CONTRACTING LIMITED**
5. **ATTORNEY GENERAL**
6. **NATHALIE ELAINE GLITZENHIRN-AUGUSTIN**
7. **THADDEUS M. ANTOINE**

Defendants

APPEARANCES:

Kimberly Roheman for the Claimant
Beverly Downes for Defendants 1, 2b, 2d, 2e
Vern Gill for Defendant 2c
Gerald Williams for the Third Defendant
Diana Thomas for the Fourth Defendant
Rene St. Rose for the Sixth and Seventh Defendants

2018: April 19th; 20th
May 11th

JUDGMENT

[1] The Claimant, Pauline Poleon ("Mrs. Poleon"), personal representative of the estate of her deceased husband, George Poleon, seeks to impugn two deeds of sale which resulted in her late husband's property being sold to the Third Defendant, Mr. Gerald Goring ("Mr. Goring") and the Fourth Defendant, North (St. Lucia) Contracting Limited ("NCL"). The property which comprised two separate parcels of land (parcels 1455B 38 and 39) located at Bella Rosa, in the Quarter of Gros Islet, was supposed to have been where Mr. and Mrs. Poleon would have built their dream home after they returned home to Saint Lucia from the United Kingdom. House plans were drawn up for the Bella Rosa property in 2007, but shortly thereafter, Mr. Poleon fell and died on 22nd September 2010.

[2] When Mrs. Poleon travelled to Saint Lucia in May 2011 to attend to the probate of her late husband's will she discovered that the two parcels of land at Bella Rosa had been sold by the First Defendant to Mr. Goring and NCL, respectively, and the proceeds of sale of the two properties had been distributed among the heirs of the First Defendant (except for Second Defendant (e) who lived in the United Kingdom and had not received any part of the proceeds of sale). How had this come to pass?

[3] Joseph Joshua Poleon (hereinafter "Joseph Poleon") was a planter from Vieux-Fort, Saint Lucia. He was commonly called George. Joseph Poleon died on 28th August 1982. A copy of the 1983 grant of letters of administration in his estate is intituled "IN THE ESTATE OF THE LATE JOSEPH JOSHUA (commonly called George) POLEON DECEASED". These letters of administration were granted to Joseph "Rameau" Poleon (hereinafter "Rameau Poleon"), brother of the late Joseph Poleon.

[4] Joseph Poleon, commonly known as George, predeceased George Poleon, who died in 2010, by about twenty-eight years. The schedule to the grant of letters of administration of the estate of Joseph Poleon listed land in Vieux-Fort and a rum

shop building (in the south of Saint Lucia), but no property at Bella Rosa, Gros Islet (in the north of Saint Lucia). So, how come Rameau Poleon, as administrator in the estate of his brother Joseph Poleon, to have sold the Bella Rosa property, as being part of his late brother's estate, to NCL on 8th August 2007 and to Mr. Goring on 19th December 2008, when these two parcels were not included as property owned by Joseph Poleon in the grant of letters of administration in his estate?

[5] Enter British businessman, David Thompson, director of NCL. On 8th October 2007, he purchased block and parcel 1455B 40 which was adjacent to parcel 38 from Mr. Lutz Bugdahn. The house on parcel 40 apparently went up to the boundary between parcel 40 and parcel 38. Naturally enough, Mr. Thompson wanted to purchase parcel 38. He went to the land registry to conduct a search and discovered that George Poleon was recorded as the owner of the property. He began making inquires by going through the telephone directory and calling up Poleons. Apparently he eventually talked to someone who said that George Poleon had owned property at Bella Rosa and they would be willing to sell. At the time he was dating a Saint Lucian woman by the name of Catherine Ferdinand. His testimony was that he had to leave Saint Lucia and agreed with Ms. Ferdinand and her mother, Gris Lord-Ferdinand, that they would find the owner of parcel 38 and negotiate a price for it, for a commission of EC$3,000.00.

[6] Second Defendant (e), Benoit Poleon, in his filed witness statement stated that during the latter part of 2007, his brother Rameau informed him that he had been receiving persistent calls from a Ms. Ferdinand about land at Bella Rosa which she alleged was owned by their deceased brother Joseph Poleon, commonly known as George. According to Benoit Poleon, though Rameau was the administrator of their brother's estate, Rameau's age and ill health prevented him from dealing with the matter and so he asked Benoit to handle it on his behalf. It should immediately be noted that Benoit Poleon did not attend trial to tender his evidence, was not

cross-examined and therefore his witness statement cannot be relied upon in these proceedings.

[7] None of the persons who comprised the Second Defendant attended at trial to tender any evidence (indeed only one had properly filed a witness statement). None could be cross-examined and therefore none had any evidence before the court. It should also be noted that Ms. Beverly Downes who represented the First Defendant and Second Defendants (b), (d) and (e) candidly advised the court that the Second Defendants were elderly people who did not dispute that they had received proceeds of sale of properties to which they were not entitled and have always been prepared to pay it back. It is unclear why this matter could not have been settled as between the Mrs. Poleon and the Second Defendants.

[8] With the information that Joseph Poleon owned land in Bella Rosa, Rameau Poleon applied for an extension of time within which the succession of Joseph Poleon could be fully and finally administered on the ground that he had only recently become aware that the Bella Rosa property had been owned by Joseph Poleon. This was how it came to be that a deed of sale for parcel 38 was executed between Rameau Poleon, as administrator of the estate of Joseph Poleon (but described as George Poleon in the deed of sale), and NCL before executing notary Natalie Augustin in 2007; and between Rameau Poleon (in the same capacity) and Mr. Goring for parcel 39 before executing notary Thaddeus M. Antoine in December 2008.

[9] Mrs. Poleon claims that Rameau Poleon acted fraudulently in that he knew that his deceased brother, Joseph Poleon (commonly called George), did not own property situate at Bella Rosa, Gros Islet, and yet represented to Mr. Goring and NCL that Joseph Poleon was one and the same person as the Claimant; and further that he knew the deeds of sale would be acted upon, resulting in loss and damage to the Claimant.

[10] Rameau Poleon, in his defence, denied any fraud and stated: (1) he was illiterate and physically incapacitated from having suffered a stroke; (2) after persistent calls from Ms. Ferdinand he passed the matter to his brother Benoit; (3) thereafter Benoit and the executing attorneys/notaries dealt with the matter; (4) he relied on the information that was given to him; (5) he was honestly mistaken as to the true identity of the owner of block and parcels 1455B 38 and 39; (6) the sum of $266,534.08, representing the proceeds of sale of parcel 38 less vendor's tax of $9,554.42, was paid for the land and that after deduction of various expenses, an amount of $52,591.81 was allotted to each of the heirs comprising the Second Defendant; and (7) that a sum of $278,800.00, representing the proceeds of sale of parcel 39 less vendor's tax of $10,200.00, was received on his behalf and that after deduction of certain expenses, an amount of $51,670.00 was again allotted to each of the five heirs.

[11] The First Defendant, Mr. Rameau Poleon, therefore does not deny that parcels 38 and 39 did not form part of his late brother's estate and that he was mistaken as to who was the true owner of the parcels; he denies that there was any fraud.

[12] As against those heirs comprising the Second Defendant, Mrs. Poleon claims that they had direct knowledge and or constructive knowledge that Joseph Poleon, commonly called George, did not own land at Bella Rosa and requires restitution and an accounting of the proceeds of sale from them.

[13] As noted above, Ms. Beverly Downes informed the court that those of the Second Defendant she represented are prepared to pay back the proceeds of sale they received, but denied any fraud. I understood that Mr. Vern Gill, counsel for the Second Defendant (c) adopted a similar posture. Second Defendant (a) was not represented.

[14] As against Mr. Goring, Mrs. Poleon, in her statement of claim, pleaded that he knew or ought to have known and had notice through his solicitor and his

relationship to the parties that the vendor of parcel 39 was not the true and correct proprietor of the said parcel of land. She claimed that he acted in concert with Benoit Poloen, knowing that he was not an heir of the Claimant, and accepting or engaging Benoit Poloen to undertake a survey of parcel 39. In his defence, Mr. Goring denied having any knowledge of the identity of the heirs of the First Defendant and denied any collusion with Benoit Poleon. He asserted that he was a bona fide purchaser for value of parcel 39. Mrs. Poleon in her witness statement and at the trial conceded that Mr. Goring was not involved in any fraud.

[15] As against NCL, Mrs. Poleon claims that through its directors NCL knew of the fraud being perpetrated by Rameau Poleon and that NCL had sought out and approached him in relation to the sale. NCL denied knowledge of or participation in any fraud and asserted that it was a bona fide purchaser for value of parcel 38. NCL counterclaimed for improvements valued at over $2,500,000.00 made on parcel 38 (which, after purchase, it had subdivided into parcels 1220 and 1221) and an order that it be declared the owner of parcels 1220 and 1221 (formerly parcel 38) or, alternatively, that it is entitled to remain in possession of the said parcels until it is paid the value of the improvements.

[16] The claim against the fifth defendant was discontinued. As against the Sixth and Seventh Defendants, Natalie Augustin and Thaddeus Antoine, respectively, Mrs. Poleon claimed against them as the executing notaries in respect of the deeds of sale in which the vendor was falsely represented. No allegation of fraud, negligence, bad faith or wrongdoing was pleaded against them. These defendants maintained that there was no cause of action against them and that in executing the respective transactions they carried out the relevant searches with due diligence in order to complete the transactions. It should be noted that it is the law of Saint Lucia that where deeds are sought to be improbated, the executing notaries to those deeds must be joined in the claim: **Desir and another v Alcide; Alcide v desir and another**.[1]

[1] [2015] UKPC 24.

[17] The relief sought by Mrs. Poleon against the Defendants is as follows:

(1) As against the First Defendant, improbation of the deeds; restitution of the price received plus the difference between what was the true market value of the properties and what they were sold for at the time of their sale; an account of the proceeds of sale; damages for fraud; special damages; interest and costs.

(2) As against the Second Defendant, restitution and accounting of the proceeds of sale; damages, interest and costs.

(3) As against the Third and Fourth Defendant, improbation of the respective deeds; rectification of the land register, special damages and costs.

(4) As against the Sixth and Seventh Defendants, improbation of the deeds and that they be declared null and void.

[18] As I see it, the issues to be determined are as follows:-

(1) Whether fraud or mistake has been made out against any of the Defendants.

(2) Whether the Claimant is entitled to rectification of the land registers.

(3) Whether the deeds of sale should be improbated.

(4) Whether the Claimant is entitled to an accounting of the proceeds of sale.

(5) Whether the Fourth Defendant is entitled to be paid for improvements made to parcel 38.

Has Fraud or Mistake been made out?

First and Second Defendants

[19] In her witness statement which stood as her evidence in chief, Mrs. Poleon did not provide any evidence that could rise to the level of actual fraud on the part of the First Defendant. She referred to the fact that the First Defendant admits to having acted under the mistaken belief that the properties belonged to her deceased brother, and she asserted that any research would have revealed that George Poleon, and not Joseph Poleon commonly known as George, was the owner of

the land. She stated that she had undertaken research and knew that due diligence should be used when undertaking research. This was all the evidence of fraud against the First and Second Defendants. Under cross-examination, nothing further emerged in relation to the First and Second Defendants.

[20] I therefore find that notwithstanding the fact that the First Defendant filed no witness statement and Second Defendants (a), (b), (c)[2] and (d) filed no witness statements (Second Defendants (b) (d) and (e) filed defences), the evidence of Mrs. Poleon simply cannot sustain a claim of fraud against them. Neither can it be said that First Defendant, Rameau Poleon, was an imposter or impersonator since he was not pretending to be either his brother Joseph Poleon commonly known as George Poleon nor was he pretending to be George Poleon, the Claimant, for the purpose of deceiving anyone. It is plain however that Rameau Poleon was mistaken as to the true owner of parcels 38 and 39 and admits as much. It is equally plain that the Second Defendants received proceeds of sale from parcels 38 and 39 which they were not entitled to. We shall return to the appropriate remedies later on in this judgment.

Third Defendant

[21] In her statement of claim Mrs. Poleon had pleaded fraud against Mr. Goring, but in her witness statement this was what she said: "*I do not believe that Mr. Goring acted fraudulently or in bad faith however, he did purchase property which was sold by an imposter*." Under cross-examination from Mr. Williams, she stated that she did not believe he was involved in any fraud.

Sixth and Seventh Defendants

[22] No fraud was alleged these defendants.

[2] This second defendant having filed no defence could not rely on his filed witness statement.

Fourth Defendant

[23] Mrs. Poleon stated in her evidence in chief that: "*I have always considered that the Fourth named Defendant knew that the Vendor was not the true and correct owner of the land, I have affixed this knowledge of the Directors of the Fourth Named Defendant throughout*". Mrs. Roheman, counsel for Mrs. Poleon, submitted that the following is enough for the court to conclude that the directors of NCL knew that the Vendor was not the true owner of the land:

(1) The grant of probate of the First Named Defendant did not mention the property at Bella Rosa as being property owned by the First Named Defendant. This ought to have caused concern to the Purchaser's Attorney who admitted in cross-examination that it was her responsibility to ensure that the property being sold was property owned by the Vendor.

(2) The Land Register was in the name of George Poleon whilst the First Defendant's name was Joseph Joshua Poleon (commonly called George); George being a pseudonym.

(3) One of the directors and shareholders of the Fourth Named Defendant Company was Catherine Alison Ferdinand who had been in a relationship with David Thompson/Director of the Fourth Named Defendant. David Thompson used the telephone directory to try and identify the proprietor of the land, but only admits that she tried to contact George Poleon.

(4) That no one contacted the true Proprietor of the Land whose address on the Land Register was P.O. Box 868 Castries that being the address of Alain Leo Cadasse. This despite the fact that the land had been extensively researched.

(5) That the Purchaser's Attorney had in her possession the Adjudication record for the land which revealed alongside the name of George Poleon (TEL. SEP/ENG) which proper enquiry to the PO Box on record would

have revealed that the George Poleon on the land register was a Telephone Service Engineer not a Planter. That the Deed of Sale reflected that the property was sold to Mr Poleon by Alain Leo Cadasse.

(6) That neither the Attorney nor the Defendant sought to contact Mr. Alain Cadasse whose P.O. Box was recorded for George Poleon.

(7) David Thompson, director of the Fourth Named Defendant, stated that Catherine Ferdinand offered to negotiate a price for the property whilst he was away. Catherine Ferdinand as well as Gris Lord-Ferdinand was paid a fee as facilitators of the sale which was admitted by David Thomson in cross examination to be $3,000.00. Was this an incentive to find a George Poleon?

(8) After the purchase on 18th August 2009, Ms. Ferdinand resigned as a Director and on 25th August 2009 she transferred her shares in the company to NEC Corporate Agents Inc. Ms. Ferdinand is believed to have left St. Lucia thereafter. She left after the filing of the claim against NCL.

(9) Mr. David Thompson had a vested interest in acquiring the properties since he planned to undertake a development. He purchased Parcel 40 and proceeded to encroach on the adjoining property of North St. Lucia Contracting Limited as was admitted in cross-examination. He said that he intended to buy the smaller lot.

(10) Discussions between David Thompson and Mr. Lutz Bugdahn, from whom David Thompson purchased parcel 40, would have certainly revealed the identity of the owners of the properties. In cross examination he said he asked Mr. Bugdahn about the whereabouts or identity of the adjoining land owner, George Poleon, and Mr. Bugdahn said he did not know.

(11) Mrs. Poleon had been approached in relation to the sale of her property by Mr Bugdahn. That Lutz Bugdahn knew the claimants and knew they lived overseas. That on one occasion he walked the property with the Claimant as well as the witness Cassandra Inglis.

(12) David Thompson came to the purchase in bad faith. He sought to avoid having to obtain an alien's licence as is required by law on his own admission as well as that of his lawyer. It is submitted that he sought to urgently secure the sale before the First Defendant changed his mind.

[24] After considering the evidence put forward, I am satisfied that it is not enough to establish fraud or bad faith. Firstly, in circumstances where no fraud, negligence or willful omission is alleged against NCL's attorney, an alleged failure by the attorney to properly research title to parcel 38 or to pick up tell-tale signs as to who the true owner was, cannot be the basis for an allegation of fraud or bad faith on the part of NCL.

[25] Secondly, while there is some evidence that Catherine Ferdinand pursued Rameau Poleon as administrator of the estate of Joseph Poleon to purchase the land, there is no evidence upon which this court can conclude that she actually knew that the Joseph Poleon commonly known as George that she might have discovered was not one and the same person as George Poleon, the true owner of the land. It is idle speculation to suggest that the fact that Catherine Ferdinand and Gris Lord-Ferdinand were paid a commission of $3,000.00 to negotiate a price with the owner of the land means that fraud was involved.

[26] Evidence that: (1) Catherine Ferdinand was the girlfriend of David Thompson; (2) she was a director of NCL, resigned from NCL and presumably left Saint Lucia after claim was filed; and (3) David Thompson made Catherine Ferdinand and Gris Lord-Ferdinand directors in his company in order to avoid getting an alien's license, taken together are not enough to move the needle over the boundary from speculation to proof of fraud. Setting up a company with local shareholders and

directors is a legitimate means of avoiding the necessity of obtaining an alien's license in Saint Lucia. There is therefore no evidential basis for a finding of fraud against NCL.

[27] Before leaving this point, and for completeness, it should be mentioned that Cassandra Inglis, Ernest Lafeuille and Felicien Williams also gave evidence on behalf of the Claimant. The court did not find their evidence to be of assistance with the issues arising for the resolution of the court.

Is the Claimant entitled to Rectification?

[28] Both Mr. Goring and NCL say they are bona fide purchasers. What is the effect of that assertion? Section 98 of **Land Registration Act** provides as follows:

> "**98. Rectification by Court**
> (1) Subject to the provisions of subsection (2) the Court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration including a first registration has been obtained, made or omitted by fraud or mistake.
>
> (2) The register shall not be rectified so as to affect the title of a proprietor who is in possession or is in receipt of the rents and acquired the land, lease or hypothec for 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 or her act, neglect or default."

[29] I am satisfied that the registration of Mr. Goring and NCL as the respective owners of parcels 39 and 38 was obtained by mistake. I am unable however, notwithstanding the finding of mistake, to order rectification to restore George Poleon as the owner of those parcels of land. Both Mr. Goring and NCL are registered proprietors in possession of their respective parcels for which they paid consideration. I have not been able to conclude, on the evidence, that either of them had knowledge of the mistake or caused such mistake or substantially contributed to it by their act, neglect or default.

[30] Since no neglect or default was pleaded against their respective attorneys, it cannot be said that either Mr. Goring or NCL contributed to any alleged neglect or default of their attorneys. Further, I agree with the submission of Ms. Thomas, counsel for NCL, that in the absence of any evidence as to the standard required of an attorney in executing a deed of sale under such circumstances as obtained in this case, the Sixth and Seventh Defendants' evidence of what they did must be accepted as having been the normal procedure that a notary would follow - absent any evidence of obvious omission or neglect. Any suggestion in closing submissions that an attorney failed to do something should be disregarded.

Should the Deeds be Improbated?

[31] Mrs. Roheman in her closing submissions on behalf of the Claimant says that whether or not there was fraud or bad faith in the execution of the deeds, they ought to be improbated since the vendor to the deeds was an impostor and not the true owner of the land being sold. It is plain that the vendor was not the true owner. I am not persuaded, however, that Rameau Poleon was an impersonator or imposter.

[32] The **Civil Code of St. Lucia** provides as follows in relation to improbation:-

> **"Article 1139**
> A Notarial instrument other than a will is authentic if signed by all the parties, though executed before only one notary.
>
> **Article 1141**
> An authentic writing is complete proof between the parties to it and their heirs and legal representatives:
> 1. Of the obligation expressed in it;
> 2. Of what was expressed in it by way of recital, if the recital have a direct reference to the obligation or to the subject of the instrument. If the recital be foreign to such obligation and to the subject of the instrument, it can serve only as a commencement of proof.
>
> **Article 1142**
> An authentic writing may be impugned and set aside as false in whole or in part, upon an improbation in the manner provided in the **Code of Civil Procedure** and in no other manner."

[33] The **Code of Civil Procedure** provides as follows:

> **"Article 173**
> Besides the action of improbation which may be brought as a principal and direct action by which a plaintiff seeks to have a notarial document produced by himself declared null, any party in a suit may proceed by improbation against any notarial document produced by the opposite party."

[34] It would appear, at first blush, that under article 1142 of the **Civil Code**, the deeds may be impugned since they are in fact false in that Joseph Poleon, commonly known as George, was not the registered owner of the parcels his administrator, Rameau Poleon purported to transfer. Ms. Thomas argued however that this was not a proper case for improbation. As I understand her argument, she contends that a claim for improbation is brought where there is some statement in the notarial deed that does not reflect what was represented by the parties to the executing notary.

[35] What is the true scope of the improbation procedure? There is nothing in **Civil Code** or the **Code of Civil Procedure** beyond what is set out above, so the court is obliged to look to cases from Quebec, whose civil code is analogous to that of Saint Lucia's, for guidance on the matter.

[36] **Cardin Salomon and Claire Hyppolite v Frantz Pierre-Louis**[3] is a case from the Quebec Court of Appeal in which the facts are not analogous to the case at bar but it made the following statements of law:

> "9. Only the parties to the legal act found in writing cannot contradict it or change its terms by testimony, except for the exception provided for in article 2863 CCQ. In this case, the appellants are not party to the notarial act of 27 September 1997.
>
> 12. Professor Yves-Marie Morissette summarizes the facts that the notary has the mission to note:
>
> > 'It can be said, in general, that in accordance with the Notarial Act, the notary's task is to record the date and place of the act, the completion of the external formalities (inter alia, when applied,

[3] 2001 CanLII 37668; 39447

> the formality of the reading made), the identity of the parties (subject to nuances which will be explored later), the legal act that the parties wish to see included in the act, their consent and their signature.'
>
> 17. In this case, the appellants do not question the conformity of the authentic instrument with the representations made by the parties to the act to the notary. It is settled in the debate that the notary correctly entered the facts reported by the parties. Therefore, no false registration procedure was required."

[37] The **Carin Salomon** case seems to suggest, especially at paragraph 17, that once the notary complies with his notarial duties, as explained in paragraph 12 of that judgment, and correctly enters the facts and formalities as reported by the parties, then no improbation procedure is required or applicable. This does not mean that such a notarial deed could not otherwise be set aside as for instance where a deed fails to comply with statutory requirements or was obtained by fraud.

[38] In **Carole Leclerc v Her Majesty the Queen**[4], a case from the Tax Court of Canada, the court stated:

> "ˆ408 *Balthazar v. Emond*, supra, note 388. Contra: *Rivest v. Lachappelle* (1935), 38 R.P. 351.Compare: *Taillefer v. Damien*, [1970] C.A. 975 In that case, the Superior Court and the Court of Appeal, on a motion for the declaratory judgment, found that impersonation in a notarial instrument had been established because of the parties' admission thereof.
> …
> Improbation is necessary to contradict a notarial instrument even where the notary acted in good faith and the alteration was unintentional ˆ409.
> …
>
> 286. Under the *Civil Code of Lower Canada*, although improbation was traditionally seen mainly as a way of challenging the validity of an instrument, the courts ˆ424 with the approval of academic commentators, ˆ425 recognized that the procedure could also be used to rectify it.
>
> 299 . . . . The state of the law as regards the correction of mistakes in a notarial instrument can be summarized in the following propositions:

[4] 2001 TCC 19991418.

> -If a notary in good faith makes a mistake in expressing the will of the parties in his or her instrument, improbation is necessary to have the instrument either voided or rectified.
>
> -If the parties mislead the notary about the object of their contract and, as a result, the notarial instrument does not correctly reflect their agreement, improbation is not necessary to correct the instrument.
>
> -Improbation is not necessary where there is a material alteration recognizable on its face.
>
> 303 - . . .Thus, an action in improbation or incidental improbation is mandatory where a litigant wants to show that, contrary to the parties' declarations, a notary drafted a contract that was different in nature ˆ253 or failed to insert a clause. ˆ254.
>
> 304 –*Mistake by notary* - As a general rule, an action in improbation or incidental improbation is necessary where the notary has, by mistake or inadvertently, made a material or intellectual alteration. ˆ257 the procedure is mandatory to prove that the notary made a mistake in describing an immovable property ˆ258 or to prove that the notary failed to insert a clause agreed on by the parties. ˆ259."

[39] **LeClerk** seems to be saying, especially at paragraphs 299, 303 and 304, that the procedure of improbation is used where the notary has made a mistake in expressing the will of the parties in the notarial deed, failed to record a clause agreed to by the parties or drafted something different in nature from what was communicated to him. In **Desir v Alcide**[5], Mitchell J. A. said:

> "A notarial deed in Saint Lucia is not the same as a deed of conveyance at common law. It is registered in the attorney's office, which is an official receptacle for deeds, not in a Registry of Deeds as in other jurisdictions of our region. A notarial instrument subsequently prepared is a report by a Notary Royal of what he did and of what occurred in his presence. The truth of this report cannot be denied otherwise than by the special, difficult and expensive procedure called improbation."

[40] It appears that improbation is an area of law that is still evolving in Saint Lucia. Indeed, it was not until the judgment of the Court of Appeal of Eastern Caribbean States in **Desir v Alcide** that it was clarified that in a claim for improbation the executing notaries must be joined as parties to the proceedings. This would be consistent with the notion that the improbation procedure is designed and directed

[5] HCVAP 2011/0030

at the notarial act of the notary and is not an open-ended procedure designed to generally correct all manner of wrongs that might affect a notarial instrument.

[41] I am therefore persuaded by these authorities that the case at bar is not one that is appropriate for the improbation procedure since there is no allegation that there was any mistake or failure in recording the intention or agreement of the parties who appeared before the notaries. In any event, even if the deeds of sale were improbated, this court would not have been able to grant rectification since the **Land Registration Act** is clear on the circumstances where the court can order rectification. Improbation of deeds of sale does not ineluctably lead to the rectification of land registers even if the persons recorded as the proprietors were based on the impugned deeds. This is so because **the Land Registration Act** was designed as a self-contained, all-embracing piece of legislation governing all dealings with land in Saint Lucia.

[42] Saint Lucia, like a number of other jurisdictions across the Commonwealth, made the decision to bring all lands in Saint Lucia under one unified system in order to simplify land adjudication and registration and to bring certainty to ownership of land. This vision and ambition was fulfilled through the Land Registration and Titling Project (LRTP). The LRTP birthed two interlocking pieces of legislation, the **Land Adjudication Act** (LAA) and the **Land Registration Act**, both enacted in 1984. The seminal and most authoritative statement of the effect of these two Acts was made by Byron JA in the OECS Court of Appeal decision in **Webster v Fleming**[6] in relation to their Anguillan counterparts but applies with equal force to their St. Lucian equivalents:

> "All land in Anguilla came subject to these Ordinances which together prevailed over all other laws relating to land adjudication and registration. The end product of this judicial adjudication process was the compulsory creation by the Registrar of Lands of a first registration of land with absolute or provisional title on the Land Register …by virtue of the final adjudication record emanating from the judicial process under the Land Adjudication Ordinance. Such a first or subsequent registration can be

[6] (1995) Anguilla Civil Appeal No. 6 of 1993 at page 5.

> defeated and rectified only on proof of mistake or fraud under the Registered Land Ordinance."

[43] The Court of Appeal affirmed this position in **Joseph and Others v Francois and Matty and Others v Francois** (consolidated appeals no. 0025 of 2011 and 0037 of 2012) when Chief Justice Pereira stated:

> "In our view the learned judge was right to recognize the intervention of the LRTP which by the conjoint effect of the LAA and the LRA, provided an entirely new all-embracing and comprehensive scheme designed to adjudicate upon and provide registered title to all lands in St. Lucia. It provided for a process for hearing disputed claims or claims to the same land by different parties; for the conduct of investigations to ascertain ownership, and finally for appeals from the decisions of the adjudicator as to ownership and other rights claimed. It was a holistic scheme implemented for the purpose of bringing certainty to the ownership and identification of lands in Saint Lucia. It provided for a system of land registration (the "Torrens system") similar to that undertaken and implemented in the 1970s in a number of Commonwealth Caribbean States and United Kingdom Overseas Territories."

[44] The Privy Council in **Louisien v Jacob**[7] observed that the LRA provided "*not only for first registration of title to land adjudicated under the LAA, but also for the operation of the whole system of registered land for the indefinite future*."

[45] These judicial pronouncements speak articulately to what was the aim and objectives of the LRTP and how these aims and objectives were achieved through the two Acts with the result that the LRA now governs "the operation of the whole system of registered land for the indefinite future". All dispositions, transmissions or other dealings with land, including applications for rectification, should now be determined in accordance with the provisions of the LRA. Indeed, the long title to LRA provides that it is "*AN ACT to make provision for the registration of land and for dealing in land so registered…*"

[46] I therefore conclude that rectification must be in accordance with the LRA and does not automatically follow as a consequence or incident of improbation

[7] [2009] UKPC 3.

[47] **Is the Claimant entitled to Restitution?**

Mrs. Poloen is clearly entitled to restitution of the proceeds of sale of her late husband's property from the First and Second Defendants, save an except Second Defendant (d) as well as any difference between what the market value of parcels 38 and 39 were at the time of sale and what the parcels were actually sold for to Mr. Goring and NCL.

[48] Two different valuations of the properties were placed before the court. Mrs. Poleon sought to rely on the valuation of quantity surveyor Mr. Charles Heywood. However, under cross-examination, Mr. Heywood admitted that a proper valuation required investigation of the general character of the neighborhood and that he had not done so. He admitted that he had not done an investigation of the particular property in question but had obtained information from the land registry. Given Mr. Heywood's own admissions as to the deficiencies in his report, the court feels unable to rely on his valuation.

[49] The court relies on the valuation of Mr. Ronald Gardner, quantity surveyor, whose valuation was not challenged by any of the parties to these proceedings. According to Mr. Gardner, parcel 38 comprised 19,534 square feet of land and was valued at $14.13 per square feet or EC $276,015.42 as at the date of sale in August 2007. Parcel 39 comprised 18,648 square feet of land and was valued at $15.49 per square feet or EC $288,857.52 as at the date of sale in December 2008. Parcel 38 was sold for $276,088.50 to NCL which is a few dollars above the accepted valuation. Parcel 39 was sold for $289,000.00 to Mr. Goring which is a price above the accepted valuation. There is therefore no difference between the valuation of the market value of the properties at the date of sale and the price they were actually sold for.

[50] I therefore make the following orders:

(1) That the First and Second Defendants, save and except Second Defendant (d), jointly and severally, pay to the Claimant, by way of restitution the sums of $213,942.27 they received for parcel 38 together with interest thereon at the rate of 6% from August 2007 until the judgment sum is paid.

(2) That the First and Second Defendants, save and except Second Defendant (d), jointly and severally, pay to the Claimant, by way of restitution the sum of $227,130.00 they received for parcel for parcel 39 together with interest thereon at the rate of 6% from December 2008 until the judgment sum is paid.

(3) That the sum of $104,261.81, held on account by Attorney Lydia Faisal shall be paid over to the Claimant forthwith.

(4) The First and Second Defendants, save and except Second Defendant (d) shall pay prescribed costs to the Claimant based on the global sum awarded.

(5) The Claimant shall pay prescribed costs to the Third Defendant in the sum of $7,500.00.

(6) The Claimant shall pay prescribed costs to the Fourth Defendant in the sum of $7,500.00.

Godfrey P. Smith SC
High Court Judge

By the Court

Registrar