EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE

Claim No. BVIHCV2015/0243

In the Matter of Section 140 of the Registered Land Ordinance, Chapter 229 of the Revised Laws of the Virgin Islands, 1991

AND

In the Matter of an application for Rectification of the Land Registers of the Parcels of Land – Parcels 145 and 146, Block 2634B, Sea Cow's Bay Registration Section of the Land Register of the Virgin Islands

BETWEEN:

ADINA DONOVAN WHITROD

First Claimant

ANDREA J. DOUGLAS

Second Claimant

STEPHEN and ELAINE BAINBRIDGE

Third Claimants

-AND-

REGISTRAR OF LANDS

First Defendant

JSSR HOLDINGS

Second Defendant

Appearances: Ms. Susan Demers, Counsel for the Claimants
Ms. Maya Barry, Crown Counsel, for the First Defendant
Ms. Akilah Anderson, Counsel for the Second Defendant

2019: June 20

JUDGMENT

[1] **Ellis J:** Pursuant to Section 140 of the Registered Land Ordinance ("RLO"), the Claimants seek rectification of the land registers for Parcels 145 and 146 of Block 2634B in the Sea Cow's Bay Registration Section in order to reflect an entry that each Parcel is subject to the mutual covenants and restrictions contained in Deed No. 253/1970.

[2] The background to this Claim is relevant and has been summarized below:

i. Parcels 54, 55 and 56 of Block 2634B, Sea Cow's Bay Registration Section each record mutual covenants and restrictions which are contained in Deed No. 253/1970. The Third Schedule of Deed No. 253/1970 provides as follows:

> "The purchaser for the benefit of the Vendor and the protection of the remaining land at Havers aforesaid or any part or parts thereof and so as to bind the land into whosoever hand the same may come hereby covenants with the Vendor that he and all those deriving title under him will at all times hereafter, observe and perform the following covenants:
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> i. Not to subdivide the land hereby conveyed into more than sixteen (16) house sites.
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> ii. To use the property for residential purposes only.

ii. The mutual covenants and restrictions in this Deed were also recorded in the proprietorship section of the land register for Parcel 57. In 2008, Parcel 57 was subdivided into Parcels 145 and 146. However, at the time of the subdivision, the Registrar neglected to record the mutual covenants and restrictions which are contained in Deed No. 253/1970 in the proprietorship sections of Parcels 145 and 146.

iii. Conrad Realty Limited was the Registered Proprietor of Parcel 57 and arranged for the subdivision of Parcel 57 into Parcels 145 and 146 by Mutation 35/2008 and Instrument 785/2008. In August 2014, Conrad Realty Limited transferred Parcels 145 and 146 to the Second Defendant, JSSR Holdings Limited. This transfer was registered by the Registrar on 19th September 2014.

iv. In or about 2014, the Claimants became aware of a proposal by the Second Defendant for the development of an area at Havers, which included the areas surrounding the Claimant's properties at Ocean Reef Villas which is to include a hotel and marina.

v. In reliance of the mutual covenants and restrictions contained in Deed No. 253/1970, which restricted the use of the various Parcels for residential purposes only, the Claimant brought these proceedings against the Defendant's seeking rectification of the land registers on the premise that the mutual covenants and restrictions contained in Deed No. 253/1970 which run with the land and restrict the development of all the Parcels to which they apply, (including 145 and 146) to residential uses only.

vi. Prior to filing this Claim, the Second Claimant herein who is the registered proprietor of Parcel 55 Block 2634B, made an application pursuant to section 139 of the RLO to have the Registrar of Lands rectify the registers for Parcels 145 and 146. A Notice of Objection was filed by the Second Defendant and a hearing commenced by the Registrar of Lands on 10th June 2015. Both the Second Claimant and the Second Defendant were represented in these proceedings. After considering both oral and written submissions, the Registrar rendered his decision on 18th August 2015.

vii. The Registrar's decision was never appealed.

viii. Counsel for the First and Second Defendants have advanced that this Claim is an attempt to re-litigate an issue which was conclusively decided by the Registrar of Lands pursuant to his powers under section 139 of the RLO. They further contend that the present claim seeks to re-litigate the issue on the basis of the identical evidence and legal arguments which were advanced before the Registrar. During case management, the Court determined that this issue should be dealt with as a preliminary issue because of its potential to dispose of the claim.

PARTIES' ARGUMENTS

[3] Counsel for the Registrar relied on a number of case authorities including the English authority of **Thrasyvoulou v Secretary of State for the Environment**[1] where Lord Bridge observed:

> "The doctrine of res judicata rests on the twin principles which cannot be better expressed than in terms of the two Latin maxims 'interest reipublicae ut sit finis litium' and 'nemo debet bis vexari pro una et eadem causa'. These principles are of such fundamental importance that they cannot be confined in their application to litigation in the private law field. They certainly have their place in the criminal law. In principle they must apply equally to adjudications in the field of public law. **In relation to adjudications subject to a comprehensive self-contained statutory code, the presumption, in my opinion, must be that where the statute has created a specific jurisdiction for the determination of any issue which establishes the existence of a legal right, the principle of res judicata applies to give finality to that determination unless an intention to exclude that principle can properly be inferred as a matter of construction of the statutory provisions**." Emphasis added

[4] Counsel submitted that this authority demonstrates that the principle of finality is not only applicable to courts but also to statutory tribunals in the public law arena which are subject to a comprehensive self-contained statutory code. In that case, a building owner appealed against enforcement notices which alleged that there had been a material change of use of his buildings in

[1] [1990] 2 AC 273 (HL); [1990] 2 PLR 69 at pages 74 – 75, applied in R v Institute of Chartered Accountants in England and Wales [2011] UKSC 1 and Laurie Blyden v Registrar of Lands BVIHCV 2015/0087

1982. This notice was issued by a planning authority. As a result of the appeal, an inspector determined that the buildings were in hotel use. The use of the buildings did not change between 1982 and 1985. Nevertheless, in the latter year the planning authority issued further enforcement notices alleging that there had been a change of use from hotel to hostel. The Court of Appeal accepted a plea of action estoppel and the House of Lords confirmed this decision.

[5] Counsel for the Registrar argued that there can be no doubt that the issue to be determined in the instant case is the same issue which was decided by the Registrar on 18th August 2015. She submitted that the mere addition of the other Claimants which have the same interest, cannot *ipso facto* circumvent the application of the law relating to issue estoppel. Counsel further submitted that the First and Third Claimants are privies of the Second Claimant and are accordingly also bound by the principle of res judicata. In support, Counsel relied on the decision in **Ashmore v British Coal Corporation.**[2] In that case, the claimant was one of many female employees who complained to the industrial tribunal that she was paid less by the defendant than her male counterparts. Sample cases were selected for trial and the others stayed pending a decision. It was an express term that the other cases were not bound by the test cases. She did not seek to put her case forward as one of the test cases and so it was stayed. Eventually, the test cases were decided adversely, and she sought to have the stay lifted to enable her to continue her claim. The Court held that although the decision in the test cases was not binding upon her as a matter of law, it would be an abuse of process for her to re-litigate the same issues since that would defeat the whole purpose of having test claims.

[6] Counsel for the Registrar submitted that the Court in the case at bar should also hold that this Claim amounts to an abuse of process because to hold otherwise would be to allow the persons who were not parties to the application before the Registrar whether individually or collectively to launch their own separate proceedings either before the Registrar or before the Court, if this current claim fails.

[7] Counsel maintained this position notwithstanding that the Claim is brought pursuant to section 140 of the RLO while the proceedings before the Registrar were brought pursuant to section 139 of the

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[2] [1990] 2 QB 338

RLO. She submitted that there is no real distinction between the two sections since the issue to be decided remains the same and the Parties have advanced the same evidence and legal submissions in support. Counsel for the First Defendant therefore submitted that the Court should strike out the Claim pursuant to its powers under CPR Part 26 (1) (c) and pursuant to its inherent jurisdiction.

[8] Not surprisingly, these submissions were fully supported by the Second Defendant who reiterated that the application before the Registrar was made not only in respect of the same subject matter, but materially on the same or substantially the same evidence that is now before the Court. She submitted that other than the addition of the new Claimants, there is in essence nothing before the Court that was not put before the Registrar.

[9] Counsel for the Second Defendant relied on the same case authorities as the First Defendant but she also relied on the judgment in **Collins Richardson and Others**[3] in which the Anguillan High Court considered multiple claims concerning one parcel of land. In that matter, there was a consent order which was challenged by a multiplicity of claimants, some in common to the original order and others who were considered privies. Mathurin J described the issue in the following terms:

> "The Respondents have applied for Benjamin's application to strike out on the basis of *res judicata*, be struck out and or dismissed and for a wasted costs order against Benjamin's legal practitioners with costs and other relief as the court sees fit. Essentially the question for the court to determine is whether a matter that was originally heard by the Registrar of Lands and which was referred back to the High Court by the Court of Appeal for rehearing with a determination of the evidence to be considered, can be the subject matter of a strike out application on the grounds of res judicata."

[10] At paragraph 24 of the judgment, the Learned Judge noted:

> "My view is that this court can hear an application to strike out any matter which attempts to re-litigate issues between different parties as an abuse of the process of the court. The power should be used in cases in which justice and public policy demand it. Lord Diplock in **Hunter v. Chief Constable of the West Midlands Police (1982) AC 529 stated at p. 536**, that:
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> "the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before

[3] AXAHCV 2010/0069 2010/0070 - Anguilla

it, or would otherwise bring the administration of justice into disrepute among right-thinking people. The circumstances in which abuse of process can arise are very varied; ...It would, in my view, be most unwise if this House were to use this occasion to say anything that might be taken as limiting to fixed categories the kinds of circumstances in which the court has a duty (I disavow the word discretion) to exercise this salutary power.""

[11] And at paragraph 25, the Court concluded:

> "I agree with the principles upon which Lord Diplock said that the power should be exercised: in cases in which re-litigation of an issue previously decided would be "manifestly unfair" to a party or would bring the administration of justice into disrepute. Lord Diplock said later in his speech, at p. 541, that the abuses of process exemplified by the facts of that case were:
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> > "the initiation of proceedings in a court of justice for the purpose of mounting a collateral attack upon a final decision against the intending plaintiff which has been made by another court of competent jurisdiction in previous proceedings in which the intending plaintiff had a full opportunity of contesting the decision in the court by which it was made."

[12] Counsel for the Second Defendant submitted that the First and Third Claimants are privies to the proceedings commenced by the Second Claimant before the Registrar as their interests are exactly the same as the Second Claimant and were effectively represented by her in those proceedings. According to Counsel, the issue of error or omission was determined in the proceedings before the Registrar and so issue estoppel arises. In the absence of an appeal of the Registrar's decision, she submitted that it is an abuse of process to raise a collateral attack on the Registrar's findings on that issue in these proceedings.

[13] In the event that the Court does not agree with this submission, Counsel argued in the alternative that the Second Claimant should be removed as a party to this Claim.

[14] The Claimants do not deny that the Second Claimant was party to an application for rectification before the Registrar, however, they contend that the doctrines of *res judicata* and issue estoppel are not applicable in this case and are not a bar to the Claim. In responding, Counsel for the Claimant submitted that the Registrar's decision was not appealed because it was deeply flawed because it was incoherent, biased and did not contain clear findings and conclusions. At paragraphs 19 – 29 of their submissions, the Claimants examine what they say are the many

deficiencies of the Registrar's decision and they conclude that the Second Claimant decided to seek relief from the Court pursuant to section 140 of the RLO rather than seek to appeal a decision which is so flawed as to border on the incomprehensible. They submitted that the Second Claimant is not barred from bringing these proceedings by the doctrine of *res judicata* or of issue estoppel.

[15] Counsel for the Claimants further submitted that in exercising its powers under section 140 of the RLO, this Court is not bound by the findings and conclusions of the Registrar who considered the application pursuant to his powers under section 139 of the RLO. She submitted that this is a critical point of distinction in the decision of **Laurie Blyden v Registrar of Lands and Anor**[4] which was heavily referenced by the Defendants.

[16] Counsel expounded that the grounds for seeking rectification under section 140 are different from the grounds for seeking rectification under section 139. The powers of the Court under section 140 are much different and broader than those of the Registrar under section 139. She further submitted that if the Legislature wanted rectification under section 139 to be the only remedy for an affected party, it would not have enacted an alternative jurisdiction under section 140. Instead, the Legislature enacted two separate jurisdictions with separate requirements, standards and discretions. Counsel relied on the highlighted portion of this quote from the **Thrasyvoulou v Secretary of State for the Environment** judgment which provided:

> "In relation to adjudications subject to a comprehensive self-contained statutory code, the presumption, in my opinion, must be that where the statute has created a specific jurisdiction for the determination of any issue which establishes the existence of a legal right, the principle of res judicata applies to give finality to that determination **unless an intention to exclude that principle can properly be inferred as a matter of construction of the statutory provisions." Emphasis added**

[17] Counsel argued that by enacting these two separate jurisdictions dealing with rectification of land registers, the Legislature made its intention clear. In vested the Registrar with a limited discretion to rectify the register under section 139 i.e. in formal matters and in cases of errors or omissions not materially effecting the interests of any proprietor, whereas the Court has a wider and separate jurisdiction to rectify the register where the registration has been obtained, made or omitted by

[4] BVIHCV 2015/00087 – Territory of the Virgins Islands High Court

fraud or mistake notwithstanding that the such rectification may materially affect the interests of proprietors.

[18] Finally, Counsel for the Claimants argued one of the aims of res judicata and estoppel is to work justice between parties. Where they may appear to be a bar to an action, there may be special circumstances where it is open to courts to recognize that an inflexible application of it may have the opposite result. Counsel relied on **Johnson v Gore Wood & Co**[5] (where the court applied the dictum in **Arnold v National Westminster Bank Plc**[6]) in support of the contention that all estoppels are not odious but must be applied so as to work justice and not injustice. **Johnson v Gore Wood** was a case involving issue estoppel. Tenants invited the court to construe the terms of a rent review provision in the sub-under lease under which they held premises. The provision had been construed in a sense adverse to them in earlier proceedings before Walton J., but they had been unable to challenge his decision on appeal. Later cases threw doubt on his construction. The question was whether the rules governing issue estoppel were subject to exceptions which would permit the matter to be reopened.

[19] The House of Lords held that they were. At page 109 Lord Keith of Kinkel said:

> "In my opinion your Lordships should affirm it to be the law that there may an exception to issue estoppel in the special circumstance that there has become available to a party further material relevant to the correct determination of a point involved in the earlier proceedings, whether or not that point was specifically raised and decided, being material which could not by reasonable diligence have been adduced in those proceedings. One of the purposes of estoppel being to work justice between the parties, it is open to courts to recognise that in special circumstances inflexible application of it may have the opposite result, as was observed by Lord Upjohn in the passage which I have quoted above from his speech in the ***Carl Zeiss* case [1967] 1 A.C. 853, 947**."

[20] Finally, Counsel for the Claimants argued that a judgment between parties raises an estoppel only against the parties to the proceedings in which it is given and their privies. Privies are of three classes: privies in blood, privies in law and privies in interest. To establish a relation of party and privy, not only must two persons have a similar interest but also the so called privy must derive title from the party. Counsel submitted that in the case at bar, while they may have a similar interest,

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[5] [2000] UK HL 65
[6] [1991] 2 A.C. 93

the First and Third Claimants are not privies of the Second Claimant because they do not derive their title and interest from the Second Claimant.

[21] Counsel then traced the title to Parcel 54, noting that the First Claimant acquired title from GCS Development Limited, through Sheila George, Eric Stanley Fairfax Deacon and Jacqueline Evelyn Deacon and Conrad Trust Limited (now known as Conrad Realty Limited). The Second Claimant and the Third Claimants however acquired title to Parcels 55 and 56 respectively, directly from Conrad Realty Limited. Counsel argued that at no point in time did the title or rights of the First and Third Claimants derive from the Second Claimant, so that they are in fact strangers to the Second Claimant. While they may be similarly situated, Counsel argued that this would not be sufficient when they were not parties and they were not applicants in the proceedings before the Registrar. He concluded that as the First and Third Claimants did not apply to have their rights to rectification dealt with in the proceedings before the Registrar, they are therefore not bound by the Registrar's Decision.

[22] Counsel submitted that the cases relied on by the Defendants are distinguishable. First, she submitted that in **Ashmore v British Coal Corporation,** the appellant was an original claimant in the case before the industrial tribunal, together with 1500 Claimants. The parties agreed to the selection of a sample of cases to be reviewed and the appellant had not put forward her own case for selection. Counsel submitted that it was in these unique circumstances that the Court supported the tribunal's exercise of discretion to strike out the appellant's claim. Counsel also submitted that in the **Collins Richardson** case there were numerous High Court proceedings over 38 years concerning the ownership of the property. The learned judge ruled that the rights of the various family members and their heirs to the ownership of the land in question had been "conclusively determined" in the previous proceedings. Counsel submitted that in contrast, the rights of the Parties in these proceedings have not been conclusively determined and the Claimants are not seeking to re-litigate matters that have been adjudicated by a court of competent jurisdiction.

COURT'S ANALYSIS AND CONCLUSION

[23] In the Court's judgment, the resolution of this preliminary issue must commence with relevant legislative context. The RLO in the British Virgin Islands heralded the system of land registration, the aim of which was to implement a system which "*gives complete safety and that positive security against adverse claims which the system of conveyancing by deeds can never give.*"[7] This utility was characterized by Lord Browne-Wilkinson in **British American Cattle Co. v Caribe Ltd** in the following terms:[8]

> "Although the details of the Torrens system vary from jurisdiction to jurisdiction, it is the common aim of all systems to ensure that someone dealing with the registered proprietor of title to the land in good faith and for value will obtain an absolute and indefeasible title, whether or not the title of the registered proprietor from whom he acquires was liable to be defeated by title paramount or some other cause. The principle is well stated in relation to the State of Victoria by the Board in **Gibbs v Messer [1891] A.C. 248, 254**:
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> > "The main object of the Act, and the legislative scheme for the attainment of that object, appear to them to be equally plain. The object is to save persons dealing with registered proprietors from the trouble and expense of going behind the register, in order to investigate the history of their author's title, and to satisfy themselves of its validity. That end is accomplished by providing that everyone who purchases, in bona fide and for value, from a registered proprietor, and enters his deed of transfer or mortgage on the register, shall thereby acquire an indefeasible right, notwithstanding the infirmity of his author's title'. That principle has been repeatedly affirmed in the various jurisdictions most recently in relation to the law of New Zealand by the Board in **Frazer v. Walker [1967] 1 A.C. 569.**""

[24] However, this critical aim is only one half of the picture. The RLO recognizes that while a proprietor's title is absolute, it is not indefeasible.[9] He may be deprived of his title through rectification of the register. Part X of the RLO regulates this scheme. While the term rectification is not defined, it is generally understood as denoting any amendment to the register for the purpose of putting right any substantive error of omission or commission or any legally recognized grievance. This Part provides that rectification may occur in a variety of circumstances and for a number of reasons. Critically, the RLO establishes two distinct and separate jurisdictional streams empowering the Registrar of Lands and the High Court to effect rectifications of a land register.

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[7] R & R., 10 excerpt from Chapter 4 of Conveyancing Law and Practice , D.G. Barnsley 1973
[8] [1998] 1 WLR, 1533
[9] Phillip Brelsford et al. v Providence Estate Limited, Civil Appeal MNIHCVAP2016/0008 – 0011 Montserrat

[25] The remit of these jurisdictional streams are entirely different. Under section 139, the Registrar (properly the Chief Registrar) has limited powers to correct the land register or any instrument presented for registration. It provides that:

> "139. –
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> (1) The Registrar may rectify the register or any instrument presented for registration in the following cases-
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> (a) in formal matters and in the case of errors or omissions not materially affecting the interests of any proprietor;
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> (b) where any person has acquired an interest in land by prescription under Part IX;
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> (c) in any case at any time with the consent of all persons interested;
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> (d) where, upon resurvey, a dimension or area shown in the register or registry map is found to be incorrect, but in such case the Registrar shall first give notice to all persons appearing by the register to be interested or affected of his intention to rectify.
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> (2) Upon proof of the change of the name or address of any Proprietor, the Registrar shall, on the written application of the Proprietor, make an entry in the register to record the change."

[26] On the other hand, section 140 which empowers the Court to effect rectification of the register and cancellation of the registration on the ground of either mistake, fraud or both. It provides:

> "140.–
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> (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.
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> (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."

[27] It is clear to the Court that the jurisdiction created by these legislative provisions are distinct and dissimilar and cannot be confused, conflated or transposed. This position has been upheld in case

law within the region and without. First, in **Phillip Brelsford et al. v Providence Estate Limited**[10], the Eastern Caribbean Court of Appeal considered whether land transfer instruments were effective in transferring title to a purchaser, notwithstanding their non-compliance with the registration requirements of section 107 of the Registered Land Act of Montserrat. The Court found that once registration is effected, it must attract the consequences which the Act attaches to registration, whether the registration was regular or otherwise. Once a purchaser is registered as a proprietor of a parcel, that purchaser acquires title to that parcel, notwithstanding any irregularity that may have occurred with respect to the vendor. Critically, the Court held that in the absence of fraud or mistake, the conditions for rectification of the register under section 140 of the Act do not arise and the court has no jurisdiction to otherwise order rectification, that is, cancellation or correction of the register.

[28] In **Ostrov Island Inc. v Attorney General,**[11] the Claimant asserted that without any notification whatsoever, the Registrar of Lands purported to cancel its land certificates and accordingly rectified the relevant land registers thereby removing it as proprietor. The Claimant contended that this was an unlawful act done without due authority. Young J of the High Court of Belize considered the exercise of the Registrar powers under section 142 of the Belize Registered Land Act (the equivalent of section 139 of the RLO) and at paragraphs 9 and 11, the learned judge reached the following conclusions:

> "In this court's opinion, the Registrar can find no shelter here, since if she corrected under subsection (a) (the only one of possible applicability) the interest of the then registered proprietor would necessarily have been materially affected. This restricts any exercise of her power entirely. This court is of the view that the defence is well aware of this limitation as they also set up a counterclaim which seeks to give effect to or confirm what had been done by The Registrar. The correct procedure ought to have been the making of an application to the court (whether by the Registrar or Bracilette), (pursuant to section 143 of the RLA) for rectification of the register and cancellation of the registration on the ground of either mistake, fraud or both. What the Attorney General attempts to do now is what ought to have been done then.
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> 11. Any correction to the Register must be done in accordance with statute, there is no other way. When the Registrar purported to correct the register in circumstances where she simply did not have the statutory authority to do so, her action amounts to a nullity and any consequences flowing therefrom are void."

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[10] MNIHCVAP 2016/0008 – 2016/0011 Montserrat Civil Appeal delivered February 15, 2018
[11] Claim No. 694 of 2016 Belize

[29] Turning now to the facts of this case, it is apparent that on 5th May 2015, the Second Claimant filed an application requesting that the Registrar rectify the register in relation to Parcels 145 and 146. The Second Claimant claimed that when Parcel 57 was subdivided by the Registry, the Registrar mistakenly failed to note that the mutated Parcels were subject to the same covenants and restrictions contained in Deed No. 253/1970 and registered against the parent parcel. She asked the Registrar to re-insert a notation that the relevant parcels are subject to the covenants and restrictions contained in the Deed.

[30] On receiving the Application, the Registrar engaged the procedure in which he issued a Notice to interested parties asking them to notify the Registrar of Lands in writing of any reason why the rectification should not occur, failing which the land register would be updated. The Registrar received an objection from Counsel for the Second Defendant and a hearing was thereafter convened.

[31] Having considered the Parties' evidence and submissions, the Registrar delivered a detailed written decision on 18th August 2015 in which he traced the title of the parcels through the several mutations and transfers. The Registrar then considered his jurisdiction to rectify under the RLO. At paragraph 64 of his Decision, he concluded that subsection 139 (1) (b), (c) and (d) were not material to the adjudication of the matter. However, he concluded that 139 (1) (a) was relevant and after he considered the evidence and the submissions, he concluded that a case had not been made out to justify rectification. At paragraphs 64 – 70 the Registrar set out his reasons:

> "[64].... First the matter under review must be a formal matter. In respect of this component, there is no doubt that the matter before the Registrar is of a formal nature, being one that legally and equitably affects the interests of proprietors. It is a matter which must be determined by application of legal principles and by reference to statutory law and/or case law.
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> [65] Second, the Registrar must have made an error or an omission. The Act does not spell out what constitutes an "error" or an "omission". The literal meanings or both suggests failure or neglect to do something or that if something has been done, it was done mistakenly or inaccurately. The Registrar must be satisfied that the Register is incorrect in some way and must correct it so as to give effect to an established property right or interest.

[66] In respect of this element, it cannot be said that the Registrar erred in not inserting the covenants on the Register. The primary reason for so concluding is that the Claimant has failed to demonstrate that the Relevant Parcels are subject to the restrictive covenants contained in Deed No. 253/1970, having regard to the fact that no reference to the Deed had been made on the face of the successive Instruments of Transfer in relation to Parcel 57 (the mother parcel) to Conrad Trust Limited, then to Conrad Realty Limited nor on the Instrument of Transfer in relation to the Relevant Parcels. Additionally, the covenants were not spelled out in the Sale and Purchase Agreement between Conrad and the Objector, which agreement was lodged in support of Caution 1271/2011. No evidence has been presented to support the proposition that the Registrar has made an error or an omission.

[67] Thirdly, the error or omission must not have materially affected the interest of any proprietor. This third element requires proof that no proprietor's interest has been prejudiced in a substantive manner. The Objector has outlined the extent to which it would be fiscally disenfranchised should the register be rectified. However, it is the Applicant who bears the burden of showing that her title or any proprietor will not be materially prejudiced by rectification of the Registrar. The Applicant has failed to demonstrate the manner or extent to which the Objector or any other proprietor (including herself) would be (or not be) materially affected by a rectification of the Registrar."

[32] It is evident from the provisions of section 139 (1) that the Registrar's powers of rectification are limited to specific circumstances to wit, formal matters and in the case of errors or omissions that do not materially affect the interests of any proprietor. While the remit of the term "materially affecting the interest of any proprietor" has not been specifically defined under the RLO, the Court is satisfied that the words must be given the plain and ordinary meaning. This provision clearly contemplates rectification where the circumstances are essentially uncontroversial and where the error or omission is perfectly clear and not reasonably disputable. They may include the clerical or typographical errors in the entries (names, addresses, dates, instrument references etc.) which can be altered without detriment to any registered interest.

[33] In cases where the parties do not agree that there is a manifest inaccuracy or where the proposed amendment would materially affect the interest of a proprietor, the Registrar must conclude that he has no jurisdiction under section 139 and that a determination by a court is the only appropriate recourse. This is because under section 140, the court has wide powers to adjudicate disputes about substantive rights, and to order the rectification entries in the register where it finds that the registration has been obtained made or omitted by fraud or mistake.

[34] It follows that in the circumstances of this case, the Registrar was essentially correct in his conclusion that the basis for rectification could not be made out under section 139 of the RLO. There can no doubt on this interpretation that the interest of the relevant proprietors would be materially affected by the rectification proposed by the Claimants. The simple fact is that he lacked the jurisdiction to consider the application. In the Court's view, it is only a court acting pursuant to section 140 of the RLO which have the power to deal with rectification in the circumstances of this case and it is clear that this power is broader in scope. In **Attorney-General v Odell,**[12] Vaughan Williams L.J. in considering the relevant legislative regime concluded that:

> "This sub-section seems to extend the area of rectification, for it provides for rectification in cases where the effect would be to destroy estates or rights acquired by registration under this Act."

[35] Counsel for the Defendants has argued that the Registrar's finding that there was no error or omission made at the instance of the Registry, raises an estoppel which in the absence of an appeal binds the Claimants. At paragraphs 65 – 67 of his Decision, the Registrar sets out the ratio for his finding that no evidence has been presented to support the proposition that the Registrar has made an error or omission. He notes:

> "Second, the Registrar must have made an "error" or an "omission". The literal meaning of both suggests failure or neglect to do something or that if something has been done it was done mistakenly or inaccurately. The Registrar must be satisfied that the Register is incorrect in some way and must correct it so as to give effect to an established property right or interest.
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> In respect of this element, it cannot be said that the Registrar either erred in not inserting the covenants on the Register. It cannot be said that the Registrar omitted to record the covenants. The primary reason for so concluding is that the Claimant has failed to demonstrate that the Relevant Parcels are subject to the restrictive covenants contained in Deed No. 253/1970 having regard to the fact that no reference to the Deed had been made on the face of successive Instruments of Transfer in relation to Parcel 57 (the mother Parcel) to Conrad Trust Limited, then to Conrad Realty Limited nor on the Instrument of Transfer in relation to the Relevant Parcels (by Instrument No. 1472/2014. Additionally, the covenants were not spelled out in the Sale and Purchase Agreement between Conrad and the Objector, which agreement was lodged in support of Caution 1271/2011.
>
> The Registrar's conclusion on this point is reached by placing reliance on Hariprashad-Charles dicta in **Belmont Association, Belmont Estates Limited v The Registrar of Land, Edwards Lyle, Tara Ford Lyle**, to the effect that it is an elementary principle of law

[12] [1906] 2 Ch. 47

that the burden of a covenant does not run with the freehold land at common law so as to bind it in the hands of a successor in title of the original convenantor."

[36] At paragraphs 69 – 70 of his Decision, he observes:

> "Thirdly, the error or omission must not have materially affected the interests of any proprietor. This third element requires proof that no proprietor's interest had been prejudiced in a substantive manner. Has this prerequisite been satisfied?
>
> The Objector has outlined the extent to which it would be fiscally disenfranchised should the register be rectified. However it is the Applicant who bears the burden of showing that her title or any proprietors (be it the Applicant's or the Objector's or any third party) will not be materially prejudiced by rectification of the Registrar. The Applicant has failed to demonstrate the manner or extent to which the Objector or any other proprietor (including herself) would be (or not be) materially affected by a rectification of the Registrar."

[37] The Registrar was clearly attempting to consider his jurisdiction under section 139 (1) (a) of the RLO to determine *whether there was an error or omission not materially affecting the interests of any proprietor*. On any application of the principles of statutory interpretation, it is clear to the Court that the Registrar would have no jurisdiction to consider the application for rectification advanced before him under section 139 and he was certainly able to so conclude. However, he went further than the jurisdictional issue to adjudicate on the substantive issue of whether there was in fact an error or omission in not inserting the covenants on the Register.

[38] In **Mills v Cooper**[13] Diplock LJ, explained operation of the doctrine of issue estoppel in the following terms:

> "This doctrine (of issue estoppel), so far as it affects civil proceedings, may be stated thus: a party to civil proceedings is not entitled to make, as against the other party, an assertion, whether of fact or of the legal consequences of facts, the correctness of which is an essential element in his cause of action or defence, if the same assertion was an essential element in his previous cause of action or defence in previous civil proceedings between the same parties or their predecessors in title and was found by a court of competent jurisdiction in such previous civil proceedings to be incorrect, unless further material which is relevant to the correctness or incorrectness of the assertion and could not by reasonable diligence have been adduced by that party in the previous proceedings has since become available to him...."

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[13] [1967] 2 QB 459 1967

[39] In brief terms, issue estoppel exists when there is a judicial establishment of a proposition of law or fact between parties to earlier litigation and when the same question arises in later litigation between the same parties. In the later litigation, the established proposition is treated as conclusive between those same parties or their privies.

[40] The learned authors of **Halsbury's Laws of England**[14] summarized the doctrine of issue estoppel in the following terms:

> "A party is precluded from contending the contrary of any precise point which, having once been distinctively put in issue, has been solemnly and with certainty determined against him. Even if the objects of the first and second actions are different, **the finding on a matter which came directly (not collaterally or incidentally) in issue in the first action, provided it is embodied in a judicial decision that is final, is conclusive in a second action between the same parties and their privies.** This principle applies whether the point involved in the earlier decision, and as to which the parties are estopped, is one of fact or one of law, or one of mixed fact and law." Emphasis added

[41] Issue estoppel is therefore a narrower example of res judicata doctrine. The policy lying behind these principles is the interest of finality in litigation. It acknowledges that courts should not be clogged by re-determinations of the same disputes and it also recognizes that "it is unjust for a man to be vexed twice with litigation on the same subject matter".[15]

[42] The Defendants argue that the new claim relies upon the same factual complaints as had been pursued before the Registrar and that the Registrar has made a definitive ruling that there was no error or omission within the meaning of section 139 (1) (a). However, it is now settled law that the principle applies to decisions of tribunals[16] which either have been upheld on appeal or not appealed, but only if the determination of the particular issue was within the jurisdiction of the tribunal and necessary to its decision.

[43] A case where neither of these conditions was satisfied is **Bon Groundwork v Foster.**[17] In that case the claimant, who was then 77 years of age, was employed by the respondent, when he was

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[14] 4th ed., vol. 16, p. 1030, 1530

[15] Clark v Focus Asset Management and Tax Solutions Ltd. [2014] EWCA Civ 118; [2014] 1 WLR 2502 paras. 11 – 12 per Arden LJ

[16] R (on the application of Coke-Wallis) v Institute of Chartered Accountants in England and Wales [2011] UKSC 1

[17] [2012] IRLR 517

laid off without pay. While still being employed by the respondent he submitted a complaint alleging he had been laid off. By a judgment of Employment Judge Salter ('the first judgment'), it was held that the claimant was not entitled to redundancy pay. The Claimant was dismissed because of retirement with effect from 31st July 2009. He then submitted a new complaint claiming, among other things, four different types of unfair dismissal, notice pay in breach of contract and a guarantee payment. The respondent applied to have the claims struck out as being res judicata by reason of the first judgment or alternatively as an abuse in the **Henderson v Henderson** sense. The application was granted save in respect of the guarantee payment. The claimant appealed.

[44] The Court reasoned that a finding of fact by an earlier court which is not a 'necessary ingredient' in the earlier cause of action will not give rise to a 'issue estoppel'. Moreover, a finding cannot be a necessary ingredient of a cause of action if the earlier court or tribunal did not have jurisdiction to decide the matter at all: see the observations of Sir Nicholas Browne-Wilkinson, as he was, in **O'Laoire v Jackel Ltd**[18] when he said:

> 'It is well established that there can be no estoppels arising out of an order or judgment given in excess of jurisdiction.'

[45] The Court found that there had been no proper basis from which the first tribunal could have inferred that the claim for a dismissal-related redundancy was properly before it. Even if it could have been said that the issue of dismissal-related redundancy had been properly before the first tribunal, the Court found that the finding that the dismissal was by reason of retirement would still not have been a necessary ingredient in the decision to reject that claim. The only necessary finding was that the reason for dismissal was not redundancy; it was not necessary in order to reach that conclusion for the judge to make a positive finding as to what was the true reason for dismissal.

[46] The Court is guided by this reasoning.

[47] In the Court's judgment, even if the error or omission could be made out, it is clear section 139 (1) (a) would not have afforded the Registrar the jurisdiction to rectify the register. That section clearly contemplates rectification where the circumstances are essentially uncontroversial and where the

[18] [1991] IRLR 170

error or omission is perfectly clear and not reasonably disputable. Moreover, it is pellucidly clear that with the purported rectification, the interest of the registered proprietor would necessarily have been materially affected. This restricts any exercise of the Registrar's power entirely. It follows that a determination as to whether an error or omission was made out was not a necessary ingredient of the decision to reject that claim. The only necessary ingredient was that the statutory provision would not have empowered him to act in the circumstances of this case; it was not necessary to then make a negative finding that there was no error or omission made out by the Second Claimant.

[48] The Court can find no justification for treating this finding as though it were the final disposal of a claim or as a determination that the issue cannot be considered at all. It is clear to this Court that Registrar's finding was not fundamental to the outcome of the decision because if a different conclusion had been reached on this issue, the outcome would essentially have been the same because (for the reasons already indicated). Section 139 (1) (a) does not empower the Registrar to rectify the register in these circumstances. In such a case, the Claimant would not be precluded from raising the issue in subsequent litigation.

[49] Having said this, the Court finds that the Registrar's decision on this point merits considerable respect and must properly be considered by the Court when considering the substantive claim. In doing so, the Court will also be cognizant of the fact that the word " mistake" in section 140 is not limited to any particular kind of mistake. Indeed, the Courts in the Eastern Caribbean have repeatedly applied the approach of Lawrence L.J. in **Chowood Limited vs Lyall**[19]**:**

> "The other point was that the case has not been brought within s.82, because the registration of the plaintiffs' title was not a mistake within the meaning of sub-s. 1[h] of that section. I disagree with that contention. **I see no reason to limit the word 'mistake' in that section to any particular kind of mistake. The court must determine in every case whether there has been a mistake in the registration of the title, and if so, whether justice requires that the register should be rectified.** Here I think there has been an obvious mistake by the erroneous inclusion in the plan filed in the register of this and of the two other strips of land which did not belong to their vendors. The evidence is clear that the predecessors in title of the plaintiffs had in fact no title and did not claim to have any title to the strip in question, and obviously therefore never intended to convey it to the plaintiffs. I have no reason to doubt that the plaintiffs thought that they were purchasing the land delineated on the plan, but in getting their title registered in the Land

[19] [1930] 2 Ch 156

Registry they were acting on the mistakes which had been made in that plan, and the entry made in the Registry in derogation of the right of the true owner who was in possession was an entry made by mistake within the meaning of the section." Emphasis added

[50] The case of **NRAM Ltd v Paul Morgan Evans and Anor**[20] is also instructive. At paragraphs 49 – 51, the English Court of Appeal reiterated the position:

> 49. "It is therefore of no surprise that the term is generally understood to have a broad if somewhat uncertain scope and to encompass a wide range of circumstances, including, for example, the accidental registration of particular land in two different titles....
>
> 50. Despite the scope and largely undefined nature of the term "mistake" in this context, the Law Commission noted in its 2016 Consultation Paper No. 227 entitled "Updating the Land Registration Act 2002" at 13.79 to 13.80 that a degree of consensus appeared to be emerging as to its boundaries. In that regard the Law Commission referred to **Megarry & Wade, The Law of Real Property 8th ed.** whose editors observe at 7 – 133 that:
>
> > "What constitutes a mistake is widely interpreted and is not confined to any particular kind of mistake. It is suggested therefore that there will be a mistake whenever the registrar would have done something different had he known the true facts at the time at which he made or deleted the relevant entry in the register, as by:
> > (i) making an entry in the register that he would not have made or would not have made in the form in which it was made;
> > (ii) deleting an entry which he would not have deleted; or
> > (iii) failing to make an entry in the register which he would otherwise have made." (footnotes omitted)
>
> 51. The Law Commission also referred to **Ruoff & Roper, Registered Conveyancing looseleaf ed.,** the authors of this work adopt, at 46.009, very much the same formulation as that of the editors of **Megarry & Wade, The Law of Real Property**:
>
> > "Mistake" is not itself specifically defined in the 2002 Act, but it is suggested that there will be a mistake whenever the Registrar (i) makes an entry in the register that he would not have made; (ii) makes an entry in the register that he would not have made in the form in which it was made; (iii) fails to make an entry in the register which he would otherwise have made; or (iv) deletes an entry which he would not have deleted; had he known the true state of affairs at the time of the entry or deletion. The mistake may consist of a mistaken entry in the register or the mistaken omission of an entry which should have been made. Whether an entry in the register is mistaken depends upon its effect at the time of registration...."

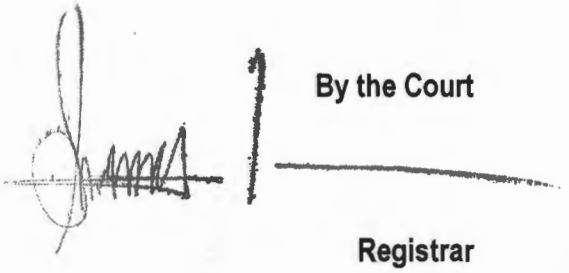
[20] [2017] EWCA Civ 1013

[51] The Court can therefore bring a different perspective to bear on the facts of this case than may have been applied by the Registrar who considered whether an error or omission had in fact been made by himself or his predecessors.

[52] Section 140 clearly affords a wider jurisdiction and the proper context to consider the matters which arise on this Claim. The Court is therefore satisfied that the preliminary objection cannot be maintained and that the substantive Claim should proceed to trial.

[53] The Court will hear the Parties on costs at the conclusion of the Claim.

Vicki Ann Ellis
High Court Judge



By the Court

Registrar