EASTERN CARIBBEAN SUPREME COURT

SAINT CHRISTOPHER AND NEVIS

IN THE HIGH COURT OF JUSTICE
(CIVIL)

CLAIM NO. SKBHCV 2011/0391

BETWEEN:

PETER PROCOPE

Claimant

and

GAIL FLEMMING

Defendant

and

THE ATTORNEY GENERAL OF SAINT CHRISTOPHER AND NEVIS

Defendant on Counterclaim

Before:

The Hon. Mde. Marlene I. Carter — High Court Judge

Appearances:

Mrs. Angela Inniss-Hodge for the Claimant
Mr. Sylvester Anthony with Ms. Angelina Sookoo and Mr. Perry Joseph for the Defendant
Mr. Esan Granderson and Mrs. N. Rattan-Mack with Ms. Rochelle Finch for the Defendant to the Counterclaim

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2015: April 29, 30;
November 17, 18.
2019: July 23rd

JUDGMENT

[1] **CARTER J**: The Claimant sought an order for possession of land and premises (hereinafter called "the property") at Newton Ground Village. He claimed that the defendant was a tenant at will of the property who had failed to quit the property and to deliver up possession of same after being served with a Notice to Quit.

[2] In her Defence, the defendant denied that she was ever a tenant or tenant at will at the property, instead she claimed that she had been in sole and undisturbed possession and occupation of the property since at least 1993. She further denied that the claimant had ever had possession or occupation of the property. The Defendant alleged that the claimant had become the registered owner of the property by fraud and/or reckless misrepresentation to the Crown.

[3] The defendant filed a counterclaim in which she asserted that she had been put into possession of the property by her father and that there was no structure on the property when she went into possession. She asserted that her father had been in continuous and uninterrupted possession of the property before that time since at least 1963. The defendant's further assertion was that she and the claimant jointly invested in the construction of a home on the property, in order to house her children.

[4] In 2008, the defendant applied to the Ministry of Sustainable Development for title to the property based on her continuous and uninterrupted possession of the property. The defendant asserts that the Ministry informed her that she qualified for the purchase of the property upon proof that other persons whom she had named in the application as persons residing on the property did not have an interest in the property, or if applicable that she and the Defendant, whom she acknowledged in her application as having an interest in the home on the property, should make a joint application for the property.

[5] The claimant did not agree to provide information on his interest in the home on the property. Instead the claimant then applied to purchase the property himself. The defendant alleges that this application contained fraudulent misrepresentations about the claimant's possession of the property and also while being fully aware that the Defendant has been conditionally approved for the purchase of the property

[6] The Defendant claims that the Ministry considered the claimant's request and invited him to provide proof of ownership of the property in order to obtain title thereto. She further claims that such a request amounted to a mistake or alternatively bad faith on the part of the Ministry as by that time it was within the Ministry's knowledge that the Defendant had an interest in the property.

[7] The defendant sought, inter alia, the dismissal of the claim, declarations that the claimant title was void ab initio and that the defendant be deemed the sole person entitled to purchase the property.

[8] The defendant to the Counterclaim asserts that the defendant failed to qualify for purchase of the property under the legislation through which she was entitled to apply to purchase the freehold of the property. The Ministry denied that the claimant was granted conditional approval and put the claimant to proof of the several matters relating to the claims of mistake, bias or fraudulent misrepresentation.

Issues to be determined

[9] There are a number of issues for the Court's determination:

(i) Whether the defendant was a tenant-at-will of the claimant?

(ii) What if any interest the defendant has in the property?

(iii) Whether the Ministry acted upon a mistake or based upon a fraudulent misrepresentation in its issuance of a Crown Grant to the claimant for title to the property?

(iv) Whether the Ministry acted in bad faith in its issuance of a Crown Grant to the claimant for title to the property?

[10] By Order of the Court the parties' witness statements stood as their evidence in chief at the trial.

The Evidence of the Clamant

[11] The claimant admitted that he was involved in an extra-marital affair with the defendant from 1992 -2008. He stated that the defendant had occupied his house at the property from about 1996 with his permission after the birth of their child. He would sleep at the house on weekends. In relation to ownership of the property the claimant stated that the property was owned jointly with his wife because the major portion of the funding for the house on the property came from an account which he held jointly with his wife.

[12] The claimant related that the property had come to his notice when he was looking for a piece of land to run a small business and that at the time that he first became aware of the property that it was unoccupied and overgrown with tall grass and bushes. He described having a survey plan for the property drawn up sometime in the 1980's, a plan which he gave to the defendant for safe keeping.

[13] The defendant went on to relate how he had approached the Ministry seeking to purchase the land and outlined that he was asked to provide proof that he had built the house that was on the land. He had his lawyer prepare several affidavits of persons who had worked on the house with him and submitted these to the Ministry together with payment for the land.

[14] The claimant states that he began construction of the house on the land in 1993. He recalled that he began building the house before the birth of the defendant's first child. He had to clear the land as "it was so over grown that it could not be used for agricultural cultivation or construction without being cleared. I cleared the land myself…it had the appearance of a rubbish heap." He stated that the house was constructed in phases. He

was employed at the time at the Public Works Department and also operated a bus service and did odd jobs.

[15] The claimant related that he did not receive any monetary contribution from the Defendant for the construction of the house nor did he have any assistance from her in construction of the house. He stated that he gave the defendant all his receipts and invoices relating to this construction.

Cross examination

[16] The claimant was cross examined extensively and closely by counsel for the defendant, Mr. Anthony. The claimant stated that when he met the defendant it was sometime in 1992 and that, at that time she had a young child. He remembered that she was not working when he met her. He insisted that he got her a job in Sandy Point and did not agree that she was working in Basseterre. He stated that she was living with her parents at the time that he met her, close to the property, on the same street as the property.

[17] In answer to Mr. Anthony, the claimant stated that the defendant's father was not working on the property when he met the defendant and maintained that *"nobody was working the land, it was in bush with grass and rat and centipede."* The claimant explained that he said that he was living at the house on the property because 'I went and came as I feel like. It was my house." The claimant denied all suggestions that the defendant had moved into land that her father controlled or that she assisted the claimant to clear the land. He denied that she gave him money to pay for the foundation or that she paid with her money for water into the land or to repair the road leading to the property after it had been dug up. He said: "When I met Pinky, my house did done build already.*"*

[18] The claimant admitted to counsel for the defendant that when he had said in his evidence in chief that he had asked the defendant to open a credit account at TDC for building material that that was not true.

[19] The claimant did not produce any receipts relating to construction on the house. When he was shown various receipts for construction materials, he could not say anything about these. He stated that when in 1998, the defendant paid for the electrical connection to the property that it was he who had sent her to do it, although he could not produce any receipts to substantiate these statements but stated in relation to receipts shown to him relating to purchases for construction of the house on the property that he these did not relate to "stuff purchased for the house." He insisted:

> "My house does not have anything like that. The house was not built by myself and Pinky. It was myself and my workmen I had doing it for me. I don't know anything about all these receipts."

[20] The claimant stated that he had first applied for title to the property in 1980. He said that he took occupation of the property in 1993. He then stated that he actually started to build the house on the property in the 1980's. In relation to the application for title in 2008, the claimant denied that he had only applied for title because he found out that the defendant had applied although he admitted that he had gone to the defendant's attorney after the defendant had approached him seeking to purchase his interest in the house on the property.

[21] With regard to the document submitted to the Ministry in support of the application for title to the property, the claimant agreed that he did not ask the defendant for an affidavit in support of his claim. He said: "I would not say she was my tenant. I was not taking any money from her. I put her in the house to stay because of the children." He went on to state *that* "I got person who worked with me on the house and they had to give affidavits if they wanted to get paid for work that they did."

[22] The claimant further stated that he was aware that the defendant wanted to purchase the house on the property, but he was not aware that she was seeking title to the property itself. When it was suggested to the claimant that he had only brought the action against the defendant because it had come to light that the children that he believed were his by the defendant were not in fact his, he denied this and denied that he had created a story in order to deny the defendant an interest in the house.

[23] **Ashton Leader** was called as a witness for the claimant. He is a surveyor by profession. He stated that sometime in the 1980's he did a survey plan at Newton Ground at the request of the claimant. His evidence was that the area that he surveyed had a garbage heap and some banana plants. He could not say who occupied the lot at the time but stated that it appeared to be vacant except for the banana plants. He knew that sometime later a building was erected on the property.

[24] Mr. Leader stated in cross examination that he did not know the defendant's father Edward Berry or any lands that he occupied. He confirmed that he had done a survey for the claimant at Newton Ground in the 1980's but he did not produce that survey plan to the court. He stated that he had looked for it but was unable to find it. He stated that at the time that he did the survey he knew that the land he had surveyed was Crown Land. His evidence was that some years later he became aware that a building was erected on the land that he had surveyed. He could not say when the building was erected or who built it.

[25] **Elvin Francois** was the third witness for the claimant. In chief his evidence was that in 1993 he saw the claimant clearing a piece of land at Newton Town. He knew the piece of land to be a garbage heap. When the claimant asked him to assist him in building a house on the property, by that time the foundation and walls of the house were completed. He assisted with putting on the roof, plastering the walls and finishing the interior of the house.

[26] He stated:

> "I took instructions from Mr. Procope alone. I saw Mr. Procope alone working on the house along with different workmen who assist me from time to time. I always knew the house to belong to Mr. Procope. I never saw any female assisting Mr. Procope with the construction of the house or aiding or assisting him in anyway."
> …
>
> "The house was built on a piece, piece basis and the material were purchased weekly some of the time I would go to the hardware with Mr. Procope to make purchases for which he paid from his pocket."

His evidence was that he never saw any female assisting with the construction or providing meals for the construction workers.

[27] In Cross examination Mr. Francois was questioned closely about his witness statement. He explained in relation to his statement that "I knew it was a document for Peter Procope to own the land I worked on. Peter Procope told me so and tell me is his house." Regarding his statements as set out at paragraph 20 above the witness stated: "I did not read the document before I swore to it. I know nothing about when the house started or who started it. I did go with Mr. Procope to buy materials but we went to TDC and buy some lumber."

[28] His evidence was that the affidavit that he had sworn in support of the claimant's claim to title in 2008 was almost exactly the same as his witness statement. He admitted in cross that there was information in the affidavit that he did not give as he did not see the claimant clearing the land nor had he ever had sight of the survey plan for the land as he stated in the witness statement. He maintained however that he never saw the defendant at the property "not liming, carrying food or water, nothing, not even as a bystander…"

The Case for the Defence

[29] The defendant called a number of witnesses in her defence and to support her counterclaim. The first witness was her father **Edward Berry.** In his evidence in chief he stated that he occupied and worked an entire block of land in an area called the Alley before he was married in 1970. He stated that: "Not so long after I got married in 1970 I cleared the land that Gail lives on and started to plant crops on it." His evidence was that Gail had lived on that land for more than 20 years. He stated that it was when Gail and Peter were starting to be together that "I gave her the disputed land to build a house. She and Peter build the house."

> "I cleared this land and began to plant it up. Then I gave it to Gail for her to build a house. Peter only started to visit the disputed property when I gave it to Gail. Peter never put Gail on that property. I was the one who was occupying it before Gail…"

[30] In cross examination he confirmed that he had worked the land and did not have a legal title to it, but he told the defendant that she could continue to work the land and build her house. He was unaware whether the claimant contributed financially to the building of the house.

He further admitted when he gave the lands to his daughter that he knew those to be state lands.

[31] **Gail Flemming, (Pinky).** The defendant's evidence is that she worked since about 1992 at different jobs including owning her own shop at the front of her house selling retail goods. She confirmed that she had had an intimate relationship with the claimant which ended about 2007. Her evidence was that the Ministry " read my application and saw that I named Peter and me as the owners of my home, they indicated that they could not give me ownership of the land unless I show that Peter had no interest in the land but only the house or if I make a joint application with him."

[32] With regard to the property, she stated that she began occupying the parcel of land in 1993 and that it was occupied by her father before that time. She stated that the disputed property had never been a dump and that her father had occupied the land since the early 1980's. Her evidence was that the house on the property was built together with the claimant with their joint money. She described her involvement in the home on the property. She stated:

> "I gave Peter my saving which was $1500.00 dollars to caste a foundation. He bought some material and got some of his friends to come and caste the foundation for my home. Peter and I used to help out with the labour for the building of the home. I used to help carry materials, cook food for the workmen.

[33] She also described going to the water Department in 1994 to pay for water service connection to the property; paying for connection for electricity; and paying monies to repair the road to the property. She also bought materials for the construction of the home from her salary produced multiple receipts and invoices from hardwares and other services relating to the property.

[34] The defendant described that after she and the claimant broke up that the claimant began to make demands that she repay him monies that he had spent on construction of the house. It was during this period that she made her application to the Ministry to buy the property. She disputed the claimant's claim to occupation of the disputed property since 1993. She stated:

> "Peter and his wife never owned or occupied the land I live on in 1993 or anytime. He only came to my home when he was in a relationship with me."

[35] In cross examination, the defendant confirmed that she had had to make an application to the Ministry of Agriculture and Lands to get seek to get title to the lands. She also confirmed that she was informed that the claimant would have to give his permission that he had no interest in the land in order for her to get title. It also alluded to a joint application but no joint application for the land was ever made. Counsel confirmed that payments were made for the land on the defendant's application by way of salary deductions after 2000 but when asked about when construction of the house began the witness confirmed that that was in 1993. She stated that she had made other contributions, "buying lumber and materials."

[36] It was suggested to the defendant that in fact it was the claimant who paid for the construction of the house and gave the defendant the monies to by lumber and materials. The defendant denied this. She readily admitted that the claimant had helped her to build the house. In answer to counsel, the defendant stated that she made the bigger contribution to the construction of the house. The defendant confirmed that at some stage she sought a loan from a bank to purchase the claimant's share of the property and denied that she had been unsuccessful in obtaining the loan.

[37] In answer to counsel Mrs. Rattan Mack for the defendant to the counterclaim, the defendant confirmed that she had received correspondence from the Ministry denying her application and stating that she did not qualify since she would have had to have been living on the land from 1967. The Ministry did offer to sell the land to her at market value. She further admitted that the Ministry did not conditionally approve the sale of the land to her, nor was she aware whether or not the Ministry had conducted investigations to confirm the parties and/or their interest in the land.

[38] **Mr. Cuthbert Mills** was a neighbor of the defendant. Relevant to the issues in this case Mr. Mills stated in his evidence in chief:

> "Sometime after she moved on to the disputed land with her one child Melecia. Most of Gail's house was built by self-help labour. Both Gail and Peter build the house. Peter Procope got some of his friends to help with the labour. At the time the house was being built, both Gail and Peter were working. The house was built piece by piece."

[39] In Cross examination he stated that he knew that the defendant moved into the house in the nineties. He said that he knew that she contributed to the building of it because he knew she was working and that "naturally' she would have contributed. He stated that "part of the house was completed' when she moved in sufficient for them to move in and then the rest, "piece by piece".

[40] **Jason Berry** is the brother of the defendant. In his evidence in chief, he stated the defendant had been occupying the property for at least 22 years. He stated that the claimant had never lived in the house on the property. His evidence was that he and the defendant were given parcels of land which had previously been occupied by their father and that the property had always been part of his father's property which was then passed on to the defendant.

[41] He knew that the claimant and the defendant built the home on the property. He stated that: "She and Peter built it piece by piece. I helped with the construction of the house." He went on to say that the house had been occupied by his family by his father and then his sister the defendant for as long as he could remember.

[42] He maintained his evidence in cross examination. While he could not say exactly when construction on the house began, he confirmed that he did assist as a labourer, that it was his sister who was building it, that the claimant did assist in the building of it but would not confirm that it was the claimant's house.

[43] **Melecia Berry** is the defendant's daughter. She testified that she had lived with her mother all her life and was aware that both the claimant and the defendant built the house on the property. She stated: "The house was built over a period of time. The house started out with one bedroom and one bathroom. Peter Procope and my mother kept making additions

to it." She stated that no one [from the Ministry] had ever come to ask her about ownership of the house or the property. She stated that her mother had never rented from the c laimant.

[44] **Versilie Berry** was the defendant's younger sister. Her evidence was similar to the defendant's: that the defendant was working during the time that the house was built, the relationship between the claimant and the defendant, and that the disputed land was part of her father's property passed on to the defendant. She was not cross examined.

[45] **Carlton Issac** was summoned by the defendant to give evidence because his affidavit was used by the claimant in support of his application to the Ministry for the property in 2008. In cross examination by counsel for the defendant he stated that he had worked on the house, at the preliminary stages. He stated that he had signed the affidavit in support of the application because the claimant promised him that if he signed and the house was sold he would get paid for the work that he had done. He was clear that he was not supposed to get paid but did this to receive something for the work he had done. Mr. Isaac stated that at the time he signed the affidavit he believed that it was owned by the defendant, that her father had owned it and he had given it to her

[46] He was asked specifically about the contents of his affidavit where he stated that:

> "I know Peter Procope, and I'm aware of the fact that Peter Procope is the owner of a lot of land situated in New Ground in the Valley of St. Christopher."
>
> Q. Maybe you didn't read it.
>
> A. …[they] Just give me the paper and maybe read it… remember they tell me that once I signed the paper, I going to get pay. So maybe I didn't get all the details. He told me once I sign the paper…
>
> Q. But that was a lie.
>
> A. He told me once I sign the paper, I going to get pay for the work I had done.

[47] Mr. Isaac admitted then that what he had said in his affidavit was untrue, and also that he had never seen or been shown a survey plan of the land when he signed the affidavit.

> "THE COURT: All right. But answer the question [that counsel had posed]. The question -- the specific question is that you did not see Peter Procope decking any house by himself in 1993 in Newton Ground?
>
> THE WITNESS: No, My Lady."

[48] The witness went on to indicate that all that he had said in the affidavit was in fact incorrect and false as he had no knowledge of those matters.

Defence to the Counterclaim

[49] At the Close of case for the defendant the defendant to the counterclaim called two witnesses. The first of these was **Beverly Harris**. She was the acting Permanent Secretary of the Ministry. Ms. Harris detailed in her evidence the procedure for obtaining a grant under the Village Lands Freehold and Purchase Act. She explained that: "If the Applicant does not qualify, the Applicant is written to and informed that he/she does not qualify. The Applicant should then be advised to complete the regular land application form and submit supporting documents to support the claim for the rights to the land." She went further to explain that if there is a structure on the land an applicant may be asked to provide evidence of their interest in the structure.

[50] In Cross-examination she could not say whether the land in question fell under the Village Freehold Act or not and was not aware of how a conflict arising thereunder could be resolved. She stated that she was not aware of any such conflict arising while she was working at the Ministry.

[51] **Ms. Hilary Hazel,** was the Permanent Secretary at the Ministry at the relevant time when the applications were made by the claimant and defendant. In her examination in chief she stated that she was aware that an application had been received by the defendant in March 2008. She stated that the applicant failed to meet the requirements for applying for lands under the Village lands Freehold and Purchase Act. She confirmed that after the Ministry informed the defendant that her application had failed that the Ministry did not received any further documentation from the defendant.

[52] When the defendant's application was received in June 2008, after the Department of Lands and Survey had carried out its investigation regarding the application, the request was approved. As the claimant showed that he was in possession of the land and owner of the building.

[53] In Cross examination Ms. Hazel explained that the defendant's application had failed because she needed to prove occupation on the lands from 1967 and was unable to do so, instead stating that she had been in occupation since 1998. Ms. Hazel agreed that an applicant would have to show that there had been occupation by the applicant or some other person related to the applicant who qualifies within the terms of the act. She explained that: "The lands in Newton Ground do qualify. [under the Act]. However, if there is no tenant that also proves the tenancy, then the land is sold as Crown lands."

[54] Ms. Hazel clarified:

> "… usually when an applicant in areas that are designated by the Village Freehold Act applies but are not applying under the powers of the Act, they are required to use the regular land application.
>
> …
>
> And it goes like that for all the areas that are named, the 40 areas that are named in the Act. They are not necessarily for all the persons who have applied to the government for land there using the format of the Village Freehold. The Village Freehold is normally used by those persons who are claiming the tenancy and so, therefore, there are two threads in terms of land application in those areas."

[55] Ms. Hazel went on to answer questions pertaining to the procedure that obtained at the time that the parties' applications were made. In regard to the claimant's application she agreed that there was a note from the Department of Lands and Survey that: "Proof of ownership of the house is needed. Perhaps this is a court matter. The owner of the house should be sold the land." She agreed that the claimant was not invited to seek joint ownership of the property as was the case with the defendant when her application was denied. She explained that because the claimant had sought straight title to the land, what was required was that he prove ownership of the house. Ms. Hazel denied that she knew of the defendant's outcome to her application at that time at that time, and stated that the burden was on the claimant to prove his ownership of the home.

[56] She emphasized that to her mind,

> "The focus of the investigation was more on who owned the house because by policy the ownership, the person who owns the house, is who is granted first priority to purchase the land. … All the evidence that was gathered that was brought to my attention indicated that Mr. Procope built the house."

[57] In answer to question by counsel that none of those affidavits provided any evidence whatsoever of Mr. Procope's ownership of the house she did not agree with that suggestion. She stated that the application from Mr. Procope was not "reviewed in context of Ms. Flemming's application." She went on to explain:

> "What did we discover in relation to ownership of the house? We discovered nothing. We were trying only at the point of application from Mr. Procope did we really receive any evidence in relation to ownership of the house. As I indicated, if someone writes on an application that they own property, that they own a house, that is not sufficient to conclude that they are the owner of the property"

[58] She denied that she ignored the result of Mr. Zakers' investigation or observations from the Director of Lands and Surveys about someone having an interest in the house on the property. She was asked directly what she would do if she discovered that the claimant had never spent any money to put up the building, what difference does that make to her:

> "It will then say to me that it was, the evidence is false and so the decision was based on falsehood. But I had no evidence at the point of approval that anything was false."

[59] She maintained that eventually the information that "we used was the affidavit on the other persons, not necessarily what Mr. Procope is saying there because what he is saying in this affidavit was no different from what he was claiming verbally." She was clear that if she discovered that the evidence that she considered to make the decision was false, that it was not true, that she would not have made the decision that she did make recommending the grant of title to the claimant.

[60] **Ms. Verlene** Simpson dealt with the claimant's application for title to the lands. She detailed the procedures and was clear that although she was aware that the Department of Lands and Surveys had submitted a report stating that there was a house on the property this was not detailed in the letter to Mr. Procope asking for proof of ownership. As far as she was concerned this was all dealt with by asking for this proof.

[61] As Ms. Simpson stated:

> "Because Mr. Procope is providing information that he was the one who built the house. So, if he's submitting an affidavit saying that I am the person and he's willing to 11 submit an affidavit from the people who built the house, technically in my limited way of understanding legal we were doing that in order to secure government's position."

[62] **Steven Zakers** was employed at the Department of Lands and Surveys and he made the investigation into the property upon the claimant's application for title. He stated that he "went and asked the questions, made the notes, write the report and delivered it to the director and that was it." He was aware of but did not do the investigation into the defendant's application.

Court's Conclusions

[63] At the end of this trial counsel sought that the court allow time for a transcript to be prepared before filing closing submissions. When this court received the transcript earlier this year, not only was the transcript incomplete but no closing submissions were received from any of the parties. This court did have the benefit of its own notes of the proceedings, especially the evidence of the claimant and his witnesses as well as skeleton arguments filed before the trial.

Issue 1

[64] The claimant was required to prove, on a balance of probabilities, that the defendant was a tenant at the property. The evidence led has failed to do so. The claimant was not a credible witness. He relied from what he had said in his witness statement on crucial points and did not appear to be able to explain other matters that did appear in his statement. I do not find the claimant was a credible witness. On the other hand, the defendant was able to explain her involvement in the property and provided the court with evidence of her interest in the property by way of invoices and receipts. The witnesses in support of the defendant also gave consistent evidence of her occupation and interest in the property. The defendant clearly had an interest in the house and in the property. She was not the claimant's tenant and was not in the home on the property as a tenant at will. The claimant fails on the first ground of relief that he sought. He is not entitled to possession of the property as claimed nor to the mesne profits arising therefrom.

Issue 2

[65] Both parties, claimant and defendant admitted to an interest in the property. I am satisfied that the defendant had an interest in the property. This view is supported by the evidence of the claimant himself that just before he made application for title to the property he went to an attorney hired by the defendant to speak about her wanting to purchase his interest in the house on the property. I am satisfied from the evidence presented by the defendant that that interest was significant. It is noteworthy that the defendant never denied the claimant an interest in the property. On the evidence presented I am satisfied that the claimant and the defendant had a joint equal interest in the house on the property.

Issue 3

[66] The claimant holds a certificate of title to the property with the house on it. This certificate of title was awarded to him based on the assertion in his application and the supporting affidavits filed in support thereof. It is clear to this court, and has been admitted by two of the persons who swore those affidavits in support, that the contents of those affidavits as they related to the claimant's involvement and expenditure on the property were not as the claimant stated and certainly not to the exclusion of some interest in favour of the defendant. It is trite law that a certificate of title is indefeasible and can only be defeated if fraud or mistake is clearly shown to have been perpetrated on the issuer of the title to the property. That such is the case on the facts of this case could not have been clearer.

[67] In the case of **Joseph Maynard and Carlyn Lawrence Maynard Barzey (The duly appointed Attorney of record of Norma Barnes Maynard) v Michele Kalski, (The intended Administratrix of the Estate of Pamela Kalski dec'd).**[1] Alleyne J.A for the Court of Appeal stated:

> **"**More important, and this is the issue on which the appeal was argued, is the nature and effect of a certificate of title. Section 4 of the Title by Registration Act CAP. 279 provides that immediately after the issue of a first certificate of title the former title to the land shall 'cease and determine'. Section 8 of the Act provides that 'All certificates of title granted under this Act ... shall be indefeasible.' The word

[1] SKB CIVIL APPEAL NO.19 OF 2003 at paragraph 12

> 'indefeasible' is defined in the First Schedule to the Act 2 as 'express(ing) that the certificate of title issued by the Registrar of Titles, and the notings by him thereon, cannot be challenged in any Court of law on the ground that some person, other than the person named therein as the registered proprietor, is the true owner of the land therein set forth, ... except on the ground of fraud *connected with the issue of such certificate of title*, ... or that the title of the registered proprietor had been superseded by a title acquired under the Limitation Ordinance, by the person making the challenge**...'"**

[68] The Court also noted:

> **"**Whatever the right, title or interest of the Appellants to the disputed property might have been, upon the issue to the Respondent of a First Certificate of Title to the land on 14th June 1999, all such right, title or interest ceased and determined in accordance with section 4 of the Title by Registration Act, and the Respondent obtained an indefeasible title, which was open to challenge only on the basis of fraud *'connected with the issue of the title'***."**[2]

[69] Sections 139 & 140 of the Title by Registration Act, Cap 10:19 governing the grant of a first certificate of title sets out the means by which a challenge can be mounted against the grant of a certificate. The issuance of a Certificate of Title pursuant to the Village Lands Freehold Purchase Act, Cap 10:21 is also governed by these sections. Section 8 (3) of the Act States: "The issue of Certificate of Title referred to in subsection (2) of this section and all other dealings with the land described in the Certificate of Title shall be governed by the provisions of the Title by Registration Act, Cap. 10.19."

[70] In **Derry v Peek**[3] it was emphasized that fraud is shown when a false representation is demonstrated to have been made knowingly or without belief in its truth or recklessly uncaring whether it be true or not. As the evidence of Ms. Hazel stated, the Ministry would not have made the award it did if it knew the true position with the property, that the proof of ownership provided by the claimant was false.

[71] There is no evidence that the Ministry granted the claimant conditional approval for title to the property. There is no issue that they acted on the application and information that the defendant had put on that form, especially the indication that the defendant had only been

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[2] Supra at paragraph 60
[3] (1889) 14 App Cas 337

residing on the property since 1998. There was no conditional acceptance of that application. The application was denied. The Defendant did not fall within the requirements for the grant of an interest pursuant to the Village Freehold Lands Purchase Act, but that there may have been another avenue for the defendant to substantiate an interest in the property. Neither is there evidence of bias on the part of the Ministry. It is clear that the procedure that was followed was their usual procedure. The fraudulent misrepresentation in this case was perpetrated on the Ministry.

[72] There is no evidence of mistake, but it is clear that the Ministry was influenced by misrepresentation in the recommendation made for the claimant to be granted title to the property. The Ministry was clearly misled by the claimant and the affidavits and information from the persons who gave affidavits in support of that application for title. It is instructive to this Court that Ms. Hazel in her evidence confirmed that had she known that the information submitted by the claimant was false, she would not have recommended that the Certificate of title be issued. (See paragraph 53 above).

[73] Section 141 of the Titles by Registration Act states:

> "141. Court may order cancellation or amendment of certificate of title.
> At the request of a Registrar of Titles upon petition or case stated, or in any proceeding respecting any land, or in respect of any contract or transaction relating thereto, or in respect of any instrument, caveat, or dealing with land, the Court may by decree or order direct the Registrar of Titles to cancel, correct, substitute, or issue any certificate of title, or make any noting or entry thereon, and to do such acts as may be necessary to carry into effect any judgment of the Court."

[73] Based on the foregoing the Court's Order is as follows:

(i) The claim is dismissed in its entirety

(ii) The defendant is found to have an equal joint interest in the house on the property.

(ii) The counterclaim is dismissed.

(iv) Pursuant to Section 141 of The Title by Registration Act, the Registrar of Titles is hereby ordered to cancel the issue of the Certificate of Title in

Register Book J3 Folio 62 at the Register of Titles issued to the claimant, forthwith.

(v) The defendant shall make an application for title to the property forthwith, such application to be determined by the Ministry as expeditiously as possible.

(iv) Costs to the defendant on the claim to be taxed if not agreed.

(vi) In light of the Court's findings resulting in the order at (iv) above, each party shall bear their own costs on the counterclaim.

Marlene I Carter
High Court Judge

By the Court

Registrar