

CONV.

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN COMMON LAW
SUIT NO. 2001/A – 036**

| | | |
|----------------|-------------------------------|-------------------------|
| BETWEEN | MICHAEL MITCHELL ALLEN | CLAIMANT |
| AND | MELFORD RANDAL WARD | FIRST DEFENDANT |
| AND | REGISTRAR OF TITLES | SECOND DEFENDANT |

IN CHAMBERS

Mr. Linton Gordon instructed by Frater, Ennis & Gordon for the claimant

Mr. Christopher Honeywell for the first defendant

Miss Katherine Francis for the second defendant

February 14, 18, and April 8, 2005

**NEGLIGENCE, BREACH OF STATUTORY DUTY, SECTION 140 OF THE
REGISTRATION OF TITLES ACT**

Sykes J

1. In this matter, the important question is whether the claim against the Registrar of Titles is sustainable in law. Miss Francis makes three major points only one of which I will resolve since it determines the matter entirely. In a succinct manner, she submits that the allegations against the Registrar do not and cannot establish negligence or breach of statutory duty because she acted in accordance with the Registration of Titles Act

(RTA). For this reason, Miss Francis submits, the claim against the Registrar should be struck out at this stage.

2. Although witness statements have not been filed in this matter, it is common ground that the respective cases are outlined in affidavits filed earlier when an application was made for an interlocutory injunction before Rattray J. As I understand it, there is no new material to come forward. The affidavits are those of Miss Stacey Mitchell, than an attorney at law, of the firm Frater, Ennis & Gordon, dated May 3, 2001, August 22, 2001 and August 28, 2001 and Miss Constance Trowers, Registrar of Titles at the material time, dated July 11, 2001.

The agreed facts

3. Mr. Allen exercised an option to purchase land that he had leased from Mr. Ward. This land is registered at volume 1115 folio 202 of the register book of titles. A dispute arose between the parties that led them to court. The action was heard and Wesley James J ordered specific against Mr. Ward. It appears that Mr. Ward had mortgages outstanding on the property. In practical terms, Mr. Allen was purchasing property from a person who was indebted to a third party. This fact alone would suggest the need to have a carefully prepared contract, which would address among other things, what would happen in the event that Mr. Ward defaulted. As it has turned out, Mr. Ward defaulted. The holders of the mortgage have realised their security hence this action.
4. On October 30, 1992, to protect his interest, Mr. Ward lodged a caveat at the Office of the Registrar of Titles. Unfortunately, the caveat was not noted on the title so that when the then Mutual Security Bank had its

mortgage registered on September 12, 1994, it did not know of Mr. Allen's caveat. This omission was brought to the attention of the Registrar by Mr. Allen's attorneys some time in 1998. The Registrar acknowledged that an error had been made and took corrective measures immediately. She wrote to the holders of the mortgage (by then National Commercial Bank) telling them of the error. The mortgage was deregistered. She asked the bank to resubmit the request to register the mortgage and recommended that the bank should specifically ask that the caveator be notified. The bank acted upon the advice of the Registrar (see letter from Lana Smith to Registrar dated December 11, 1998). Up to this point, Mr. Allen had not suffered any loss of damage because of the non-registration of his caveat.

5. The Registrar warned Mr. Allen in accordance with section 140 of the RTA by sending the notice by registered mail to the address of Mr. Allen, as stated on the caveat. This is supported by a postal receipt dated December 22, 1998 and the caveat index card that shows the address given by Mr. Allen, namely, 21 Duke Street, which was the address of his attorneys. The significance of this is that on receipt of the notice, Mr. Allen had fourteen days to respond failing which, the Registrar would be at liberty to reregister the mortgage (see section 140 of the RTA). No response came from Mr. Allen and the mortgage was registered.

6. Mr. Allen is saying that he did not receive this notice and therefore he did not know that the registrar had warned him about the intention of National Commercial Bank to register the mortgage. He says this non-receipt of the notice meant that the Registrar breached her duty of care to him and also her statutory duty. These breaches, he alleges resulted in the mortgage being registered and his caveat not noted, thereby allowing

the mortgagees the opportunity of exercising the power of sale, that was in fact exercised and so he has lost the land which he purchased.

7. It is important to note that none of the affidavits of Miss Mitchell alleged that the Registrar did not send the notice. She swore that after extensive searches and enquiries being made in her chambers and at the post office what was revealed was that the her chambers were not sent the notified that registered mail was at the post office. Mr. Allen's attorneys allege and I accept that they never received the registered mail and neither did they receive the notice of arrival of registered mail. I do not see how this apparent failure by the postal service can be attributed to the Registrar.

8. Mr. Gordon submitted that it was incumbent upon her to go further having regard to the facts of this case. He even went as far as suggesting that the document showing the registration of the letter was a forgery. The submissions of Mr. Gordon hinted at possible collusion between the Registrar and the post office. By this, Mr. Gordon meant that the person who took the letter to the post office on behalf of the Registrar, for some unknown reason, either did not register the letter but forged a document to show that he did or he and some unknown person simply decided not to register the letter and then manufacture evidence to show that it was registered. Mr. Gordon claimed that, at any trial, he will be able to show that the document exhibited by the Registrar as proof of registering the letter is not the kind usually issued by the post office at the material time.

9. Miss Francis responded to this by saying that this is not the case of the claimant as understood for the past four years. Miss Francis says that this way of putting the case amounts to fraud and that has not been specifically pleaded. She accepted that fraud is a breach of duty but

submitted that it would be a misuse of language to regard fraud as negligence. So to do would subvert the rule of that requires fraud to be specifically pleaded. According to Miss Francis the claim against the Registrar, as endorsed on the writ of summons, reads as follows: *Damages against the Second Defendant for negligence and for breach of Statutory Duty in failing to give Notice to the Plaintiff of the Warning of Caveat No. 737818 lodged in respect of lands registered at Volume 1115 Folio 202 prior to removing the same.*

(**10.** This pleading, Miss Francis submitted, does not indicate anything remotely approaching allegations of forgery or collusion between the employee of the Office of the Registrar of Titles and some unknown person.

(**11.** I agree with Miss Francis' submissions. The allegations against the Registrar do not show that she acted negligently once the error was discovered. It is important to note that the act of negligence relied on here is not the omission to register the caveat initially but rather failing to send notice to the claimant after the letter from the bank was received by the Registrar in which they asked, specifically, that the caveator be notified. As I have said, it is not that the Registrar failed to send the notice, the real failure, if any is that of the postal service. I accept Miss Francis' submission that if the claimant is relying on fraud he ought to have pleaded that specifically. That has not been done. It is too well established that where a claimant wishes to rely on fraud he must specifically set out the particulars of the fraud.

Conclusion

12. The facts as alleged do not establish either the tort of negligence or breach of statutory duty. Fraud has neither been alleged nor pleaded. The resort to fraud seems to be the result of lawyer's ingenuity in suggesting that that is a possible way of interpreting the evidence. The affidavits of Miss Mitchell make it clear that no one thought of accusing the Registrar of fraud. Claim against the Registrar is struck out. Costs to the second defendant in the sum of \$40,000.