

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 15/08  
SUPREME COURT SUIT NO. C.L. 2000/ B-219  
CONSOLIDATED WITH SUIT NO. C.L. 2002/D-038

BEFORE: THE HON. MRS JUSTICE HARRIS, J.A.  
THE HON. MR JUSTICE MORRISON, J.A.  
THE HON. MISS JUSTICE G. SMITH, J.A. (Ag)

BETWEEN	RUDOLPH BANCROFT (By Michael Bancroft under Power of Attorney)	1 <sup>ST</sup> APPELLANT
AND	DAVID PARCHMENT (By Errol Bancroft under Power of Attorney)	2 <sup>ND</sup> APPELLANT
AND	LEAFORD COOKHORNE	1 <sup>ST</sup> RESPONDENT
AND	JUNIOR DIXON	2 <sup>ND</sup> RESPONDENT
AND	ERVING DONEGAL	3 <sup>RD</sup> RESPONDENT

Mr Jeffrey Daley for the appellants.

Mr Garth Lytle instructed by Garth E. Lytle & Co. for the respondents.

15, 16 December 2008 and 24 April 2009

HARRIS, J.A.

I have had the opportunity of reading in draft the judgment of Morrison J.A. I agree with his reasoning and conclusions and wish to add nothing further.

**MORRISON, J.A.****Introduction**

1. This is an appeal from a judgment of Donald McIntosh J given on 25 January 2008 in consolidated suits numbered C.L. 2000/B-219 ("the Bancroft action") and C.L.D. 038/2002 ("the Donegal action").
2. In the Bancroft action, the plaintiffs are Mr Rudolph Bancroft (by Michael Bancroft under Power of Attorney) ("Bancroft") and Mr David Parchment (by Errol Bancroft under Power of Attorney) ("Parchment"). The defendants are Mr Leaford Cookhorne ("Cookhorne") and Mr Junior Dixon ("Dixon").
3. In the Donegal action, the claimant is Mr Erving Donegal ("Donegal") and the defendants are Mr Donald Addison Banks ("Banks"), Bancroft and Parchment.
4. These actions were consolidated by the order of Campbell J made at a case management conference in the Bancroft action on 10 February 2005.
5. The subject matter of both actions is the beneficial ownership of 87.5 acres of land ("all that parcel of land situate lying and being in the District of Saint John in the parish of Saint Catherine commonly called and known [by] the name of Minimus containing by survey eighty seven and half acres"), being land formerly comprised in Certificate of Title

registered at Volume 9 Folio 37, but now registered at Volume 1065 Folio 118 and Volume 1074 Folio 199 of the Register Book of Titles ("the land").

6. Donald McIntosh J dismissed the Bancroft action, with costs to Cookhorne and Dixon to be taxed, if not agreed. In the Donegal action, he entered judgment for Donegal against Banks, Bancroft and Parchment, granting declarations "that Titles registered at Volume 9 Folio 37, Volume 1074 Folio 199 and Volume 1065 Folio 118 were obtained by fraud and are to be cancelled". An order for costs was made in this action in favour of Donegal against all three defendants.

#### **The position on the titles**

7. The Certificate of Title registered at Volume 9 Folio 37 was issued on 9 October 1896, just seven years after the Registration of Titles Act ("the RTA") came into force on 1 October 1889. The first registered proprietor of the land was William Bagshaw Hannan, described as a journalist of the city and parish of Kingston. By transfer dated 8 December 1909 and registered on 10 November 1916, Mr Hannan transferred his interest in the land to Albert Augustus Ayton, a medical practitioner also of Kingston, for a consideration of £56.

8. By Miscellaneous entry no. 36196 made on 20 November 1968, the following is recorded over the Registrar's signature on the Certificate of Title:

"By an order made in the Supreme Court of  
Judicature of Jamaica in the High Court of

Justice in Suit No E95 of 1962 on the tenth of November 1962, It was ordered that the land comprised in this Certificate be vested in Virginia Donegal of Fairfield Road, Spanish Town Saint Catherine, Widow. No entry hereof have [sic] been made on duplicate of this certificate, the same having not been produced to me. Entered herein the 20<sup>th</sup> day of November 1968."

9. By Instrument of Transfer no. 256493 dated 31 October (the actual entry omits the year) and registered on 6 February 1970, Virginia Donegal transferred all her estate in the land to Banks and Bancroft as tenants-in-common, for a consideration of £2,600. The title again records, following this entry, that no entry had been made on the Duplicate Certificate, "production thereof having been dispensed with by miscellaneous 39199".

10. Miscellaneous entry no. 39198, also entered on 6 February 1970, records that "this certificate has been cancelled the duplicate thereof having been lost and a new Certificate in duplicate therefor is registered at Volume 1065 Folio 118".

11. Upon the subsequent issue of the Certificate of Title registered at Volume 1065 Folio 118 on 28 April 1970, therefore, Banks and Bancroft were the registered proprietors of the land. Thereafter, by Miscellaneous entry no. 40745 made on 2 June 1971, some 71 acres of the land was surrendered by virtue of section 76 of the Registration of Titles Act ("the RTA"), "and a new Certificate therefor and for other lands is registered at Volume 1074 Folio 199."

12. Certificate of Title registered at Volume 1074 Folio 199 issued on 2 June, 1971 confirms Banks and Bancroft as proprietors of an estate as tenants-in-common in fee simple of:

“All those three parcels of land part of Retreat called Labour Hall also known as Minimus in the parish of Saint Catherine together containing by Survey Eighty-Two acres Three Roods Twenty Perches...and being as to a part thereof part of the land comprised in Certificate of Title registered at Volume 1065 Folio 118.”

13. The result of all of this was that Banks and Bancroft were registered as proprietors in tenancy-in-common of all the land comprised in Certificates of Title registered at Volume 1065 Folio 118 and Volume 1074 Folio 199, a total land area of approximately 98 acres. Although the circumstances in which an additional 10.5 acres came to be included in the latter title were not explored in the evidence and remain unexplained, no issue was joined by the parties as to this.

14. Finally, by Instruments of Transfer nos. 345208 and 345207, both dated 8 March and registered on both titles on 17 May 1977, Banks transferred all his estate in one undivided half share of the land to Parchment, with the result that, as of the date of registration, Banks dropped out of the picture altogether and Bancroft and Parchment became registered proprietors of the land as tenants-in-common. Save for the registration and subsequent discharge of two mortgages in favour

of Securities Limited and National Commercial Bank Limited, that is the state in which the titles remained up to the time of trial.

### **The parties**

15. In the manner already described, Bancroft and Parchment are the registered proprietors of the land and Banks is Parchment's predecessor in title in respect of his undivided half share. Donegal is the grandson of Virginia Donegal and claims to have been in possession of the land for many years. Cookhorne and Dixon are in possession of portions of the land, purportedly as purchasers for valuable consideration from Donegal of 25 acres and 10 acres respectively.

### **The Bancroft action**

16. In this action, Bancroft and Parchment claimed as registered proprietors of the land against Cookhorne and Dixon for recovery of possession and damages for trespass, "for that in 1995 [they] wrongfully entered upon and took possession of...[the land]".

17. In their Defence, Cookhorne and Dixon denied that they were trespassers and challenged Bancroft and Parchment's title to the land. Specifically, they pleaded that:-

- (a) The land is owned by Donegal "and was never sold by him to anyone and in particular" Bancroft and Parchment;
- (b) that Bancroft and Parchment "obtained the said property by way of FRAUD" (emphasis in the original).

18. Cookhorne and Dixon particularized the fraud alleged against Bancroft and Parchment as follows:

“(a) The Plaintiffs purchased no lands from Erving Donegal in 1977 or Virginia Donegal or at all;

(b) The land was never sold to Donald Addison Banks and Rudolph Bancroft on 28<sup>th</sup> April, 1970 or at all, by Erving Donegal or anyone under his authority.”

19. Finally, Cookhorne and Dixon asserted “that they entered into possession to portions of the said lands with the consent of the owner having purchased 25 acres and 10 acres respectively”.

20. The Reply to Defence filed on behalf of Bancroft and Parchment joined issue with the Defence and stated as follows:

“1...

2. The plaintiffs will say that they purchased the said lands from one Mr. Donald Banks (deceased) and that at the time of purchase a small portion of the said lands had been occupied by one Mr. Donegal.

3. That the Plaintiffs permitted Mr. Donegal to remain in occupation of the said small portion of the said lands after they purchased same from Mr. Donald Banks (deceased).

4. The Plaintiffs deny paragraph 3 of the Defence and the Particulars of Fraud itemized thereunder.”

21. After some delays, the reasons for which are not now relevant, a case management conference (at which both sides were represented by counsel) took place before Campbell J on 10 February 2005, when the

usual orders as to discovery and inspection of documents, time for exchange of witness statements, and so on, were made. It was also ordered, as already noted, that this action should be consolidated with the Donegal action and the consolidated action was set for trial on 14 January 2008 for two days.

### **The Donegal action**

22. In this action (filed on 4 June 2002) Donegal claimed against Banks, Bancroft and Parchment for the following reliefs:

“... ”

(a) A declaration that the lands comprising 87.2 acres or 82.3R situated at Minimus District in the parish of Saint Catherine registered at Volume 1065 Folio 118 and Volume 1074 Folio 119 of the Register Book of Titles were obtained by fraud against the owner in possession Erving Donegal and the estate of Virginia Donegal, deceased.

(b) Declaration that the Defendants and or their Principal made no purchase of the land from the owner and therefore are not entitled to the said land or possession of it.

(c) Declaration that the Defendants not being the owners of the aforesaid land are not entitled to the declarations sought nor the order applied for.

(d) Declaration that the Defendants have committed a fraud against the Plaintiff and the estate of Virginia Donegal in obtaining the titles for the said property.



(e) An Order that the Defendants hand over to the Plaintiff the duplicate Certificate of Title, registered at Volume 1074 Folio 118 and Volume 1065 Folio 119, respectively.

(f) An Order that the said Titles registered at Volume 1074 Folio 118 and Volume 1065 Folio 119 be cancelled as they were obtained by way of fraud.

(g) Damages in lieu of the value of the lands registered at Volume 1074 Folio 118 and Volume 1065 Folio 119.

(h) Further or other relief as this Honourable Court deems fit.

(i) Interest on any amount this Honourable Court finds due and payable to the Plaintiff.

(j) Cost and Attorneys costs.

For that on or about the 31st day of October, 1970 the Defendants Donald Addison Banks and Rudolph Bancroft, Manager and Company Secretary, respectively, purportedly purchased 87.2 acres of lands at Minimus District in the parish of Saint Catherine from Virginia Donegal who died in the year 1967 and in 1977 the first Defendant sold to the thirdnamed Defendant his one half interest in the said land as evidenced by duplicate Certificate of Title registered at:-

(i) Volume 9 Folio 37 dated 6th February, 1970.

(ii) Volume 1065 Folio 118 dated 28th April, 1970.

(iii) Volume 1074 Folio 119 dated 2nd June, 1971

The Plaintiff therefore claim that such purchase was done by way of FRAUD against the estate of the said Virginia Donegal and the Plaintiff who inherited the land in 1967."

23. In his Statement of Claim, Donegal stated that he had been "in possession of the land for over SIXTY FIVE (65) YEARS where he resides and cultivates the said property and says that at no time was the said land sold by Virginia Donegal, or himself to" Banks and or Bancroft or Parchment. He specifically alleged fraud against all three defendants particulars of which he provided as follows:

(a) Purported purchase of the property by the first and secondnamed Defendants took place approximately three (3) years after the death of Virginia Donegal.

(b) In Affidavit of Rudolph Bancroft in Suit No. 2000/B.219 sworn to on the 20th December, 2001 the second Defendant deponed that he bought the land from Donald Banks the first Defendant in 1977 (paragraph 3 and 4).

(c) The secondnamed Defendant states that Donald Banks told him that he purchased the land from one Mr. Erving Donegal . (paragraph 5 of the Affidavit sworn to on the 25th December, 2001) which is denied by Erving Donegal.

(d) The Plaintiff denies selling any such property to the first and or second or thirdnamed Defendants.

(e) Further, the Plaintiff denies ever meeting any of the Defendants.

(f) Furthermore, the Plaintiff denies signing any document such as Agreement for Sale, Transfer Instrument or any document selling or transferring any land to any of the Defendants.

(g) Still further, the Plaintiff denies ever receiving any money, or consideration, whatsoever from any

of the Defendants and has paid and still paying property taxes for the said land.

8. By reason of the matters aforesaid the Plaintiff contends that the Defendants perpetuated [sic] the fraud as aforesaid.

(a) When the firstnamed Defendant on the 6th February, 1970 along with the secondnamed Defendant, purportedly purchased the said land from Virginia Donegal as evidenced by Transfer No. 256493 approximately three (3) years after her death.

(b) That both the first and second Defendants within two (2) months (on the 28th April, 1970) obtained a new title for the said lands registered at Volume 1065 Folio 118 of the Register Book of Titles.

(c) By Miscellaneous Entry No. 40745 on the said Title registered at Volume 1065 Folio 118, the first and second named Defendants surrendered 71A-1R-20.6P by virtue of Section 76 of the Registration of Titles Act.

(d) That by Transfer No. 345208 dated 8th March, 1977 and registered 12th May, 1977 on Title registered at Volume 1065 Folio 118 Donald Addison Banks transferred his one half share of the said lands to David Churchill Parchment for consideration of One Thousand Seven Hundred and Fifty Dollars.

(e) That on the same day 17th May, 1977 both the second and thirdnamed Defendants obtained a mortgage as evidenced by Mortgage No. 304266 for One Hundred Thousand Dollars (\$100,000.00) using the said Title registered at Volume 1065 Folio 118 as security for the said loan.

(f) That by June 2, 1971 the first and secondnamed Defendants obtained a title for the said land consisting of 82A-3R-20P registered at Volume 1074 Folio 199

(g) That these activities and entries on the Title were unknown to the Plaintiff until September, 2000 when the Plaintiff sold two (2) parcels of land to two (2) Purchasers to whom Notices were later given by two (2) Agents of the Defendants to quit and deliver up these parcels of land.

(h) The Plaintiff therefore says that the said land was obtained by Fraud against the estate of Virginia Donegal and the Plaintiff and claims that he is entitled to the entire 87A-2R-OP of land which was owned by his mother Virginia Donegal and inherited by him. "

24. The Writ of Summons in this action was directed to each of the three defendants "c/o his Attorney-at-law, Rattray, Patterson, Rattray, 15 Caledonia Avenue, Kingston 5". While it appears that copies of the writ and the Statement of Claim were in fact delivered to Messrs Rattray, Patterson, Rattray at some point, this was not done pursuant to any order of the court and there is no evidence that it was done with the agreement or consent of the defendants (neither is there any evidence that the attorneys were authorised by the defendants to accept service on their behalf). Whatever the reason, it is common ground that the defendants were never served personally, that no Appearance or Acknowledgement of Service was ever entered on their behalf and no Defence to the action was ever filed. There is also some evidence that by the time these proceedings were issued, Banks was dead and Bancroft and Parchment were both resident outside of the jurisdiction of the court, in the United States of America and Italy respectively.

25. It also appears that the only other step taken in this action was that on 5 June 2002 an application was filed on behalf of Donegal for an order that this action "be consolidated and joined" with the Bancroft action. That application was initially set for hearing on 4 July 2002 and, it not having been heard on that date, was re-issued for hearing on 16 September 2002. In the end, it was never heard.

### **The issues at trial**

26. The issues for determination at trial of the consolidated actions were therefore as follows:

1) Whether Bancroft and Parchment were entitled to an order for possession of the land by virtue of their registered titles, or whether those registered titles were defeasible by reason of fraud.

2) Whether Cookhorne and Dixon were lawfully entitled to remain in possession of the land, by virtue of their position as purchasers for valuable consideration from Donegal.

3) Whether Donegal was entitled to the declarations and orders sought by him against Bancroft and Parchment by virtue of his peaceful, open and undisturbed possession of the land as heir and successor in title to Virginia Donegal.

**The trial**

27. At the outset of the trial, counsel for Bancroft and Parchment obviously had second thoughts about the order consolidating the actions (although in fairness to Mr Daley, it should be said that he had not himself appeared as counsel at the case management conference) and applied to have the cases tried separately. This application was refused by the judge, who in his reasons for judgment at the end of the case commented that "it must have been obvious that the issues were the same."

28. Witness statements from Bancroft, Michael Bancroft, Dixon, Cookhorne and Donegal were admitted in evidence. In addition, these witnesses were permitted by the court to amplify their witness statements in examination-in-chief and were cross-examined.

29. Bancroft identified himself as a resident of the State of Florida (since 1977) and one of the registered proprietors of the land. His co-owner, Parchment, he said, lives in Italy. In his witness statement he said that they had both purchased the land, "around 1997," from Banks "as a speculative investment in the belief that the said lands would increase in value". He was advised by Banks that Donegal had been given permission by him (Banks) "to remain in occupation of a small section of the said lands" and stated that he (Bancroft) and Parchment were thus

aware that Donegal was in occupation "as we had taken the decision to allow [Donegal] to remain in occupation as we had no immediate use for the said lands". He denied that any fraud had been committed by either himself or Parchment in the acquisition of the land and asserted as follows:

"To the best of my information and belief Mr. Donald Banks from whom myself and Mr. Parchment purchased the said lands in 1977, himself purchased the said lands from Mr. Irving Donegal sometime prior to 1977. Further, that Mr. Donegal had full knowledge of not only the purchase by Mr. Donald Banks but the subsequent sale by Mr. Banks of the said lands to me and Mr. Parchment. Mr. Donald Banks died in August 2002."

30. When he was cross-examined, Bancroft accepted that the land had been transferred to himself and Banks in 1970, but said that it was Banks who had dealt with the vendor and that he had himself never met Virginia Donegal. He had given his share of the purchase price (£1,300) to Banks, who had done the business on behalf of them both. Pressed with the suggestion that he had at no time at all purchased any land from Virginia Donegal, Bancroft's response was "I cannot answer that. The name Donegal was mentioned but I was not in touch with vendor". And to the further suggestion that he had at no time purchased land from Donegal, his answer was "Can't respond".

31. Bancroft's nephew Michael Bancroft, was given power of attorney in 1997 by his uncle for the purpose of dealing with the land. It was he

who had observed on his first visit to the land in that same year that Cookhorne and Dixon were in occupation of portions of the land and the Bancroft action was in fact commenced on his instructions. He told the court of the enquiries he had made with respect to the payment of property taxes and produced a letter from the National Land Agency to his attorney-at-law dated 4 December 2007, stating "that Volume 1065 Folio 118 and Volume 1074 Folio 199 are not recorded on the valuation roll".

32. Cookhorne's evidence was that in 1995 he had purchased 25 acres of the land from Donegal, who, as far as he was aware, was the owner of the land, for \$465,000.00. He paid a deposit of \$25,000, with the balance to be paid "when the Title is ready." He had taken possession upon payment of the deposit and was engaged in pig and poultry rearing and the planting of agricultural crops on the land.

33. Dixon's evidence was to similar effect in that he too had purchased a piece of the land from Donegal "somewhere in 1995". He said that he had purchased 50 acres (he had pleaded 10) for "about \$916,000.00", which he had paid to Donegal who he understood to be the owner of the land. He had been put in possession by Donegal on the understanding that the balance of the purchase money would be payable "when the Title is ready and the land formally transferred to me." In cross-



examination, he said that his understanding was that "there was no title for the land [and that Donegal] had to do work for a complete title".

34. And then, finally, there was the evidence of Donegal himself. The relevant portions of his witness statement are set out below:

"1. That this claim against Leaford Cookhorne and Junior Dixon arose out of my selling them a piece of my land which I inherited from my mother Virginia Donegal and from child's birth (sic) today I have lived and occupy the land.

2. That the piece of land is comprised of 87'2 Acres and was previously owned by my father who gave it to my mother under a Supreme Court settlement and evidence in Certified Copy Title registered at Volume 9 Folio 37 of the Register Book of Titles. See copy Title attached and at no time did she sell any part or all the land to Donald Allison Banks or Rudolph Bancroft or any person.

3. That I have lived and worked the land and as far as is known to me, there was no mortgage, lien or charge over or affecting the land.

4. That my mother died in the year 1967 and I buried her on the land and no part of the land was ever sold by her or myself and not until I sold two parcels one to Mr. Leaford Cookhorne and the other to Mr. Junior Dixon, but up until that time there remained 87 1/2 Acres of land which I owned.

5. That I am now 87 years of age and throughout my life I have exercised total jurisdiction and has (sic) undisturbed and peaceful possession of this parcel of land.

6. That at the time of my mother's passing in 1967 I was age 34 years and was always in total control of the land even before that, from I was a boy I grew up on the land and was responsible for all her business transactions and to my certain knowledge she did not apply for any new Title for this parcel of land nor did she sell any of this to anyone. "

35. Donegal then summarised the various dealings with the land as they appear from the certificates of title and continued as follows:

"....

10. At no time did my mother sold or transferred [sic] the land to any one and neither I nor my mother received any money for the sale of my land to Mr. Banks nor Messrs. Rudolph Bancroft or David Parchment and no notice of the sale or purchase was given to me.

11. That I note from the record, Title registered at Volume 9 Folio 37 that the endorsement shows that the land was purportedly sold in the month of April, 1970 and between 1970 to the year 2000 no one visited the land, nor disturbed me or reap any crop or served me with any document and I continued to live on the land peacefully and undisturbed and pay my property tax from my mother's death todate (sic).

12. I therefore contend that if any transfer of the land took place it was fraudulently done or obtained by fraud as neither my mother nor myself signed any document or Agreement for Sale or Transfer of Land Instrument.

13. **Power of Attorney-** I am advised and verily believed that the Power of Attorney being relied on by both Claimants, have no effect and cannot be relied upon. Moreover, I am advised and verily believe that

- a. Mr. Banks died sometime in the 1980's, and
- b. Mr. David Parchment died sometime in the 1990's and therefore neither signed the Power of Attorney being relied on. See copy Power of Attorneys attached.

14. In the year 1995 I sold a piece of the land to Inspector Leaford Cookhourne and Mr. Dixon who have both occupied their respective portion since the sale took place and therefore they could not be seen to be trespassing on the land which I sold to them and the balance of the land is mine absolutely and therefore require that the Claimant provide proof of the sale of the land to them. See copy Property Tax Receipt."

36. Cross-examined, Donegal said this:

"I have never held a title for land I sold as yet. I only have tax paper. Virginia Donegal was my grandmother, I was born in her hand. She was my mother's mother. She died 1967 in August. My mother was Mary. She died when I was a baby, she was Virginia's only child.

When my grandmother get down low she was blind. She direct me to where the title was and I went there but don't see it. I don't know how the documents missing.

I grew up on land. It was occupied by my grandmother before I remember. I was 30 years old when my grandmother died.

My grandmother and her stepson went to court and she got land as a court settlement."

37. He went on to tell the court that his grandmother had not left a will, but that he had paid the property taxes on the land up until 1994. He denied receiving any permission to stay on the land from either Bancroft

or Parchment and said that he had "never heard the name Donald Banks before this case started". He insisted that he had authority to sell the land, that his grandparents had left him in possession and that he had lived on the land undisturbed by anyone for 89 years. While he knew that his grandmother had documents for the land, he did not know if she had title. His recollection was that he sold 25 acres each to Cookhorne and Dixon, retaining 8 acres for himself which he continued to occupy.

38. Tax receipts produced to the court by Donegal and admitted as exhibits evidenced payment by him of taxes on the property known as Minimus, sometimes in the name of Virginia Donegal, at other times in the name of Erving Donegal, "per V. Donegal", over a 15 year period between 1981 and 1996.

**Donald McIntosh J's judgment**

39. Having heard the evidence on 14, 15 and 25 January 2008, the judge felt able to dispose of the matter immediately in a brief, unreserved judgment, a note of which was made available to us for the purposes of the appeal. This is the operative part of his judgment:

"The evidence of Rudolph Bancroft is that he was not a party to any transaction leading to obtain in the Registered Titles in his name or in his name and [B]anks name.

He purchased no land from the Donegals; whether Virginia or Erving. He signed papers pursuant to the obtaining of title. This court does not accept his evidence that he at any time

walked the lands or that he intended to develop same. He did not know Erving Donegal and it is unlikely that he ever met him.

The only time any effort was made to claim possession under the title was when it became apparent strangers [Dixon and Cockhorne] used the land over 30 years after title was obtained.

On a balance of probabilities, this court finds that titles in the names of (a) Banks and Bancroft and (b) Bancroft and Parchment were obtained fraudulently. Further, this court accepts the undisputed evidence that Erving Donegal has lived on the lands contained in the said titles, all 89 years of his life. He has been in undisturbed possession to date. No one exercised any control or possessory rights or challenged his possession of the lands.

He paid the taxes for the lands. He said portions of the lands to Cockhorne and Dixon.

The claimants were persons representing those named in the title first came to the lands in about 1997. By then the Statute of Limitations would have extinguished any rights to the land by Bancroft and Parchment as against the undisturbed possessory [sic] of Erving Donegal."

40. The judge accordingly entered judgment in the terms set out at paragraph 6 above.

### **The grounds of appeal**

41. Mr Daley filed separate, but overlapping, grounds of appeal in respect of both the Bancroft and Donegal actions. Bancroft and Parchment are the appellants and Cookhorne, Dixon and Donegal are

the respondents. What follows is my (hopefully accurate) paraphrase of the grounds.

### **The Bancroft Action**

- (i) The trial Judge erred in law by finding that the respondents had an interest superior to that of the appellants as registered owner.
- (ii) The learned trial judge fell into error when he found that Donegal had the power to sell parts of the land to the respondents, notwithstanding the appellants' registered title.

### **The Donegal Action**

- (iii) The trial judge erred when he found that the respondent had established **locus standi** to bring the action and was entitled to the various declarations sought in his capacity as owner of the land.
- (iv) The trial judge erred in proceeding to trial in this action, notwithstanding several procedural defects.
- (v) The trial judge erred in finding that the appellants' registered title had been obtained by fraud.

### **The submissions**

42. Mr Daley's submissions for the appellants, though fully set out in admirable detail in his skeleton arguments, may be shortly stated. On

ground (i) he relied on the provisions of the RTA and the principle of indefeasibility of registered title to say that Cookhorne and Dixon on the evidence produced by them, had no basis to resist the claim of Bancroft and Parchment as registered proprietors. On grounds (ii) and (iii) he submitted that Donegal, through whom Cookhorne and Dixon claimed, had himself shown no legal or equitable title to the land, whether in a representative capacity or by way of inheritance. As far as adverse possession was concerned, he submitted that that was not Donegal's pleaded case and that the judge ought not therefore to have given effect to the doctrine in his judgment. On ground (iv) he submitted that the Donegal action was improperly constituted on a number of bases (commencement of the action against non-resident defendants without leave, non-service on the defendants, claimant's representative capacity not pleaded, action not properly brought under Civil Procedure Rules 2002), as a result of all of which the action was a nullity and incapable of sustaining the declarations made by the judge. And finally, on ground (v), it was submitted that fraud, which it was necessary to prove in order to defeat Bancroft and Parchment's registered titles, had neither been properly pleaded nor proved.

43. Mr Garth Lytle for the respondents submitted there was "an abundance of evidence...to show that both Banks and Bancroft and by extension Parchment, obtained the land by fraud", which had not been

negated by them. This was therefore sufficient to defeat their registered titles. With regards to Donegal's status, Mr Lyttle submitted that he was entitled to rely on both his rights of inheritance and on the doctrine of adverse possession, given his longstanding occupation of the land. On the question of service of the Donegal action, Mr Lyttle contended that service on the attorneys-at-law on the record in the earlier Bancroft action was sufficient in the circumstances, given the fact that it was accepted that both defendants resided overseas. And finally, on the question of the status of the Donegal action, Mr Lyttle submitted that this action had in effect been revived by the order consolidating the actions made at the case management conference in the Bancroft action.

### **The effect of a registered title**

44. It is against this extended background that I come at last to consider the issues raised by this appeal. The relevant principles on the first issue, the effect of a registered title, are happily not in controversy.

The starting point is sections 68, 70, 71 and 161 (d) of the RTA:

**"68.** No certificate of title registered and granted under this Act shall be impeached or defeasible by reason or on account of any informality or irregularity in the application for the same, or in the proceedings previous to the registration of the certificate; and every certificate of title issued under any of the provisions herein contained shall be received in all courts as evidence of the particulars therein set forth, and of the entry thereof in the Register



Book, and shall, subject to the subsequent operation of any statute of limitations, be conclusive evidence that the person named in such certificate as the proprietor of or having any estate or interest in, or power to appoint or dispose of the land therein described is seized or possessed of such estate or interest or has such power.

**70.** Notwithstanding the existence in any other person of any estate or interest, whether derived by grant from the Crown or otherwise, which but for this Act might be held to be paramount or to have priority, the proprietor of land or of any estate or interest in land under the operation of this Act shall, except in case of fraud, hold the same as the same may be described or identified in the certificate of title, subject to any qualification that may be specified in the certificate, and to such incumbrances as may be notified on the *folium* of the Register Book constituted by his certificate of title, but absolutely free from all other incumbrances whatsoever, except the estate or interest of a proprietor claiming the same land under a prior registered certificate of title, and except as regards any portion of land that may by wrong description of parcels or boundaries be included in the certificate of title or instrument evidencing the title of such proprietor not being a purchaser for valuable consideration or deriving from or through such a purchaser:

Provided always that the land which shall be included in any certificate of title or registered instrument shall be deemed to be subject to the reservations, exceptions, conditions and powers (if any), contained in the patent thereof, and to any rights acquired over such land since the same was brought under the operation of this Act under any statute of limitations, and to any public rights of way, and to any easement acquired by enjoyment or user, or subsisting over or upon or affecting such land, and to any

unpaid rates and assessments, quit rents or taxes, that have accrued due since the land was brought under the operation of this Act, and also to the interests of any tenant of the land for a term not exceeding three years, notwithstanding the same respectively may not be specially notified as incumbrances in such certificate or instrument.

**71.** Except in the case of fraud, no person contracting or dealing with, or taking or proposing to take a transfer, from the proprietor of any registered land, lease, mortgage or charge, shall be required or in any manner concerned to enquire or ascertain the circumstances under, or the consideration for, which such proprietor or any previous proprietor thereof was registered, or to see to the application of any purchase or consideration money, or shall be affected by notice, actual or constructive, of any trust or unregistered interest, any rule of law or equity to the contrary notwithstanding; and the knowledge that any such trust or unregistered interest is in existence shall not of itself be imputed as fraud.

**161.** No action of ejectment or other action, suit or proceeding, for the recovery of any land shall lie or be sustained against the person registered as proprietor thereof under the provisions of this Act, except in any of the following cases, that is to say –

(a)...

(b)...

(c)...

(d) the case of a person deprived of any land by fraud as against the person-registered as proprietor of such land through fraud, or as against a person deriving otherwise than as a transferee

*bona fide* for value from or through a person so registered through fraud."

45. It is now well established, on a long line of authority with which I happily do not need to burden this already overlong judgment, that the combined effect of these sections is to confer on the person registered as proprietor under the RTA what has come to be called 'indefeasibility of title'. That expression, though not used in the Act itself, has been described as "a convenient description of the immunity from attack by adverse claim to the land or interest in respect of which he is registered, which a registered proprietor enjoys" and as a "conception [which] is central in the system of land registration" (***Frazer v Walker*** [1967] 1 AC 569, 580, per Lord Wilberforce delivering the judgment of the Privy Council on an appeal from New Zealand, where the Torrens system of land registration also applies). Such a title can only be defeated by proof of fraud and section 71 "exempts a person, except in the case of fraud, from tracing the root of title of any registered land with which he proposes to deal" (per Wright J, as he then was, in ***Lynch and Lynch v Ennevor and Jackson*** (1982) 19 JLR 161, 174).

46. It is sufficient, I think, to refer to two judgments of this court in this regard. In ***Nunes and Another v Williams and Others*** (1995) 22 JLR 339, 351, Campbell JA described a registered title as being "immune from adverse claims except as statutorily provided for in the Registration of

Titles Act"; and in **Willocks v Wilson and Wilson** (1993) 30 JLR 297, 299,

Carey P (Ag) observed:

"That registration of title confers on the proprietor indefeasibility of his title, save for fraud, is the very basis of the Torrens System of registration of land and is a matter of settled law".

### **Proof of fraud**

47. In **Willocks**, Carey P (Ag) pointed out (at page 300) "that fraud in [the RTA] means actual fraud, i.e., dishonesty," as distinct from "what is called constructive or equitable fraud" (see also per Lord Lindley in **Assets Company Ltd v Mere Roihi** [1905 AC 176, 210]). And, as Wright J observed in **Lynch & Lynch** (at page 174), "fraud simpliciter will not avail. Such fraud must be brought home to the person whose registered title is impeached or his agents".

48. In both the Bancroft and Donegal actions, it was accepted that this was the position in relation to holders of registered titles generally and that, in order to succeed, it needed to be established that Banks, Bancroft and Parchment had procured their registration as proprietors of the land by fraud.

49. It is a commonplace of the civil trial process that fraud must be pleaded with the utmost particularity and strictly proved (see, for example, **Wallingford v The Directors of the Mutual Society, et al** (1879-80) L.R. 5 App. Cas. 685, 697 and 701). As far as the pleadings in these actions go, I have already set out the particulars of the fraud alleged in both

actions at paragraphs 18 and 22 above. Mr Daley submitted that these were to a large extent "particulars in form only", and I agree with him. In the Bancroft action, the particulars provided do no more than restate Donegal's bare assertion that neither Banks, Bancroft nor Parchment purchased any lands from him or from Virginia Donegal, without stating specifically in what respect it is alleged by him that they acted fraudulently. The particulars in the Donegal action, though more expansive, are in fact little better, doing no more than inviting the conclusion that there was fraud from known and undisputed facts which are in themselves incapable of giving rise to any such inference.

50. A couple examples taken from the Statement of Claim in the Donegal action suffice to make this point. In the first place, it is implied that there was something sinister in the fact that the original transfer from Virginia Donegal to Banks and Bancroft was registered on 6 February 1970, "approximately three years after her death". Quite apart from the fact that the only evidence of the date of his grandmother's death came from Donegal himself, it is not clear what fraudulent inference is invited from this fact alone. Certainly the history of the dealings over the years on that very title registered at Volume 9 Folio 37 reveals that on one occasion a transfer was registered almost seven years after its date (see paragraph 7 above) and that on another the registration of the very order of the court from which Virginia Donegal herself derived title was only effected six

years after the date on which it was made (see paragraph 8 above) and, if Donegal's recollection is correct, the year after her death. Secondly, it is also implied that there is some significance in the fact that within two months of their original registration as proprietors on 6 February 1970 a new title was issued to Banks and Bancroft on 28 April 1970, when the last entry on the original title registered at Volume 9 Folio 37 demonstrates that this was as a result of the action of the Registrar of Titles and not of the proprietors themselves (see Miscellaneous entry no. 39198, which is set out at paragraph 10 above). The fact that these and other activities recorded on the title took place without Donegal's knowledge, as is pleaded, cannot in my view take the matter any further, since he was at no time himself a registered proprietor of the land.

51. So that from the standpoint of pleadings, I would have thought that Donegal, upon whom the burden of proving fraud primarily lay, fell far short of what was required. And so, inevitably in my view, did the evidence put forward in proof of these pleadings. The trial judge obviously attached significance to his understanding of Bancroft's evidence which, the judge said in his reasons, was as follows:

"He was not a party to any transaction leading to obtain...Registered Titles in his name or in his name or Banks' name.

He purchased no land from the Donegals; whether Virginia or Erving. He signed no papers pursuant to the obtaining of Title. This court does not accept his evidence that he at any time

walked the lands or that he intended to develop same. He did not know Erving Donegal and it is unlikely that he ever met him".

52. For my own part, I doubt very much that what is attributed to Bancroft by the judge in this passage from his judgment could by itself amount to fraud, particularly in the absence of any allegation by Donegal as to the circumstances in which the land came to be registered in the names of Banks and Bancroft, or as to the subsequent substitution of Parchment for Banks.

53. In any event, what Bancroft in fact said in cross-examination (having accepted that he had been in error when he stated in his witness statement that the land had originally been acquired by Banks and then sold to himself and to Parchment), was that Banks was his partner and was the person who negotiated and dealt directly with the vendor on behalf of them both. In those circumstances, it is not clear to me what, if any, sinister intent or conduct could possibly be inferred from his saying frankly, more than 30 years after the event, that he did not recall signing any documents in respect of the purchase of the land, when absolutely no evidence has been produced to suggest that he did not in fact sign the transfer that was in due course registered on the title.

54. If it is the law that the registered proprietor's title is indefeasible save in cases of fraud, then it seems to me that as a matter of first principle the burden of proving fraud must clearly be on the person alleging fraud.

What seems to have happened in this case, to the contrary, is that because thirty 30 years after the event (with both Virginia Donegal and Banks, a key player, already dead) Bancroft, notwithstanding his position as registered proprietor and all that that signifies to the world, was unable to recollect in detail the circumstances of the transaction, the judge concluded that the acquisition must have been fraudulent. In other words, the burden of disproving fraud appears to have been placed on the registered proprietors, instead of the burden of proving it being borne by the party challenging the registered title.

55. In my view, therefore, there was no evidence to support the judge's finding that "titles in the names of (a) Banks and Bancroft and (b) Bancroft and Parchment were obtained fraudulently". In coming to this conclusion, I have not lingered on Mr Daley's submission that the trial judge also erred in deciding the case on a 'mere' balance of probabilities, since in my view there was clearly no evidence in the case sufficient to establish fraud on any basis. However, I would observe in passing that Mr Daley's submission, based on the decision of this court in **Paramount Betting Ltd v Brown** (1971) 12 JLR 342 that, even within the civil standard of proof on a preponderance of probability, the degree of probability required may vary with the occasion or the subject-matter, is well grounded in authority (see, for instance, **Bater v Bater** [1951] P. 35, 36-



7, per Denning LJ; and see also *Home Secretary v Rehman* [2002] 1 All ER 122, 141, per Lord Hoffman).

### **The Position of Donegal**

56. While this conclusion suffices to dispose of the allegation of fraud in both actions, it remains necessary to consider the alternative basis on which the trial judge decided the case. That is, that Donegal had been in "undisputed possession" of the land and that that possession had extinguished any rights to the land held by Bancroft and Parchment.

57. Donegal's claim to the land, it will be recalled, was on the basis that he had inherited it from his mother, as he described Virginia Donegal both in his Statement of Claim and in his witness statement. As it turned out when he was cross-examined, Virginia Donegal was in fact his grandmother who, as far as he knew, died without leaving a will. It is obvious from the evidence (or lack of it) that nothing has been done since her death in 1967 (assuming that that date can be taken to be reliable) to administer her estate, from which any claim to the land by Donegal based on inheritance would necessarily have to derive.

58. In *Naldi Hynds v Fernando Haye* (RMCA no. 15/06, judgment delivered 20 February 2007), land at Winchester in the parish of St. Elizabeth was owned by one Richard Hynds, who died intestate in 1970, predeceased by his wife, and leaving three (3) children, Charles, Arnold

o/c Naldi and Gloria. Naldi, who was the appellant, laid claim to the land in the following terms:

"I am the owner of this land. This is Hynds family land and I bought it from my brother (Charles)"

59. Harrison P, having described this claim as 'misconceived', said this (at page 2):

"On Richard Hynds death in 1970, the land would pass under the rules of intestacy in accordance with the Intestates' Estates and Property Charges Act to his three children equally.

The legal estate would vest in he who applies for and obtains letters of administration, failing which the Administrator General would apply. No letters of administration were issued. The legal estate would remain in the estate of Richard Hynds.

No legal estate vested In Charles Hynds to pass legal title."

60. In the instant case, Donegal's claim to ownership of the land on the basis of inheritance from his grandmother is in my view similarly misconceived, in the absence of any steps having been taken to administer the estate of Virginia Donegal (under which he could, in that event, stand to benefit as the child of a child who predeceased her parent – see section 4(5) of the Intestates' Estates and Property Charges Act). In those circumstances, it appears to me that Mr Daley was plainly correct in his submission that "it was incompetent for [Donegal] to make

any claim for the subject lands in his personal capacity whilst the lands vested in the estate of Virginia Donegal".

61. Neither could Donegal's position be improved by treating his claim as one made in a representative capacity. Quite apart from the requirement that a person bringing an action in a representative capacity must state what that capacity is (Judicature (Civil Procedure Code) Act, ("CPC"), section 12; see also Civil Procedure Rules 2002 (CPR) Rule 8.7(6)), he must at the date of filing the action be clothed with the necessary authority to do so, either by way of a grant of probate or Letters of Administration (see Parry & Clark's "The Law of Succession", 11<sup>th</sup> edition, at paragraph 18-26, where it is stated that "In order to prove his title in any court a personal representative must produce a grant of probate or Letters of Administration (as the case may be)"). Donegal's Writ in such circumstances would "incurably be a nullity. [It] was born dead and could not be revived" (per Scott LJ in *Ingall v Moran* [1944] 1 KB 160, 164-5).

62. I therefore think that it follows from this that (save for any possible possessory claim, which I will now consider), Donegal had neither title in his own right nor legal authority to sell any part of the land to Cookhorne or Dixon, or to maintain an action in his own name against Bancroft and Parchment, the registered proprietors.

**The possessory claim**

63. The trial judge found as a fact that Donegal had lived on the land all his life and that he had been in undisturbed possession of the land for a long time. As a result of this, he concluded, by the time claims to the land were asserted on their behalf "in about 1997", "the Statutes of Limitations would have extinguished any rights to the land by Bancroft and Parchment as against the undisturbed possessory [sic] of Erving Donegal".

64. The question that naturally arises is whether this approach was open to the judge on Donegal's case as pleaded. As Mr Daley submitted, his claim from the outset was based on inheritance from Virginia Donegal (see paragraph 1 of his Statement of Claim). While this would not necessarily preclude him advancing an alternative claim on the basis of the Limitation of Actions Act (see section 70 of the RTA, the proviso to which specifically excepts claims "under any statute of limitations), such a claim would be required to be both pleaded and proved. However, both in his Statement of Claim (paragraph 6) and in evidence, issues relating to the character and extent of his possession of the land were only explored at the trial in the context of Donegal's insistence on the inference that Bancroft and Parchment must have acquired their interest in the land by fraud since neither he nor his grandmother during her lifetime had sold any land to them.

65. Mr Daley also referred us to an extract from 'Civil Litigation' by John O'Hare (7<sup>th</sup> edition at page 156), in which the point is made that, since defences under the Limitation Act are regarded as procedural rather than substantive, "the Defendant must plead them if he wishes to rely on them". On this basis Mr Daley submitted that so too ought the Limitation of Actions Act to have been specifically pleaded in the Donegal action and I agree with this submission. For this reason, as well as on the basis of the matters considered in the paragraphs following, I would conclude that it was not open to the judge to give judgment for Donegal on the basis of his belated possessory claim. Despite the fact of long possession pleaded at paragraph 6 in the Donegal action, the fact that the case for Donegal was at no stage conducted on the basis of a limitation claim resulted in there being no or no sufficient evidence to establish the requisite intention to possess for the purposes of the Limitation of Actions Act (see generally *JA Pye (Oxford) Ltd v Graham* [2003] 1 AC 419).

**Procedural defects in the Donegal action**

66. It appears clear that several aspects of how this action was commenced and conducted were in breach of the rules of the Judicature (Civil Procedure Code) Act ("CPC"), which were in force at the time of filing of the action:

- (i) A writ was issued for service out of the jurisdiction on Bancroft and Parchment, parties known to be resident

outside of the jurisdiction, without leave of the court (CPC, sections 45-50);

(ii) in lieu of personal service of the writ and statement of claim, service was effected by leaving the documents at the offices of attorneys-at-law without any authority from the defendants or order for substituted service permitting this (CPC, sections 34-35 and 41-42);

(iii) trial of the matter was commenced on the basis of the unserved writ and statement of claim only.

67. In addition, there was no evidence that the required steps were taken by the claimant to bring the action within the scope of CPR (Rule 73.3(4)). Rule 73.3(8) provides that, where this is not done by 31 December 2003, the proceedings are "struck out without the need for an application by any party". The effect of this, it seems to me, is that, as at the date of the case management conference on 10 February 2005, the Donegal action had already been struck out. Any application to restore it was required by the rules to have been made by 1 April 2004 "on notice to all other parties and must be supported by evidence on affidavit" (Rule 73.4 (4) and (5)). In the absence of such an application, it is difficult to see how the making of an order on the case management conference in the Bancroft action, consolidating that action with the Donegal action (without notice, which would at the very least have entitled the personal

representatives of Banks to enter the fray), could, by itself, reinstate or revive the latter action, as Mr Lyttle contended that it did.

### **Conclusion**

68. For all of the above reasons I have therefore come to the conclusion that the appeal must be allowed and the judgment of Donald McIntosh J set aside. The appellants (Bancroft and Parchment) are accordingly entitled to judgment in the Bancroft action (Suit no. C.L. 2000/B-219) and also in the Donegal action (Suit no. C.L.D. 038/2002). I would accordingly set aside the orders made by the trial judge and make an order in the Bancroft action that Cookhorne and Dixon should deliver up possession to Bancroft and Parchment on or before 31 July 2009. Bancroft and Parchment are also entitled to their costs both in the court below and of the appeal, to be taxed if not sooner agreed.

### **SMITH, J.A. (Ag.):**

I too agree.

### **ORDER:**

### **HARRIS, J.A.:**

The appeal is allowed. The judgment of Donald McIntosh J is set aside. Judgment is entered in favour of the appellants (Bancroft and Parchment) in the Bancroft action (Suit No. CL 2000/B219) and the Donegal action (Suit No. CL 2002/D050).

The appellants are awarded costs both here and in the court below to be taxed if not agreed.