NMLS

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

SUIT NO. C.L. 1993/B 115

BETWEEN	**LINEL BENT (Administrator of the estate of ELLEN BENT, deceased)**	**1ST CLAIMANT**
AND	**LINEL BENT (Administrator ad litem of the estate of ELGA ISAACS, deceased)**	**2ND CLAIMANT**
AND	**ELEANOR EVANS**	**DEFENDANT**

Ms. Suzette Wolfe instructed by Crafton Miller & Co. for the claimant

Mrs. Janet Taylor and Ms. Kadia Wilson instructed by Taylor, Deacon & James for the defendant

Heard: June 27 & 28, 2008 & February 27, 2009

Land Dispute- registered land- application to bring land under the Registration of Titles Act- allegation of fraud- meaning of fraud under the Registration of Titles Act -whether title obtained by fraud- standard of proof required -whether title to be cancelled on grounds of fraud- The Registration of Titles Act, ss. 42,68,70,161(d),153 &158

Request for adjournment- considerations for grant of an adjournment- no good reason shown - Civil Procedure Rules (CPR), r.39.7

Evidence- documentary evidence- admissibility- whether documents illegally obtained – principles governing illegally obtained documents in civil proceedings- proof of originality and authenticity of documents- copy documents disclosed in list of documents- opposing party served no notice to prove authenticity -whether party should be allowed to object to admissibility of documents at trial on grounds of authenticity - Civil Procedure Rules (CPR), 2002, r. 28.19

McDONALD-BISHOP, J

THE PARTIES

1. In March, 1993, Ellen Bent and Elga Isaacs, both now deceased, brought an action by Writ of Summons against Eleanor Evans alleging fraud in respect of her application to the Registrar of Titles to bring lands situated at Gratto District, Bellvue in the parish of St. Elizabeth, under the Registration of Titles Act. At the commencement of the action, Ellen Bent sued in a representative capacity as administrator in the estate of her late husband, Charles Bent, who died in or around 1947. She had obtained letters of administration in his estate in 1948. Charles Bent was the brother of Elga Isaacs and so Ellen Bent and Elga Isaacs were sisters-in-law. Elga had sued in her personal capacity.

2. Both, Ellen Bent and Elga Isaacs, however, died before the matter reached trial. Following on the death of Ellen Bent, her son, Linel Bent, was appointed administrator for her estate and on March 8, 1999, pursuant to order of Master Beswick (Ag) (as she then was), he was substituted as first claimant in these proceedings in a representative capacity. On June 29, 2006, by order of Sykes, J, Linel Bent was also appointed administrator *ad litem* in the estate of Elga Isaacs, his aunt, and was then substituted as second claimant also in a representative capacity.

3. Linel Bent, therefore, stands as claimant in two separate and distinct capacities by way of an Amended Writ of Summons. For our purposes, Linel Bent will be referred to as 'the claimant'. Ellen Bent and Elga Isaacs will be referred to as 'the original claimants' while the term 'claimants' will be used whenever it becomes necessary to refer to all three or one or the other of them.

4. Eleanor Evans, the defendant, is the cousin of the claimant. She is the daughter of Ello Lewis and the grand-daughter of Lucius Bent both of whom are deceased. Lucius Bent was the uncle of Charles Bent and Elga Isaacs, they being children of his brother Matthew Bent who is also deceased. The defendant is the registered proprietor of approximately 7 acres of land at Gratto, Bellvue, St. Elizabeth 4 acres of which the claimant is contending was owned by the original claimants as joint owners.

THE CLAIM

5. The claim against the defendant is that the defendant had obtained certificate of title for the land by fraudulently representing to the Registrar of Titles in 1984 that she is owner of the land described in an application #87313. The particulars of fraud have been pleaded in the following terms:

(a) The Defendant wrongfully stated and sworn to in a Voluntary Declaration, that **ELLO LEWIS** was the owner of the lands knowing that this was untrue.

(b) The Defendant wrongfully stated and sworn to in a Voluntary Declaration that the said **ELLO LEWIS** used the rents and profits of the said land when she knew that the said **ELLO LEWIS** never lived on the said land nor exercised any acts of ownership thereover and collected no rents nor profits therefrom.

(c) The Defendant fraudulently represented and falsely told the said Registrar in the form of a sworn to Voluntary Declaration that **ELLO LEWIS** sold the land to her, when this was untrue and she had no written evidence of same.

(d) The Defendant untruthfully sworn to a Voluntary Declaration stating that she had been in possession of the said land from 1975, when she had never been in possession, nor exercise any acts of ownership thereover.

(e) The Defendant wrongfully produced to the Registrar a Certificate of Payment of taxes for the said land at Valuation # 20105011032 in the name of **ELORINE LEWIS** claiming it concerns the said land when the land was on the tax roll at Valuation # 201050060250 in the name of **ELLEN BENT.**

(f) The Defendant wrongfully swore to a Voluntary Declaration that she was the owner of the said land knowing that she was not and that the statement was false and untruthful.

6. On the basis of this alleged fraud, the claimant seeks, *inter alia*, the following remedies:

(1) A declaration that he is the owner (as personal representative of the original claimants) of that parcel of land comprising approximately 4 acres;

(2) An order that the Registrar of Titles cancel the certificate of title issued in the name of the defendant for the said lands registered at Volume 1206 Folio 386 of the Register Book of Titles issued in the name of the defendant as sole owner;

(3) An order that the defendant by herself, her servants and/ or agents be restrained from entering on the claimant's land and from doing anything on it.

THE DEFENCE

7. In response to the claimant's claim, the defendant denies the claimant's claim to ownership of any portion of the land comprised in her certificate of title. She avers in her Amended Defence as filed, that, *inter alia,* she had purchased the land registered in her name from her mother, Ello Lewis, in 1975. She averred that the land was inherited by her mother from her mother's father, Lucius Bent, on his death and that the said Lucius Bent inherited the said 7 acres from his parents. She is entitled to ownership of the land in dispute and she had made no fraudulent representations to the Registrar of Titles at any time concerning her acquisition of the said lands. She denies the particulars of fraud as pleaded by the claimant.

REQUEST FOR ADJOURNMENT

8. At the commencement of the trial, the claimant's counsel, Ms. Wolfe, sought an adjournment of the trial for two reasons. The first reason advanced by her was that it was necessary for proof of the claimant's case that certified copies of the documents that were submitted in support of the defendant's application for registered title be obtained from the Registrar of Titles. The claimant had made an application for court order to this end but the application was set for hearing in December, 2008- a date after the date set

for trial. According to her, they have always been in possession of the uncertified copies of the documents but were of the view that no issue was being taken with the authenticity of the documents until a week or so before the trial after a Notice of Intention to Adduce Hearsay had been served on the defence and the defence stated their objection to the documents. She argued that the claimant would be prejudiced in the presentation of his case if time was not granted for him to obtain the required documents.

9. Ms. Wolfe further advanced as a second basis for the grant of the adjournment the argument that the claimant needed time to allow Thelma Blake, a daughter of Elga Isaacs, to obtain a grant of letters of administration in her mother's estate, the application for which is pending in the St. Elizabeth Resident Magistrate's Court. This is necessary for an application to be made for Thelma Blake to be joined as a party to these proceedings.

10. The application for adjournment was strongly opposed by counsel for the defence who maintained, *inter alia*, that the claimant has had more than ample time to obtain the certified copies of the documents. She argued that as far back as 1986, the claimants had lodged a caveat against the application and they had known from then that documents in support of the application for title had been submitted to the titles' office. She submitted that the granting of an adjournment in light of the fact that the matter has been before the court for over fifteen years would cause considerable hardship on the defendant who has always been ready to defend the claim against her.

11. The **Civil Procedure Rules (2002) (CPR), r. 39.7** gives a judge a general power to grant an adjournment of a trial. It reads: *'The judge may adjourn a trial on such terms as the judge thinks fit.'* The power to grant an adjournment is thus discretionary. The learned authors of ***Blackstone's Civil Practice, 2004 (para. 59.9)*** noted that this discretion should,

however, be exercised in accordance with the overriding objective and that where an adjournment is sought for reasons outside the control of the party applying, it should usually be granted.

12. In examining the first reason put forward for the need for an adjournment, I considered the length of time that it has taken for the matter to reach the stage for trial. The records reveal that the matter has been before the court since March, 1993 making it at time of trial over fifteen years. But even before that, the claimants had known about the documents because they had lodged a caveat in objection to the registration of the land on the basis that the claimant had made fraudulent representations in her application to the Registrar of Titles. In 1987, following the expiration of the caveat, the certificate of title was issued to the claimant.

13. Six years later, the original claimants commenced proceedings on the basis of the contents of the documents they alleged were submitted to the titles' office. The kernel of the case rests on the documents and they would have known that the original documents were with the Registrar of Titles. Yet between 1993, when the matter commenced and 2007, when the trial date was set, no one saw it fit to obtain the certified copies of the documents considered necessary to prove the case. That would be fourteen years since commencement of the proceedings.

14. Despite the fact that before the trial date, the matter had passed through several interlocutory proceedings at the instance of the claimant and had gone through case management conference and pre-trial review, nothing was done by or on behalf of the claimant to obtain the necessary documentation. The fact of the matter is that the claimants have waited roughly twenty-two years (that is since finding about the application made by

the defendant) to take steps to obtain the certified copies of the documents on which they wish to rely to prove fraud against the defendant.

15. The claimant has had more than ample time before the trial to obtain such an order. This is surely not something outside of his control to do. I formed the view that the delay on the part of the claimant in seeking to obtain the requisite documentation was rather inordinate and inexcusable. Given the considerable length of time that had elapsed and the conduct of the claimants over that period, I formed the view that to adjourn the trial to allow the claimant more time to prepare his case in relation to something that has always been within his power and that of his predecessors to do would not be in keeping with the overriding objective. There is thus no good and acceptable reason advanced by the claimant that would justify an adjournment of the trial on this basis.

16. The same holds true in respect of the second reason advanced for the adjournment. There is no indication as to when, if at all, an application for a grant of letters of administration had, in fact, been made by Miss Blake in the estate of Elga Isaacs. In 2006, being thirteen years since the filing of the claim and two years prior to the date fixed for trial, an application was made for an order for the claimant to be appointed administrator *ad litem* in the estate of Elga Isaacs. There is no explanation given for the failure of Miss Blake to have been presented then, or at any time since then, as a proposed candidate to be appointed as a representative party. There is no good reason, or indeed, any reason at all, advanced on behalf of the claimant as an explanation for the delay in having Miss Blake joined as a party to these proceedings before the date of trial.

17. Furthermore, the court had already, on the application of the claimant, appointed him as claimant in place of Elga Isaacs for the purposes of these

proceedings. There is nothing put before the court to suggest that he is not a competent representative for the estate of Elga Isaacs to warrant the appointment of a new representative. There is nothing no suggest that there is a real risk of injustice to the estate of Elga Isaacs if Miss Blake is not joined as a party.

18. For the claimant to come to court after fifteen years since the matter had been initiated to ask for an adjournment, he must show really exceptional circumstances and compelling reasons to justify such an adjournment. For such circumstances to be exceptional, they must be as a result of something totally outside the control of the claimant or something that he could not reasonably have foreseen. The claimant has not satisfied me that that is the position in this case. The failure of the claimant to properly put himself in a position to proceed after such an inordinate delay is inexcusable.

19. The fact that the claimant waited until the day of trial to request an adjournment in a case that has been on the list for over fifteen years and in which, after much delay, the trial had been set for two days could not be overlooked as a consideration that should militate against the grant of an adjournment. In **Alderson v Stillorgon Sales Ltd** [2001] EWCA Civ 1060 LTL 13/6/2001 (as reported in Blackstone's), a joint expert delivered his report to the parties later than was directed by the court. The court had directed that the report should be served on the parties two weeks before trial but the expert was late with the report and he served it five days before. The report was favourabe to the defence. The claimants having received the report sought an adjournment on the day before the trial was scheduled to commence. The adjournment was refused and they renewed it on the day of trial which also was refused. They appealed. On appeal it was held, *inter alia,*

that waiting to the day before trial to apply for an adjournment was inappropriate.

20. I adopt that argument of the English Court of Appeal and say that in the circumstances of this case the claimant's request for adjournment on the day of trial with all the parties ready and with the case already set for two days on the court's schedule is more than inappropriate. It seems almost tantamount to a blatant disregard for the processes of the court. I concluded that in all the circumstances of this case, an adjournment would not have been in keeping with the overriding objective and the court's ultimate duty to ensure that there is a timely disposal of matters. I was, therefore, compelled to deny the application for adjournment and ruled that the trial should proceed.

THE EVIDENCE

21. During the course of the trial both parties in support of their respective case gave evidence through witness statements (which were amplified, where necessary) that stood as their examination- in -chief and through *viva voce* evidence adduced primarily upon cross-examination. I was, therefore, afforded the opportunity to observe the parties and to assess their demeanour in an effort to determine the true facts of the case.

22. On a point of interest, I must say that none of the parties apparently saw it necessary to have a third party witness, with personal knowledge of the history of the land in question, attend to testify on their behalf. The practical effect of this is that in relation to the devolution of the land as claimed by each side, I had only the word of one party against the word of the other with both seeking to rely on matters allegedly told to them by third parties who are now deceased. While neither party objected to the witness statement of the other, on assessing the evidence placed before me, I find that

there are matters contained in the evidence of both that are practically hearsay and this, of course, affects the extent to which, if at all, such evidence can be relied on as proof of the particular fact stated. Before proceeding to my analysis of the evidence, however, I would first seek to highlight and summarize some salient aspects of the evidence of the parties and then will proceed to deal with some collateral issues that arose for consideration.

The claimant's case

23. The claimant's evidence is summarized as follows. He is 64 years old having been born in 1944. He is the son of Charles Bent and Ellen Bent and the nephew of Elga Isaacs. He lived on the land at Gratto District since birth until the 1980's when he moved to live in his own place. He nevertheless continued to farm on the land and would go there to tend to his crops.

24. His grandfather, Matthew Bent, had purchased approximately 12 acres of land at Gratto and he gave each of his six children 2 acres. The witness at one point in his witness statement said his grand-father purchased 6 acres and under cross-examination he said 11 ½ acres but he later said those are erroneous and that it was about 12 acres that was bought. He said that it was by that means that his father and Elga were each given 2 acres.

25. On the death of his father, his mother got his father's share while Elga remained on her share. This is the land which he said amount to about 4 acres that comprise the estate of Ellen and Elga. In addition to the 2 acres given to his father, he also stated that his father bought ¾ acre of land from Stanford Joseph and that plot adjoined the 2 acre plot that was given to his father by his grandfather. It means on his evidence that the total land entitlement of his father would have been 2 ¾ acres.

26. He had always known his father and aunt to live on their respective share of the land for all their lives. When his father married his mother, both of them lived on that land and that is where he and his sisters were born and grown. Elga's children were born on the land and lived on the land all their lives in particular Thelma Blake who lived on the land until 2004 when the family house was destroyed by hurricane Ivan. Family members including his grandparents, his father and three of Elga's children are buried on the land.

27. The original claimants always paid the property taxes for the land and in proof of this, he exhibited two copy tax receipts, one for the period 1975-1976 in the name of Elga Isaacs and the other for 1983-1984 in the name Ellen Bent. Ello Lewis, the defendant's mother, had never owned land at Gratto as the same was owned by his father and his aunt. Ello Lewis never farmed the lands nor had she ever used any rent or profits from the land. She had never exercised any acts of ownership over the 4 acres at Gratto. Neither the defendant nor her mother has ever been in possession of the land. It was always his father and aunt who were in possession of the land.

28. For the time he lived on the land, he had never seen the defendant or her mother or any of her siblings on the land. He was advised by his mother that the defendant's mother had told her to leave the house at Gratto because she said it was owned by her grandmother. That was when his mother sought the assistance of an attorney-at-law to sort out his father's estate. He was told that when the administration documents were read to the defendant's mother, she never molested his mother and aunt again. The only time he has had interference from the defendant was in 1993 when she sent some workmen to dig a hole on his father's share of the property and he told them to leave the land. This, of course, would be after the certificate of title had been issued in the name of the defendant.

29. In 1986, he and his aunt saw the advertisement in relation to the defendant's application for title. About three weeks after the publication of the advertisement, he attended the 7th floor of the title's office to ascertain the basis on which the defendant was trying to get title for the land. He received copies of the documents filed by the defendant in support of her claim to title for the land. He received a copy of application # 87313; copy of the declaration sworn to by the defendant in support of the application; the copies of supporting declarations of Ronnie Forbes and Cardinal McIntosh, as well as, a copy of the tax certificate which the defendant relied on. He said he read the documents and found them to have contained lies. These documents were tendered and admitted into evidence as exhibits 4 – 8 despite objection from the defence. The reasons for this will be explained later.

30. He said he further conducted enquiries at the tax office and found out that the tax receipt used by the defendant was for land in the name of her brother George Evans. This is, however, shown to be in direct conflict with the claimant's pleadings where he stated that the receipt used was in the name of Ello Lewis but that the valuation number was not for the land in question. The tax receipt tendered into evidence also does not bear the name George Evans. When confronted about this under cross- examination he had no explanation to give as he stated, "I don't know how that go."

31. He said however that after seeing the advertisement, he and Elga obtained the services of an attorney-at-law, Mr. Carlton Campbell, and a caveat was lodged on August 18, 1986. This caveat was tendered into evidence by consent and it showed that the caveat was lodged by Elga Isaacs as owner in fee simple of 4 ½ acres of land. He also said the documents he had received were handed over to his attorney-at-law, Mr. Crafton Miller, with instructions.

32. The claimant was thoroughly cross-examined by Mrs. Taylor the object of which was to show that the claimant has no interest in the land in question and that the defendant is the rightful owner through her mother, Ello, and so did not make any false representation concerning her ownership. The claimant, however, insisted that the land was owned jointly by his father and aunt and then by his mother and aunt. He did not know Lucius Bent and he knew nothing about Lucius allowing his brother Matthew to live on the land. He knew nothing about his mother pulling down a 'wattle and daub' house and leaving the land when the defendant's mother claimed the land. There were several inconsistencies pertaining to the actual size of the land in question and as to who was owner of what portion and at what time. He could not account for two tax receipts in the name of the two original claimants for the land at the same valuation number but he continued to deny that the land was owned by Ello Lewis.

33. Mrs. Taylor also challenged the claimant's evidence that he obtained the documents from the titles' office. He maintained that he received them from a Mr. Errol Gordon, a staff member at the title's office, and that he did not pay for them and that he received the tax receipt from the Collectorate of Taxes in Santa Cruz. He denied the suggestion of Mrs. Taylor that he got the documents from the office of Mr. Cecil July, attorney-at-law, who acted for the defendant in applying for title.

34. A number of questions were put to the claimant in cross-examination concerning the history of ownership of the land and the conduct of his predecessors in relation to the land but he was unable to give an answer as he had no personal knowledge of some matters as he was a young child at the time of their alleged occurrence.

35. He was also asked about his knowledge as to the sale of 2 acres of land by his mother to Elga that took place in 1990. He denied knowledge of a sale transaction saying that his mother was administering on the entire land to include Elga's share and that what she did was merely to cut off Elga's share and gave it to her. He knew nothing of Elga paying for the land. Upon being shown the conveyance document, he said that the 2 acres came from the 4 ½ acres that form the estate. He insisted that although Ellen had given Elga the 2 acres, 4 ½ acres still comprise the estate.

36. The claimant also denied having knowledge in 1990 of any sale transaction entered into by Elga in respect of the land. He said it was not until 2007, when a survey was being conducted by Mr. Ainsworth Dick, commissioned land surveyor, that he learnt of those dealings with the land. Despite him having been shown the conveyances by which Elga purported to sell portions of the land to her daughter, son and grandson, the claimant still maintained his position that the original claimant's at the time of filing of the action in 1993 still had interest in approximately 4 acres of the land jointly owned by them which is registered in the name of the defendant. The defendant, he said, is not the true owner of the land and her title was obtained by fraud.

The Defendant's Case

37. The defendant's case will now be summarized. The defendant gave evidence that she was born in 1937, that would make her about 71 years old at the time of trial. She admits that she is the registered proprietor of the 7 acre plot of land at Gratto. She had known from an early age that the land belonged to her mother. Although she lived with her mother in another district, Top Hill, in the parish of Saint Elizabeth they would always visit the property in question and she always known it to be "our land".

38. The land was inherited by her mother from Lucius Bent who had inherited it from his mother. In support of this assertion she relies on a letter purportedly written and signed by Lucius Aaron Bent on June 8, 1947 bearing a Cuban address and addressed "to his daughter Ello Bent." It was signed as been witnessed by one A. Gonzales. This letter was admitted by consent. In so far as is relevant, it states:

> *"All of what is belonging to me as inheritance from my mother and father and should in case I don't return home must be deliver to my daughter Ello "Luise" (partially illegible) fourteen acres in Bellvue Mountain to be divided seven for me and seven for Matthew, two acres at Bellvue our "bedyard" (not clear) and six acres at Gratto my deceased mother and myself labour"*

39. The defendant stated that when she first knew the land, Elga Isaacs and Ellen Bent were both residing on it but before that Matthew Bent had been living on the land. The land, however, belonged to his brother, Lucius Bent as Matthew had no land of his own. Matthew Bent was therefore living on the land with the permission of her grandfather.

40. Her mother always maintained that the property was hers and the fact of her ownership was widely known in Gratto. Her mother also paid the taxes on the property. Her mother had always made it clear to her siblings and her that Elga was not to be disturbed on the land and should be permitted to reside in the old house until she died.

41. She also recalled that throughout her childhood whenever any of Matthew Bent's descendants, particularly, Elga Isaacs or Charles Bent or Ellen Bent took any step to act in any way adverse to her mother's ownership of the land, her mother would speak to a man Mr. B. DaCosta (Mass Bedda), executor of her great- grandmother's estate, and he would talk to the offending party and they would cease whatever they were attempting to do.

42. She had lent her mother some money and as her mother was unable to repay her, in 1975 her mother gave her the land in settlement of the debt. They prepared no formal documents in respect of the transaction but with her mother's knowledge she started making effort to have the land registered. In 1987, the land was registered in her name.

43. Elga had accepted that the land belonged to her mother and that she was permitted to remain on the land until her death. Ellen Bent had also admitted the defendant's ownership of the land and had advised the defendant that it was because of her knowledge that the land belonged to the defendant, that she moved off the land. Neither Ellen Bent nor any of her children had returned to reside on the land. Despite the claimant's claim to ownership, neither Ellen Bent nor Elga Isaacs is buried on the family plot on the property nor had any of their children. In March 1993, she sent men to do some work on the property when it was challenged by the claimant.

44. The original claimants had lodged a caveat against her having the land registered but fifteen months passed without the claimants doing anything about her registration and so she was issued a certificate of title in 1987. After she was registered as owner, the original claimants made several conveyances of the said land in 1990. She relies on the statutory declaration of the commissioned land surveyor, Mr. Dick (admitted by consent) which indicated that certain conveyances were executed by the original claimants in their attempt to dispose of the property. These were the same transactions put to the claimant in his cross-examination. At the time the original claimants were disposing of portions of the land, Elga had known of the title because she (the defendant) had produced the title to her for inspection the same year she received it.

45. She maintained that all the facts stated in her voluntary declaration in support of the application to register the land are true and that she made no false representation to the Registrar of Titles. She sought to explain every aspect of her application that has been challenged by the claimant as being untrue.

46. The defendant was rigorously cross -examined by Ms Wolfe and given the details elicited, it would be impracticable to reproduce all that was adduced. I will simply say that all the facts adduced by way of cross-examination, including inconsistencies and discrepancies have been duly noted and considered. However, for the sake of brevity at this point, only the major aspects will be highlighted. Upon cross- examination, the defendant identified the application form as one signed by her in respect of the registration of the land in question. She also admitted that the statutory declaration shown to her was sworn to by her in relation to her application to register title. She admitted to knowing Ronnie Forbes and Cardinal McIntosh who she said she had approached personally to assist her in her application for registered title. She gave their names to her attorney, Mr. July, who was preparing the application on her behalf.

47. In relation to the acquisition of the land, she explained that her mother had borrowed money from her and gave her the land as repayment. She could not say how much money she lent her mother but she knows she lent her money over several years. At first she said that at the time she got the land, she was insisting that her mother pay back the loan but then when asked when it was that she was insisting, she then said she could not insist on her mother. She said she asked for repayment in the seventies but it is a long time and she cannot now remember the exact time.

48. With regard to providing documentary proof of the transaction with her mother concerning her acquisition of the land, the defendant said that her mother had written on a piece of paper but that she cannot find that paper. Although she had said in her application that a conveyance was prepared, in her witness statement she said that no formal document was prepared and in cross- examination she said that her mother had written on a piece of paper.

49. In evidence she also stated that she had never lived on the land nor had her mother but they would visit it and they cultivated cassava on it for their own use. She said the cassava was planted between the lot on which Elga lived and the lot on which Ellen lived but she cannot remember when she planted the first crop. She recalled planting cassava in the early1980's.

50. In sum, she was asked questions under cross-examination the object of which was to show that she had made false statements to the Registrar in her application on the aspects challenged by the defence as being fraudulent. She, however, denied making any false statements to the Registrar as the claimants are contending.

ISSUE# 1: **WHETHER COPY DOCUMENTS ON WHICH THE CLAIMANT RELIES ARE INADMISSIBLE**

51. During and after the hearing of evidence of the parties several issues of law arose for contemplation. The first question relates to whether the copy documents on which the claimant is seeking to rely to prove that the defendant had made false representations to the Registrar were admissible in evidence.

52. The gravamen of the claimant's case is that the defendant made fraudulent misrepresentations to the Registrar in application #87313 leading

the Registrar to issue a certificate of title in respect of the land in question. The claimant sought to rely on copy of the documents on which he claims the defendant relied. Mrs. Taylor, in mounting her objection to the admissibility of the documents, based her arguments on the following grounds: (1) that the documents would, at best, represent hearsay (2) that the method by which the claimant procured the documents from the titles' office was unlawful and (3) that the documents were not properly authenticated as emanating from the titles' office. Despite the objections, the documents were admitted nevertheless as exhibits 4- 7. The reason for that ruling is outlined below.

Whether documents are inadmissible on grounds of hearsay

53. In relation to the objection that the documents constituted hearsay, this was not accepted as the documents that were challenged were, for the most part, documents purportedly made by the defendant or caused to be prepared by her and submitted in support of her application for registered title. The claimant has challenged the application and statutory declaration that he is contending was signed by the defendant. The defendant is thus the alleged maker of these documents. Should the claimant call the defendant as a witness on her case to prove these documents? I know of no rule of law and none has been brought to my attention to say that this is required. The defendant as alleged maker of the documents is a party to the proceedings and not a third party and as such is not only in a position to admit or deny the documents but is quite competent to do so. I found that the objection on the basis that these documents purportedly made by the defendant are inadmissible hearsay documents could not be sustained.

54. In relation to the statutory declarations of Forbes and McIntosh and the tax receipt tendered into evidence, these were admitted merely for the fact that these documents were allegedly submitted by the defendant as part of her application. The claimant has not alleged fraud on the part of the

maker of these documents; what the claimant is alleging is that the claimant relied on them in perpetrating her fraud. These are documents that the claimant is saying were under the control and the contents within the knowledge of the defendant. So, although the defendant might not have been the maker 'properly so called', the claimants are alleging that she was the one who would have procured the preparation of these documents and have them submitted with her application for title. As such, she would be in a position to speak to them. It is within her competence to deny them or to admit them.

55. I found that the documents were relevant and since they were alleged to be the 'defendant's documents', I concluded that the basis for admissibility, as a matter of law, was established. Once admitted, it would then become ultimately, a question of fact as to whether the particular document is proved to have emanated from the defendant.

Whether the documents are inadmissible on the ground of failure to establish originality and authenticity

56. The claimant stated that he received the documents from a staff member of the titles' office following on his enquiries when he saw the advertisement of the application for registration of title in the paper. He said he handed them over to his attorney. This was his evidence in- chief. There was nothing at that point to contradict him. Although it was suggested to him on cross-examination that he got it from Mr. July's office, he denied this stating that he received it from the titles' office. Prima facie, on the claimant's case, the documents were received from the titles' office. It means that if the defendant is contending otherwise, then an evidential burden (as distinct from a legal one) would lie on her to adduce evidence to contradict the claimant on this point. What the claimant said would ultimately be a question of fact as to whether he is speaking the truth. It has no bearing on the question of admissibility but rather weight.

57. Mrs. Taylor relied heavily, however, on the fact that the documents do not bear the stamp of the titles' office nor had they been certified as having been obtained from the titles' office. This of course brings into focus questions pertaining to originality and authenticity. It is a settled principle of law that originality and authenticity are ultimately matters affecting weight of evidence and so in the words of the learned author of **Murphy on Evidence** 6th edn, p.113 in re-asserting that principle, there is no doubt that the evidence is legally admissible. This is thus a question to be assessed by the tribunal of fact. In **R v. Robson** [1972] 1 WLR 651 Shaw, J, in dealing with the question as to whether copy of a tape recording was admissible within the context of a criminal case said:

> *"In the first stage, when the question is solely that of admissibility... my own view is that in considering that limited question the judge is required to do no more than to satisfy himself that a prima facie case of originality has been made out by evidence which defines and describes the provenance and history of the recordings up to the moment of production in court. If that evidence appears to remain in tact after cross- examination, it is not incumbent on him to hear and weigh other evidence which might controvert the prima facie case. To embark on such an enquiry seems to me to be a trespass on the ultimate function of the jury."*

58. The claimant in saying that following the advertisement of the application, he obtained the documents from the titles' office as documents purportedly submitted by the defendant has given evidence of provenance and history. It then becomes, *prima facie*, evidence of originality. The ground for admissibility does exist. It then becomes a question for me as a tribunal of fact to determine whether he, in fact, got them from the titles' office. This is a question as to the weight to be accorded to the evidence at the end of the case having regard to all the evidence including that of the defendant, if any.

59. I will also go further to indicate on this point that an examination of the parties' statements of case has revealed that the fact that the application was made as well as the terms of the application were pleaded on the claimant's case. The defendant did not deny making an application in those terms as pleaded nor did she deny in her pleadings that those were the facts on which she relied in applying for title. What she denied was that the representations made were false. It means then that the claimant could have been led to believe and, based on Ms. Wolfe's argument in her application for an adjournment, did, in fact, believe that authenticity of the documents was not disputed.

60. Within this context, I have also observed that pursuant to case management orders, there was standard disclosure of some of the documents in question as evidenced by the claimant's list of documents. These documents were made available for inspection pursuant to order of the court. The record shows that the claimant's list of documents was received by the defendant's attorney-at-law on January 8, 2008. There is no indication on the record that any notice was given at any time thereafter by the defence requiring the claimant to prove authenticity.

61. The **CPR, r. 28.19** provides that a party shall be deemed to admit the authenticity of any document disclosed to that party [under that part] unless that party serves a notice that the document must be proved at trial. A notice to prove a document must be served not less than 42 days before trial. There is no indication that the defendant had complied with the rule in relation to requiring proof of authenticity of the disclosed documents. Accordingly, the defendant is deemed to have admitted the authenticity of those documents disclosed being the copy application and statutory declaration in the defendant's name and the copy certificate of payment of taxes in her mother's name. These were admitted as exhibits (4, 5 & 8)

62. In relation to those not disclosed in the list of documents being the statutory declaration of Forbes and McIntosh, (exhibits 6 &7) the question of authenticity goes to weight rather than admissibility and so they cannot be held inadmissible on this basis as contended by the defence.

Whether the documents are inadmissible as being illegally obtained

63. Mrs. Taylor also submitted as a ground for rejecting the documents as being inadmissible that the claimant obtained them 'surreptitiously and/ or illegally.' She prayed in aid the **Registration of Titles Act** (the Act), s. 42 which states in part:

> *42. Upon registering a Certificate of Title, the Registrar shall retain in his custody and possession all deeds, instruments and documents, evidencing the title of the person registered, and shall endorse upon the last of them, if there be more than one, a memorandum that the land included in the certificate has been brought under this act and shall sign such memorandum;*
> *...No person shall be entitled to the inspection of such deed, instrument or documents, except upon the written order of the person originally deposited the same, or of some person claiming through or under him, or upon an order of a Judge..."*

64. Miss Wolfe submitted that section 42 does not apply as it only operates where the certificate of title has already been registered by the Registrar. Registration, she said, is deemed to be effected when the Registrar had marked on the duplicate the volume and folium of the Register book in which the certificate is entered. She raised in support of her argument the provisions of sections 55 and 58 of the Act that speak to how land is to be brought under the operation of the Act and as to what constitutes registration under the Act, respectively. As authority for her interpretation of sections 55 and 58, she relies on the dicta of the Judicial Committee of the Privy Council in **Alaric Pottinger v Traute Raffone** P.C. Appeal no. 64 delivered April 17, 2007 in which it was stated by Lord Roger of Earlsferry:

Under section 55 of the Registration Act, registration is effected by the Registrar preparing a Certificate of Title in duplicate. One copy is entered into the Register book by binding up or filing it in the Book. The proprietor is given the duplicate copy, marked with the volume and folium number where the certificate is entered. Registration is deemed to take place when the Registrar marks the volume and folium number on the duplicate certificate: section 58. The proprietor is entitled to receive a duplicate certificate of title (section 64.)

She contended that in this case, the documents submitted by the defendant were obtained prior to the issuance of title and so registration had not yet taken place as provided for under sections 55 and 58 of the Act. Since the documents were obtained prior to registration, section 42 does not apply.

65. I am minded to agree with that submission. The claimant did not state that he had obtained the documents following registration of the title. At the point at which he said he got them, the registration process would not have reached the point at which the documents should be sealed by the Registrar. Section 42 would, therefore, not apply to the situation that obtains in this case.

66. But then, even if section42 were to be held to be applicable and the documents were obtained contrary to the section, the position is that they would still be admissible. The rule governing the admissibility of illegally or unfairly obtained evidence in civil cases is that relevant evidence is admissible regardless of the manner in which it was obtained. As the learned author of **Murphy on Evidence** (6th edn.) puts it at page 83:

> *"The court is concerned with the relevance, not the source of evidence and will leave the parties to other remedies for any wrongful acts indulged in to obtain such evidence."*

Cross on Evidence (7th edn. p. 193) also noted in this regard:

> *"It was denied in Ibrahim v R {[1914] AC 599 at 610} that there was any discretion to exclude improperly obtained statements in civil proceedings. In Helliwell v Piggott-Sims where the Court of*

Appeal assumed the evidence to have been obtained by improper means the same view was repeated:
In criminal cases the judge may have a discretion. That is shown by *__Kuruma v R__. {[1955] A.C. 197}. But so far as civil cases are concerned, it seems to me that the judge has no discretion. The evidence is relevant and admissible. The judge cannot refuse it on the ground that it may have been unlawfully obtained in the beginning {[1980] FSR 356at 357}.*

67. The principle seems to be well settled that generally a judge in a civil case has no discretion to exclude evidence illegally or unfairly obtained. There is nothing in this case to justify a departure from this general rule. Accordingly, I concluded that the documents cannot be held to be inadmissible as being illegally or improperly obtained. The objection of the defence also fails on this limb.

ISSUE #2 **WHETHER THE DOCUMENTS EXHIBITED WERE RELIED ON BY THE REGISTRAR OF TITLES**

68. The evidence at the end of the case is that the defendant made an application for title on application # 87313. The contents of the application and the statutory declaration of the defendant were spelt out. The evidence disclosed that the same facts that are contained in the application and the statutory declaration are admitted by the defendant except that she is saying that they are true while the claimant is saying they are lies. The defendant has accepted that her signature is on the documents shown to her as the ones submitted by her in applying for registered title. At the end, of the case, the defendant has not put forward any evidence in keeping with her duty to adduce evidence (evidential as distinct from legal burden) to show that an application bearing different facts on which she relied was submitted to the Registrar of Titles.

69. Furthermore, the claimant was never required to prove the authenticity of the defendant's documents as disclosed as being copies of

what were submitted. The defendant having already been deemed to have admitted the authenticity of the application form and statutory declaration is estopped from saying these are not true representation of what was submitted by her.

70. In the absence of evidence to the contrary, I am satisfied that these documents were procured from the office of the Registrar of Titles as the copies of documents submitted by the defendant in support of her application for registered title. My finding is fortified by the fact that the defendant has sought to explain every aspect of the contents of her application to the Registrar which are in identical terms to those contained in the documents tendered into evidence by the claimant. There is no evidence, direct or inferential, which shows that other documents bearing different facts than those pleaded by the claimant were submitted to the Registrar.

71. In all the circumstances and on the totality of the evidence, there is only one reasonable and inescapable inference that can be drawn and that is that the same facts as contained in the documents exhibited are the same facts presented to the Registrar by the defendant and would be the same facts on which the Registrar relied to issue title to her. The absence of a stamp showing receipt by the Registrar does not dilute this inference.

ISSUE #3: **WHETHER THE DEFENDANT OBTAINED REGISTERD TITLE BY FRAUD**

72. The kernel of the dispute as extracted from the parties' pleadings and ultimately from the evidence advanced in support of their respective case is not so much whether the application alleged to have been made was in fact made in the terms alleged but rather whether the representations made therein were fraudulent.

The Law

73. The defendant stands in the position of a registered proprietor of the land and as such her title is, *prima facie,* indefeasible. This is reflected in several provisions of the Registration of Titles Act. Section 68 for example clearly gives effect to this doctrine. It reads:

> *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 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, be subject to the subsequent operation of any statute of limitation, 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 seised or possessed of such estate or interest or has such power.*

74. The claimant is, however, challenging the defendant's title on the basis that he is the owner of the land and that the defendant obtained her registered title through fraud. Within this context, Section 70 of the Act becomes instructive. It provides, in part:

> 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...(emphasis added).*

75. Similarly, in furtherance of the indefeasibility principle, section 161(d) of the Act also provides in part:

> 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-

"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..."

76. Fraud is therefore explicitly recognized under the Act as a vitiating factor and therefore can create a 'chink in the indefeasibility armour' of a registered proprietor. As such under the Act, proof of fraud in obtaining a certificate of title is a ground that is sufficient to warrant the cancellation of title by the Registrar (**see s.153**) and the court is empowered to so order (**see s. 158**).

<u>What is fraud under the Act?</u>

77. Whilst the Act has established that fraud can be a basis for cancellation of a registered title, it has offered no working definition of what is fraud. In the New Zealand case of **Stuart v Kingston** (1923) C.L.R. 309 at 359 Starke, J, in considering the question of fraud within similar statutory regime in that jurisdiction, observed:

> *"No definition of fraud can be attempted, so various are its forms and methods...But we must say this: fraud will no longer be imputed to a proprietor registered under the Act unless some consciously dishonest act can be brought home to him. The imputation of fraud based upon the refinements of the doctrine of notice has gone. But the title of the person who acquires it by dishonesty, by fraud (sec. 69), by acting fraudulently (sec. 187), or by being a "party to fraud" (sec. 187), in the plain ordinary and popular meaning of those words is not protected by reason of registration under the Act."*

Knox, C.J. in the same case described the kind of conduct that would amount to fraud as *"personal dishonesty"* or *"moral turpitude."*

78. The meaning of fraud within the context of the Act has been authoritatively laid down for our guidance by the Privy Council in the New

Zealand case of **Assets Company Limited v Mere Roihi** (1905) A.C. 176. Lord Lindley, in delivering the opinion of the Board, clearly stated at page 210 the nature of the fraud required to defeat a registered title. The following guiding principles have been distilled from the opinion at page 210.

(a) *By fraud in the Act is meant actual fraud i.e. dishonesty of some sort, not what is called constructive or equitable fraud.*

(b) *The fraud which must be proved in order to invalidate the title of the registered proprietor for value must be brought home to the person whose registered title is impeached or to his agents.*

(c) *A person who presents for registration a document which is forged or has been fraudulent or improperly obtained is not guilty of fraud if he honestly believes it to be a genuine document which can properly be acted upon.*

79. Again, in **Sawmilling Company Limited v. Waoine Timber Company Limited** [1976] A.C. 101, the Board made the point:

> *"If the designed object of a transfer be to cheat a man of a known existing right, that is fraudulent and so also fraud may be established by a deliberate and dishonest risk causing an interest not to be registered and thus fraudulently keeping the register clear. It is not, however, necessary or wise to give abstract illustrations of what may constitute fraud in hypothetical conditions, for each case must depend on its own circumstances. The act must be dishonest, and dishonesty must not be assumed solely by reason of knowledge of an unregistered interest."*

80. These principles have been adopted and affirmed by our Court of Appeal in several cases see for instance: **Enid Timoll - Uylett v George Timoll** (1980) 17 JLR 257; **Franklyn Grier v Tavares Bancroft** SCCA no. 16 of 1997 delivered April 6, 2001.

<u>The standard of proof required to establish fraud in civil proceedings</u>

81. It is the claimant who asserts that fraud is involved in the acquisition by the defendant of the certificate of title. He asserts it and so, it follows in the ordinary course of things, that he must prove it. Therefore, the ultimate onus, that is to say, the legal burden of proof to establish fraud to the requisite standard rests squarely on the shoulders of the claimant.

82. The question now arises as to what is the applicable standard of proof. Mrs. Taylor has submitted that the standard of proof is that of the criminal standard that is to say proof beyond a reasonable doubt. She relies for her contention on the dictum of Bingham, J.A. in **Franklyn Grier v Bancroft Tavares** (supra) where he stated that the standard of proof in an allegation of fraud is no different whether the proceedings are civil or criminal and that is beyond reasonable doubt.

83. It is noted that Bingham, J.A. had cited no authority for this proposition and upon closer scrutiny it seems that his declaration as to the standard of proof in cases of this nature seems to run counter to the weight of authority to include previous authority from our own Court of Appeal. In **Halsbury's Laws of England** 426, the following statement appears:

> *In civil cases the standard of proof is satisfied on a balance of probabilities [see the formulation of Denning, J in <u>Miller v Minister of Pensions</u> [1947] 2 All ER 372 at 373–374]. However, even within this formula variations in subject matter or in allegations may affect the standard required [see the observation of Denning LJ in <u>Bater v Bater</u> [1951] P 35 at 36–37, [1950] 2 All ER 458 at 459]; it is commonly said that the more serious the allegation, for example fraud..., the higher will be the required degree of proof [see for example <u>Hornal v Neuberger Products</u> Ltd <u>[1957] 1 QB 247</u>, <u>[1956] 3 All ER 970</u>, (fraud alleged in civil proceedings).However, it is not so much that a different standard of proof is required in different circumstances varying according to the gravity of the issue, but that the gravity of the issue becomes part of the circumstances which the court has to take into*

consideration in deciding whether or not the burden of proof has been discharged. The more serious the allegation, the more cogent is the evidence required to overcome the unlikelihood of what is alleged and thus to prove it [see Re H and R (minors) (sexual abuse: standard of proof) [1996] AC 563, [1996] 1 All ER 1, HL; and see Re Dellow's Will Trusts, Lloyds Bank Ltd v Institute of Cancer Research [1964] 1 All ER 771 at 773, [1964] 1 WLR 451 at 454–455; see also Hornal v Neuberger Products Ltd (supra).]

84. **In Paramount Betting Ltd v. Brown** (1971) 12 JLR, 342, the Jamaican Court of Appeal, following on the line of thinking on the point in some of the English authorities cited above (**Hornal v Neuberger Products Ltd; Bater v Bater; Re Dellow's Will Trusts)**, categorically stated that the standard of proof in civil cases, where fraudulent conduct is alleged, is on a balance of probabilities and not on the criminal standard of proof beyond a reasonable doubt.

85. In the words of Luckoo, J.A., with whose arguments Henriques, P expressly agreed:

> *"While the accusation of fraudulent conspiracy is a grave one in a civil case, the standard of proof necessary to sustain such an accusation is the civil standard of a preponderance of probability, the degree of probability required being commensurate with the occasion..."*

In an even more robust fashion, Fox, J.A., at page 352, expounded his views on the matter as follows:

> *"For the purpose of testing the sufficiency of the magistrate's considerations, and the validity of his conclusions, it is important to bear in mind the nature of the burden of proof which was upon the defence to establish the allegation of fraudulent conspiracy. This was a civil action, and although the commission of crime was being alleged, this was sufficiently established on a preponderance of probability...The Magistrate had only to be "reasonably satisfied" his mind need not "attain that degree of certainty which is indispensable to the support of a conviction upon a criminal charge" (Rejfek v McElroy [1965] 39 A.L.J.R. at p.178). But the amount of evidence which is required to tilt the balance of probability towards any fact in a civil case is not fixed. It varies with the subject-matter and the*

circumstances of each case. When criminal conduct is alleged against a person, the antecedent improbability of his guilt is "a part of the whole range of circumstances which have to be weighed in the scale when deciding as to the balance of probabilities": (see MORRIS, *L.J. in Hornal's case [1956] 3 All E.R. at p.978) ".*

Later at page 353, the said learned Judge of Appeal continued:

> *"It is this formidable hurdle, the improbability of a person's guilt which has caused it to be said that fraud must be strictly proved, but this should not be allowed to obscure the rule that in a civil action, all issues, including an allegation of criminal conduct, are decided on a preponderance of probabilities."*

86. The learned authors of **Cross on Evidence** (supra) in adding their voice to this particular issue has pointed out at page 155:

> *"In Hornal v Neuberger Products Ltd the Court of Appeal recognised that the earlier English cases conflicted, and concluded, in apparently general terms, that proof on a preponderance of probability will suffice when the commission of a crime is alleged in a civil action...Hornal's case may be taken to have settled the English Law for the time being. An allegation of criminal conduct, even of murder, need be established only on a preponderance of probability in a civil action."*

87. After a review of several authorities on this point, it is seen that the weight of authority is against the position that the standard of proof in a case of this nature is the criminal standard. In light of the fact that Bingham, J.A. in **Grier** v **Tavares** did not cite any authority in support of his declaration which stands in conflict with the pronouncements of the Court of Appeal in **Paramount Betting** (a decision which to the best of my knowledge has not been overruled), I am persuaded to follow the guide afforded by **Paramount Betting** and hold that the standard of proof in this case is on a balance of probability with the degree of probabilities required being such as would be commensurate with the allegation.

88. In order to appreciate the nature and quality of the evidence required to prove fraud to the standard required, the dictum of Rowe, J (as he then

was)in **Chin v Watson's (Off-Course Betting)** 1974 12 JLR 1535 proves quite instructive. In that case, Rowe, J, in dealing with the nature of the evidence required to establish fraud in civil proceedings, made the point that fraudulent conduct must be distinctly proved and it is not allowable to leave it to be inferred from the facts *(Davy v. Garret cited).* After following the guidance given by Lord Westbury in **McCormick v. Grogan** (1869) L.R. 4 H.L. 82, the learned judge noted that while it is true that fraud can be proved from circumstantial evidence just as well as it can be established by direct evidence, that proof must be by the clearest and most indisputable evidence.

89. It is clear to me that an allegation of fraud ought not to be taken lightly and so the evidence to prove it must be as weighty as the allegation of it. I will venture to say therefore that fraud must not only be strictly pleaded but must be strictly proved by those who assert its existence on the clearest, most cogent and indisputable evidence on a balance of probabilities. The pertinent question now is: has the claimant discharged this burden placed on him to warrant cancellation of the certificate of title on the basis of fraud? It is to a consideration of this question that I will now turn.

Analysis of the evidence

90. The claimants have pleaded grounds on which their allegation of fraud is based. In keeping with the principle that fraud must be strictly pleaded, any fact not pleaded as constituting fraud will not be taken into account in seeking to ascertain whether fraud is proved as alleged. So of necessity, I shall examine the evidence particularly against the background of the particulars of fraud as pleaded.

Whether there is fraudulent representation that Ello Lewis was owner of the land

91. The first representation in respect of ownership of the land that the claimant alleges to be fraudulent is that the defendant states that her mother, Ello Lewis, was the owner of the land in question. The root of the defendant's claim is that her mother inherited the land from her father, Lucius Bent who was Matthew's brother. Her claim as we have seen is based on the letter she is contending was written by her grandfather in 1947. She also based her claim of her mother's ownership on things she is claiming were told to her by her mother and based on the conduct of her mother towards the land.

92. I do realize that things the defendant said were told to her by her mother do constitute hearsay and as such could not properly be tested on cross-examination. Some things are therefore accorded no weight but some are taken into account only to the extent that they are agreed by the claimant and are such that would be relevant to the defendant's state of mind which is in issue because the question ultimately is whether she had a honest belief in the matters she asserted in her application for registered title..

93. In this regard, the fact that the claimant spoke to dispute between the original claimants and the defendant's mother concerning the land (although that too is hearsay) and the fact that the defendant also spoke to times when the parties acted adverse to her mother's claim to the land tell me that at some point in the past, the defendant's mother had laid claim to the land which is in dispute causing problems between herself and the original claimants. This has come out on the evidence of both sides and is accepted as true.

94. However, in his effort to prove the falsity of the defendant's statement, the claimant gave evidence as to his version of the history of the ownership of the land. According to him, his predecessor in title was Matthew Bent, his grandfather who had shared up his land giving Charles and Elga 2 acres each. It is clear on the evidence that while asserting that Ello Lewis is not the owner, the claimant himself has not produced any documentary evidence to say otherwise or to show a root of title through the original holding of Matthew Bent who he is claiming as his predecessor –in- title.

95. There is, indeed, no evidence that any land at Gratto formed part of Charles' estate when he died in or around 1947. The letters of administration has been exhibited but no inventory as to what constituted the estate has been furnished. There are two tax receipts evidencing payment of taxes by the two original claimants but this was for a period after the death of both Matthew Bent and Charles Bent.

96. Also, Mr. Dick, the commissioned land surveyor whose report has been admitted by consent, has indicated that based on surveys he carried out on the land on the instruction of the defendant and in the presence of the claimant, there was no evidence on the ground to suggest that the land registered by the defendant had previously formed part of a 12 acre plot that was subdivided. I have no reason to reject the opinion of Mr. Dick having seen his qualification and experience. This manages to raise a question as to the veracity of the claimant's assertion that the land was originally part of a 12 acre plot that was shared up.

97. Furthermore, it is also noted that the claimant in his Amended Statement of Claim filed August 23, 1999 averred that since 1947 Ellen Bent and Elga Isaacs were co-owners of the 4 acre parcel of land and before that the land was owned by Charles and Elga. He said in his pleadings that Elga

had been in possession of approximately 1 acre while Ellen had been in possession of the remainder. This pleading is in conflict with the evidence given.

98. The claimant having pleaded that Elga owned 1 acre and his father the remainder is now saying that Charles was given his 2 acres and Elga was given her 2 acres when Matthew shared up the land. If that is so then what would account for the pleading that Elga had only 1 acre? The inconsistency on the claimant's case gets deeper because the tax receipts tendered by the claimant show that at some point Elga Isaacs paid taxes for 1 ½ acres of land at Bellvue and then tax receipt for a later period showed Ellen Bent paying for 3 acres in respect of the said land. During the course of the trial, the claimant also gave evidence of having 4 ½ acres and sometimes 4 ¾ acres as comprising the estate. What was the true entitlement of the original claimants is not proved by clear and cogent evidence.

99. Is the evidence advanced by the claimant enough to ground fraud on the basis of the defendant's representation? For it to be accepted as fraudulent, not only must the representation be false but the defendant must have made the statement without an honest belief in its truth with the object being to cheat the claimants of a known existing right.

100. I really do accept that the defendant could reasonably have been led to believe by the letter coupled with the manner her mother acted towards the land to form the view that the land belonged to her mother. The fact that there is no documentary proof or evidence of the formal vesting of the property in Ello cannot be taken to mean she could not have held an honest belief. The question is not what is the true nature and effect of the letter as a matter of law but whether the defendant having seen it could have been honestly led to believe that her grandfather intended for her mother to get

the land and that the land devolved to her mother on the basis of that letter. Her belief is that her mother owns the land based on what is contained in the letter and based on things she had seen and heard from her mother.

101. In the end, the evidence of the surveyor coupled with the inconsistencies in the claimant's evidence and the discrepancy between his pleadings and evidence as to the ownership of the land have served to weaken the potency of his assertion that the land passed from Matthew Bent to the original claimants. While the defendant's evidence does have some internal inconsistencies, fraud cannot, without more, be simply inferred because of them. This is so because the defendant bears no legal burden to prove that she was not fraudulent in her conduct. It is for the claimant to prove on the most credible and indisputable evidence that Ello Lewis was not the owner and that the defendant at the time of making her application knew this and therefore could not have held any honest belief when she asserted that the land was owned by her mother.

102. The allegation of fraudulent representation in the context of the Act must be proven on weighty evidence commensurate with the seriousness of the allegation. In light of the tenuous nature of the claimant's evidence in proof of the ownership of the land and its devolution to Charles and Elga, I find that the claimant has failed to prove to the requisite standard that the defendant fraudulently represented in her application that the land belonged to Ello Lewis.

Whether the defendant fraudulently represented that Ello Lewis sold her the land

103. Another aspect of the claimant's complaint of fraud is that the defendant fraudulently represented that Ello Lewis had sold her the land. The claimant contends that the defendant's representation as to her

acquisition of the property is untrue as the defendant has failed to produce any written evidence of that sale.

104. The defendant had stated in her application that she bought the land from her mother and that she had received a conveyance in respect of the land but it cannot be found and that she believed it to be lost. In evidence, she sought to explain that she had lent money to her mother and as repayment her mother gave her the land. In her witness statement she said no formal document was prepared when the land was exchanged. This is in conflict with her reference to a conveyance in the application. Under cross-examination, she then said her mother had signed a piece of paper but it was not recorded or stamped. She said that to her mind a conveyance can be anything such as the piece of paper on which she claimed her mother wrote. She is therefore saying that when she spoke about conveyance in the application for title she meant the piece of paper she has referred to.

105. She, however, maintained that she can see no difference between saying that she bought the land and saying that the land was given to her as a settlement for a debt. Miss Wolfe submitted that the defendant's representation concerning her purchase of the land is perhaps the most indicative of the deception committed by her. According to her, the court must view the failure of the defendant to give specificity as to the sum of money lent to her mother and the period she gave the loan coupled with her failure to produce written evidence of the transaction as being indicative of falsehood. She argued that the vagueness of the defendant's evidence is a basis for concluding that the truth has not been spoken.

106. I have really failed to see the critical distinction being drawn by Ms. Wolfe between a purchase of land and land obtained in exchange for re-payment of a loan. If the defendant were to be believed, the transaction she

spoke about would amount to exchange of land for money. It would be a set – off and as such would be no different in effect from a purchase. The consideration for the land would be the money owed. The fact that the defendant herself states that she does not see the concepts as being different would suggest that in saying it was a sale she meant it to be no different from the transaction by which she acquired the land. This would not suggest the absence of honest belief necessary in the proof of fraud.

107. The failure of the defendant to provide written proof of the transaction and her vagueness as to the specificity of the dealing with her mother may well raise suspicion that the truth might not be spoken but whether it amounts to positive proof that she is, in fact, not speaking the truth is a totally different matter. Fraud cannot be established on mere suspicion alone. In combing the evidence of the claimant and all the evidence in the case, I have discerned no proven fact that amounts to direct or circumstantial evidence of fraud on the basis of this representation.

108. Ms. Wolfe has placed reliance on **Honiball and Anor v Alele** (1993) 43 WIR, 314 in support of her argument that there is fraud on this limb. I have examined the facts of that case (which I do not think necessary to repeat at this stage) and I find it does not in any way advance the claimant's cause that there is actual dishonesty in the defendant's representation in this regard.

Whether the defendant fraudulently represented that she has been in possession from 1975

109. The claimant has challenged as being untrue the defendant's statement that she had been in possession of the disputed property since 1975. He claims she has never been in possession nor exercised any act of ownership over the land. Ms. Wolfe in arguing that the defendant told an

untruth on this limb relied on the definition of the concept of possession as explained in **JA. Pye (Oxford) Limited and anor v Graham and anor** (2002) 3 All ER 865, 876 wherein Lord Browne-Wilkinson said:

> *"There are two (2) elements necessary for legal possession: (1) a sufficient degree of physical custody and control ('factual possession'); (2) an intention to exercise such custody and control on one's own behalf and for one's own benefit ('intention to possess')."*

110. On the basis of that definition, Ms. Wolfe submitted that the evidence shows that the defendant at no time had control or custody of the property and even if she had an intention to possess the land, this was not demonstrated by any act on her part between 1975 and 1984 when she applied for title. She submitted that the defendant's representation that the property had been in her 'continuous open, quiet and undisturbed possession was a contrived deception' and the court should so find.

111. It is quite evident that at no time was the defendant in actual occupation of the land. The defendant has said in evidence that neither she nor her mother had ever lived on the property. She has admitted that from as far as she has known the land, the two original claimants lived on the land although they moved off at some point and Elga returned. She however explained that when she became the new owner, she acted like her mother as previous owner used to do. That would entail visiting the land just to look at it and to determine if anyone had acted contrary to her interest. She also said in evidence that both her mother and herself would go on the land to pick oranges and that they also grew cassava on the land. She also explained that although Elga Isaacs remained on the land and was occupying the land, Elga only did so with her permission. She gave evidence that it was on that basis that she said she was in possession.

112. The claimant has, however, said he had never seen the defendant on the land and under cross-examination the defendant had said that she left Jamaica in 1955 but returned in 1998. Between those years when she left Jamaica, she would visit the land once per year when she returned for vacation. Her visit it seems from her evidence would include her passing the land to visit her grandmother's tomb.

113. Elga is not present to admit or to dispute the assertion of the defendant that she had admitted the defendant's ownership to the land and that she lived there with permission. There also is no written evidence of such acknowledgement of ownership. The claimant has produced two tax receipts to show that Elga had paid taxes for 1975-1975 and Ellen 1983-1984. This would suggest that the original claimants might not have accepted the defendant's asserted claim to the land.

114. The defendant might not have honestly believed she was in possession but nevertheless stated it or she might honestly have believed so based on her notion of ownership. She has stated by way of explanation that because Elga was there with permission, she (the defendant) considered herself to be the one in possession. At the highest, the honesty of the defendant's assertion that she was in possession of the land might be doubtful. Fraud, however, cannot be proved on what is doubtful. It must be proved on affirmative evidence pointing to actual dishonesty and moral turpitude on the part of the person who is said to have committed the fraud.

115. I find therefore that even if the defendant did not exercise sufficient degree of custody and control over the land for there to be possession as required by law, I am still not able to find any positive evidence to satisfy me on a preponderance of the probabilities that the object of this assertion was

more to cheat the original claimants of a right she knew they had rather than to establish a right that she honestly thought she had. Even if I were to hold that the defendant was not in possession as a matter of fact and law, this in and of itself cannot be enough to ground fraud. She must have made the representation dishonestly as part of her goal to deprive the original claimants of their property which she knew they owned. I am not convinced that the evidence advanced by the claimant to prove fraudulent representation on this limb has attained that standard to ground such a finding.

Whether the defendant made fraudulent representations concerning the use of rents and profits by Ello and herself

116. The claimant has identified as being deceptive and thus fraudulent, the defendant's assertion that she used the rents and profits from the land for her own use and benefit and that before she started doing so, her mother did the same. There is indeed no evidence that the land was utilized in a fashion where rent and profit, in the true sense of the terms, were derived from it. The defendant spoke to the growing of cassava by her mother and her for family consumption and that although Elga should have paid rent, none was collected. Whether or not cassava was planted as contended, the fact is no actual income seemed to have been derived from the land.

117. The claimant himself has not given evidence as to anyone deriving profit and rents from the land. The defendant's representation is not borne out on the evidence and so stands as unsubstantiated. This could well be misrepresentation. The question is whether it stands as one innocently made or one fraudulently made, that is without any honest belief in its truth. Again there is no proper evidence from which it can be deduced conclusively or on a balance of the probabilities that it was either one or the other.

118. In considering that assertion, the most that could be said is that the defendant misrepresented the fact but was it designed with a view to cheat the claimants of their ownership of the property that she knew they had? This, I think, would depend on the belief of the defendant as to ownership because if she honestly believed that she was the owner, then I believe that her representation cannot be held to be fraudulent in that it was said with an intention to deceive and done with a view to deprive the original claimants of their rights. Since I have already found that the claimant might have held an honest belief that she owns the land, then it means any assertion pertaining to the land could be done in her attempt towards solidifying her claim rather than to cheat the claimants out of a right she knew they possess. There is no evidence from the claimant to support the latter finding.

Whether the defendant acted fraudulently in producing the wrong certificate of payment of taxes

119. The claimant alleges that the defendant fraudulently submitted the wrong certificate of payment of taxes to the Registrar of Titles. The tax certificate tendered was in relation to 7 acres of land at Bellvue at valuation # 201501103 in name of her mother, Ello Lewis. The defendant explained that she mistakenly submitted the wrong tax certificate to her attorney- at-law as she had two valuation numbers in respect of land formerly owned by her grandfather one for the land in issue that she thought was 6 acres and another for a 7 acre plot. She gave the number to her attorney for the 7 acre plot. She also claimed she was dealing with more than one land transaction at the time and she had submitted the wrong number. She maintained that it was a genuine error on her part.

120. A perusal of the certificate shows that it speaks to 7 acres of land at Bellvue with the name Ello Lewis being on the tax roll. The error, if any, would be in relation to which plot of land that particular valuation number

relates. Given that the discrepancy was in relation to a valuation number, it is not inconceivable that an honest error could have been made.

121. The law is quite clear that the use of a wrong document or even a forged document is not fraudulent if the person using it uses it with a genuine belief that it be can be used for the purpose. Given that it was a valuation number that made the difference, I am not provided with sufficiently cogent evidence to tip the balance in favour of a finding adverse to the defendant that there was no error but an actual act of dishonesty done with an intention to deceive and to cheat the claimants of their known existing rights.

Whether the defendant fraudulently represented that she is the owner of the land knowing it is not true.

122. The defendant's claim to the land is based on a history of ownership chronicled by her. She has produced a document as evidence of her claim through her mother. There is evidence to suggest that the dispute as to the ownership of the land predated the claim of the defendant as her mother seemed to have been in some dispute as to ownership of the land with the original claimants following the death of Charles Bent.

123. Ms. Wolfe has submitted that neither the defendant's alleged root of title nor her alleged possession has been made out. Ms. Wolfe seems to want to place the burden of proof on the defendant. While the defendant has not given evidence of any transfer to her or vesting of the property in question in her or her mother, the claimant who is alleging fraud has not brought evidence to prove that the property was definitely not so vested. The claimant has failed to show that at the time of registration, the property had already been vested in the original claimants and so they had an existing right known to the defendant.

124. The crucial question is not whether in law title to the land was properly vested in the defendant but whether the defendant held an honest belief in all the circumstances that she had a bona fide claim to the land. This has not been rebutted by the claimant, on whom the burden lies, to prove by positive evidence that the land did not belong to the defendant's mother and that it was not sold to the defendant in the manner she described.

125. The claimants' attorney has also submitted that the defendant's assertion in her application that the land is 7 acres when the document she relied on in support of her application has stated 6 acres is a basis to set aside the certificate of title on the ground of fraud. The surveyor, following on his survey, found that the acreage was overstated as the land in actuality comprised 4.395 acres. I must say that although there is a discrepancy as to the actual size of the land, the title was issued on an estimated acreage and not by actual survey. There is nothing to say that the land was not sufficiently identifiable. What is inconsistent is the actual size versus the estimated size. The defendant explained that it was on the basis of the tax receipt in her possession (the same one she stated she had relied on in error) that she represented the size of the land to be 7 acres. This of course is in conflict with the letter she is relying on which speaks to 6 acres at Gratto. According to her, she had mixed up the paper because she was attending to more than one transaction.

126. Despite the inconsistency, I refuse to use this as a basis for finding fraud as submitted by Ms. Wolfe in such circumstances where the claimant did not plead this as a ground in their particulars of fraud. Misdescription of the land was never identified as an element of the fraud alleged. I will therefore not allow the claimant to introduce new facts that were never

pleaded as part of the allegation of fraud. Fraud must be strictly pleaded just as how it must be strictly proved; fairness demands it.

127. The ultimate question must be: is there actual dishonesty, moral turpitude, proved on the part of the claimant the object of which was to deprive the claimants of a right that she actually knew them to have had in the property? This is the essence and quality of fraud required to be proved under the Act in order to pierce the indefeasibility of the defendant's title. The defendant has made some assertions which, while not proved to be true, are not proved conclusively to be untrue. It is not for her to prove the truth but for the claimant to prove that they are not so and that the defendant could not honestly believe them to be so. For there to be actual fraud proved, the falsity of the assertions must be established by clear and compelling evidence. This proof must be at the instance of the claimant who asserts it.

128. The claimants in advancing the serious allegation of criminal conduct on the part of the defendant has presented a history of landownership which is, at best, incomprehensible on the available evidence including the documents exhibited. The claimant's attempt at establishing his lawful rights to the land has, indeed, left more questions than answers. For instance, the claimant had said that prior to Charles' death the land had already been shared among Matthew's children with each getting 2 acres. However, this original 12 acre holding has not been verified by survey identification or by any documentation whatsoever. In 1975,the tax receipt in the name of Elga Isaac said 1 ½ acre while in 1983 a tax receipt in respect of the same land but in the name of Ellen Bent is saying 3 acres with a notation at the top, *"Elga Isaacs in charge"*. It is not clear as to what was the actual size of the land that is being claimed by the claimant and who owned what share of the land.

129. To go even further, the endorsement on the caveat shows that in 1986 when the caveat was lodged, Elga Isaacs objected to the defendant's application and stated that she was the owner in fee simple of the 4 ½ acres of land. Nothing was said of Ellen owning a portion. The claimant, in an attempt to explain this, stated that at the time of the caveat, Ellen was not around. However, he had said earlier in his testimony that since his father's death, Ellen was the one administering on the entire parcel of land.

130. Following up on this assertion of the claimant that Ellen was administering on the entire plot, I have duly noted the unchallenged evidence of Mr. Dick indicating that in May, 1990, Ellen sold 2 acres of the land comprised in the defendant's certificate of title to Elga Isaacs for $3000.00. A conveyance was effected and recorded. The questions arise as to why it is that Ellen would need to sell 2 acres of the land to Elga if Elga was already entitled to 2 acres and what portion of the land did Ellen sell. In an attempt to explain this, the claimant stated that after his father's death, his mother received letters of administration for all the land and started dealing with the 4 acres and so in 1990 she was merely cutting off Elga's share. This has done nothing to explain why it is that Elga would need to give money for the land, if the land was already hers. What the claimant has stated is surely not borne out by any documentary evidence. In fact, the documentary evidence produced seems inconsistent with this because Elga Isaacs, it is seen, had been dealing with the land or, at least, a part of it at some time or the other between 1975 (when she paid taxes) and 1986 (when she lodged caveat). The dealing with the land between Ellen and Elga in 1990, three years after title had been issued to the defendant, is not explained on the claimant's claim.

131. The picture becomes even more complicated when one examines the documentary evidence of the surveyor. It also reveals that two days after the sale of the 2 acres of the land by Ellen to Elga, Elga sold ¾ acre to her

daughter, Thelma Blake and ½ acre to Clarence Isaacs. On May 5, 1990, a day later, Elga again sold ¾ acre to Donald McPherson. This, on my computation, would amount to 2 acres. This land is also part of the land registered in the name of the defendant. If the claimant's explanation is to be accepted that Ellen had only given Elga her land, then the question arises: where did Elga get 2 acres to sell two days later? If it was her 2 acres to which she is entitled, it would mean she would have sold all her land and so in 1993 when this action was filed, she could not have been part owner with Ellen Bent as she had claimed.

132. If what Ellen had sold to Elga was Ellen's share, then it would mean that in 1993 when this action was filed, Ellen would have had no land remaining of the Matthew Bent's 2 acre -inheritance. Elga then , by obtaining Ellen's 2 acres, would then be the sole owner of 4 acres. Elga, however, sold 2 acres which would mean in the end that she would only be left with 2 acres. It would mean on this analysis that Elga's entitlement at the time of filing of the claim in 1993, would only be 2 acres and so she could not have been co-owner with Ellen as they had claimed. It follows therefore, that the claimant's claim to now be the owner of 4 acres is inexplicable in light of the transactions disclosed on the report of Mr. Dick.

133. It becomes even more unclear when the conveyances that were executed in 1990 are closely examined. None of them shows the original claimants as owners of any adjoining lands to the lands sold. If what each party conveyed was just a portion of her land, then one would expect to see them reflected as owners of adjoining land to the piece sold but that is not the case. The question arises as to what were the entitlements of the original claimants not only when the defendant applied for title but also at the time they initiated proceedings in 1993. The evidence adduced by the claimant does not admit of any easy answer. It is not clear. There must be a known

existing right of the claimants to the property before the defendant can be found to have acted fraudulently.

134. It has now become rather puzzling that following the registration of title by the defendant, the original claimants have managed to deal with the land in the manner shown and then three years later filed an action contending that they were joint owners of 4 acres of land. All this had occurred after the defendant had advertised her intention to register the land and the claimant, despite lodging a caveat, had allowed the caveat to expire without any further action. It seems to me unjust and contrary to good conscience to now allow the claimant, in light of the state of the evidence and the history of their conduct, to challenge the defendant's title.

135. I would adopt the position taken by Kerr, J.A. in **Timoll-Uylett v Timoll** (supra), where, in considering an allegation of fraud against a registered owner of land, the learned Judge of Appeal paid due regard to the fact that the defendant had advertised the application to bring the land under the Registration of Titles Act. He found that the notice of the application was brought to the attention of the plaintiff in that case but that for some reason she did not see it fit to lodge a caveat. I will adopt the line of reasoning of Kerr, J.A. and say that in this case, even if the defendant's case raises suspicion as to the truth of her assertions, she did what was required of her in such circumstances, namely to give due notice of her intention to have the land registered in her name. As was observed by Kerr, J.A. in **Timoll- Uylett v Timmoll,** this was with a view to enable persons like the claimant and his predecessors who might have had a claim or interest in the land to take appropriate action. Such a notice was brought to the attention of the claimants and they lodged a caveat.

136. For some unexplained reasons the claimants allowed the caveat to expire and according to the defendant for 15 months nothing was done by them to stop the registration of the land. Title was thereafter issued but again no one did anything to set aside the title on grounds of fraud. What they did instead was to, three years later, embark on a series of transactions designed to dispose of the land already registered in the name of the defendant having had an opportunity to stop the registration. But then, even after doing so, they waited another three years to initiate court proceedings- being six years after the certificate of title had been issued.

137. To allow the claimant to impeach the defendant's title on the basis of fraud on the unclear and confusing state of the evidence as to his entitlement and in light of the conduct and maneuverings of his predecessors in relation to the land would be manifestly unjust.

138. I find that the claimant has not provided the clearest and most indisputable evidence to warrant a finding of actual dishonesty on the part of the defendant. The fact is that even if the defendant had lied to the Registrar of Titles, there is no evidence advanced by the claimant from which it can be said conclusively, on a balance of probabilities, that she did, in fact, lie out of actual dishonesty the object being to cheat the claimants of any existing proprietary rights that she knew they had in the property.

CONCLUSION

139. I find, when all things are considered, that the claimants have not provided sufficiently clear and cogent evidence of appreciable weight commensurate with the serious allegation of fraud against the defendant. There is no sufficiently clear and indisputable evidence to ground a finding of actual dishonesty in the defendant of the nature required to defeat her title and to entitle the claimant to the relief being sought. There might well be, at

the highest, doubt or suspicions as to the truth of some aspects of the defendant's assertions in respect of her application for title. But equally so, there is also doubt and confusion about the claimant's assertion as to his ownership of the land. A passage extracted by Rowe, J in **Chin v Watson** (supra) from **KERR on FRAUD AND MISTAKE** (7th edn.) p. 672 sums up my views very neatly. I therefore adopt it and will repeat it verbatim:

> *"The law in no case presumes fraud. The presumption is always in favour of innocence and not of guilt. In no doubtful matter does the court lean to the conclusion of fraud. Fraud is not to be assumed on doubtful evidence. The facts constituting fraud must be clearly and conclusively established. Circumstances of mere suspicion will not warrant the conclusion of fraud. The proof must be such as to create belief not suspicion."*

140. I find this to be a case riddled with inconsistencies on both sides of the 'fence'. In the end, there might well be room for suspicions as to the veracity of the defendant's case but the fact is that she bears no burden of proof. The burden lies on the claimant to prove his case. Indeed, this is a case that has to ultimately be resolved on the question as to who bears the burden of proof and whether the burden has been discharged. The claimant bears the burden and he has failed to provide sufficiently weighty evidence necessary to discharge the ultimate burden of proof placed on him. He is therefore not entitled to the relief sought in his Amended Writ of Summons.

JUDGMENT

141. Judgment is hereby entered for the defendant with costs to be agreed or taxed.