[2024] JMCA Civ 41

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MISS JUSTICE EDWARDS JA
THE HON MRS JUSTICE DUNBAR-GREEN JA
THE HON MR JUSTICE BROWN JA

SUPREME COURT CIVIL APPEAL NO COA2021CV00112

BETWEEN	**FIRST UNION FINANCIAL COMPANY LIMITED**	**APPELLANT**
AND	**SHARCA BROWN**	**RESPONDENT**

Written submissions filed by Samuel Beckford for the appellant

Written submissions filed by Robinson, Phillips and Whitehorne for the respondent

7 June and 20 December 2024

Land law - Summary judgment - Striking out - Indefeasibility of registered title - Exceptions under the statute - Adverse possession - Fraud - Registration of Titles Act sections 68, 70, 71 and 85 - Limitation of Actions Act sections 3, 4 and 30 - Part 15 and rule 26.1(3)(1)(c) of the Civil Procedure Rules 2002

(Considered on paper pursuant to rule 1.7(2)(j) of the Court of Appeal Rules 2002)

EDWARDS JA

[1] I have read in draft the judgment of Brown JA and agree with his reasoning and conclusion. There is nothing that I wish to add.

DUNBAR-GREEN JA

[2] I too have read the draft judgment of Brown JA. I agree with his reasoning and conclusion.

BROWN JA

Background

[3] This appeal was filed on 24 December 2021 challenging the orders made by Anderson J ('the learned judge'), on 10 December 2021, striking out part of the respondent's claim, refusing the appellant's application for summary judgment and ordering the appellant to pay the costs of the proceedings.

[4] This case concerns a dispute as to the ownership of two adjoining parcels of land situated at 13 – 15 Stennett Street, in the parish of Saint Mary ('the disputed property'). These two parcels of land were registered at volume 603 Folio 99 and volume 1166 folio 323 in the name of Gertrude McKay and Lily Carby, respectively. The two properties making up the disputed property were later merged on the titles issued to Mr Euton Smith ('Mr Smith').

[5] The appellant, a company and the current registered proprietor acquired the disputed property from Mr Smith. He had acquired registered title by way of adverse possession on 13 October 2016. The disputed property was transferred to the appellant on 8 August 2017. In November 2017, the appellant served a notice to quit, along with a commercial lease agreement on the respondent, who was and continues to be in possession of the disputed property.

[6] Upon receiving these documents, the respondent filed a claim in the court below claiming ownership of the disputed property by adverse possession. In her claim, the respondent asserted that she has been in undisturbed possession of the disputed property since 1994 until November 2017, when she received the appellant's notice. She also averred that she did not know Mr Smith. She asserted that she operates a bar at the premises and collects rent from persons to whom she rents shops situated on the disputed property.

[7] It is the respondent's further assertion that Mr Smith acquired the title in his name fraudulently as he was not in possession of the property. The respondent maintained that

she had already acquired title to the disputed property by adverse possession against the original proprietors; therefore, their title would have been extinguished at the time Mr Smith made his application for title by adverse possession. Furthermore, 12 years had not elapsed since she had obtained possessory title in 2016; when the registered title was issued to Mr Smith.

[8] On 21 June 2018, the respondent filed an amended claim form and added Mr Smith as a defendant. In the amended claim form, the respondent sought several orders for declarations dealing with the ownership of the land and asserted that Mr Smith's title was fraudulent, and that the appellant was not a *bona fide* purchaser for value without notice.

[9] On 12 March 2018, the appellant filed a defence and counterclaim (signed by its Managing Director, Mr Lloyd G Campbell) and averred that, it is the registered owner of all the disputed property comprised in certificates of title registered at volume 1502 Folio 555 and volume 1502 and folio 329 of the Register Book of Titles and that the respondent was trespassing on the disputed property.

[10] The appellant sought four orders on the counter claim. These were: (a) a declaration that it is entitled to recover possession of the property from the claimant and her servants and/or agents; (b) an order directing the claimant and her servants and/or agents to cease occupation and vacate the land or any part of it; (c) mesne profits; and (d) costs.

[11] The respondent applied for and was granted an *ex parte* interim injunction restraining the appellant and its agents, employees or servants from interfering with, destroying or damaging the disputed property. On 6 March 2020, after an *inter partes* hearing, that injunction was extended until the determination of the claim.

Notice of application to strike out the claim and for summary judgment

[12] The appellant, on 14 August 2020, filed a notice of application for court orders seeking the following orders:

> "1. That mediation of the matter herein be dispensed with or discontinued.
>
> 2. That the Claim Form and Particulars of Claim filed by the [respondent] on January 22 2018, and the amended Claim form and Particulars herein be struck out for disclosing no reasonable grounds for bringing the claim against the [appellant] t.
>
> 3. Alternatively, that summary judgment in favour of the [appellant] be entered against the [respondent] on the ground that there is no real prospect of succeeding on the claim herein against the [appellant].
>
> 4. Costs to the [appellant] to be agreed or taxed.
>
> 5. Such further and/or other relief as this Honourable Court may deem just."

[13] The application was made on a number of grounds and supported by an affidavit deponed to by Lloyd Campbell. The appellant relied on rules 26.3(1)(c), 15.2(a) and 1.1 of the Civil Procedure Rules 2002 ('CPR').

<u>The decision in the court below</u>

[14] The learned judge noted that Mr Smith had not been served with the claim form within six months, and, as a result the claim had elapsed.

[15] The learned judge identified the following five issues for his determination:

> "(i) Whether the grant of an interim injunction prevents the [appellant] from pursuing an order for summary judgment and/or striking out.
>
> (ii) Whether the claim against the[appellant] is viable in circumstances where no actual fraud is being alleged against it.
>
> (iii) Whether the interest being claimed by the [respondent], is enforceable as against the [appellant].
>
> (iv) Whether the [respondent's] claim should be struck out.

> (v) Whether summary judgment should be granted in the circumstances."

[16] Before addressing these issues, the learned judge resolved a preliminary issue raised by the respondent's counsel. Counsel submitted that since an interim injunction had been granted, the court had already concluded that there was a serious question to be tried. Therefore, the matter is not suitable for summary judgment. The learned judge disposed of the preliminary issue in this way, at para. 11:

> "The court believes that the fact of an interim injunction being granted to the claimant earlier, does not serve to preclude this court from either granting summary judgment on this claim, or striking out the claim. The court is aware that on the grant of an interim injunction, the court had to satisfy itself that there was a serious issue to be tried and that damages would not be an adequate remedy. Those considerations do not arise properly for a court, considering whether summary judgment ought to be granted, or whether a party's statement of case, ought to be struck out."

[17] The learned judge also pointed out that there was more evidence available to the court at the time of the summary judgment application, than at the earlier stage when the application for the interim injunction was being considered.

[18] The learned judge then examined the rules in the CPR granting the power to strike out a statement of case or a part of a statement of case and cited paras. [14] and [23] from **Gordon Stewart v John Issa** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 16/2009, judgment delivered 25 September 2009 ('**Stewart v Issa**'), where Cooke JA stated the applicable principle based on rule 26.3(1)(c) of the CPR.

[19] In examining the jurisdiction, the learned judge discussed rules 15.2 and 15.6 of the CPR, which give the court the jurisdiction to grant summary judgment and to make the orders listed in the CPR, after hearing such an application. The learned judge cited dicta from this court in **Fiesta Jamaica Ltd v National Water Commission** [2010] JMCA Civ 4 where Harris JA, at para. [31], referred to **Swain v Hillman and another**

[2001] All ER 91 and **Three Rivers District Council v Governor and Company of the Bank of England No 3** [2001] 2 All ER 513; [2001] UKHL 16, in discussing what the test laid down in the rules, to be applied to summary judgment applications, means in practical terms.

[20] The learned judge then looked at the distinction between an application for striking out and summary judgment. He relied on the dicta of Morrison JA (as he then was) in **Stewart v Issa**. He stated that he found the quote from **B v N and L** [2002] EWHC 1692 (QB), as cited in **Stewart v Issa,** helpful. The quote clearly outlined the approach a court should take when dealing with applications of this nature. It also highlighted the fact that there are two distinct tests for consideration when dealing with applications to strike out and for summary judgment.

[21] As it relates to the important issue of the exceptions to indefeasibility of registered title, the learned judge outlined sections 68 and 70 of the Registration of Titles Act ('ROTA') and stated at para. [24] that:

> "The indefeasibility of a registered title is made subject to a finding of adverse possession and fraud. The court will examine the operation of both exemptions below and apply same to the facts of this case, in deciding whether the [respondent's] claim is suitable for summary judgment or striking out, on the basis that the same discloses no reasonable cause of action or whether it is a case which has a realistic prospect of success."

[22] After succinctly setting out the appellant's application, the learned judge laid out what his approach would be. At para. [25], he said:

> "The [appellant] is seeking that the [respondent's] case against it, be struck out, on the basis that while fraud is being alleged against [Mr Smith] , no fraud has been alleged nor particularized against it, such as would serve in law to defeat its title. Given the nature of the submissions before the court, the court ought now to assess the [respondent's] case, to ascertain whether there is a claim for fraud against the [appellant] , and if so, to determine whether it discloses any

> reasonable grounds for being brought against the [appellant] and whether it has any realistic prospect of success."

[23] Following from that, the learned judge examined the proof required to establish a claim of fraud. The learned judge stated that the evidence needed to prove fraud must be cogent and he cited paras. [75] to [88] of Morrison P's judgment in **Leiba and others v Warren** [2020] JMCA Civ 19. He accepted that "[t]o succeed on a claim of fraud, it must be specially pleaded and specially proven". He relied on the Privy Council decision in **Crawford and others v Financial Institutions Services Ltd** [2005] UKPC 40 ('**Crawford**') for this well-established principle.

[24] Having considered the nature of the claim against the appellant, the learned judge held that "… it is evident that the claimant has not explicitly stated that she is bringing a claim for fraud against the [appellant]". The learned judge further held that, based on **Crawford**, this should have been done. Nonetheless, the learned judge thought it prudent to examine the implication of the respondent's assertion that the appellant neglected to inspect the disputed property, in order to ascertain whether anyone had obtained a possessory title to it. This, he found, flowed from the respondent's claim for a declaration that the appellant was not a *bona fide* purchaser for value without notice of her interest; and the declaration was therefore "undergirded by an allegation of wrongdoing on the [appellant's] part".

[25] In seeking to determine whether there was actual fraud by the appellant, the learned judge relied on the cases of **Assets Company Ltd v Mere Roihi et al** (Consolidated Appeals) [1905] AC 176 and **Half Moon Bay Ltd v Crown Eagles Hotel Ltd** [2002] UKPC 24 and stated, at para. [33], that "[f]raud, within the context of the ROTA, means actual fraud, committed by the present title holder, not constructive or equitable fraud".

[26] The learned judge found, at para. [36], that:

> "The claimant has asserted that the 1st defendant obtained title from a person who claimed ownership through fraud. She

> has not however, led any sufficient allegation in support of that assertion, in her statement of case, which could implicate the 1st defendant. In the absence of such allegation, the court is unable to find, without more, that the claim can be successful based on the 1st defendant's alleged notice of her possession. Even if it should be proven at trial, that notice without more, cannot be proof of actual fraud against the 1st defendant."

[27] The learned judge held, at para. [38], that:

> "The conclusion as regards this issue is clear, the [respondent's] claim against the [appellant] on any allegation of fraud, other than actual fraud, cannot suffice to render her statement of case against the [appellant], as being one which discloses a reasonable ground for the claim of fraud, having being [sic] brought against the [appellant] , to defeat the [appellant's] title to the disputed property on the ground of fraud."

[28] In the learned judge's assessment, there was no expectation that the respondent would be able to advance any evidence of actual fraud against the appellant. Therefore, there was no realistic prospect of successfully proving that the appellant was guilty of actual fraud.

[29] The learned judge then examined the law in relation to adverse possession. In this regard he discussed sections 3 and 30 of the Limitation of Actions Act ('LAA') and found, at para. [46], that:

> "These provisions make it clear that after twelve (12) years, where one has enjoyed open and undisputed possession, a registered owner's title is extinguished."

He also considered sections 68 and 70 of the ROTA as well as the Privy Council decision in **Recreational Holdings v Lazarus** [2016] UKPC 22 ('**Recreational Holdings**'), in which **Chisolm v Hall** (1959) 1 WIR 413 was cited dealing with the interrelation between the limitation rights and a registered title. The learned judge placed emphasis on their Lordships' exposition that the first registration of land is designed to destroy all prior

existing claims, but all subsequent owners are susceptible to the operation of the limitation statute.

[30] Against that background, the learned judge found that the burden would be on the respondent to prove her claim of adverse possession against the previous owners. If the claimant succeeds in that regard, Mr Smith would not have been able to pass a valid title to the appellant, as the claimant would then be the owner of the disputed property.

[31] Accordingly, the learned judge then went on to consider whether the claim could subsist against the appellant only, since the claim form against Mr Smith had expired. The learned judge found that the claim against the appellant can be pursued in the absence of Mr Smith, as the appellant is the registered owner. This is how the learned judge expressed it at para. [55]:

> "In a case of this nature, the court ought to satisfy itself as to whether the requisite period of adverse possession exists in the [respondent's] favour. If it does, then, based on the law as earlier referred to, the claim should succeed. [Mr Smith] does not need to be made a party to this claim. At most, he could be made an interested party, but such does not need to be done, in order for this claim to be properly resolved."

[32] Turning his attention to the application to strike out, the learned judge declared that the claim could not be struck out purely on the basis that Mr Smith had not been served. He referred to the test for striking out laid down in the CPR and pronounced himself satisfied that the claim against the appellant disclosed a reasonable cause of action. He grounded that finding in the respondent's claim for adverse possession against the appellant (see para. [59] of the judgment).

[33] The learned judge made the following orders:

> "(1) The [appellant's] application to strike out the [respondent's] claim on the ground of fraud, is granted.
>
> (2) **The [appellant's] application to strike out the entirety of the claim, is denied, in part.**

(3) The [appellant's] application for summary judgment is denied.

(4) Mediation between the parties is to proceed and the same shall be completed within ninety (90) days of the date of this order and if mediation is unsuccessful, a case management conference should be scheduled by the Registrar, without any undue delay.

(5) **The [respondent] is awarded two-thirds (66 2/3%) of the costs of this application and such costs shall be taxed, if not sooner agreed.**

…" (Emphasis added)

The grounds of appeal

[34] The appellant, being aggrieved by the three orders highlighted above, filed a notice of appeal on 21 December 2021. On 14 January 2022, the appellant filed an amended notice of appeal. Although there was no submission nor ground of appeal in relation to the order made as to costs by the learned judge in the notice of appeal, the amended notice of appeal listed it as one of the orders being challenged. The amended notice of appeal contained the following grounds:

"(1) The Learned Judge erred in not awarding summary judgment to the Appellant when there was no fraud alleged against the Appellant, having found that it is fraud on the part of the current title holder that would defeat its registered title, and that there was no allegation of fraud as against the Appellant, the current registered title holder of the subject property.

(2) The Learned Judge erred in not striking out the claimant's claim in its entirety in circumstances whereby [Mr Smith] transferred title to the Appellant after having first obtained said title by virtue of adverse possession, and having satisfied the Registrar of Titles regarding the acquisition of the title by such means.

(3) The Learned Judge erred in not appreciating or sufficiently appreciating that the grant of title to a person acquiring title by adverse possession precludes a competing claim for title to

said property on the basis of adverse possession unless, in the circumstances as alleged by the Respondent, fraud can be established by the Respondent against [Mr Smith] and that, accordingly, fraud must be proved against [Mr Smith] for the [appellant's] title to be defeated.

(4) The Learned Judge erred in not appreciating or sufficiently appreciating that there being no particularization of fraud as against [Mr Smith] in the Respondent's pleadings, there is no basis for a challenge to the title of [Mr Smith] acquired by virtue of satisfaction of the requirements under the Registration of Titles Act regarding registering of interests acquired by adverse possession, and that accordingly, the title with respect to the transfer of the subject property to the Appellant by [Mr Smith] is to be regarded as indefeasible.

(5) The Learned Judge erred in not appreciating or sufficiently appreciating that (a) there being no claim against [Mr Smith] for fraud in [Mr Smith's] acquisition of the title transferred to the [appellant] and that (b) the Respondent's claim is dependent on proof of fraud by [Mr Smith] in his acquisition of the subject title by adverse possession, the Respondent's claim has no reasonable prospect of success.

(6) The Learned Judge erred in law in failing to find that the title acquired by [Mr Smith] was acquired by adverse possession in accordance with section 85 of the Registration of Titles Act as evidenced by the notation on said title.

(7) The Learned Judge in failing to find that the title acquired by [Mr Smith] was already acquired on the basis of adverse possession by [Mr Smith] further fell into error in failing to appreciate or to appreciate sufficiently that there being no claim of fraud as against the [Mr Smith] in his acquisition of said title there was therefore no basis for a conclusion that the Respondent has a realistic prospect of success as against the Appellant since the Respondent's claim is that [Mr Smith] acquired the subject title fraudulently.

(8) The Learned Judge erred in law in holding that the [respondent's] claim regarding adverse possession against the Appellant has a realistic prospect of success.

[35] Based on the above grounds of appeal the appellant sought the following orders:

> "(1) The Appeal is allowed.
>
> (2) Summary Judgment for the Appellant.
>
> (3) Striking out of the Claimant's claim in its entirety.
>
> (4) Cost [sic] here and in the court below to be agreed or taxed.
>
> (5) Such further or other relief as this Honourable Court deems fit."

Submissions

[36] I hope I do no violence to the industry, elegance and thoroughness of the submissions for the appellant and the respondent by restricting their replication to their essence. Although the submissions were made under the individual heads of the grounds, they overlapped and had a consistent theme. I will summarise the appellant's submissions first.

Appellant's submissions

[37] The appellant submitted that the learned judge erred in not granting summary judgment. His error, firstly, stemmed from his failure to recognise that in the absence of any allegation of fraud against the appellant, its title is indefeasible. That indefeasibility, it was argued, cannot be defeated by the respondent's claim of adverse possession. Secondly, it was a misapprehension of the learned judge that the respondent's claim of adverse possession could be prosecuted without proving fraud against Mr Smith. That was compounded by the fact that the claim of fraud was no longer being pursued against Mr Smith, in light of his absence from the proceedings because he was not served. **Recreational Holdings** was cited in support of these submissions.

[38] The appellant referred us to **Fabian Lee Bradshaw et al v Jonathan Ellis et al** [2016] JMSC Civ 102 ('**Bradshaw v Ellis**') and **Morrison v Phipps and others** [2015] JMSC Civ 219 which cited the Privy Council decision in **Half Moon Bay Ltd v Crown Eagle Hotels Ltd (Jamaica)** [2002] UKPC 24. **Bradshaw v Ellis** was cited for the proposition that if the person or persons alleged to have committed the fraud are not

before the court there is no serious question to be tried, unless the current title holder was also guilty of fraud in acquiring the title.

Respondent's submissions

[39] For their part, counsel for the respondent sought to support the decision of the learned judge. The nub of the respondent's submission is as follows. By the year 2006, the respondent had obtained a possessory title, with the consequence that the original owner's title had been already extinguished. Therefore, Mr Smith could not, by his claim for adverse possession, have extinguished the original owner's title. If the respondent were able to establish possession from 1994-2006, that would necessarily undermine Mr Smith's adverse possession claim as, counting back from 2016, when he obtained his registered title, he would fall below the statutory threshold of 12 years.

[40] Notwithstanding the respondence's acceptance of the obligation to prove actual fraud against the present registered proprietor, counsel for the respondent maintained that the submissions on adverse possession should prevail. In this regard, the respondent relied on **Half Moon Bay Ltd v Crown Eagle Hotels Ltd Jamaica**. Consistent with the respondent's position of primacy of its adverse possession, it was submitted that a trial should determine the quality and extent of the respondent's adverse possession and whether the appellant's title had been barred as the title of its predecessor in title had been extinguished.

Analysis

[41] I will begin by articulating the framework within which the ensuing analysis will be undertaken. Firstly, since it is the exercise of the learned judge's discretion that is under challenge, the parameters of this court's review function will be briefly discussed. Secondly, the orders being appealed may conveniently be subdivided into two categories: (a) the refusal to strike out the claim; and (b) the refusal to enter summary judgment. Thirdly, that subdivision and the issues raised by the grounds of appeal all have a common base. That is, the law of adverse possession and its interplay with the provisions of the

ROTA. Fourthly, only ground two exclusively addresses the refusal to strike out the claim. Accordingly, ground two will be discussed first. The other grounds will be discussed together under the refusal to enter summary judgment, against the background of the relevant land law principles.

Jurisdiction/standard of review

[42] This court's jurisdiction, in relation to appeals arising from the exercise of a judge's discretion, is governed by the principles set out in **Hadmor Productions Ltd v Hamilton and others** [1982] 1 All ER 1042 ('**Hadmor Productions Ltd v Hamilton**'). At page 1046, Lord Diplock demarcated the parameters of the appellate court's jurisdiction when reviewing the exercise of a judge's discretion as follows:

> "… On an appeal from the judge's grant or refusal of an interlocutory injunction the function of an appellate court, whether it be the Court of Appeal or your Lordships' House, is not to exercise an independent discretion of its own. It must defer to the judge's exercise of his discretion and must not interfere with it merely on the ground that the members of the appellate court would have exercised the discretion differently. The function of the appellate court is initially one of review only ..."

[43] Lord Diplock particularised the above parameters of appellate reach as appears below:

> "1. the judge misunderstood the law or the evidence;
>
> 2. drew an inference that has been proven by further or later evidence to be demonstrably wrong;
>
> 3. there has been such a change of circumstance after the learned judge's decision that would have justified his acceding to an application to vary it;
>
> 4. detailed reasons have not been provided and although no erroneous assumption of fact or law can be identified the decision is so aberrant that it must be set aside on the ground that no reasonable judge regardful of his duty to act judicially could have reached it."

The court in **Hadmor Productions Ltd v Hamilton** made it clear that the appellate court's power to set aside the decision emanating from the exercise of a judge's discretion and exercising its own discretion must abide occurrence of one or more of the above circumstances.

This exposition of the law was elegantly restated in **Attorney General of Jamaica v MacKay** [2012] JMCA App 1 by Morrison JA (as he then was), at para. [20], as follows:

> "This court will therefore only set aside the exercise of a discretion by a judge on an interlocutory application on the ground that it was based on a misunderstanding by the judge of the law or of the evidence before him, or on an inference - that particular facts existed or did not exist - which can be shown to be demonstrably wrong, or where the judge's decision 'is so aberrant that it must be set aside on the ground that no judge regardful of his duty to act judicially could have reached it'."

[44] To determine whether or not the learned judge properly exercised his discretion, it will be necessary to assess the relevant law and its applicability to this case. The learned judge, in essence, decided that the respondent's claim should be ventilated as the outcome will be determined by the view taken of the evidence, that is, the credibility of the parties or witnesses. The appellant's complaint, however, is that the respondent cannot succeed based on the applicable law in relation to a registered title.

[45] The application to strike out the respondent's statement of case required the learned judge to assess the respondent's claim as pleaded.

[46] The application for striking out and the one for summary judgment require separate consideration based on the provisions in the CPR. This is despite the fact that one of the remedies available upon a summary judgment application is an order striking out or dismissing the claim in whole or in part (see Part 15.6(1)(b) of the CPR). In **Stewart v Issa** Morrison JA explained it as follows, at para. [31]:

> "… The difference between the approach on an application to strike out and on a summary judgment application is neatly

captured by Eady J in **B v N and L** [2002] EWHC 1692 (QB), in the following passage (at paragraph 21.22):

> '21. I must focus on the claimant's pleaded case in the first instance. That is all I am permitted to do for the purposes of the strike-out application. If I rule against the plea, then that would be the end of the matter.
>
> 22. As to the Part 24 application, however, I can have regard also to the evidence for determining whether the claimant's case has no realistic prospect of success'."

Application to strike out – Ground 2

[47] The jurisdiction to strike out a party's statement of case is wide. This jurisdiction is exercisable as part of the court's case management tool kit. The court is empowered to strike out a party's statement of case for any one of four reasons under rule 26(3)(1). This appeal is concerned with only one of those reasons, as set out below. Rule 26.3(1)(c) of the CPR reads:

> "In addition to any other powers under these Rules, the court may strike out a statement of case or part of a statement of case if it appears to the court –
>
> …
>
> (c) that the statement of case or the part to be struck out discloses no reasonable grounds for bringing or defending a claim; ..."

[48] In **Stewart v Issa,** this court gave helpful guidance as to the approach a court should take when considering this type of application. The court was of the view that it would require an assessment of the averments in the statement of case, in order to determine whether or not it discloses a proper claim. Cooke JA expressed it this way, at para. [14]:

> "… At this stage, the genesis of the proceedings, the consideration under rule 26.3(1)(c) is whether or not the claim as pleaded satisfies the legal requirements for the prosecution of its alleged cause. A trial judge ought not to

> attempt to divine what will be the outcome of a properly filed claim …"

[49] Morrison JA, who agreed with Cooke JA, cited the following passage from **B v N and L** [2002] EWHC 1692 (QB):

> "I must focus on the claimant's pleaded case in the first instance. That is all I am permitted to do for the purposes of the strike-out application. If I rule against the plea, then that would be the end of the matter …"

[50] The court in **Stewart v Issa** adopted the interpretation of this rule by Dukharan JA in **Sebol Limited and others v Ken Tomlinson and others** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 115/2007, judgment delivered 12 December 2008, as being "whether the pleadings give rise to a cause of action".

[51] The learned judge correctly stated the relevant rule and the decided cases treating with the principles applicable to striking out. He then assessed the respondent's statement of case to ascertain whether it disclosed reasonable grounds for bringing the claim. The learned judge found that, as the current title holder, the appellant had to be a party to the claim and that he was satisfied that the claim brought by the respondent disclosed a reasonable cause of action against the appellant.

[52] It is important to examine the nature of the claim brought by the respondent. The respondent was seeking to enforce her alleged claim of a possessory title. To this end, she sought a number of declarations and other consequential orders. The respondent is seeking to have her right to title by adverse possession declared by the court and to enforce it against the appellant by having its title cancelled as a result.

[53] Title acquired by adverse possession is a legal right enforceable against the world, or a right *in rem*. By virtue of rule 8.6 of the CPR, the respondent would need to establish a right in order to obtain a declaratory judgment. Her claim for ownership by adverse possession would suffice.

[54] The applicable test required the learned judge to assess the respondent's statement of case to determine whether it disclosed any reasonable grounds for bringing the claim. The respondent has outlined her basis for claiming ownership of the disputed property, which was due to her possession of it for over 12 years. The respondent's assertion that she had acquired a possessory title to the disputed property is the basis of her claim to a right to a declaratory order to that effect. The respondent has adequately set out her claim as to her entitlement to ownership of the property, and her claim discloses reasonable grounds for bringing it. The learned judge was, therefore, correct in refusing to strike out her claim, as the requirement in the rule has been satisfied.

[55] His approach cannot be faulted and so this court has no jurisdiction, in the light of the principles set out in **Hadmor Productions Ltd v Hamilton**, to interfere with the exercise of the learned judge's discretion as it relates to the refusal of the application to strike out the entire claim, and to only strike out the section relating to the alleged failure on the part of the appellant to conduct an "adequate enquiry as to the nature of the [respondent's] occupation or possession of the said property".

<u>The application for summary judgment – Grounds 5 and 8</u>

[56] Summary judgment applications are governed by Part 15 of the CPR. The court is empowered to grant summary judgment by virtue of rule 15.2. It states:

> "The court may give summary judgment on the claim or a particular issue if it considers that –
>
> (a) The claimant has no real prospect of succeeding on the claim or the issue; or
>
> (b) The defendant has no real prospect of successfully defending the claim or the issue."

[57] The grant of summary judgment, therefore, turns on the applicant meeting the bar of real prospect of success. The meaning of real prospect of success was explained in **Swain v Hillman**, a decision on the English equivalent of Part 15 of the CPR. At page 92 j Lord Woolf said:

> "… The words 'no real prospect of succeeding' do not need any amplification, they speak for themselves. The word 'real' distinguishes fanciful prospects of success …they direct the court to the need to see whether there is a 'realistic' as opposed to a 'fanciful' prospect of success."

[58] This learning has been accepted and applied in several decisions of this court. A number of cases have provided guidance as to the approach that a judge should take when considering these applications and the pitfalls that should be eschewed. The main peril is the temptation to conduct a mini-trial. In **Swain v Hillman**, at page 95, after outlining the allegations in the case, Lord Woolf MR said that:

> "Those are matters which will have to be considered carefully by the judge at the trial. I am not seeking to indicate what his view should be on those facts. It is a matter to be dealt with by the judge at a trial and not at a summary hearing. Useful though the power is under Pt 24 [which is the English equivalent to CPR Part 15], it is important that it is kept to its proper role. It is not meant to dispense with the need for a trial where there are issues which should be investigated at the trial ..."

[59] Lord Woolf MR adopted and endorsed counsel's submissions, when he said that:

> "… the proper disposal of an issue under Pt 24 [CPR Part 15] does not involve the judge conducting a mini-trial, that is not the object of the provisions; it is to enable cases, where there is no real prospect of success either way, to be disposed of summarily ..."

[60] In **Sagicor Bank Jamaica Limited v Taylor-Wright** [2018] JMCA UKPC 12, the Board succinctly explained the test and its purpose in a practical way, at paras. 16 and 17:

> "16. Part 15 of the CPR provides, in Jamaica as in England and Wales, a valuable opportunity (if invoked by one or other of the parties) for the court to decide whether the determination of the question whether the claimant is entitled to the relief sought requires a trial. Those parts of the overriding objective (set out in Part 1) which encourage the saving of expense, the dealing with a case in a proportionate

> manner, expeditiously and fairly, and allotting to it an appropriate share of the court's resources, all militate in favour of summary determination if a trial is unnecessary.
>
> 17. There will in almost all cases be disputes about the underlying facts, some of which may only be capable of resolution at trial, by the forensic processes of the examination and cross-examination of witnesses, and oral argument thereon. **But a trial of those issues is only necessary if their outcome affects the claimant's entitlement to the relief sought. If it does not, then a trial of those issues will generally be nothing more than an unnecessary waste of time and expense**." (Emphasis added)

Real prospect of success

[61] In this case, as in all applications for summary judgment, the all-important issue is the question of the real prospect of success, and the factors determining it in each particular case. In order to determine whether or not the learned judge was correct in concluding that the respondent's claim had a real prospect of success, it will be necessary to examine the applicable law relating to the issues raised based on the claim filed and the grounds of appeal challenging his decision. The law in relation to the following will be discussed below:

1. The principle of the indefeasibility of registered title;
2. The law on adverse possession; and
3. Fraud.

1. The principle of indefeasibility of registered title

[62] The fee simple interest is the highest or largest interest that can be acquired in land. It essentially gives ownership of the land and once someone acquires this interest and a title is issued under the ROTA, it becomes conclusive proof of ownership of the land.

[63] Sections 68, 70 and 71 of the ROTA give effect to this principle. Together these sections provide that the registered title is indefeasible except in certain specified circumstances and that the certificate of title is to be treated as conclusive proof of ownership. Sections 68, 70 and 71 are quoted below:

> "68. No certificate of title registered and granted under this Act shall be impeached or defeasible by reason or on account of any informality or irregularity in the application for the same, or in the proceedings previous to the registration of the certificate; and every certificate of title issued under any of the provisions herein contained shall be received in all courts as evidence of the particulars therein set forth, and of the entry thereof in the Register Book, **and shall, subject to the subsequent operation of any statute of limitations**, be conclusive evidence that the person named in such certificate as the proprietor of or having any estate or interest in, or power to appoint or dispose of the land therein described is seised or possessed of such estate or interest or has such power.
>
> …
>
> 70. Notwithstanding the existence in any other person of any estate or interest, whether derived by grant from the Crown or otherwise, which but for this Act might be held to be paramount or to have priority, the proprietor of land or of any estate or interest in land under the operation of this Act shall, **except in case of fraud**, hold the same as the same may be described or identified in the certificate of title, subject to any qualification that may be specified in the certificate, and to such incumbrances as may be notified on the folium of the Register Book constituted by his certificate of title, but absolutely free from all other incumbrances whatsoever, except the estate or interest of a proprietor claiming the same land under a prior registered certificate of title, and except as regards any portion of land that may by wrong description of parcels or boundaries be included in the certificate of title or instrument evidencing the title of such proprietor not being a purchaser for valuable consideration or deriving from or through such a purchaser:
>
> **Provided always that the land which shall be included in any certificate of title or registered instrument shall**

> **be deemed to be subject to** the reservations, exceptions, conditions and powers (if any), contained in the patent thereof, and to **any rights acquired over such land since the same was brought under the operation of this Act under any statute of limitations**, and to any public rights of way, and to any easement acquired by enjoyment or user, or subsisting over or upon or affecting such land, and to any unpaid rates and assessments, quit rents or taxes, that have accrued due since the land was brought under the operation of this Act, and also to the interests of any tenant of the land for a term not exceeding three years, notwithstanding the same respectively may not be specially notified as incumbrances in such certificate or instrument.
>
> 71. Except in the case of fraud, no person contracting or dealing with, or taking or proposing to take a transfer, from the proprietor of any registered land, lease, mortgage or charge, shall be required or in any manner concerned to enquire or ascertain the circumstances under, or the consideration for, which such proprietor or any previous proprietor thereof was registered, or to see to the application of any purchase or consideration money, or shall be affected by notice, actual or constructive, of any trust or unregistered interest, any rule of law or equity to the contrary notwithstanding; and the knowledge that any such trust or unregistered interest is in existence shall not of itself be imputed as fraud." (Emphasis added)

[64] Although section 68 of the ROTA bestows upon the title holder conclusive proof of ownership, that conclusiveness of ownership is made subject to one infirmity. That is, ownership of the land is subject to the operation of any statute of limitations after first registration. Similarly, even though section 70 of the ROTA gives primacy to the title holder and his interest except in the case of fraud, the proviso to section 70 states that the land included or described in the certificate of title is subject to, amongst other things, rights acquired under any statute of limitations since being registered or the first title was issued.

[65] Section 71, in conjunction with section 70, also gives effect to the principle of indefeasibility. It does not require a party acquiring an interest from a registered

proprietor to make enquiries into the circumstances or the consideration for which any previous proprietor was registered, except in the case of fraud.

[66] These sections have been the subject of judicial attention in several cases, at least two of which went to the Privy Council, **Recreational Holdings** being the most recent. This court's decision in **Recreational Holdings** was upheld.

[67] At para. [68] of this court's decision in **Recreational Holdings** (cited as [2014] JMCA Civ 34) Morrison JA (as he then was) addressed the meaning or effect of section 71 of the ROTA as it relates to the indefeasibility principle and concluded that:

> "In this regard, nothing turns, in my view, on section 71, which does not mention the issue of limitation at all … As Mr Wood submitted, I think correctly, it is necessary to read section 71 in context and in the light of other provisions of the Act, particularly the immediately preceding section 70. The proviso to section 70 makes it clear that, notwithstanding the general primacy of the register as the source of rights affecting registered land, certain unregistered rights, such as those arising under the LAA, can continue to operate on a registered title."

[68] In **Thomas Anderson v Monica Wan (As Personal Representative in the Estate of Iris Anderson)** [2020] JMCA Civ 41, Morrison P, in explaining the purpose or objective of the registration of land system as implemented under the ROTA and the role or function of the indefeasibility of title principle, relied on a quote from the Privy Council decision in **Pottinger v Raffone** [2007] UKPC 22. He stated at para. [36] that:

> "As Lord Rodger of Earlsferry explained in **Pottinger v Raffone**, a decision of the Privy Council on appeal from this court, '[t]he main aim of this system of registration of title is to ensure that, once a person is registered as proprietor of the land in question, his title is secure and indefeasible except in certain limited circumstances which are identified in the [RTA]'."

[69] In **Anderson v Thompson** [2015] JMCA Civ 51, Phillips JA, in discussing the principle of indefeasibility of title, at para. [51] stated:

> "The principle of indefeasibility of title enunciated in sections 68 and 70 of the ROTA … confers on the certificate of title absolute evidence that the person named therein is rightfully entitled to the land to which that title relates. This principle of indefeasibility is more clearly set out in section 70 of ROTA. Section 70 provides that all preferential and prior rights are defeated in favour of the registered proprietor, except in the case of fraud. Additionally, generally any encumbrance or interest, unless noted on the certificate of title, cannot fetter the registered proprietor."

[70] In **Chisolm v Hall,** the Privy Council addressed the apparent inconsistency in the equivalent provisions to sections 68 and 70 of the ROTA. The Board reconciled the two provisions by interpreting the two sections in two ways that the Board opined would lead to the same result. The interpretation I prefer is contained in the quote that follows:

> "… The critical words in [section 68] – 'subject to the subsequent operation of any statute of limitations' – contain the first of the only two references to limitation to be found in the law. The reader is thus invited to look further to see what provision is made later in the law in regard to the operation of any statute of limitations, the brief reference to limitation in [section 68] being in itself of doubtful import. Looking further, the reader comes to [section 70] and he there finds a provision to the effect that the land included in any certificate is to be deemed to be subject to any rights acquired over such land since the same was brought under the operation of the Law under any statute of limitations, notwithstanding that such rights may not be specially notified as incumbrances in such certificate. Having reached this point, is he not justified in concluding that the reference to limitation in [section 68] is a mere reference forward to the provision in regard to limitation contained in [section 70], and that 'subsequent' in [section 68] is no more than a short way of saying what is said by [section 70] in the words 'since the same [ie, the land] was brought under the operation of this Law'? In their Lordships' view this construction, which can be compendiously described as making the word 'subsequent' in [section 68] mean subsequent to the date of issue of the first certificate issued in respect of the land in question, can legitimately be adopted for the purpose of reconciling the provisions of the two sections."

[71] It is clear from the sections quoted above that the indefeasibility principle is not absolute, however, only fraud and adverse possession can defeat the interest of a registered title holder. In this case, both adverse possession and fraud are being alleged. It is important to note that the respondent's claim is based on title acquired by adverse possession. The exceptions and their impact on registered title will be discussed below, under the headings, adverse possession and fraud.

2. The law on adverse possession

[72] Title to land can be acquired based on possession for a particular period of time, as stated in the LAA. In the text Commonwealth Caribbean Property Law, First Edition, Gilbert Kodilyne defined and explained the policy behind this concept as follows, at page 243:

> "The concept of adverse possession is rooted in the theory that the basis of title to land in English law is possession. The fact of possession gives a title to the land which is good against all persons except one who has a better right to possession. All titles to land are relative, in the sense that a person's title, including the person who has the documentary (or 'paper') title, is only good in so far as there is no other person who can show a better title. **The effect of adverse possession is that a person who is in possession as a mere trespasser or 'squatter' can obtain a good title if the true 'owner' fails to assert his superior title within the requisite limitation period in the particular jurisdiction.**" (Emphasis added)

[73] The statute of limitation gives a title (what is sometimes referred to as a 'possessory title' to the land) to persons who are in possession without the authorisation or consent of the registered title holder for over 12 years. Sections 3 and 30 of the LAA speak to the acquisition of title by adverse possession. These sections are set out in full below:

> "3. No person shall make an entry, or bring an action or suit to recover any land or rent, but within twelve years next after the time at which the right to make such entry, or to bring

> such action or suit, shall have first accrued to some person through whom he claims, or, if such right shall have not accrued to any person through whom he claims, then within twelve years next after the time at which the right to make such entry, or to bring such action or suit, shall have first accrued to the person making or bringing the same.
>
> …
>
> 30. At the determination of the period limited by this Part to any person for making an entry, or bringing any action or suit, the right and title of such person to the land or rent, for the recovery whereof such entry, action or suit respectively might have been made or brought within such period, shall be extinguished."

[74] Section 3 of the LAA limits the time within which action can be taken to recover land or rent to 12 years after the right to take action accrued. Section 4 of the LAA declares when time begins to run or the right would have accrued. Section 30 of the LAA then extinguishes the right and title of the registered owner after the expiration of the time limited.

[75] These sections of the LAA give effect to the historical policy of title to land being derived from possession in England, as recognised by Kodilyne in Commonwealth Caribbean Property Law. Our system of law is based on English law and that explains the seeming incongruence of these provisions with the main purpose of the registration of land. Through adverse possession, the registered title holder can be dispossessed of registered title or ownership of land under the ROTA.

[76] The acquisition of title to land by adverse possession features prominently in this case. The respondent is seeking to challenge a title issued to the appellant acquired from Mr Smith, who had obtained a registered title based on his claim of adverse possession. The respondent is, however, contending that the title, against which Mr Smith claims to have acquired registered title by adverse possession, had already been extinguished by her antecedent acquisition of title by adverse possession, in 2006, for the disputed property.

[77] Therefore, the central issue raised by this appeal, taking grounds 3, 4 and 5 together, is whether the registered title of a proprietor can be defeated in the absence of proven fraud on the part of his predecessor in title, who was registered as proprietor in pursuance of an entitlement to an adverse possession claim. If the answer is in the affirmative, then the learned judge was correct in refusing to strike out the respondent's claim in totality and withholding the entry of summary judgment on behalf of the appellant. If the answer is in the negative, the converse would apply and the learned judge's exercise of his discretion in favour of the respondent must be set aside. Central to the ensuing discussion is an understanding of the process by which land previously registered under the ROTA may be acquired by a stranger through adverse possession. To that end, I now turn my attention to the provisions of the ROTA.

Procedure for registration of land under the ROTA

[78] For all intents and purposes, the procedure for entering the name of an applicant as the registered proprietor of land previously registered under the ROTA, is materially indistinguishable from a first application to bring the land under the operation of the ROTA. The application to be registered as the proprietor of lands already under the operation of the ROTA is made under sections 85-87. On the other hand, an application to bring land under the umbrella of the ROTA for the first time is dealt with, broadly, under sections 24-42; together with what may be conveniently described as companion provisions, sections 43-46. Section 86(2) mandates that the provisions of sections 31-36 and 43-46, inclusive, shall apply to an application made under section 85. It will perhaps make the discussion more intelligible to commence with the provisions appertaining to an application for registration through adverse possession, then revert our attention to the procedure on a first application.

[79] Any person who asserts that he has acquired a possessory title over land previously entered in the Register Book of Titles may apply to the Registrar of Titles to be registered as the proprietor of that land, to the extent of his claim, under section 85 of the ROTA. A possessory title or title by adverse possession, is title obtained by virtue of the

provisions of sections 3 and 30 of the LAA. That is to say, the applicant, by his application, asserts that he has been in exclusive possession of the land in question for an unbroken period of 12 years without the let or licence of the registered owner (see section 3 of the LAA) and, by the fact of that adverse, undisturbed possession, extinguished the title of the registered owner (see section 30 of the LAA).

[80] The impact of sections 3 and 30 of the LAA upon land already under the administration of the ROTA is elegantly encapsulated by Dr Lloyd Barnett, in his article "The land Registration System and Possessory Titles – A Jamaican Perspective", published in the December 1998 edition of the West Indian Law Journal, at page 72. At para. 13 of the article, Dr Barnett wrote:

> "On the effluxion of the statutory periods, the Limitation Act expressly extinguishes the title of the owner who has been out of possession and implicitly confers a good and legal title on the adverse possessor. Since he can no longer be ejected by the former owner whether he was registered or not or by any third party he acquires a right in rem. Accordingly, he is able by proving that he acquired a possessory title to invoke the procedures of the Registration of Titles Act for obtaining registration of his interest."

The effect of adverse possession for the statutory period (12 years for privately owned land) on the title of the registered proprietor is to poke debilitating chinks of clay into the iron armour of indefeasibility which otherwise envelopes the registered title. I will return to the concept of indefeasibility below, which was authoritatively pronounced upon in **Chisholm v Hall**. Before doing so, I must continue to look at the application process by an adverse possessor.

[81] The application form for first time registration and subsequent adverse possessor is set out in the same First Schedule form, with the appropriate modifications. Chief among the modifications is the description of the application. Whereas an application for a first-time registration would recite, after a reference to the named applicant in the first person, "hereby apply to have the lands hereinafter described brought under the

operation of the Registration of Titles Act", the adverse possessor's application would substitute those words with, "hereby apply to be registered as the proprietor of the lands hereinafter described, such land having already been brought under the operation of the Registration of Titles Act" (see section 86(1)(a) of the ROTA). The application is accompanied by (i) evidence supportive of the application; (ii) an affidavit swearing to prescribed particulars; (iii) the prescribed fees to bring land under the ROTA; and (iv) a certificate declaring that all quit rents and property tax are paid up, as at the date of the application. The application of the adverse possessor then follows the path of the application for first time registration, with the necessary adaptations.

[82] In **Thomas Anderson v Monica Wan (As Personal Representative in the Estate of Iris Anderson)**, Morrison P, while acknowledging that it lacked the force of law, accepted the summary of the statutory requirements for an application to bring land under the rubric of the ROTA, found on the website of the National Land Agency. At para. [33] of the judgment, the learned President listed the following:

> "1. An application form prescribed by the Registration of Titles Act and signed by the applicant.
>
> 2. A Statutory Declaration by the applicant to prove possession (a statutory declaration is a written statement confirmed by oath).
>
> 3. Supporting statutory declarations to prove ownership from two persons who have known the land for at least 30 years and can verify ownership of the land throughout this period. It must be their personal history of the land.
>
> 4. An up-to-date certificate of payment of Property Tax.
>
> 5. Survey pre-checked diagram (if the land is being registered by plan).
>
> 6. Any other document you may have that proves ownership e.g. Receipt, Conveyance, Probate, Certificate of Compliance under the Facilities for Titles Act.

> 7. Applications otherwise than by Plan must describe the land so as to enable identification of the location of the parcel on the ground by reference to a land mark [sic] and must state the names by which the property is known. The description must state the distances along each boundary and the compass direction of each boundary line, the names of the abutting properties, the names of the adjoining owners, and where the abutting land is registered land, the title reference for the property.
>
> 8. There may be other documents required depending on the facts of each respective case. Persons who wish to register land should therefore seek the assistance of a lawyer."

[83] As was said above (see para. [77]), this application is then processed in compliance with sections 31-36 of the ROTA. For the sake of completeness, the sections preceding section 31 do not address the procedure attendant upon bringing the land under the ROTA. Section 31 mandates the Registrar to submit the application, together with the deeds, documents or other evidence of title, to one of the Referees of Title ('Referee') for his direction (the Minister appoints a panel of three to 10 Referees of Title who are qualified members of the Bar of Jamaica or other named territories under section 6 of the ROTA). The Referee must then satisfy himself of the following three things: (a) the applicant falls within the category of persons entitled to make the application (see section 28 of the ROTA); (b) the applicant is in possession of the land, either by himself or through a tenant; and (c) the applicant would be entitled to maintain and defend his possession of the land against any person claiming the same land or a part of it. If the Referee is satisfied of those criteria, he will provisionally approve the registration of the applicant (or his nominee) as having an absolute title to the land.

[84] The Referee does have the option of provisionally approving a qualified title, instead of an absolute title, if the applicant has not satisfied him that he would be entitled to maintain and defend his own possession of the land against an estate, right or interest that might arise, either before a specified date or under a specified instrument (see section 31 of the ROTA). If the Referee exercises this option, he must state, with specificity, the nature of the qualification affecting the title.

[85] The Referee may approve the registration of the title, despite the land being subject to liabilities, rights or interests which the ROTA does not require to be noted on the certificate of title as encumbrances (incumbrances is the old language used in the ROTA). Similarly, the Referee's approval does not have to abide encumbrances which may be specified in the certificate of title, and continuing, other than a mortgage (see section 32 of the ROTA).

[86] Once the Referee has provisionally approved the registration of a title, he communicates his provisional approval to the Registrar, with certain directions. The Referee directs the Registrar to cause a notification of his provisional approval of title to be advertised either in the Gazette or, at least one newspaper published in Kingston or the neighbourhood of the land that is the subject of the application. The Registrar is also directed to serve the notification upon any person the Referee may name and upon everyone who is either in possession or charge of all lands adjoining the land which is the subject of the application. The notification to these persons contains a warning that the land will be registered according to the terms of the provisional approval, unless a caveat forbidding its registration is lodged within the time stipulated in the notification (see section 33 of the ROTA).

[87] In furtherance of the Referee's directions, the Registrar also causes the following to be done. A notice of the provisional approval, together with the approved description or identification of the land, is published. A copy of that notice is posted at a conspicuous place in the office of the Registrar of Titles. A copy of the notice is also sent by registered mail, in an envelope clearly marked, "Office of Titles, Jamaica", to the persons listed in the application as occupiers of the land, if the applicant is not the occupier, as well as to the occupiers of the adjoining (contiguous) lands (see section 36 of the ROTA).

[88] The notification under section 33 would have warned its recipients that the way to prevent the registration of the land is to lodge a caveat (see para. [85] above). Section 43 of the ROTA instructs any person claiming an estate or interest in the land to lodge a caveat with the Registrar forbidding its registration. The caveat may be lodged either by

the person claiming the estate or interest ('caveator'), or his agent but must be lodged within the time specified in the notification. The caveator is required to particularize the estate or interest that is claimed; and support it by statutory declaration, if the Registrar so requires.

[89] The lodging of the caveat evokes two responses from the Registrar. Firstly, the Registrar must notify the applicant that the caveat has been lodged. Secondly, the registration exercise is put in abeyance. The suspension of the registration procedure terminates on the happening of one of three events. That is, the caveator may withdraw it, the caveat may lapse, or the caveat may be ordered removed by the Supreme Court (see section 44 of the ROTA).

[90] The caveat automatically expires at the end of one month from its date of lodgement with the Registrar, if no action is taken by the caveator. The caveat will, however, stay in place if the caveator acts within that time to prosecute his claim in a court of competent jurisdiction. The caveator must serve a notice of the proceedings upon the Registrar (see section 45 of the ROTA).

[91] Naturally, if there is no objection to the application for registration as provided for by the ROTA (lodging of a caveat), the registration will proceed to the point of the issuance of a certificate of title in the name of the applicant or his nominee (see section 37 of the ROTA).

[92] From this look at the provisions of the ROTA, the applicant for registration must meet two primary criteria before the Referee will provisionally approve the registration. Firstly, the Referee must be satisfied that the applicant is in possession of the land, personally or through his tenant. Secondly, that possession must be such as to invest in the applicant the legal entitlement to maintain and defend his possession against any competing claim to either the same land or a part of it. This aspect of the approval procedure is entirely on paper. The ROTA speaks to Referee acting "on consideration of the deeds, documents or other evidence" (see para. [82] above).

[93] The necessity for the applicant to satisfy these criteria is further underlined by the notice phase of the process. In the notification of the Referee's provisional approval to the sundry occupiers of the contiguous lands, the Registrar must also serve a copy of the published notice, by registered post, on the occupiers of the land in question, if the land is not occupied by the applicant (see para. [86] above). The registration process cannot, therefore, be completed without service of the notice of provisional registration on the present occupiers of the relevant land, unless the applicant has sworn in his affidavit and or statutory declaration that he is in fact in possession, and not through a tenant.

[94] It seems fair to say that the integrity of the land registration procedure up to the point of provisional approval is based on the assumed authenticity and veracity of the documents of title, to sum, the requirements in a phrase. It is from these documents of title that the Referee not only forms the opinion that approval for registration may be granted provisionally, but also who must be served with notification of his decision. Whereas the persons in charge or possession of the adjoining lands must be served, the Referee appears to have a discretion as to who else should be served. So that, if the applicant is not himself in physical possession but through tenants, and that fact is omitted from the application, the Referee would have no basis to direct the Registrar to cause service to be effected on the occupier or occupiers of the land, although the applicant is not himself in physical possession.

[95] Beyond that, the requirement of publication in the Gazette or print media in circulation either in the city of Kingston or the neighbourhood of the land makes the process of land registration very transparent. This undergirds the requirement of open undisturbed historical possession (possession for the statutory period). Together, these features inhere the system of land registration with the kind of rigour that reduces the possibility of more than one viable, contemporaneous, competing claim of adverse possession to a vanishing point, absent proof of fraud.

[96] In treating with an initial or original application to bring land under the operation of the ROTA, the Privy Council in **Chisholm v Hall** said, at page 739:

> "… The registration of the first proprietor is made to destroy any rights previously acquired against him by limitation, in reliance, no doubt, on the provisions as to investigation of the title to the property and as to notices and advertisements, which are considered a sufficient protection to anyone claiming any rights of that description ..."

While the Board was there interpreting the scheme of section 70 of the ROTA, in relation to the impact of a subsequent transfer of the registered title vis-à-vis an intervening possessory title, those observations are apt in the present discussion. It would perhaps be going too far to say the process of registering a title, acquired by adverse possession subsequent to the registration of the first proprietor, is made to destroy any competing rights. However, the process certainly acknowledges and solidifies the paramountcy of the title of the adverse possessor. The paramountcy of title of the adverse possessor is established not only by the notices and advertisements, but by the requirement to demonstrate, by his possession, the entitlement to maintain and defend his possession against any person claiming the same, or part of the same, land (see section 31 of the ROTA and para. [82] above).

3. Fraud

[97] This takes me to the major proposition in the appellant's ground 3. The appellant contends that the grant of title to a person who acquires title by adverse possession precludes a competing claim for title by adverse possession, in the circumstances alleged by the respondent, unless the respondent can establish fraud. The learned judge found that the respondent did not explicitly allege fraud in her statement of case on the part of the appellant (see para. [30] of the judgment). However, since the respondent contended (by virtue of the declaration sought) that the appellant was not a bona fide purchaser for value without notice of her interest, the learned judge thought it prudent to examine the implication of fraud on the part of the appellant's predecessor in title (the absent defendant). The learned judge specifically found that the case against the appellant was unsustainable without any allegation of actual fraud (see para. [38] of the judgment). Those findings left the claim against the appellant in a peculiar position.

[98] The peculiarity confronting the learned judge was this. Being fully aware of the indefeasibility of the appellant's registered title, save for fraud or adverse possession (see paras. [21]-[24] of the judgment), and finding no actual fraud alleged against the appellant, the following question confronted the learned judge. Could the claim against the appellant continue in the absence of the appellant's predecessor in title? Although the learned judge accepted that the claim no longer subsisted against the appellant's predecessor in title, he rejected the submission that that rendered the claim non-viable against the appellant (see paras. [51]-[53] of the judgment). Ultimately, the learned judge concluded the claim could be pursued against the appellant only. At para. [54] of the judgment, he said:

> "In the **Recreational Holdings case** ..., the alleged adverse possessor who dispossessed the former title owner of the disputed parcel of land that was the subject of the claim, was not made a party to the claim. Every case is different and whilst therefore, that **Recreational Holdings** judgment may not be a very useful precedent as to who should be parties in a claim such as this, nonetheless, the claim at hand does not have to be pursued by the claimant as against anyone [sic] than the registered title holder, to the disputed property at present."

The learned judge accepted that **Recreational Holdings**' precedential value for the joining of a party's predecessor in title in cases of this nature was negligible. However, he appears to have placed some reliance on **Recreational Holdings** in citing it as an iteration in which there was no such joinder.

[99] **Recreational Holdings**, although a case in which adverse possession was an issue, is distinguishable from the facts of the present appeal for two main reasons. Firstly, the question of fraud never arose. Secondly, in the words of Morrison P, at para. [9] in the decision of this court, **Recreational Holdings** was "a case of dual registration" of adjoining parcels of land. The claim for adverse possession arose in the context of the later registered owner, 'C', being in possession, for the statutory period, of a strip of land which was included in the certificate of title issued to 'C' and the previous title owner of

the adjoining land, 'A'. A then sold his land to B. The question in that case boiled down to whether A's title to the strip of land occupied by 'C' had been extinguished by the operation of the LAA sections 3 and 30, by the time of 'A's sale to B. Both this court and the Privy Council held that 'A' (who was not a party to the claim) had no title to pass to 'B'. Hence, 'C' had become the owner of the strip of land by adverse possession. From this encapsulation of the facts, it is clear that the claim for adverse possession was free-standing and, therefore, did not require the joining of the previous owner of the strip of land. Accordingly, **Recreational Holdings** is absolutely not a "useful precedent as to who should be parties in a claim such as this".

[100] Although the learned judge seems to have recognised he was on shaky ground with **Recreational Holdings** as a precedent to allow the claim against the appellant to go forward in the absence of the claimant's predecessor in title, he decided that there was another basis upon which the claim had a prospect of success. That is to say, if the respondent could establish possession for the statutory period, the claim should succeed. In the learned judge's thinking, as articulated at para. [55] of the judgment:

> "In a case of this nature, the court ought to satisfy itself as to whether the requisite period of adverse possession exists in the [respondent's] favour. If it does, then, based on the law earlier referred to, the claim should succeed. The 2nd defendant [respondent's predecessor in title] does not need to be made a party to this claim. At most, he could be made an interested party, but such does not need to be done, in order for this claim to be properly resolved."

In short, this being a claim for adverse possession, the only disputants necessary for resolution of the question are the appellant and the respondent; the person against whom actual fraud was alleged (the respondent's predecessor in title) became, at best, "an interested party". I must, therefore, examine the legal principles, "the law earlier referred to", on which he anchored his decision, to see whether he was correct in so holding.

[101] The learned judge discussed the indefeasibility of a registered title, quoting sections 68 and 70 of the ROTA, being of the view, correctly, that the case "concerns the

circumstances in which a registered title may be defeated" (see paras. [21]-[24] of the judgment). In respect of adverse possession, the learned judge referenced sections 3 and 30 of the LAA then turned his attention to **Recreational Holdings**. He noted that in **Recreational Holdings,** their Lordships followed **Chisholm v Hall**, abstracting the passage from **Chisholm v Hall** that was quoted in **Recreational Holdings** (see paras. [44]-[47] of the judgment). I cited a part of that passage earlier but am constrained to set out the full extract here, for clarity and ease of reference.

> "The scheme of [section 70] is reasonably plain. The registration of the first proprietor is made to destroy any rights previously acquired against him by limitation, in reliance, no doubt, on the provisions as to the investigation of title to the property and as to notices and advertisements, which are considered a sufficient protection to anyone claiming any right of that description. But from and after the first registration the first proprietor and his successors are exposed to the risk of losing the land or any part of it under any relevant statute of limitations to some other person whose rights when acquired rank as if they were registered incumbrances noted on the certificate, and accordingly are not only binding upon the proprietor against who, they are originally acquired but are not displaced by any subsequent transfer or transmission."

[102] The learned judge then noted the meaning of the word "subsequent" which appears in section 68 of the ROTA that was accepted by the Privy Council. At para. 17 of its judgment, the Privy Council, in **Recreational Holdings**, approved the meaning ascribed to the word in **Chisholm v Hall**. When section 68 is read against the background of the wording of the proviso to section 70 of the ROTA, "acquired over such land since the same was brought under the operation of the Act", "subsequent" in section 68 means "subsequent to the first registration". Accepting that "subsequent" means "subsequent to the first registration" in contradistinction to "subsequent to the registration of the respective owner", the learned judge's reasoning then led him to observe that the first registration was in November 1982 (see para. [48] of the judgment).

[103] It was a short step from there to the learned judge's conclusion that, for the respondent to succeed, she had "to prove her adverse possession against the title of the

previous owners" (see para. [49] of the judgment). The learned judge then opined, at para. [50]:

> "If she can prove same, the effect of that, would have been that the [appellant] could not have obtained a valid registered title to the disputed property. In that circumstance, the [appellant] could not have obtained a valid registered title to same, because the party who would have transferred that purportedly valid title to them, that being the [appellant's predecessor in title] would have had, at that time, no valid title to transfer, as [the respondent] was the person who by virtue of her possession, the owner of the disputed property which title was extinguished in her favour."

As I understand the learned judge, this was an application of the principles derived from **Chisholm v Hall** and ratified in **Recreational Holdings**. The question is, was this a correct application of the principles?

[104] Respectfully, it is impractical, as well as illogical, to reduce the contest of the bona fides of the appellant's registered title to proof of the respondent's adverse possession against the original title holders, in the circumstances of this case. On the known facts, the title of the original title holders no longer exists. In order for the appellant's predecessor in title to have obtained title to the land in question, the Registrar would have had to cancel the titles issued to the original registered owners (see section 87 of the ROTA). Consequently, there is no path open to the respondent to establish her claim to adverse possession of the same land that does not traverse the issue of title to the appellant's predecessor in title. The respondent, at trial, would have to allege and prove that the appellant's predecessor in title fraudulently misrepresented to the Registrar that he had obtained a possessory title. Specifically, the respondent would have to aver and prove that it was a fraudulent misrepresentation that the appellant's predecessor in title was in possession of the land for the statutory period; a corollary to that would perhaps be a misrepresentation that the land was untenanted, since the respondent alleges her own occupation which would have entitled her to service of the notice published by the Registrar. It is a reasonable inference from the matters placed before the learned judge

that the respondent was not served with the notice. In other words, as I intimated earlier, the respondent would have to frontally attack the veracity and authenticity of the documents of title, submitted to the Registrar, which the Referee would have considered before making his provisional recommendation to the Registrar (see paras. [82]-[86]; [91]-[94] above).

[105] To assert a claim with a reasonable prospect of success against the appellant, without proof of fraud against the appellant's predecessor in title, inverts the principle laid down in **Chisholm v Hall** and **Recreational Holdings**; namely, a person whose title has already been extinguished cannot pass a valid title. The principle contemplates a title holder who purports to transfer title to his land, without the knowledge that by the effluxion of the statutory period, his title to all or a part of the property had been extinguished (**Recreational Holdings** is an example of this). The principle expresses itself in the incapacity of the intermediate party to make a lawful transfer of title to the property.

[106] The learned judge was of the view that the respondent could, at trial, by showing her own adverse possession against the original registered owners, nullify the legal capacity of the appellant's predecessor in title to pass title. The difficulty with this position is that it contemplates the possibility of contemporaneous, independent adverse possessors of the same land. As I tried to show (at para. [78] above), this is inconsistent with the procedure for the registration of title under the ROTA. Therefore, as I said earlier, the respondent cannot hope to establish title by adverse possession against the original registered title holders without successfully impeaching the indefeasibility of the title of the appellant's predecessor in title through the portal of fraud. Simply put, if she was in adverse possession for the time alleged then the appellant's predecessor in title cannot have honestly represented that he too was in possession.

[107] Assuming, for the sake of argument, that the respondent could establish fraud in the registration of the appellant's predecessor in title, would that have any impact on the appellant's title? In the circumstances of this case, the answer is an unqualified no. Firstly,

the learned judge, relying on **Half Moon Bay Limited v Crown Eagles Hotel Limited** [2002] 2 UKPC 24, correctly accepted that proof of fraud under the ROTA must be against the current title holder (see para. [35] of the judgment). After what appears to be a scrupulous review of the material before him, the learned judge expressly found an absence of anything to impute actual fraud to the appellant and, therefore, the respondent had no realistic prospect of succeeding on the claim alleging fraud on the part of the appellant.

[108] Secondly, the ROTA exempts the registered title holder from the fraud of his predecessor in title unless the current registered owner is tainted by that fraud. **Assets Company Ltd v Mere Rolhi** [1905] AC 176, a case relied on by the appellant and considered by the learned judge, puts it beyond doubt that fraud on the part of the person or persons under whom the registered proprietor claims cannot operate to make his title defeasible, unless the registered proprietor's asserted veil of ignorance of the fraud is pierced by evidence that the fraud was brought to his attention or that of his agent. At page 210 of that judgment, their Lordships said, among other things:

> "… the fraud which must be proved in order to invalidate the title of a registered purchaser for value, whether he buys from a prior registered owner or from a person claiming under a title certified under the Native Land Acts, must be brought home to the person whose registered title is impeached or to his agents. Fraud by persons from whom he claims does not affect him unless knowledge of it is brought home to him or his agents. The mere fact that he might have found out fraud if he had been more vigilant, and had made further inquiries which he omitted to make, does not itself prove fraud on his part. But if it be shewn that his suspicions were aroused, and that he refrained from making inquiries for fear of learning the truth, the case is very different, and fraud may be properly ascribed to him. A person who presents for registration a document which is forged or has been fraudulently or improperly obtained is not guilty of fraud if he honestly believes it to be a genuine document which can properly be acted upon."

The learned judge correctly applied these principles to the appellant. He specifically found a vacuum in the evidence that the appellant's suspicions were aroused to put it on a path of inquiry. Consequently, actual fraud was needed to substantiate the claim and the respondent's statement of case was devoid of any such averment (see paras. [37]-[38] of the judgment)

[109] Having ruled out fraud on the part of the appellant, whether directly or by being smeared with the alleged fraud of its predecessor in title, the case against the appellant was shorn of any possibility of success. That is to say, since no fraud could be established against the appellant, the appellant's title to the property is indefeasible. The indefeasibility of the appellant's title automatically removes the appellant from the claim as a litigant.

<u>The refusal to strike out</u>

[110] And so, I come to the learned judge's refusal to strike out the respondent's claim in toto. His refusal to strike out the claim in its entirety was based on his understanding that the claim for adverse possession could be pursued in the absence of the appellant's predecessor in title. That begs the question, how could that claim be prosecuted with only the appellant on the opposite side? Any attempt to embark on a trial would be fraught with difficulties.

[111] Significantly, there is no valid claim subsisting against the appellant's predecessor in title. The learned judge observed that there was no order extending the life of the claim which had not been served. Since the trial could not proceed in respect of an invalid claim, the contest would be, as the learned judge supposed, between the appellant and the respondent, the spectre of which presents a legal conundrum for the appellant. The confusion and difficulty that would confront the appellant would manifest itself in the appellant's inability to traverse any of the averments of adverse possession advanced by the respondent. At the end of this 'show trial', the appellant would face the prospect of judgment being entered and a costs order made against it, in circumstances of the legal handicap adverted to.

[112] Any judgment so entered would be a horse of an unknown breed. It could not be properly described as a judgment in default of filing either an acknowledgement of service or a defence, since the appellant would have responded to the claim in the ways prescribed by the CPR. Neither could it be a default judgment against the absent predecessor in title because he had not been served. And, although the appellant would not have been able to join issue with the averments of adverse possession, the judgment could not be described as by admission. In all practicality, a judgment entered in favour of the respondent would have the complexion of default judgment owing to the appellant's inability to cross swords with the respondent on any issue of adverse possession. A more far-reaching impact of a 'default judgment', in these circumstances, would be to rend the fabric of indefeasibility at its core and mock the Torrens system of land registration.

[113] The point is, as I tried to articulate earlier, judgment could not be lawfully entered against the appellant without proof of fraud against the appellant. Furthermore, the claim for adverse possession is not viable without also proving fraud against the appellant's predecessor in title. And that fraud would have to infect the appellant.

[114] On this vital issue of fraud, it is interesting to note that the claim as originally filed and pleaded (22 January 2018) neither contained any allegation of fraud against the appellant nor joined the appellant's predecessor in title. The latter was mentioned in the particulars of claim as having made a fraudulent application for (title by) adverse possession. The amended claim and particulars of claim were filed on 21 June 2019. It was in the amended particulars of claim that the respondent alleged that the appellant purchased the property "without any or any adequate inquiry as to the nature of the Claimant's occupation/possession of the said property".

[115] As I demonstrated above, the learned judge found this solitary allegation of fraud against the appellant to be less than the actual fraud required by law. Having made that finding, any hope of further pursuing the claim against the appellant became palpably

forlorn and the learned judge should have acted under rule 26.3(1)(c) of the CPR. Rule 26.3(1)(c) is extracted below:

> "26.3 (1) In addition to any other powers under these Rules, the court may strike out a statement of case or part of a statement of case if it appears to the court-
>
> a) that there … proceedings;
>
> b) that the … the proceedings;
>
> c) that the statement of case or the part to be struck out discloses no reasonable grounds for bringing or defending the claim; or
>
> d) that the … requirements of Parts 8 or 10."

A claim is to be struck out if, on the face of the statement of case, no reasonable grounds for bringing the claim are not evident.

[116] The learned authors of Commonwealth Caribbean Civil Procedure, 4th edition, summarise the position on striking out in the following extract, at page 206:

> "This power falls under the rubric of the court's case management powers. Like the farmer separating the wheat from the chaff, the power to strike out allows the procedural judge to set apart cases so weak that they have no real prospect of success from those requiring a full investigation at trial. This, of course, is to do no more than give effect to the overriding objective of 'dealing justly with a case', which includes saving expense (Rule 1.1 (2)(b) and ensuring that it is dealt with expeditiously and fairly (Rule 1.1 (2) (d). in the exercise of the power to strike out, the court is enjoined to give effect to the overriding objective (Rule 1.2). the use of the power to strike out is clothed with judicial conservatism which antedates the promulgation of the CPR. The old Rules (RSC) required sparing use of this power. That attitude has been transitioned to the new (CPR) regime. The dictum of Cooke JA in *Gartman v Hargitay* [(2007) Supreme Court, Jamaica, No 116 of 2005] best encapsulates the post-CPR position: 'The striking out … of a claimant's statement of case … is a draconian order. Such an order, while compelling in

> suitable circumstances, should be informed by caution, lest litigants are deprived of access to the 'judgment seat'. In my view, this drastic step of striking out a statement of case should only be considered when such statement of case can be categorised as entirely hopeless."

In essence, the power to strike out is a sword to be wielded with Solomonic wisdom. While judicial restraint should characterise its use, compelling cases demand that it be employed without reticence.

[117] Shorn of proof of fraud, together with the impossibility of obtaining any of the declarations and orders sought against the appellant, it was pellucid that there were no reasonable grounds for bringing the claim against the appellant. In fine, there were compelling reasons to strike out the claim against the appellant.

<u>The refusal to enter summary judgment</u>

[118] That takes me to the charge that the learned judge erred in not entering summary judgment for the appellant The bases on which the learned judge refused summary judgment are, respectfully, flawed. Firstly, the respondent's claim for adverse possession cannot succeed on the principles derived from **Chisholm v Hall** and **Recreational Holdings**, adverted to in the judgment at para. [55] as "based on the law as earlier referred to". In those cases, the contest for title to the disputed land was between two legal title holders (the paper title holder and the claimant to a possessory title). On the triumph of the possessory title holder, the purported transfer of the land was reversed, since the title was already extinguished. No question of fraud arose in those cases.

[119] In this case, as I tried to demonstrate earlier, the respondent cannot establish her claim to adverse possession without also alleging and proving fraud against the appellant's predecessor in title. However, proof of that fraud will produce no chinks in the iron armour of indefeasibility clothing the appellant's title. Without the proof of fraud affecting the appellant itself, the appellant is left in the enviable position of what is called in equity, 'the Chancellor's darling'; that is, a bona fide purchaser for value without notice. In that circumstance, the legal principle derived from **Chisholm v Hall** and

Recreational Holdings (that a paper title extinguished by adverse possession cannot be subsequently transferred) is of no application.

[120] Any attempt to extend the principle of non-transferability of a previously extinguished title, to a bona fide purchaser for value without notice, is not only inconsistent with **Half Moon Bay Limited v Crown Eagles Hotel Ltd** and **Assets Company Ltd v Mere Roihi**, but also section 71 of the ROTA. Section 71 is extracted below, in so far as is relevant:

> "Except in the case of **fraud**, no person contracting or dealing with, or taking or proposing to take a transfer, from the proprietor of any registered land, … shall be required or in any manner concerned to enquire or ascertain the circumstances under, … which such proprietor or any previous proprietor thereof was registered, … or shall be affected by notice, actual or constructive, of any … unregistered interest, any rule of law or equity to the contrary notwithstanding; and the knowledge that such … unregistered interest is in existence shall not of itself be imputed as fraud." (Emphasis added)

[121] In essence, by virtue of this provision, when the appellant contracted to take the transfer of the land from its predecessor in title (then the proprietor of the registered land), the appellant was not required by law to trace the root of its predecessor's title. Or, in the language of the draftsman, the appellant was not bound to "enquire or ascertain the circumstances under which" its predecessor in title came to be registered as the proprietor. Therefore, absent the blight of fraud, the appellant received a good title. As I tried to show above, the integrity of the title so obtained cannot be afterwards impugned by proving fraud in the appellant's predecessor in title.

[122] That said, in **Chisholm v Hall** (at page 740), it was recognised that the combined effect of sections 68 and 70 of the ROTA casts a duty upon the purchaser of registered land to look behind the register for the accrual of any adverse limitation interest, where the transaction, or proposed transaction, is taking place at or after the expiry of the limitation period since first registration. In this case, the appellant purchased the land, in 2017, from the person who obtained a possessory title to it (on 13 October 2016),

purporting to displace the proprietor who held the land since its first registration. The rationale underlying the look behind the register is to ensure that the registered proprietor is still seised of all the property that is proposed to be transfer under the contract. On the face of the title, no adverse limitation interest could have accrued since the appellant's immediate predecessor had obtained title by adverse possession against the original registered proprietor, less than a year before the transfer to the appellant.

[123] Consequently, in my thinking, even if the appellant had made no inquiries, in these circumstances, it would have complied with **Chisholm v Hall**. However, the evidence before the learned judge is that the appellant made enquiries of its predecessor in title concerning the respondent's status and the respondent brought no evidence to refute the allegation that she had been the tenant of the appellant's predecessor in title but had fallen into arrears of rent. This underlines the point made earlier that the respondent cannot hope to establish her claim to adverse possession of the same land without also alleging and proving fraud against the appellant's predecessor in title.

[124] That takes me to the second basis, joining the appellant's predecessor in title for purposes of indemnity. Rule 18.3 of the CPR, to which the learned judge adverted, would allow the appellant, having filed an acknowledgment of service, or a defence, to make an ancillary claim for contribution or indemnity against its predecessor in title (the 2nd defendant below). Although the learned judge did not make the possibility of that filing a requirement to the claim proceeding, his reference to the appellant seeking indemnification elides his finding of, in essence, unimpeachable conduct on the part of the appellant in obtaining title. At para. [57] of the judgment, the learned judge said:

> "… If the [appellant] wishes indemnification from [its predecessor in title] if they are found liable to the [respondent], then it is for them to seek to join that party. See in that regard: **Rule 18(3) of the CPR**." (Emphasis as in the original)

Respectfully, this inverts the true position. Since the appellant has obtained a good title, by virtue of being a bona fide purchaser for value, the appellant has no need to be indemnified.

Conclusion

[125] The upshot of the preceding analysis is that the learned judge was wrong in concluding that the case against the appellant has a realistic prospect of success. Accordingly, the learned judge erred in refusing to strike out the claim against the appellant in its totality and, denying it the entry of summary judgment. I would, therefore, allow the appeal, set aside the impugned orders of the learned judge, strike out the claim against the appellant and enter judgment, summarily, in its favour. I would also award the appellant the costs of this appeal and in the court below, to be agreed or taxed.

EDWARDS JA

ORDER

1. The appeal is allowed.
2. Orders 2, 3 and 5 of the orders made by K Anderson J on 10 December 2021 (denying in part the appellant's application to strike out the entirety of the respondent's claim; refusing the appellant's application for summary judgment; awarding the appellant two-thirds (66 2/3%) of the costs of its application) are set aside.
3. The respondent's statement of case against the appellant is struck out in its entirety.
4. Summary judgment is entered for the appellant.
5. The costs of the appeal and in the court below are awarded to the appellant, to be taxed if not agreed.