

**(1) Charles Gardener and (2) Inez Walker**

*Appellants*

v.

**Edward Lewis**

*Respondent*

FROM

**THE COURT OF APPEAL OF JAMAICA**

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JUDGMENT OF THE LORDS OF THE JUDICIAL  
COMMITTEE OF THE PRIVY COUNCIL,

Delivered the 22nd June 1998

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*Present at the hearing:-*

Lord Browne-Wilkinson  
Lord Jauncey of Tullichettle  
Lord Slynn of Hadley  
Lord Nolan  
Lord Hutton

*[Delivered by Lord Browne-Wilkinson]*

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This appeal from the Court of Appeal of Jamaica concerns land situate in Belmont in the Parish of Westmoreland, Jamaica. The whole of the land is registered under a Certificate of Title issued on 14th May 1987 to the appellants, Charles Gardener (sometimes known as Charles Pinnock) and Inez Walker, for an estate as joint tenants in fee simple. In their conduct of the present litigation, the appellants have chosen not to explain how they came to be so registered, choosing instead to rest their case on the bald assertion that they have been advised that the issue to them of the Certificate of Title makes them the legal and equitable owners of the whole of the land.

On the other side, the case made by the respondent, Edward Lewis, is as follows. He deposes that his mother, Alice Gardener, was given the land by her father in 1922, that she lived on the whole of the land exercising all rights

of ownership over it until her death in 1975. He produces her last will and testament under which Alice Gardener left Edward Lewis and his brother Clement Noble three and a half acres each out of the land and the remaining one acre was bequeathed to Charles Gardener. Probate of the will of Alice Gardener was on 4th November 1987 granted to Isaac Samuels and Harold Henry, neither of whom is a party to the present proceedings. The respondent's brother, Clement Noble, is not a party to these proceedings but their Lordships were told that he had a separate action against Charles Gardener and Inez Walker claiming his share of the land, which was awaiting the outcome of the present appeal.

The claim in the action is for a declaration that the plaintiff is entitled to an interest in the registered land to the extent of three and a half acres and for orders directing the appellants to take the steps necessary to vest such three and a half acres in the respondent. The claim was upheld by the trial judge and the Court of Appeal.

The case is in a very unsatisfactory state. This is primarily due to the fact that the appellants have been maintaining an entirely erroneous view of the law applicable viz. the view that the registration of their title gives them an unchallengeable title to the whole of the eight acres not only at law but also in equity. They are mistaken.

The position is as follows. The Registration of Titles Act provides for a Torrens system of land registration in Jamaica. Under section 28, a person claiming to be the owner of the fee simple either at law or in equity can apply to have the land brought under the operation of the Act. If he does so, the application is examined by a referee and, if given provisional approval, notice of the claim is advertised. On the successful conclusion of that process a Certificate of Title is registered and a copy of the registered certificate provided to the registered proprietor.

The consequences of registration are laid down by sections 68, 70 and 71 of the Act which, so far as relevant, provide as follows:-

“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:

...

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.”

From these provisions it is clear that as to the legal estate the Certificate of Registration gives to the appellants an absolute title incapable of being challenged on the grounds that someone else has a title paramount to their registered title. The appellants’ legal title can only be challenged on the grounds of fraud or prior registered title or, in certain circumstances, on the grounds that land has been included in the title because of a “wrong description of parcels or boundaries”: section 70.

But it is clear that these provisions relate solely to the legal title to the land. Although the owner of the fee simple in equity is authorised to apply for first registration of the land, apart from that all trust interests, whilst continuing to exist, are kept off the register: see section 60. The land certificate is conclusive as to the legal interests in the land. But that does not mean that the personal claims (e.g. for breach of contract to sell or to enforce trusts affecting the registered land against the trustee) cannot be enforced against the registered proprietor. In *Frazer v. Walker* [1967] A.C. 569 at page 585 Lord Wilberforce said:-

“... their Lordships have accepted the general principle that registration under the Land Transfer Act, 1952, confers upon a registered proprietor a title to the interest in respect of which he is registered which is (under sections 62 and 63) immune from adverse claims, other than those specifically excepted. In doing so they wish to make clear that this principle in no way denies the right of a plaintiff to bring against a registered proprietor a claim in personam, founded in law or in equity, for such relief as a court acting in personam may grant. That this is

so has frequently, and rightly, been recognised in the courts of New Zealand and of Australia: see, for example, *Boyd v. Mayor, Etc., of Wellington* [1924] N.Z.L.R. 1174, 1223 and *Tataurangi Tairuakena v. Mua Carr* [1927] N.Z.L.R. 688, 702."

In their Lordships' view those principles are equally applicable to the Torrens system of land title applicable in Jamaica.

How then do those principles apply in the present case? First, the Court of Appeal held that, because under the will of Alice Gardener, Charles Gardener was only entitled to one acre whereas he had been registered as proprietor of the whole eight acres, it was permissible to rectify the Certificate of Title so as to refer only to one acre, there having been a "wrong description of parcels or boundaries" within the meaning of section 70. Their Lordships are unable to accept this view which is inconsistent with the long established principle laid down in *Hamilton v. Iredale* (1903) 3 S.R.N.S.W. 535, a case which unfortunately was not drawn to the attention of the Court of Appeal. In that case Walker J. (at page 550) said in relation to a similar provision in the Real Property Act of New South Wales:-

"Misdescription is where, intending to describe A, I describe B, or so describe A as to make it include B; but it is no misdescription if I describe correctly the land I am applying for, though the land is not mine. It is then a case, not of misdescription, but of no title, and the position depends on my conduct in the matter."

Plainly in this case the appellants were not misdescribing the one acre devised to one of them, Charles, by the will of Alice Gardener but were claiming the whole of the eight acres under some other claim of right. In their Lordships' view this case cannot be treated as a misdescription of parcels or boundaries.

This leaves the case in an impossible position. The unchallenged evidence is that Alice Gardener had title to the land at her death and that it accordingly formed part of her estate. On that basis, Alice Gardener's estate,

represented by the executors to whom probate has been granted, may have an equitable right enforceable against the legal estate vested in the appellants to recover the whole land and then administer it properly by transferring three and a half acres each to the respondent and his brother and the remaining one acre to Charles. Alternatively the respondent, as an underpaid devisee, may have an equitable claim in personam and in rem against the appellants either on the grounds that they have intermeddled in the administration of the estate of Alice Gardener or alternatively on the grounds that they have a claim in equity against the property comprised in the estate. Accordingly, on one view either the executors or the respondent have personal claims in equity enforceable against the appellants which may enable the court to make an order against the appellants, as registered proprietors, to give effect to the equitable rights of the respondent.

On the other side, it may be that, when the facts are known, the appellants obtained registration of their title on the grounds that they had acquired title by adverse possession against Alice Gardener during her lifetime or against her estate after her death. On that basis, the appellants would have obtained a title paramount to that of Alice Gardener and therefore paramount to any claims arising under her will. On this view, the appellants' registered title would be unchallengeable save on the grounds that they had obtained it by fraud.

The truth of the matter is that none of the relevant evidence is before the court. There is therefore no option but to remit the case for a rehearing at which all the relevant facts can be investigated.

Their Lordships will accordingly humbly advise Her Majesty that the appeal should be allowed and the case remitted for rehearing. Since the waste of costs already incurred has been almost exclusively due to the wrong view of the law adopted by the appellants, the appellants must pay the respondent's costs both before their Lordships and in the courts below.