JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 122/97

BEFORE: THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MR. JUSTICE HARRISON, J.A.
THE HON. MR. JUSTICE PANTON, (Ag.)

BETWEEN:	H.G. WILLIAMS CONSTRUCTION & REAL ESTATE LIMITED	APPELLANT
AND	THE ST. THOMAS PARISH COUNCIL	1ST RESPONDENT
AND	THE REGISTRAR OF TITLES	2ND RESPONDENT
AND	THE ATTORNEY GENERAL OF JAMAICA	3RD RESPONDENT

Raphael Codlin, Esq., instructed by Raphael Codlin & Co., for the appellant

Miss Carol Vassall, instructed by C.M. Vassall & Co., for the 1st defendant/respondent

Lennox Campbell, Esq., Senior Assistant Attorney General, instructed by the Director of State Proceedings, for the 2nd and 3rd defendant/respondents

June 16, 1999

HARRISON, J.A.

This is an appeal from the order of Cooke, J. on 14th October, 1997 that:

(1) The originating summons is not the appropriate process for a declaration that the plaintiff company (the plaintiff) is the registered proprietor of Lot 998 registered at Volume 1071 Folio 8 of the Register Book of Titles because of the competing claims necessitating extensive cross-examination.

(2) The proceedings by originating summons shall proceed as if begun by writ and the affidavits filed shall be regarded as pleadings.

(3) The court would decline to entertain an application for entry of judgment on the admissions of the 1st defendant/respondent The St. Thomas Parish Council (the Parish Council) under the provisions of section 307 of the Judicature (Civil Procedure) (Code) Act, all the issues to be heard simultaneously and,

Costs to be in the cause.

The plaintiff/appellant Company (H. G. Williams Construction and Real Estate Ltd.) alleges that it is the registered proprietor of Lot 998 at Albion Estate in the parish of St. Thomas registered at Volume 1071 Folio 8 of the Register Book of Titles having purchased it from one Gloria Miller bona fide for value without notice of any fraud. The said plaintiff had no knowledge that the said lot was designated as a playing field, nor any knowledge of any fraud committed in that respect and therefore the plaintiff's title is valid and indefeasible, in accordance with the provisions of section 68 and 163 of the Registration of Titles Act.

The 1st defendant/respondent argued before this Court and also in the court below that the said Lot 998 was part of Albion Estate development, disclosed on the original sub-division plan DP#3640 submitted to the 1st defendant/respondent for approval and expressly designated thereon as a playing field and the plaintiff had knowledge of this because its Title registered at Volume 1071 Folio 8 refers specifically to the said plan DP #3640. In addition, on an application to adduce fresh evidence, counsel argued before us that, also submitted with DP#3640 for sub-division approval was a blue print #2081. Such latter plan was destroyed in September, 1988, at the time of Hurricane Gilbert and only recently was a copy thereof located, and its original is now located at the office of the 2nd defendant/respondent (the Registrar of Titles).

Counsel for the 2nd and 3rd defendant/respondents also opposed the appellant's case.

The Court of Appeal Rules 1962, rule 18(2) empowers this Court to receive fresh evidence at a hearing, in circumstances where it is shown that the said evidence could not be obtained for use at the trial with reasonable diligence, would have affected the outcome of the said trial and is credible see **Ladd vs. Marshall** [1954] 3 All ER 745. Having been satisfied of the said conditions, we granted the application and considered the fresh evidence.

The original subdivision approval was granted to Albion Estate Development Company (Jamaica) Ltd. on 10th October 1968 by the St. Thomas Parish Council and shows on DP#3640 that Lot No. 998 registered at Volume 1071 Folio 8 was designated thereon as a playing field, to be held and transferred to the said Parish Council for the use of the community at Albion Estate, St. Thomas. The Company, in breach of its obligation and to the detriment of the community transferred the said lot to Eugene Clarence and Gloria Miller on 4th September, 1975, inscribed with covenants, inter alia:

"That the land shall not be subdivided."

The relevant transfer No. 326957 described the said Lot 998 as being on the "...Plan of Albion Estate... deposited in the office of Titles on 29th October, 1970...registered at Volume 1071 Folio 8". The blue print #2081, the subject of the fresh evidence admitted, submitted along with DP3640 for sub-division approval, also shows clearly marked thereon, Lot 998 as a "playing field". The duplicate Certificate of Title Vol. 1071 Folio 8 evidencing the transfer from Gloria Miller, the survivor of the joint tenancy, to the plaintiff company/appellant specifically refers to DP#3640, fixing the

said appellant with notice of the designation "playing field", albeit in writing, in respect of Lot 998.

The evidence of Constance Trowers, the Registrar of Titles, referring to transfer No. 790228 of Lot No. 998 from the said Gloria Miller to the plaintiff/appellant, reveals that she recognised the existence of the words "playing field" on DP#3460, albeit in pencil writing. It is my view that the omission of the typewritten words "playing field" from DP # 3460, as appears on blue print #2081, is some evidence of fraud. The said pencil writing however was sufficient to put the Registrar of Titles on notice and enquiry. The evidence of the said Constance Trowers is at least ambiguous. Section 307 of the Judicature (Civil Procedure Code) Law reads:

> "Any party may, at any stage of a cause or matter where admissions of facts have been made, either on the pleadings or otherwise, apply to the Court or a Judge for such judgment or order as upon such admissions he may be entitled to, without waiting for the determination of any other questions between the parties; and the Court or a Judge may, upon such application, make such order or give such judgment as the Court or a Judge may think just."

Having said, in her affidavit that on examining the deposited plan and the sub-division approval conditions, and finding nothing in the said conditions designating lot 998 a playing field, and stated that the notation "playing field" written in pencil, was "... an unofficial insertion, done at an unknown time and by unknown persons...(and therefore)... cannot be taken into account in preparation of the title...", the said witness Constance Trowers then said, curiously:

> "That in the premises I therefore humbly pray that the plaintiff's claim be dismissed."

This being the nature of the evidence before the trial judge in the court below, he could not have done otherwise than decline to entertain an application for judgment on those "admissions", under the provisions of the said section 307.

Furthermore, I have observed that the said Lot 998 consisting of five (5) acres was transferred by Albion Estate Development Co. (Jamaica) Ltd. to the said Eugene and Gloria Miller in 1975 for Five Thousand Dollars ($5,000.00). Correspondingly, Lot 26C (Volume 1055 Folio 665) of approximately one quarter (¼) acre in the said subdivision had been transferred by the said Development Co. to one Gardner on 6th October, 1971 for One Thousand Eight Hundred and Seventy Dollars ($1870.00) and the latter transferred the said Lot to Herman Williams, managing director of the appellant/plaintiff Company, and Myrtle Viola, his wife on 9th August, 1982 for Six Thousand Dollars ($6,000.00). It is significant to note that if a ¼ acre Lot in 1971 was valued at One Thousand Eight Hundred and Seventy Dollars ($1,870.00), the sale in 1975 of a five (5) acre lot, Lot 998, for Five Thousand Dollars ($5,000.00), a lot twenty (20) times larger and at a time four (4) years later, depicts a sale of Lot 998 to Eugene and Gloria Miller at a gross under value.

The said quarter ¼ acre lot 26C in the Albion Estate sub-division transferred to Herman Williams et ux. for Six Thousand Dollars ($6,000.00) on 9th August, 1982, increased considerably in value, as evidenced, prima facie, by the mortgage endorsed on Title. Its value was approximately:

> "(i) in 1987 - per mortgage No. 474066, - upstamped $250,000
>
> (ii) in 1991 - per mortgage No. 688194, - upstamped $500,000
>
> (iii) in 1993 - per mortgage No. 786643 dated 2nd November,1993 - $600,000.00

Junior Goldson, a resident in the said sub-division and who maintained that

Lot 998 has been used as a playing field for cricket and football, said in his affidavit dated 18th April, 1997, of the price of the said lots, that:

> "...in 1993 ¼ acre of lot was sold between Two hundred and fifty thousand dollars ($250,000.00) (to) Three hundred thousand dollars ($300,000.00.)

This could be seen as a confirmation of the value of ¼ acre lots, on the modest side.

In contrast, Lot 998 of five (5) acres, twenty (20) times the size of Lot 26C was transferred to the appellant/plaintiff company (H.G. Williams Construction and Real Estate Co. Ltd.), the managing director of which is Herman Williams, on 17th November, 1993, by Gloria Miller for Four hundred and fifty thousand dollars ($450,000). That sum is One hundred and fifty thousand dollars ($150,000.00) less than the quarter ¼ acre Lot 26C that he owned and was presumably valued in the said month of November 1993 for Six hundred thousand dollars ($600,000.00). A court could not fail to observe that Lot 998, probably worth millions of dollars in 1993, was acquired by the appellant/plaintiff Company at a gross undervalue, which in itself is some evidence of fraud.

In **Honiball vs. Alele** (1993) 43 WIR, 314,324 the Board of the Judicial Committee of the Privy Council (per Lord Oliver) advised that:

> "...(a) valuation of no more than Three thousand five hundred dollars ($3500.00) was so ludicrously low as to be evidence of fraud and the Court of Appeal drew, as regards this evidence, the only inference that could reasonably be drawn."

I am of the view that, coupled with the other allegations of fraud, this acquisition of Lot 998 by the appellant/plaintiff Company at the gross undervalue of Four hundred thousand dollars ($400,000.00) is a basis for the issue to be tried in open court. The order of Cooke J. is correct and ought to stand. This appeal ought to be dismissed with costs to the respondents.

PANTON, J.A. (Ag.):

I agree that the appeal should be dismissed. Without stating the details set out in the affidavits, I note that this is a matter in which the propriety of the plaintiff's acquisition of lot 998 is being challenged by the first defendant which has certain responsibilities in respect of the development of land in St. Thomas.

The first defendant is asserting that only provisional approval was granted to the plaintiff. In any event, it is alleging that the plaintiff misled it when it applied for subdivision approval.

It is further being alleged that the plaintiff's title is tainted with fraud from its inception and that the plaintiff ought to have been aware of the fraud, as well as of the incumbrances.

In the circumstances, it is my view that it would have been most imprudent for the learned judge below to have granted the declarations sought, as there are various contending issues of fact. He was clearly right in deciding that to proceed by originating summons would be inappropriate for the determination of the issues.

DOWNER, J.A.

On the 14th October, 1997, Cooke J., ordered that the issues raised by the appellant H.G. Williams Construction and Real Estate Ltd. in their Originating Summons should be adjudicated in open court and that the Originating Summons and the affidavits be used as pleadings. The appellant is aggrieved by that order and so appeals to this Court. The principal issues debated over some four days by counsel were firstly whether there was sufficient evidence capable of raising the issue of fraud so as to defeat the Registered Title of the appellant pursuant to Section 307 of the Civil Procedure Code Law and secondly whether the evidence of the Registrar of Titles consisted of admissions which concluded the issue of the registered title in favour of the appellant. So the concern of the appellant was whether by Section 68 and 163 of the Registration of Titles Act and the evidence so far it was entitled to carry out its development plan.

As to the first issue the appellant stated that he was a bona fide purchaser for value without notice of any other interest in the land and that he was not guilty of any fraud. The affidavit dated 6th March 1997 of the first Respondent of the St. Thomas Parish Council has challenged this stance. They point out in paragraphs 22,23 24:

> "22. That I say in further answer that the subdivision application submitted by the plaintiff herein, with the vital and necessary plans, could only have been obtained from D.P. #3640 which must have been referred to by the Plaintiff or his duly authorised agent Rixon E. Richards, the Commissioned Land Surveyor acting on his behalf as the dimension for Lot 998, its location, field notes and directions could only have been obtained from the said D.P. to enable the Plaintiff to make its application.
>
> 23. That as a consequence the Plaintiff knew or ought to have known that its proposed Vendor had obtained a Title tainted by fraud as the original registered proprietor had no right to sell and all subsequent buyers including the Plaintiff

> had not Title at all and cannot now claim to be a bona fide Purchaser without notice of this encumbrance.
>
> 24. That even in the event that the Plaintiff's Managing Director did not personally know of this encumbrance it is impossible for the Commissioned Land Surveyor, its agent, to have prepared the accompanying plans to the subdivision application without reference to D.P. # 3640 and thus the Plaintiff is deemed to have known of the encumbrances."

These facts are capable of raising the issue of fraud pursuant to Section 70 of the Registration of Titles Act.

Again they pointed out that Mr. H. G. Williams the Managing Director of the Appellant owned a ¼ acre lot in the subdivision and obtained a mortgage of Six hundred thousand dollars ($600,000) on 2nd November, 1993. He then through his company bought the lot in issue which is about five (5) acres for four hundred and fifty thousand dollars ($450,000) on 1st. November, 1993. All this evidence is derived from the Registered Titles. One inference is that the purchase price was at an undervalue which suggests fraud. See **Honiball and Another v Alele** (1993) 43 W.I.R. 314. Further the transfer suggests that the purchase was from Gloria Miller the survivor of the joint tenancy with her late husband Eugene Miller.

There is further evidence capable of fixing the appellant with knowledge that both vendor and purchaser knew that the lot in issue was reserved for the community. Here is the affidavit of the 1st Respondent paragraph 5 and paragraph 13:

> "5. That the Plaintiff was obliged at the time of purchasing to make the necessary enquiries as to its Vendor's right to sell and to transfer subject to the encumbrances in D.P. 3640. That the rule of Caveat emptor applied and still applies in the circumstances and any duty of care was owed by its Vendor, not by the First Defendant.
>
> 13. That in answer to paragraph 9 and 10 the First Defendant says that one condition was specifically that the Minister of

> Health and the Environment must approve the Application which he refused so to do."

On the aspect of undervalue as it relates to the issue of fraud there is also the evidence of a resident Junior Goldson which runs thus:

> "7. That in 1993 ¼ acre of lot was sold between $250,000.00 and, $300,000.00 so that the price of $450,000.00 for five (5) acres for lot 998 is unusual."

Turning to the issue of admissions Ms. Vassall for the Parish Council directed the Court's attention to paragraphs 7 and 8 of the evidence of the Registrar of Title. These paragraphs read:

> "7. That in this case, having examined the said Deposited plan and the relevant conditions of approval contained in the Subdivision Approval there is nothing in conditions numbered (a) to (i) expressely designating Lot 998 as a playing field. Hence, no such endorsement as to restrictive user appears on the said Certificate of Title.
>
> 8. That on the said Deposited Plan, a notation of "Playing Field" written in pencil was inserted on the said plan. This was an unofficial insertion, done at an unknown time and by persons unknown. Therefore, cognisance of the said notation in pencil cannot be taken into account in the preparation of the Title because there is no formal endorsement and further it is not supported by the Resolution Approval."

It was her submission that taken together these paragraphs could not amount to an admission pursuant to Section 307 of the Judicature (Civil Procedural Code) Law. On the contrary the Registrar or Referee ought to have been put on enquiry about the insertion in the relevant document DP#3460 as appeared on the blue print # 2081, as fraud might have been in the offing.

As to the plans for development, three paragraphs from the Secretary of the St. Thomas Parish Council will suffice how the issue will be fought out at a trial:

> "11 That in further answer to paragraph 5 to 8 the First Defendant says that the Plaintiff misled the First Defendant as the Plaintiff never mentioned in its Application that the Lot 998

> was designated a playfield by D.P. #3640 and misled the First Defendant to its true state and the existence of the lot having been so designated and in fact furnished a blue print of surveys in which this fact was never mentioned.
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> 12. That having been misled by the Plaintiff the First Defendant granted provisional approval subject to certain conditions on or about the 10th day of January, 1995 and I exhibit marked "B" for identity a copy of that approval.
>
> 13. That in answer to paragraph 9 and 10 the First Defendant says that one condition was specifically that the Minister of Health and the Environment must approve the Application which he refused so to do."

Miss Vassall also moved this court to accept fresh evidence and the application was successful. The fresh evidence was accepted because it conformed with the principles laid down by **Ladd v Marshall** [1954] 3 All ER 745. Because a trial is ordered this oral judgment is of necessity brief. It is against this background that this Court has decided that Cooke J. was correct to rule that there should be a trial. Consequently, the appeal is dismissed and the order below affirmed. The Appellant must pay the taxed or agreed costs of this appeal.