MMLJ

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN EQUITY
CLAIM NO E 476/2001 AND HCV 1445/2003 (CONSOLIDATED)

SUIT NO E 476/2001

BETWEEN	LLOYD HAUGHTON AND HENRY HAUGHTON (EXECUTORS OF ESTATE OF ALEXANDER HAUGHTON, Deceased)	CLAIMANTS
AND	YVONNE HAUGHTON	DEFENDANT

HCV 1445/2003

BETWEEN	YVONNE HAUGHTON	CLAIMANT
AND	LLOYD HAUGHTON AND HENRY HAUGHTON (EXECUTORS OF THE ESTATE OF ALEXANDER HAUGHTON, Deceased)	FIRST AND SECOND DEFENDANTS
AND	CYNTHIA RAINFORD	THIRD DEFENDANT

IN CHAMBERS

Mr. Dennis Forsythe instructed by Forsythe and Forsythe for Yvonne Haughton in both claims

Miss Sandra Johnson instructed by Robinson, Phillips, Whitehorne for Lloyd Haughton and Henry Haughton, executors of the estate of Alexander Haughton, deceased, in both claims

February 15, 18, 25 and April 8, 2005

APPLICATION TO STRIKE OUT DEFENCE, STATEMENT OF CASE AND PERMISSION TO ENTER JUDGMENT, RULES 15.2 AND 26.1(2)(j), ABUSE OF PROCESS

Sykes J

The case management conference

1. The application before me was precipitated by Miss Yvonne Haughton's non-compliance with orders made by Sinclair-Haynes J (Ag) on December 11, 2003, at a case management conference. Her Ladyship ordered:

a. Application with regard to application to consolidate dated the 21st day of October 2003 granted in terms of paragraph 1 of Notice of Application to Consolidate dated October 21, 2003.

b. Standard disclosure of documents including (a) agreement of sale (b) transfer documents, receipt or receipts and or other evidence of payment, on or before the 31st day of March 2004.

c. Standard inspection on or before the 19th day of April 2004.

d. Witness statement and/or affidavit on or before the 14th day of May 2004 (sic).

e. Statement of issues and facts to be filed and served on or before the 30th day of June 2004.

f. Trial by judge alone for 2 days.

g. Trial set for hearing on 27th and 28th of June 2005.

h. Pre-trial review set for the 23rd day of September 2004.

i. Listing questionnaire to be filed and served on the 10th day of September 2004.

j. Leave to amend statement of claim granted to the claimants in action E476/2001 on or before the 16th day of January.

k. Defendant (if desire) (sic) to file and serve amended defence within 28 days of service of the amended statement of claim.

l. Costs to be costs in the claim.

2. In response to these orders Lloyd Haughton and Henry Haughton (the Haughton brothers) filed

a. on January 14, 2004, an amended statement of claim;

b. on April 28, 2004, witness statements of Cynthia Rainford, Lloyd Haughton and Henry Haughton; and

c. on June 17, 2004, a statement of facts and issues.

From this, it is clear that there was a conscientious effort to comply with the order. However, they have not complied with the order for disclosure and inspection of documents.

3. Miss Haughton on the other hand responded in this way:

a. on June 22, 2004, she filed a statement of facts and issues;

b. she has not filed any witness statement, affidavit or witness summary;

c. she has not disclosed any documents.

4. On July 22, 2004, Yvonne Haughton launched a full-scale attack on the case of the Haughton brothers. She filed an application, supported by the affidavit of Mr. Dennis Forsythe, to dismiss the Haughton brothers' claim on the grounds that: (a) section 161 of the Registration of Titles Act expressly bars proceedings against a registered proprietor, except where fraud can be proven and (b) the statement of case of the claimants failed to disclose sufficient or any particulars of fraud as is required to set aside a registered certificate of title or to maintain an action against the registered proprietor. This application was hung on rule 26.1(2)(j) of the Civil Procedure Rules (CPR) (i.e. to dismiss or give judgment after decision on a preliminary issue).

5. The Haughton brothers responded with a counter attack. They filed a notice of application for court orders on September 21, 2004, seeking an order:

a. striking out (i) the fixed date claim form and particulars of claim in suit no HCV 1445/2003 and (ii) the defence to claim no E476/2001. and permission to enter judgment against Yvonne Haughton in both claims; or

b. in the alternative that an unless order be made. i.e. an order in terms of (a) above unless Yvonne Haughton complies with all the court orders of December 11, 2003.

6. The order filed on September 21, 2004 was refiled again on September 24, 2004. The formats are different but the contents are identical.

7. On September 23, 2004, in accordance with the orders of Sinclair-Haynes J (Ag), the pretrial review came before me. On that date, the matter was adjourned to September 28, 2004.

8. On the resumed pretrial review Mr. Nelton Forsythe (who appeared for Miss Haughton at the time) submitted that since his application was purely one of law, the fact that his client did not fully comply with the court orders ought not to prevent him making his submissions because success there meant success totally, subject to any appeals. To use the language of tennis: it would have been game, set and match for Miss Haughton. I decided to hear Yvonne Haughton's application. I adjourned the application of the Haughton brothers pending the outcome of Yvonne Haughton's application. On November 17, 2004, I dismissed Miss Haughton's application. A written judgment was delivered from which there has been no appeal. As I made clear in my written judgment, the submissions in support of Miss Haughton's application rested upon a misapprehension of the correct legal principles. I shall, again, set out later in this judgment her position is not sustainable.

9. I am now concerned with the application made by the Haughton brothers in their notice of application for court orders dated September 24, 2004. Miss Johnson's submissions rest on rules 26.2, 26.3 and 26.4 of the CPR. A bit of background is necessary.

The genesis

Suit no. E 476/2001

10. These consolidated claims have their origins in the death of Alexander Haughton, the father of all the litigants, who died on May 11, 2000. He left a will in which he purported to dispose of the same land allegedly bought by Yvonne Haughton. This land, also known as Lot 50 Gibraltar Estate, Annotto Bay, St. Mary, is registered at Volume 1104 Folio 838. The Haughton brothers are executors of the will. They discovered that Yvonne Haughton, their sister, is the registered proprietor.

11. There is some confusion, based upon the records, about the precise date the writ of summons was filed. There are two writs on the file. One has the date August 29, 2002. The other, exhibited to the affidavit of Henry Haughton, dated July 26, 2001, has the year 2001. The endorsement on the writ of summons is not a model of clarity but the basis of the claim was that Miss Yvonne Haughton committed a fraud. No statement of claim was filed at the time the writ was filed.

12. It seems most likely that the writ was filed in 2001 because on November 19, 2001, the Master granted permission to the Haughton brothers to service notice of the proceedings on Miss Haughton who was residing overseas. The firm of Forsythe and Forsythe entered an appearance for Yvonne Haughton on November 14, 2002. On December 10, 2002, Miss Haughton consented to the statement of claim being filed out of time. The statement of claim was filed on December 10, 2002. On January 20, 2003, Miss Haughton filed a defence and attached a number of documents including a power of attorney and a copy of what is alleged to be the will of Alexander Haughton. Significantly, she omitted to file the transfer on which she relies. This transfer, which is alleged to have been signed by the deceased, was exhibited to the affidavit of Henry Haughton. She repudiates any suggestion of impropriety. She says that she bought, legitimately, the land in 1997 for $750,000 and is properly registered as the proprietor.

13. The power of attorney, dated June 4, 2000, that was attached to the defence, appoints Mr. Dennis Forsythe to "*supervise, rent and sell my property known as lot 50, Gibraltar Estate in the parish of St. Mary, Jamaica registered at Volume 1104 Folio 838".* It ends by saying that she "*agree[s] and undertake[s] to ratify and confirm all and whatsoever that my Attorney (sic) shall lawfully do or cause to be done by virtue of this deed*'. The power of

attorney was executed before a Barbara Buchanan, Notary Public in the State of New York in the United States of America.

14. Also on January 20, 2003, Yvonne Haughton file a document headed *Ancillary Claim Form* in which she sought recovery of possession of the property from Cynthia Rainford who was in occupation of the land. She also claimed mesne profits. The basis of the claim was the same as the defence, namely, Yvonne Haughton is the registered proprietor.

15. The firm of Robinson, Phillips and Whitehorne, attorneys for the Haughton brothers, wrote to Forsythe and Forsythe on January 28, 2003. Mr. Dennis Forsythe responded by a letter, dated February 3, 2003 in which he states, among other things, "*[i] am agent of Yvonne Haughton and a legitimate recipient of any documents in any suit against her. The Power of Attorney in our possession gave (sic) me "power to conduct any legal action necessary" to carry out her biddings".* The letter ends by suggesting that *"[a] case management conference is therefore the appropriate step forward, and I shall so move the court*".

16. Mr. Dennis Forsythe had more than second thoughts about the desirability of moving to case management. He wanted to scuttle the claim against his client. He filed an application for summary judgment dated February 12, 2003 supported by an affidavit from him also dated February 12, 2003. In that affidavit, Mr. Forsythe sets out the defendant's case. In brief, the affidavit said that Yvonne Haughton bought the property legitimately from Alexander Haughton, her father, and that the firm of Pollard, Lee, Clarke and Company had carriage of sale. The attorneys acted upon the instruction of Alexander Haughton and transferred the land to Yvonne Haughton who was then living abroad. The affidavit went on to say that, the statement of claim did not particularize the alleged fraud. Mr. Forsythe was referring to the unamended claim. Mr. Forsythe stated, in his affidavit, that on October 1, 2001, the Supreme Court removed a caveat that was filed on August 18, 2000. He said the caveat was removed because the court found that what was being alleged did not amount to fraud. He added that it was the same allegations that were relied on to support the caveat that are being relied on to establish fraud in suit no E476/2002. Those allegations, he said, were found wanting and so the caveat was removed. My only comment on the removal of the caveat is that I do not know whether at the hearing when the caveat was removed the court had before it the information stated in paragraph 20 below.

17. In the February-12-2003 affidavit, Mr. Dennis Forsythe, stated, "*there are no real issues to be tried, and whatever dispute there is can be disposed of on the basis of documentary evidence before this Court*" (para 2). This is quite an unusual position given the allegations of Henry Haughton in his affidavit bearing in mind the two documents (i.e. the transfer and will) which were exhibited to this affidavit (see para. 20 below).

18. On April 22, 2003, the Registrar informed both parties that there would be a case management conference. The notice on the court file does not indicate the date of the conference. The summons to enter judgment came before Rattray J on July 22, 2003 but was adjourned to December 9, 2003. There is no minute of order stating what happened on December 9, 2003. However, the matter came before Sinclair-Haynes J (Ag) on December 11, 2003, for case management where the orders referred to above were made. After permission was granted by Sinclair-Haynes J (Ag) to amend the claim, they abandoned the claim based on fraud and are instead relying on undue influence.

19. The Haughton brothers, in the amended statement of claim, are seeking (a) a declaration that the deceased was induced to transfer the property by the undue influence of Yvonne Haughton; (b) or in the alternative a declaration that Yvonne Haughton hold and has held the property as trustees for and on behalf of the estate of the deceased; (c) an order that Yvonne Haughton execute all such documents and to all such acts and things as may be necessary to transfer the land to the estate of the deceased; (d) an injunction restraining Yvonne Haughton, whether by herself, her servants and/or agents or however (sic), from transferring or in anyway dealing with the said property; (e) further or other relief and (f) costs.

20. It is not entirely clear why they have abandoned the claim for fraud because there is an affidavit from Henry Haughton dated July 26, 2001 which alleges: (a) Alexander Haughton was unable to read or write (see para. 11); (b) Alexander Haughton was partially blind for the last four years of his life; (c) the transfer purportedly signed by the deceased, on February 19, 1997, with a full signature and not an "X" mark; and (d) the last will and testament purportedly executed by the deceased with an "X" mark on July 27, 1999. Therefore, on the face of it, the allegations of fraud, while regrettably not particularized in the unamended statement of claim, amounted to this: it would be extremely unlikely that a man who was unable to read and write would write his full signature in 1997 but make an "X" mark in 1999.

21. All the documents to which I have referred, other than those filed in 2004, were before Sinclair-Haynes J (Ag). It should therefore come as no surprise that she ordered that the agreement for sale and evidence of payment be produced.

Claim No. HCV 1445/2003

22. While all this activity was taking place in suit no. E 476/2002, Yvonne Haughton filed claim no. HCV 1445/2003 on August 5, 2003. The particulars of claim alleged that Yvonne Haughton is the registered proprietor of the disputed land and she is seeking to recover possession from the Haughton brothers and Cynthia Rainford, who lived at the property.

She repeats what was stated in the document headed *Ancillary Claim Form* that was filed in claim no. E 476/2001. On August 20, 2003, Yvonne Haughton filed an application asking for the consolidation suit no. E 476/2001 and claim no. HCV 1445/2003. For some unknown reason, the consolidation application was filed again on October 21, 2003.

23. I have set out all these matters at some length in order to demonstrate that many of Mr. Dennis Forsythe's submissions are factually and legally inaccurate.

Mr. Forsythe's affidavits and submissions

24. One of the points made by Mr. Dennis Forsythe is that on September 28, 2004, when I commenced hearing Miss Haughton's application there were two applications before me: one for summary judgment and the other for dismissal or giving judgment on a claim after a decision on a preliminary issue. He said that both are quite distinct applications and that I had dealt with the application for summary judgment. He said further that the application for summary judgment arose under the old rules while the other application arose under the Civil Procedure Rules (CPR). He concluded that I had adjudicated upon the application for summary judgment and not the application to dismiss the claim after a decision on a preliminary issue (see affidavit dated February 23, 2005).

25. This is factually inaccurate because the minute of order says : *Notice of application for court orders filed by Yvonne Haughton dated July 22, 2003 dismissed. Costs in the sum of $16,000 to Lloyd Haughton and Henry Haughton. Costs to be paid on or before November 30, 2004.* The minute of order is referring to the application to dismiss or give judgment on a claim after decision on a preliminary issue. No arguments were addressed to me on behalf of Miss Haughton concerning the summons to enter judgment that was filed in February 2003. That summons was not pursued. This is not surprising because the affidavit files in support of the summons for summary judgment had virtually the identical information that was put before me in support of the application to dismiss a claim after decision on a preliminary issue. Equally, a careful examination of the structure of the CPR shows that many of the matters that fall within rule 26.1(2)(j) (i.e. to dismiss or give judgment on a claim after a decision on a preliminary issue) will also fall within rule 15.2 (i.e. giving summary judgment on a claim or particular issue if it is decided that the claimant or defendant as the case may be, has no real prospect of succeeding). Where cases fall within both rules, it is up to the applicant to choose which he will use to secure judgment in his favour. The procedural requirements for both sections are not the same.

26. In addition to being factually inaccurate, in law, Mr. Dennis Forsythe could not now be allowed to argue the summary judgment application because it would be an abuse of process to allow a litigant to reopen an issue that has already been decided between the

parties. A litigant cannot simply rename his application in order make the identical submission on identical issues of fact and law, that were already determined unless and until the earlier decision has been set aside by a court competent to do so. He chose the door marked rule 26.1(2)(j). Now that he has not reaped the hoped for success he cannot retrace his steps and seek to enter through the door marked rule 15.2. This particular case fell within rules 26.1(2)(j) and 15.2.

27. In an attempt to rebut the affidavit and submissions in support of the application now before me, Mr. Dennis Forsythe filed an affidavit dated February 23, 2005. It is a striking document. Instead of setting out factual information, it contains, largely, legal arguments. In the affidavit, it is said, that an *unless order* should not be granted because I am being asked to change the order of Sinclair-Haynes J (Ag). It is also said that the *unless order* should have been sought at the case management conference and that not having been done, I ought not to grant the order. Mr. Dennis Forsythe adds that Sinclair-Haynes J (Ag) should not have made the order requiring Miss Yvonne Haughton to produce the agreement for sale, the transfer documents and receipts for the payment of land. He then asks in his affidavit, in rhetorical fashion, "*How many purchasers can verify their bona fide purchase by presenting these documents?*" He provides the answer in the next line of the affidavit: "*Very few, I believe.*"

28. The further argument is made in the affidavit, that the Haughton brothers have not stated the basis on which they are asking for the orders at paragraph 5 of this judgment. This, perhaps, is based upon either a misreading or misunderstanding of the application. There it is, an affidavit of defiance rather than an explanation for non-compliance with the orders.

29. There are two important paragraphs of the affidavit, dated February 23, 2005, that must be set out and I do so now:

> *5. I do not know my client Yvonne Haughton, nor have I ever seen a picture of her. She retained me from the U.S.A. upon recommendation of friend.*
>
> *6. Her last written communication in year 2001 came from 35 Coolidge Avenue, Rye New York, from where she sent me Power of Attorney. (Exhibit A: DHL slip, with address). She no longer resides at this address, as my latest correspondence have been returned. (Exhibit B: returned envelope).*

30. Fourteen months after the case management conference Mr. Dennis Forsythe is saying (a) he does not know his client; (b) he does not know what she looks like; (c) he has never met her; (d) he last heard from her in 2001 (four years ago and two years before the case management conference); (d) he does not know how or where to contact her.

31. Earlier, I said that I would state, again, why the position of Mr. Dennis Forsythe on the question of whether an action can be brought in equity against a registered proprietor in land is flawed (see para. 5 of this judgment). I now do so. This attitude is identical to that of the defendants in ***Gardener v Lewis*** (1998) 53 W.I.R. 236. The Judicial Committee of the Privy Council had to correct this erroneous view of the law. The case was an appeal from Jamaica. This is how Lord Browne-Wilkinson, addressed the point at page 238a

> *[T]he defendants 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.*

32. The erroneous view of which His Lordship spoke was identified earlier in his judgment at page 237e-f:

> *In their conduct of the present litigation, the appellants have chosen not to explain how they came to be 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 land.*

33. His Lordship set out sections 68, 70 and 71 of the Registration of Titles Act and then concluded at page 239c-f:

> *From these provisions it is clear that as to the legal estate the certificate of registration gives to the defendants an absolute title incapable of being challenged on the grounds that someone else has a title paramount to their registered title. The defendants' 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.***(my emphasis)

34. Lord Browne-Wilkinson relied on the advice of Lord Wilberforce who delivered the advice of the Privy Council on ***Frazer v Walker*** [1967] 1 AC 569 on appeal from the Court of Appeal of New Zealand. Lord Wilberforce said at pages 584 – 585:

> *Before leaving this part of the present appeal their Lordships think it desirable, in relation to the concept of "indefeasibility of title" as their Lordships have applied it to the facts before them, to make two further observations.*
>
> *First, in following and approving in this respect the two decisions in Assets Co. Ltd. v. Mere Roihi[10] and Boyd v. Mayor, Etc., of Wellington,[11] 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. (my emphasis)

35. After citing this passage Lord Browne-Wilkinson in ***Gardener***, conclusively said at page 239j:

In their lordships' (sic) view those principles are equally applicable to the Torrens system of land title applicable in Jamaica.

36. Almost in prophetic anticipation of the arguments made by Mr. Dennis Forsythe Lord Wilberforce added in the ***Frazer*** case, thirty eight years ago, these words at page 585

Their Lordships refer to these cases by way of illustration only without intending to limit or define the various situations in which actions of a personal character against registered proprietors may be admitted.

37. In ***Gardener's*** case, the claim was for "a declaration that the respondent 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 one half acres in the respondent" (see page 237j). The Privy Council remitted the case for a rehearing so that a proper determination of the issues could take place. The result of this case puts it beyond doubt that one cannot simply say, "I am the registered proprietor. You cannot bring any claim in law or equity against me".

38. I dealt with this preliminary point at paragraphs 23 – 39 of my previous judgment in this matter. Therefore to say that it was not addressed is not accurate. In any event, even if I had not dealt with it, I have set out the passages from the ***Gardener*** and ***Frazer*** cases to show that there is clear legal authority for the proposition that being a registered proprietor of land does not prevent a claim in equity or law being made against the proprietor. This position was reaffirmed by the Court of Appeal of Jamaica in ***Carty v Carty*** RMCA No.13/2004 (delivered March 11, 2005), a case in which a husband sought to argue that land registered in the joint name names of himself and his wife, meant, "conclusively" that there should be equal share of the beneficial interest. He relied on section 68 of the Registration of Titles Act. The court rejected that proposition.

39. Mr. Dennis Forsythe's earlier affidavit, dated December 1, 2004, has an even greater declaration of defiance. In reference to the order to produce receipts, agreement for sale and transfer documents as well as filing of witness statements, Mr. Dennis Forsythe had this to say:

(7) The problem originated on (sic) 11th day of December 2003, when Mrs. Justice Sinclair-Haynes, made the Case Management Orders aforementioned, rather than adjourning the Case Management Conference, pending consideration of the preliminary issue (which was before the court) as to whether or not a case of fraud existed in the statement of claim or amended statement of claim. Only after this preliminary issue was

settled in the affirmative should the Case Management Conference have proceeded to make the Orders that it did.

(8) There should be no penalty or sanctions for breach of this Order as it was made prematurely and is purely procedural.

(9) ...

(10) The court cannot ask the Defendant to produce "receipts, Agreement, Transfer" etc unless these documents are in the possession of the Defendant and only if she did intend to rely upon these at the trial, which would not be the case.

40. It is a bit disingenuous for Mr. Dennis Forsythe to make these points. At the case management before Sinclair-Haynes J (Ag), both parties were represented by counsel. Mr. Dennis Forsythe represented Miss Haughton at the case management conference. He was also her agent since by that time, he had not one but two powers of attorney on which he relied and is relying now as authority for him to conduct this matter as her agent. If Mr. Forsythe wanted to make those submissions, it was his duty to raise them before the judge. There is nothing on the record to indicate that Sinclair-Haynes J (Ag) heard any submissions regarding any application to strike out suit no. E476/2001. If Mr. Forsythe had any misgivings about the propriety of the orders and/or the ability of his client to comply with any of them, he was under a duty to raise them with the judge. If it is that these thoughts came to him after the conference he should have sought to vary the orders.

41. There is nothing, on the record of the this court, to indicate that between December 11, 2003 (i.e. the date of the case management) and September 23, 2004 (i.e. the pretrial review date) that Miss Haughton applied to vary any of the orders made at case management. I should point out that at the hearing before me of Miss Yvonne Haughton's application to strike out the brothers' claim she did not apply for a variation of the case management orders. I should say as well that during the hearing of Miss Haughton's application there was no indication that Mr. Forsythe had not heard from his client for approximately three years. This only became known during the hearing of this application.

42. This case demonstrates the good sense of insisting on the litigants being present at both the case management conference and the pretrial review. Clearly, had it been disclosed to Sinclair-Haynes J (Ag) that Miss Haughton could not be found and neither could the documents be produced she would not have made the order that she did. What we have here is a case in which important information was withheld from the court by the attorney, who now seeks to accuse the judge of (i) making an incorrect order and (ii) failing to determine a preliminary point when there is not one shred of evidence to show that the application for summary judgment was pursued before the judge. On December 11, 2003,

the summary judgment application would be the only one before the court since the application to dismiss a claim after decision on a preliminary issue was filed in July 2004.

43. Assuming for the purposes of argument that Mr. Forsythe is correct that Sinclair-Haynes J (Ag) should not have made the orders until the preliminary points were disposed, an act of defiance is not the remedy nor the response expected of litigants. In any event, the complaint has been addressed because I heard the preliminary points and delivered a written judgment. Thus, the perceived obstacle to complying with the case management orders was removed. It is now that the imagined obstacle has been removed that it is now being said that the client cannot be found and has not been seen or heard from for over three years.

44. Miss Johnson submitted that the conduct of the litigation on behalf of Miss Yvonne Haughton, at this point, is an abuse of process. Miss Johnson has pointed to the continued breach of the case management orders, the repetition of submissions that were made, rejected and not appealed and the inability of Mr. Forsythe to comply with court orders despite his power of attorney. She says that Mr. Forsythe's inability to file witness summaries, despite his power of attorney, reinforces that point that he, as agent, cannot speak to the full circumstances that led to the purported sale of land and registration of Miss Haughton as the registered proprietor.

The powers of attorney

45. It would be appropriate to comment on what is revealed on the face of the powers of attorney. In Mr. Forsythe's affidavit of February 18, 2003 filed in support of the application for summary judgment a second power of attorney from Miss Haughton is exhibited. It is dated March 25, 2002. It was signed before Hazel Jones, Justice of the Peace for the parish of Kingston, Jamaica. That power of attorney has two paragraphs. The first is in substantially the same terms as the first power of attorney (see para. 13 of this judgrnent). This second power of attorney authorises Mr. Dennis Forsythe to "*conduct any legal action necessary to carry about any of the above, including recovery of possession*". She also undertook to ratify all decisions that he may make. If it is that the power of attorney was sworn to before a Justice of the Peace in Kingston, Jamaica, this would suggest that Miss Haughton was in Jamaica, at least on March 25, 2002. Under the signature of what purports to be Miss Haughton's signature are these words: *Yvonne Patricia Haughton (signed while on visit to Jamaica)*. If she was in Jamaica, it does seem odd that she did not contact Mr. Forsythe. If it is that this second power of attorney was sent to Mr. Forsythe between March 25, 2002 (the date of execution) and February 12, 2003 (the date of the affidavit) it would not be entirely accurate to say that the last written communication he received from her was

in 2001. It will be recalled that Mr. Forsythe is saying that he last had written communication from her in 2001. He said that the written communication came from 35 Coolidge Avenue, Rye, New York. That, incidentally, is the address Mr. Forsythe says he sent some communication to her by courier that was returned to him. However, the address on the power of attorney dated March 25, 2002, is 1205 College Avenue Apt. 6B, New York 10456. There is no evidence that Mr. Forsythe has sent any communication to what would be an address given to him, via the second power of attorney.

First principles and the Civil Procedure Rules

46. The submissions of Mr. Dennis Forsythe make it imperative that I set out what ought to well known fundamental principles that under pin the rule of. It is not necessary to demonstrate by any reference to case law to derive the principles I am about to state. They can be derived just from an analysis of the concept of the rule of law. They are what are called self-evident truths, which are so basic and fundamental that if they did not exist no system of law could function.

47. It is axiomatic that any society based upon the rule of law must accept the undeniable proposition that the rule of law demands obedience to court orders. Unless this is so then the expression "the rule of law" is nothing more than words. Second, in a judicial system that provides for appeals or variation of orders then an aggrieved party, must utilize the legal remedies open to him. He cannot disobey court orders, ignore judgments against his contention and then when an application is made to strike out his case, simply responds by repeating the rejected arguments and seek to advance reasons why a particular order should not have been made. Mr. Forsythe did not seek to make an argument that orders made by Sinclair-Haynes J (Ag) were nullities (see Downer J.A. in ***Delroy Rhoden v Construction Developers Associates Limited and Trevor Reid*** SCCA No. 42/2002 (March 18, 2005) slip op. 13 – 31).

48. The basic principles identified above are supplemented by the CPR. These are the procedural rules that inform litigants of the procedural steps that are necessary to gain access to the courts and to secure the benefit of the courts powers.

49. The new rules embody a new ethos. Gone are the bad old days of litigation. Under the ancien régime, the court was more reactive than proactive. With these new rules, the courts are mandated to be proactive, and actively manage cases. The power to manage actively cases would be useless without provisions that make this possible. One such power is the ability of the court to make such orders as it believes are necessary to dispose of the case justly, fairly and at least cost to the parties. Part 26 of the CPR confers upon the courts wide ranging powers to achieve the overriding objective set out in rule 1.1. In the new spirit of

cooperation between the parties, rule 1.3 imposes a duty to the litigants to help the court to further the overriding objective. In my view, it is implicit in that the parties, in the spirit of cooperation, ought to disclose to each other, before case management, those documents, other than those subject to legal professional privilege or subject to some legal prohibition against disclosure, that support their case. If this is done, then each party would be better able to assess the prospects of success well before the case management. They would be better able to advise their clients which would result in reduced costs, shortened proceedings. In the United Kingdom, the spirit of cooperation is reinforced by preaction protocols. We can arrive at the same position without these protocols, if the litigants and their attorneys embrace the spirit, philosophy, purpose and intention of the new rules.

50. Had the spirit of cooperation of which I speak infused this case in all probability this application would have been unnecessary. Some of the resources allocated to this case might have been applied more beneficially to other cases.

51. The CPR recognises that with the best will in the world, there will be some litigants who will not cooperate, voluntarily. There will be those litigants who are stiff necked and mistake tolerance for impotence and forbearance for weakness. In recognition of such possibilities, the CPR give the court various powers that are to be used judiciously so as to ensure that court orders are obeyed. The striking out of a case is the nuclear weapon in the courts' arsenal. If exercised, that power excludes the litigant from the judicial process. This is why it is not, usually, the first or primary response of the court whenever there is non-compliance with the order of the court. However, there may well be cases that striking out is the most appropriate remedy.

Disposal of the application

52. I have been greatly assisted by the judgments in ***UCB Corporate Services Limited (Formerly UCB Bank PLC) v Halifax*** [1999] C.P.L.R. 691 C.A. and ***Axa Insurance Company Limited v Swire Fraser Ltd.*** [2001] C.P. Rep 17; [2000] C.P.L.R.142. The former emphasizes the point that sanctions for non-compliance with an order and the rules of court ought to correspond to the seriousness of the breach. It made the point that very serious breaches may result in the claim being struck out, if that is the just thing to do. The latter makes the point that a party who successfully resists a striking out may be required to pay the costs of the hearing if his conduct precipitated the application.

53. Miss Haughton has never attended any hearings in this matter. She was represented by her agent Mr. Dennis Forsythe. His knowledge is her knowledge. He knew of the court orders. Her attorney says he does not know where to find her. However, the documents purporting to be powers of attorney, say that she agrees to ratify and confirm all that her

attorney shall lawfully do or cause to be done. Given the stance taken by her agent it is doubtful that with more time she will comply with the orders. On the other hand, the Haughton brothers have displayed great interest in this matter. At least one of them has attended all the applications and case management conferences held so far. As stated already, they are in breach of the order for disclosure and inspection. The way in which I deal with the defaults must take account of the conduct of the parties to date, the seriousness of the default, the impact of the default on the proceedings, whether any explanation has been offered, the nature of the explanation, how long the default has continued, whether it is likely to be remedied. In other words, the sanction, if any, must be proportionate to the breach.

54. Is the breach of the Haughton brothers sufficiently serious to prevent the striking out of Miss Haughton's defence and claim? I think so. He who is seeking to strike out a statement of case on the basis of non-compliance with court orders should, generally, not be in breach or at least not in breach of the more critical parts of case management orders. The documents in support of a case are vital to effective case management. Despite the egregious conduct of Miss Haughton, an immediate striking out would not be appropriate. Having said this, in light of what I have said about the Haughton brothers and taking into account the full circumstances of this case, I do not believe that their application should be denied completely. On the question of costs, even though the Haughton brothers have not been completely successful, it is my view that the conduct of Miss Haughton ought not to pass unnoticed. Her conduct has prolonged this hearing much longer than necessary. She invoked previously rejected arguments and on the whole engaged in conduct that ought not to be countenanced. Miss Haughton is to pay the costs of the Haughton brothers.

55. My orders are as follows:

a. Unless Lloyd Haughton and Henry Haughton comply with the orders made by Sinclair-Haynes J (Ag) on December 11, 2003, for standard disclosure and inspection of documents not later than 3:00 pm on Friday, April 22, 2005 claim no. E476/2001 is stayed.

b. Unless Yvonne Haughton fully complies with the orders made by Sinclair-Haynes J (Ag) on December 11, 2003, not later than 3:00 pm on Friday, April 22, 2005, the defence in claim number E476/2001 will stand struck out without further order and claim number HCV 1445/2003 will stand struck out without further order.

c. On the striking out of defence in claim no E476/2001 judgment to be entered in claim no. E476/2001 in the following terms:

1. It is declared that the deceased Alexander Haughton was induced to transfer the said property registered at Volume 1104 Folio 838 of the Register Book of Titles to Yvonne Haughton because of undue influence.
2. It is declared that the transfer to Yvonne Haughton of the property referred to in paragraph (1) is null and void.
3. It is ordered that the defendant to execute all such documents and do all such acts and things necessary to transfer the property to the estate of the deceased Alexander Haughton within thirty days of April 22, 2005 failing which the Registrar of the Supreme Court is empowered to execute all such documents and do all such acts and things necessary to transfer the property to the estate of the deceased Alexander Haughton.
4. Yvonne Haughton whether by herself, her servants and/or agents or anyone acting or purporting to act on behalf of Yvonne Haughton is restrained from transferring or otherwise dealing with property registered at Volume 1104 Folio 838 of the Register Book of Titles except in the manner specified in paragraph 3 above.
5. Costs of $84,000 to Lloyd and Henry Haughton in both claims.

d. If parties comply with (a) and (b) above the trial is to take place on June 27 and 28, 2005.

e. Costs of this application to Lloyd and Henry Haughton in the sum of $12,000.