Privy Council Appeal No 64 of 2005

Alaric Astor Pottinger *Appellant*

v.

Traute Raffone *Respondent*

FROM

THE COURT OF APPEAL OF JAMAICA

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

Delivered the 17th April 2007

Present at the hearing:-

Lord Bingham of Cornhill
Lord Rodger of Earlsferry
Baroness Hale of Richmond
Lord Carswell
Lord Brown of Eaton-under-Heywood

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*[Delivered by **Lord Rodger of Earlsferry**]*

1. The present action concerns 34 lots or parcels of land which form part of the Gibraltar Estate in the Parish of Saint Mary. On various dates between 1956 and 1959 the Gibraltar Estate Investment Company Limited ("the company") was registered as the proprietor in fee simple of those lots in accordance with the Registration of Titles Act ("the Registration Act"). By virtue of section 26 a person so registered is entitled to hold the land in fee simple.

2. So far as is relevant for present purposes, under section 3 of the Limitation of Actions Act ("the Limitation Act") no action or suit to recover any land can be brought "but ... within twelve years next after the time at which the right to ... bring such action or suit shall have first accrued to the person making or bringing the same." Section 16 provides that, when any acknowledgment of the title of the person entitled to any land has been given to him or to his agent

> "in writing signed by the person in possession ..., then such possession ... of or by the person [giving the acknowledgment] shall be deemed to have been the possession ... of or by the person to whom or to whose agent such acknowledgment shall given at the time of giving the same; and the right of such last-mentioned person ...to ... bring an action to recover such land ... shall be deemed to have first accrued at and not before the time at which such acknowledgment, or the last of such acknowledgments if more than one, was given."

In broadest outline, the combined effect of these provisions is that a proprietor may lose the right to recover his land if someone else is in possession of it for 12 years. Where, however, the person in possession acknowledges the proprietor's title in a signed document, then the period of 12 years runs from the date of that acknowledgment.

3. Under section 85 of the Registration Act any person who claims that he has acquired a title by possession to land which is under the operation of that Act may apply to the Registrar to be registered as proprietor of the land in fee simple. If the various steps are successfully completed, under section 87 the Registrar will inter alia cancel the existing certificate of title and issue a new certificate of title in the name of the applicant. Their Lordships will look at the registration procedure in more detail later.

4. By an application dated 22 June 1992 the appellant, Alaric Astor Pottinger, applied under section 85 to be registered as proprietor of the 34 lots of land which - as already explained - had been registered in the name of the company between 1956 and 1959. His application was accompanied by various documents including a declaration by himself setting out the circumstances on which he relied to show that he had been in possession for the requisite period of 12 years. Their Lordships will have to examine that declaration in due course. Under cover of a letter dated 31 July 1992 the Registrar returned Mr Pottinger's application and asked him to supply evidence about the current state of the company and, in particular, whether

it was still on the Register of Companies in Jamaica and whether it had been dissolved or not. On 25 August 1992 the Registrar of Companies advised that the company still appeared on the Register of Incorporated Companies but that steps would soon be taken to remove it. After this, the remaining stages in Mr Pottinger's application for registration as proprietor of the 34 lots were completed. These included advertisement of his application in the Gleaner newspaper on three dates, a week apart, in September 1992.

5. On 8 January 1993, in terms of section 87 of the Registration Act, the Registrar cancelled the certificates of title showing the company as the proprietor of the estate in fee simple in the 34 lots. At the same time the Registrar issued new certificates of title showing that "Alaric Astor Pottinger of Gibraltar Heights, Oracabessa in the parish of Saint Mary, Businessman is now the proprietor of an estate in fee simple subject to the incumbrances notified hereunder" in the relevant lots. This was the end of the registration process, but only the beginning of Mr Pottinger's dispute with the respondent, Ms Traute Raffone.

6. To trace the origins of that dispute their Lordships must first go back to 1986. At that time Ms Raffone wanted to buy 43 lots of land in the Gibraltar Estate, including the 34 lots to which their Lordships have already referred. The lots were owned by the company and a certain Eugene Sugarman was apparently its sole surviving director. On 1 December 1986 - the date is no longer disputed - Ms Raffone drew a cheque for US$5,000 in favour of Mr Sugarman. Then, on 12 December, as "President and Sole Surviving Director", Mr Sugarman signed an "Agreement for Purchase and Sale of Property" between the company and Ms Raffone. The agreement related to the 43 lots. On 31 December 1986 Ms Raffone signed the agreement. To judge by the details relating to the signing of the agreement, both Mr Sugarman and Ms Raffone were in New York at the time when they executed it.

7. Clause 2 of the agreement provided that the purchase price "is and shall solely be the total amount of money paid by BUYER to settle the arrears for taxes, water rates, transfer tax, stamp duty plus the legal cost incurred for legal services performed to eliminate the tax arrears while effectively transferring those 43 lots from SELLER to BUYER. BUYER will pay directly to the collector of taxes, stamp duty office and lawyer respectively all expenses." Clause 9 provided that the seller would immediately issue a power of attorney authorising a lawyer in Ochos Rios to do the necessary legal work inter alia to effect the transfer of the 43 lots to the buyer. Clause 10 provided that:

> "This agreement contains all the terms and conditions agreed upon, and there are no outside representations or oral agreements. This agreement constitutes the sole basis on which this sale is made and may not be changed except by mutual written consent by SELLER and BUYER."

8. It is common ground that Ms Raffone did not in fact pay the sums envisaged by clause 2 and that nothing was done, whether by issuing a power of attorney or otherwise, to effect the transfer of the property from the company to Ms Raffone. It follows that in these proceedings she presents herself as a purchaser of the 34 lots but she has not paid for them and nothing has been done to transfer the title in them to her.

9. Mr Pottinger says, however, that she should not even be regarded as a purchaser. His counsel submitted that it was apparent from the circumstances of the transaction that the sale agreement was a sham. As the payment of US$5,000 to Mr Sugarman shortly before the agreement showed, the true consideration for the sale of the land to Ms Raffone had not simply been that set out in clause 2 but had included some unspecified sum of money that she was to pay to Mr Sugarman. Clause 2 had been drafted in a form which did not mention any sum of money passing, as a ruse to avoid the effects of section 33 of the Exchange Control Act 1954 (now repealed). The agreement was accordingly illegal and void and the court should treat it as such, even though the point had not been pleaded. Ms Davis submitted both that it would have been necessary in the circumstances of this case for the point to be pleaded and also that there was nothing on the face of the sale agreement to show that it violated section 33 of the Exchange Control Act. It should accordingly be treated as valid.

10. The Board can see that the application of the Exchange Control Act to the circumstances of this particular sale agreement might not be entirely straightforward. But the Board does not require to go into the matter since it is prepared to assume, without deciding, that the agreement was valid and that Ms Raffone is properly to be regarded as a purchaser of the 34 lots, albeit a purchaser who has not paid the price or taken any further steps to secure the transfer of the title to her.

11. Their Lordships can now return to the time when Mr Pottinger had registered his title to the 34 lots in January 1993. Ms Raffone, who lived in New York and visited Jamaica only twice a year, had not heard of Mr Pottinger's application before the registration took place. But by May 1994 she had become aware that he had been registered as proprietor and she had raised the present

proceedings against him and the Registrar of Titles. By way of relief, she sought a number of declarations and orders. For present purposes the declaration which matters is one to the effect that Mr Pottinger "fraudulently misrepresented to [the Registrar of Titles] that he had a possessory title to the said lands as required under the Registration of Titles Act."

12. In due course the matter went to trial before Ellis J. He found in favour of Mr Pottinger, first, on the basis that the sale agreement between the company and Ms Raffone was not enforceable because it did not provide for any consideration to flow from Ms Raffone to the vendor. This is so self-evidently not the position that counsel for Mr Pottinger did not seek to rely on that aspect of the judge's decision. Ellis J went on to hold that, at best, Ms Raffone was a mere purchaser of the lots from the company and so did not have the necessary standing to challenge Mr Pottinger's title. Allowing Ms Raffone's appeal, the Court of Appeal held that she had the right "to protect her equitable interest in view of the 'attack' on the legal estate of the vendor, by [Mr Pottinger's] act of seeking to acquire title by adverse possession."

13. Before the Board Mr Scharschmidt QC renewed his attack on Ms Raffone's locus standi. He accepted that, when the sale had been agreed, as between the parties to the sale, the company became in equity a trustee for Ms Raffone and the beneficial ownership passed to her. See *Lysaght v Edwards* (1876) 2 Ch D 499, 506 per Jessel MR. But, he said, Mr Pottinger is a stranger to that relationship and so Ms Raffone, as a mere purchaser, does not have the necessary locus standi to bring the present proceedings challenging his title to the lots.

14. What is indeed apparent is that any successful challenge to Mr Pottinger's title would simply have the effect of reinstating the title of the company. It would then be necessary for Ms Raffone to take the necessary steps to allow her to apply to be registered as owner of the lots. In their order the Court of Appeal recognised this by going no further than directing the Registrar to rectify the register by removing Mr Pottinger as the registered proprietor of the 34 lots: it did not go on, as Ms Raffone had sought, and direct the Registrar to "reinstate" her as the registered proprietor of the lots.

15. Ms Davis submitted that, nevertheless, Ms Raffone was a proper person to bring the proceedings. In support of her position she cited the decision of this Board in *Honiball v Alele* (1993) 43 WIR 314.

16. The respondent in that case had bought the land in question from a company, Cardiff Hall Estates, had paid the purchase price and had received in exchange a

duplicate certificate of title. So, although the respondent had not then registered his title, he was at least one step further forward than Ms Raffone in this case. Many years after that transaction, Cardiff Hall Estates was in liquidation. In very complicated circumstances – which Lord Oliver of Aylmerton rightly described as "extraordinary" - in proceedings for execution of a judgment against Cardiff Hall Estates the appellants persuaded the court to issue a certificate to the Registrar of Titles certifying that the appellants had been declared the purchasers of Cardiff Hall Estate's interest in the lands and that the lands had been sold pursuant to an order of the court. Acting on this certificate and other documents, the Registrar cancelled Cardiff Hall Estate's certificate of title and registered the appellants as owners of the land. When he came to hear of these events, the respondent entered the proceedings and applied, by motion, for an order to have the court's previous order and the cancellation of Cardiff Hall Estate's certificate of title set aside – on the ground that they had been obtained by the appellants' fraud.

17. The Board was initially concerned about the competency of proceedings of this kind being initiated by motion. Ms Davis submitted that Lord Oliver had not suggested, however, that the respondent lacked standing to challenge the appellants' title. It appears to their Lordships, however, that, so far from supporting Ms Davis's submission that Ms Raffone has all the necessary standing, the decision in *Honiball* suggests that the seller - in the present case, the company - would have been a necessary party. Lord Oliver noted that there had been a certain logic in the respondent proceeding by way of motion in the proceedings which already existed. He continued, 43 WIR 314, 318:

> "The action in which the order had been made was one against the company and the company by its liquidator was a necessary party to any proceedings to set aside the order and cancel the certificate of title of the appellants, for the effect of that relief, if granted, would merely be to reinstate the title of the company. It would then be for the respondent to lodge his executed transfer and apply to the Registrar of Titles to register him as proprietor, an application which the company might wish to resist."

This passage lends some support to Mr Pottinger's argument that, at least without the concurrence of the company, Ms Raffone lacked the necessary locus standi to raise these proceedings. The Board would be reluctant to decide the point, however, without being fully informed about the current position of the company. Happily, it is unnecessary to reach a concluded view: the Board is again content to assume in Ms Raffone's favour that she does have the requisite standing and that,

if necessary, any procedural complications relating to the company's position could still be sorted out without prejudice to Mr Pottinger.

18. Setting that point on one side, the Board can now approach the substance of the litigation. As already mentioned, in her statement of claim Ms Raffone sought a declaration that Mr Pottinger "*fraudulently* misrepresented to [the Registrar of Titles] that he had a possessory title to the said lands as required under the Registration of Titles Act" (emphasis added). At no point in her pleadings did Ms Raffone seek relief on any basis other than that Mr Pottinger had acted fraudulently. In the Court of Appeal, however, Smith JA held that, even though, in his view, Ms Raffone had not established fraud, she was still entitled to succeed because, on the evidence, Mr Pottinger's possession had started in 1983, rather than 1975. He continued:

> "Accordingly the certificates issued by the Registrar pursuant to such representation were wrongfully obtained by the respondent. In the circumstances the Registrar of Titles may by virtue of section 153 of the Registration of Titles Act take the necessary steps to have the certificates cancelled provided the rights of third parties are not involved."

So Smith JA was prepared to remove Mr Pottinger's name from the register on the ground that his certificates of title were "wrongfully" – not fraudulently – obtained. The reference to section 153 of the Registration Act shows that Smith JA's judgment is based on an interpretation of the statute which would have profound implications for the system of registration of title in Jamaica. Their Lordships must therefore look a little more closely at the way the system works and the scope of section 153.

19. Under section 55 of the Registration Act registration is effected by the Registrar preparing a certificate of title in duplicate. One copy is entered in the Register Book by binding up or filing it in the Book. The proprietor is given the duplicate copy, marked with the volume and folium number where the certificate is entered. Registration is deemed to take place when the Registrar marks the volume and folium number on the duplicate certificate: section 58. The proprietor is entitled to receive a (duplicate) certificate of title (section 64). No certificate is to be impeached or defeasible by reason of, or on account of, any informality or irregularity in the application or in the proceedings leading up to registration (section 68). The certificate is evidence both of the particulars which it contains and of the entry in the Register Book and is - subject to the subsequent operation of

any statute of limitations - conclusive evidence that the person named in the certificate is the proprietor (section 68). The Registrar has only very limited power under section 80 to amend the register in minor respects.

20. The 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 legislation. This is achieved by section 161 of the Registration Act which provides:

> "No action of ejectment or other action, suit or proceeding, for the recovery of any land shall lie or be sustained against the person registered as proprietor thereof under the provisions of this Act, except in any of the following cases, that is to say–
>
> (a) the case of a mortagee as against a mortgagor in default;
>
> (b) the case of an annuitant as against a grantor in default;
>
> (c) the case of a lessor as against a lessee in default;
>
> (d) the case of a person deprived of any land by fraud as against the person registered as proprietor of such land through fraud, or as against a person deriving otherwise than as a transferee *bona fide* for value from or through a person so registered through fraud;
>
> (e) the case of a person deprived of or claiming any land included in any certificate of title of other land by misdescription of such other land, or of its boundaries, as against the registered proprietor of such other land not being a transferee thereof *bona fide* for value;
>
> (f) the case of a registered proprietor with an absolute title claiming under a certificate of title prior in date of registration under the provisions of this Act, in any case in which two or more certificates of title or a certificate of title may be registered under the provisions of this Act in respect of the same land,
>
> and in any other case than as aforesaid the production of the certificate of title or lease shall be held in every court to be an absolute bar and estoppel to any such action against the person named in such document as the proprietor or lessee of the land therein described any rule of law or equity to the contrary notwithstanding."

The basic rule is that, if any proceedings are brought to recover land from the person registered as proprietor, then the production of the certificate of title in his name is an absolute bar and estoppel to those proceedings, any rule of law or equity to the contrary notwithstanding. The only situations where a certificate of

title is not a complete bar to proceedings are those listed in paragraphs (a) to (f). For present purposes the only relevant paragraph is (d), proceedings by a person deprived of any land by fraud against the person registered as proprietor of land through fraud. Therefore, assuming in Ms Raffone's favour that she could claim to have been deprived of the 34 lots, Mr Pottinger's certificate of title would not be a bar to her proceedings if, but only if, she could show that she had lost the land because Mr Pottinger had been registered as proprietor of it through fraud.

21. If the claimant succeeded in her action under section 161 and recovered the land, then section 158 would furnish the court with the necessary powers to give effect to her victory:

> "(1) Upon the recovery of any land, estate or interest, by any proceeding at law or equity, from the person registered as proprietor thereof, it shall be lawful for the court or a Judge to direct the Registrar—
>
> (a) to cancel or correct any certificate of title or instrument or any entry or memorandum in the Register Book, relating to such land, estate or interest; and
>
> (b) to issue, make or substitute such certificate of title, instrument, entry or memorandum or do such other act, as the circumstances of the case may require,
>
> and the Registrar shall give effect to that direction.
>
> (2) In any proceeding at law or equity in relation to land under the operation of this Act the court or a Judge may, upon such notice, if any, as the circumstances of the case may require, make an order directing the Registrar—
>
> (a) to cancel the certificate of title to the land and to issue a new certificate of title and the duplicate thereof in the name of the person specified for the purpose in the order; or
>
> (b) to amend or cancel any instrument, memorandum or entry relating to the land in such manner as appears proper to the court or a Judge."

So, here, the court could direct the Registrar to cancel the certificates of title in the name of Mr Pottinger in the Register Book, cancel any duplicate certificates of title in that name, enter certificates of title in the name of the company in the Register Book and issue duplicate certificates of title, also in name of the company.

22. In the Court of Appeal Smith JA led the claimant to victory by an entirely different route. He held that Ms Raffone could not succeed under section 161

(because she could not prove fraud), but he treated section 153 as permitting the court to cancel Mr Pottinger's certificates of title to the lots on the ground that they had been "wrongfully obtained". Although Bingham JA and Harrison JA did not base their decision on a finding that Mr Pottinger had acted "wrongfully" as opposed to "fraudulently", they too seem to have thought that the proper basis for the action was section 153 to which Harrison JA referred at two points in his judgment. Their Lordships are unable to agree with this approach which mistakes both the scope of section 153 and the nature of the present proceedings.

23. Section 153 is not concerned with the fundamental matter of the validity of the title of a proprietor whose name appears on the register. Rather, it provides the Registrar with what are, essentially, administrative powers to deal with significant, but less fundamental, problems relating to the certificates which evidence that title.

24. The duplicate certificate of title which the proprietor receives from the Registrar is a most important document since, subject to the exceptions in section 161, it is incontrovertible proof of his title to the land in question. It should be accurate, there should be only one copy in circulation and that copy should be kept safe. In a perfect world nothing would go wrong. But the legislation is realistic: it recognises that things may go wrong and provides mechanisms for putting them right. If a certificate is lost or destroyed, then under section 82 the Registrar may cancel it and register a new certificate in duplicate. A clerical error may have been made when the certificate was prepared – eg the lands or their boundaries may have been misdescribed or a name may be inaccurate. Or indeed some entry may have been made on the certificate as a result of wrongful or fraudulent conduct. Or the Registrar may have issued a duplicate certificate when he ought not to have done. Or someone may have tricked the proprietor into parting with the duplicate certificate and so have obtained it by fraud. Or someone may have managed to obtain the duplicate certificate from the proprietor without his consent – and, so, wrongfully. Or someone may have found the duplicate certificate and wrongfully kept it without the owner's permission. Section 153 gives the Registrar power to deal with all these and similar situations:

> "In case it shall appear to the satisfaction of the Registrar that any certificate of title or instrument has been issued in error, or contains any misdescription of land or of boundaries, or that any entry or endorsement has been made in error on any certification of title or instrument, or that any certificate, instrument, entry or endorsement, has been fraudulently or wrongfully obtained, or that any certificate or instrument is fraudulently or wrongfully retained, he may by writing

> require the person to whom such document has been so issued, or by whom it has been so obtained or is retained, to deliver up the same for the purpose of being cancelled or corrected, or given to the proper party, as the case may require; and in case such person shall refuse or neglect to comply with such requisition, the Registrar may apply to a Judge to issue a summons for such person to appear before the Supreme Court or a Judge, and show cause why such certificate or instrument should not be delivered up for the purpose of aforesaid, and if such person, when served with such summons, shall refuse or neglect to attend before such Court or a Judge thereof, at the time therein appointed, it shall be lawful for a Judge to issue a warrant authorizing and directing the person so summoned to be apprehended and brought before the Supreme Court or a Judge for examination."

In any of the circumstances envisaged in the section the Registrar can require the person who has the certificate of title which is causing the problem to deliver it up to be cancelled or corrected or to be given to the proper party. If the person concerned fails to co-operate, he can be required to attend court. In that event, under section 154, the court has the same powers as it has under section 82 to deal with certificates which have been lost or destroyed.

25. Therefore, when section 153 refers to a certificate of title being "fraudulently or wrongfully obtained", it is referring quite specifically to the certificate rather than to the title. It is envisaging the kind of case where someone has got hold of a certificate of title either wrongfully, say, without the owner's consent, or by some fraudulent device. It follows that, contrary to Smith JA's view, the section does not give the Registrar the far-reaching power to annul a proprietor's title on the ground that the title has been "wrongfully obtained". This interpretation of the scope of the Registrar's powers is confirmed by a variety of considerations.

26. First and most importantly, the broader interpretation favoured by Smith JA would be wholly inconsistent with the overall approach of the statute. In the words of Lord Oliver in *Honiball v Alele* 43 WIR 314, 320, registration confers "an unassailable title" on the proprietor shown in the certificate of title, save in the specific cases enumerated in section 161. Paragraph (d) speaks of a person being deprived of land by fraud and of a person being registered as proprietor through fraud – and nothing else. The same policy of confining the attack on title to cases of fraud is reflected in sections 70 and 71. A statute which contained a parallel provision, allowing a title to be attacked on the ground that it had been fraudulently or wrongfully obtained, would be utterly incoherent.

27. Secondly, it would be astonishing to give a far-reaching power to annul a title to an official, the Registrar, acting alone, to be exercised whenever it should "appear" to his "satisfaction" that a title had been wrongfully obtained. Such a power would seriously jeopardise the certainty and stability of title which the system is intended to promote.

28. Thirdly, section 153 occurs under the heading "Procedure and Practice" and the side-note refers to "Procedure in cases of error or misdescription in certificate of title or of its being in possession of wrong person." As this suggests, the section is not concerned with problems relating to the basic title itself but with problems relating to the content of, or possession of, the certificate of that title – much more the kind of thing which would be expected to fall within the scope of the powers of an official such as the Registrar.

29. Fourthly, the ultimate power given to the court under section 154 is the same as the power under section 82 when the original certificate of title is lost or destroyed. Under these provisions the court may cancel the original certificate and register a new certificate in duplicate. Where a certificate is lost or destroyed, there is, of course, no question of registering a new certificate which changes the ownership of the land. The same applies under sections 153 and 154.

30. The Board had occasion to consider the scope of section 153 in *Thomas v Johnson* (1997) 52 WIR 409. Their Lordships agree with what Gault J said in that case about the scope of the section:

> "Section 153 appears in a separate part of the Act under the heading 'Procedure and Practice'. It is unlikely that the legislature would have intended such a section directed to the procedure for requisitioning outstanding instruments and certificates to confer power on the registrar to determine proprietorship of land and interests therein when the registrar's powers to amend the primary record, the register, are so confined. The true scope of the section is better appreciated if it is kept in mind that a certificate of title issued by the registrar is just that, a certificate as to the title recorded in the register."

The Board went on to consider what the position would be if section 153 were construed as giving the Registrar a distinct power to cancel an otherwise indefeasible title. But, for the reasons they have given, their Lordships consider

that the scope of the Registrar's power under section 153 is indeed limited in the way which Gault J indicated and which they have just described.

31. It follows that section 153 has no role to play in the present dispute where what is under challenge is Mr Pottinger's title to the lots as the registered proprietor and only secondarily, and as a consequence, the certificates evidencing that title. As is plain from section 161, Mr Pottinger's title to the lots is unassailable unless Ms Raffone can establish that he was registered as proprietor through fraud. That must in turn depend on what Mr Pottinger told the Registrar when he made his application to be registered as proprietor of the lots.

32. Mr Pottinger's application to the Registrar contained a standard form declaration to this effect:

> "That I am not aware of any mortgage or encumbrance affecting the said lands or that any other person or persons hath any estate or interest therein at law or in equity in possession reversion or contingency."

There is nothing in the evidence given at trial which would show that this statement was inaccurate, far less fraudulent. Mr Pottinger also made a fuller declaration inter alia to this effect:

> "2. That I have known the lands the subject of this application from the year 1970 when I purchased a house on one of the lots of the subdivision of which the lands the subject of my application forms a part and where I have since lived.
>
> 3. That the lands the subject of this application are all registered in the name of Gibraltar Estate Investment Company Limited.
>
> 4. That Gibraltar Estate Investment Company Limited, a company incorporated in Jamaica, bought Gibraltar Estate and had the property subdivided and sold it out in lots of which the lots the subject of this application form the remaining unsold lots.
>
> 5. That when I purchased my home as aforesaid I noticed the lots the subject of my application to be in bush, unoccupied and unattended which presented an untidy appearance to the whole subdivision and provided a meeting place for thieves and I used my best endeavours to trace the registered proprietors but from all information I received, the company had ceased to operate in Jamaica from the early part of the 1960s and had no office in Jamaica and the owners of the company,

> William Donnell and his wife, who were both English, had left the island.
>
> 6. That in order to protect the value of the holdings in the section of the subdivision that had been sold, including my own lot, in the year 1975 I took possession of the lots the subject of this application, bushed the lots and have since remained in the sole undisputed and undisturbed possession of the said lots and in receipt of the rents and profits thereof and have settled all outstanding taxes on the said lots.
>
> And I make this solemn declaration conscientiously believing the same to be true and by virtue of the Voluntary Declarations Law."

33. In her statement of claim Ms Raffone gave the following particulars of what she alleged had been fraud on the part of Mr Pottinger:

> "i The 1st defendant fraudulently misrepresented that he was in possession of the said land for upwards of 12 years or at all.
>
> ii The 1st defendant fraudulently misrepresented to the 2nd defendant that he had no knowledge of the whereabouts of the plaintiff or anyone with a competing or superior title to the said lands."

In effect, she was alleging that Mr Pottinger had made the statements in paragraphs 5 and 6 of his declaration, knowing them to be untrue. Secondly, she was alleging that Mr Pottinger had known of the whereabouts of Ms Raffone but had deliberately said that he did not. Their Lordships can dismiss this second allegation straightaway since they agree with Smith JA in the Court of Appeal that there is no evidence whatever to show that Mr Pottinger knew of her whereabouts in 1992 and, moreover, he said nothing about her in his declaration. Nor is there any evidence that Mr Pottinger knew that anyone other than the company had a competing or superior title to the lots. Indeed there is nothing to show that anyone did. So far as the company itself is concerned, Mr Pottinger, of course, referred quite specifically to the lots being registered in its name – something that would, in any event, have been patent to the Registrar from the certificates in the Register Book. So the critical area is what Mr Pottinger said about his possession of the lots in paragraphs 5 and 6 of his declaration.

34. Because he disposed of the case by holding that Ms Raffone lacked the necessary locus standi to bring the proceedings, Ellis J did not make findings about the underlying facts. For that reason Ms Davis submitted that, if the Board came to the conclusion that the Court of Appeal had been mistaken, it should remit the case to Ellis J to make findings as to the facts relating to Mr Pottinger's possession of

the lots and his alleged fraudulent statements about it. The Board would obviously adopt that course if the evidence and documents in the case could provide a basis on which the judge could reasonably hold that Mr Pottinger's application to the Registrar had been fraudulent. No shorthand record of the evidence exists and, like the parties and the Court of Appeal, the Board can only rely on the typed-up version of the judge's notes. But, since the trial began as long ago as October 2000 and the Court of Appeal then took all but two years to deliver judgment, so far as the content of the evidence is concerned, more than six years later Ellis J would be in much the same position as the Board.

35. In his declaration to the Registrar Mr Pottinger indicated that he bought a house in the area in 1970 and then became aware that the 34 lots, which were still in bush, were not only unattractive but tended to attract thieves. Having failed to trace the registered proprietors of the lots, in order to protect the value of the properties which he and other people had bought, in 1975 he took possession of the 34 lots and bushed them. Since that time he had been in undisputed and undisturbed possession of the lots and had paid the taxes on them.

36. Ms Raffone contends that this account contains significant omissions. In particular, while the precise dates and sequence of events are not clear, the evidence shows that Mr Pottinger made enquiries about the ownership of the lots. He said that he began doing so around 1980 in order to obtain compensation for the work he had done on the lots, but that in about 1983 he developed an interest in actually acquiring them. He had discussions with Mr Sugarman and they agreed a purchase price. He drafted an agreement. On his lawyer's advice, he then discontinued those discussions and the draft agreement was never signed. In his evidence Ms Raffone's husband, Mr Douglas Campbell, confirmed that there had never been any agreement between Mr Pottinger and Mr Sugarman. Mr Pottinger accepted that he also had discussions with Mr Campbell about buying the lots. He visited Mr Campbell at the Campbells' home in New York. Mr Pottinger denied, however, that any agreement had been reached with Mr Campbell. He testified that he had not signed the two exhibits which were said to be sale agreements dated 23 February 1983 between himself and Mr Sugarman and Mr Campbell respectively. Mr Campbell said that he himself had bushed the lots between 1982 and 1986. He had taken possession of them in January 1987. Mr Pottinger was lying when he said that he had been in possession of them since 1975.

37. In submitting that Mr Pottinger had made fraudulent misrepresentations to the Registrar, Ms Davis placed some weight on the conflicting evidence of Mr Pottinger and Mr Campbell about Mr Pottinger's possession of the lots. On any view, however, that evidence is unspecific and inconclusive. More particularly,

their Lordships can find in it nothing which would establish that Mr Pottinger knowingly misrepresented the position to the Registrar. Ms Davis emphasised that, according to his evidence, Mr Pottinger had first entered the lots in order to do work on them on behalf of other owners in the neighbourhood, as well as for his own benefit. She reminded the Board that, in 1994, he had become the custos of the sub-division. All this showed that he had not really been in possession of the lots on his own account and he had knowingly misrepresented the position. That submission must be rejected: the fact that Mr Pottinger may have entered the lots with a wider civic purpose is not inconsistent with his having actually taken possession of them. In any event, so far from fraudulently concealing that this was what he had done, Mr Pottinger referred to it in paragraph 6 of his declaration to the Registrar. As Smith JA said in relation to this aspect of the case, the evidence led by the claimant "falls woefully short of the required standard."

38. Going somewhat further than the statement of claim, Ms Davis argued that the judge could take the view that Mr Pottinger had deliberately kept the Registrar in the dark about the course of negotiations between himself and Mr Campbell and Mr Sugarman. Those negotiations were inconsistent with Mr Pottinger having the type of possession which was necessary for acquisition of title. They had culminated in the sale agreements in 1983. Those agreements would have constituted signed acknowledgments of title which, by reason of section 16 of the Limitation Act, would have been fatal to Mr Pottinger's claim to the title to the lots.

39. Developing her argument, Ms Davis submitted that, in order to acquire title, "the person must be in possession in the assumed character of owner": Stonham, *The Law of Vendor and Purchaser* (1964), para 1089. Since Mr Pottinger had been negotiating for the purchase of the lots from Mr Sugarman and Mr Campbell, he could not simultaneously have been in possession of them in the assumed character of owner. The judge could conclude that he must have realised this and have deliberately concealed the facts from the Registrar. Their Lordships reject that submission.

40. In the first place, before it could be inferred that Mr Pottinger was deliberately concealing these matters in order to advance his application to the Registrar, it would be necessary for Ms Raffone to show that he would actually have been aware of the legal rule about the nature of the possession required. Not only, however, is there nothing in the evidence to show this, but the rule itself, which was never clear-cut, has now been declared to be a "heresy". For English law the heresy was extirpated by the House of Lords in *JA Pye (Oxford) Ltd v Graham*, [2003] 1 AC 419, 436H, para 42, where Lord Browne-Wilkinson made it

clear that in the Limitation Acts "the word 'possession' has its ordinary meaning". In *Wills v Wills* [2003] UKPC 84, para 21, Lord Walker of Gestingthorpe, giving the judgment of the Board, held that in Jamaica "the heresy ... would not have survived the House of Lords' decision in *Pye*." In *Pye* [2003] 1 AC 419, 438, para 46, Lord Browne-Wilkinson held that a squatter's willingness to pay for his possession if asked by the owner is not inconsistent with his having the requisite possession for the purposes of the Limitation Act: "An admission of title by the squatter is not inconsistent with the squatter being in possession in the meantime." Similarly, the fact that Mr Pottinger engaged in negotiations with Mr Sugarman and Mr Campbell, and even drafted a sale agreement, is not inconsistent with him being in possession for purposes of acquiring title. In these circumstances the Board can find no evidence on which it could properly be held that Mr Pottinger, whose application was handled by his lawyer, deliberately concealed these negotiations from the Registrar for fear that his application would otherwise have been refused.

41. The legal basis behind the supposed concealment of the sale agreements which he allegedly signed is equally unconvincing. As their Lordships explained in para 2, by reason of section 16 of the Limitation Act, the relevant twelve year period of possession for acquiring title runs from the date of any document signed by the person in possession acknowledging the title of the person entitled to the land. So Ms Raffone's contention is that the relevant period of possession would only have run from the date of the alleged sale agreements, 23 February 1983. Even supposing, however, that the signed agreements were genuine and were signed by Mr Pottinger, they refer to Mr Sugarman and Mr Campbell: they make no reference whatever to the company. So they could not possibly constitute the type of acknowledgment of the company's title to the lots to which section 16 refers. On the most favourable interpretation for the claimant, therefore, their Lordships see no plausible basis in the evidence for inferring that Mr Pottinger knowingly concealed the existence of these documents on the misguided supposition that, if the Registrar had known about them, he would have had to reject his application.

42. For these reasons the Board is satisfied that the evidence in the case would not, on any reasonable view, justify an inference that Mr Pottinger acted fraudulently when he submitted his declaration and other material to the Registrar. It follows that, in terms of section 161 of the Registration Act, Ms Raffone has not established that he was registered as proprietor of the 34 lots through fraud. That being so, his title to the lots is indefeasible.

43. Their Lordships will accordingly humbly advise Her Majesty that the appeal should be allowed and the action dismissed. The respondent must pay the appellant's costs before the Board and in the High Court and the Court of Appeal.