

JAMAICA**IN THE COURT OF APPEAL****SUPREME COURT CIVIL APPEAL NO: 53 OF 2002**

BEFORE: THE HON MR JUSTICE BINGHAM, J.A.
THE HON MR JUSTICE HARRISON, J.A.
THE HON MR JUSTICE SMITH, J.A.

BETWEEN: TRAUTE RAFFONE **APPELLANT**
AND ALARIC ASTOR POTTINGER **RESPONDENT**

Miss Carol Davis for appellant

**Donald Scharschmidt, Q.C., for respondent instructed by
Messrs: Robinson, Phillips and Whitehorne**

**February 26, 27, 28, April 9, 10,
May 26, 27, 28, 2003 and March 11, 2005**

BINGHAM, J.A:

Having read in draft the judgment prepared in this matter by my learned brother Paul Harrison, J.A. I am to state that I am entirely in agreement with the reasoning he has advanced and the conclusions to which he came. There is nothing further that I could usefully add.

HARRISON, J.A:

This is an appeal from the judgment of Ellis, J on March 20, 2002, giving judgment for the respondent with costs to be agreed or taxed.

By a writ dated May 25, 1994 the appellant sought against the respondent:

- (a) declarations that she was the owner and/or entitled to possession of certain parcels of land in Gibraltar in the parish of St Mary, which land the respondent fraudulently represented that he had possessory titles thereto and caused the old titles to be cancelled and new titles issued in his name;
- (b) injunctions restraining the respondent from dealing with or trespassing on the said lands then in the appellant's possession;
- (c) damages for wrongfully selling specific lots of land on the said lands and
- (d) an order that the Registrar of Titles be directed to reinstate the appellant, or alternatively, endorse the appellant's name on the new certificates of title, as the registered proprietor of the said parcels of land.

Gibraltar Heights is a land development at Gibraltar in the parish of St Mary divided into several hundred lots each with its individual Title under the Registration of Titles Act, and initially owned by Gibraltar Estates Ltd., a company registered in Jamaica.

In 1972 the respondent bought one of the lots, lot 55, and resided there as one of 14 residents in the development. The respondent "bushed" the overgrown lots on the property. He said, in cross-examination, at page 45 of the record:

"I was bushing lots qua president of association-president since 1976. I was concerned with the integrity of committee etc.

Initiality (sic) I acted to preserve integrity of community. I know of it about 1970-5 (who registered owners were) Bonnell was chairman of company. Started to enquire of Bonnell in early 1980's.

I wanted at outset to get compensation for what I had done. I could not continue to cut lots from my pocket. I developed an interest to acquire lots in 1983 (Sugarman). I made enquiries all over and locally. Local part led me to Sugarman. I negotiated with Sugarman as he said he owned the lots. I know who the registered owners were. I assumed he was connected with Gibraltar Estates Limited. I drafted Sugarman's agreement. It was between me and Sugarman."

The respondent had made enquiries as to the ownership of the said lots and, he said in examination in chief at page 43:

"Eugene Sugarman's name came up early in 1983. I have never met him. I have spoken to him on the phone. We arrived at purchase price for 34 lots. Lot was placed (sic) in an agreement. It was returned to me. I took it to Sydney Phillips at Highgate. He called Sugarman in my presence. I heard what he said to Sugarman. Phillips gave me advice and I discontinued negotiation with him."

The respondent thereafter had discussions with one Douglas Campbell, the appellant's husband, and who was representing Sugarman and the company in respect of the sale of lots on the property. The respondent in examination in chief at page 44, said:

"I got several phone calls from Douglas after discontinuation with Sugarman. Campbell phoned me from New York. He said he took over from Sugarman to deal with me. Discussions led nowhere. I did visit his home in New York. I went on his invitation. We discussed lots owned by foreigners." (Emphasis added)

In December 1986, the appellant entered into an agreement for sale exhibit 3, to purchase 43 lots in the "Gibraltar Estate sub-division" from Gibraltar Estate Investments Co. Ltd, as seller. The purchase price is stated in paragraph 2 of exhibit 3. It reads:

"2. Purchase Price: In consideration of the 43 lots and mutual agreements herein contained, seller and buyer agree as follows:

The purchase price for which Seller agrees to sell and convey those 43 lots to Buyer and which Buyer agrees to, subject to the terms and conditions hereof, 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." (Emphasis added)

The agreement, exhibit 3, is signed by "Eugene Sugarman" as the "President and sole surviving director" on behalf of Gibraltar Estate Investments Company Ltd, on December 12, 1986 and by the appellant on December 31, 1986 and witnessed by notaries public of the State of New York, Rose Stevens and John C Mujica, respectively. The said agreement recites in paragraph 6:

"6. The registered titles for 34 of those lots are currently being held (for safe keeping and for direction by Seller) by E.M. Robinson, Attorney-at-Law, whose office is located in Ocho Rios, St Ann, Jamaica, West Indies."

and in paragraph 7 that the registered Titles to the remaining 9 of the 43 lots were missing and presumed lost, but that the said attorney-at-law would secure duplicates, in order to effect the transfer of the 43 lots.

The appellant said, in evidence that she made out a cheque, exhibit 4, to "Sugarman", not to Gibraltar Estates Ltd. She accompanied her husband Campbell to the said lands several times thereafter "... to see that lots were being cleaned."

Douglas Campbell, the husband of the appellant, stated in examination-in-chief, that he had known the respondent for over "30 years ...", and that he Campbell was authorized from 1982 to sell the said lands on behalf of Gibraltar Estates Development Co. He had discussions with the respondent in 1982 in Ocho Rios by telephone. He said:

"Agreed that we would sell the land. Down to \$125,000 - \$121,000.00".

Campbell said that he told the respondent that "... company was dormant".

Tendered in Campbell's evidence were:

(1) Exhibit 7, an agreement dated February 23, 1983 between Campbell and the respondent with the signatures of both parties and witnessed by one "Noel Jackson", for the payment of \$12,000.00. "The consideration for closing on the conclusion of the sale between Eugene Sugarman, vendor of Carib Ocho Rios Apartment and Alaric A. Pottinger of Gibraltar Estates, Oracabessa, St Mary, for the purchase

of 34 lots of land, for the sum of One Hundred and Twenty-Five Thousand Dollars (\$125,000.00) or for lesser sum ..."

Campbell said that the respondent gave him exhibit 7. The respondent denied that he did so or that the signature was his; and

(2) Exhibit 8, a sale agreement dated February 23, 1983 between Sugarman and the respondent for the sale of "... forty-one (41) lots in Gibraltar Heights ... Consideration ... the purchaser agrees to pay Ja. \$125,000 for the land ..."

This exhibit has a signature "A.A. Pottinger," which was witnessed. The respondent denied seeing that document before and denied that it was his signature.

Campbell said that he took exhibits 7 and 8, to New York. He spoke to Sugarman. He said further, that, the respondent had told him Campbell that he would be in New York to pay for the land in United States currency. The respondent went to Campbell's home in New York in 1983. Campbell said that the respondent promised to "bring the money next day." The respondent failed to do so.

The respondent admitted visiting Campbell's home in New York in 1982, but not to deliver purchase monies. The appellant's witness Julius Dixon, a resident of Gibraltar Heights in excess of 20 years, stated that he knew the respondent for many years both having been employed to the same insurance company. The respondent also lived close to him. He had seen Campbell, whom he knew for over 30 years, "cleaning the lands" at Gibraltar in the 1980s. He had never seen the respondent on the said lands during that period.

The respondent admitted that:

"In 1992 I obtained titles for the 34 lots – subject of this action ...".

but before doing so he "made enquiries as to the owners." He said further:

"I did not succeed in locating William Bonnell. Gibraltar Estates Ltd. owned the lots."

and that he first heard in 1994 that the appellant had acquired the lots.

The appellant's statement of claim alleged, inter alia:

"5. The 1st defendant while having previous knowledge and notice of the plaintiff's right and interest in the said lands has made an application to the 2nd defendant for titles to the said lands on the basis that he was in continuous possession of said lands for a period in excess of twelve years.

6. The representations made by the 1st defendant to the 2nd defendant were knowingly false and were uttered with an intention to defraud the plaintiff of her said lands.

Particulars of fraud of first defendant

- 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.
- iii. The 2nd defendant acting upon the 1st defendant's said fraudulent misrepresentation wrongfully cancelled and issued in their stead new titles in the name of the 1st defendant."

In answer to the appellant's claim to be the owner in possession of the said land and the allegation of fraud against him, the respondent in his defence filed, stated, inter alia:

"2. The defendant denies the allegation made in paragraph 4 of the Statement of Claim and says that he is the registered proprietor of lots the subject matter of dispute having acquired same by adverse possession.

3. As to paragraph 5 and 6 this defendant admits that he made an application to the second named defendant to be registered as proprietor of the lots mentioned in the particulars of paragraph 6 on the basis that he was in continuous and undisturbed possession of same for a period in excess of twelve (12) years but denies that he made any false representation. The defendant denies the particulars of fraud in paragraph 6."

Ellis, J having heard the evidence and submissions of counsel, found inter alia, at page 29:

"I do not find that the agreement is an enforceable contract. It does not provide for any consideration which flows from the plaintiff to the vendor. What to my mind paragraph 2 has done is to request the one party to pay the statutory liabilities of the other party. There is no evidence that the requested party did discharge any statutory liability of the property."

and at page 30:

"There is no doubt that if the agreement was valid and enforceable it would, by the doctrine of conversion, make the plaintiff owner of the land (See **Lysaght v Edwards** (1876) Ch. D. 499 at 506) and the passage from **Barnsley's** text book cited by Mr Morrison.

I have concluded the invalidity of the contract on which the plaintiff relied to found (sic) her ownership. Since the contract has not established her ownership, she has no competence to bring any action. That circumstance is enough to dispose of the case in favour of the first defendant."

and further at page 31:

"The contract (exhibit 3) certainly does not speak to when possession is to be taken. That being so, possession under that contract could only have been given on the payment of full purchase price.

On the plaintiff's own evidence she has never been in defacto possession of the land and she gave no evidence of having paid any full purchase price.

I find that the submissions on the issue of possession are well founded. They are well supported by the cases cited and the passage from the text book. In the light of my findings I must conclude that the plaintiff has not established her competence to bring this action."

The learned trial judge thereafter gave judgment for the respondent with costs.

The grounds of appeal read as follows:

"1. The learned trial judge erred in awarding judgment to the 1st defendant/respondent herein.

2. The learned trial judge erred in that he failed to make any or any proper finding as to whether the respondent's application to the Registrar of Titles for titles to the lots the subject matter of the suit herein was fraudulent as alleged by the appellant.

3. The learned trial judge erred in fact and in law in that he failed to find that the defendant/respondent's application to the Registrar of Titles for titles to the lots the subject matter of the suit herein was fraudulent and/or failed to give weight and/or any proper weight to the overwhelming and

unchallenged evidence that the said application was knowingly false and or fraudulent.

4. The learned trial judge erred in law in that he failed to appreciate that the plaintiff/appellant's claim was that the defendant/respondent had fraudulently claimed adverse possession in his application to the Registrar of Titles.

5. The learned trial judge erred in finding that the appellant had no competence to bring an action before the Court.

6. The learned trial judge erred in finding that the appellant had no competence to bring an action before the Court in that no such issue was raised on the pleadings between the parties before the Honourable Trial Judge.

7. The learned trial judge erred in considering the enforceability of the contract between the appellant and Gibraltar Estates Investments Company Limited, which was not a matter in issue or properly in issue between the appellant and the respondent.

8. The learned trial judge erred in finding that the appellant was not in possession of the land the subject matter of the suit herein.

9. The learned trial judge failed in giving proper consideration of the evidence with regard to the appellant's possession of the land the subject matter of the suit herein."

The respondent filed in this Court a notice dated February 24, 2003 of his intention to contend that the judgment of Ellis, J should be confirmed on the ground:

"That the contract on which the plaintiff/appellant relies is in breach of section 33 of the Exchange Control Act which was in force at the material time."

A valid contract for the sale of land, required by section 4 of the Statute of Frauds 1601 to be in writing, has to contain four essential features. They were correctly recognized by Ellis, J to be the parties, the property, the consideration and the nature of the interest to be transferred.

The effect of a valid contract is, that on execution, the equitable interest in the land passes immediately to the purchaser. The legal estate remains with the vendor who has a lien for the payment of the purchase price. Jessel, M.R. in **Lysaght v Edwards** (1876) 2 Ch. 499 (supra) at page 506, said:

"... it was completely settled before the time of Lord Hardwicke, who speaks of the settled doctrine of the Court as to it. What is that doctrine? It is that the moment you have a valid contract for sale the vendor becomes in equity a trustee for the purchaser of the estate sold, and the beneficial ownership passes to the purchaser, the vendor having a right to the purchase-money, a charge or lien on the estate for the security of that purchase money, and a right to retain possession of the estate until the purchase-money is paid, in the absence of express contract as to the time of delivering possession."

Consideration is fundamental to the law of contract. The authors of **Chitty on Contracts** 26th Edition (1989) at paragraph 163, state that a promise has no contractual force unless some value has been given for it.

Consequently, even though there may be no evidence of valuable consideration having actually been given, the purchaser under a valid contract of sale, being the beneficial owner, is competent to bring an action. The courts are not concerned with the adequacy of the consideration. The parties are free to

determine the amount and nature of the purchase price. The consideration should be real and for value and not illusory.

Additionally, a contract must be free from the taint of illegality. If it is not, it may be unenforceable, for example, if it is in breach of a statutory provision. The courts will not assist in the enforcement of a contract which is prohibited by law. The headnote to the case ***Re An Arbitration Between Mahmoud and Ispahani*** [1921] All E.R. Reprint 217 reads:

"The court will not enforce a contract which is made illegal by a statutory Order, even though the question of illegality is raised by the party who has been guilty of it, and even though the other party honestly believed, as a result of statements made to him by the party guilty of the illegality, that no breach of the Order was being committed."

However, even if illegality is not specifically raised, if it arises on the evidence the court is bound to deal with it [***Chettiar v Chettiar*** (1962) A.C. 294].

The Exchange Control Act (repealed in 1992) provided in section 33:

" (1) except with the consent of the Minister it shall not be lawful in the Island ...

(a) ...

(b) for any person resident outside the scheduled territories, or any person acting on behalf of any person so resident, to transfer, convey or do any act forming part of a series of acts calculated to result in the transfer or conveyance by way of sale, exchange, gift or mortgage of any land, buildings or other hereditaments situated in the Island or any instrument, or certificate

of title relating thereto to any person
wherever resident ..."

However, failure to obtain the permission of the Minister prior to the formation of the contract will not make it illegal, but such failure will prevent the performance of the contract until such consent was obtained. The breach would not make the contract illegal as formed, it would only affect its performance. Their Lordships' Board of the Privy Council in ***Friend v Tulloch*** (1994) 44 WIR 345 held that the parties to the contract for the sale of land had not intended to commit a breach of the Exchange Control Act. Their Lordships held (per Lord Templeman) at page 348:

"The contract was lawful but could not be completed until the consent of the Minister was given or ceased to be necessary."

In the instant case, Sugarman as director of Gibraltar Estates Ltd, the vendor, had signed exhibit 3, the agreement for sale. In his letter dated August 13, 1982 to the witness Campbell, he stated that "... Sydney was supposed to get permission from the Bank of Jamaica, Exchange Control Section)." This is evidence that there was no intention to commit a breach of the Exchange Control Act. The contract, exhibit 3, was clearly legal as formed.

A claimant who holds a beneficial interest in the land and who seeks to defeat the registered title of another in such land, may do so by proving fraud. Under the Registration of Titles Act, a registered title is generally indefeasible except in the case of fraud.

A person may be registered as owner of property, if he satisfies the Registrar of Titles that he had been in possession of such property for twelve years continuously, coupled with the requisite intention to possess that is, the "*animus possidendi*." This is the concept of adverse possession. Therefore if one enters another's property as a trespasser, but later seeks to show that he has dispossessed the true owner, he has to bring compelling evidence of continuous occupation for a period of not less than 12 years and that he had the required *animus possidendi*. In ***Powell v McFarlane*** (1979) 38 Property and Compensation Reports 452, Slade, J laid down some basic principles in relation to possession. At page 470, inter alia, he said:

" (1) In the absence of evidence to the contrary, the owner of land with the paper title is deemed to be in possession of the land, as being the person with the prima facie right to possession. The law will thus, without reluctance, ascribe possession either to the paper owner or to persons who can establish a title as claiming through the paper owner.

(2) If the law is to attribute possession of land to a person who can establish no paper title to possession, he must be shown to have both factual possession and the requisite intention to possess ("*animus possidendi*").

(3) Factual possession signifies an appropriate degree of physical control. It must be a single and conclusive possession, though there can be a single possession exercised by or on behalf of several persons jointly. Thus an owner of land and a person intruding on that land without his consent cannot both be in possession of the land at the same time. The question what acts constitute a sufficient degree of exclusive physical control must depend on the circumstances, in particular the nature of the land and

the manner in which land of that nature is commonly used or enjoyed. ...

4. The *animus possidendi*, which is also necessary to constitute possession, was defined by Lindley M.R., in ***Littledale v Liverpool College*** (a case involving an alleged adverse possession) as "the intention of excluding the owner as well as other people." ... What is really meant, in my judgment, is that the *animus possidendi* involves the intention, in one's own name and on one's own behalf, to exclude the world at large, including the owner with the paper title if he be not himself the possessor, so far as is reasonably practicable and so far as the processes of the law will allow."

However, if the person claiming title by adverse possession acknowledges the title of the true owner within the said period of twelve years, time having started to run would cease, and time would have to start running afresh. In Halsbury's Laws of England, 4th Edition, Volume 28 paragraph 980, the authors stated:

"Where, having taken adverse possession of land, a trespasser expressly or impliedly acknowledges the title of the owner, time will start to run afresh against the owner from the date of the acknowledgement. However, an acknowledgement of title made after the expiry of the limitation period will not suffice to revive the owner's title."

In ***Edginton v Clarke*** [1963] 3 All E.R. 468, the Court of Appeal (England) held that an offer by the trespasser to purchase the land from the owner constituted an acknowledgement of the latter's title, with the result that the 12 year limitation period started to run afresh. The trespasser had written letters to a person whom he knew to be the owner's agent making an offer to purchase the

property, thereby showing that he knew that the owner had a better title than he did.

A registered title obtained by means of adverse possession may be defeated if it is proved that the material employed by the adverse possessor to obtain title was fraudulent. Fraud means a conscious and purposeful act of dishonesty on the part of the person complained of, thereby, presenting a picture otherwise than the truth. In discussing the nature of the fraud necessary to defeat a registered title, Lord Lindley, in ***Assets Co. v Mere Roihi*** [1905] A.C. 176, at page 210, said:

"... fraud meant actual fraud ... i.e. dishonesty, not constructive or equitable fraud."

In ***Honiball v Alele*** (1993) 43 WIR 314, their Lordships in the Judicial Committee of the Privy Council, advised that in an affidavit sworn to by the appellant Brown giving his opinion of the value of a lot of land (contradicted by two expert appraisers of land) which affidavit facilitated the registration of the said lot in the appellants' names, was such a gross under valuation, that it amounted to fraud. The Board (per Lord Oliver) at page 323, said:

"... the uncontradicted evidence of the actual value of lot 96 was so startling that Mr Brown's unsupported opinion, said to be based upon information from an unidentified source, simply could not be explained away as an honest but unfortunate error attributable to lack of expertise. Here was totally convincing evidence from two experts which was put forward to support a clear and unequivocal allegation of fraud. It cried out for an answer. Yet, in his evidence in answer, Mr Brown did not for a moment seek to

controvert a single fact in the evidence against him
 ..."

Section 153 of the Registration of Titles Act reads:

"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 certificate 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 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."

Although section 161 of the Act confers an unassailable title on the registered proprietor of land, except in specific cases, section 153 permits the Registrar of Titles on being satisfied that such a title was fraudulently obtained, to cause it to be delivered up for cancellation. In *Honiball v Alele* (supra), the Board advised that the registered title issued in the name of the appellants

had in fact been obtained by fraud, and accordingly was properly ordered by the Jamaican Court of Appeal to be cancelled.

Grounds 2, 3 and 4 of the appeal in the instant case as argued by Miss Davis for the appellant may conveniently be dealt with together. Counsel argued that the learned trial judge failed to find, and in view of the overwhelming nature of the evidence, he should have found, that the respondent's application to the Registrar of Titles was knowingly fraudulent and fraudulently based on his claim of adverse possession of the lots in question. She submitted that, on the evidence, the respondent dishonestly stated in exhibit 2, that he was in possession of the said lots since 1975. Such fraud the learned trial judge failed to consider. But even if the respondent had started "bushing" the lots in 1976, in 1983, he acknowledged the ownership of the registered proprietor and entered into negotiations to purchase thereby not exercising his rights as owner. The respondent, she argued, was not "in sole and undisputed possession of the said lots", nor was he, on the evidence, in possession in law or fact.

The respondent filed with the Registrar of Titles, an application, with supporting declaration, each dated June 6 1992, part of exhibit 2, to be "registered as proprietor"... of the lots in question. The application, in paragraphs 4 and 5, reads:

"4. 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.

5. That the said lands are occupied by me."

The respondent said in his declaration, at paragraph 6:

"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."

These recitals by the respondent and in particular, the bushing of the lots, were put forward to establish the basis for his claim to be registered as the proprietor of the said lots on the ground of his long undisturbed possession of the said lots for a period in excess of twelve (12) years and his intention to possess the said lots in his own right. However, in evidence, in cross-examination the respondent said:

"I was bushing lots qua president of association – president since 1976. I was concerned with the integrity of the committee etc. Initially, I acted to preserve the integrity of community ..."

He said further that:

"I wanted at outset to get compensation for what I had done. I could not continue to cut lots from my pocket. I developed an interest to acquire lots in 1983 (Sugarman) ..."

This latter evidence conflicts with the respondent's declarations in exhibit 2, and reveals that it was open to the learned trial judge to find that, the respondent:

- (1) did not adversely possess nor possess the said lots in 1975, having "bushed" the lots, as president and for the benefit of the community from 1976.
- (2) did not remain "in sole and undisputed and undisturbed possession of the said lots" since 1975, - not having "developed an interest to acquire the lots ... " until 1983.
- (3) had not, prior to June 22, 1992 the date of the declaration, "... settled all outstanding taxes on the said lots ...". The exhibited tax certificates, part of exhibit 2, reveal payments:
 - (a) on April 29, 1993 on lots 55, 24, 32, 46, 48, 23 and 2 unnumbered for the tax year 1993-1994 and on lot 67 and another for the tax year 1992-1993,
 - (b) on August 12, 1994 on lots 24 32, 46, 48, 20A, 53, 54, 23, 55, 49A, 50 and 50A plus ten (10) unnumbered for the tax year 1993-1994.

This negatives any evidence of *animus possidendi* in the respondent, prior to 1983. This is emphasized by the fact that the respondent wished to be compensated for the expenditure he made from 1976 in the bushing of the lots, presumably from the true owner. Consequently, the declaration, exhibit 2, is not supported by the evidence, contains untrue assertions and tells a lie about itself. Therefore the learned trial judge could have held that the appellant's complaint of fraud in the respondent was valid.

Furthermore, if one assumes, which is not supported by the evidence, that the respondent had been in possession of the said lots since 1975, there is no

evidence of twelve (12) years "... sole undisputed and undisturbed possession of the said lots ..." as the respondent declares in exhibit 2. This would be a necessary requirement to satisfy the concept of adverse possession. The respondent admitted in cross-examination that:

- (1) he knew in about 1970-1975 that the registered owner of the lots was Gibraltar Estates Ltd. that Bonnell was chairman of the company and he "started to enquire of Bonnell in early 1980s".
- (2) he, in 1983, developed an interest in acquiring the lots and "make enquiries all over and locally" and the local enquiry led him to Sugarman.
- (3) he negotiated with Sugarman "as he said he owned the lots". He "assumed (Sugarman) was connected to Gibraltar Estates Ltd." He drafted the agreement - "Purchase price was \$150,000.00".
- (4) he stopped negotiations with Sugarman on the advice of Phillips and commenced negotiations with Campbell, the appellant's husband "on the assumption he was acting for Sugarman" – negotiations continued.

These admissions by the respondent amounted to his knowledge and acknowledgements of the true owner of the lots and from whom he attempted to purchase, therefore portraying the absence of any *animus possidendi*, in 1983, and also causing the cessation of any time which may have commenced to run in 1975. See Halsbury's Laws of England 4th edition Volume 28, (supra) and ***Edginton v Clarke***, (supra). More specifically, even if the respondent took possession of the said lots in 1975, as he claims, his acknowledgment of the owner's title in 1983, would credit the respondent with a mere eight (8) years possession, which, would be four (4) years short of the required twelve (12)

years when he applied to be registered in 1992. Further, if time again commenced to run in 1986, or even 1983, the respondent could only rely on a period of six (6) years or nine (9) years respectively, in 1992, when the respondent made his application for registration, exhibit 2.

There was therefore ample evidence from which the learned trial judge ought to have found that the respondent's contention and assertion, in exhibit 2, of entitlement to the lots by 12 years adverse possession was not supported and therefore fraudulent; (*Honiball v Alele* supra). Grounds 2, 3 and 4 accordingly succeeded.

Grounds 5 and 6 may also be considered together. Ellis, J found that the agreement was unenforceable due to lack of consideration from the appellant, no possession in the appellant and consequently she was not competent to bring the action. The learned trial judge was thereby concluding that the appellant had no competence to bring the action because the contract on which she relied was an invalid one.

The contract, exhibit 3, was a valid enforceable one, on the face of it. It contained all the essential requirements. The consideration, the purchase price, being:

"... 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."

although unusual, is perfectly legitimate and quantifiable. The obligation under the contract, by a purchaser to discharge the statutory liability of the vendor, is a detriment to the purchaser conferring a benefit on the vendor. On the signing of the contract, therefore, the purchaser, the appellant, had an equitable interest arising, coupled with an obligation to pay the purchase price, and the vendor, Gibraltar Estates Ltd., retained the legal estate, with the lien to obtain the said purchase price (*Lysaght v Edwards* supra). I agree with Mr Scharschmidt for the respondent, who submitted that the appellant must succeed on the strength of her Title. As a general rule this is correct. However, the issue is not the strength of competing title between the appellant and the respondent, but the right of the appellant to protect her equitable interest in view of the "attack" on the legal estate of the vendor, by the respondent's act of seeking to acquire title by adverse possession.

It is equally a misconception to maintain that because the appellant had no title "she cannot succeed unless she was in possession of the land". Although on the evidence the appellant seeks to establish possession through the witness Campbell, her husband, even the absence of possession would not be a bar to the appellant's suit as possessor of the equitable interest. A party to a valid contract for the sale of land, is not precluded from advancing his interest in a court due to lack of possession. Invariably he has none. The appellant succeeds on ground 5.

However, I do not agree with the appellant's arguments on ground 6, that because the competence to sue was not raised in the pleading it could not be advanced at the trial. Counsel for the respondent based his submissions as a point of law, whether valid or not, that is, on the issue of absence of possession. Being fundamental to the issue of the *locus standi* of the appellant to bring the suit, it is my view that the learned trial judge had a duty to consider it. I regard this as a jurisdictional point.

The appellant advances her argument on the basis that her valid contract with the vendor Gibraltar Estates Investments Co. Ltd., is in danger of not being able to be specifically performed because of the conduct of the respondent in effecting the issuance of Titles to the said lots to him by the Registrar of Titles. The effect of the appellant's claim, if successful, is the basis on which the Court may order the cancellation of the Titles to the said lots, issued to the respondent on the strength of his application in 1992.

The indefeasibility of the registered Title, except in specific situations, is emphasized in section 161 of the Registration of Titles Act, with the recognition of the specific persons competent to challenge such title. The section, *inter alia* reads:

"161. No action of ejectment or other action, suit or proceedings, 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 –

...

(d) the case of a person deprived of any land

by fraud as against the person registered as proprietor of such land through fraud, ..." (Emphasis added)

In the instant case, the appellant maintains that she is "... a person deprived of ... land by fraud ..." of the respondent, she being in possession of a valid contract for the sale of the lots.

The consequential procedure that may be employed on a finding of fraud is contained in section 153 of the said Act. The section, inter alia, reads:

"153. 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 certificate 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, ..."

The section therefore provides that the Registrar may act if it shall appear to her satisfaction, that fraud has been employed in obtaining a certificate of title. The section is silent on the means or procedure by which such conduct should be brought to the Registrar's attention. The section does stipulate, that if the Registrar thereafter orders the person complained against to produce the said certificate for cancellation and he refuses or neglects to do so, then the Registrar may apply to the Supreme Court for the issuance of a summons to such a

person. Counsel for the respondent argued that the fact that the appellant came first to the court with the allegation of fraud, instead of previously obtaining such a finding by the Registrar, as required by section 153 of the Act, the appellant is disqualified from obtaining the declaration from the Court. He relied on ***Barraclough v Brown*** (1897) AC 615 and ***Craies on Statute Law, 7th edition***, page 247-249, maintaining that where a statute creates a right and a specific remedy, any enforcement of this right must be by means of that remedy. In ***Vallance v Falle*** (1884) 13 QBD 109, it was held that the provisions and object of the particular enactment must be looked at to discover whether it conferred a general right or restricted the individual to a duty to employ particular proceedings. Their Lordships' Board in ***Loke Yew v Port Swettenham Rubber Company*** (1913) AC 491, at page 504, held that:

"So long as the rights of third parties are not implicated a wrongdoer cannot shelter himself under the registration as against the man who has suffered wrong ... the duty of the Court to rectify the register in proper cases is ... imperative because of the absoluteness and the effect of the registration if the register be not rectified ..."

In ***Honiball v Alele*** (supra) their Lordships held that although the wrong procedure had been employed in advancing the allegation of fraud under section 153 of the Act, there were sufficient particulars of the allegations revealed to entertain the complaint, and the section anticipated that the Registrar may be notified of the fraud, even informally. Their Lordships, at page 324, said:

" ... the Registration of Titles Act itself, in sections 153 and 154, contemplates that an issue of fraud may fall

to be determined informally on a summons to show cause in any case where the Registrar of Titles, by means which are not prescribed in the Act, is satisfied that the registration has been procured by fraud."

Section 153 is silent as to the means or procedure by which the Registrar may be notified of the fraud alleged. What better means exists than obtaining a declaration from a court that fraud exists and thereafter so advising the Registrar? Moreover, section 158, in its general ambit seems to contemplate such a course. Section 158 (2)(a) reads:

"(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 ..."

The appellant was perfectly competent to sue and to do so by the method that she employed.

In support of ground 7, counsel for the appellant argued that the issue of non-enforceability of the contract was not pleaded in the defence nor was it an issue and therefore the learned trial judge was in error to consider it.

As observed above, the validity of the contract creating an equitable interest in favour of the appellant entitled her to pursue her claim in challenge to a fraudulent obstruction to the appellant obtaining title to the said lots. However, the enforceability of the said contract is an issue between the

contracting parties, namely, the appellant and Gibraltar Estates Ltd and is therefore irrelevant to the tortious conduct of the respondent. The learned trial judge's finding that the agreement was not "... an enforceable contract" for the reason that:

"It does not provide for any consideration which flows from the plaintiff to the vendor;"

besides being erroneous in law was not necessary for the determination of the claim before him. This ground also succeeds.

Grounds 8 and 9 concern the failure of the learned trial judge to find that the appellant was in possession of the said lots on a proper consideration of the evidence.

Mr Scharschmidt for the respondent submitted that the appellant not having had a Title cannot succeed unless she was in possession of the land. The learned trial judge referred to the principle in ***Lysaght v Edwards*** (supra), accepted counsel's submission and said, at page 31 of the record:

"The contract (exhibit 3) certainly does not speak to when possession is to be taken. That being so, possession under that contract could only have been given on the payment of full purchase price. On the plaintiff's own evidence she has never been in defacto possession of the land and she gave no evidence of having paid any full purchase price. I find that the submission on the issue of possession are well founded."

The appellant stated in evidence that she bought the land in 1986 "I signed document – December 1986". She visited the land along with the witness Campbell, her husband, of whom she said:

"Whatever was done on the land would have been done by him on my behalf."

Campbell said in January 1987 he took possession of the property which his wife bought, she having signed agreement, exhibit 3, with Sugarman. Campbell said further:

"Between 1982-86 I visited Jamaica and the property to bush it ...

In 1988 right on until 1994 I discovered that new titles had been issued. I saw no indication that defendant had possession."

Dixon, the appellant's witness saw Campbell on the Gibraltar lands in the 1980's:

"He was with others and by himself several times clearing the land. I have never seen Pottinger on those lands during that period."

Neither of the respondent's witnesses Adolph Murdock and Herman Webley, supported him in respect of his possession of the said lots.

There was ample evidence on which the learned trial judge could have found possession in the appellant between 1982 to 1986 and onwards. However, the appellant's claim against the respondent did not depend on the former's possession. It is the respondent, albeit unsuccessfully, who sought to rely on possession, in order to advance his claim of adverse possession. There is virtue in the appellant's contention on these two grounds.

The appellant executed and holds a valid contract for the sale of the said lots, untainted by any illegality under the now repealed Exchange Control Act, as alleged. She was entitled in 1994 to take steps to enforce it.

The respondent, on the evidence, was improperly registered as owner, for the reason that he was not in continuous possession of the said lots in excess of twelve (12) years, nor did he have the required *animus possidendi*. In addition, in 1983, a date within the twelve year period, he sought to buy the said lots from Sugarman (exhibit 8) then from Campbell (exhibit 7) and then from Gibraltar Estates, respectively, thereby acknowledging the existence of the legal estate in the true owner. Furthermore, the respondent's application was tainted by fraud by the untrue declarations that he had been in possession since 1975, and that he had, in 1992 "... settled all outstanding taxes on the said lots."

The appellant, having employed the correct procedure is entitled to succeed.

The appellant seeks from this Court:

- "1. Judgment for the plaintiff/appellant
2. A declaration that the appellant is the owner of and/or entitled to possession of all those parcels of land in Gibraltar in the parishes of St Mary being the lands previously and now registered at the following Volume and Folio numbers:

Old		New	
<u>Volume No:</u>	<u>Folio No:</u>	<u>Volume No:</u>	<u>Folio No:</u>

939	373	1258	192
939	383	1258	200
939	252	1257	58
822	61	1257	54
939	371	1258	190
824	71	1257	52
939	374	1258	193
938	268	1257	65
938	255	1257	60

<u>Volume No:</u>	<u>Folio No:</u>	<u>Volume No:</u>	<u>Folio No:</u>
938	382	1258	199
822	73	1257	56
939	370	1258	189
939	384	1258	201
939	372	1258	191
938	269	1257	66
938	281	1257	71
822	60	1257	53
822	72	1257	55
939	375	1258	194
939	376	1258	195
939	377	1258	196
939	378	1258	197
939	379	1258	198
938	248	1257	57
938	262	1257	61
938	265	1257	62
938	266	1257	63
938	267	1257	64
938	270	1257	67
938	271	1257	68
938	279	1257	69
938	280	1257	70
938	286	1257	72
822	62		
822	63		
822	64		
822	65		
822	70		
824	68		
939	362		
939	380		

939	386
938	254
938	276
939	282
939	381

3. A declaration that the respondent fraudulently misrepresented to the Registrar of Titles that he had a possessory title to the said land as required under the Registration of Titles Act.
4. An injunction to restrain the respondent from dealing with or purporting to deal with the said lands.
5. An injunction to restrain the respondent, his servants or agents from trespassing upon the said lands or interfering with the appellant's possession thereof.
6. Damages against the respondent for wrongfully selling or purporting to sell the following lots of land:

Volume No:Folio No:

1257	54
1257	59
1257	67
1257	68
1258	194
1257	62

7. An Order that the Registrar of Titles be directed to rectify the Register of Titles by removing the respondent as the registered proprietors of the aforesaid lots of land itemized in paragraph 2 thereof, or alternatively that the plaintiff/appellant be endorsed on the aforesaid new Certificates of Title as the registered proprietor on said Certificates of Title.
8. Costs to the appellant to be agreed or taxed.
9. Further or other relief."

The agreement for sale, exhibit 3, between the appellant and Gibraltar Estates Ltd. was signed by the appellant and by Sugarman, in his capacity as director of Gibraltar Estates Ltd. The author of Pennington's Company Law, 3rd Edition, in dealing with the contracts entered into by companies, at p. 108, said:

"At common law a corporation's contracts had generally to be made in writing under its common seal, but companies formed under the Companies Act (UK) have always been able to make their contracts in the same form as individuals ... when the contract is one which the law requires to be in writing it may be made on behalf of the company in writing signed by a person authorized by it."

Correspondingly, the Companies Act (Jamaica), in section 34(1) reads:

"34-(1) Contracts on behalf of a company may be made as follows

- (a) ...
- (b) a contract which if made between private persons would be by law required to be in writing, signed by the parties to be charged therewith may be made on behalf of the company in writing signed by any person acting under its authority express or implied."

The agreement, exhibit 3, is a valid contract on the face of it, with all the specific requirements including the consideration.

Mr Scharschmidt, Q.C., argued before us that the payment of US\$5000.00 by cheque by the appellant to Sugarman in New York, was an illegal payment making the agreement, exhibit 3 a sham. The appellant's cheque, exhibit 4, was payable to "Eugene L Sugarman and dated January 12 1986." Counsel concedes, that it may be an understandable error in writing "1986" in January of

a new year, but "1987" was intended. I agree. The appellant said in her evidence-in-chief:

"I bought land in 1986. I signed document in December 1986 ... I paid a cheque ..."

She was then shown the cheque, exhibit 4 and she identified Sugarman's signature. The endorsement on the back of exhibit 4 reads:

"For deposit Eugene Sugarman".

In cross-examination, the appellant at page 36 of the record, said:

"Exhibit 3 does not provide for my giving Sugarman anything. Cheque was signed before I signed agreement. Cheque was made out to Sugarman and not to Gibraltar Estates Ltd."

At no time was the appellant asked specifically the obvious question. For what was the payment of US\$5,000.00 exhibit 4?

The defence filed recites in paragraph 1:

"1. The defendant makes no admission as to paragraphs 1, 2, and 3 of the Statement of Claim;"

in response to the appellant's recitals therein, detailing the agreement, exhibit 3, regarding the purchase of the lots, the giving of valuable consideration and the appellant's entitlement to "a legal equitable interest in the said lands."

The respondent raised no issue of illegality in respect of the said payment, nor is there any patent fact to so describe exhibit 4. In **Northwestern Salt Company Ltd v Electrolytic Alkali Co. Ltd** [1974] A.C. 461, the defendants, sued for breach of contract, did not plead illegality of the contract, but sought to rely on facts and documents admitted in

evidence at the trial on other issues to show that the said contract was illegal as against public policy. The contract was for the sale and distribution of table salt. In allowing the appeal from the decision of the Court of Appeal, their Lordships in the House of Lords held that the contract was valid. The headnote, at page 461 reads:

"Where an action is brought on a contract which is ex facie illegal as being in unreasonable restraint of trade, the Court will decline to enforce the contract, irrespective of whether illegality is pleaded or not; but, where the question of illegality depends upon the surrounding circumstances, as a general rule, the Court will not entertain the question unless it is raised by the pleadings".

Lord Moulton, with reference to the contract, at page 476, said:

"... if the contract and its setting be fully before the Court it must pronounce on the legality of the transaction. But it may not do so if the contract be not ex facie illegal, and it has before it only a part of the setting, which it is not entitled to take, as against the plaintiffs, as fairly representing the whole setting. ... The contract sued upon is not en facie illegal."

In the instant case, the contract exhibit 3, is, on the face of it valid and not illegal. The payment of the cheque, exhibit 4 is at its best equivocal. I do not agree with counsel for the respondent to the contrary on this point.

However, on the wider issue where the appellant seeks, albeit in the alternative:

"... An order ... that the Plaintiff/Appellant be endorsed on the aforesaid new Certificates of Title as the registered proprietor on the said Certificates of Title."

it is my view that no such order should be made.

The legal estate in the said lots are vested in Gibraltar Estates Ltd. the vendor, in exhibit 3. Any instrument of transfer would therefore have to be effected by the said company. Sugarman signed exhibit 3 in his capacity as a director of the company. However, by letter dated August 13, 1982 admitted as exhibit 6, from Sugarman to the witness Campbell, which, inter alia, reads:

"Dear Doug:

Confirming our various telephone conversations I wish to sell my interest in 42 lots in Oracabessa, Jamaica (Golden Head Estates). I am enclosing an exchange of correspondence between myself and Sydney A Phillips Esq., which sets forth my interest in the lots. You will note from Sydney's letter to me that I held (and still hold), the said lots as security for a loan which I made to Gibraltar Estates Investment Co. Ltd. and William Bonnell. You will also note that Sydney was supposed to get permission from the Bank of Jamaica, Exchange Control Section." (Emphasis added)

the capacity of Sugarman is rendered unsure. As between the appellant and Gibraltar Estates Ltd, Sugarman signed exhibit 3, on behalf of the vendor. Sugarman's letter, exhibit 6, seems to classify him as vendor of "my interest in the lots ... as security for a loan which I made to Gibraltar Investment Co. Ltd. and William Bonnell" making him either a mortgagee or debenture holder or both. In either case documentary proof in support thereof is necessary. Furthermore, there was no evidence before the learned trial judge of the fact that the consideration stipulated, namely:

"Buyer will pay directly to the collector of taxes, stamp duty office and lawyer, respectively, all expenses." (Emphasis added)

was satisfied.

A further issue exists as to the status of the company. The appellant's witness Campbell said in evidence.

"In 1982 I told him (Pottinger) company was dormant. He said he had a lawyer friend who would check it."

If the company was in fact "dormant" in 1982, was there any functionary of the company with authority to sell and moreso, capable of transferring a valid legal estate? Did the assets of the company pass to the Crown "bona vacantia?"

The above outstanding issues will ultimately affect the relationship of the appellant and Gibraltar Estates Ltd. in respect of the agreement, exhibit 3.

As far as the purchasers of the six lots, sold by the respondent, are concerned, their titles are valid and their interests saved, being bona fide purchasers for value, as recognized under the Registration of Titles Act.

For all the above reasons, this appeal should be allowed and the order of Ellis, J set aside. The order of this Court should be:

1. Judgment for the appellant
2. It is declared that the Respondent fraudulently misrepresented to the Registrar of Titles that he had a possessory title to the said land as required under the Registration of Titles Act.
3. Injunction granted that the Respondent is restrained from dealing with or purporting to deal with the said lands.

4. Injunction granted that the Respondent, his servants or agents are restrained from trespassing upon the said lands.
5. The Registrar of Titles is hereby directed to rectify the Register of Titles by removing the Respondent as the registered proprietor of the aforesaid lots of land itemized in paragraph 2 of the Notice and Grounds of Appeal herein.
6. Cost of this appeal and costs below to the appellant to be agreed or taxed.

SMITH, J.A.

I have had the benefit of reading in draft the judgment of my brother Paul Harrison, J.A. and, although we differ in part, I nonetheless agree that the appeal should be allowed. We differ from each other only in so far as the proof of fraud is concerned. Harrison, J.A. holds that there was ample evidence that the respondent made fraudulent misrepresentations to the Registrar of Titles with a view to establishing adverse possession for the prescriptive period. I do not share the view that such misrepresentations were, on the evidence, fraudulently made. Fraud in this context means a false representation of fact made knowingly or without belief in its truth or recklessly not caring whether it is true or false – see **Derry v. Peek** (1889) 14 A.C. 337. It is important to note that a representation means a statement of fact not a statement either of law or of opinion. Fraud must not only be specifically alleged it must be strictly proved. Although the standard of proof required in civil cases is generally expressed as proof on the balance of probabilities, the degree of probabilities which must be established will vary from case to case.

The court when assessing the probabilities will have in mind as a factor that the more serious the allegation the stronger should be the evidence before the Court concludes that the allegation has been established on the balance of probabilities.

In **Bater v. Bater** (1950) 2 All ER 458; Denning L.J. said at page 459:

"Many other great judges have said that in proportion as the crime is enormous, so ought the proof to be clear. So also in civil cases. The case may be proved by a preponderance of probability, but there may be degrees of probability within that standard. The degree depends on the subject matter. A civil court, when considering a charge of fraud, will naturally require a higher degree of probability than that which it would require if considering whether negligence were established. It does not adopt so high a degree as a criminal court, even when it is considering a charge of a criminal nature; but still it does require a degree of probability which is commensurate with the occasion."

The above passage was favourably considered by the Court of Appeal, (England) in **Hornal v. Neuberger Products Limited** (1957) 1QB 247 an action for damages, breach of warranty and fraudulent misrepresentation.

In the instant case the allegations of fraud against the respondent are serious. Indeed they amount to criminal charges. Thus, in my judgment, a high degree of probability is required. The evidential background to this case is set out in the judgment of Harrison, J.A. There is no need to rehearse the facts in detail.

In June 1992 the respondent made an application to the Registrar of Titles to be registered as proprietor of 41 parcels of land situate at Gibraltar Estates in St. Mary. He had, in 1970, bought a house lot in Gibraltar.

The respondent's application was supported by two solemn Declarations. One was signed by the respondent and the other jointly signed by Adolph Murdock and Ivy Shim. The basis of his application was that he was in continuous and undisturbed possession of the lots for a period in excess of 12 years. The respondent in making the application was represented by attorneys-at-law. Notices of the application were published in the Daily Gleaner on the 15th, 22nd and 29th September, 1992.

In paragraph 6 of the Declaration the respondent stated:

"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 receipts of all the rents and profits thereof and have settled all outstanding taxes on the said lots."

The joint Declaration of Mr. Murdock and Miss Shim supports the above statement of the respondent.

On the basis of Declarations titles to the lots in question were issued by the Registrar of Titles in the name of the respondent.

On May 25, 1994, the appellant filed a writ seeking, among other things, a Declaration that the respondent "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." In her Statement of Claim the appellant averred that the representations made by the respondent

"were knowingly false and were uttered with an intention to defraud the plaintiff (the appellant) of her said lands."

The plaintiff based her entitlement to the lands on an Agreement for the purchase of the lots which she said she entered into in 1986 with the registered proprietor.

The particulars of fraud pleaded are (see paragraph 6 of Statement of Claim):

- "(i) The 1st Defendant (respondent) 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 (The Registrar of Titles) that he had no knowledge of the whereabouts of the Plaintiff or anyone with a competing or superior title to the said lands.
- (iii) The 2nd Defendant acting upon the said fraudulent misrepresentation wrongfully cancelled and issued in their stead new titles in the name of the 1st Defendant ..."

In his Defence the respondent denied that the representations were false.

He also denied the particulars of fraud.

Were the representations of the respondent to the Registrar fraudulently made? The first particular of fraud is that he fraudulently misrepresented that he was in possession of the lands for upwards of 12 years.

In evidence the respondent stated that he took possession of the lots in 1975; he bushed them, reared goats thereon and reaped pimento. He made enquiries as to the ownership of the lots. He was given the name Eugene Sugarman. He began negotiations by telephone with Sugarman with a view to buying the lots. In 1983 an instrument of Agreement was prepared. The respondent took the instrument to Mr. Sydney Phillips his attorney-at-law. On the advice of counsel he discontinued negotiation with Sugarman. Thereafter he received telephone calls from Mr. Douglas Campbell who was residing in New York, U.S.A. Campbell, he said, told him that he had taken over from Sugarman. Their discussions were futile. He denied signing any Agreement with Campbell in 1983.

Miss Davis, counsel for the appellant, submitted that the evidence of the respondent, shows that he was dishonest when he stated that he had been in continuous and undisturbed possession of the land since 1975. She contended that by entering into negotiations to purchase the land in 1983 he was thereby acknowledging the ownership of the registered proprietor.

I agree with Miss Davis as to the legal effect of the respondent's negotiation to purchase the lots in 1983. In **Edgington v. Clark** et al (1963) 3 All ER 468 the Court of Appeal (England) held that the making of an offer to purchase freehold land, of which the offeror did not know who

was the owner, showed that the offeror realized that the offeree had a better title to the property than the offeror and so the offer constituted an acknowledgement of the true owner's title for the purposes of the Limitation Act.

The effect of the acknowledgment is that the 12 year limitation period would start to run afresh. Put another way by the operation of law, the respondent by negotiating to purchase that land in 1983 would be deemed to have realized that the registered proprietor had not discontinued its possession in 1975. Therefore even if he had been in adverse possession in 1975 such possession would cease in 1983. Accordingly, his representation in 1992 that he had been "in the sole undisputed and undisturbed possession" since 1975 would not be correct. But is this a fraudulent misrepresentation? I think not. In my view the respondent's statement constitutes a misrepresentation of the law and not of fact. Although his knowledge of the law was obviously flawed this does not make his representation fraudulent. It should be remembered that the respondent was represented by counsel. There can be no doubt that he was acting on the advice of counsel albeit such advice was clearly erroneous.

For the appellant to succeed in establishing that the respondent made a fraudulent misrepresentation she must show that he knowingly misrepresented the facts. She must establish that the respondent did not

bush the lots, did not receive rents and profits and did not settle the outstanding taxes. What is the evidence in this regard? The appellant said she went to Gibraltar Estates sometime after 1977 with her husband, Mr. Campbell. She could not remember when she first went there. Her husband, she said, had taken people there to clean the land. She went there regularly but could not say how many times. She saw no one there and saw "no signs of occupation of the land."

Mr. Douglas Campbell said that in 1982 he had had discussion with the respondent concerning the sale of the lots. His evidence is:

"Between 1982 - 86 I visited Jamaica and the property to bush it. Mr. Pottinger (the respondent) says he has been in possession of the property since 1975. That's a lie."

I have already referred to the evidence of the respondent.

Mr. Adolph Murdock gave evidence on behalf of the respondent. He supported the respondent's claim that he bushed the lots. He said: "Watchie bushed the lots for Pottinger." It is my firm view that the evidence adduced by the appellant has not established that the respondent's representation that he had bushed the land, received rents and settled outstanding taxes was fraudulent. We have seen that a high degree of probability is required to establish such a serious allegation.

In my judgment the appellant's evidence falls woefully short of the required standard.

The second particular of fraud is that the respondent fraudulently misrepresented to the Registrar of Titles that he had no knowledge of the whereabouts of the plaintiff or anyone with a competing or superior title to the said lands.

There is no evidence that the respondent made any such representation. The solemn Declaration made by the respondent does not contain such a representation. But even if the respondent had stated in 1992 that he did not know the whereabouts of the plaintiff or anyone with a superior title, there is no evidence that that was not factually so.

It is true that in the 1980s the respondent was in touch with Mr. Sugarman, an agent of the registered proprietor and Mr. Campbell the husband of the plaintiff. However there is nothing to indicate that in 1992 he knew of their whereabouts.

In the light of the foregoing I am impelled to dissent from the conclusion of my brother Harrison, J.A. that there was ample evidence from which the learned trial judge ought to have found that the respondent had fraudulently represented to the Registrar that he had a possessory title to the lots in question.

However the respondent's statement that he had been in adverse possession of the lots for 12 years is wrong in law. On the evidence the computation of the time for adverse possession would commence as of 1983 and not 1975 as the respondent was probably advised. 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 s.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.

The upshot is that the following is the declaratory relief to which in my view the appellant would be entitled:

It is hereby declared that the Certificates of Title in respect of those parcels of land in Gibraltar, St. Mary, itemized in paragraph 1 of the Endorsement of Claim on the Writ herein were wrongfully obtained by the respondent.

As stated at the outset I agree with the other aspects of my brother's judgment.

ORDER:

BINGHAM, JA:

1. Appeal allowed, judgment for the appellant.
2. It is declared (by a majority; Bingham, P. Harrison, JJA) that the respondent fraudulently misrepresented to the Registrar of Titles that he had a possessory title to the said land as required under the Registration of Titles Act; (Smith, JA – that the respondent wrongfully obtained the said title)
3. Injunction granted that the Respondent is restrained from dealing with or purporting to deal with the said lands.

4. Injunction granted that the Respondent, his servants or agents are restrained from trespassing upon the said lands.
5. The Registrar of Titles is hereby directed to rectify the Register of Titles by removing the Respondent as the registered proprietor of the aforesaid lots of land itemized in paragraph 1 of the Endorsement of Claim on the Writ provided that the rights of third parties being bona fide purchasers for value are not involved.
6. Costs of this appeal and costs below to the appellant to be taxed if not agreed.