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JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 80/2002

**BEFORE: THE HON MR JUSTICE P. HARRISON, J.A.
THE HON MR JUSTICE SMITH, J.A.
THE HON MR JUSTICE COOKE, J.A.**

BETWEEN: THE REGISTRAR OF TITLES APPELLANT

AND RAMALHALE RAMHARRACK RESPONDENT

**Mrs. Nicole Foster-Pusey and Miss Annaliesa Lindsay instructed by
the Director of State Proceedings for the Appellant.**

Dr Lloyd Barnett instructed by Ms. Leila Parker for the Respondent

June 30, July 1, 2, 2003 & July 29, 2005

P. HARRISON, J.A:

This is an appeal from the judgment of Miss Gloria Smith, J on June
14, 2002, which reads:

(1) ... the transfer entry No. 154762 be removed
by the respondent (the Registrar of Titles) from the
(Register Book of Titles) with respect to the Certificate of
Title formerly registered at Volume 948 Folio 105, and

(2) ... the transfer entry No. 154726 be removed
by the respondent from the Register Book of Titles
registered at Volume 1269 Folio 659.

The relevant facts are as follows:

Land at Unity Farm in the parish of Clarendon containing by survey approximately 128½ acres registered at Volume 948 Folio 105 was transferred on May 16, 1960, by transfer No. 154725 dated May 16, 1960, from Caroline Stultz, executor of the estate of Stanley Stultz to Ramalhale Ramharrack ("the respondent") for the sum of £4,500. This transfer was signed in the presence of "E.M. Poule, Solicitor" who himself signed the transfer as witness to the signature of the transferor.

The said land was transferred on June 14, 1960, by transfer No. 154726 dated June 14, 1960, to the American Development Co. Ltd. ("the Company"), from Ramalhale Ramharrack for the sum of £5,500. This transfer was signed in the presence of "Stanley Fyffe, Solicitor", who himself signed the transfer as witness to the signature of the transferor.

Both transfers were submitted for registration by one "A.K. Varma, Solicitor."

On June 17, 1960, at 11:50 a.m., fees of £4.10.8 and £5.10.0 were paid and receipts Nos: 2658 and 2659, in consecutive sequence, were issued in respect of the said transfers Nos: 154725 and 154726, respectively. The said transfers were entered in the Register Book of Titles at Volume 948 Folio 105 as on June 17, 1960, but such entries were subsequently struck out and replaced. Transfer No. 154725 was endorsed as having been

entered on June 25, 1960, and transfer No: 154726 was endorsed as having been entered on July 6, 1960.

The American Development Co. Ltd. was therefore registered on July 6, 1960 as proprietor of land at Volume 948 Folio 105 by transfer No: 154726, purchased for £5,500 from Ramalhale Ramharrack.

On October 13, 1976, the said Company was struck off the Register of Companies in accordance with the provisions of section 320 of the Companies Act (See Jamaica Gazette dated July 22, 1976, and dated November 11, 1976). The Company was thereby dissolved.

Furthermore, on the said October 13, 1976, under the provisions of section 321 of the Companies Act, the said land registered at Volume 948 Folio 105 vested in the Crown as *bona vacantia*. Section 321, *inter alia* reads:

"321. Where a company is dissolved, all property and rights whatsoever vested in or held on trust for the company immediately before its dissolution (including leasehold property but not including property held by the company on trust for any other person) shall, subject and without prejudice to any order which may at any time be made by the Court under sections 319 and 320 be deemed to be bona vacantia and shall accordingly belong to the Crown, and shall vest and may be dealt with in the same manner as other bona vacantia accruing to the Crown."
(Emphasis added)

There the matter vested until 1994.

Early in 1994, the respondent applied to the Registrar of Titles ("the appellant"), for the issue of a new duplicate Certificate of Title to the land and the cancellation of the old certificate registered at Volume 948 Folio 105 on the ground that his old certificate could not be found. The original title registered at Volume 948 Folio 105 could not be found in the office of the appellant. The respondent produced to the appellant a photocopy of the duplicate certificate registered at Volume 948 Folio 105. This photocopy did not reflect thereon transfer No: 154726.

On April 27, 1994, the appellant cancelled the duplicate certificate registered at Volume 948 Folio 105 and issued in the name of the respondent, a new duplicate certificate for the said land registered at Volume 1269 Folio 659 of the Register Book of Titles. This was based on the said photo-copy submitted by the respondent and which did not reflect the transfer No: 154726.

The appellant subsequently discovered its error and consequently amended the Register by showing that the duplicate certificate of title at Volume 1269 Folio 659, was issued in the name of the American Development Co. Ltd., on April 27, 1994. The appellant in accordance with her powers under section 153 of the Registration of Titles Act ordered the respondent to deliver up to her for cancellation duplicate certificate registered at Volume 1269 Folio 659. The respondent refused to do so.

By suit No. M 79/96 the appellant issued a summons seeking an order canceling the certificate of title registered at Volume 1269 Folio 659 in the name of the respondent on the ground that the land had been transferred to the Company which, having been struck off the register of companies, the said property then vested in the Crown as *bona vacantia*.

Reid, J heard the summons and on September 12, 1997, dismissed it with costs to the respondent. No reasons for such dismissal was given by the learned trial judge.

By entry dated December 29, 2000, the land was vested in the Commissioner of Lands pursuant to section 321 of the Companies Act. A new certificate of title was issued in the name of the Commissioner of Lands and registered at Volume 1331 Folio 300. The former certificate of title registered at Volume 1269 Folio 659 was cancelled.

On February 22, 2002, the respondent took out an originating summons against the appellant seeking the removal of transfer No. 154726 to the Company from certificates of title registered at Volume 948 Folio 105 and Volume 1269 Folio 659.

As stated, on June 14, 2002, Miss Gloria Smith, J found in favour of the respondent, giving rise to this appeal.

The grounds of appeal are:

- a. The learned judge erred in ruling that the Respondent/Applicant could proceed by way of Originating Summons to recover the land in the circumstances, particularly in light of the fact that

whatsoever, except the estate or interest of a proprietor claiming the same land under a prior registered certificate of title, and except as regards any portion of land that may by wrong description of parcels or boundaries be included in the certificate of title or instrument evidencing the title of such proprietor not being a purchaser for valuable consideration or deriving from or through such a purchaser."

(Emphasis added)

The section highlights the prime importance of registration in the resistance of adverse claims against the registered proprietor. Fraud aside, he can rely on the conclusive nature of the duplicate certificate issued, in proof of his title (section 69).

Consequently, when there is fraud committed by the registered proprietor, in effecting the registration, the conclusive presumption of validity is breached. Such fraud on the cases, has been recognized as necessarily, actual fraud.

Section 161 of the Act emphasizes the unassailable nature of the register and the registered title, except for the situations noted. The section, inter alia, reads:

"161. 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 -

...

- (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; . . .

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 of the land therein described, any rule of law or equity to the contrary notwithstanding."

In order to impeach the registered title there must be actual fraud on the part of the registered proprietor (***Assets C.o, Ltd., v Mere Roihi*** [1905] A.C. 176, 210). This decision was approved in the case of ***Frazer v Walker*** [1967] 1 All ER 649, a decision of the Judicial Committee of the Privy Council. The facts are that the appellant's wife forged his signature to a mortgage document in securing a mortgage on farmlands owned by them both. She obtained a sum of money from the 2nd respondents who registered the mortgage at the land registry. The wife defaulted in the mortgage payments and the 2nd respondent sold the farmlands under their powers of sale to the 1st respondent. The transfer by the 2nd

respondents to the 1st respondent was registered. The 1st respondent sued for possession. The appellant counter claimed, on the basis of the forgery of his signature to the mortgage document, that his interest was not affected, that the mortgage was a nullity and that the registrar should cancel the consequential entries in the register. His counter-claim was dismissed. Their Lordships, in dismissing his appeal, held that the appellant's counter-claim was in effect an action for recovery of possession under section 63 of the Land Transfer Act 1952 (New Zealand) (similar to section 161 of the Act (Jamaica)), and since it did not fall within any of the exceptions to that section, it was rightly dismissed. They held, in addition, (head note), that:

"registration was effective to vest title in a registered proprietor notwithstanding that he acquired his interest under an instrument that was void ..."

The New Zealand Transfer Act is based on the Torrens System of land registration, as is the Jamaican Registration of Titles Act.

The indefeasibility of the title of the registered proprietor, except in the case of proven fraud, restricts the powers of the Registrar of Titles to cancel the duplicate certificate or to amend the register, except in clear statutorily prescribed circumstances. Section 80 of the Act permits the Registrar, in respect of the certificate of title to registered land to, amend the description of land, entries, insert or delete the designated name or

number of any road or to correct the name, address or occupation of persons in certain circumstances.

Section 153 however, is wider in scope and obliges the Registrar to cancel the registration of a registered proprietor, in the event of fraud or wrongdoing. Section 153, 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, 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, . . ."

(Emphasis added)

This statutory duty placed on the Registrar is restricted to discernable cases of errors or omissions in registration or proven fraud or wrongdoing in the case of a registered proprietor. There is no responsibility on the Registrar to decide competing claims of parties nor the ownership of land.

In **Thomas v Johnson** (1997) 52 WIR 409, approving **Frazer v Walker** supra, the Privy Council, (per Gault, J) observing that the powers of the Registrar in Jamaica, "does not seem to extend to the cancellation of an entry as to proprietorship", at page 419, said:

"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 by 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 near sanctity of the register and the necessity that it be maintained free from errors and omissions, as far as possible, cannot be overemphasized. Its entries, their accuracy, and the necessity for the Registrar to be ever vigilant to effect vital corrections, are central to the system of land registration. The true nature of the register was described quite aptly by the New Zealand Court of Appeal in the case of **Fels v Knowles** (1906) 26 NZLR 604, 620, where it was said of the Land Transfer Act, 1952:

"The cardinal principle of the statute is that the register is everything and, that, except in cases of actual fraud on the part of the person dealing with the registered proprietor such person upon registration of the title under which he takes from

the registered proprietor, has an indefeasible title against all the world."

In the instant case the Company purchased the land from the respondent for £5,500.00 evidenced by transfer No. 154726 dated June 14, 1960, and was registered as proprietor at Volume 948 Folio 105.

No fraud was alleged against the Company nor was any fraud alleged or proven as committed by its servants or agents. The Company was a bona fide purchaser for value without notice of any fraud. No taint therefore, is attached to the Company's right to be registered as proprietor.

Even assuming that there was forgery of the signature of the respondent on transfer No 154726, the Company, despite being an immediate transferee was an innocent purchaser "for value bona fide" (section 161 of the Act) without notice of any fraud, and even under a forged instrument - acquired a good title on registration (See **Frazer v Walker** supra).

The appellant, having issued to the respondent a new duplicate certificate of title registered at Volume 1269 Folio 659 on April 27, 1994, for the reason that the former duplicate certificate was lost, was entitled to an order of the court to cancel the said newly issued duplicate certificate of title, in the exercise of her powers under section 153 of the Act. The decision of Reid, J dismissing the summons in the respondent's favour must be viewed in its own peculiar context. No reasons were given by Reid, J

for his decision. The respondent states that he raised the issue of the forgery of his signature. However, that issue, by itself is insufficient to affect in any way, the indefeasibility of the title of the Company, the registered proprietor endorsed on the original certificate of title in the appellant's office. As I have already noted, no fraud was alleged nor proven against the said company. There is no evidence on the record that Reid, J was asked to, nor considered the indefeasibility of the title of the said Company.

This state of affairs was not without some contributory blame on the part of the appellant from the inception. Both transfers No. 154725 and 154726, filed simultaneously, were entered in the Register Book at Volume 948 Folio 105 on June 17, 1960. Each entry was subsequently struck out and replaced as having been entered on June 25, 1960, and July 7, 1960, respectively. No explanation was given for the change of, and separation of the date of entry. Section 59 of the Act provides inter alia:

"59. Every instrument presented for registration may be in duplicate (except a transfer whereon a new certificate of title is required), and shall be registered in the order of, and as from, the time at which the same is produced for that purpose; and instruments purporting to affect the same estate or interest shall, notwithstanding an actual or constructive notice, be entitled to priority as between themselves according to the time of registration, and not according to the date of the instrument. Upon the registration of any instrument the Registrar shall bind up the original in his office in a book to be kept for that purpose ..." (Emphasis added)

Had the original date of presentation of the transfers namely, June 17, 1960, been retained on the Register, no duplicate certificate issued as a consequence could fail to have endorsed thereon the transfer No. 154726 to the Company. Neither could a photocopy of such certificate purport not to have such endorsement. The application by the respondent made in April 1994, for a new duplicate certificate of title to replace the one lost, was dealt with, unlike the proverbial bureaucratic delay, with commendable haste. The replacement duplicate certificate registered at Volume 1269 Folio 659 was issued on April 27, 1994. Probably, a more lengthy search at the appellant's office may have unearthed then, the original certificate with the endorsed transfer No. 154726.

The duplicate certificate registered at Volume 1266 Folio 659 issued to the respondent was flawed, because it was based on two mistakes of fact, namely:

- (1) that there was no registered transfer to American Development company and,
- (2) that there was no endorsement thereof on the original title in the appellant's office.

The appellant was obliged, in pursuance of her statutory obligation to act as she did under section 153 of the Act.

The appellant was not alleging fraud before Reid, J. It was the respondent who did in his effort to show cause why the appellant should not cancel the duplicate certificate registered at Volume 1269 Folio 659

issued to him, in rectification of the Register. Assuming that the respondent's signature was a forgery, as the affidavit of Carl Major sought to prove, it was quite irrelevant to the proceedings brought by the appellant before Reid, J. nor was the respondent alleging fraud by the appellant. Reid, J could not therefore be taken to be determining the proprietorship of the said land by his dismissal of the appellant's summons.

In the proceedings before Miss Gloria Smith, J against the appellant, the respondent by originating summons sought the cancellation of the duplicate certificate of title at Volume 1331 Folio 300 of the Register in the name of the Commissioner of Lands on the basis that it was improperly issued. The affidavit of the respondent dated February 8, 2002, in support, inter alia, reads:

"7. That about two or three months after receiving this new title from the Registrar of Title, I was duly informed by them that I should return the title, as the land in question was transferred by me to the American Development company and it was this company who is the registered owner. I was also shown a copy of the purported "transfer" which indicated that I had transferred my land to the American Development Company on the 14th day of June 1960. The said transfer was purported to have been witnessed by a Solicitor called Stanley Fyffe. I exhibit hereto marked "RR4" for identification a copy of the said transfer.

8. That I was flabbergasted by this revelation, as at no time had I sold my land to the American Development Company, nor had I in fact ever signed any transfer in front of the

aforementioned Solicitor indicating an intention to do so.

9. That I have never transferred my ownership of the land to the American Development Company and therefore the land could not have been vested in the Crown *bona vacantia* as the abandoned land of American Development Company."

The said affidavit referred to the proceedings before Reid, J and continued, at paragraph 11:

"The said summons was heard by Mr Justice Reid on February 11, 1997 and September 12, 1997 and was dismissed with costs being ordered in my favour."

It was argued by Dr. Barnett before Miss Gloria Smith, J and again before this Court, that the issue of fraud having been raised before Reid, J and not controverted by the appellant, the appellant would be estopped from raising that issue at proceedings subsequently, being bound by the previous proceedings. He relied on ***Henderson v Henderson*** (1843) 3 Hare 100. The learned judge accepted that argument and finding for the respondent said:

"It is my opinion that, if on a previous occasion when this matter was ventilated before the Court, where the issue of Fraud was raised by the Applicant, and no challenge was made by the Respondent, then the Respondent would be estopped for doing so at this stage."

In so doing the learned judge was in error.

Both the submission of learned counsel for the respondent and the finding of the learned trial judge are based on misconceptions. The appellant in the pursuance of her statutory obligations under section 153 of the Act was not required to be concerned with, nor to pay heed to any allegation of fraud, in the circumstances of the case. Any transaction between a transferor and the registered proprietor, the Company, on the question of the proprietorship of the land, is irrelevant to the appellant's functions under section 153, to maintain the Register faultless. The appellant was not required to answer any "challenge ... (of fraud) made by the Respondent," before Miss Gloria Smith, J.

I agree with counsel for the appellant that no issue estoppel arises in favour of the respondent on the basis of the judgment of Reid, J.

The further issue of the use of the originating summons before the learned judge was not material to the determination of this case. Although it is undesirable to use such a summons where issues between the parties are contested for example, an allegation of fraud, such a matter may proceed having been commenced by that process, if a court chooses to so order. The court may treat the matter as if begun by writ, and the affidavits filed regarded as pleadings (*Eldemire v Eldemire* (1990) 38 WIR 234). Paradoxically, in the instant case, no "contested" facts properly arose between the parties, fraud not being an issue. Therefore the point is purely academic.

The entire action is wholly misconceived. The action is, obliquely, a challenge to the validly issued registered title of the Company, which in these circumstances is prohibited by section 161 of the Act. No such challenge, as mounted by the respondent in respect of the said title issued by the appellant could properly be pursued against the appellant.

The respondent did not obtain a valid title in 1994 by the issuance to him of the duplicate certificate of title registered at Volume 1269 Folio 659 of the Register Book of Titles, based on the photocopy supplied by him. The appellant was obliged to order the respondent to hand in such duplicate for cancellation, based on the true state of the Register showing a transfer in 1960, bona fide for value to the American Development Company Ltd. No fraud was alleged nor proved against the said Company which transferee was a bona fide purchaser for value without notice of any fraud (section 161, **Frazer v Walker**, supra). That title was consequently indefeasible.

The land accordingly, vested in the Crown as *bona vacantia* when the Company was struck off the register and was properly vested in the year 2000 in the Commissioner of Lands and registered at Volume 1331 Folio 300. The statutory provisions of the Companies Act, therefore, make a challenge by the respondent further remote from any chance of success.

The transfer entry No. 154726 was properly endorsed on certificates of title registered formerly, both at Volume 948 Folio 659 and Volume 1269 Folio 659 and, contrary to the finding of the learned trial judge, was not liable to be removed.

This appeal should be allowed with costs of this appeal and in the court below to the appellant to be agreed or taxed.

SMITH, J.A.

I have read in draft the judgments of my brothers, P. Harrison and Cooke, JJA. I agree with their reasons and conclusions and have nothing further to add.

COOKE, J.A.

This dispute pertains to some 128 acres of land, a part of Unity Farm in the parish of Clarendon ("the land"). In order to appreciate the issues that fall for determination it is necessary to recount the chronology of events:

- (i) By an instrument of transfer made on the 16th of May, 1960 the land is conveyed by Caroline Stultz to the respondent. The purchase price was Four Thousand Five Hundred Pounds (£4, 500).
- (ii) There is an instrument of transfer dated the 14th of June, 1960, which shows the respondent conveying the land to American Development Company Limited. The purchase price was Five Thousand Five Hundred Pounds (£5,500).
- (iii) Curiously, the entry of both these transfers was done virtually simultaneously at 11:50 a.m. on the 17th June, 1960. As the record further reveals the solicitor concerned in both entries was one A.K. Varma. The Stultz transfer is numbered 154725 and the other 154726. The land, up to this time, is registered at Volume 948 Folio 105 in the Register Book of Titles.
- (iv) In October 1976 the American Development Company Limited is struck off the Register of Companies.
- (v) In April 1994 (the exact date is uncertain) the respondent made a lost title application in relation to the land. He produced a photocopy of the duplicate Certificate of Title. This does not reflect Transfer No. 154726. At this time the original title could not be located.
- (vi) On the 27th April, 1994, the Certificate of Title registered at Volume 948 Folio 105 is cancelled and a substitute Certificate of Title is issued in the

name of the respondent which is now registered at Volume 1269 Folio 659.

- (vii) The original title registered at Volume 948 Folio 105 is found. This prompted the Registrar of Titles on the 20th March, 1995 to write to the respondent requesting him to submit Duplicate Certificate registered at Volume 1269 Folio 659 so that transfer 154726 could be endorsed on it.
- (viii) The respondent not having complied with this request, the Registrar of Titles took out an originating summons for the delivery up of the duplicate certificate of title for cancellation. This summons was dismissed on the 12th September, 1997. This was Suit M-79/1996.
- (ix) On the 29th of December 2000 by Miscellaneous No. 1061951 the land is vested in the Commissioner of Lands pursuant to section 321 of the Companies Act. This is on the basis that American Development Company no longer existed and therefore the land, property of that company, was deemed to be bona vacantia and accordingly belonged to the crown. The land is now registered at Volume 1331 Folio 300 in the Register Book of Titles.
- (x) By an originating summons dated 18th February, 2002 the respondent essential sought the removal of Transfer entry 154726. On the 14th June, 2002, this summons found favour with the court. This was Suit E-105/2002.

Suit E-105/2002

This was an application by way of an originating summons brought by the now respondent which sought orders for:

- a) the removal of transfer entry 154726 by the Registrar of Titles from the Register Book of Titles with respect to the Certificate of Title

formerly registered at Volume 948 Folio 105 and;

- b) the removal of transfer entry 154726 by the Registrar of Titles from the Register Book of Titles registered at Volume 1269 Folio 659.

These orders were granted on the 14th June, 2002, by Gloria Smith, J. At this hearing it would appear from her judgment that essentially the rival submissions advocated in this court were similar to those in the court below. It was a succinct judgment which is now reproduced hereunder:

"In the Affidavit evidence of the Applicant Ramalhale Ramharrack it was stated that in Suit No. M79 of 1996 the Respondent applied to this Court for an order of cancellation of Certificate of Title registered at Volume 1269 Folio 659 in the name of the Applicant (Ramalhale Ramharrack) on the grounds that it had been transferred to American Development Company Limited and a Certificate of Title registered at Volume 1269 Folio 659 was issued in the name of that Company, which having been struck off the Register of Companies, then the said property had become vested in the Crown as reflected by the Certificate of Title registered at Volume 1331, Folio 300 of the Register of Titles.

This summons was heard by Mr. Justice Reid on the 11th day of February and the 12th day of September 1997, and was dismissed with costs ordered in the Applicant's favour.

At that hearing an Affidavit by Constance Trowers dated the 18th day of June 1996 was relied on by the Respondent. (A similar Affidavit dated the 13th day of June 2002 was again relied on by the Respondent in these proceedings).

It was submitted by Dr. Lloyd Barnett for the Applicant that at the time of the hearing of the

summons before the Hon. Mr. Justice Reid, the issue of Fraud was raised by the Applicant. No issue was joined or was it controverted by the Registrar of Titles. Dr. Barnett therefore argued that as a result of this, the Respondent would be estopped from raising that issue now.

Mrs. Foster-Pusey on the other hand argued that the doctrine of estoppel did not apply in this case.

It is my opinion that, if on a previous occasion when this matter was ventilated before the Court, where the issue of Fraud was raised by the Applicant, and no challenge was made by the Respondent, then the Respondent would be estopped from doing so at this stage.

A number of cases were cited by Mrs. Foster-Pusey on behalf of the Respondent to support her submission that the wrong procedure had been adopted by the Applicant when it brought an originating summons. However, on an examination of the cases what was gleaned for them was that issue was joined between the parties on the question of Fraud from the very outset of the cases. As a result they proceeded to trial by way of Writs of Summons. No issue of Fraud having been raised in the previous proceedings then I formed the view that there was nothing to preclude the Applicant from proceeding by way of Originating Summons as it would have been reasonable for him to assume that there was no challenge forthcoming from the Respondent."

The Appellant's submissions

The grounds of appeal were:

- a. "The Learned Judge erred in ruling that the Respondent/Applicant could proceed by way of Originating Summons to recover the land in the

circumstances, particularly in light of the fact that the Respondent/Applicant claimed to have been deprived of the land by fraud;

- b. The Learned Judge erred in finding that the doctrine of estoppel applied and further erred in ruling that the Registrar of Titles was estopped from challenging the title of the Respondent/Applicant;
- c. The Learned Judge erred in failing to find that Transfer 154726 is valid unless proceedings in fraud for the recovery of the land are taken against the person in whom title is vested;
- d. The Learned Judge erred in failing to find that the title vested in the Commissioner of Lands should stand until the Respondent/Applicant takes the appropriate proceedings."

In respect of ground (a) the submissions may be summarised thus:

- (1) An originating summons was inappropriate in the light of the allegation of fraud raised by the respondent. Cases cited were **Eldermire v. Eldermire** (1990) 38 W.I.R. 234. **Clarence Reid v. Bobby Wilson and Winnifred Kerr** (1994) 31 JLR 123.
- (2) The raising of the issue of fraud in Suit M 79/1996 in the summons for the respondent to deliver up the duplicate of title in his possession for cancellation did not result in the determination of the proprietary interest in the land. **Thomas and Another v. Johnson and Another** (1997) 52 WIR 409 was cited.

In respect of ground (b) the submission was that:

"the doctrine of estoppel does not enure to the benefit of the respondent because the issue of fraud could not have properly been determined by the application brought by the Registrar in Suit M 79/96. Further, fraud

was neither alleged nor proved as against the appellant in the prior application before Reid, J."

As regards grounds (c) and (d) the submissions were:

- "(1) That until the validity of transfer No. 154726 had been properly challenged and proved to be fraudulent that transfer remained valid and effective.
- (2) American Development Company Limited had been owner of the land since 1960 from the time that transfer 154726 had been noted on the title to that land then registered at Volume 948, Folio 105 in the Register Book of Titles.
- (3) The land was now properly vested in the name of the Commissioner of Lands, that land having passed to the crown as bona vacantia, American Development Company being no longer in existence."

The land was now registered at Volume 1331 Folio 300. The Certificate of Title registered at Volume 1269 Folio 659 had been cancelled as had been that of volume 948 folio 105.

- "(4) Therefore when the respondent by Suit E 105/2002 sought the removal of the transfer entry No. 154726 from the titles registered at Volume 1269 Folio 659 those titles were no longer in existence having been previously cancelled."

The Respondent's submissions

- (i) The essence of the application by the Registrar in Suit M-79/96 was that the respondent had transferred the land to American Development Company Limited and had therefore fraudulently procured the substitute title.

- (ii) In this suit the respondent replied to the allegation of fraud. He did this by his own affidavit denying any sale to American Development Company Limited and signing the transfer to American Development Company Limited and by an affidavit by Carl Mingo Major, then a Senior Superintendent of Police, a handwriting analyst who swore that the signature on the transfer of 14th June, 1960 to American Development Company was not that of the respondent.
- (iii) On February 12, 1979, Reid J. gave judgment for the respondent and dismissed with costs the appellant's application. The only issue raised on the hearing before Reid J. was whether or not the respondent had procured the substitute title improperly because he had previously transferred land. The Registrar could have filed an affidavit in support of her allegation in which case the proceedings had to be continued by Writ. As the Registrar did no such thing the respondent's right to the property was effectively determined by the judgment of Reid J. from which there was no appeal.
- (iv) Since the respondent's Certificate of Title had not been validly transferred and no order for cancellation made, it follows that as a proprietor who had not divested himself of his interest, his Certificate of Title was the only valid one. It is not necessary for him to bring any new action, the Court having upheld the validity of his Certificate of Title. Such proceedings would be a waste of the

Court's time and cause unnecessary costs as the perpetrators of the fraud no longer existed and the Registrar of Titles is the only person seeking to uphold the fraudulent transfer.

- (v) As the earlier transferee and the holder of the earlier title the Respondent by virtue of sections 59 and 70 of the Registration of Titles Act had priority over the subsequent title which the Registrar sought to support, unless fraud was established against him.
- (vi) The protection given by the Act to third parties is confined to persons contracting or dealing with the proprietor of registered land. On the only evidence before the Court the Respondent did not deal or contract with American Development Company and the Commissioner of Lands did not deal with American Development Company and in any case there was fraud.
- (vii) Since land can only be transferred by the proprietor by virtue of section 88 of the Act and the Respondent had not extended the Instrument of Transfer, the purported transfer to American Development Company was a nullity.
- (viii) Section 153 of the Act provides that where an entry in the Register had been fraudulently or wrongfully obtained the Registrar has the power to call for the return of the Certificate of Title for cancellation. The Registrar should have invoked this provision in favour of rather than against the Respondent.

- (ix) Section 158(2) gives the Court the power to order the Registrar to cancel a Certificate of Title and issue a new one in its place. It is submitted that this power was properly exercised by the Court.
- (x) On the application by the Registrar for cancellation of the Respondent's Certificate of Title the issue of fraud quite properly arose and in the absence of any evidence against the Respondent's contention was correctly resolved in his favour.

The Registrar was a party to those proceedings and had the opportunity to meet the Respondent's case in any way she chose. She cannot therefore seek to ignore the effect of that decision and is bound by it. **Henderson v Henderson** [1843] 3 Hare 100; **Greenhalgh v Mallard** [1947] 2 All ER 258; **Hoystead v Commissioner of Taxation** [1926] A.C. 155; **Yat Tung Investment Co. Ltd. v Dao Heng Bank Ltd.** [1975] A.C. 581.

**What was the effect of the dismissal of the Registrar's
application in Suit M 79/1996 by Reid J?**

The answer to this question is critical to the resolution of the issues which were the subject of debate in this court. There were no written reasons for the decision nor any note by counsel of any oral reasons which might have been given. So what did Reid J. determine? This has to be inferred from the nature of the application before him and an analysis

of section 153 of the Registration of Titles Act pursuant to which this application was brought. It was an application for the respondent:

"... to show cause why Certificate of Title registered at Volume 1269 Folio 659 of the Register Book of Titles should not be delivered up to the Applicant for cancellation and issuance of a new Certificate of Title in the name of the Commissioner of Lands."

Before Reid J. there were three affidavits: that of the Registrar of Titles, Constance Trowers which sought to ground the application and those from the respondent and Carl Mingo Major. It is necessary to set out the Registrar's affidavit in extenso:

"That by Transfer No. 154725 and dated the 16th day of May, 1960 all that land comprised in Certificate of Title registered at Volume 948 Folio 105 of the Register of Titles was transferred by Caroline Stultz to Ramalhale Ramharrack, the Respondent herein. There is now produced and shown to me marked "C.T.1" a copy of the said Transfer No. 154725.

That by Transfer No. 154726 dated 14th June 1960 all the said land comprised in Certificate of Title registered at Volume 948 Folio 105 was transferred by the Respondent to the American Development Company Limited. There is now produced and shown to me marked "C.T.2" a copy of the said Transfer 154726.

In April 1994 the Respondent made an Application to me for a replacement of Certificate of Title registered at Volume 948 Folio 105 on the grounds that it was lost.

That as the original Certificate of Title relating to Volume 948 Folio 105 could not be located - a substitute Title with the same Volume 948 Folio

105 was therefore prepared using a photocopy of the Title which was provided by the Respondent.

That the said substitute Certificate of Title did not reflect Transfer No. 154726 referred to in paragraph 3 herein as the photocopy given by the Respondent did not have that Transfer endorsed on its face. There is now produced and shown to me marked "C.T.3" a copy of the Substitute Certificate of Title prepared and registered at Volume 948 Folio 105.

That a new Certificate of Title registered at Volume 1269 Folio 659 was issued in the name of the Respondent and the Substitute Certificate of Title registered at Volume 948 Folio 105 was cancelled on the 27th April 1994. There is now produced and shown to me marked "C.T.4" a copy of the Certificate of Title registered at Volume 1269 Folio 659.

That I am informed by Wentworth Coke and do verily believe that the American Development Company, to whom the respondent transferred the land by Transfer No. 154726, was removed from the Register of companies in 1969, was dissolved and as a result the land in question was deemed to be bona vacantia and the property of the Crown.

That on the 20th March 1995 I wrote to the Respondent indicating that Transfer Entry 154726 was not noted on the photocopy of Title of lands formerly registered at Volume 948 Folio 105 and therefore the new Certificate of Title registered at Volume 1269 Folio 659 ought to have properly been issued in the name of American Development Company. This is now produced and shown to me marked "C.T.5" a copy of letter dated 20th March, 1995.

That in the said letter I requested that the Respondent submit to me Duplicate Certificate

of Title registered at Volume 1269 Folio 659 which was issued to him in order that I could have it corrected by endorsing Transfer No. 154726.

To date the Respondent has not submitted the Certificate of Title to me for correction.

That in the circumstances I humbly pray that pursuant to Section 153 of the Registration of Titles Act a Summons be issued to the Respondent requiring that he show cause why he should not deliver up Certificate of Title registered at Volume 1269 Folio 659 for correction."

The relevant parts of the affidavit of the respondent's reply to the Registrar's affidavit are now set out:

That the property was transferred to me by transfer dated the 16th day of May, 1960 and same was registered on the 25th day of June, 1960. I exhibit hereto marked "RR3" for identification a copy of the said transfer.

That on moving on to the property I engaged in cattle rearing until about 1963 when I cease to do so. This was largely due to the inadequate supply of water to the property. I, however, continued to maintain the property and engaged in the cutting of fences, as there was little I could do in the area of development of the property due to its aridity.

That due to the condition of the land I along with my family eventually removed in or around 1963, but I continued to maintain the land as I was still the registered owner and had not abandoned same.

That in or around 1994, I applied to the Ministry of Agriculture for subdivision approval of the said land. It was about that time that I realized that the Duplicate Certificate of Title for the property could not be located. Despite my best effort to

locate the title, I could not do so, and I was forced, in or about the earlier months of 1994, to make a lost title application. This involved the cancellation of the old title that was registered at Volume 948 Folio 105 of the Register Book of Titles and the issuance of a new title.

That a part of this application involved the advertising of the Notice of my application in the Daily newspaper. That despite the advertisement no objections were made to the issuance of the new title to me. I exhibit hereto marked "RR4" for identification a copy of the said advertisement that was made in the Daily Star on the 5th day of April, 1994.

That on or around the 27th day of April, 1994 I was granted a new Duplicate Certificate of Title in respect of the said land, and this is registered at Volume 1269 Folio 659 of the Register Book of Titles.

That about two or three months after receiving this new title from the Registrar of Title, I was duly informed by them that it should be returned, as the land in question was transferred by me to the American Development Company and it was this Company that was the registered owner of the property. I was also shown a copy of the purported "transfer" which indicated that I had transferred my land to the American Development Company on the 14th day of June, 1960. The said transfer was witnessed by a Solicitor called Stanley Fyffe which I exhibit hereto marked "RR5" for identification.

That I deny that the signature on the purported transfer is my signature, as I have never signed such a document, and it is merely an attempt to forge what is believed to be my true signature.

That I deny that I have ever sold my land to the American Development Company nor to anyone and I further deny that I have ever

signed any transfer of the said land before Mr. Stanley Fyffe or any other Attorney-at-Laws.

That on Wednesday, the 24th day of April, 1996, I enlisted the services of Mr. Carl Mingo Major a handwriting analyst in charge of the Forensic Science Laboratory Division of the Jamaica Constabulary Force who has confirmed that the signature purporting to be mine on the alleged transfer is a forgery.

That I have had no dealings with the American Development Company, contractually or otherwise, with respect to the said land and at no time was the ownership of the land transferred to the Company.

That based on the foregoing I humbly pray that the Order in terms of the Summons herein be refused.

In his affidavit, Major, the hand writing analyst concluded as follows in paragraph 8:

"That based on my observations it is my opinion that the signature of Ramalhale Ramharrack on the transfer dated the 14th day of June, 1960 is not a true signature of Mr. Ramalhale Ramharrack but is merely a simulation of what is thought to be his true signature."

Attention is now turned to section 153 of the Registration of Titles

Act which is now set out:

Procedure and Practice

"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, 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."

The scope of this section has to be examined being mindful that the Registrar's application was brought by virtue of it. **Thomas and Another v. Johnson and Another** (1997) 52 W.I.R. 409 is a judgment of the Judicial Committee of the Privy Council. It is a case from this jurisdiction. The advice of the Board was delivered by Gault, J. at page 419, b-g it is written:

"In the Jamaican Act, the registrar's power to amend the register is conferred by section 80 which is limited in scope:

'On the occasion of the registration of a certificate of title to registered land or at any time thereafter the registrar, after such inquiry and notices, if any, as he may consider proper and upon the production of such evidence and the compliance with such requests, if any, as he may think necessary to require or make, may -(a) amend the description of the land by the omission of any general words of description or such other manner as he may think proper; (b) omit such entries or portions of entries as he is satisfied no longer affect the land or the title thereto; (c) insert, amend or delete the name of any road and the number by which any land on such road is designated; (d) substitute the correct name, address or occupation of any person whose name, address or occupation was incorrectly entered.'

That does not seem to extend to the cancellation of any entry as to proprietorship.

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 by 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."

It is recognized that the comments pertaining to section 153 of the Registration of Titles Act were **obiter dicta**. They are nonetheless worthy of notice. It is my view that when section 153 is subject to scrutiny it becomes clear that this section provides the framework within which the

Registrar performs her administrative function in maintaining the integrity of the system of land registration. She is the keeper of the records. This responsibility of accurate record keeping is indispensable. Section 70 of the Act speaks to the indefeasibility of a registered title "except in the case of fraud". Section 70 as far as is relevant states:

"Notwithstanding the existence in any other person of any estate or interest, whether derived by grant from the Crown or otherwise, which but for this Act might be held to be paramount or to have priority, the proprietor of land or of any estate or interest in land under the operation of this Act shall, except in case of fraud, hold the same as the same may be described or identified in the certificate of title, subject to any qualification that may be specified in the certificate, and to such incumbrances as may be notified on the *folium* of the Register Book constituted by his certificate of title, but absolutely free from all other incumbrances whatsoever, except the estate or interest of a proprietor claiming the same land under a prior registered certificate of title, and except as regards any portion of land that may by wrong description of parcels or boundaries be included in the certificate of title or instrument evidencing the title of such proprietor not being a purchaser for valuable consideration or deriving from or through such a purchaser."

In **Frazer v. Walker** [1967] 1 A. C. 569 the Judicial Committee of the Privy Council upheld the decision of this Court as to the indefeasibility of a registered title.

It is my view that the application of the Registrar in Suit M 79/96 was entirely administrative. She wished to have delivered to her the substitute

duplicate certificate of title which had been issued to the respondent so that an error could be corrected. This was an error of omission in that transfer no. 154726 which had been duly entered in the Register Book of Titles, had not been endorsed on it. The basis upon which the Registrar of Titles made her application (as is set out earlier in her reproduced affidavit) was on the records pertaining to the land in her office. Paragraphs 2-7 recite her record of the transactions pertaining to the land. In her affidavit, the Registrar did not seek to be involved in any issue concerning the right to the proprietary interest in the land. She could not for two reasons. Firstly, section 153, of the Act does not permit the engagement of the Registrar in any activity of this nature. Secondly, the Registrar would have been a complete stranger in respect of any transaction. I therefore cannot accept the submission of the respondent that "the only issue raised on the hearing before Reid, J. was whether or not the respondent had procured the substitute title improperly because he had previously transferred the land. The Registrar could have filed an affidavit in support of her allegation in which case the proceedings would have had to be continued by writ." A perusal of the Registrar's affidavit does not contain any such allegation as that contended by the respondent. In any event she would have been in no position to so allege. The burden of the respondent's affidavit was two-fold:

- (a) He had not transferred the land to American Development Company Limited and;
- (b) The signature on the transfer No. 154726 was not his – it was a forger.

It is the respondent who introduced the issue of fraud. The summons of the Registrar was for the respondent to "show cause why Certificate of Title registered at Volume 1269 Folio 659 should not be delivered up to the Applicant for cancellation ...". By his denial of transferring land to American Development Company Limited and his assertion that his signature was forged, the respondent had "shown cause". He had put forward quite reasonable grounds for resisting the Registrar's application. The question as to the proprietary right in the land was not before Reid, J. Therefore the submission that "the issue of the respondent's right to the property was therefore effectively determined by the judgment of Reid, J." is without merit. All Reid, J. determined was that the respondent had "shown cause". I accept as correct the submission of the appellant that the order granted by Reid, J. did not determine the fundamental issue as to the proprietary rights to the land. It is true that, as the respondent submitted, section 158(2) of the Act "gives the court the power to order the Registrar to cancel a Certificate of Title and issue a new one in its place." However it is false to say that Reid, J. made any such order. It is therefore unsustainable to say that "this power was properly exercised by the court."

The Proceedings before Gloria Smith, J. in E 105 of 2002

The judgment of the court has been previously reproduced. Based on the foregoing analysis and conclusions as to the effect of the dismissal of the Registrar's summons (79/96) the learned judge in the court below was in error when she opined:

"that, if on a previous occasion when this matter was ventilated before the Court, where the issue of Fraud was raised by the Applicant, and no challenge was made by the Respondent, then the Respondent would be estopped from doing so at this stage."

This demonstrated that there was a misconception as to what Reid, J. had determined. Further, it does not appear that the learned trial judge fully appreciated the submission that the wrong procedure had been adopted by the then applicant. She said:

"However, on an examination of the cases what was gleaned from them was that issue was joined between the parties on the question of Fraud from the very outset of the cases. As a result they proceeded to trial by way of Writs of Summons."

It is impossible to conceive how the Registrar could be one of the "parties on the question of Fraud". The question of fraud goes to the ownership of the land. This is an issue that has to be settled between the claimants to the land. This, at that time (before the advent of the Civil Procedure Rules

2002) should have been an action commenced by Writ of Summons. This would be pursuant to section 161(d) of the Registration of Titles Act.

"161. 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) ...
- (b) ...
- (c) ...
- (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) ...
- (f) ..."

In conclusion I hold that in this case the doctrine of estoppel cannot assist the respondent. This is so because the platform on which the respondent would seek to establish this submission does not exist. Accordingly the authorities cited on behalf of the respondent in that regard are not relevant to the resolution of this appeal. I further hold that as correctly contended by the appellant, the wrong procedure was

employed as an originating summons is inappropriate where there has to be the resolution of disputed facts. **Eldemire v Eldemire** (1990) 38 WIR 234. I doubt that in any subsequent action pertaining to the ownership of the land the Registrar can be made a protagonist. Grounds (c) and (d) are consequential to the main thrust of the appeal and it is unnecessary for one to comment on them. En passant, it is more than curious to understand how there could be orders pertaining to Certificates of Title which at that time were not in existence.

I would allow the appeal, set aside the order in the court below and accord costs both here and in the court below to the appellant.

P. HARRISON J.A.

ORDER:

1. Appeal allowed
2. Costs of the appeal and in the court below to the appellant to be agreed or taxed.