

11/11/08

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 91/2008

**BEFORE: THE HON. MR. JUSTICE SMITH, J.A.
THE HON. MRS. JUSTICE HARRIS, J.A.
THE HON. MR. JUSTICE MORRISON, J.A.**

**BETWEEN ALBERT SMITH APPELLANT
(Represented by ANITA SMITH and
TREVOR SMITH by Order of the Court
On the 26th day of February, 2007)**

AND HAZEL STEER RESPONDENT

**Patrick Foster, Q.C. and Miss Tavia Dunn, instructed by Nunes,
Scholefield, Deleon & Co. for the appellant**

**Leroy Equiano instructed by Kingston Legal Aid Clinic for the
Respondent**

12, 13, January and 8 May, 2009

SMITH, J.A.

1. I have read in draft the judgments of Harris, J.A. and Morrison J.A. I agree with the reasoning and conclusions and there is nothing further that I desire to add.

HARRIS, J.A.

2. This is an appeal from an order of Daye J., in which he declared that a transfer of lands by the appellant to his wife and son was intended to defeat the execution of a judgment against him. He ordered that the transfer be rescinded and that the lands be sold to satisfy the judgment debt. On January 13, 2009,

we allowed the appeal, set aside the order of the learned judge and ordered that there be no order as to costs. We now fulfil our promise to put our reasons in writing.

3. The order was made pursuant to an application brought by the respondent, subsequent to the award of the judgment against the appellant. To fully appreciate the circumstances under which the application was brought, it is necessary to recount the events preceding the application. On June 21 1982, the respondent, a passenger in a motor vehicle owned and driven by the appellant, sustained injuries when the vehicle collided with a stationary tractor trailer along the Christian Pen main road.

4. On March 29 1983, she commenced action against the appellant for negligence. On January 5 1984, the appellant filed a defence denying liability and alleging negligence on the part of the owner of the tractor trailer. The owner of the tractor trailer was not sued.

5. On December 10 1993, the appellant, the owner of property known as 28 Queensborough Terrace in the parish of Saint Catherine being the land comprised in Certificate of Title registered at Volume 1059 Folio 372, transferred it to his wife Anita Smith and his son Trevor Smith by way of a gift.

6. On October 10 2001, judgment was handed down in the respondent's favour, as follows:

"General damages in the sum of \$5,000,000.00 with

interest at the rate of 6% per annum from date of the appearance on April 25 1983 to October 10, 2001. Special damages in the sum of \$953,520.00 with interest at 6% per annum from June 2, 1982 to October 10, 2001.

Costs in the sum of \$64,000.00"

7. The judgment remained unsatisfied. The appellant died in or about July, 2006. On February 26, 2007, by order of the court, his widow Anita and his son Trevor were appointed representatives of his estate.

8. On September 24, 2007, the respondent filed the notice of application in which she sought a declaration that the transfer of the land was intended to defeat the execution of the judgment as well as an order that the transfer be rescinded. She also sought certain consequential orders.

9. The application was supported by an affidavit of Simone Jarrett, Attorney-at-Law for the respondent.

Paragraphs 4, 5 and 9 read:

- "4. That the defendant via transfer No. 794007 transferred by way of gift registered on the 10th day of December, 1993 to his wife ANITA SMITH and his son TREVOR SMITH all his interest in Lot 396 Golden Acres, Spanish Town, Post Office, Saint Catherine registered at Volume 1059 Folio 372 of the Register Book of Titles (hereinafter referred to as the said land). A copy of the title to the said land is attached and marked "SOAJ1" for identity.
5. The Defendant transferred the property to avoid settling the inevitable Judgment which it was foreseeable would be made against him in this Suit.

9. That on the 9th day of February 2006 the Defendant came to Court but was not prepared to give any information regarding his financial status to the Court, and on his request the hearing was adjourned. A new date was set for the 11th day of May 2006, for the Defendant to bring proof of his financial position and to return with a plan for settlement of the judgment debt. He was also to address the transfer of the property situated at 28 Queensborough Terrace, Golden Acres, Spanish Town in the parish of saint Catherine to his wife ANITA AGATHA SMITH and his son TREVOR SMITH on the 10th day of December 1993, by way of gift. This transfer was done while the suit was pending and I do verily believe it was an attempt to avoid the Claimant from realizing any part of a judgment debt to be made against ALBERT SMITH."

10. An affidavit in response was filed by Mrs. Smith stating that her husband and herself lived and worked in England for 12 years, returned to Jamaica where they also worked, pooled their resources and in 1974 purchased the property at 28 Queensborough Terrace. She also stated that a mortgage was obtained from the Bank of Nova Scotia on the security of the property and they jointly contributed to the mortgage repayments. She further averred that although the title was issued in Mr. Smith's name only, there was an understanding between them that the property was jointly owned by them. It was also her averment that the transfer of the property to their son Trevor and herself by the appellant was as a result of illness and his incapacity to manage his affairs.

11. On February 12, 2008 the learned judge made the following order:

- " 1) It is declared that the transfer of the land being all that parcel of land part of Williamsfield Pen Part of GOLDEN ACRES now known as No. 28

QUEENSBOROUGH TERRACE in the parish of SAINT CATHERINE being the Lot numbered THREE HUNDRED AND NINETY SIX on the Plan of Golden Acres, registered at Volume 1059 Folio 372 in the Register Book of Titles, from ALBERT SMITH to ANITA AGATHA SMITH and TREVOR SMITH on the 10th day of December, 1993, by way of gift was intended to defeat execution of judgment herein

- 2) The said transfer No. 794007 by ALBERT SMITH to ANITA AGATHA SMITH and TREVOR SMITH made on the 10th day of December 1993, of the land registered at Volume 1059 Folio 372 be rescinded.
- 3)
 - (a) That ANITA AGATHA SMITH and TREVOR SMITH deliver up the Certificate of Title for the land registered at Volume 1059 Folio 372 to the Claimant's Attorney-at-Law within 7 days of the service of this Order on the Defendants or their Attorney-at-Law.
 - (b) failing which the Registrar of Titles is directed to cancel the said Certificate of Title and to re-issue same in the name of the Claimant, HAZEL STEER to facilitate the sale of the said property. The registrar is empowered to cancel and re-issue the said certificate of title in the name of HAZEL STEER upon being served by the Claimant's attorney-at-law with a Certificate of Non-compliance certifying that ANITA AGATHA SMITH and TREVOR SMITH have not complied with paragraph 3(a) herein.
- 4) That there be an Order for Sale of the land, being all that parcel of land part of Williamsfield Pen Part of GOLDEN ACRES now known as No. 28 QUEENSBOROUGH TERRACE in the parish of SAINT CATHERINE being the Lot numbered THREE HUNDRED AND NINETY SIX on the Plan of Golden Acres, registered at Volume 1059 Folio 372 in the Register Book of Titles for the purpose of the enforcement of the Judgment herein.

- 5) That the Claimants' Attorney-at-Law be appointed to have carriage of Sale of the land.
- 6) That pending the sale, the said land stand charged with the Judgment debt due to the Claimant herein.
- 7) That the purchase money from the sale be applied in satisfaction of monies due under the judgment to the Claimant dated 10th October, 2001, and all costs incidental to the sale, this application and any enquiries or further application with respect to the sale herein.
- 8) That such enquiries be made by the Registrar of the Supreme Court to determine:
 - a) The estate and interest of the Defendant ALBERT SMITH in land registered at Volume 1059 Folio 372 of the Register Book of Titles.
 - b) Whether any person other than the Claimant is entitled to any charge or interest in the said premises.
 - c) The exact amount due to the Claimant from the Defendant in respect of the Judgment debt herein together with interest therein and costs.
- 9) That the time for leaving the Certificate of Sale under the Writ herein with the Registrar of Titles for entry on the register pursuant to S.134 of the Registration of Titles Act be directed to three (3) months or such longer time as is required to complete the sale of the Defendant's interest in the said land.
- 10) That the Defendant is required to obtain a valuator of the said land by Messrs. C.D. Alexander Realty Company Limited or such other valuator as may be agreed by the parties or appointed by this Honourable Court.
- 11) That the requirement for valuation in the support of this application be waived."

Fourteen grounds of appeal were filed. They are as follows:

- a. The learned judge erred as a matter of law in failing to consider that an instrument of transfer could only be set aside in instances of fraud.
- b. The learned judge erred as a matter of law in that he failed to consider that the Respondent/Claimant had failed to give sufficient grounds for its averment that the property was transferred to avoid judgment.
- c. The learned judge erred as a matter of fact and/or law in finding that the transfer by Albert Smith, deceased to Anita Agatha Smith and Trevor Smith, the property was transferred by the deceased to defeat the execution of the judgment.
- d. That the learned judge erred as matter of law in finding that the order to set aside the transfer herein could be made pursuant to a Notice of Application for Court Orders, and not by way of fresh proceedings against the Appellant and the registered proprietors, Anita Agatha Smith and Trevor Smith.
- e. The learned judge erred as a matter of law in failing to ensure that Anita Agatha Smith and Trevor Smith, the registered proprietors of all that parcel of land contained in Certificate of Title registered at Volume 1059 Folio 372 of the Register Book of Titles appeared and/or were represented in their personal capacity as the registered proprietors of the said land, at the hearing of the application.
- f. The learned judge erred as a matter of law in failing to consider whether the existence of a judgment in favour of the Respondent/Claimant created a legal and/or equitable interest in the property.
- g. The learned judge erred as a matter of fact and/or law in failing to consider that the issue of liability on the part of Albert Smith, deceased was not at the time of transfer adjudicated upon.

- h. The learned judge erred as a matter of fact in failing to give regard to the averment that it was agreement and/or an understanding between Anita Agatha Smith and Albert Smith that the property was for the joint benefit of both persons.
- i. The learned judge erred as a matter of fact and/or law in failing to consider the equitable interests of Anita Agatha Smith and Trevor Smith in the said property by virtue of their contributions thereto.
- j. The learned judge erred as a matter of fact and/or law in failing to consider that the Respondent/Claimant was only entitled to enforce the judgment against assets forming part of the deceased's estate.
- k. The learned judge erred as a matter of law in finding that the Respondent/Claimant was entitled to a charge order over the said land.
- l. The learned judge erred as a matter of law in finding that the Respondent Claimant was entitled to enforce the judgment by way of an order for sale of the said land.
- m. The learned judge erred as a matter of law in finding that the time for leaving the Certificate of Sale with the Registrar of Titles pursuant to Section 134 of the Registration of Titles Act be directed to three months or such longer time as is required.
- n. The learned judge erred as a matter of law in finding that the Respondent/Claimant was to have possession of the Certificate of Title or to have Certificate of Title endorsed in her name."

Grounds a – c.

- Setting aside transfer by fraud only.
- Insufficient grounds that transfer effected to avoid judgment

12. Mr. Foster submitted that Miss Jarrett had implicitly alleged that the appellant had fraudulently transferred the property in order to avoid the payment

of the judgment debt. He argued that, under the Registration of Titles Act a registered proprietor is vested with an indefeasible title which can only be defeated by evidence of fraud. Fraud within the context of the Act means actual fraud, he argued, and such an allegation must not only be specific but must be accompanied by sufficient evidence to establish such a claim. He further submitted that the appellant's transfer of the property was lawful and valid.

13. It was Mr. Equiano's submission that the transfer by the appellant was for the purpose of defeating the execution of the judgment. He argued that the learned judge had before him sufficient evidence to conclude that the transfer was fraudulent, as, the circumstance of the transfer by the appellant to his wife and child by way of a gift when a judgment was pending, must be regarded as suspicious and accordingly, fraudulent.

14. No reasons were given by the learned judge for his decision but there can be no doubt that he accepted Miss Jarrett's averment in paragraphs 5 and 9 of her affidavit as evidence of fraud. The critical question arising therefore is whether, as a matter of law, the learned judge was correct in entertaining the application and concluding that the transfer of the property by the appellant to his wife and son had been done to evade the execution of the judgment and that the transfer should be rescinded.

15. The Registration of Titles Act governs the proprietorship and the transfer of registered land. Under the Act, any interest or estate in land which is

conferred on an owner, remains indefeasible and can only be invalidated by fraud. Sections 70, and 71 of the Act speak to the indefeasibility of a registered title and specifies that it can only be set aside by reason of fraud.

Section 70 so far as applicable reads:

“ 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 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...”

Section 71 provides

“ Except in the case of fraud, no person contracting or dealing with, or taking or proposing to take a transfer, from the proprietor of any registered land, lease, mortgage or charge, shall be required or in any manner concerned to enquire or ascertain the circumstances under, or the consideration for, which such proprietor or any previous proprietor thereof was registered, or to see to the application of any purchase or consideration money, or shall be affected by notice, actual or constructive, of any trust or unregistered interest, any rule of law or equity to the contrary notwithstanding; and the knowledge that

any such trust or unregistered interest is in existence shall not of itself be imputed as fraud.”

16. In defining the authenticity of ownership of registered lands under a title, in **Fels v. Knowles** (1906) 26 NZLR 620, the New Zealand Court of Appeal, in construing their Land Transfer Act (which bears similarity to our Registration of Titles Act), observed as follows:

“The cardinal principle of the statute is that the register is everything that, except in cases of actual fraud on the part of the person dealing with the registered proprietor, such person upon registration on the title under which he takes from the registered proprietor has an indefeasible title against the entire world”

17. In **Registrar of Titles v. Ramharrack** SCCA No. 80 of 2002 delivered on July 29, 2005 P. Harrison J.A., as he then was, described the indefeasibility of the title of a registered proprietor of lands in this way:

“Under the Registration of Titles Act, the registered proprietor of any estate or interest has a valid indefeasible title (subject to some reservations) unless such registration by the proprietor has been tainted by fraud.”

18. The foregoing shows the conclusive character of ownership under the Registration of Titles Act. In the absence of fraud, an absolute interest in land is vested in a registered proprietor. He remains clothed with such an interest, unless or until unquestionable proof is presented demonstrating that such an interest had been acquired by fraud. It follows therefore, that a court will not

interfere with a title unless there is evidence disclosing fraud. Only cogent evidence of fraud will be sufficient to render the title invalid. Fraud, however, within the context of the Act, means actual fraud, dishonesty of some kind and not equitable or constructive fraud. See **Assets Co. Ltd v. Mere Roihi & Ors** [1905] A.C. 176, and **Willocks v. Wilson and Another** (1993) 30 JLR 297; **Stuart v. Kingston** (1923) 32 CLR 309.

19. To set aside a transfer on the ground of fraud, a claimant must show that a defendant, by some dishonest means by way of the transfer, alienated the property. It is a well settled principle that an allegation of fraud must be pleaded and proved. There was no pleading before the learned judge outlining any allegation of fraud and surely there was no platform from which proof of fraud could have been launched.

20. It could well be that an allegation of fraud was contained in paragraphs 5 and 9 of Miss Jarrett's affidavit. The affidavit does not rank as a pleading; but even if the respondent had challenged the transfer by way of a pleading, the averments therein were in general terms. A general allegation of fraud is insufficient to establish fraud. In **Wallingford v. The Directors & c., of the Mutual Society and Anor** (1879 – 1880) L.R. 5 App. Cas. 685 at para. 710

Lord Hatherly said:

“Now I take it to be as settled as anything well can be by repeated decisions, that the mere averment of fraud, in general terms, is not sufficient for any practical purpose in the defence of a suit. Fraud may

be alleged in the largest and most sweeping terms imaginable.'

He went on to say:

"Nobody can be expected to meet a case, and still less to dispose of a case, summarily upon mere allegations of fraud without any definite character being given to those charges by stating the facts upon which they rest."

21. The allegation that the transfer was done for the purpose of evading the enforcement of the judgment debt is a bald and general assertion. It is merely a conjecture and would clearly have been of no probative value if the allegation of fraud had been pleaded. Accordingly, I am constrained to disagree with Mr. Equiano that the transfer was designed to deprive the respondent of the fruits of her judgment.

22. The property had been transferred to the appellant's wife and child approximately ten years after the commencement of the suit against him and almost 8 years before the delivery of judgment. This does not mean that the appellant had done anything illegal. It was open to him, as duly registered proprietor of the property to deal with his land as he deemed fit. The Registration of Titles Act clearly bestows on him such a right. His transferring of the property to his wife and child, eight years prior to the delivery of the judgment and at a time when illness rendered him unable to manage his affairs, could not be said to be an act falling outside that which the Act permits him

to perform. It is without doubt that he was legally empowered to effect the transfer when he did so.

Grounds d - e Setting aside ought to be by way of fresh proceedings.

22. It was submitted by Mr. Foster that a notice of application for court orders was an inappropriate method by which the respondent had sought the relief. The nature of the relief was predicated on a new cause of action founded on an allegation of fraud and ought to have been the subject of a fresh claim, naming Anita and Trevor Smith parties thereto.

23. It cannot be disputed that the respondent had a right to seek to recover the sums which were due to her, judgment having been awarded in her favour. Nor can it be denied that the appellant would have been under an obligation to pay the judgment sum. It is also indisputable that proceedings for the recovery of the judgment debt by way of an order for the sale of land owned by him would have been an avenue open to the respondent. However, at the time of the presentation of the application for the orders, he was no longer the registered proprietor of the property for which the orders were sought.

24. The respondent's allegation that the transfer was engineered by fraud, without doubt, raised a cause of action which must be pursued by initiating fresh proceedings. Rule 8.1 of the Civil Procedure Rules 2002 provides the machinery by which proceedings may commence. By this rule, a claim may be contained in a Claim Form or a Fixed Date Claim Form. Where a claim involves substantial

disputes as to fact, a Claim Form must be used to initiate proceedings and indeed, an allegation of fraud would unequivocally rank as one which would raise substantial factual disputes. Rule 8.7 (1) (a) ordains that a claimant must set out the nature of his claim. It follows that, in obedience to the rule, a claimant is required to expressly plead and particularize his claim by a Claim Form. Proceeding by way of an application for court orders was clearly erroneous.

25. A further matter of importance is that, at the time of the application, the appellant's wife Anita and son Trevor were the registered proprietors of the property. They were not parties to the action in which the judgment had been handed down against the appellant. They were joined in the action in a representative capacity after the appellant's death. Although they were the duly qualified legal personal representatives of the appellant's estate, the respondent would have been under a duty, to commence a separate action against the appellant joining them as parties thereto, as rightly contended by Mr. Foster.

26. It is without doubt that the respondent, in attempting to set aside the transfer, had adopted an incorrect procedure. Having not pursued the requisite process on which her claim could have been grounded, the learned judge ought not to have entertained the application presented by her.

27. The foregoing sufficiently disposes of the fundamental issue in the appeal thus rendering it unnecessary for me to give consideration to the remaining grounds.

MORRISON, J.A.

28. At the conclusion of the hearing of this matter on 13 January 2008, the appeal was allowed and the order of Daye J in the court below set aside, with no order as to costs. These are my reasons for concurring in that decision.

29. On 2 June 1982, the respondent was a passenger in a motor vehicle owned by the appellant when it came into collision with a cane trailer in the vicinity of White Marl Bridge, St. Catherine. The respondent sustained serious injuries as a result and on 28 March 1983 commenced proceedings against the appellant in the Supreme Court, in which she sought to recover damages from him for her injuries and the losses sustained by her.

30. On 10 December 1993, while this action was still pending, the appellant transferred property owned by him at 28 Queensborough Terrace, Golden Acres, St Catherine ("the property") by way of gift to his wife, Anita Agatha Smith, and his son, Trevor Smith ("the Smiths"). The property was thereupon registered in their names at Volume 1059 Folio 372 of the Register Book of Titles.

31. On 10 October 2001, the respondent obtained judgment against the appellant and was awarded general damages of \$5,000,000.00, special damages of \$953,620.00, plus interest and costs in the sum of \$64,000.00. That judgment remains unsatisfied.

32. The appellant died in or around July 2006 and on 26 February 2007 the Smiths were appointed as personal representatives of his estate.

33. On 24 September 2007, the respondent made an application for an injunction restraining the appellant through his personal representatives and or their agents from dealing with the property, a declaration that the transfer of the property from the appellant to the Smiths on 10 December 1993 was intended to defeat execution of the judgment in the respondent's favour, rescission of the said transfer, an order for sale of the property to satisfy the judgment debt and other consequential reliefs.

34. The application was supported by an affidavit sworn to by the respondent's attorney-at-law in which it was alleged that the transfer by the appellant to the Smith's had been done "to avoid the inevitable Judgment which it was foreseeable would be made against him in this Suit." An affidavit in opposition was filed by Mrs Smith, who denied this allegation, stating that the appellant had effected the transfer by way of gift in order "to facilitate better supervision of the property", he having by that time become ill and incapable of taking care of his own affairs. Mrs Smith also averred that she and her son had beneficial interests in the property by virtue of the intention of the parties at the time of its acquisition and subsequent contributions to mortgage payments, repairs and maintenance.

35. On 12 February 2008, after considering the affidavit evidence and having heard counsel on both sides, Daye J made orders in terms of the respondent's application and it is these orders that have given rise to this appeal. No reasons appear to have been given by the judge for his decision.

36. The appellant filed some 14 grounds of appeal, which may be summarised in the following broad submissions:

- (a) The learned judge erred in failing to consider that a transfer of property under the Registration of Titles Act ("the RTA") could only be set aside in cases of fraud, of which there was no evidence in this case (the registered title point).
- (b) The learned judge erred in purporting to set aside the transfer in favour of the Smiths, who were the registered proprietors of the property and who were not parties to the action in their personal capacities.
- (c) The learned judge erred in failing to consider the true legal effect of the judgment in favour of the respondent which was obtained after the transfer of the property to the Smiths had been effected.
- (d) The learned judge failed to take into account the claim by the Smiths to a beneficial interest in the property in their own right.

- (e) The learned judge erred in failing to consider that the respondent's rights as a judgment creditor, if any, could only be against the appellant's estate.

The registered title point

37. On this point, Mr Foster Q.C. observed that the effect of Daye J's order was to revest ownership of the property in the appellant's estate, notwithstanding the position of the Smiths as the registered proprietors. He submitted that under the RTA the registered proprietor of any estate or interest in land has a valid and indefeasible title, except in cases of registration obtained by or tainted with fraud. Further, that fraud for the purposes of the RTA connotes actual and not constructive or equitable fraud. On this basis, he contended that the lawful transfer of the property by the appellant to the Smiths while the suit was pending did not constitute fraud and that the appellant was entitled to effect such a transfer in the absence of any order of the court preventing him from doing so.

38. Mr Equiano for the respondent accepted that the instrument of transfer in favour of the Smiths could only be set aside on proof of fraud, but maintained that there was sufficient evidence to establish that the transfer in this case "was intended to defraud the [respondent] and rob her of the fruit of an impending judgment". Mr Equiano emphasised what he described as "the suspicious circumstances in which the property was

transferred", including the fact that the transfer was by way of gift, to close relatives and for no obvious reason other than to defeat the respondent's "inevitable judgment" against the appellant. In all these circumstances, he submitted, the judge's conclusion was justifiable on the evidence and ought not to be disturbed.

39. The relevant sections of the RTA are sections 68, 70, 71 and 161(d), which are set out below:

"68. No certificate of title registered and granted under this Act shall be impeached or defeasible by reason or on account of any informality or irregularity in the application for the same, or in the proceedings previous to the registration of the certificate; and every certificate of title issued under any of the provisions herein contained shall be received in all courts as evidence of the particulars therein set forth, and of the entry thereof in the Register Book, and shall, subject to the subsequent operation of any statute of limitations, be conclusive evidence that the person named in such certificate as the proprietor of or having any estate or interest in, or power to appoint or dispose of the land therein described is seised or possessed of such estate or interest or has such power.

...

70. 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 a 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:

Provided always that the land which shall be included in any certificate of title or registered instrument shall be deemed to be subject to the reservations, exceptions, conditions and powers (if any), contained in the patent thereof, and to any rights acquired over such land since the same was brought under the operation of this Act under any statute of limitations, and to any public rights of way, and any easement acquired by enjoyment or user, or subsisting over or upon or affecting such land, and to any unpaid rates and assessments, quit rents or taxes, that have accrued due since the land was brought under the operation of this Act, and also to the interests of any tenant of the land for a term not exceeding three years, notwithstanding the same respectively may not be specially notified as incumbrances in such certificate or instrument.

71. Except in the case of fraud, no person contracting or dealing with, or taking or proposing to take a transfer, from the proprietor of any registered land, lease, mortgage or charge, shall be required or in any manner concerned to enquire or ascertain the circumstances under, or the consideration for, which such proprietor or any previous

proprietor thereof was registered, or to see to the application of any purchase or consideration money, or shall be affected by notice, actual or constructive, of any trust or unregistered interest, any rule of law or equity to the contrary notwithstanding; and the knowledge that any such trust or unregistered interest is in existence shall not of itself be imputed as fraud.

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;..."

40. The combined effect of these sections is to confer on the registered proprietor what has come to be described as 'indefeasibility of title', a phrase which, though not used in the Act itself, "is a convenient description of the immunity from attack by adverse claim to the land or interest in respect of which he is registered, which a registered proprietor enjoys" (***Frazer v Walker*** [1967] 1 A.C. 569, 580, per Lord Wilberforce).

41. The concept has been given effect to in numerous decisions of this court, and it is sufficient to refer only to ***The Registrar of Titles v Ramharrack*** (SCCA No. 80/2002, judgment delivered 29 July 2005), a case cited by Mr Foster. In that case P. Harrison J.A. (as he then was) said this (at page 7):

“Under the Registration of Titles Act the registered proprietor of any estate or interest has a valid indefeasible title (subject to some reservations) unless such registration by the proprietor has been tainted by fraud”.

42. The learned President went on to refer to, and apply, the well known decision of the Privy Council in **Assets Company Ltd. v Mere Roihi & Others** [1905] AC 176, in which it was decided that fraud for the purpose of defeating the registered title means actual fraud or dishonesty of some kind and not constructive fraud. Such fraud must be “brought home to the person whose registered title is impeached or to his agents” (per Lord Lindley, at page 210).

43. As a result, P. Harrison J.A. (as he then was) concluded in the **Ramharrack** case (at page 10) that:

“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”.

44. Mr Equiano did not dissent from any of this, but maintained that it was clear on the evidence “that the transfer was intended to defraud” the respondent. In my view, there was absolutely no such evidence placed before Daye J. Neither was there even an allegation, far less evidence, that the Smiths, the registered proprietors whose title it was sought to impugn, were themselves guilty of or party to any fraud. The fact is that the affidavit of Miss Jarrett, sworn to 14 years after the event,

could not do more than offer a wholly speculative reason for the transfer and accordingly fell far short of the accepted requirements of both the pleading and proof of fraud (see **Wallingford v The Directors of the Mutual Society et al** (1879-80) L.R. 5 App. Cas. 685, 697 and 701). In the absence of any order of the court restraining him from doing so pending the outcome of the respondent's action, the appellant was fully entitled to deal with his property as he saw fit.

45. It follows from this, in my view, that the appeal must be allowed on this ground, which indeed goes to the very foundation of Daye J's order. For if the judge had no power to, in effect, reverse an entry in the Register Book of Titles by rescinding the transfer to the Smiths, neither did he have any power to order the cancellation of the certificate of title registered in their names nor to make an order for sale of the property on the footing that the appellant (as judgment creditor) was the registered owner of the property.

46. In the light of this inevitable consequence, I do not find it necessary to express a view on any of the other grounds of appeal, which were also fully argued by Mr Foster, save to say that, on the face of it, they also appear to be irresistible on the facts of this matter. I would only add that, since preparing this judgment, I have had the benefit of reading in draft the judgment prepared by Harris J.A. and I am in full agreement with her conclusion as to the inappropriateness of the procedure adopted by

the respondent in seeking to set aside the transfer in the circumstances of this case.

47. These are therefore my reasons for having concurred in the order set out at paragraph 28 of this judgment. I cannot, however, leave the matter without stating that I have great sympathy for the unfortunate position of the respondent, who remains truly an unrequited victim. It is in the circumstances entirely to their credit that Mr Foster's clients did not insist on the order for costs that would ordinarily have followed the event.

SMITH, J.A.:

ORDER:

48. Appeal allowed. Order of the learned judge below set aside. No order as to costs.