JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 85/94

COR: **THE HON MR JUSTICE CAREY JA**
THE HON MR JUSTICE DOWNER JA
THE HON MR JUSTICE PATTERSON JA

BETWEEN	**MIGUEL THOMAS** **MERLENE LEWIS** **(Executors Est. Ethline Dayes)**	**APPELLANTS**
A N D	**WILLIAM JOHNSON** **KATHLEEN JOHNSON**	**RESPONDENTS**

Dennis Forsythe, Nelton Forsythe & Winston Walters instructed by Forsythe & Forsythe for appellants

H S Rose for respondents

15th, 16th May & 19th June 1995

CAREY JA

The chequered history which forms the backdrop to this appeal, the last in a trilogy of hearings and appeals, must needs, in the telling, be examined, so that finality in litigation may be achieved but more immediately just to understand it.

We are concerned with premises 384 Greendale Boulevard, Spanish Town in St. Catherine which on 12th February 1988 was the subject of an agreement for sale between the late Ethline Dayes as vendor and the present respondents as purchasers. The vendor attempted to repudiate the agreement by a letter dated 17th March, but the respondents'

riposte was to serve a "notice of completion" which I take to mean that time was made the essence of the contract. But on the vendor's failure to perform, the purchasers filed an action for specific performance (E293/89) which came on for hearing before Langrin J on 3rd October 1989. He granted the order but this court on 20th December 1991 set aside his order on the ground that the wrong procedure was invoked by the respondents: they should have proceeded by writ, but instead used an originating summons.

Before this court had determined the matter however, the Registrar of Titles had duly registered the transfer pursuant to the order of Langrin J. That registration was effected 10th January 1991. Another supervening event occurred on 22nd November 1990 when the executors (the purchaser having died by then,) lodged a caveat against the certificate of title. It would seem that the basis of their interest was not as executors but personal, in reliance on a Deed of Gift dated 10th March 1988. Putting forward this purported root of title,seems a trifle odd in the face of an undoubtedly valid and extant agreement for sale. Be that as it may, the respondents applied to the court to have the caveat removed, but Smith J dismissed that summons. The reasons for his decision which was never challenged by any appeal, were not vouchsafed to us. In December 1991, these appellants applied to the court to have the certificate of title cancelled and a new certificate issued either in the name of the previous registered owner or the appellants. They rested their application on the basis of the Deed of Gift dated 10th March 1988. It is plain that the appellants were not at that stage acting in a representational character or role: they were acting in their personal characters as owners. Pitter J correctly as this court held, dismissed the appellants' summons. That decision

remains in full force and effect. It could only have been challenged by an appeal to the Privy Council: none was made.

But that judgment was not to give to the entire matter its quietus. Far from it. Sleeping dogs were not allowed to lie. Surprisingly, the respondents initiated further action. They filed a summons claiming, so far as material, a declaration :

> "that the Applicants have acquired an undefeasible (sic) title to premises known as Lot 384 Greendale Boulevard, Spanish Town in the parish of St. Catherine and registered at Volume 1009 Folio 102."

The summons came on before McIntosh J (Ag). He had all the matters which I have thus far recited. He had as well a letter dated 30th August 1993 from the Registrar of Titles requiring the respondents to return the certificate of title for correction in view of this court's judgment in July 1992 (which had set aside the order of Langrin J). The declaration sought was duly granted by the learned judge. The appeal now before us challenges that judgment and order dated 28th July 1994. We do not have the judge's reasons which would have been of no little assistance to us, and indeed, to counsel.

A number of grounds of appeal were filed and although in the event not expressly abandoned, were not argued as formulated. In accepting a suggestion from a member of the court, Mr. Dennis Forsythe who led for the appellants said he intended to argue that the learned judge was wrong to grant the declaration in the face of the request to return for correction the certificate of title by the Registrar of Titles. He prayed in aid section 163 of the Registration of Titles Act to submit that those provisions only protected a bona fide purchaser for value, which the respondents were not. The basis of the protection of the indefeasibility of title provided by the Act, had been removed when this court set aside the

order of Langrin J and it was irrelevant that the Registrar of Titles had registered the transfer to the appellants prior to the order of this court.

The doctrine of the indefeasibility of title which is enshrined in the Torrens system of registration is a fundamental principle. It describes the immunity from attack by adverse claims to land or the interest in respect of which the proprietor is registered. This indefeasibility is the indefeasibility of title of a purchaser for value from a registered proprietor and exists in the interest of the purchaser and not of the vendor. **Mere Roihi v Assets Co [1902] 21 NZR** at p. 275. The principle operates so that registration is effective to vest title in a registered proprietor notwithstanding that he acquired his interest under an instrument that was void: **Frazer v Walker & Ors. [1967] 1 All ER 649** and see also **Assets Co Ltd v Mere Roihi [1905] AC 176.** The significance of these decisions lies in the fact that registration is the basis and foundation of indefeasibility. A number of provisions in the Registration of Titles Act demonstrate this fact. For example, section 68 provides as follows:

> "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."

Other relevant provisions which may be mentioned are sections 69, 70, 71, 73, 161 and 163.

The principle does not, however, mean that every person registered has an unanswerable title against the world. This is borne out by section 161 which details a number of exceptions. It provides as follows:

> "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) the case of a mortgagee as against a mortgagor in default;
>
> (b) the case of an annuitant as against a grantor in default;
>
> (c) the case of a lessor as against a lessee in default;
>
> (d) the case of a person deprived of any land by fraud as against the person registered as proprietor of such land through fraud, or as against a person deriving otherwise than as a transferee bona fide for value from or through a person so registered through fraud;
>
> (e) the case of a person deprived of or claiming any land included in any certificate of title of other land by misdescription of such other land, or of its boundaries, as against the registered proprietor of such other land not being a transferee thereof bona fide for value;
>
> (f) the case of a registered proprietor with an absolute title claiming under a certificate of title prior in date of registration under the provisions of this Act, in any case in which two or more certificates of title or a certificate of title may be

> registered under the provisions of this Act in respect of the same land,
>
> and in any other case than as aforesaid the production of the certificate of title or lease shall be held in every court to be an absolute bar and estoppel to any such action against the person named in such document as the proprietor or lesee of the land therein described any rule of law or equity to the contrary notwithstanding."

Subsections (d) and (e) must be highlighted. Fraud or misdescription of land or its boundaries can therefore defeat the title of a registered owner. Accordingly section 158 empowers a court or judge to direct the Registrar of Titles to cancel or correct a certificate of title. It should be set out:

> 158. (1) Upon the recovery of any land, estate or interest, by any proceeding at law or equity, from the person registered as proprietor thereof, it shall be lawful for the court or a Judge to direct the Registrar-
>
> (a) to cancel or correct any certificate of title or instrument or any entry or memorandum in the Register Book, relating to such land, estate or interest; and
>
> (b) to issue, make or substitute such certificate of title, instrument, entry or memorandum or do such other act, as the circumstances of the case may require,
>
> and the Registrar shall give effect to that direction.
>
> (2) In any proceeding at law or equity in relation to land under the operation of this Act the court or a Judge may, upon such notice, if any, as the circumstances of the case may require, make an order directing the Registrar-
>
> (a) to cancel the certificate of title to the land and to issue a new certificate of title and the duplicate thereof in the name of the person specified for the purpose in the order; or

(b) to amend or cancel any instrument, memorandum or entry relating to the land in such manner as appears proper to the court or a Judge."

This now leads me to section 153, a provision mentioned by Mr. Forsythe in the course of his submissions. It is in the following form:

> 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."

It plainly confers power on the Registrar of Titles to call upon any person who has obtained or retains a certificate of title, which -

(i) has been issued in error

(ii) contains a misdescription of land or its boundaries

(iii) contains entries made in error

(iv) has been fraudulently or wrongfully obtained or retained

to deliver up the same for correction or cancellation as the case may be. A certificate of title not falling within the categories I have extracted from the provision may therefore not be recalled. I conclude therefore that a certificate validly issued cannot be recalled by the Registrar under the powers conferred on him by section 153. Logically it follows that the Registrar cannot exercise his powers under this section to deprive of his estate a registered proprietor who is a purchaser bona fide and for valuable consideration: **Assets Co Ltd v. Mere Roihi [1905] AC 176**.

In the instant case Mr Dennis Forsythe maintained that the respondents were not bona fide purchasers for value, but that I do not think to be right. The respondents had a valid agreement for sale of the property with the registered owner. Counsel has not suggested that the agreement for sale was invalid nor that the registration was made either on the basis of fraud or misdescription. The registration must therefore have been valid. When this court set aside the order of Langrin J, that did not in my judgment, affect the status of the respondents as bona fide purchasers for value of the property for the reason I have suggested. If the registration was valid and effective, as indeed it was, then it could only be defeated by fraud or misdescription.

The Registrar of Titles could not under the section i.e. section 153 recall the certificate because it had not been issued in error and contained no misdescription of the land or its boundaries. It contained no error with respect to entries endorsed thereon and

had not been obtained by fraud. Although she did write recalling the certificate, it was not stated wherein lay her power to take such action. The respondents would therefore be at liberty to ignore her request.

There is one matter remaining with which I must deal. Mr Forsythe in the course of his submissions, urged that the judge had no jurisdiction to make any declaration under the Registration of Titles Act. He relied on a judgment of Campbell J (as he then was) in **Re Dervent Taylor** delivered 18th June 1981. What occurred there was this. Farquharson J (Ag) had granted declarations under that Act on an ex parte summons. Campbell J set aside those declaration on two grounds. First he held that a judge of the Supreme Court has no power under the Registration of Titles Act - Section 158, to entertain any proceedings whatever in law or equity creative of or pertaining to a registered estate or interest in land under the Act because section 158 was not a recovery proceeding. Secondly, he held that the procedure adopted was a fundamental breach of principle and an error in procedure.

I am far from clear how that approach assists Mr Forsythe. The instant case is altogether different from **Re Dervent Taylor**. The respondents in the present appeal were not invoking section 158 of the Registration of Titles Act to recover land of which they had been dispossessed. They sought rather, a declaration under the court's inherent power to grant declarations. That power is not conferred by any specific statute but by the plenitude of power accorded a superior court of record of unlimited jurisdiction. I did not understand Mr Forsythe to be suggesting that the court does not have an inherent power

to make declarations. Section 239 of the Civil Procedure Code Law should be quoted. It states:

> "No action or proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right whether any consequential relief is or could be claimed, or not." [emphasis supplied]

Campbell J has nowhere stated that not to be the position at law. The ratio of his judgment in that case seems to be that there is no power in the Supreme Court to grant declarations under the Registration of Titles Act so as to allow the Registrar of Titles to cancel or correct a certificate of title unless there is some proceeding to recover land as permitted by the Act. That proposition has undoubted support in **Assets Co Ltd v Mere Roihi** (supra). I am in no doubt that Campbell J came to a correct decision and for reasons which are unimpeachable.

That ground also fails.

It seems inescapable to conclude that McIntosh J (Ag) was entitled to hold that the certificate of title, not having been cancelled in proceedings brought by the appellants for that purpose and for all the other reasons I have endeavoured to explain, was valid and accordingly he was bound to maintain the status quo, in short, to grant the declaration sought. It might seem that the respondents have acquired premises on the basis of a contract that has not been ordered specifically performed against the vendor or her executors. But the registration ends the matter. It must also be remembered that the appellants sought to obtain the same for themselves by virtue of a deed of gift, a claim

which has failed. Perhaps it is best that the premises go to those who have paid for it; their claim rests on surer foundations.

For all these reasons, I would dismiss the appeal with costs.

DOWNER J A

The respondents to this appeal William and Kathleen Johnson purchased Lot 384 Greendale Boulevard, Spanish Town registered at Volume 1009 Folio 102 in the Register Book of Titles. There are concurrent findings by Pitter J and this court (Carey P (Ag), Forte & Wolfe JJA) to that effect. See Suit E317/91 & SCCA 36/92.

It seems that part of the purchase money was paid to Victoria Mutual who held a mortgage and the chronology of events prepared by the appellants suggest that a cheque of $20,000 was paid but the vendor returned it. There were no submissions as regards this amount of $20,000. Be it noted however that the purchasers have always been willing to pay over to the executors the balance of the purchase money. This was expressly stated in their affidavits before this court. For ease of reference, they are called the purchasers. The appellants are Miguel Thomas and Merlene Lewis and they are the executors of the estate of Etheline Dayes. They are referred to as the executors. They became executors on 15th March 1991. The date is important as there was an order for specific performance by Langrin J of the agreement of sale between the purchasers and the vendor from 3rd October 1988. Having regard to these dates, the executors face a formidable task in seeking to set aside the order below.

Ethline Dayes was the vendor who sold the purchasers the estate in issue. She also purported to give the estate to the executors as a deed of gift after she had contracted to sell it.

Because there has been so many concurrent proceedings in connection with this estate in the Resident Magistrate's Court, the Supreme Court and the Court of Appeal, it is important to particularise the parties in each case and identify the dates of the Supreme and Appeal Court's orders. The order which calls for immediate attention was made in suit E346 of 1993 where the purchasers sought and obtained declarations which the executors have challenged on appeal. So it is important to set out the declaratory order awarded by McIntosh J (Ag) on 28th July 1994. It reads:

> **IT IS HEREBY ORDERED THAT:-**
>
> 1. That the applicants have acquired an undefeasible (sic) Certificate of Title to premises known as Lot 384 Greendale Boulevard, Spanish Town in the parish of Saint Catherine and registered at Volume 1009 Folio 102;
>
> 2. That the Applicants are entitled to possession thereof;
>
> 3. That the interest of the Executors resides only in the balance of the Purchase money;
>
> 4. Cost to the Applicants to be taxed, if not agreed."

The inescapable inference must be that McIntosh J(Ag) made these declarations on the basis of the findings of Pitter J and the Court of Appeal in Suit E317 of 1991 and SCCA 36/92.

Regrettably, Pitter J did not set out the terms of the contract of sale or the deed of gift in his judgment and the parties to this appeal did not include them in the record. Nor have the executors included in the record the letter they allege the vendor wrote on March 14 1988 repudiating the agreement and returning the cheque for $20,000 on the ground that it was not the amount agreed to. This information was revealed for the first time when this court requested a chronology of events from Mr Dennis Forsythe on the first day of hearing.

There was therefore no opportunity to pronounce on its force and effect if indeed it does exist. Be it noted however that the property was subject to a mortgage and it seems the purchasers have paid off that.

As the executors are aggrieved by that order of McIntosh J (Ag) they have appealed. They have also been evicted by order of the Resident Magistrate for St. Catherine. It is pertinent to examine the basis on which the learned judge made the declaratory orders as he gave no reasons for his decision and the appellants have complained that he did not accord them a hearing.

The jurisdiction of McIntosh J(Ag) to have made declaratory orders on the basis of the judgment of Pitter J and the order of the Court of Appeal

It must be noted that it was the purchasers who had judgment in their favour from Pitter J and the Court of Appeal. They also sought the declaratory orders from McIntosh J(Ag). It was a curious proceeding: if the executors were aggrieved by the order of the Court of Appeal they should have appealed to the Privy Council. To respond before McIntosh (J(Ag) was superfluous.

It is appropriate to set out the parties' proceedings before Pitter J. It is as follows:

"

IN THE MATTER of the Registration of Titles Act and dealing with land registered at Volume 1009 Folio 102

AND

Section 142 of the Registration of Titles Act.

BETWEEN	MIGUEL GEORGE THOMAS AND JOSEPHINE THOMAS	APPLICANTS
AND	WILLIAM JOHNSON	FIRST RESPONDENT
AND	KATHLEEN JOHNSON	SECOND RESPONDENT
AND	THE REGISTRAR OF TITLES	THIRD RESPONDENT"

The Registrar of Titles was not represented. As for dates, it was heard on 18th November 1991 and judgment was delivered on 6th April 1992. This first extract from the judgment makes the important finding as regards a sale agreement and a subsequent deed of gift. The effect of that finding was since the sale takes precedence, then the gift was a nullity. Here is how the learned judge put the matter:

> " The genesis of this action began with the first and second respondents entering into an agreement with Etheline Dayes, the mother of the applicants herein, for the sale of premises Lot 384 Greendale Boulevard, Saint Catherine and registered at Volume 1009 Folio 102 to the said respondents. The Agreement for Sale is dated 12th February, 1988.
>
> By Deed of Gift dated 10th March 1988 Ms. Dayes purport to transfer the said to the applicants in consideration of 'love and affection.'
>
> Ms Dayes died subsequently since the execution of the said Deed of Gift."

At this point it is important to note that this judgment was affirmed on appeal - (Carey P (Ag) Forte & Wolfe JJA). There were no written reasons but the order tells the story. It states:

> " November 10, 1992
>
> Appeal dismissed. Order of the Court Below affirmed. Costs to the Respondent."

Be it noted that before Pitter J and this court , the executors sought cancellation of the registered title in favour of the purchasers and they failed in both courts. It was perhaps to put the matter beyond doubt that the purchasers

invoked the jurisdiction of the Supreme Court for a declaratory order as to their rights as purchasers of the estate.` This is what they sought before McIntosh J(Ag). Since it was contended in this appeal that the learned judge had no jurisdiction to make a declaratory order in the circumstances of this case, a reference to section 239 of the Civil Procedure Code is instructive. It reads:

> 239. No action or proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right whether any consequential relief is or could be claimed, or not."

Moreover, section 159 of the Registration of Titles Act (The Act) states expressly that the same rules of procedure and practice, i.e. the Civil Procedure Code shall apply to actions and suits brought under the Act. It was on the basis of this provision together with the concurrent findings of fact that empowered McIntosh (J(Ag) to make the declaration under appeal pursuant to the Act.

The parallel proceedings before Langrin J and the Court of Appeal

In order to grasp the central issues of this protracted litigation, it is necessary to quote Pitter J who referred to the parallel proceedings before Langrin J. Here is the relevant passage:

> " A series of court actions followed as a result. The first was an application by the first and second respondents for specific performance of the Agreement for Sale of the said premises against Etheline Dayes and the Victoria Mutual Building Society which held a mortgage thereon. In Suit No. E 293 of 1988 Langrin J. made the following order on the 16th October, 1990:

'Upon hearing summons for Liberty to Apply dated the 25th day of September, 1990, and upon hearing the Affidavit in Support of Summons for Liberty to Apply sworn to on the 25th day of September, 1990, and upon hearing Mr. H.S. Rose, Attorney-at-Law, on behalf of the Applicants and the Respondents not appearing nor being represented

IT IS HEREBY ORDERED THAT:

(1) HERBERT S. ROSE, Attorney-at-Law of #80 East Street, Kingston be declared to have Carriage of Sale in regard to completion of the said matter.

(2) The Registrar of the Supreme Court be designated the person authorised to sign the Transfer on behalf of the first named Respondent.

(3) The Victoria Mutual Building Society deliver to the Attorney with Carriage for Sale the Certificate of Title registered at Volume 1009 Folio 102 and the discharge of mortgage on receipt by them of the mortgage debt or an undertaking to pay the debt by the Attorney having the Carriage of Sale.

Costs for the application to be agreed or taxed.' "

The first point to note is that Langrin J made this order pursuant to the purchasers application for liberty to apply. A previous order ought therefore to be in existence but it has not been adverted to by either party in this appeal, save in the chronology of events. There it is stated that the order for specific performance was granted on 3rd October 1988 so the summons for liberty to

apply was two years later on 16th October, 1990. There ought to have been an application to set aside the above order by reliance on sections 524 and 525 of the Civil Procedure Code, because the wording of the order suggests that the respondents who were named did not attend. The vendor died on January 1 1990. The sections read:

> Proceeding "ex parte" if party fails to attend
>
> 524. Where any of the parties to a summons fail to attend, whether upon the return of the summons, or at any time appointed for the consideration or further consideration of the matter, the Judge may proceed 'ex parte', if, considering the nature of the case, he think it expedient so to do; no affidavit of non-attendance shall be required or allowed, but the Judge may require such evidence of service as he may think just."
>
> Reconsideration of "ex parte" proceeding.
>
> 525. Where the Judge has proceeded 'ex parte', such proceeding shall not in any manner be reconsidered in the Judge's Chambers, unless the Judge shall be satisfied that the party failing to attend was not guilty of wilful delay or negligence; and in such case the costs occasioned by his non-attendance shall be in the discretion of the Judge who may fix the same at the time, and direct them to be paid by the party or his solicitor before he shall be permitted to have such proceeding reconsidered, or make such other order as to such costs as he may think just."

These sections suggest that the executors ought to have pursued this course instead of resorting to the appellate procedure which required firstly an application for extension of time and then an appeal on the merits.

The second point to note is that the necessary implication in these two sections is that if the purchasers had instituted ex parte proceedings, it could be set aside on that basis. Campbell J (as he was then) in **Re Dervent Taylor** suit No E 40 of 1979 relied in the alternative on the inherent jurisdiction of the court to achieve this end and so did the Privy Council in **The Ministry of Foreign Affairs Trade & Industry v Vehicles and Supplies Ltd & Northern Industrial Garage Ltd** Privy Council appeal No. 2/1991 delivered 13th May 1991 or (1991) 1 WLR 550.

The executors challenged Langrin's J judgment but as they were out of time, they had to seek leave to enlarge time. This came before the court (Wright, Downer JJA & Bingham JA(Ag)). A decision was given on 2nd December 1991 followed by a written judgment delivered on 20th December 1991. The dates are important as the hearing before Pitter J had commenced on 18th November 1991 and judgment was delivered 6th April 1992. As to whether Pitter J had this judgment before him, it is impossible to say, because of the haphazard way in which these proceedings were conducted on both sides. The record was badly made up and submissions in court were made as if every step was independent of the other concurrent proceeding. It is as if the lawyers on both sides deliberately created a maze with which to entrap the courts.

In this state, the rights of the parties become blurred and such a situation is not in the interests of the parties or of justice. Bingham JA (Ag) in a

careful judgment quotes from the affidavit of the executors and the following passages are of relevance:

> "2. That two separate but related Orders were entered against our deceased mother Etheline Dayes and in favour of the abovenamed Respondents on October 3rd, 1985 and October 1990, respectively in this matter by Justice Langrin, and I exhibit herewith marked with the letters 'T1' and T2' copies of these two Orders.
>
> 3. That both Orders related to the granting of Specific Performance of an Agreement of Sale for Land dated 12th day of February 1988 signed between Etheline Dayes (vendor) and WILLIAM/KATHLEEN JOHNSON (purchasers)."

Then the affidavits go on to state irregularities as follows:

> 4. That both Orders were obtained most irregularly and constitute a great injustice against us because:
>
> (a) Etheline Dayes our mother, died on the 1st January 1990 before an Order of Specific Performance was completed and yet this action was carried on against and in the name of the deceased when it should have been continued against us as the personal representatives of the deceased;
>
> (b) That the respondents knew of the death of our mother and yet chose to ignore this fact when they continued suit E293 of 1988 against the deceased as sole defendant some eight months after her death. We refer to Exhibit 'T3' which is the Affidavit of Herbert Rose dated 25th September 1990 Paragraph 2."

Then the executors stated their interest thus:

> "(c) That we do have an interest in this matter as executor of the duly executed Will of the deceased probate of which was obtained on the

> 15th day of March 1991 and is exhibited herewith and marked 'T4' for identification.
>
> ...
>
> (f) inspite of these facts we were never joined in this action as a party upon the death of our mother, nor even served with Notice of these proceedings.
>
> (g) That on the 16 th of October 1990 when the crucial order was made instructing the Registrar of the Supreme Court to authorise and sign the Transfer neither my mother Etheline Dayes nor her personal representative was represented, that Judgment was in effect obtained exparte."

Then there is this important statement by Bingham JA(Ag):

> " There has been no attempt made by learned counsel for the respondents to challenge or traverse any of the facts alluded to in these affidavits."

This illustrates the difficulty which has bedeviled this case. The affidavits could have been refuted but the respondents' counsel sat idly by and just smiled.

It must be emphasised that the order sought and granted was to enlarge time for the executors to appeal but the judgment is most useful in explaining the background to these contentious issues.

The substantive appeal was heard by (Wright Downer & Morgan JJA). It does not appear that there was any written judgment although the order dated 7th July 1992 stated:

> "Appeal allowed. Order of the Court below set aside.
> Costs to Appellants to be agreed or taxed.
> (Reasons to be put in writing)."

So the order of Langrin J referred to by Pitter J in his judgment was set aside. Here it is necessary to summarise the dates. Langrin's J order was set aside 7th July 1992; Pitter's J order referring to and affirming Langrin's J order for specific performance was 8th April 1992. The order of this Court (Carey P. (Ag.) Forte Wolfe JJA) affirming Pitter's J order was made on 10th November 1992. So although the order of this Court (Wright Downer Morgan JJA) on 7th July 1992 set aside Langrin's J order, that same order was implicitly approved by this Court (Carey P (Ag.) Forte Wolfe JJA) on 10th November 1992.

This order was crucial for the effect of it was that the certificate of title obtained by the purchasers on January 10 1991 pursuant to the orders of Langrin J on 16th October 1990, was indefeasible although the court's orders on which the Registrar acted could and were challenged successfully at some stage. The statutory authority for this is section 68 of the Registration of Titles Act which states:

> "Section 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 the 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 or having any estate or interest in, or power to appoint or dispose of the land therein described is seized or

> possessed of such estate or interest or has such power."

Pitter J put it thus:

> " The case of Fraser v Walker et al [1967] 1 All ER p. 649 establishes that it is the fact of registration and not its antecedents which vests or divests title. It also establishes that even if the proceedings precedent to registration were not merely irregular but void, any registration effected thereby remains operative and establishes in the person registered an indefeasible and unimpeachable title subject to the cases specifically exempted under the Registration of Titles Act. Such excepted cases are totally independent of the existence or non-existence of fraud." (See S. 161(a)(b)(e)(f) of the Act)

So it is necessary to advert to Pitter's J order which was in response to the executors' originating summons to cancel the registered title which was obtained by the purchasers. The six findings were as follows:

> "(1) That the first and second respondents acquired title by virtue of an Agreement for Sale.
>
> (2) That the said Agreement for Sale was enforced by this Honourable Court consequent to an Order made on the 16th day of September 1990.(Langrin's J ex parte order, my addition)
>
> (3) (This finding will be referred to later)
>
> (4) That the Register (sic) of Titles in registering the transfer to the first and second respondents acted in accordance with the Order of the Court." (The registration was on January 10 1991 - my addition)
>
> "(5) That the first and second respondents are registered proprietors of the land in question having thus acquired an unimpeachable and indefeasible title.

> (6) There is no basis in law or equity for the cancellation of the respondents' title."

It does not appear that the judgment of Pitter J delivered on 6th April 1992 formed part of the proceedings which resulted in the order of 7th July 1992 - (Wright Downer Morgan JJA). So since McIntosh J (Ag) must have relied on the judgment of Pitter J, and the affirming order by the Court of Appeal, we must return to the judgment of Pitter J.

> **On what basis did Pitter J find that the purchasers had acquired an unimpeachable and indefeasible title?**

The first point to make is that having regard to the unnecessary but correct declaratory order of McIntosh J (Ag), this court must again examine Pitter's J judgment. There was a previous order of this court (Carey P (Ag) Forte Wolfe JJA) SCCA 36/92 affirming this decision: It is an unpleasant task to go over this exercise again, but if this judgment reviews the previous proceedings, it might be of some help in clarifying the issues so that the executors are able to understand the options open to them. This was stated in paragraph 18 of the purchasers' affidavit. It reads thus:

> "18. That the Applicants have always been ready and willing to bring this matter to a conclusion by paying to the Executors all monies due and owing in respect of the property as is evidenced by a copy of a letter dated the 19th day of November 1992, addressed to Ms Merlene Lewis c/o Winston Walters & Company, Attorneys-at-Law and Miguel Thomas c/o Messers Forsythe & Forsythe, Attorneys-at-Law (see copy enclosed marked 'G' for identity) which sets out the applicants position."

A good starting point for this reexamination of the judgment of Pitter J is the finding in favour of the purchasers which was not examined previously. It is (3) which reads:

> "(3) That the Caveat # 645923 registered against premises registered at Volume 1009 Folio 192 of the Register Book of Titles on the 22nd November, 1990 predates the Order of the Court above and is therefore of no effect."

As regards this caveat, be it noted that Langrin's J ex parte order was dated 16th October 1990. Pitter's J order after full argument which refused cancellation of the title granted on the basis of the order by Langrin J, was in April 1992. As was pointed out in the court below, the judge's ruling discharged the caveat. That is provided for in section 44 of the Act which reads in part:

> "44. The Registrar, upon receipt of such caveat, shall notify the same to the applicant, and shall suspend proceedings in the matter until such caveat shall have been withdrawn or shall have lapsed as hereinafter provided or until an order in the matter shall have been obtained from the Supreme Court."

So although Smith J on the application of purchasers refused to remove the caveat on October 3 1991 when Pitter J made his order on 6th April 1992 declaring the caveat to be of no effect and this was affirmed by the Court of Appeal, the caveat was discharged.

Three points must be emphasised. The first is that the declaratory orders by Pitter J were affirmed by the order of this Court and there was no

further appeal to the Privy Council. To reiterate, the second is that the order of McIntosh J (Ag) was superfluous as all it did was to make a declaration in terms of the judgment of Pitter J. The third point which seems to have eluded the executors is that if indeed the title obtained by the purchasers is indefeasible, then there are statutory remedies in money terms which have been offered.

I am compelled to remark that the conduct of counsel on both sides showed that they were not always candid with the courts. They did not display the requisite knowledge of the subject matter and they have caused unnecessary expenditure to their clients and wasted the time of the courts. I am indebted to the appellants for the chronology of events as it demonstrates the point I have been at pains to make.

The executors claim they have a grievance. Pitter J adverted to the decision of Langrin J which it will be recalled ordered specific performance in the absence of the executors. They were executors from 15th March 1991 while Langrin's J order was on 16th October 1990. Pitter J said:

> " The applicants herein, not be out done, on the 22nd November, 1990 lodged with the Registrar of Titles Caveat No. 645923 against the said Certificate of Title referred to above. Subsequently, the first and second respondents again brought the applicants to court, seeking the removal of the Caveat. The matter was heard before Smith J on the 26th day of September, 1991 who dismissed the summons.
>
> The applicants not to be discouraged apply (sic) by way of Originating Summons dated 9th October 1991, 'to have the said Certificate of Title cancelled and that a new Certificate of Title be issued either in the name of the previous owner or the present

applicants.' It is this summons which is now being heard before me."

Then comes the substantial point which Pitter J recounts thus:

" Prior to this however, on the 10th January, 1991, the Registrar of Titles registered Transfer No. 649160 in the names of both respondents on the said Certificate of Title despite the existence of the Caveat having been lodged against it."

The following letter dated 22nd August 1991 to Mr Nelton A. Forsythe shows the involvement of the Registrar of Titles. Here is the letter:

"Nr. Nelton A. Forsythe
Attorney-at-Law
51A Duke Street
Kingston

Dear Sir

Re: Certificate of Title registered at Volume 1009
Folio 102 - Caveat No. 645923

Please refer to yours of the 19th and 21st instant. Thorough searches carried out at this Office have failed to locate the above Certificate of Title nor are we able to locate the Transfer numbered 649160.

We observe from the copy of the Certificate of Title that you have sent us, that the Transfer was first produced for registration on December 19, 1990 was rejected and resubmitted on the 10th January 1991. This may suggest that the Caveat may have blocked the transfer and that something may have been done to the Caveat so that registration could proceed in 1991. I cannot say for sure what happened since, to date I cannot find the Original Title nor can the Caveat card be located.

In the meantime I suggest that another Caveat be lodged in view of the fraud alleged.

> Any Court action taken in the matter should be brought to our attention by submitting of copy of the Court document to the Registrar's Secretary.
>
> Yours faithfully
>
> C.M. Trowers (Miss)
> ACTING REGISTRAR OF TITLES.

There is mention of fraud in this letter but so far I have not been able to trace any averment by the executors to that effect.

Then there was a further letter of 30th August 1993 from the Registrar of Titles to the purchasers and their attorney-at-law which reads thus:

> "Mr William Johnson and
> Mrs. Kathleen Johnson
> c/o Herbert Rose
> Attorney-at-Law
> 6 Nugent Street
> Spanish Town
> St. Catherine
>
> Dear sir:
>
> In view of the Judgment of the Court of Appeal made in July 1992, I have to ask that you deliver to me Duplicate Certificate of Title registered at Volume 1009 Folio 102 by the latest 30th October 1993 for the necessary correction.
>
> Yours truly
>
> R.N. Andrade (Mrs)
> Registrar of Titles.

This was a reference to the order of (Wright Downer & Morgan JJA) but it has already been mentioned that on July 7 1992 when that order was made, Pitter J earlier on 6th April 1992 had rejected the executors plea that the certificate in

the hands of the purchasers be cancelled and that order was affirmed by this Court on 10th November 1992. The salient feature is that on or around 10th January 1991 the purchasers had an indefeasible registered title. To reiterate the statutory authority for that is section 68 of the Registration of Titles Act which reads:

> "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."

Two statements from Lord Wilberforce in **Frazer v Walker & anor.** [1967] 1 All ER 649 at 651 and 654 illustrate the force and effect of the section. The first runs thus:

> "... It is in fact the registration and not its antecedents which vests and divests title."

The second reads:

> "The leading case as to the rights of a person whose name has been entered on the register without fraud in respect of an estate or interest is the decision of this Board in **Assets Co., Ltd v. Mere Roihi** [1905] AC 176. The Board there was concerned with three consolidated appeals from the Court of Appeal in New Zealand, which had decided in each case in

> favour of certain aboriginal natives as against the registered proprietors. In each appeal their lordships decided that registration was conclusive to confer on the appellants a title unimpeachable by the respondents. The facts involved in each of the appeals were complicated and not identical one with another, a circumstance which has given rise to some difference of opinion as to the precise ratio decided - the main relevant difference being whether the decision established the indefeasibility of title of a registered proprietor who acquired his interest under a void instrument, or whether it is only a bona fide purchaser from such a proprietor whose title is indefeasible. In **Boyd v. Wellington Corpn.** [1924] NZLR 1174 the majority of the Court of Appeal in New Zealand held in favour of the former view, and treated the **Assets Co.** case as a decision to that effect. The decision in **Boyd v Wellington Corpn.** related to a very special situation, namely that of a registered proprietor who acquired his title under a void proclamation, but, with certain reservations as to the case of forgery, it has been generally accepted and followed in New Zealand as establishing, with the supporting authority of the **Assets Co**. case, the indefeasibility of the title of registered proprietors derived from void instruments generally."

It has been necessary to refer to the letters from the Registrar of Titles particularly as Mr. Dennis Forsythe developed a painstaking argument on the legal consequences of them. He relied on section 153 of the Act which 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 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."

His contention was that in light of the letter of August 1991 to Mr Nelton Forsythe and in particular the letter of 30th August 1993, to the purchasers and their attorney, Mr. Herbert Rose, the Registrar was alleging that the purchasers wrongly retained the certificate of title in issue. But the Registrar issued no summons to the purchasers to appear before a judge of the Supreme Court. Even if there was a response, the enforceable contract for sale in favour of the purchasers and the order for specific performance on which the Registrar acted, would be a barrier to the cancellation and it would be for the Registrar to institute proceeding for section 154 of the Act to be brought into play. That section reads:

> 154. Upon the appearance before the Court or a Judge of any person summoned or brought up by virtue of a warrant as aforesaid, it shall be lawful for the Court or Judge to examine such person upon oath and, in case it shall seem proper, to order such person to deliver up such certificate of title or

> instrument as aforesaid and, upon refusal or neglect by such person to deliver up the same pursuant to such order, to commit such person to prison for a period not exceeding six months unless such certificate or instrument shall be sooner delivered up; and in such case, or in case such person cannot be found so that a requisition and summons may be served upon him as hereinbefore directed, the Registrar shall, if the circumstances of the case require it, issue to the proprietor of the land such certificate of title as is herein provided to be issued in the case of any certificate of title being lost or destroyed, and shall enter in the Register Book notice of the issuing of such certificate, and the circumstances under which the same was issued, and thereupon the certificate of title or instrument as aforesaid, so refused or neglected to be delivered up as aforesaid, shall be deemed for all purposes to be null and void as far as the same shall be inconsistent with the certificate or instrument so issued in lieu thereof."

The key to the understanding of these two sections is that exclusive power is given to the Registrar to invoke them and that a claimant must seek the Registrar's assistance. The Registrar did not move the court so that was the end of the matter. The following passage from **In the Estate of Derwent Taylor** (supra) at p. 9 Campbell J states:

> " In considering the powers of the supreme Court under the Land Transfer Acts 1870 - 1885 (New Zealand) the provisions of which are 'in pari materia' with our Registration of Titles Act, Lord Lindley in Assets Company Limited v. Mere Roihi [1905] A.C. at page 195 had this to say:
>
> > 'There does not, moreover, appear to be any power conferred on the Supreme Court to cancel or correct any Certificate of Title or entry on the register unless applied to by the Registrar or on appeal from him, except where land or some estate or interest therein is recovered by some

> proceeding in that Court from a registered proprietor. In such a case if the proceeding is not expressly barred - i.e. if having regard to section 56 (our Section 161) the plaintiff is entitled to recover - the Supreme Court or a Judge can direct the Registrar to cancel a certificate or entry and to substitute another for it.' "

At this stage it is pertinent to examine the entry in the Register. Pitter J refers to it thus:

> "Transfer No. 649160 registered 10th January, 1991, to William Johnson and Kathleen Johnson both of 37 Stratford Drive, Greendale, St Catherine, Security Officer and House Wife respectively as joint tenants. Consideration money Four Hundred and Fifty Thousand Dollars."

Also relevant at this stage is to refer to the precise claims made before Pitter J.

The learned judge states it thus:

> "... The Originating Summons filed on behalf of the applicants seek the following:
>
> > '(1) Make an Order in compliance to Section 158 (2)(a) of Registrar (sic) of Titles Act that the Registrar of Titles cancel the Certificate of Title to the land registered at Volume 1009 Folio 102 and that a new Certificate of Title be issued either in the name of the previous owner or in the name of the present applicants."

So now we turn to section 158. That section reads:

> "158. (1) Upon the recovery of any land, estate or interest, by any proceeding at law or equity, from the person registered as proprietor thereof, it shall be lawful for the Court or Judge to direct the Registrar-
>
> (a) to cancel or correct any certificate of title or instrument or any entry or memorandum in the

Register Book, relating to such land, estate or interest; and

(b) to issue, make or substitute such certificate of title, instrument, entry or memorandum or do such other act, as the circumstances of the case may require, and the Registrar shall give effect to that direction."

Then section (2) reads:

"(2) In any proceeding at law or equity in relation to land under the operation of this Act the Court or a Judge may, upon such notice if any as the circumstance of the case may require, make an order directing the Registrar-

(a) to cancel the certificate of title to the land and to issue a new certificate of title and the duplicate thereof in the name of the persons specified for the purpose in order; or

(b) to amend or cancel any instrument, memorandum or entry relating to the land in such manner as appears proper to the court or a Judge."

But the appellants have not recovered any land so they cannot invoke this section. The appellants could not bring themselves within any of the exceptions in section 161 so they had no case. Because this section is so important, I will quote it. It 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-

(a) the case of a mortgagee as against a mortgagor in default;

(b) the case of an annuitant as against a

grantor in default;

(c) the case of a lessor as against a lessee in default;

(d) the case of person deprived of any land by fraud as against the person registered as proprietor of such land through fraud, or as against a person deriving otherwise than as a transferee bona fide for value from or through a person so registered through fraud;

(e) the case of a person deprived of or claiming any land included in any certificate of title of other land by misdescription of such other land, or of its boundaries, as against the registered proprietor of such other land not being a transferee thereof bona fide for value;

(f) the case of a registered proprietor with an absolute title claiming under a certificate of title prior in date of registration under the provisions of this Act, in any case in which two or more certificates of title or a certificate of title may be registered under the provisions of this Act in respect of the same land,

and in any other case than as aforesaid the production of the certificate of title or lease shall be held in every court to be an absolute bar and estoppel to any such action against the person named in such document as the proprietor or lesee of the land therein described, any rule of law or equity to the contrary notwithstanding."

This appeal was bound to fail. It seems that there is purchase money to which the executors are entitled. The purchasers are willing to pay up. Even if there were fraud or error by the Registrar or purchaser, section 162 of the Act was available which provides for compensation. The declarations of McIntosh J (Ag) were correct. So the appeal must be dismissed and the order below is

affirmed. The appellants must pay the taxed or agreed costs to the respondents.

PATTERSON, J.A.:

On the 28th July, 1994, McIntosh J. (Ag.) heard an application by way of an originating summons filed by William and Kathleen Johnson ("the respondents") against Miguel Thomas & Merlene Lewis (executors estate Ethline Dayes, deceased) ("the appellants"). The learned judge made the following order in terms of the originating summons:

> "IT IS HEREBY ORDERED THAT:
>
> 1. That the Applicants have acquired an undefeasible (sic) Certificate of Title to premises known as Lot 384 Greendale Boulevard, Spanish Town in the parish of Saint Catherine and registered at Volume 1009 Folio 102;
>
> 2. That the Applicants are entitled to possession thereof;
>
> 3. That the interest of the Executors resides only in the balance of the Purchase money;
>
> 4. Cost to the Applicants to be taxed, if not agreed."

The evidence presented to the learned judge clearly established that the property in question, which was registered land, had been transferred to the respondents, and that their names had been entered on the certificate of title as the registered proprietors as of the 10th January, 1991, pursuant to the orders of Langrin, J. made on the 3rd October, 1988, and on the 16th October, 1990. The appellants filed a caveat with the Registrar of Titles on the 22nd November, 1990, after the orders of Langrin, J., but before the transfer had been registered. The appellants, by an originating summons dated the 9th October, 1991, applied "to have the said certificate of title cancelled and that a new certificate of title be issued either in the name of the

previous owner or the present applicants". Pitter, J. heard that application, and in a reasoned judgment, he came to the following conclusion:

> "Having considered the evidence and the relevant submissions I find as follows:
>
> (1) That the first and second respondents acquired title by virtue of an Agreement for Sale.
>
> (2) That the said Agreement for Sale was enforced by This Honourable Court consequent to an Order made on the 16th day of September (sic), 1990. (I think he meant October).
>
> (3) That the Caveat # 645923 registered against premises registered at Volume 1009 Folio 102 of the Register Book of Titles on the 22nd November, 1990 predates the Order of the Court above and is therefore of no effect.
>
> (4) That the Register (sic) of titles in registering the transfer to the first and second respondents acted in accordance with the Order of the Court.
>
> (5) That the first and second respondents are registered proprietors of the land in question having thus acquired an unimpeachable and indefeasible title.
>
> (6) There is no basis in law or equity for the cancellation of the respondents title."

He dismissed the originating summons. The appellants appealed, and this court, on November 10, 1992, made the following order:

> "Appeal dismissed. Order of court below affirmed. Costs to the respondents."

No further appeal was lodged and I would have thought that the matter was at an end. The findings of Pitter, J. at "(5)" and "(6)" above were clear and unequivocal, and were binding on the parties. So, in my view, there was no necessity for the respondents to have taken out the summons under review. Nevertheless, they did, and Mr. Rose

explained the reason. The orders of Langrin, J., he said, had been set aside by this court on the 7th July, 1992, on a purely procedural ground. The Registrar of Titles wrote, on the 30th August, 1993, requiring the respondents to return the certificate of title "for the necessary correction", having regard to the judgment. However, this court affirmed the judgment of Pitter, J., and, ex abundanti cautela, the respondents filed the summons under review.

McIntosh, J. (Ag.) saw no difficulty in making the order in terms of the summons. It appears to me that there was no other course open to the learned judge having regard to the judgment of Pitter, J. which was confirmed by this court. However, before us, counsel for the appellants argued that the learned judge had no jurisdiction to "grant a declaration" under the provisions of the Registration of Titles Act ("the Act"), declaring that the certificate of title was indefeasible. He argued further that the learned judge failed to take into account the request of the Registrar of Titles which was made under the provisions of section 153 of the Act. He contended that the respondents were not "bona fide purchasers for value, without notice" and therefore they could not "claim the privilege of indefeasibility under section 163 of the Act." Counsel submitted that there was prima facie evidence before the learned judge which established on a balance of probabilities that the respondents' title was "wrongfully obtained" and "wrongfully retained". He referred to the power of the court below to direct the Registrar of Titles under section 158 of the Act to rectify the register, and asked the court to invoke its powers under section 19(1) of the Court of Appeal Rules to finally dispose of the case.

I have no doubt that the learned judge has jurisdiction to make declarations and, where necessary, consequential orders. Section 239 of the Judicature (Civil Procedure Code) Law clearly states:

> "239. No action or proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right whether any consequential relief is or could be claimed, or not."

That being so, the contention of counsel in this regard falls flat and is without merit. In my view, the learned judge was bound by the judgment of this court which pronounced for the indefeasibility and unimpeachability of the certificate of title in question, and that is sufficient to dispose of the arguments put forward by counsel for the appellants. This appeal must, therefore, be dismissed and the order below affirmed, with costs to the respondents to be taxed if not agreed.