

**(1) Miguel Thomas and (2) Merlene Lewis  
(Executors of the Estate of Ethline Dayes)**

*Appellants*

*v.*

**(1) William Johnson and (2) Kathleen Johnson**

*Respondents*

FROM

**THE COURT OF APPEAL OF JAMAICA**

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JUDGMENT OF THE LORDS OF THE JUDICIAL  
COMMITTEE OF THE PRIVY COUNCIL,  
Delivered the 16th December 1997  
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*Present at the hearing:-*

Lord Goff of Chieveley  
Lord Lloyd of Berwick  
Lord Hope of Craighead  
Lord Clyde  
Mr. Justice Gault

*[Delivered by Mr. Justice Gault]*

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The Registration of Titles Act ("the Act") in Jamaica provides for the Torrens System of land title registration common in large measure to a number of other Commonwealth countries including Australia and New Zealand. Subject to limited exceptions, registration confers conclusive title to land and to any estate or interest in the land and the register may be relied upon by persons dealing with the proprietor of any registered interest. The respondents ("the Johnsons") are the registered proprietors of Lot 384 Greendale Boulevard, Spanish Town in the parish of Saint Catherine as recorded at Volume 1009 Folio 102 of the register. The issue in this appeal is whether their title can be challenged by the appellants who are the executors in the estate of Ethline Dayes, deceased, from whom they claim to have purchased the property.

The background to the present proceedings must be summarised. To do this it is necessary to draw upon sources beyond the brief affidavits filed in the present matter. Much comes from judgments in other proceedings, inferences from decisions where no written reasons are available, copies of documents handed up at the hearing and separate chronologies prepared by counsel. All were relied upon before their Lordships without objection.

By written agreement dated 12th February 1988 Mrs. Dayes agreed to sell to the Johnsons the property on which there is a purpose built commercial building. The purchase price of \$450,000 was to be paid in part by a deposit of \$67,500 on the signing of the agreement with the further sum of \$158,000 to be paid by 31st March 1988. Completion was to be effected on or before 12th July 1988 when possession was to be given subject to existing tenancies.

On 17th March 1988 in circumstances not disclosed in the record, Mrs. Dayes purported to determine the contract and returned the sum of \$20,000 which was said to have been the total amount she had received by way of deposit. Apparently believing the contract was at an end, she is alleged to have made a gift of the property to her daughter and son-in-law Josephine and Miguel Thomas. No transfer in their favour was registered though it is said that at some point they repaid the mortgage then registered against the title.

After the vendor failed to complete the sale on the due date, the Johnsons served a notice requiring completion and eventually, on 1st November 1988, commenced proceedings (Suit No. E293/88) in the Supreme Court of Jamaica seeking by originating summons specific performance by Mrs. Dayes and the registered mortgagee. On 3rd October 1989 Langrin J. made an order for specific performance. Mrs. Dayes died on 1st January 1990 without having executed a transfer in accordance with the order. Thereafter, on 16th October 1990, on an application made on behalf of the Johnsons, Langrin J., noting that the respondents did not appear and were not represented, made further orders declaring the Johnsons' solicitor to have carriage of sale, designating the Registrar of the Supreme Court as authorised to sign the transfer on behalf of the vendor and requiring the mortgagee to deliver the certificate of title and a discharge of the mortgage on receipt of payment or an undertaking as to payment. While the orders made no express provision for the

payment of the purchase price that plainly was the responsibility of the solicitor given carriage of sale.

A transfer was duly executed by the Registrar of the Supreme Court, but before it was registered a caveat was lodged in the names of Mr. and Mrs. Thomas claiming an interest in the land as donees from the registered proprietor Mrs. Dayes. Under section 142 this should have had the effect of preventing registration of any dealings against the title but it appears the caveat was not noted in the register because on 10th January 1991 the transfer in favour of the Johnsons was registered.

On 15th March 1991 probate in the estate of Mrs. Dayes was granted to the present appellants. Mrs. Lewis, their Lordships were told, is a niece of the deceased.

The Thomases' caveat, or one subsequently lodged by them, eventually was registered against the title. The Johnsons took proceedings to have it removed but were unsuccessful. Mr. and Mrs. Thomas then commenced proceedings (Suit No. E317/91) in the Supreme Court seeking by way of originating summons dated 9th October 1991 to have the certificate of title in the name of the Johnsons cancelled and a new certificate issued either in their own names (as donees) or in the name of the previous owner. That matter was heard by Pitter J. on 18th November 1991 but his judgment was not delivered until 6th April 1992. In the period between hearing and judgment the Thomases applied for and obtained leave to appeal against the orders for specific performance made by Langrin J. in Suit No. E293/88. Leave was given on 2nd December 1991 and the reasons of the Court of Appeal were delivered on 20th December 1991. The Court held that the proceeding before Langrin J. was wrongly commenced by originating summons instead of the mandatory writ of summons. The Court went on to state:-

"There are good reasons for this rule. Such an action for specific performance affecting as it did, rights of a proprietary nature had of necessity, to be adjudicated upon in open court by way of viva voce evidence and not as occurred in this case by an originating summons supported by affidavit evidence and a hearing in chambers. The jurisdictional question having been determined in the applicant's favour, the entire proceedings before Langrin J., are bad and a nullity.

Needless to say any subsequent proceedings based upon this order for specific performance would be itself a nullity."

Subsequently the Court of Appeal on 7th July 1992 allowed the substantive appeal and set aside the orders that had been made by Langrin J. No further written reasons were delivered.

On 6th April 1992 when Pitter J. came to give judgment in the 'Thomases' Suit No. E317/91 the Thomases had obtained leave to appeal against the orders pursuant to which the Johnsons had become registered as proprietors of the land though the substantive appeal, which was something of a formality, was still to be dealt with. But the judge appears not to have been told of this. He gave judgment in favour of the Johnsons. In brief, his reasons were that even if the 'Thomases' caveat had been on the title, the Registrar correctly registered the transfer to the Johnsons which had been executed pursuant to a court order then extant. The caveat must be taken to have been, in effect, discharged pursuant to the court order. Further, the Johnsons' title once registered was indefeasible even if it had been secured by a void instrument because of the decision of the Privy Council in *Frazer v. Walker* [1967] A.C. 569.

The appeal by the Thomases against Pitter J.'s judgment was dismissed by the Court of Appeal (Carey P. (Ag.), Forte J.A. and Wolfe J.A. (Ag.)) on 10th November 1992. It is acknowledged that that Court was fully informed of the decision of the same Court (but differently constituted) which had set aside Langrin J.'s orders. There was no further appeal in that suit which was finally resolved against the Thomases as donees. Before their Lordships Mr. Sydenham conceded that the outcome was inevitable on the authority in *Frazer v. Walker* and their Lordships have not been called upon to deal with it.

The present proceeding began in the Supreme Court of Jamaica on 30th September 1993. It was commenced by the Johnsons as Suit No. E346/93 by way of originating summons seeking declaratory relief. The Johnsons were prompted to seek the assistance of the Court because of steps taken on behalf of the executors in Mrs. Dayes' estate to have the Registrar of Titles correct the register and call in the Johnsons' certificate of title for correction in light of the

decision of the Court of Appeal setting aside the orders pursuant to which the Johnsons acquired their title.

Section 153 of the Act provides:-

"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."

On 30th August 1993 the Registrar wrote to the Johnsons requesting their "Duplicate Certificate of Title" for correction "in view of the judgment of the Court of Appeal made in July 1992". Rather than waiting for the Registrar to apply to the Court following their refusal to comply with the request, the Johnsons applied naming the executors as respondents and seeking in their summons an order:-

- "(1) Declaring that the Applicants have acquired an undefeasible(sic) 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 is (sic) entitled to possession thereof;
- (3) That the interest of the Executors resides only in the balance of the Purchase money;
- (4) Further and such relief as the Court deems fit."

In view of this action taken by the Johnsons the Registrar understandably stayed her hand.

The affidavit of Mr. Johnson in support of the originating summons sets out the history of the litigation and in particular contains the following paragraphs.

- "3. That by a letter dated the 17th day of March 1988, (copy attached marked 'B' for identity) the said ETHLINE DAYES sought to repudiate the said Contract.
- 4. That by Notice to Complete dated the 29th day of July 1988, (see copy enclosed marked 'C' for identity) the Applicants served Notice to Complete said Contract on the said ETHLINE DAYES.
- 5. That notwithstanding repeated request by the Applicants and their Attorney the said ETHLINE DAYES refuse to take steps towards completion of the said agreement.
- 6. That Applicants have at all material time being ready and willing to perform their obligations under the said Contract.
- 7. That the said ETHLINE DAYES had no Defence to an Action for Specific Performance of the said Contract."
- ...
- 17. That the Respondents as Executors cannot prove an interest in the fee simple of the property and their sole interest in the property rest in the receipt of the balance of the purchase price.
- 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 Messrs. Forsythe & Forsythe, Attorneys-at-Law (see copy enclosed marked 'G' for identity) which sets out the Applicants position.

19. That the Executors, their servant and or agent has no Legal rights to the premises and the Applicants have acquired an undefeasible and unidefeasible Title and is entitled to possession of the said premises."

In his affidavit in answer Mr. Thomas addressed the assertions made in Mr. Johnson's affidavit but with respect to those just set out he simply relied upon the terms of the judgment of the Court of Appeal dated 20th December 1991 giving reasons for granting leave to appeal against the orders of Langrin J. (because the wrong procedure had been adopted) and to the fact that the Johnsons had given no consideration for the property that had been transferred into their names.

The matter was dealt with in chambers by McIntosh J. on 28th July 1994. No written reasons appear to have been given but orders were made as applied for and for costs.

The executors gave notice of appeal. Among the grounds of appeal specified was the following:-

"The Learned Judge by his decision pronounced upon the validity of the Agreement of Sale dated the 12th February 1988 yet this issue of the contract was not properly before the court, nor was there even a copy of this contract even before his Honour."

The appeal was argued over two days before the Court of Appeal, one or another of the members of which had sat on each of the three prior occasions the dispute over this piece of land had been before that Court. In separate judgments the Court was unanimous in the view that the appeal should be dismissed. It is unnecessary to set out in detail the reasons given in the three judgments. The Court held that, as had been decided by Pitter J. and affirmed by the Court of Appeal earlier, the Johnsons' title is indefeasible and that the appellants could not invoke section 153 to deprive them of it.

In a careful argument before their Lordships Mr. Sydenham made no attempt to challenge the conclusion reached in the courts in Jamaica that, having secured registration pursuant to a court order extant at the time, and without fraud, the Johnsons enjoyed the protection conferred by section 70 which 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 of any estate or interest in land under the operation of this Act shall, except in case of fraud, hold the same as the same may be described or identified in the certificate of title, subject to any qualification that may be specified in the certificate, and to such incumbrances as may be notified on the *folium* of the Register Book constituted by his certificate of title, but absolutely free from all other incumbrances whatsoever, except the estate or interest of a proprietor claiming the same land under a prior registered certificate of title, and except as regards any portion of land that may by wrong description of parcels or boundaries be included in the certificate of title or instrument evidencing the title of such proprietor not being a purchaser for valuable consideration or deriving from or through such a purchaser."

It was submitted that this section must be read with section 153 under which the Registrar is empowered to cancel or correct the certificate of title where it was issued in error, wrongfully obtained or is wrongfully retained; that the Johnsons' certificate of title was both issued in error because it should have been prevented by the Thomases' caveat and was wrongfully obtained because the entire proceedings leading to the orders made by Langrin J. were, as held by the Court of Appeal, "bad and a nullity"; that the declaration of indefeasibility made in the present proceedings should be set aside so as to ensure the Registrar will not be inhibited in taking the next step under section 153 of seeking enforcement of her requisition of the certificate of title for correction thereby leaving the Johnsons, if they so choose, by proper proceedings, to justify their claim to have the contract for sale enforced. In the alternative it was submitted that the declarations should not have been made as a matter of discretion when the true substance of the dispute as to the enforceability of the contract is unresolved.



The objective of the appellants of opening the way to further litigation in which the enforceability of the contract can be determined is, in their Lordships' view, unattainable.

The appellants contemplate that once the declarations are set aside the Registrar will take steps pursuant to section 153 to ask the Supreme Court to direct delivery of the Johnsons' certificate of title for correction (though there is no assurance of that). But proceedings between the Registrar and the Johnsons will not provide a proper context for resolving the contractual dispute between the executors and the Johnsons: *Macarthy v. Collins* (1901) 19 N.Z.L.R. 545. The Court can be expected to decline to direct production of the title until the enforceability of the contract is determined.

In any separate proceedings between the executors and the Johnsons the executors would be estopped from litigating the right of the Johnsons to enforce the contract on the ground that it has been, or should have been, determined in the present proceeding: *Henderson v. Henderson* (1843) 3 Hare 100, 115.

It is clear from the declarations applied for and made and from Mr. Johnson's affidavit that the Johnsons were relying upon the enforceability of the contract. Not only did they seek and obtain a declaration that their title was indefeasible notwithstanding the setting aside of Langrin J.'s orders (plainly on the basis that they were entitled irrespective of whether the wrong procedure had been adopted initially), but they sought and obtained the further declarations including that as to the vendor's interest in the balance of the purchase price. That necessarily rested on the validity of the contract.

In the present proceedings the appellants have chosen not to advance any substantive case for the invalidity of the agreement for sale of the land. They have been content to rely upon the inappropriate form of procedure by which the orders for specific performance were obtained, anticipating some further proceeding in which the substantive contractual dispute will be resolved. The ground set out in the notice of appeal from McIntosh J.'s orders, that the contractual issue was not properly before him, was unsustainable in the light of the original application and supporting affidavit. Presumably the ground was not the

subject of argument (Carey J.A. noted in his judgment that there were grounds of appeal that were not argued as formulated) because in the judgments Carey J.A. referred to the fact that the respondents have a valid agreement for sale of the property with the registered owner and counsel had not suggested it was invalid and Downer J.A. referred to the enforceable contract for sale.

In the absence of any evidential foundation for an argument that the contract was validly rescinded, the conclusion that it was valid and enforceable was inevitable and is one their Lordships are not able to disturb. The consequence is that the issue will be finally determined in this proceeding. The parties cannot seek further to litigate the same issue. The appellants, therefore, have no sustainable basis on which they can resist the declarations obtained by the Johnsons.

That is sufficient to dispose of the present appeal. It will of course be a matter for the Registrar to determine what steps she should take in light of the outcome of the present appeal. She may be required to give consideration to the scope of her powers under section 153. It is unnecessary for their Lordships to decide upon the arguments presented to them in this respect but, conscious that the Registrar was not represented before them, offer the following comments in case they may assist by way of guidance.

Mr. Sydenham rested his argument that the Registrar's powers under section 153 are independent of other limited powers in the Act for defeating registered rights upon dicta in the judgment of the Privy Council delivered by Lord Wilberforce in *Frazer v. Walker*. In tracing the scheme of the New Zealand Land Transfer Act 1952 he said (page 580E-581A):-

"It is these sections which, together with those next referred to, confer on the registered proprietor what has come to be called 'indefeasibility of title'. The expression, 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. This conception is central in the system of registration. It does not involve that the registered proprietor is protected against any claim whatsoever; as will be seen later, there are provisions by which the entry on which

he relies may be cancelled or corrected, or he may be exposed to claims in personam. These are matters not to be overlooked when a total description of his rights is required; but as registered proprietor, and while he remains such, no adverse claim (except as specifically admitted) may be brought against him."

Later in the judgment there are observations first as to the vulnerability of registered proprietors to claims in personam notwithstanding indefeasibility of title and secondly as follows (pages 585D-586B):-

"The second observation relates to the power of the registrar to correct entries under s.80 and s.81 of the Land Transfer Act, 1952. It has already been pointed out (as was made clear in the *Assets Co. case* [*Assets Company Ltd v. Mere Roihi & Others* [1905] A.C. 177] by this Board) that this power is quite distinct from the power of the court to order cancellation of entries under s.85, and moreover while the latter is invoked here, the former is not. The powers of the registrar under s.81 are significant and extensive (see *Assets Co. case* (6)). They are not coincident with the cases excepted in s.62 and s.63. As well as in the case of fraud, where any grant, certificate, instrument, entry or endorsement has been wrongfully obtained or is wrongfully retained, the registrar has power of cancellation and correction. From the argument before their lordships it appears that there is room for some difference of opinion as to what precisely may be comprehended in the word 'wrongfully'. It is clear, in any event, that s.81 must be read with and subject to s.183 with the consequence that the exercise of the registrar's powers must be limited to the period before a bona fide purchaser, or mortgagee, acquires a title under the latter section.

As the appellant did not in this case seek relief under s.81, and as, if he had, his claim would have been barred by s.183 (as explained in the next paragraph), any pronouncement on the meaning to be given to the word 'wrongfully' would be obiter and their lordships must leave the interpretation to be placed on that word in this section to be decided in a case in which the question directly arises."

While sections 70, 161 and 163 of the Jamaican Act are to the same effect as sections 62, 63 and 183 respectively of the New Zealand Act, sections 80, 153 and 158 correspond only broadly with New Zealand sections 80, 81 and 85. In particular, whereas New Zealand section 81 which empowers the Registrar to require delivery up for cancellation or correction of a certificate of title or other instrument is preceded immediately by section 80 which empowers the Registrar to "correct errors and supply omissions in certificates of title or in the register, or in any entry therein, and may call in any outstanding instrument of title for that purpose", the structure of the Jamaican Act is different.

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

"On the occasion of the registration of a certificate of title to registered land or at any time thereafter the Registrar, after such enquiry and notices, if any, as he may consider proper and upon the production of such evidence and the compliance with such requests, if any, as he may think necessary to require or make, may -

- (a) amend the description of the land by the omission of any general words of description or in such other manner as he may think proper;
- (b) omit such entries or portions of entries as he is satisfied no longer affect the land or the title thereto;
- (c) insert, amend or delete the name of any road and the number by which any land on such road is designated.
- (d) substitute the correct name, address or occupation of any person whose name, address or occupation was incorrectly entered."

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

Section 153 appears in a separate part of the Act under the heading "Procedure and Practice". It is unlikely that the legislature would have intended by such a section directed to the procedure for requisitioning outstanding instruments and certificates to confer power on the Registrar to determine

propriatorship of land and interests therein when the Registrar's powers to amend the primary record, the Register, are so confined. The true scope of the section is better appreciated if it is kept in mind that a certificate of title issued by the Registrar is just that, a certificate as to the title recorded in the register. That is why the Registrar's letter of 30th August 1993 called for delivery of the "Duplicate Certificate of Title". Accordingly, the observation of Lord Wilberforce on the Registrar's powers under the New Zealand Act cannot automatically be taken as applicable to the provisions of the Jamaican Act.

Even if section 153 is to be construed as giving the Registrar a distinct power to cancel an otherwise indefeasible title, its exercise in the circumstances surrounding the Johnsons' title would raise further difficulties. It would seem no longer to be open to contend that the registration was obtained as a result of error by registration of the transfer over the caveat which had been lodged but not noted against the title. That is because it was held in Suit No. E317/91 by Pitter J. and affirmed by the Court of Appeal that the order of the Court effectively discharged the caveat. There having been no appeal in that proceeding by the caveators there is no ground on which it could now be said that the registration was made in error.

There is also the issue as to whether the registration of their proprietorship could be said to have been "wrongfully obtained" by the Johnsons. The meaning of the word "wrongfully" in the corresponding section in the New Zealand Act was left open by the Privy Council in *Frazer v. Walker*. More recent decisions at first instance in New Zealand and New South Wales have considered the matter. In *Congregational Christian Church of Samoa Henderson Trust Board v. Broadlands Finance Ltd.* [1984] 2 N.Z.L.R. 704, 715 Barker J. expressed the view that wrongful conduct in its New Zealand context involves more than that the instrument pursuant to which it was procured was void and that it involves acting other than honestly and in good faith. In *Scallan v. Registrar-General* (1988) 12 N.S.W.L.R. 514 Young J., with reference to the corresponding New South Wales provision, followed the New Zealand cases accepting that a registration would be wrongfully obtained by an intentional act which is not rightful but which may fall short of "fraud" within the meaning of the statute.

Their Lordships have not been persuaded that the law is developing on any erroneous line nor would they be inclined to accept on the material placed before them that merely employing the wrong procedure without any intentional objective of defeating the rights of others would amount to wrongful conduct in this context. They would be disposed to take the same view in relation to the formal steps of obtaining *ex parte* a further order directing execution of a transfer by the Registrar of the Supreme Court and carriage of completion of a contract for sale following the death of a party who had been ordered specifically to perform a contract. Those matters, however, may well fall for determination by the Registrar in due course.

For the reasons given their Lordships will humbly advise Her Majesty that the appeal should be dismissed. The appellants must meet the respondents' costs before their Lordships' Board.

The respondents applied for a direction that the costs of this proceeding which the appellants are liable to pay to the respondents, including those of this appeal, the hearing before the Court of Appeal of Jamaica and the hearing at first instance, whether taxed or agreed (and after making allowance for the application towards the respondents' costs of the sum paid as security for costs), be set off against the sum due from the respondents to the appellants in respect of the purchase money for the property. Their Lordships are however of the view that the Court of Appeal is better placed than they are to consider this application. They accordingly remit the application to the Court of Appeal and direct that the appellants are to take no steps to recover the purchase money until the application has been disposed of by the Court of Appeal.