

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 28/76

BEFORE: THE HON. MR. JUSTICE LEACROFT ROBINSON - PRESIDENT  
THE HON. MR. JUSTICE KERR, J.A.  
THE HON. MR. JUSTICE ROBOTHAM, J.A.

BETWEEN: ENID TIMOLL-UYLETT - PLAINTIFF/APPELLANT  
A N D: GEORGE TIMOLL - DEFENDANT/RESPONDENT

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Mr. W. B. Frankson for Plaintiff/Appellant.

Mr. Horace Edwards, Q.C., for Respondent.

January 29, 30, and 31, 1979; December 5, 1980.

KERR, J.A.

This is an appeal from the judgment of Marsh, J. delivered on March 15, 1976, whereby judgment was entered for the defendant with costs to be agreed or taxed.

The action filed by the plaintiff sought inter alia:-

- "(1) An Order for possession of the said lands registered at Volume 1072 Folio 602 in the Register Book of Titles.
- (2) A Declaration that the Plaintiff is entitled to an estate in fee simple in possession of the said land.
- (3) An Order that the Duplicate Certificate of Title in respect of the said land be delivered up to the Plaintiff.
- (4) Cancellation or Rectification of the said Certificate of Title."

The lands situate at Juno Crescent in the parish of Clarendon were purchased about 1919 by the late William Timoll (Senior) who died in 1965. His wife Lucy Timoll who survived him died on 14th November, 1972.

By his Will, probated on the 25th November, 1965, he made the following devise to the plaintiff of the lands in dispute:-

"..... 'my dwelling house and 8½ acres at Juno Crescent to my wife Lucy Timoll for the rest of her life and after her death to my Grand-daughter Enid Timoll-Uylett absolutely in fee simple.' "

In 1970 the lands were brought under the Registration of Titles Act and a Certificate of Title issued in the name of Lucy Ann Timoll pursuant to an application made by her.

By her Will she devised the lands in dispute to the defendant/respondent.

The bases for the remedies sought by plaintiff in her statement of claim rested on the following grounds:-

- (1) That at the time of his death, Timoll (Senior) was the owner in possession of the lands in dispute.
- (2) By his Will, there was a valid devise to the plaintiff.
- (3) The Certificate of Title was obtained by false and fraudulent representations with intent to deprive the plaintiff of her estate in fee simple absolute in possession in the said lands.

Issue was joined by the defence by denying the allegations of fraud and asserting that in 1919 William Timoll (Senior) put Lucy Timoll in possession of the lands in dispute and she paid taxes thereon and remained in undisturbed possession until her death and accordingly she was competent to dispose of the lands by Will as she in fact did.

The plaintiff gave evidence to the effect that she was the grant-daughter of William Timoll (Senior) by his eldest son Joseph who was not Lucy's son and that from time to time during his life Timoll (Senior) would make a gift of land to his children to "set them up" - her father was the exception. That after his death and apparently before the lands were brought under registration his widow Lucy was informed of the Will by the plaintiff. The Testator was about 80 years of age and plaintiff had accompanied him to the

Lawyer Mrs. HoSang, who drafted the Will which was executed 4 - 5 months before he died. That as far as she knew Timoll (Senior) had always lived on the lands in dispute. Lucy Ann continued to live on the property and after her death and up to the date of trial the defendant/respondent was in occupation.

Mrs. HoSang gave evidence of preparing the Will at Testator's instruction. The Testator was an illiterate person.

Plaintiff admitted in cross-examination that her attention was adverted to the notice of intention to bring the lands under the Registration of Titles Act and she consulted Mrs. HoSang who advised Messrs. Silvera & Silvera, Attorneys-at-Law. Papers in application for Registration of the lands were tendered - they contain no evidence of a caveat having been filed.

Witnesses Manley Timoll and Rutell Timoll did not advance the plaintiff's case much further. Their evidence in the main was concerned with the credit of Roslyn Sinclair and Aubrey McCarthy - whose affidavits supported Lucy Ann Timoll's application for Registration and anticipatory with the credit of Aubrey McCarthy who gave evidence for the defence as to the Testator's oral declaration that the lands in dispute were Lucy Ann's.

The defendant gave evidence to the effect that Timoll (Senior) declared at a family gathering presumably assembled for the purpose:- "It is for my wife Lucy, this house and land" and that ever since that date in 1919 until her death, Lucy Ann lived there in undisturbed possession. In support of this declaration he called Aubrey McCarthy, his cousin and tendered in evidence the Tax Roll which revealed that from 1939 (the earliest date of which the Records are extant) the property appeared therein in the name of Lucy Ann Timoll and receipts for taxes paid duly issued in her name.

Before us notwithstanding the wide ranging grounds of appeal Counsel's arguments for the appellant may be summarised under the following main heads:-

1. The Court below was wrong in holding -
  - (a) that the alleged declaration, if it ever was made, transferred to Lucy Ann ownership in the lands.
  - (b) that Lucy Ann had honestly and genuinely held the belief that the property was hers.

2. On the contrary the proper inference to be drawn from the evidence is that she was well aware of the plaintiff's interest in the land and the nature and extent of that interest.

3. That declaring in her application for the Registration of the lands:-

"That the deeds, document or other evidence on which I rely in support of my title to the said land are set forth in the Schedule hereto to the best of my knowledge and belief and there are no deeds, documents or other evidence invalidating my title to the said land,"

involved a suppressio veri, which amounted to fraudulently procuring the Certificate of Title.

The following are the relevant Sections of the Registration of Titles Law:-

"70. Notwithstanding the existence in any other person of any estate or interest, whether derived by grant from the Crown or otherwise, which but for this Act might be held to be paramount or to have priority, the proprietor of land or of any estate or interest in land under the operation of this Act shall, except in case of fraud, hold the same as the same may be described or identified in the certificate of title, subject to any qualification that may be specified in the certificate, and to such incumbrances as may be notified on the folium of the Register Book constituted by his certificate of title, but absolutely free from all other incumbrances whatsoever, except the estate or interest of a proprietor claiming the same land under a prior registered certificate of title, and except as regards any portion of land that may by wrong description of parcels or boundaries be included in 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."

.....

"71. Except in the case of fraud, no person contracting or dealing with, or taking or proposing to take a transfer, from the proprietor of any registered land, lease, mortgage or charge, shall be required or in any manner concerned to enquire or ascertain the circumstances under, or the consideration for, which such proprietor or any previous proprietor thereof was registered, or to see to the application of any purchase or consideration money, or shall be affected by notice, actual or constructive, of any trust or unregistered interest, any rule of law or equity to the contrary notwithstanding; and the knowledge that any such trust or unregistered interest is in existence shall not of itself be imputed as fraud."

It is clear from the decided cases dealing with the interpretation of "fraud" in similar legislation, that the word does not embrace what is sometimes called "equitable fraud". In Assets Co. Ltd. v. Mere, Roihi (1905) A.C. p. 176 at p. 210 in delivering the judgment said referring to somewhat similar provisions in the New Zealand Statutes said:-

(those provisions) "appear to their Lordships to shew that by fraud in these Acts is meant actual fraud, i.e., dishonestly of some sort, not what is called constructive or equitable fraud - an unfortunate expression and one very apt to mislead, but often used, for want of a better term, to denote transactions having consequences in equity similar to those which flow from fraud. Further, it appears to their Lordships that the fraud which must be proved in order to invalidate the title of a registered purchaser for value, whether he buys from a prior registered owner or from a person claiming under a title certified under the Native Land Acts, must be brought home to the person whose registered title is impeached or to his agents. Fraud by persons from whom he claims does not affect him unless knowledge of it is brought home to him or his agents. The mere fact that he might have found out fraud if he had been more vigilant, and had made further inquiries which he omitted to make, does not of itself prove fraud on his part. But if it be shewn that his suspicions were aroused, and that he abstained from making inquiries for fear of learning the truth, the case is very different, and fraud may be properly ascribed to him. A person who presents for registration a document which is forged or has been fraudulently or improperly obtained is not guilty of fraud if he honestly believes it to be a genuine document which can be properly acted upon.

In dealing with Colonial titles depending on the system of registration which they have adopted, it is most important that the foregoing principles should be borne in mind, for if they are lost sight of that system will be rendered unworkable."

Regardless how careful has been the endeavour to interpret by precise language a word that has enjoyed a varied meaning in different branches of the law, there will always remain the difficulty of deciding whether the facts of the case fall within the ambit and scope of the relevant interpretation.

I accept as a correct statement that "fraud" in the Registration of Titles Act means actual fraud i.e. "dishonesty of some sort" - but the question will always be "what sort?" Be that as it may, I am of the view that "fraud" in Section 70 must be given the same meaning as that in Section 71 since both are in pari materia and concerned with limiting the challenge to the indefeasibility of a Registered Title.

Section 71, however, is specifically concerned with protection of parties dealing or transacting business with the proprietor of Registered lands and expressly exempt such parties from being affected by notice of unregistered interest.

The difference between the original applicant and a party dealing with the registered proprietor is implicitly recognized in Section 178 which provides:-

"178. If any person wilfully makes any false statement or declaration in any application to bring land under the operation of this Act, or in any application to be registered as proprietor, whether in possession, remainder, reversion or otherwise, on a transmission, or in any other application to be registered under this Act as proprietor of any land, lease, mortgage or charge; or suppresses, withholds or conceals, or assists or joins in or is privy to the suppressing, withholding or concealing, from the Registrar or a Referee, any material document, fact or matter of information, or wilfully makes any false statutory declaration required under the authority or made in pursuance of this Act; .....such person shall be guilty of a misdemeanour, and shall incur a penalty not exceeding one thousand dollars or may at the

discretion of the Court by which he is convicted, be imprisoned with or without hard labour for a period not exceeding two years; and any certificate of title, entry, erasure or alteration so procured or made by fraud be void as against all parties or privies to such fraud."

In Stuart v. Kingston (1923) 32 C.L.R. 309 at p. 343

Higgins J. in appreciation of this difference said:-

"It is to be noticed that the word "fraud" is not here used. I rather infer from the difference in language between secs. 71 and 72, and secs. 186 and 187, that the Act did not mean to give to a registered proprietor who has taken under circumstances which would make him ordinarily a trustee the same impregnable position as is given by secs. 186-187 to persons contracting with a registered proprietor. The Legislature, probably, meant to draw some distinction between fraud to which the transferee from the registered proprietor is an active party, and want of nona fides, as where a person becomes registered proprietor through a dealing which must, to his knowledge, do wrong to an outsider."

and Starke J. -

....." 'The difficulty lies,' as Mr. Hogg points out (Registration of Title Land throughout the Empire, p. 142), "in the demarcation of the line between knowledge or notice that is not to be treated as fraud, and notice that under particular circumstances must be treated as fraud." Cases must necessarily arise in which opinions will differ as to whether the conduct proved is or is not fraudulent. No definition of fraud can be attempted, so various are its forms and methods. But we may say this: that fraud will no longer be imputed to a proprietor registered under the Act unless some consciously dishonest act can be brought home to him. The imputation of fraud based upon the refinements of the doctrine of notice has gone. But the title of a person who acquires it by dishonesty, by fraud (sec. 69), by acting fraudulently (sec. 187), or by being a "party" to fraud" (sec. 187), in the plain ordinary and popular meaning of those words, is not protected by reason of registration under the Act. And to titles so acquired the equitable obligations imposed by the law of trusts are as applicable as formerly."

Accordingly, while the transferee needs not concern himself with matters behind the screen provided by the Certificate of Title the original applicant cannot use the certificate to shield his own male fides in procuring the Registered Title. His position is clearly not as sheltered as for example the bona fide purchaser for value who takes under a title which on the face of it is free from fault.

It is against this background that the judgment in the Court below will be analysed.

In the instant case despite the vigorous challenges by cross-examination and otherwise the learned trial judge found in effect that there was this family gathering and that Timoll (Senior) did make the declaration in 1919 that the house and land were Lucy Ann's. That is a finding of a primary fact from direct evidence and which on principle this Court ought not to disturb. No such fetter however exists in the drawing of inference.

Mr. Frankson contends in effect that such a declaration by Timoll (Senior) if it ever occurred was ineffective to transfer the fee simple to Lucy Ann as there was not a sufficient memorandum in writing to meet the requirements of the Statute of Frauds and therefore at best it was an imperfect gift.

In my view the declaration was not only inconclusive but not inconsistent with an intention to create a life interest as subsequently devised in the Will. But the matter does not end there. The Records of the Tax Office as far back as they are extant, revealed that since 1939 the taxes on the land were paid in the name of Lucy Ann as owner and the receipts tendered remain as unchallenged evidence of payments by her of the taxes for over fifty years.

That the "In giving" putting her name on the Tax Roll has not been produced because the records beyond 1939 are not available cannot in my view affect the position. Timoll (Senior) was illiterate but not ignorant. It is unlikely he would be unaware of her name being on the Tax Roll as owner.

The fact that Timoll (Senior) her husband, and herself lived together on the land and there was ostensibly no change in his behavioural pattern or dealings with the land were not unequivocally indicative of his ownership.

On the bases of the oral declaration, on the payment of taxes in her name for so many years and in her undisturbed possession of the lands in question she was justified in holding that she was the owner. Whether or not Timoll (Senior) at the time of executing the Will believed he still had the right and power to so dispose of the land is not the vital question because it is the "mens" of Lucy Ann and not of Timoll (Senior) that is in question. True that there has been no challenge in this case to his testamentary capacity and any such finding would not be supported by the evidence. But does this rule out the foibles and perversity of a man in the twilight of his life 'made weak by time and fate' endeavouring to curry favour with his grand-daughter by a vain and generous gesture?

After a fairly full review of the evidence in dealing with this aspect of the case the learned trial judge said:-

"Looking, therefore, at the evidence as a whole, and bearing in mind particularly the documentary evidence comprising the Tax Roll and the tax receipts, I have come to the conclusion that the Defendant's story is consistent with an honest and genuine belief by Lucy Ann Timoll that the property was hers. In particular I accept the evidence that an event occurred which was intended to vest title in her sometime in the year 1919, and that ever since then she had dealt with the property as an outright owner.

In coming to that conclusion I bear in mind, without intending any disrespect whatever, the reasonable inference on the evidence as a whole that Lucy Timoll and her husband were relatively simple country folk and were, in all probability quite unaware, despite Mr. Frankson's eloquent arguments, of the need for transactions concerning land to be evidenced in writing, or of the rules of equity as to the perfecting of imperfect gifts. So far as Mrs. Lucy Timoll was concerned her husband had given her the property; she had put it on the Tax Roll in her own name and paid taxes on that basis until her death in 1972. The further inference from the evidence is that her husband, William Timoll, was fully aware of that state of affairs. So far, therefore, as the period preceding the death of Mr. Timoll, and the

coming into existence of his Will is concerned, I am satisfied, and I so find, that Lucy Timoll honestly believed that the property was hers to do with as she pleased."

I see no good reason for disagreeing with those findings. Therefore, the co-ordinate question is: - Was the declaration in paragraph 3 of her affidavit in application for Registration of the lands (see exhibit 2),

"That the deeds, document or other evidence on which I rely in support of my title to the said land are set forth in the Schedule hereto to the best of my knowledge and belief and there are no deeds, documents or other evidence invalidating my title to the said land,"

evidence of dishonesty? One has to be realistic.

To include in her application the devise in the Will would be a tacit recognition that there was some validity in the devise. If she bona fide believed, as she was entitled to believe, that she was the owner of the lands, she was justified in treating the devise as an old man's whim or impishness.

She did what was required of her in such circumstances namely to give due notice of her intention to bring the lands under the Registration of Titles Act. The purpose of this requirement is self-evident - to enable persons having a claim or interest in the lands in question to take appropriate action. Such a notice was brought to the attention of the plaintiff but for some unexplained reason no caveat was lodged.

In my view the evidence for the plaintiff falls short of establishing fraud in the application of Lucy Ann Timoll and the trial judge was correct in so holding.

For these reasons I would dismiss the appeal.

Leacroft Robinson, P.: I concur.