

C.A. Civil - Land - Action for recovery of possession - Pleadings
Defence - Motion for summary judgment - whether an N.M.C.S.
had defence to action.
Registration of title - fraud - what constitutes fraud.
Appeal against order for recovery of possession dismissed.
Cases referred to:
① Nunez et al v Williams et al (unreported)
S.C.A. 14 and 67/84 - 13/6/85
JAMAICA ③ Waimiha Sawmilling Co Ltd v. Waione
Timber Co Ltd (1926) A.C. 101
⑤ Alele v Brown (unreported) CA 11/89 - 3/9/91
④ Assets Co Ltd v Mere Roihi (1905)
A.C. 176.

SUPREME COURT CIVIL APPEAL NO: 53/92

COR: THE HON. MR. JUSTICE CAREY, P. (AG.)
THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MR. JUSTICE HARRISON, J.A. (AG.)

BETWEEN DORIS WILLOCKS DEFENDANT/APPELLANT
AND GEORGE WILSON
DOREEN WILSON PLAINTIFFS/RESPONDENTS

Lord Gifford and Miss Yvette Wallace for Appellant

Miss Ingrid Mangatal and Miss Nerine Small for Respondents

May 11, 12, 13 & June 7, 1993

CAREY, P. (AG.)

This is a sad story which ends or will end with the appellant being put out of a home at 7 Stanley Terrace Forrest Hills, St. Andrew in which she lived with her commonlaw husband (now deceased) and their six children - all because he signed as guarantor of a mortgage loan for a friend who defaulted. The mortgagees exercised their power of sale first, in respect of the friend's house but the funds realized proved insufficient to discharge the debt and thereafter they had recourse to their power of sale under the guarantor's mortgage with them. The mortgagees sold the house to the respondents who were constrained to bring an action for recovery of possession against the appellant who had continued to reside in the house with the children all during these events. Although the appellant entered appearance, no defence was filed.

The respondents filed a motion for summary judgment supported by an affidavit, in which having deposed in terms of their statement of claim, concluded thus:

- "7. [He] verily believe that there is no Defence to this action and submit that the document headed 'Defence' and the purported exhibit thereto entitled 'Statement of Claim' disclose absolutely no defence to our claim for recovery of possession. We are respectfully of the view that same have been filed herein merely for the purpose of delay."

In reply, the appellant filed two affidavits, one of which exhibited a proposed defence. It is not necessary to set these out in any detail except for two paragraphs from that dated 30th March 1992, nor is it at all necessary to refer to the other. These paragraphs set out below were prayed in aid by Lord Gifford in course of his submissions as providing material to show that there was some triable issue.

- "9. That the Plaintiff had knowledge that the defendant was in possession of the premises 7, Stanley Terrace and that the Defendant was infact claiming an interest in the said property. That the Defendant did speak with the Plaintiffs personally in November, 1991 when the Plaintiffs came to view the said premises and the Defendant also refused to let the Plaintiffs view the said premises and the Defendant further advised the Plaintiffs personally that she the Defendant had commenced proceedings against the Bank of Nova Scotia to claim a share in the premises and that the matter was before the Court.
10. That a caveat was lodged on behalf of the Defendant herein against the said property known as 7, Stanley Terrace, Forest Hills, St. Andrew on the 3rd September, 1990 and has not been released by the Defendant. That notwithstanding the Caveat being so lodged the Plaintiffs and the Bank of Nova Scotia nevertheless were able to have a transfer registered in favour of the Plaintiffs."

The defence which the appellant exhibited, was in the following form:

"The Defendant further states that the Bank of Nova Scotia Jamaica Limited had neither the right nor authority to sell the premises known as 7, Stanley Terrace and that any such purported sale was in breach of law and that therefore, the Bank of Nova Scotia Jamaica Limited could not and has not passed a good and proper Title to the Plaintiffs herein by any such purported sale.

That on the 31st day of August, 1990 the Defendant herein by way of Suit No. C.L. W190/90 brought an action as Plaintiff against the Bank of Nova Scotia Jamaica Limited claiming inter alia a beneficial interest in the said premises 7, Stanley Terrace, Forest Hills, St. Andrew and further seeking a declaration that the mortgage held by the Bank of Nova Scotia Jamaica Limited was not valid ... That a caveat was lodged on behalf of the Defendant herein against the said property known as 7, Stanley Terrace, Forest Hills, St. Andrew on the 3rd September, 1990 and has not been released by the Defendant.

That by reason of the matters set out in the Statement of Claim filed in Suit No. C.L. W190 a copy of which is attached hereto as 'Exhibit 1' the Bank of Nova Scotia Jamaica Limited could not and has not lawfully passed a Title to the Plaintiffs herein and hence the Plaintiffs herein cannot succeed where the Bank of Nova Scotia Jamaica Limited has failed since the Plaintiffs herein seek to make their claim through the said Bank of Nova Scotia Jamaica Limited."

Smith J, in a closely reasoned judgment, gave judgment in favour of the respondents and ordered that the appellant give up possession of the said premises.

I trust I do no disrespect to the arguments of Lord Gifford if I put them in this way. I pause to observe that it was necessary for him to show that fraud on the part of the purchasers could be inferred from the affidavits of the appellant for he accepted that there were no pleadings, properly so called, in which fraud was pleaded and he readily conceded that this was a requirement of the Civil Procedure Code Law. But, he asserted, fraud could be inferred from three sets of circumstances which appeared in

the appellant's affidavit. First, they were advised of the fact of a dispute between the appellant and the mortgagees in which the appellant was claiming "a share in the premises and the matter was pending in Court." Secondly, it was said that a caveat had been lodged against the title and had not been withdrawn. Thirdly, it was suggested with a decided lack of confidence that the purchase was at an undervalue. It is enough to say that there was not a scintilla of evidence on which this last suggestion could have been made.

With respect to the first submission, I understood the appellant to be saying that the purchasers by reason of their knowledge of the dispute should have been put on enquiry. But assuming without accepting that conclusion, it is pertinent to ask what would such an enquiry reveal. It would disclose an action by the appellant C.L. 1990/W190 Willocks v. Bank of Nova Scotia in which no allegation of fraud was being made against the mortgagees. It seems to me that unless the enquiry disclosed fraud, the appellants would be bona fide purchasers for value without notice. I do not think that Lord Gifford ever sought to contend otherwise than that fraud could defeat a registered title.

Nunes & Another v. Williams & Others (unreported) S.C.C.A. 64 & 67/84 delivered 13th June, 1985 per Campbell, J.A. That registration of title confers on the proprietor indefeasability of his title, save for fraud, is the very basis of the Torrens System of registration of land and is a matter of settled law. Section 71 of the Registration of Titles Act provides as follows:

"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." [Emphasis added]

It is plain from the words emphasized in the cited provision that even knowledge of the existence of a trust or other unregistered interest does not constitute fraud. I entirely agree with Miss Mangatal that if knowledge of a claim to a trust or unregistered interest is not fraud then an allegation that such a claim is being asserted by court action, can have no more significance. She relied on Waimiha Sawmilling Co. Ltd v. Waione Timber Co Ltd [1926] A.C. 101 at page 108 where Lord Buckmaster L.C. said this:

"Litigation is the means by which a disputed interest in land can be established. If knowledge of the interest itself does not affect a registered proprietor, knowledge that steps are being taken to assert that interest can have no more serious effect."

It is right to point out that fraud in this Act means actual fraud, i.e. dishonesty. See Alele v. Brown (unreported) C.A. 111/89 delivered 14th March, 1991 citing with approval Assets Co. Ltd v. Mere Roihi [1905] A.C. 176.

The claim to an interest in the house, which the appellant put forward was based on the fact that she had contributed substantial amounts to the purchase price of the house. This claim was never established during the lifetime of her commonlaw husband and thus remains to be proved, if that is at all possible, at this stage. Howsoever that might be, it cannot affect the interest of the title of the respondents.

I turn now to consider the matter of the lodgment of the caveat. Lord Gifford strenuously argued that once a caveat was lodged, the Registrar of Titles was enjoined against entering

"... any change in the proprietorship or any transfer or other instrument presented for registration subsequent to the date on which such caveat was lodged purporting to transfer or otherwise deal with or affect the estate or interest in respect of which such caveat may be lodged, unless such transfer or other instrument or dealing be expressly exempted from the operation of the caveat or unless the caveator shall consent thereto in writing."

See section 142 of the Registration of Titles Act. He was quite unable however to show that any sanction which the Act imposed, enured to the benefit of the caveator's interest. Indeed the Registrar by virtue of section 160 has a limited immunity from suit. Section 160 provides as follows:

"The Registrar shall not, nor shall the Referee or any person acting under the authority of either of them, be liable to any action, suit or proceeding, for or in respect of any act or matter bona fide done or omitted to be done in the exercise or supposed exercise of the powers of this Act."

But all this matters not. The purchasers would nevertheless be protected by section 106 of the Act and the appellant would have no right against the mortgagee. Section 106 provides as follows:

"106. If such default in payment, or in performance or observance of covenants, shall continue for one month after the service of such notice, or for such other period as may in such mortgage or charge be for that purpose fixed, the mortgagee or annuitant, or his transferees, may sell the land mortgaged or charged, or any part thereof, either altogether or in lots, by public auction or by private contract, and either at one or at several times and subject to such terms and conditions as may be deemed fit, and may buy in or vary or rescind any contract for sale, and resell in manner

"aforesaid, without being liable to the mortgagor or grantor for any loss occasioned thereby, and may make and sign such transfers and do such acts and things as shall be necessary for effectuating any such sale, and no purchaser shall be bound to see or inquire whether such default as aforesaid shall have been made or have happened, or have continued, or whether such notice as aforesaid shall have been served, or otherwise into the propriety or regularity of any such sale; and the Registrar upon production of a transfer made in professed exercise of the power of sale conferred by this Act or by the mortgage or charge shall not be concerned or required to make any of the inquiries aforesaid; and any persons damnified by an unauthorised or improper or irregular exercise of the power shall have his remedy only in damages against the person exercising the power." [Emphasis supplied]

The fact that a caveat has been lodged does not therefore lead to an inevitable inference that fraud has occurred and it is accepted on all sides that actual fraud in the sense previously noted, must be established, in order to defeat the title.

Lord Gifford recognized that the learned judge asked himself the correct questions, viz:

"(1) Has the defendant satisfied me that she has a good defence to the action on the merits? If the answer is negative then,

(2) Has the defendant disclosed such facts as may be deemed sufficient to entitle her to defend the action generally?

In my judgment, his answers with which I entirely agree were complete and unassailable. For all these reasons, I agree with my brothers that the appeal be dismissed and the judgment affirmed.

DOWNER, J.A.

I agree.

HARRISON, J.A. (AG.)

I agree.