

**IN THE CARIBBEAN COURT OF JUSTICE  
Appellate Jurisdiction**

**ON APPEAL FROM THE COURT OF APPEAL OF THE  
CO-OPERATIVE REPUBLIC OF GUYANA**

**CCJ Appeal No CV 3 of 2008  
GY Civil Appeal No 100 of 2000**

**BETWEEN**

**SUBHAS RAMDEO**

**APPELLANT**

**AND**

**HERALALL**

**RESPONDENT**

**Before The Honourables**

**Mr Justice Nelson  
Mr Justice Pollard  
Mr Justice Saunders  
Madame Justice Bernard  
Mr Justice Hayton**

**Appearances**

**Mr Khemraj Ramjattan, Mr Neil Persram and Mr Dave Persaud for the Appellant**

**Mr Rajendra Poonai, Mr Roopnarine Satram and Mr Chandraprakash Satram for the Respondent**

**JUDGMENT**

**of**

**The Honourable Justices Nelson, Pollard, Saunders, Bernard and Hayton**

**Delivered by**

**The Honourable Mr Justice David Hayton  
on the 15<sup>th</sup> day of April, 2009**

## JUDGMENT

### Overview

- [1] This case emphasises the need for a contractual purchaser of land from a registered proprietor to protect himself against a subsequent transfer of title to another person by lodging a caveat against that title under section 125 of the Land Registry Act, Cap. 5:02. Otherwise, under ss 4, 65(1), 66, 69 and 70 of that Act, the new registered proprietor will obtain an indefeasible title unless involved in some fraud relating to the transfer, s 69(2) making it clear that mere knowledge of a contract unprotected by a caveat is not of itself to be imputed as notice of fraud. As Lord Wilberforce stated in *Midland Bank Trust Co Ltd v Green*<sup>1</sup> “It is not ‘fraud’ to rely on legal rights conferred by Act of Parliament”, so that a contractual purchaser can take advantage of his right to become registered proprietor free from the right of another purchaser who failed to protect his contract by entering a caveat.
- [2] The Appellant, Mr Ramdeo, was a contractual purchaser who failed to lodge a caveat, despite delays on the part of his vendor in transferring title. Thus he had to rely on alleging that the Respondent, Mr Heralall, who had registered a transfer of title from the vendor pursuant to a contract, had been involved in some fraud relating to the transfer. As Wooding CJ emphasized in *Roberts v Toussaint*<sup>2</sup>, “in actions in which a registered title is being impeached, fraud means some dishonest act or omission, some trick or artifice, calculated and designed to cheat some person of an unregistered right or interest.”
- [3] Unfortunately, the Appellant’s then attorney in his pleadings overlooked the elementary need to provide clear particulars of fraud involving the Respondent: High Court Rules, Order 17 r. 6; Bullen & Leake & Jacob’s Precedents of Pleadings 15<sup>th</sup> Edition 2004, para 48-02. An allegation of fraud is a very serious allegation, requiring that the person against whom fraud is alleged be made as aware as possible of what is alleged to be his fraudulent behaviour. This is a requirement that enables the defendant to be well-positioned to try to

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<sup>1</sup> [1981] AC 513 at 531

<sup>2</sup> (1963) 6 WIR 431 at 433

counteract such allegation and that also places the judge in a good position to make definitive findings in support of, or in rebuttal of, such allegation.

- [4] Despite the Respondent's attorney filing a Defence stating at paragraph 7, "The plaintiff has failed to file particulars of fraud and his statement of claim ought to be struck out", the Appellant's amended statement of claim in its five extra paragraphs failed to provide particulars of behaviour that was fraudulent.
- [5] The Appellant's current attorneys in their written and oral submissions skillfully pointed to various matters that they considered most suspicious and led them to draw very adverse inferences as to the Respondent's behaviour, but it is possible that there could have been an innocent explanation for such matters. If these matters had been particularised and investigated at first instance and this had led the trial judge to find there to be evidence that the Respondent had been involved in some fraud relating to the transfer of title to him, then the Appellant would have succeeded in his claim to the land.
- [6] In the absence of such investigation and such a finding, however, there are no possible grounds on which the Appellant's claim can succeed. Thus, at the hearing on 27 March 2009 we dismissed the appeal with costs here and below agreed in the sum of \$350,000 (three hundred and fifty thousand Guyanese dollars). We are now giving our written reasons for such dismissal.

**From contract to trial before Roy J.**

- [7] Under an agreement of sale and purchase of 29 April 1993 ("the Agreement") the Appellant bought from Mr Bissoondial Dharamlall ("Mr Dharamlall") two parcels of land, namely Nos 206 and 243 of Block V, Zone BRW, at Inverness, West Coast Berbice, ("the Disputed Parcels"), of which Mr Dharamlall was the duly registered proprietor. The Agreement provided for a purchase price of \$38,000 with half paid on 29 April 1993 and the remaining half to be paid on transfer of the title which was to be within one month. On 29 April 1993 possession of the land was also given to the Appellant, who soon afterwards spent \$200,000 in sand-filling and fencing the land.

- [8] The Respondent, who lived close by, passed by the Disputed Parcels several times and saw what was going on: one day he even let the Appellant use his trailer to load sand on the Disputed Parcels.
- [9] On 18 May 1993 Mr Dharamlall's wife, Mrs Phulwantie Dharamlall ("Mrs Dharamlall"), through her attorney, Mr Murseline Bacchus ("Mr Bacchus"), brought Action No 557 of 1993 against her husband and the Appellant. She sought a declaration that she was the owner of one half of the Disputed Parcels contracted to be sold under the Agreement and a declaration that the Agreement was of no legal effect. She also sought an order that her husband transfer to her a half interest in the Disputed Parcels and an injunction restraining her husband and the Appellant from disposing of the Disputed Parcels.
- [10] On 8 June 1993 the Appellant brought Action No 620 of 1993 claiming specific performance against Mr Dharamlall for failing to transfer to him title to the Disputed Parcels as provided for in the Agreement.
- [11] In response, on 1 July 1993 Mr Dharamlall swore an Affidavit of Defence, drawn up by his attorney, the self same Mr Bacchus, who was also acting for his wife in the above Action No 557 against him. Mr Dharamlall stated that he could not pass title until his wife's Action No 557 of 1993 had been determined, but admitted that he had purported to sell the Disputed Parcels to the Appellant, though "my wife Phulwantie is the bona fide owner of one half of the property."
- [12] Also on 1 July 1993 Mr Dharamlall swore an Affidavit of Vendor (drawn up by an attorney, Mr Dridhnauth Perry Gossai,) in which he averred that on 14 November 1991 he had sold the Disputed Parcels to the Respondent in consideration of \$12,000 whose receipt he had then acknowledged. On 1 July, too, the Respondent swore the corresponding Affidavit of Purchaser (also drawn up by Mr Gossai) and on that same day Mr Dharamlall and the Respondent executed the Transfer of title to the Disputed Parcels to the Respondent. The transfer was effected on the register on 28 July 1993 so that the Respondent then became the registered proprietor.

[13] The Appellant did not learn of these July events for some months during which Mrs Dharamlall in her Action No 557 of 1993, pursuant to a summons of 22 June 1993, obtained an interlocutory injunction on 19 November 1993 against the Appellant prohibiting him from putting up any structure on the Disputed Parcels. Her affidavit in support of her interlocutory claim was drawn up by Mr Bacchus.

[14] On 16 December 1993 the Appellant as Plaintiff filed Action No 1592 of 1993 (which has given rise to the present appeal) against Mr. Dharamlall as first Defendant, Mrs. Dharamlall as second Defendant and the Respondent as third Defendant, claiming the following remedies against them jointly and severally.

- (1) A declaration that the Plaintiff is entitled to the right, title and ownership of the Disputed Parcels.
- (2) A declaration that the transfer by the first Defendant to the third Defendant of those Parcels is “illegal, null, void and of no legal effect and is vitiated for fraud.”
- (3) An order setting aside the transfer of 28 July 1993 of the Parcels.
- (4) An order compelling the first Defendant to transfer title to the Parcels to the Plaintiff.
- (5) An injunction restraining the Defendants from building or erecting any structure on the Parcels or interfering with the Plaintiff’s peaceful occupation of the Parcels.
- (6) Damages in excess of \$1,500.
- (7) Any other order the Court may deem just.
- (8) Costs.

[15] On 16 February 1994 the Appellant filed his Statement of Claim. Only the Respondent as third Defendant filed a Defence prepared by his attorney, Mr Bacchus. In this Defence,

filed on 21 January 1997, the Respondent denied knowledge of the Agreement and of Actions No 557 and 620 of 1993, claimed to have been a bona fide purchaser for value of the Disputed Parcels without notice of the Appellant's contract, claimed as registered proprietor to have an unimpeachable title to those Parcels, and, most significantly, alleged that failure to file particulars of any fraud should lead to the Appellant's Claim being struck out.

[16] With the leave of the court, the Appellant filed his amended Statement of Claim on 24 April 1997 so as to allege in five new paragraphs:

3. That the third-named Defendant lives two houses west of the first and second named Defendants.
  
16. That on the 3<sup>rd</sup> day of May 1993, the Plaintiff borrowed and used the third named Defendant's trailer to transport sand to the land and fill the said land.
  
17. That on the 9<sup>th</sup> day of May, 1993, the Plaintiff commenced fencing the said lands.
  
18. That while the Plaintiff was in the process of fencing the said land the first and third named Defendants went to the said land and the first-named Defendant stopped the plaintiff from continuing the said works. That the third-named Defendant was present.
  
19. That the third-named Defendant then accepted title to the said lands on a purported sale to him for \$12,000 (twelve thousand dollars).

He re-iterated in a renumbered paragraph 20 that neglected to particularize fraud:

20. That the Defendants have acted fraudulently in order to deprive the Plaintiff of the aforesaid property.

### **The trial before Roy J.**

- [17] Only the Respondent as third-named Defendant appeared at the trial via an attorney, Mr R Chandan, holding for Mr Bacchus, but the Respondent was not himself present. The Appellant gave evidence and was cross-examined by Mr Chandan. A registry clerk gave evidence as to the transfer of title to the Disputed Parcels to the Repondent. On being cross-examined he confirmed that all the provisions of the Land Registry Act had been complied with in the Respondent becoming registered proprietor.
- [18] The Appellant gave evidence as to the existence of the Agreement. He then gave evidence supporting paragraphs 3, 16, 17,18 and 19 of his amended Statement of Claim by revealing that the Respondent lived near the first and second Defendants (the Dharamlalls), about an eighth of a mile from the Disputed Parcels, and knew about the Appellant filling those Parcels with sand and fencing the Parcels. He also gave evidence that one day the Respondent allowed him to use the Respondent's trailer to transport sand to the Disputed Parcels, and that on a later day the Respondent was present when the first Defendant, Mr Dharamlall, stopped the Appellant from further fencing the Parcels. Otherwise, the Appellant accepted that "Number three [Defendant, being the Respondent] and I never had any transaction. It was between myself and the number one Defendant [Mr Dharamlall]."
- [19] Three days later on 29 September 2000 Roy J delivered a very brief judgment in a hearing attended by the Appellant's attorney, but not the Respondent's attorney.
- [20] After finding that the Agreement between the Appellant and the first Defendant, Mr Dharamlall, amounted to a valid contract, Roy J. merely stated as follows:

“While awaiting transfer of title, the Plaintiff expended some \$200,000 on the said land by filling it up with sand and putting up a fence. Unknown to the Plaintiff, the 1<sup>st</sup> Defendant on the 28th July 1993 caused to be transferred to the 3rd Defendant both parcels of land he initially sold to the Plaintiff. I have accepted the Plaintiff's evidence and entered judgment for him in the following terms:

It is ordered that the plaintiff is entitled to the right, title and ownership of parcels 209 and 243, Block V, Zone BRW, Inverness, West Coast Berbice with no building thereon and that the transfer by the 1<sup>st</sup> Defendant of the said property described herein is null, void and of no legal effect [not going on to add “and is vitiated for fraud” as in the declaration claimed by the Appellant] and that the transfer of title dated 28 July 1999 of the said property be and is hereby set aside and that the 1<sup>st</sup> Defendant be and is hereby compelled to transfer title of the subject property to the Plaintiff within 6 weeks and in default thereof the Register of Deeds or his/her lawful Deputy be and is hereby authorized to do so and in such an event the Plaintiff is duly authorized to apply for and obtain a Certificate of Compliance on behalf of the 1<sup>st</sup> Defendant to effect the said transfer and that the costs of the same be deducted from the balance of the purchase price of \$19,000 and the remainder if any be lodged with the registrar of the Supreme Court for the benefit of the 1<sup>st</sup> Defendant.”

### **The appeal before the Court of Appeal**

[21] The Respondent appealed to the Court of Appeal. Chang CJ (ag) delivered the judgment of the Court of Appeal orally on 21 April 2008. In his written judgment, supplied on 2 February 2009 for the benefit of this appeal, he rightly emphasized how important it is for a trial judge to make clear both his factual findings and his legal analysis of the issues arising from those findings. He stated:

“But the trial judge made no specific finding of fraud in either Bissoondial Dharamlall or the appellant [who is the Respondent in this further appeal]. Indeed, no Particulars of Fraud appeared in the Statement of Claim.....

It is difficult to decipher on what basis the trial judge made the legal finding that the transfer of the lands to the appellant to be ‘null, void and of no legal effect.’ The total lack of legal analysis in his decision has rendered it impossible to read his thought processes”

[22] Chang CJ (ag) pointed out that most of the authorities indicated that a contract to purchase land does not create any equitable proprietary interest therein capable on general equitable principles of binding third parties other than a bona fide purchaser for value without notice. In any event, under the Land Registry Act a registered proprietor obtained an absolute indefeasible title except in the case of fraud, and fraud could not be imputed to a proprietor merely from his knowledge of the existence of a contractual interest that was not protected on the register: ss 65 and 69 of the Act. Moreover, Chang CJ (ag) considered that for a person to bring an action against a registered proprietor to recover land under s 70(2) such person needed to be deprived of an existing proprietary interest in land, and a contract to purchase land is not such an interest.

### **Leave to appeal to the Caribbean Court of Justice (the “CCJ”)**

[23] The Appellant obtained leave to appeal to the CCJ from the majority of the Court of Appeal on 9 July 2008 on the basis that he had an appeal as of right under s 6(a) of the Caribbean Court of Justice Act, No 16 of 2004, because the Disputed Parcels were worth over one million Guyanese dollars and there was a genuinely disputable issue over whether a contract to purchase land created an equitable proprietary interest in land, while such a contract might be treated differently if concerning registered land as opposed to unregistered land falling under the Deeds Registry Act, Cap 5:01.

### **The intervening impact of *Ramdass v Jairam*<sup>3</sup>**

[24] On 22 July 2008 the CCJ delivered judgment in *Ramdass v Jairam*. It held<sup>4</sup> that equitable proprietary interests in Guyanese immovables (as opposed to movables) could not exist in Guyanese property law. The interest of a purchaser under a contract of sale of an immovable, while affording him the right to sue the landowner for specific performance, is merely a personal right exercisable against the landowner to compel full and absolute title to the land to be transferred to the purchaser: this is a “*ius in personam ad rem*”<sup>5</sup>. It made no difference that the purchaser had been given vacant possession of the land and had even

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<sup>3</sup> [2008] CCJ 6 (AJ), (2008) 72 WIR 270

<sup>4</sup> At [20] and [27]

<sup>5</sup> At [33]

paid the full purchase price<sup>6</sup>. Moreover, because a contractual purchaser of land has no *in rem* right imposed on or attached to the land, he cannot have a “registered interest” within the meaning of ss 2 and 23 (1) (c) of the Deeds Registry Act that can affect the full and absolute title to land vested in the landowner by a transport registered under that Act<sup>7</sup>. It follows that to protect his *in personam* right a contractual purchaser or his attorney needs regularly to read the Gazette to see if it advertises a transport to another of the land he has contracted to purchase, so that he can then oppose the passing of the transport in timely fashion and in due form.

### **The issues before the CCJ**

[25] At the case management conference it was agreed to have written submissions as to two issues:

1. In the case of land under the land registration system in Guyana, in the context of this Appeal, what are the rights and remedies, if any, of a purchaser in possession prior to completion where the vendor subsequently sells to a second purchaser who becomes the registered proprietor pursuant to the Land Registry Act, Chapter 5:02?
2. Whether on the facts found there was evidence of fraud within the meaning of the Land Registry Act and, if so, what are the consequences for this case?

### **Indefeasibility of title: “The Register is everything”**

[26] The objects of the Land Registry Act according to s 4(1) are “to simplify the title to land and facilitate dealing therewith and to secure indefeasibility of title to all registered proprietors, except in certain cases specified in this Act.” By s 4(2) the Act has to “be construed in such manner as shall best give effect” to those objects.

[27] Accordingly, s 66 states as follows:

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<sup>6</sup> At [1]

<sup>7</sup> At [31]-[32]

“Every proprietor registered with an absolute title shall hold the registered land subject to-

- (a) any interests registered or entered in the register;
- (b) any public right of way or easement;
- (c) any charge on or over land created by the express provisions of any other Act without reference to registration under this Act to secure any unpaid rates, taxes, assessments or other moneys due and owing to the State or to any statutory authority;
- (d) such interests as may under the provisions of this Act subsist over registered land without being entered in the register,

but with all rights, privileges and appurtenances belonging or appurtenant to such land and *free from all other rights and interests whatsoever* including rights and interests of the State.”

[28] Section 65(1) lays down the rule that, subject to some special cases involving first registration or adverse possession,

“the title of every registered proprietor shall be absolute and indefeasible and accordingly shall not be impeached or affected in any way by the existence in any other person of any interest (whether derived by grant from the State or otherwise) which but for this Act might be held to be paramount or to have priority or by reason or on account of any informality or irregularity in the application or proceedings for registration except –

- (a) in the case of fraud;
- (b) as regards any portion of land erroneously included in any parcel by misdescription of boundaries, unless such

proprietor is a *bona fide* purchaser for value or derived title from or through such a purchaser;

(c) as otherwise specified in the register or provided in this Act.”

[29] To protect persons dealing with registered land of a registered proprietor s 69 provides as follows:

(1) A person contracting or dealing or taking or proposing to take a transfer in respect of registered land shall neither be required nor be concerned in any manner to-

(a) inquire or ascertain the circumstances in or under which or the consideration for which the registered proprietor or any previous registered proprietor of the land in question is or was registered;

(b) see to the application of the purchase money or any part thereof;

(c) give effect to, nor be affected in any way by, any *notice* of any instrument, fact or thing, whether registered or not under the Deeds Registry Act or under any other Act, or of any trust, right or interest unregistered or unprotected by caveat, any rule of law or equity to the contrary notwithstanding.

(2) The protection granted by this section shall not apply to a person who is privy to *or has notice* of any fraud relating to the transfer to such person, but knowledge of the existence of any instrument, fact or thing, trust, right or interest, unregistered or unprotected as aforesaid, or omission to search a register not kept

under this Act or investigate any of the matters hereinbefore mentioned, shall not of itself be imputed as fraud.

[30] It is to be noted that under s 69(1)(c) a person contracting to take a transfer of registered land is not to be affected in any way by “any notice of” any instrument, trust, right or interest unregistered or unprotected by caveat, any rule of law or equity to the contrary notwithstanding. “Notice” in equity extends beyond actual notice to constructive notice and imputed notice, the latter being actual or constructive notice of an agent that is imputed to his principal. A purchaser has constructive notice of those matters that would have come to his knowledge if such inspections and inquiries had been made as ought reasonably to have been made in all the circumstances.

[31] By virtue of s 69(2) the protection in s 69(1) does not apply to a purchaser “who is privy to *or has notice of* any fraud relating to the transfer” making him registered proprietor, while the purchaser’s knowledge of any fact or thing, trust, right or interest unregistered or unprotected (e.g. by a caveat) or his omission to investigate any such matters “shall not of itself be imputed as fraud.” This latter clause needs to be construed in context as “shall not of itself be imputed as *notice of* fraud.”

[32] Section 70 then provides as follows:

(1) “Save as hereinafter provided no action of ejectment in respect of registered land or other action suit or proceeding for the recovery of such land shall lie or be sustained against the registered proprietor except in relation to the enforcement of mortgages, charges, leases or other interests registered under this Act or of an order of the Commissioner made under section 49, and the production of the certificate of title shall be held in every court of law to be an absolute bar and estoppel to any such action, any rule of law or equity to the contrary notwithstanding.

(2) An action may be brought against a registered proprietor not being a *bona fide* transferee for value nor deriving title from or through such a transferee by-

(a) a person deprived of any land by or through the fraud of the registered proprietor or of any prior registered proprietor from or through whom he derived title otherwise than as a *bona fide* transferee for value;

(b) a person deprived of or claiming any land erroneously included in any parcel by misdescription of boundaries;

Provided that the claim of such person is not then barred by any law relating to limitation.”

[33] Section 70(2)(b) reminds one that the Act contains provisions for rectification of the register by the Court with corresponding provision for compensation to be paid out of an Assurance Fund to persons suffering loss or damage from rectification otherwise than due to their own fault . In particular, s 61(a) provides as follows:

“Rectification of the register may be ordered by the Court in such manner as the Court thinks fit-

(a) where the Court is satisfied that the registration of any person as proprietor of land has been obtained through any error or omission or by reason of any entry procured by fraud or made under a mistake.”

[34] There is a crucial proviso to s 61 as follows:

“Provided that as against a proprietor who has acquired the land *bona fide* for value the Court shall not rectify the register unless such proprietor is privy to the fraud or mistake or has caused or substantially contributed thereto by his act, neglect or default.”

It would seem in context that a “*bona fide*” proprietor and also a “*bona fide*” transferee within s 70(2) are to be regarded as *bona fide* if they have knowledge of a relevant matter but are not privy to any fraud or mistake.

[35] Due to the strength of the above indefeasibility of title provisions, a person desirous of protecting his or her *in personam ad rem* right (like a contractual purchaser or a person

interested under an express, resulting or constructive trust of an immovable) needs to lodge a caveat under s 125 of the Land Registry Act or, where appropriate, have a restriction or prohibition entered under s 117 or s 126 thereof respectively.

[36] By way of contrast, in the case of unregistered land indefeasibility of a transported title is provided by s 23(1) of the Deeds Registry Act. Every transport of immovable property (other than a judicial sale transport) vests in the transferee the full and absolute title to the immovable property subject only to (a) statutory claims, (b) registered incumbrances, (c) registered proprietary interests registered before the date of the last advertisement of the transport in the Gazette and (d) registered leases registered before such date. Thus a person having an *in personam ad rem* right against a landowner needs regularly to monitor the Gazette to watch for an advertised transport by the landowner so that the passing of transport may be opposed in good time.

[37] There is a narrow fraud proviso to s 23(1): “Provided that any transport, whether passed before or after the 1<sup>st</sup> January, 1920, obtained by fraud shall be liable in the hands of all parties or privies to the fraud to be declared void by the Court in any action brought within twelve months after the discovery of the fraud.”

[38] It is, however, important to realize that apart from the limited statutory exceptions to the principle of indefeasibility of registered or transported title there is an *in personam* exception to such principle. In particular, the doctrines of equity, as administered in the High Court of Justice in England and applicable in Guyana under s 3 (b) of the Civil Law of Guyana Act , Cap 6:01, provide that “equity will not allow a statute to be used as an instrument of fraud”, while recognizing that if, in the interests of security of title to land, a right affecting land has to be protected by entry on a register then it is not fraud to take advantage of a strict statutory right enabling a purchaser to take free of an unprotected right. As Lord Denning, however, has pointed out in *Crabb v Arun DC*<sup>8</sup>, in a passage endorsed by Ramson JA in *Collymore v George*<sup>9</sup>, “Equity.....will prevent a person from insisting on his strict legal rights – whether arising under a contract, or on his title deeds, or

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<sup>8</sup> [1976] Ch 179 at 187-188

<sup>9</sup> (2008) 72 WIR 229 at 244

by statute – when it would be inequitable for him to do so having regard to the dealings which have taken place between the parties.”

[39] As Lord Wilberforce stated in *Frazer v Walker*<sup>10</sup>, a New Zealand case involving a system of land registration similar to that of Guyana:

“their Lordships have accepted the general principle, that registration under the Land Transfer Act 1952 confers on a registered proprietor a title to the interest in respect of which he is registered which is (under s 62 and s 63) immune from adverse claims, other than those specifically excepted. In doing so they wish to make clear that the principle in no way denies the rights of a plaintiff to bring against a registered proprietor a claim in personam .... for such relief as a court acting in personam may grant. That this is so has frequently, and rightly, been recognized in the courts of New Zealand and of Australia.”

[40] Without intending to limit or define the various situations in which *in personam ad rem* actions may be admitted against “O” ,the owner of an indefeasible registered or transported title, it seems that a person, “P”, may be able to make a successful *in personam* claim against O in respect of O’s title where P claims to rescind his transfer of the land to O due to O’s undue influence, or P claims that dealings between O and P had led to O being an *in personam* trustee of the land for P<sup>11</sup> or to O being personally obliged on equitable estoppel principles to create an interest in land for P<sup>12</sup>. Against third parties O has an indefeasible title as absolute owner, but O cannot maintain this against P where there have been dealings between them that would clearly make this inequitable<sup>13</sup>.

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<sup>10</sup> [1967] 1 AC 569 at 585

<sup>11</sup> *Collymore v George* (2008) 72 WIR 229. Note s 129(a) and (d) of the Land Registry Act

<sup>12</sup> *Clark v Kellarie* (1970) 16 WIR 401, *Thorner v Major* [2009] UKHL 18

<sup>13</sup> Further see Tang Hang Wu, “Beyond the Torrens Mirror: A Framework of the In Personam Exception to Indefeasibility” [2008]Melbourne Univ LR 20

### **The Appellant's position on the facts found in the High Court**

- [41] In the absence of any such dealings between the Appellant and the Respondent, there are no special circumstances justifying the Appellant having any *in personam* claim against the Respondent outside the parameters of the Land Registry Act.
- [42] Within those parameters two routes might have been available to the Appellant to show that he was entitled to become registered proprietor of the Disputed Parcels. These routes involved proceeding under either s 70(2) or s 61.
- [43] The Court of Appeal, however, considered that s 70(2) was not available to enable the Appellant to bring an action for “the recovery of” land under s 70(1) because he was not “a person deprived of any land” since he never had any *in rem* proprietary interest in land.
- [44] There is something to be said for such approach because s 70, in historical context based on actions of ejectment, seems concerned to enable someone in possession of land by virtue of an *in rem* proprietary interest to recover possession thereof. However, in a broad sense, a person whose contract would have enabled him to become registered proprietor of certain land, but for the intervention of title being transferred to a stranger, can be regarded as a person deprived of such land, and it is a special feature of Guyanese property law (unlike, say, Jamaican law<sup>14</sup>) that a contractual purchaser of land does not have an *in rem* proprietary interest.
- [45] For the present we will leave the issue open because, in any event, the Appellant would not have been able to satisfy the requirements of s 70(2)(a). The Respondent ranked as a bona fide transferee for value because as noted above at [34] a person is regarded as bona fide even if he has knowledge of an unprotected interest so long as he is not privy to any fraud, and, as will shortly be explained, it was neither properly pleaded nor established at the trial by cogent evidence that he was so privy.

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<sup>14</sup> In *Honiball v Alele* (1993) WIR 314 the Privy Council assumed that the respondent, a USA resident, who had bought the disputed land and paid taxes thereon, but had not registered his title because uncertain whether to develop the land as an individual or through a company, could recover the land under the equivalent s 161 of the Jamaica Registration of Titles Act as “a person deprived of land by any fraud”

- [46] Irrespective of s 70, it is clear that under s 61 the court may order rectification of the register against a registered proprietor (even so as to replace him) if his registration had been obtained by reason of an entry procured by fraud. Here, as under s 70, no assistance can be given to the Appellant unless the Respondent was privy to some fraud relating to the transfer of title to him.
- [47] The Appellant's attorney strove manfully to try to establish that there was some evidence of the Respondent being privy to some fraud, while trying to invoke rules 24 and 30 of Order 17 of the High Court Rules, so as to circumvent rule 6. This clearly requires that "in all cases in which the party pleading relies on any misrepresentation, fraud....., particulars (with dates and times, if necessary) shall be stated in the pleading."
- [48] Rule 24 is concerned only with allegations as to a person's mental state and rule 30 is concerned only with technical objections as to "any alleged want of form." Paragraph 20 of the amended Statement of Claim (at [16] above), however, relates to the conduct of the Defendants alleged to "have acted fraudulently" i.e. in fraudulent fashion without particularizing fraudulent conduct involving the Respondent as third Defendant, while a lack of such particulars is a fundamental matter of substance not of form.<sup>15</sup>
- [49] The Appellant's attorney submitted that the alleged contract dated 14 November 1991 between the Respondent and Mr. Dharamlall had been concluded after Mr. Dharamlall's Agreement of 29 April 1993 with the Appellant but had been fraudulently back-dated. Otherwise, why was it not used to stop the Appellant fencing the Disputed Parcels and filling them in with sand and why was it not pleaded in the Respondent's Defence to this action, his earlier equitable *in personam* claim prevailing over the Appellant's later such claim? Indeed, why was it not pleaded in Mr. Dharamlall's Defence to the Appellant's specific performance Action No. 620 of 1993? Moreover, was not Mrs. Dharamlall's Action No.557 of 1993 an artifice to stall the contracted transfer to the Appellant and enable Mr. Dharamlall and the Respondent arrange for the Respondent to obtain title rather than the Appellant, especially when one notes the involvement of Mr. Bacchus acting for

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<sup>15</sup> *Roberts v Toussaint* (1963) 6 WIR 431 at 433 and 436 per Wooding CJ, *Leon Vansluytman v New Building Society Limited* (1996) 54 WIR 270 at 277 per Bernard JA

both Mr. and Mrs. Dharamlall – and for the Respondent in drafting the Respondent’s Defence?

[50] To answer these questions one can respond “why were all these matters not pleaded in the amended Statement of Claim, so that the Respondent and his co-Defendants and then the trial judge could deal with these issues?” Roy J would then have been able to make a finding that the Respondent was – or was not - privy to a fraud enabling him to be entered as registered proprietor.

[51] As matters stand, it is possible that Mrs. Dharamlall had a genuine claim against her husband to be owner of one half of the Disputed Parcels. It is possible that this matter, so closely affecting Mr. Dharamlall, was at the forefront of his mind when formally defending the Appellant’s specific performance Action No 620 of 1993 by pointing out that his wife’s Action prevented him from performing his contract with the Appellant. When the Appellant brought Action No 1592 of 1993 the Respondent had already become registered proprietor and so could simply rely upon the indefeasibility of his title and the lack of any particulars of fraud as pleaded in paragraphs 6 and 7 of his Defence drawn up by the ubiquitous Mr. Bacchus. Admittedly, it is odd that in paragraph 5 it is stated that the Respondent “is a bona fide purchaser for value without notice and he bought on the strength of the first-named Defendant’s title,” so implying that there was no notice of an earlier contract with the Appellant, yet the Respondent’s contract was alleged to have been concluded in 1991 *before* the Appellant’s 1993 Agreement. It could, however, be argued that the bona fide purchaser defence was unthinkingly put forward as a standard defence by an over-worked attorney throwing the proverbial “kitchen sink” at the Appellant. The Appellant’s difficulty is that as stated by Wooding CJ in *Roberts v Toussaint*<sup>16</sup>, “Proof of fraud or dishonesty depends upon certainty, not on maybe”, and the facts and circumstances relied upon to evince the fraud must be clearly, distinctly and fully pleaded.

[52] As seen above, there are circumstances here that raised significant suspicions that the Respondent might have been privy to some fraud enabling him to become registered proprietor of the Disputed Parcels. We, however, are not in a position to resolve any of

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<sup>16</sup> (1962) WIR 431 at 434

these factual issues. They were never pleaded nor brought specifically to the attention of the trial judge.

[53] In a democratic society where the rule of law prevails it is fundamental that if a plaintiff seeks to establish a factual basis for allegations that the defendant defrauded him, he must in his pleadings specify precisely the nature of the allegations upon which such very serious charge is founded and set out full factual particulars to justify such allegations. No such matters as those raised in [49] above were pleaded and particularized, so that the Respondent and his co-Defendants could justifiably expect not to have to meet charges of fraud. The judge himself was not in a position to make any findings as to fraud. Hence, though asked to declare that the transfer by the first Defendant was “illegal null, void and of no legal effect and is vitiated for fraud”, Roy J in his order merely declared the transfer to be “null void and of no legal effect.”

[54] The Appellant, via his then attorney, has only himself to blame for this. He is also to blame for not entering a caveat (i) when the Agreement was not duly completed within a month or (ii) when Mrs. Dharamlall filed her Action No. 557 of 1993 on 18<sup>th</sup> May, 1993, or (iii) when he filed his action No. 620 of 1993 for specific performance on 8<sup>th</sup> June, 1993.

### **Conclusion**

[55] The appeal must be dismissed with costs here and below to be paid by the Appellant, such costs being agreed in the sum of \$350,000 (three hundred and fifty thousand Guyanese dollars).

/s/ R F Nelson

The Hon. Mr. Justice R. Nelson

/s/ Duke Pollard

The Hon. Mr. Justice D. Pollard

/s/ A Saunders

The Hon. Mr. Justice A. Saunders

/s/ D P Bernard

The Hon. Madame Justice D. Bernard

/s/ D Hayton

The Hon. Mr. Justice D. Hayton