[2012] JMCA Civ 61

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 131/2005

BEFORE: THE HON MR JUSTICE PANTON P
THE HON MR JUSTICE DUKHARAN JA
THE HON MISS JUSTICE PHILLIPS JA

BETWEEN	**CONSETTA EDWARDS**	**1ST APPELLANT**
AND	**CLIFTON EDWARDS**	**2ND APPELLANT**
AND	**D & Y ENTERPRISES LIMITED**	**3RD APPELLANT**
AND	**JOAN MAY BLACK VALENTINE**	**1ST RESPONDENT**
AND	**THE REGISTRAR OF TITLES**	**2ND RESPONDENT**
AND	**JENNIFER M SMITH**	**3RD RESPONDENT**

Burchell Brown for the appellants

Ian Wilkinson and Miss Shanique Scott instructed by Ian G Wilkinson and Company for the first respondent

Mrs Michelle Shand-Forbes and Garcia Kelly instructed by the Director of State Proceedings for the second respondent

Miss Peta-Gaye Manderson instructed by John G Graham for the third repsondent

14, 15 June, 29 July 2011, 8 October and 20 December 2012

PANTON P

[1] I have read the reasons for judgment that have been written by Phillips JA. I agree with her and have nothing to add.

DUKHARAN JA

[2] I too have read the reasons for judgment of Phillips JA and agree.

PHILLIPS JA

[3] This is an appeal from the order of Master Lindo made on 30 November 2005, wherein she ordered that:-

> "1. The Claim be struck out;
>
> 2. The Registar of Titles be directed to remove caveat No. 956448;
>
> 3. Leave to appeal granted to the Claimants, and
>
> 4. Costs to the defendant to be taxed if not agreed."

The notice and grounds of appeal were filed on 12 December 2005.

[4] On 29 July 2011 we gave our decision as follows:-

> "1. appeal allowed;
>
> 2. decision of the Master set aside;
>
> 3. case restored to the list; case management conference to be held;
>
> 4. costs of the appeal to the appellants to be agreed or taxed."

We promised that reasons for our decision would follow. These are the reasons.

[5] Subsequent to the delivery of our decision, in August 2011, counsel for the first respondent wrote to the court indicating that the court had intimated at the close of hearing submissions on the appeal, that the court would entertain arguments as to costs after the ruling on the outcome of the appeal. The matter was therefore relisted for those submissions to be made, and the decision on the same, is hereinafter set out.

The pleadings

[6] A writ of summons was filed on 16 December 1997, and the appellants (the claimants below) claimed against the respondents (the defendants below) that the certificate of title in respect of all that parcel of land fraudulently registered by the first respondent in her name at Volume 1206 Folio 334 of the Register Book of Titles, be cancelled; that the defendants pay damages to the plaintiffs for the fraud committed in registering the plaintiffs' land in the name of the first respondent; and that the first respondent be restrained from any further dealing with the land.

[7] The statement of claim was detailed and comprehensive. It made the following assertions:

(a) That the first appellant owned the land which consists of approximately 4 acres in Maryland in the parish of Saint Andrew, and which was registered at Volume 1261 Folio 265 of the Register Book of Titles on 18 November 1993, ('the said land'); the second appellant was her son; and the third appellant had purchased the said land from the first appellant.

(b) That the first respondent had fraudulently obtained the said land and registered the same on 4 June 1987, in her name at Volume 1206 Folio 334 of the Register Book of Titles.

(c) That the second respondent had acted in bad faith, either directly or through her servants or agents, fraudulently and/or negligently placed the first respondent's name on the said certificate of title.

(d) That the third respondent fraudulently and/or negligently falsely swore to the attestation of documents, not signed by the first appellant and the previous owner of the said land, to facilitate the registration of the said land in the name of the first respondent.

(e) That the said land was originally owned by one Mercelena Spaulding, whom the first appellant had cared for and who had given the said land to the first appellant as a gift, and the first appellant had been in undisturbed possession of, and had reaped and planted crops on the said land, up to the date of the action.

(f) That the first appellant had placed a caretaker on the land, initially one Mr Doyley, (o/c Aston Williams) and both of them had built a house on the said land. Subsequently, the first respondent had taken over as caretaker of the said land, and lived in the house and was answerable to the first appellant.

(g) That the first respondent offered to purchase the said land in 1987 and paid, in 1988, to the first appellant $22,000.00 as a downpayment on the said land, and the first appellant gave the first respondent the surveyor's report and tax receipts.

(h) That it came as a shock to the first appellant, that the first respondent had obtained a certificate of title to the said land, without her consent, particularly as Mercelena Spaulding was unable to see or hear and could barely walk, and was therefore not capable of doing any such transaction, and also Mercelena Spaulding did not know the first respondent.

(i) That the third respondent claimed that she had witnessed the signatures of the first respondent and Mercelena Spaulding but Mercelena Spaulding did not know the third respondent and it was not possible for Mercelena Spaulding to attend on the third respondent, without the first appellant, due to her infirmities, and in any event they had never been to 3½ Olivier Place, the address stated on the documents.

(j) That with regard to the second respondent, the title to the said land had been issued to the first respondent prior to the time fixed for the lodging of caveats to prevent registration. The second respondent did not obtain any proof of consideration in

respect of the transaction before the first respondent's name was placed on the title.

(k) The first appellant does not sign her name as "Consett" which is the way her signature appears on the documents in support of the title issued in the name of the first respondent, but as "Consetta" or "Consette" Edwards.

(l) Particulars of fraud of the first respondent were pleaded which cumulatively stated that the first respondent had used fraudulent documents, not signed by the first appellant or one Gladys Johnson or Mercelena Spaulding to obtain the certificate of title in the first respondent's name. The first respondent had therefore conspired with the third respondent to attest to the said signatures on the documents.

(m) Particulars of fraud of the second respondent were pleaded stating that she had placed the name of the first respondent on the title without consideration, or any valid reason to do so, and contrary to legal provisions, and additionally before the prescribed period permitting that registration.

(n) Particulars of the third respondent were set out stating that she had fraudulently attested to all the documents submitted in the application for bringing the land under the Registration of Titles

Act, including a declaration of the first appellant and one Gladys Johnson, and the application in the name of the said Mercelena Spaulding, all allegedly signed by the first appellant, Gladys Johnson and Mercelena Spaulding respectively, which the appellants stated had not occurred.

(o) The appellants claimed as special damages, "deprivation of sale price of land, deprivation of land as collateral to facilitate business -$2,500,000.00", with interest of 40% per annum from the date of deprivation of the said land.

[8] The first respondent, in her defence did not admit to knowing that the first appellant had any title for or was the owner of the said land or that the said land had been sold to the third appellant. She denied that she had obtained her certificate of title in respect of the said land fraudulently and accepted that Mercelena Spaulding was the previous owner of the land, but stated that she knew nothing about the alleged gift of the said land to the first appellant. She denied that the first appellant had reaped or planted any crops on the said land, and stated that the said Mr Doyley had been a squatter on the land and the first respondent had had to pay him money to get him removed from the said land.

[9] The first respondent also claimed that she had purchased the land from the said Mercelena Spaulding for the sum of $160,000.00 with a mortgage from Bank of Nova

Scotia Jamaica Limited in the sum of $100,000.00. She had paid $22,000.00 to Mercelena Spaulding as the final payment on the purchase of the property.

[10] The first respondent pleaded that the first appellant had accompanied her to the Office of Titles to assist with the application for registration of the said land. She stated that Mercelena Spaulding authorized, signed and gave her blessing for the transfer of the said land. She did not accept that she was blind or deaf. She had had several conversations with her. The documents used to obtain registration, she maintained, were all duly signed and she denied any fraudulent actions on her behalf or that of the second and or third respondents.

[11] The first respondent counterclaimed that the certificate of title obtained by the first appellant had been obtained fraudulently and was illegal. She set out the particulars of fraud, namely that the first appellant had obtained the title knowing that she had no interest in the said land, and knowing of the first respondent's interest in the same. The first respondent therefore claimed declarations that the certificate of title issued to her was lawful, and that the title issued to the first appellant was illegally obtained and should be cancelled by the Registrar of Titles. She also claimed damages, interest and costs.

[12] The first appellant filed a reply to the defence, and a defence to the counterclaim in which she took issue with, and denied all facts pleaded by the first respondent in the defence and counterclaim and reiterated those pleaded by her in the statement of claim, and particularly denied all allegations of fraud made against her.

The chronology of events

[13] This matter has had a long and interesting history. I will try to set out the parties tortuous story as briefly as possible, referring only to events relevant to the disposal of the appeal.

- On 8 May 1987, application No. 89527 dated 7 May 1987 was filed at the Office of Titles allegedly by Mercelena Spaulding.
- On 4 June 1987, Certificate of Title registered at Volume 1206 Folio 234 of the Register Book of Titles in the name of the first respondent.
- On 28 June 1989, Mercelena Spaulding died.
- On 18 November 1993, Certificate of Title registered at Volume 1261 Folio 265 of the Register Book of Titles in the name of the first appellant.
- On 13 February 1996, Certificate of Title registered in the name of the third appellant although completion of transaction stalled due to duplication in the registration of the said land.
- On 20 November 1996, Caveat No. 956448 was lodged by the first appellant against Certificate of Title registered at Volume 1206 Folio 234.
- On 16 November 1997, a writ of summons and statement of claim filed by the appellants in the Supreme Court.
- On 6 January 1998, the first respondent entered an appearance.
- On 13 February 1999, the first appellant passed on.
- On 15 February 1999, the first respondent filed defence with consent of the appellants.

- On 25 October 1999, 30 June 2000 and 15 October 2001, summons for directions filed by the appellants.

- On 9 January 2002, order made on summons for directions.

- On 18 January 2002, letter sent to registrar of the Supreme Court indicating that pleadings are closed and asking for trial date to be fixed.

- On 10 September 2002, letter from the registrar indicating that the case has been placed on the cause list.
- On 17 December 2003, letter sent to the registrar under the new rules requesting a date for case management conference.

- On 5 May and 8 June 2005, case management conferences held but no proof of service on the appellants who were not present.

- On 8 June 2005, the second respondent filed an acknowledgement of service.

- On 20 June 2005, the first respondent filed an application to strike out the appellants claim.

- On 20 June 2005, the application to strike out the appellants' claim is short served on the appellants' attorneys-at-law, and on the second and third respondents for the case management conference.

- On 27 June 2005, all parties present at case management conference, but file not before the Master. The matter was adjourned to 30 November 2005.

- On 30 November 2005, Master struck out the appellants' claim.

- On 12 December 2005, notice and grounds of appeal filed.

- On 28 December 2005, probate of the will of the first appellant granted.

- On 20 July 2010, an amended notice and grounds of appeal filed.
- On 7 September 2010, the first appellant substituted by the second appellant by order made by Dukharan JA.
- On 14 and 15 June 2011, the appeal was heard.
- On 29 July 2011, the decision on appeal was delivered.
- On 8 October 2012, submissions heard by the court on the issue of costs.
- To date no defence has been filed in respect of the third respondent.

The application to strike out the claim

[14] The application was filed pursuant to part 26.3 of the Civil Procedure Rules (CPR) on the grounds that the claim was frivolous, vexatious and an abuse of the court's process [paragraph 1]; that the statement of case disclosed no reasonable grounds for bringing the claim [paragraph 2]; and that there had been a failure of the appellants to attend case management conference "and/or to do anything else consistent with actively prosecuting the instant claim" [paragraph 3].

[15] The first respondent filed an affidavit in support of the application in which she deposed that she had purchased the said land lawfully from the previous owner Mercelina Spaulding (spelt thus), had paid the full purchase price of $160,000.00 to the said Mercelina Spaulding before she died, and was therefore a bona fide purchaser for value of the said land, and the legal owner of it, having obtained her Certificate of Title therefor. She said that the first appellant was a declarant in the application to bring the

said land under the Registration of Titles Act, and had accompanied her and the said Mercelina Spaulding to the Office of Titles to file her application for the registered title for the said land. She stated that the first appellant knew that the said land which was previously unregistered was then being registered for the purpose of passing title to her. The first respondent further deposed that the first appellant claimed that Mercelina Spaulding had given the said land to her, but she averred that the first appellant had nothing to substantiate such a claim, and that the first appellant had applied for, and caused a second title to be issued in respect of the said land, in her name, knowing that she had no interest in the said land, and that the said land already belonged to the first respondent. She deposed that in so doing the first appellant had acted fraudulently, as the said Mercelina Spaulding had, in her life time, transferred the said land to the 1st respondent, and the claim being made by the first appellant was therefore an abuse of process.

[16] The first respondent stated further that the appellants had not acted with any expedition, had used up more than their proportionate share of the courts' time and resources, and had failed to comply with the orders and directions of the court, as they had failed to attend the case management conferences fixed to advance the litigation, thereby showing disregard for the court. Both applications to bring the land under the Registration of Titles Act allegedly made by Mercelina Spaulding and subsequently by the first appellant, and the respective Certificates of Title in respect of the said land, issued to the first respondent and the first appellant, 6 years apart, respectively, were attached to the affidavit in support of the application as exhibits.

Reasons for judgment of Master Lindo

[17] The learned Master dismissed this claim at the case management conference held on 30 November 2005. She referred to the application and to the fact that the court file had previously been misplaced and a duplicate file had subsequently been prepared. She referred to the fact that counsel for the appellants had sought an adjournment in order to file an affidavit in response to the affidavit filed in support of the application to strike the claim. The learned Master noted that counsel for the appellants claimed that the case management conference was "basically a new concept" and that "he was not aware that the first defendant would be pursuing the application". The Master made her first ruling stating thus:

> "The power to grant an adjournment is discretionary. I am not satisfied that there was any good reason put forward by the claimants' attorney-at-law for the matter to be adjourned. The claimants had ample time to respond to the affidavit of the first defendant. I was of the view that in the circumstances it would not be in keeping with the overriding objective of dealing with cases justly, in particular in dealing with cases expeditiously to adjourn the matter, so I ruled that the hearing of the application should proceed."

[18] The learned Master then referred to the evidence deposed to in the affidavit in support of the application set out in paragraphs [15] and [16] above. She mentioned that the third appellant claimed to have purchased the said land from the 1st appellant in February 1996. She noted however that the third appellant had never had a representative in court. The Master then made the following findings which led to her ultimate decision to dispose of the claim.

> "The action was filed from as far back as 1997 and the claimants have not pursued it with due diligence and neither have they shown any urgency to have the matter determined. The first defendant is in possession of the property in question and the court is told that she also pays taxes for the property.
>
> In coming to a decision I have taken into account the overriding objective of the Civil Procedure Rules which is to deal with cases justly. It is my view that it is unjust for the claimants to file a suit against the defendants, do nothing and then at this late stage seek to get an adjournment. No useful purpose can be served by the granting of an adjournment at this stage. There is no hope of success on the claim without the first claimant being present. Even if the first claimant is substituted, there would not be sufficient evidence forthcoming to substantiate the claim.
>
> The claim is bound to fail as there is no claimant with proper standing who could pursue it. There would be the need for a witness statement from the first claimant. It would be unfair and unjust to allow it to proceed any further having already taken up a lot of the court's time."

[19] The learned Master ruled that the claim should therefore be struck out against all the appellants with costs, and that the caveat No. 956448 filed by the first appellant against any dealings with the certificate of title for the said land, registered in the name of the first respondent, be removed.

The appeal

[20] The appellants filed their notice and grounds of appeal on 12 December 2005. The amended notice and grounds were filed on 20 July 2010. There were 21 grounds

of appeal. I will accept counsel for the first respondent, Mr Wilkinson's categorization of them into five main grounds as set out below:

> "(a) The learned Master erred when she struck out the Appellants' case since costs were a just remedy to the 1st Respondent to adjourn to another date;
>
> (b) The Master should have used her discretion and granted the Attorney-at-Law for the Appellants time as requested to respond to the application and provide handwriting expert report;
>
> (c) The Master erred when she indicated that the death of the 1st Claimant/1st Appellant prior to trial makes the trial unnecessary;
>
> (d) The Master failed to recognize that the ultimate objective must be to have such a matter tried and ventilated in open court; and
>
> (e) The learned Master erred when she ruled that "there is no hope of success on the claim without the 1st Claimant present. Even if the 1st Claimant is substituted, there would not be sufficient evidence forthcoming to substantiate the claim."

[21] In my view the sole issue in this appeal was whether, in all the circumstances of this case, and bearing in mind the stage of the proceedings, the learned Master in exercising her discretion to refuse the application for the adjournment, and to strike out the appellants' claim against all the respondents erred in the application of the relevant principles, and in so doing her decision was plainly wrong.

[22] At the commencement of the appeal counsel for the appellants indicated that he intended to formally file a notice of withdrawal of appeal against the second respondent, and as a consequence wished leave not to pursue arguments against the

second respondent. We ordered that the second respondent be released from the appeal with costs.

The submissions

[23] Counsel for the appellants submitted that the action was certainly neither frivolous, vexatious nor an abuse of the court's process, and that there were reasonable grounds for bringing the case. Of seminal importance, he said, was the fact that the appellants had pursued the case diligently and been represented in court on all occasions when notified. Counsel insisted that he had filed summons for directions, had issued the letter to the registrar indicating that the pleadings were closed and requesting that the matter be placed on the cause list for trial, and he had received indication from the registrar informing him that the matter had not been reached, all steps made timeously under the old regime. He stated that he had requested a date for the case management conference in the matter, by way of letter 15 December 2005 when the new regime was introduced, under the Civil Procedure Rules 2002 (CPR) and had attended the conference on 27 June 2005, which was the first case management conference that he had been aware of, which had been adjourned, not at his request but as the court file could not be located.

[24] He submitted that he had received the first respondent's application to strike out the claim prior to attending that conference, but he was of the view that on the next adjourned date, namely 30 November 2005, the court would have instead pursued the advancement of the claim, and when it became clear that that was not going to be the

approach of the court, he had requested a seven day adjournment to respond to the affidavit filed by the first respondent, in support of that application, which he said would have caused no prejudice to the first respondent. He maintained that counsel for the first respondent had insisted that he had not attended the first two case management conferences, (5 May and 8 June 2005) and that the adjournment requested on 30 November 2005 was the second time that he was making such an application, neither of which was accurate. Indeed, he vehemently denied the suggestion that he had flouted the rules of court. He submitted however, that those submissions of counsel for the first respondent had adversely influenced the learned Master, and had thus caused her to fall into error.

[25] He submitted that the first respondent's case was that she had paid $160,000.00 for the property, but no proof of payment had been submitted, and this was in circumstances where the appellants were alleging fraud in respect of her acquisition of the said land, and so, he argued, the learned Master should have readily discerned that the case was one which should have been tried in open court. He also submitted that the learned Master had erred when she found that there was no hope for success for the appellants in the action, as such a finding was premature, and the decision, he stated, was based on speculation. There was, he asserted, no law which said that the first appellant must give evidence, and in any event, he stated there were other witnesses available. Additionally, he argued, Mercelena Spaulding had been in the care of both the first and second appellants, and her condition of being blind and unable to walk had been supported by medical evidence.

[26] Counsel maintained that the fact that the documents submitted by the first respondent for registration, were supposed to have been witnessed by the third respondent, at a location some 20 miles away, and who had not yet filed a defence to the allegation that she had not witnessed any such signatures, was sufficient to show that the case of the appellants had a real chance of success. There was, he submitted, a hand writing expert who could assist the court in deciding whether the signatures allegedly affixed to the documents utilized by the first respondent to obtain registration were authentic.

[27] Counsel submitted further that the allegations in the first respondent's affidavit could be shown to be plainly false. She claimed, he submitted, that she had purchased the said land for the amount of $160,000.00, at a time when it was valued at approximately $400,00.00. However, he submitted, within 10 months of the purchase she had borrowed on mortgage in respect of the said land, sums amounting to $420,000.00.

[28] Counsel further submitted that it was the first appellant's case that the third appellant had purchased the said land but that purchase had been stymied as a result of the title having been previously issued to the first respondent, and in those circumstances the learned Master in an effort to deal with cases justly, should have featured that situation in the balance when exercising her discretion. In any event, the application to strike out the claim had been made only by the first respondent, and so the decision of the learned Master to strike out the claim against all the respondents meant that she would have been acting on her own initiative, which required that

certain steps be taken under the CPR, which had not been complied with. He submitted that where other approaches could have been taken, such as the first respondent applying for an "unless order" which was far less draconian, and which the authorities have indicated would have been more appropriate in the circumstances, than in exercising her discretion to strike out the claim against all respondents, the learned Master was clearly wrong. Counsel referred to and relied on the principles enunciated in **Biguzzi v Rank Leisure Plc** [1999] 4 All ER 934, and **International Hotels Jamaica Limited v new Falmouth Resorts Limited** SCCA Nos 56 & 95/2003, delivered 18 November 2005.

[29] Counsel submitted that he had offered costs as a palliative to the respondents for the inconvenience of the adjournment, but that had been ignored, and what had been done by the learned Master instead, he stated, was "in violation of the law with total disregard for natural justice and equity", and would, he said, if allowed to stand, "be clearly unjust enrichment for the first respondent".

[30] Counsel for the first respondent argued that in refusing the further application by the first appellant for the adjournment (although that was later adjusted as being inaccurate), and in striking out the claim, the learned Master had properly exercised her discretion. He set out the basis in law for the court to exercise its discretion to grant an adjournment and referred to **Albon v Naza Motor Trading Sdn Bhd (No. 5)** [2008] 1 WLR 2380). He submitted that this court ought not to interfere with the exercise of the discretion of the judge unless it could be shown that the judge had contravened the relevant principles.

[31] Counsel submitted that the first appellant had certainly been abusing the court's process as the first appellant had died on 13 February 1999, probate had not been granted until 7½ years after her death, and there had been no application to substitute her in the action, until 7 September 2010, when the application had been granted. Indeed the information of the first appellant's death had only come to light at the case management conference on 30 November 2005. Counsel submitted initially, that at the time that the claim was struck out the first appellant was not in a position to prosecute the claim, although later indicated that under the previous rules of court the claim could proceed in spite of the death of a claimant. Counsel also argued that there had been more than sufficient time for an affidavit in response to the first respondent's application to have been filed, yet none had been filed, and there had been no good reason given for having not done so. He submitted that the application for striking out the claim had been properly served on the first appellant's attorneys- at-law prior to the case management conference on 27 June 2005. He also submitted that it was quite appropriate for the Master to dismiss the claim when no witness statements had yet been required or filed. This was so, he argued, as there were no witnesses in this case who could say that the first appellant had not participated in the application to bring the land under the Registration of Titles Act. Miss Gladys Johnson, he submitted, may have been available as a witness in 1995, but there was no indication that she was still available in 2005, which would be prejudicial to the first respondent. He maintained that there was no one to prove the alleged fraud against the first respondent, and so even if the result of dismissing the claim might appear

draconian, it was justifiable in the instant case. It was unreasonable, he stated, that the first respondent had purchased the said land in 1987, and 24 years later she had not yet been able to utilize the property.

[32] Counsel submitted that, in deciding whether to grant the adjournment, the Master had considered the delay in prosecuting the claim and the merits of the claim. Counsel had indicated in his written submissions that the first appellant had failed to attend the case management conferences fixed in the matter, but in oral submissions conceded that there was no proof before the Master that the notices for the said conferences on 5 May and 8 June 2005 had been served on the first appellant's attorney-at-law. He agreed with the Master, however, that the first appellant had filed suit and then had done nothing but ask for an adjournment of the application before the court in November 2005. He also indicated that the Master had acted properly pursuant to rule 26.3 of the CPR, and had not erred in not granting an "unless order" in the circumstances of this case.

[33] Counsel submitted that the Master was correct in stating that there was no hope of success in the claim. He referred to the well known dictum of Lord Wolfe in **Swain v Hillman and another** [2001] 1 All ER 91. He then set out nine bases why in his submission, there was no reasonable prospect of the first appellant succeeding on the claim. These were inter alia:

(i) the first respondent had purchased the said land as a bona fide purchaser for value and was registered on the certificate

of title in respect of the land since 4 June 1987 during the life of the former owner, whereas the first appellant only became a registered proprietor in respect of the said land six years subsequently; there was therefore no fraud disclosed on the part of the first respondent;

(ii) the application to register the land was made by the former owner of the said land and the first appellant had participated in that application by giving a declaration, and the application had been advertised in the national newspaper, which was notice to the world at large, and no one had objected to the registration of the said land including the appellants, so the suit was, he submitted, definitely an abuse of process;

(iii) the first appellant's claim to the said land by way of gift was impossible, in law and fact, as the said land had already been registered in the name of the first respondent, when her application was made, and in any event there was no evidence of a gift having been made to her, as there had been no memorandum in writing or any other evidence established or proved in that regard;

(iv) the first appellant having died there can be no evidence of the alleged fraud.

[34] Counsel also complained that in respect of the handwriting report submitted subsequent to the order striking out the claim, there had been no application before the court at the case management conference in November 2005, asking that the handwriting expert be treated as such. Further, and in any event, he submitted, the said report was equivocal, and could take the matter no further, as the expert had only said that the signatures of the first appellant on the two applications to register the said land were different, and there was now, with the death of the first appellant no one to say which was the right signature, even if accepting that the signatures were really different, as suggested in the report.

[35] Counsel also stated that the first respondent would be prejudiced by the delay which had occurred, contrary to the submissions of counsel for the first appellant, as based on the facts of this case, cross-examination of the first appellant was crucial and in the interests of justice, that could no longer occur.

[36] On the basis of all of the above, counsel submitted that there was no merit in the appeal and it ought to be dismissed with costs.

[37] Counsel for the third respondent accepted that the third respondent had benefitted from the first respondent's application, and informed the court that though the third respondent had been served the originating documents in this suit from as far

back as 3 February 1998, and had not yet filed a defence to the claim, she would be asking for an extension of time to do so if the claim survived. Counsel admitted that she had been present at the case management conferences in May and June 2005.

[38] Counsel for the first appellant, in response, indicated that although the handwriting expert's report had not been before the Master in November 2005, he had indicated to the Master, that he was in the process of obtaining it, but the Master was of the view that it would not have been of any real assistance in the circumstances. However, counsel stated that he had obtained the report within two weeks thereafter, although it could have been obtained sooner, but time was not so much of the essence then, as the claim had already been struck out.

Analysis

[39] The law with regard to the review by this court of the exercise of the discretion of the judge at first instance has been settled for some time. In **Re Jokai Tea Holdings Ltd** [1993] 1 All ER 630 at p. 635, the English Court of Appeal set out the law in this way:

> "It is common ground that the judge was right in treating the matter as being within his discretion. As Mr Chadwick QC, for the bank, has rightly stressed, it follows that this court has no right to intervene and substitute its own decision unless in some way the judge misdirected himself with regard to the principles to be applied or, in exercising his discretion has taken into account matters which he ought not to have done or has failed to take into account matters which he ought to have done, or if the decision of the judge is plainly wrong. Therefore the first, and basic,

> question is whether the judge erred in one or other of those ways in exercising his discretion."

Cooke JA stated specifically in **RBTT Bank Jamaica Limited v YP Seaton and Others** SCCA No 107/2007 delivered 19 December 2008, that he accepted that formulation as correct, and this court has repeatedly endorsed that approach.

It is clear therefore that this court will only interfere with the exercise of the decision of the judge sitting in the court below, if he has not considered relevant material or has considered irrelevant material, or has failed to apply the correct principles, or his decision was just plainly wrong.

[40] The case relied on by counsel for the respondent (**Albon v Naza Motor Trading Sdn Bhd (no 5)**) with regard to the exercise of the discretion of the learned judge to grant an adjournment is helpful, but not entirely applicable as that case was dealing with a trial, and a witness being unable to attend court due to ill-health. At first it was submitted to Lightman J, that the exercise of his discretion should be based on the following principles: whether the evidence of the witness was really necessary for the party's case to be properly presented; whether the witness would be available at the adjourned hearing; and whether the opponent would suffer any injustice. Lightman J held that although those considerations could give guidance, they originated from authorities prior to the Civil Procedure Rules 1998 in the UK, and were not decisive. The exercise of the discretion as to whether to grant an adjournment, he stated, was now governed by the Civil Procedure Rules, and in particular the overriding objective.

The learned judge said that added to the overriding objective the following factors also require consideration, namely:

(i) the allotment to the case of the appropriate share of the court's resources;

(ii) the fact that it was necessary if the court was to deal with cases justly that the parties and their attorneys act justly, responsibly and in accordance with any directions of the court; and

(iii) the court's view of the merits of the applicant's case/ application that he is seeking to adjourn.

The dictum of Peter Gibson LJ in **Yunez Teinaz v London Borough of Wandsworth**, [2002] EWCA Civ 1040 is helpful and insightful, but that case was also dealing with an application for adjournment in a trial in an inferior tribunal, in respect of a witness who was unable to attend the hearing due to ill-health. Peter Gibson LJ made some general observations on the grant of adjournments and having indicated that as is well known, an adjournment is a discretionary matter, said:

> "… some adjournments must be granted if not to do so amounts to a denial of justice. Where the consequences of the refusal of an adjournment are severe, such as where it will lead to the dismissal of the proceedings, the tribunal or court must be particularly careful not to cause an injustice to the litigant seeking an adjournment. As was said by Atkin LJ in **Mawell v Keun** [1928] 1 KB 645 at page 653 on adjournments in ordinary civil actions:

> 'I quite agree the Court of Appeal ought to be very slow indeed to interfere with the discretion of the learned judge on such a question as an adjournment of a trial, and it very seldom does so; but, on the other hand, if it appears that the result of the order made below is to defeat the rights of the parties altogether, and to do that which the Court of Appeal is satisfied would be an injustice to one or other of the parties, then the Court has power to review such an order, and it is, to my mind, its duty to do so.'"

[41] What is clear from an interpretation of the CPR and the perusal of the authorities, is that although the Court of Appeal is slow to interfere with the exercise of the discretion of the single judge in the court below on the grant of an adjournment, if this court is of the view that an injustice may have occurred, this court must review the judge's discretion and if satisfied that the judge is plainly wrong, it is the duty of this court to put it right.

[42] In my view, in this case, it is important to examine the situation that obtained at the case management conference in November 2005. There had been three case management conferences before that. It seems accepted now, by all, that the notices in respect of the case management conferences on 5 May and 8 June 2005, had not been served on the attorney for the appellants. He therefore was not present at those conferences and could not have been expected to have been in attendance. At the 27 June 2005 case management conference the file could not be located. Indeed the note in the minute sheet in respect of this case management conference reads as follows:

" JUDICATURE OF JAMAICA

RECORD OF PROCEEDINGS

AND

MINUTES OF ORDER

BEFORE THE MASTER

IN CHAMBERS

THE 27TH DAY OF June, 2005

SUIT NO CL 1997/E100

BETWEEN Edwards & Ors

AND Valentine v Ors

APPLICATION FOR .....CMC.....

(file not located) ..App to file Defence.....

..out of time.....

Ordered that the 2nd Defendant is permitted to file and serve a Defence within 21 days of the date hereof.

No order as to costs

CMC adjourned to November 30, 2005 at 2:00pm for 2 hours

2nd Defendant's attorney to prepare file and serve order

CLERK..... MASTER LINDO

APPEARANCES:

.....Mr Burchell Brown.....
FOR CLAIMANT(S)/APPLICANT(S)

..... Mr Ian Wilkinson for 1st Defendant.....
FOR DEFENDANT(S)/RESPONDENT(S)

Miss Candice Rochester instructed by DSP for the 2nd respondent

Mr John Graham instructed by JG Graham & Co for 3rd defendant

2nd claimant and 3rd Defendant present."

[43] Of note, there is no mention of any application for an adjournment made by counsel for the appellants. Of even more importance, is the fact that there is no mention at all of the first respondent's application to strike out the appellants' claim. That application had been filed and served on the appellants' attorney on 20 June 2005 and so pursuant to the CPR, as seven clear days notice of an application is generally required (rules 11.11(1) (b) and 3.2 (2)), the application, contrary to what counsel for the first respondent was putting forward, would not have been "properly served", and could not have been heard on 27 June 2005, if there had been objection, without the court's intervention, and with good reason. It had been short served, and therefore technically was not before the court. I do not know if this is why there is no mention on the minute sheet on 27 June 2005, of the application being adjourned to 30 November 2005. That being the case, if the application was not adjourned to 30 November 2005, then the question must arise, ought the application to have been served within the time required by the rules for the next case management conference, which was 30 November 2005? We were told that the application was not re-served. Had that been done, it certainly would have ensured that counsel for the appellants would have known that the application was going to be pursued on that date.

[44] On 30 November 2005, however, the application not having been adjourned to, or re-served for that date, the Master was required to consider and balance all the facts before her. It is also not in dispute that no affidavit in response to the application had

been filed by the appellants, and that an application was made for an adjournment, to permit the appellants to do so. The affidavit could only have been considered to be five months late, if the application had been properly served and adjourned to the next case management date. The adjournment was being requested for a period of seven days, and contrary to statements made by counsel for the first respondent initially, this was the first request for an adjournment, being made on the appellants' behalf. This was not a trial date. There had not been dates fixed for the hearing of the application, which would have been wasted.

[45] The Master, in my view, could not accurately say that the appellants had filed suit, and then done nothing save asked for the adjournment. The appellants had filed suit on 16 December 1997, accompanied by the statement of claim, had given consent for the filing of pleadings out of time, (to the first respondent), had filed summons for directions, informed the registrar that the pleadings had been closed, obtained a trial date, (through attendance no doubt at the then regularly held date fixing sessions) although the matter had not been reached, all under the old regime. Then counsel for the appellants had made application for the case management conference and obtained the same under the new regime.

[46] So, the question must arise, what was the basis of the application to strike out the claim which was to be heard at the case management conference on 27 June 2005. There was at that stage no non-compliance with the rules, in respect of the attendance at the two case management conferences, the case management conference had been requested in time in compliance with the rules, although a date for the conference had

not been given until 2005. It is true that there should have been some follow up on the request for the date from the registrar of the Supreme Court, and there was no evidence that that had been done, but suffice it to say, on 27 June 2005, there did not appear to have been any basis for the first respondent to have filed an application to strike out the claim in respect of paragraph 3 of the notice of application, filed 20 June 2005.

[47] With regard to paragraphs 1 and 2 in the said notice, even if Counsel for the first respondent was of the view that the matter could not succeed, and I make no comment on that at this stage of the matter, what was before the court on the pleadings was that there were two different certificates of title in respect of the same land, having been brought under the Registration of Titles Act by two different persons, six years apart. The registered proprietor on the subsequently issued title, (the first appellant) was claiming that the earlier registration, (the first respondent) had been obtained by fraud, in that the signatures on that application were claimed to be forged, and the alleged attestation to the same, dishonest. The first respondent was claiming that she lawfully obtained the said land through purchase, and the first appellant was claiming the same by way of a gift, both had not yet supplied any specific documentation in support of their respective allegations. The appellants' claim does not appear prima facie to be frivolous or vexatious, or that there was no basis for bringing the claim. Even if, in the circumstances the second respondent could not be held liable for the situation which obtained, she certainly would have some explaining to do, as a potential witness for either party, and the third respondent is a proper party to the

action, who had to date not filed a defence answering the serious allegations made against her.

[48] Section 144 of the Civil Procedure Code (CPC) indicates that the cause or matter shall not become abated by reason of the marriage, death or bankruptcy of the parties, and if the cause of action survives, judgment can be entered notwithstanding the death of a party. Sections 145-6 permit the addition of a party on whom the estate devolved, and for the continuation of the action until the person can be so added. This action having commenced in 1997, the CPC would have been applicable up until the CPR came into effect in 2003. The death of the first appellant in 1998 would not have prevented the action continuing until her estate could be substituted. In any event there are two other appellants and in November 2005, the third respondent had not yet filed her defence. So the issues between the parties were clear, and the fact that fraud had been raised required a determination of the matters in controversy between them in open court. There was delay in obtaining the substitution of the first appellant but under the CPC it appears that that could have been done at any time, although that is not the case under the CPR. Under the CPR where a party to the proceedings dies, the court can give directions to enable the proceedings to be carried on. Rule 21.8 of the CPR permits a representative to be appointed by the court with or without an application. It is true that once the claimant dies, his or her personal representative should apply to be substituted in the claim, and if they do not apply the defendant can apply to have the claim struck out, but notice must be given to the personal representatives of the claimant, if any or such other persons as the court may

direct (21.9 (1) and (2)). Additionally if the court had made an order under this rule it would have had to say that if the personal representative does not apply within the time specified for substitution, or for an order for directions under rule 21.8, then the claim can be struck out (21.9(3)). The rules also allow however, that on a hearing for the claim to be struck out under rule 21.9, the court can give directions under 21.8. Suffice it to say the application to strike out the claim was not made under these provisions of the CPR, but if that had been the case, the court would have had to follow those procedures.

[49] I am unclear as to why the learned Master was able to say, without any orders having been made for the provision of witness statements, that there was no hope of success in the claim as the first appellant had died, and she must give evidence. Based on the order we have made in this matter, the action continues to trial, so I intend to say as little as possible about the issues on the pleadings, the statements to date, declarations and other documentary material, which were before us. But I will only say that there appear to be other persons who may be able to attest to the relevant signatures on the applications, to that of Mercelina Spaulding, and to give evidence relative to the question of the attestation of the signatures on the applications. The third respondent is still available and desirous of participating in the trial. She will no doubt be called on to speak to the attestation of the documents allegedly done by her, and be tested on her testimony as to their authenticity. The learned Master's position on this, appears therefore, in my view, to be clearly wrong.

[50] I will say even less about the handwriting expert's report as this was not before the Master, only promised, save to say that even if the results are equivocal, this is a civil case, and although the allegations relate to fraud, at the end of the day, it ought still to be a matter for the tribunal of fact to decide on a balance of probabilities, whether the appellants have proved their case.

[51] With regard to Part 26 of the CPR, I agree with counsel for the appellants that as the second and third appellants made no application to the court to strike out the claim and the application made by the first respondent was not made on their behalf as well, the court in considering whether to strike out the claim against all the respondents would have been acting on its own initiative, in which case, the court is required to give the appellants, the persons likely to be affected, a reasonable opportunity to make representations, orally, in writing or telephonically, or by such other means as the court thinks reasonable. The parties likely to be affected (the appellants in this case) are entitled to seven days notice of any action by the court to act on its own initiative, and also if the court intends to hold a hearing to decide whether to do so (rule 26.2 (1) - (4)). That would therefore have been another basis on which the court should have entertained the adjournment for seven days in order to give the appellants an opportunity to respond as they wished to do by way of affidavit.

[52] In my view, rule 26.3 of the CPR would not have been applicable in the circumstances as there was no indication that there had been non-compliance with any rules, save the appointment of a representative to continue the matter, which was not one of the bases for the application to strike the claim. The matter could not be

considered an abuse of the process of the court, nor could one say that the statement of case discloses no reasonable grounds for bringing the claim. Equally, rule 26.4 could not have been applicable. There was no basis on 27 June 2005 or 30 November 2005, on which the first respondent could have asked for an "unless order", save in the circumstances set out in paragraph [48] herein, when as indicated, notice would have been required. Indeed the second appellant as executor and personal representative of the first appellant has been substituted for her, by order of Dukharan JA on 7 September 2010.

[53] In this case, therefore, based on the facts disclosed, the authorities cited, and in keeping with the overriding objective to deal with cases justly, and to use the court's resources efficiently, the adjournment ought to have been granted, and in failing to do so the learned Master erred, and we made the orders as set out in paragraph [4] herein. Had the adjournment been granted, perhaps the case could have been disposed of by now, instead the matter was struck out, has been heard on appeal, has been restored to the court's list and is yet to be determined by the court below.

[54] As indicated earlier, the first respondent requested an opportunity to address the court specifically on the question of the costs attendant with the disposal of the appeal, which was granted.

[55] Counsel for the first respondent submitted that the award of costs is always in the discretion of the court, and recognized that costs usually follow the event, so that a successful party to the appeal and the application would generally be entitled to their

costs. Counsel argued however that there are sometimes exceptional circumstances when that does not occur, and submitted that exceptional circumstances exist in the instant case. He rehearsed what he considered to be the dilatory approach to the litigation which had been adopted by the appellants, by going through the chronology of events since the inception of the matter in 1997, (but which unfortunately still contained the errors of the appellants failing to attend the two case management conferences and the application for the adjournment in June 2005). He referred the court to rules 64.6 (3) and 64.6 (4) (a) (e) (i) of the CPR, dealing with what the court should consider when deciding to make an award as to costs, in this case particularly the conduct of the appellants throughout the case, thus far, and the manner in which they had pursued their case. He submitted that the lethargic and inefficient approach they had adopted, should persuade the courts to award costs of the application below and the appeal to the first respondent, or alternatively, the costs below should be the first respondent's and the costs in the appeal should be costs in the claim.

[56] Counsel for the appellants maintained that the order made on 29 July 2011 awarding costs to the appellants should remain. He submitted that counsel for the first respondent had refused any overtures or suggestions to settle the appeal, even in the light of what would be the obvious result, namely that the matter would be restored to the cause list. The first respondent should bear the losses of counsel's adamant and unrelenting position, he argued, as he was warned of the increased costs likely to be associated with his dogmatic stance.

[57] It is well known and accepted that the award of costs is discretionary. In my view, no useful purpose would be served by rehashing the history of this case. However in light of what I have given as my reasons for arriving at our decision to set aside the order of the learned Master, it is clear that in striking out the claim the Master acted in error. The appellants were therefore entitled to their costs. Having also been successful on appeal, in my view, costs should follow the event. I see no reason therefore to disturb the order made on 29 July 2011 in respect of costs. The appellants should have their costs both here and below.

PANTON P

ORDER

The order made on 29 July 2011 is hereby amended by deleting number 4 thereof and substituting the following:

> "4. Costs both here and in the court below to the appellants to be agreed or taxed."