[2010] JMCA Civ 46

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE PANTON P
THE HON MRS JUSTICE HARRIS JA
THE HON MR JUSTICE DUKHARAN JA

SUPREME COURT CIVIL APPEAL NO 31/2007

BETWEEN	HARLEY CORPORATION GUARANTEE INVESTMENT COMPANY LIMITED	APPELLANT
AND	ESTATE RUDOLPH DALEY	1ST RESPONDENT
AND	ETAL WALTERS	2ND RESPONDENT
AND	RBTT BANK JAMAICA LIMITED	3RD RESPONDENT

SUPREME COURT CIVIL APPEAL NO 44/2007

BETWEEN	RBTT BANK JAMAICA LIMITED	APPELLANT
AND	ESTATE RUDOLPH DALEY	1ST RESPONDENT
AND	ETAL WALTERS	2ND RESPONDENT
AND	HARLEY CORPORATION GUARANTEE INVESTMENT COMPANY LIMITED	3RD RESPONDENT

Dr Lloyd Barnett, Keith Bishop & Miss Kerry-Ann Ebanks instructed by Bishop & Fullerton for Harley Corporation Guarantee Investment Co Ltd

David Batts & Miss Terry-Ann Brown instructed by Livingston Alexander & Levy for Estate Rudolph Daley

Mrs Nesta-Claire Smith-Hunter & Miss Marsha Smith instructed by Ernest A. Smith & Company for Etal Walters

Vincent Nelson, QC & Christopher Kelman instructed by Myers Fletcher & Gordon for RBTT Bank Jamaica Limited

9, 10, 11 June 2009; 25 September 2009 and 20 December 2010

PANTON, P

[1] I have read in draft the judgment of my sister Harris, JA and agree with her reasoning and conclusions. There is nothing further that I wish to add.

HARRIS, JA

[2] These are consolidated appeals in which the RBTT Bank Jamaica Limited ("The Bank") and Harley Corporation Guarantee Investment Company Limited appealed against the order of Sykes J in which he delivered judgment in favour of the 2nd respondent. On 25 September 2009 we allowed the appeals and made the following orders:

> "Orders of Sykes J. set aside. It is hereby declared that Harley Corporation Guarantee Investment Company Limited is the legal and beneficial owner of all that parcel of land registered at Volume 1022 Folio 570 and is entitled to possession thereof.
>
> The matter is remitted to the Supreme Court for assessment of mesne profits due from the respondent Etal Walters to Harley Corporation Guarantee Investment Company Limited.

> Costs of the appeal and in the court below to the appellant Harley Corporation Guarantee Investment Company Limited."

It is further ordered that Daley's claim is remitted to the Supreme Court for assessment of damages against RBTT Bank Jamaica Limited.

[3] We promised to put our reasons in writing and in obedience to that promise, we now do so.

[4] The 1st respondent, Rudolph Daley, now deceased, was the owner of a parcel of land at Exchange in the parish of Saint Ann registered at Volume 1022 Folio 570. By and with his consent, the bank, granted a loan to one Raymond Martin which was guaranteed by way of a mortgage on the security of the property. The mortgage fell into arrears. On 12 December 1992, Daley entered into a contract of sale with the 2nd respondent Etal Walters for the sale of the property for the sum of $135,000.00. Walters paid an initial deposit of $100,000.00 on the purchase price and was put into possession. He subsequently constructed a dwelling house and a shop on the land.

[5] A statutory notice dated 25 January 1994 demanding payment of the mortgage, addressed to Daley c/o Happy Holiday Tour & Car Rental, 3 Rennie Road, Ocho Rios, was issued by the bank in the exercise of its powers of sale. It appears that sometime after the notice was issued, Daley requested a further

deposit of $35,000.00 from Walters which was paid and a receipt dated 3 June 1994 was issued by him to Walters. On 10 October 1994 Daley made a payment of $30,000.00 to the bank on account of the mortgage (loan account 5003549). On 10 January, 1995 a payment of $35,000.00 was made by Daley to the bank which is evidenced by a receipt showing that the payment was made with respect to "(1) Loan A/C 5003549 Raymond Martin $26, 292.50 (2) Fees re auction sale in connection with loan # 5003549 for $8707.50".

[6] It was Walters' evidence that Daley and himself attended the bank, when he, Walters, paid the sum of $35,000.00 on account of the mortgage and they informed the loans officer, Mrs Joy Traille, that they had entered into the agreement for the sale of the land. He asserted that she gave them an assurance that the certificate of title would be released to Daley's attorneys at law to facilitate a transfer of the property to Walters and that she also stated that she would instruct the bank's lawyers to discharge the mortgage. Mrs Traille refuted that she held discussions with Walters and Daley at a joint meeting about the sale or that Walters had paid $35,000.00 towards the mortgage or that she had given any assurances to them. She stated that Walters attended the bank and told her of the agreement and that a man had told him that he had purchased the land from the bank.

[7] On 14 December 1994 the bank advertised the property for sale by public auction as being land with foundation building. At the time of the agreement

between Daley and Walters, no building was on the land. Only an incomplete foundation was on it. On 22 December 1994 the public auction was held. However, no bids were received. The property was subsequently sold to the 3rd respondent, Harley Corporation Guarantee Investment Company Limited ("Harley Corporation") by private treaty for the sum of $200,000.00 and was transferred to it on 18 March 1995. Following the sale the net proceeds of $52,961.14 was remitted to Daley by the bank.

[8] On 30 April 1995 Harley Corporation served a notice to quit on Walters to vacate the property. His failure so to do, impelled it to commence on 15 May 1996, an action for recovery of possession of the property by way of Suit No. C.L. H 094 of 1996.

[9] On 13 September 1995, by Suit No. C.L. D162 of 1995, Daley commenced proceedings against the bank, claiming the following:

> 1. Damages for Negligence and/or for Breach of Contract and/or Breach of Fiduciary Duty and/or Breach of Statutory Duty in that the Defendant by itself, its servants and/or agents purported to sell the property of the Plaintiff at a gross undervalue and at a time when it knew or ought to have known that the Plaintiff had already sold same and at a time also when the Plaintiff was servicing his Mortgage with the Defendant.
>
> 2. Further or in the alternative an account of the alleged or any sum due and owing under and by virtue of instrument of Mortgage dated the 29th day of July, 1991 and made between the Plaintiff and the Defendant.

3. A Declaration that the Plaintiff is entitled to an indemnity and/or contribution from the Defendant with respect to any or any alleged claim by Mr. and Mrs. Etal Walters of Exchange in the Parish of St. Ann with respect to their purchase of the said land from the Plaintiff.

4. Damages.

5. Costs.

6. Interest on such Damages as may be awarded.

7. Further or other Relief."

[10] On 22 February 1996, by Suit No. C.L. W 55 of 1996 Walters brought an action against Daley, the bank and Harley Corporation, seeking a declaration that he was the beneficial owner of the property which forms the subject matter of the dispute. On 17 October 1997, by Suit No. C.L. W 369 of 1997 Walters again initiated proceedings seeking a declaration in the same terms as sought in Suit No. C.L. W 55 of 1996, but the claim in the latter suit was against the Daley and the bank only.

[11] Defences were filed in respect of each suit. All four suits were consolidated. On 30 January 2007 the learned trial judge made the following orders:

"IT IS HEREBY ORDERED as follows:-

1. That the sale in respect of All that parcel of land registered at Volume 1022 Folio 570 of the Register Book of Titles and being part of

Exchange in the parish of Saint Ann by Power of Sale under Mortgage No. 654674 to Harley Corporation Guarantee Trust Company Limited be and is hereby set aside.

2. The Registrar of Titles is directed to remove the name of Harley Corporation Guarantee Trust Company Limited from Certificate of Title registered at Volume 1022 Folio 570 of the Register Book of Titles of Jamaica.

3. It is declared that Etal Walters is the legal and beneficial owner of All that parcel of land registered at Volume 1022 Folio 570 of the Register Book of Titles of Jamaica.

4. The declaration in paragraph three only comes into effect on payment in full of the balance of thirty five thousand dollars (JA$35,000.00) by Etal Walters to the Estate of Rudolph Daley.

5. The sum of Thirty-five Thousand Dollars ($35,000.00) and/or any balance remaining after payment to the mortgagee pursuant to paragraph 10 below, attracts interest at the rate of 33% per annum and is to be paid to RBTT Bank Jamaica Limited and Harley Corporation Guarantee Trust Company Limited jointly and severally to Estate Rudolph Daley from the 6th day of March, 1995 to the date of payment.

6. That All that parcel of land registered at Volume 1022 Folio 570 of the Register Book of Titles and being part of Exchange in the parish of Saint Ann be transferred and registered in the name of Etal Walters and/or his nominee only after Etal Walters has paid the balance of thirty-five thousand dollars (JA$35,000.00) to the Estate of Rudolph Daley.

7. The Estate of Rudolph Daley and Etal Walters to pay such costs including taxes, duties, registration fee as they would have paid had the property

been transferred in 1995 and any increase in costs of the transfer including taxes, duties, registration fee and any increase, or adjustments since 1995 to be borne by the RBTT Bank Jamaica Limited and Harley Corporation Guarantee Trust Company Limited jointly and severally.

8. The purchase price of Two Hundred Thousand Dollars ($200,000.00) which was paid by Harley Corporation Guarantee Trust Company Limited is to be refunded to it by RBTT Bank Jamaica Limited.

9. It is declared that RBTT Bank Jamaica Limited is to indemnify Estate, Rudolph Daley, dec'd in respect of any loss or damage suffered by Etal Walters with respect to his purchase of the aforesaid land from Rudolph Daley, deceased.

10. The Estate of Rudolph Daley to pay the balance due and owing to RBTT pursuant to the mortgage/guarantee as at February 1995. The said amount to be agreed and if not agreed, the Registrar of the Supreme Court is to take on (sic) account and certify the amount due to the bank as at February 1, 1995.

11. Upon payment to RBTT of the balance agreed or the amount certified in paragraph 10 above, RBTT Bank Jamaica Limited is to forthwith execute a Discharge of Mortgage in respect of Mortgage No. 654674 endorsed on Certificate of Title registered at Volume 1022 Folio 570 of the Register Book of Titles.

12. Harley Corporation Guarantee Trust Company Limited's claim in Claim No. C.L. H-094 of 1996 for recovery of possession and mesne profits is dismissed with costs to Etal Walters to be agreed or taxed.

13. Estate Rudolph Daley, dec'd is to recover its costs from RBTT Bank Jamaica Limited in Claim No. C.L.

D-162 of 1995 to be taxed, if not agreed.

14. Etal Walters is awarded costs in Claim No. C.L. W-055 of 1996 from RBTT Bank Jamaica Limited and Harley Corporation Guarantee Trust Company Limited jointly and severally to be taxed, if not agreed and no costs in Claim No. C.L. W-369 of 1997.

15. In the event that any party does not forthwith comply with any provisions of this Order or Judgment the Registrar of the Supreme Court be and is hereby appointed to execute such documentation or other instrument required to be executed by that party in order to comply with the provisions of this Order and Judgment and the Registrar of Titles shall issue such Certificate of Title, Discharge of Mortgage or other relevant document and/or issue new certificates or otherwise as necessary pursuant to the Registrar's powers in that behalf under and by virtue of the Registration of Titles Act.

16. Liberty to apply."

[12] The grounds of appeal of RBTT are:

"[a] Having correctly found that the sale by the Respondent Rudolph Daley to Respondent Etal Walters was in clear breach of the mortgage between Daley and the Appellant, the learned judge erred when he proceeded to find that there was no evidence that Walters knew of this term of the mortgage, failing to appreciate that the whole scheme of the **Registration of Titles Act** was the provision of a system for the public registration of interests in land which once registered constituted notice to the world.

[b] The learned trial judge fell into error in having no or insufficient regard to the provisions of the Mortgage which prohibited a lease or demise of

the mortgaged premises by Rudolph Daley without the written consent of the Appellant first had and obtained and conversely had too much regard to the alleged oral discussions between Joy Traille, Rudolph Daley and Etal Walters.

[c] Having found as a matter of law that any document relied on as a memorandum in writing for the purposes of the **Statute of Frauds** must contain the essential terms of the contract, the learned trial judge proceeded to accept and rely on a receipt dated December 12, 1992 issued by the Respondents (sic) Daley to Walters which did not contain the essential terms of the alleged contract between Messrs Daley and Walters. The learned trial judge proceeded at the same time to find that a receipt dated January 5th, 1995 issued by the Appellant to Harley Corporation was insufficient to satisfy the **Statute of Frauds** since it did not contain all the essential terms of the sale.

[d] The learned trial judge wrongly found that the doctrine of part performance could not be prayed in aid by Harley in respect of whether there was a concluded sale agreement between the Appellant and Harley of February 3, 1995 when by letter of that date the Appellant advised Mr. Daley's Attorneys that the mortgaged property had been sold. This was based on the trial judge's erroneous finding that Harley had not done any act capable to (sic) meeting the requirements of the doctrine, despite Harley having concluded an oral contract and having paid a deposit on the purchase price, contrary to established principles that payment of a deposit by itself can constitute a sufficient act of part performance.

[e] The learned trial judge erred in finding that the Mortgage (which pursuant to the provisions of the **Registration of Titles Act** was required to be in writing), was capable of being varied by alleged

oral discussions between the Respondents (sic) Daley and Walters and Joy Traille contrary to the rule in **Wilmott v. Barber**

[f] The learned judge was also wrong in finding that the parol evidence rule did not apply even though the evidence relied upon by both the estate of Mr. Daley and Mr. Walters did not fall into any of the known exceptions to the parol evidence rule.

[g] The learned trial judge clearly failed to appreciate the significance of and therefore disregarded the requirements of the parol evidence rule which required him to disregard the evidence of alleged oral discussions between Daley, Walters and Joy Traille and to find instead upon a proper assessment of the evidence that Daley's breach of the mortgage meant that he lacked capacity to pass any title or interest to Walters.

(h) The learned judge was also wrong in finding that the well settled rule of pleading that fraud must be specifically pleaded was met in this case.

[i] The learned judge fell into further error by imputing as fraud Harley's knowledge of the Walters' unregistered interest in the mortgaged property, contrary to the provisions of the **Registration of Titles Act.**

[j] The learned judge failed to appreciate that Harley as purchaser from the Appellant, was under no duty to bring to the Appellant's attention the enhanced value of the mortgaged property and that such failure could not and did not constitute fraud on his part.

[k] The learned judge fell into error in awarding judgment against the Appellant in favour of Etal Walters and should have found instead that based on the admission that the mortgaged

property was sold at an undervalue, any remedy to which the estate of Daley became entitled was limited only to damages and in respect of Etal Walters' claims, any relief to which he was entitled could only properly be claimed against the Estate of Rudolph Daley.

[l] The judgment of the learned trial judge was unreasonable and went against the weight of the evidence in that:

(i) the learned trial judge wrongly found that Etal and Veronica Walters and Rudolph Daley were witnesses of truth when material aspects of their evidence differed;

(ii) their evidence was at variance with the documentary evidence, to wit the provisions of the Mortgage whereby the Respondent Mortgagor Rudolph Daley covenanted not to lease or demise the mortgaged premises without the written consent of the Appellant first had and obtained;

(iii) by his own admission Etal Walters failed to lodge a caveat to protect his alleged unregistered interest in the mortgaged premises. The learned trial judge however, had no regard or paid insufficient regard to this admission and should have found instead that this failure constituted negligence on the part of Etal Walters and made him the author of his own misfortune;

(iv) the learned trial judge attached too much weight to the evidence whether Joy Traille was aware of the sale to Etal Walters by Rudolph Daley and in doing so failed to appreciate that in the context of the mortgage clause prohibiting lease or demise by Rudolph Daley without the Appellant's written consent first had and

obtained, evidence of any discussion with Joy Traille was irrelevant and in fact inadmissible by virtue of the parol evidence rule;

(v) the learned trial judge failed to consider whether in all the circumstances a court of Equity should aid Etal Walters and had he done so, upon a proper assessment of the evidence he would have concluded that a court of Equity should not."

[13] The grounds of appeal of Harley Corporation are as follows:

"(1) The learned trial Judge erred and misdirected himself on the facts holding that because there was a complete and occupied house it was evident to Mr. Harley that the property was purchased and occupied by someone who was not the registered proprietor;

(2) The learned trial Judge erred and misdirected himself on the facts by inferring that knowledge that Mr. Daley had been the registered owner implied that Mr. Harley knew of the prior sale by him of the property;

(3) The learned trial Judge erred and misdirected himself on the facts by holding that an honest purchaser would have reported his observations to the Bank or made further inquiries;

(4) The learned trial Judge erred and misdirected himself on the facts in holding that the Appellant was not a bona fide purchaser for value;

(5) The learned trial Judge erred and misdirected himself in holding that in the circumstances a finding of fraud was inevitable.

(6) The learned trial Judge erred in law in holding that the Bank's statement that it had sold the

property was legally incorrect, since the unenforceability by action of an agreement for sale of land by reason of the absence of writing to satisfy the Statute of Frauds does not mean that there is no contract nor does the ability of a party to obtain specific performance have any such legal consequence.

(7) The learned trial Judge erred in law in holding that there had been no contract of sale to the Appellant, although the effect of non-compliance with the statutory requirements is procedural and not substantive, only the parties to the contract can rely on the non-compliance by an express pleading to that effect and the contract can in any event be used as a defence.

(8) The learned trial Judge erred in law in focusing on whether or not specific performance could have been obtained by the Appellant as that question had become irrelevant and could not arise since the contract was completed and the title registered in the name of the Appellant.

(9) The learned trial Judge erred in law in failing to recognize that the only interest which Mr. and Mrs. Walters had acquired was equitable and they had failed to notify their interest by lodging a caveat thereby acting negligently and such an interest could not override the Appellant's legal interest.

(10) The learned trial Judge erred in law in holding that an allegation by a person that they had purchased land and built a dwelling-house on it which they occupied implied that a purchaser should question whether the registered mortgagee could exercise its contractual or statutory power of sale or assume that the representations of the occupants are accurate or that even if they had an interest that that could have prevented the mortgagee from exercising its power of sale.

(11) The learned trial Judge erred in law in failing to hold that fraud should be specifically pleaded but instead erroneously treated the "curtailment" of the doctrine of notice under the Registration of Titles Act as modifying the manner in which fraud should be raised.

(12) The learned trial Judge erred in law in assuming that there was a duty on the Appellants to investigate the allegations of Mr. and Mrs. Morris although the Appellant had no reason to doubt that the Bank as registered mortgagee had the legal right to exercise the power of sale under its mortgage and this right was not subject to any equitable interests that Mr. & Mrs. Morris might have had.

(13) The learned trial Judge erred in law in holding that knowledge of a third party claim requires a purchaser from a mortgagee exercising his power of sale to refrain from proceeding with the purchase and that if he does he is guilty of fraud.

(14) The learned trial Judge erred in law in holding that the Appellant was guilty of contrived ignorance or wilful blindness as the circumstances were not such as required it to undertake any inquiries.

(15) The learned trial Judge erred in law in failing to hold that a purchaser from a mortgagee exercising its power of sale is not concerned as to the propriety or regularity of the sale and any person damnified by an improper exercise of the power of sale is by virtue of section 106 of the Registration of Titles Act confined to his remedy in damages."

[14] The central issues arising in this appeal are:

1. Whether a valid and enforceable agreement between the bank and Harley Corporation is in

existence.

2. Whether the doctrine of estoppel arises.

3. Whether fraud on the part of Harley Corporation was properly before the learned trial judge.

The agreement between the bank and Harley Corporation

[15] Mr Nelson QC submitted that the learned trial judge wrongly attributed great weight to the evidence of Daley, Walters and Traille, failing to recognize that the bank's mortgage proscribes the very transaction upon which Walters' cause of action was founded. The learned trial judge failed to appreciate that Daley, having sold the property in breach of the mortgage agreement, could not have entered into an enforceable agreement with Walters, he argued. He further argued that the learned trial judge, rejected **Steadman v Steadman** [1976] AC 536, and wrongly held that there was no enforceable agreement for sale between the bank and Harley Corporation. The learned trial judge, he argued, erroneously found that the receipt of 3 January 1994 did not contain all the essential terms of the agreement between Harley Corporation and the bank yet found that the receipt from Daley to Walters contained all the essential terms, notwithstanding both receipts contained identical terms. He submitted that the Registration of Titles Act provides a system for public registration of interest in land which, upon registration, constitutes notice to the world. The

bank's mortgage, he argued, was duly registered under the Act and therefore Walters would have been fixed with notice of the mortgage.

[16] It was Dr Barnett's submission, that the existence of a contract between the bank and Harley Corporation was never an issue. The assault on the contract was launched by Walters on the ground that Harley was not a bona fide purchaser for value for the reason that he was aware of his [Walters'] prior purchase of the property. He further argued that the learned trial judge in dealing with the contract between Harley Corporation and the bank wrongly held that the Statute of Frauds had not been satisfied. To rely on the statute, it must be pleaded and this was not done, he argued. In any event, the bank did not place reliance on the statute and consequently, any question as to the applicability of the Statute of Frauds would not arise, he contended. The fact that a contract is not made in compliance with the Statute of Frauds does not render it void, he argued, but rather unenforceable by action and as a result it would have been unnecessary for Harley Corporation to place reliance on the statute in order to affirm ownership. The agreement for sale between Harley Corporation and the bank contains all the essential elements which satisfies the statute, he submitted.

[17] A perusal of the pleading discloses that the question of a valid contract between the bank and Harley Corporation was never an issue.

Despite this, the learned trial judge embarked on an extensive analysis as to whether a binding contract between these parties was in place and found that there was none. At paragraphs 17 and 18 of his judgment, he said:-

> "17. There is one further point that I need to deal with at this juncture. The agreement for sale between the bank and Harley Corporation was executed on the date stated, namely, February 20, 1995. Before the execution of this agreement, Mr. Daley's attorneys at law, Abendana and Abendana, by letter date January 23, 1995, to the manager of Jamaica Citizens Bank Ltd., Ocho Rios P.O., St. Ann, asked whether the property had been sold. The bank responded in a letter dated February 3, 1995, indicating that the property had been sold by private treaty. This response by the bank was legally incorrect. As a matter of language it is difficult to describe something as being sold if there is no enforceable contract in existence between the parties. There was no sale agreement and the company could not have received an order for specific performance based on the doctrine of part performance. On January 3, 1995, when the deposit was paid there was no **enforceable** contract for the sale of the land to the company. The evidence regarding the sale by private treaty, is, that on January 3, 1995, the company paid a deposit, and received a receipt, which, in its terms, was insufficient to constitute a sufficient memorandum in writing under the Statute of Frauds, because the receipt did not have all the necessary information, and specifically, it did not contain the purchase price. Further the executed sale agreement had as a special condition precedent that the agreement for sale shall not come into effect until it was signed by both vendor and purchaser. Mr. Morris wanted to suggest that at the time the deposit was paid by

Harley Corporation on January 3, 1995, the receipt was a sufficient memorandum in writing, and therefore a contract capable of being ordered to be specifically performed was in existence. This was an attempt to suggest that the company had a proprietary interest that was enforceable by court action. The ultimate goal was to suggest that the company and not the Walters had a proprietary interest in the land by the time of the 1995 sale by the bank to the company. That submission is not consistent with known authority. It is too well established that any document relied on as a sufficient memorandum in writing for the purposes of the Statute of Frauds must contain the essential terms of the contract (see ***Patrick Grant v Laurel Maloney*** (1989) 26 J.L.R. 240); ***McLean v Espuet*** (1991) 28 J.L.R. 92; ***Tiverton Estates v Wearwell*** [1975] Ch 146). It therefore means that absent (sic) a memorandum in writing the parties are treated as if the contract is purely oral. One would have to see what acts of part performance were done to see if those acts could ground an order of specific performance.

18. The doctrine of part performance could not be prayed in aid because the company had not done any act capable of meeting the demands of ***Maddison v Alderson*** 8 App. Cas 467. This is so despite the efforts of the House of Lords in ***Steadman v Steadman*** [1976] A.C. 536 to suggest that the doctrine is not a stringent as ***Maddison*** states. ***Steadman v Steadman*** is at odds with the defining case of ***Maddison v Alderson***. The Law Lords forming in ***Steadman v Steadman*** the majority failed to demonstrate the unsoundness of the major premise of ***Maddison v Alderson*** which was that, if acts such as payment of money alone or some other equivocal act was admitted as a sufficient act of part performance, there would be, in effect, judicial repeal of the Statute of Frauds. They did not show, by compelling reason, that Lord Selbourne's

> historical analysis was incorrect, lacked internal coherence or that the relationship between the Statute of Frauds and the doctrine of part performance, as explained in ***Maddison***, was based on a fundamental misunderstanding of the statute…"

He went on to say at paragraph 21, inter alia:

> "…If there is possession coupled with expenditure of funds then the acts of part performance are virtually irrebutable. So although the company paid a deposit on the property on January 3, 1995, that payment was not a sufficient act of part performance."

[18] In his findings, it can be readily observed that the learned trial judge placed enormous reliance on the Statute of Frauds. He correctly found that, for the purpose of the statute, any document upon which reliance is placed as a sufficient memorandum in writing must contain essential terms of a contract. However, in finding that there was no enforceable contract between the bank and Harley Corporation, he failed to invoke a cardinal rule of pleadings in that, in order to be relied upon, the Statute of Fraud must be pleaded. Nowhere in the pleadings is it disclosed that the statute had been pleaded. Therefore, the learned trial judge could not have properly acted upon it. In light of his findings, we think it appropriate to deal with the statute and its effect.

[19] Section 4 of the statute provides:

> "No action shall be brought whereby to charge … the defendant … upon any contract or sale of lands, tenements or heriditaments, or any interest in or concerning them … unless the agreement upon which such action shall be brought, or some memorandum, or note thereof, shall be in writing and signed by the party to be charged therewith or some other person thereunto by him lawfully authorized."

The statute does not render invalid a contract which does not conform with its provisions. This has been definitively pronounced by Lord Blackburn in **Maddison v Alderson** (1883) 8 App. Cas. 467, when he said, at page 488:

> "I think that it is now finally settled that the Statute of Frauds both the 4th and 17th sections is not to render the contracts within them void still less illegal but is to render the kind of evidence required indispensable when it is sought to enforce the contract."

[20] As regards compliance with the statute, the foregoing illustrates that there is a distinction between the validity and the enforceability of a contract. As shown in **Maddison v Alderson**, a contract may still be valid notwithstanding its noncompliance with the statute. However, as correctly submitted by Dr Barnett, the question of its enforceability cannot be successfully raised in an action. No issue has been raised on the pleadings as to the enforceability of the contract between Harley Corporation and the bank.

[21] A further error on the part of the learned trial judge is that in

misconstruing the statute, he misdirected himself on the evidence. His finding that the requirements of the statute were not satisfied was primarily based on a receipt of 5 January 1995, issued by the bank, through its attorneys-at-law, to Harley Corporation, with respect to the deposit paid. The finding that the receipt was insufficient as a memorandum in writing to satisfy the statute for the reason that it did not contain all the essential terms of an agreement, is flawed. He failed to recognize that the payment of a deposit subsequent to an oral agreement for the purchase of land is sufficient evidence in support of a claim for specific performance. He rejected the case of **Steadman v Steadman**, the leading case on the doctrine of part performance, the ratio decidendi of which clearly supports a proposition that a receipt referable to the payment of money for land is sufficient to give birth to a valid and enforceable contract.

[22] In **Steadman**, pursuant to an oral agreement between a husband and a wife for the purchase of the wife's share of the matrimonial home, the husband paid £100.00 to the wife. His solicitors prepared a transfer which the wife refused to sign. It was contended by the husband that the wife compromised the agreement. It was held that the payment of the £100.00 for arrears of maintenance, although not referable to the terms of an agreement in relation to land, was an act of part performance.

[23] It is also somewhat of an enigma that the learned trial judge found that the contents of the receipt issued by Daley to Walters contained all the essential elements of a contract but that which emanated from the bank to Harley Corporation did not. The receipt issued to Harley Corporation on January 1994 states as follows:

> "Received from Harley Corporation Trust Co the sum of thirty thousand dollars for deposit on lands part of Exchange St Ann Volume 1022 Folio 570"

The receipt issued to Walters on 12 December 1992 states:

> "Received from Etal Walters the sum of One Hundred Thousand Dollars for deposit on land Vol 1022 Folio 570 part of Exchange."

[24] As pointed out by Mr Nelson, there is absolutely no difference in the terms as set out in the receipts. Although, importantly, the learned trial judge acknowledged that Daley had sold the land in breach of the mortgage contract yet he bolstered his finding that Walters had an enforceable contract not only from the existence of a receipt but also that Walters was placed in possession. He undoubtedly did not address his mind to the fact that Daley was bound by a very essential condition of the mortgage contract, namely, covenant 1(d), which expressly prohibits the sale of the property without the bank's written consent. By this clause Daley was required:

> "Not to lease or demise or part with the possession of the mortgaged lands or any part or parts hereof during the continuance of this security without the express consent in writing of the Bank first had and obtained."

[25] The clause requires the written consent of the bank should Daley desire to sell. This Daley had not secured. He, being in breach of the mortgage agreement, could not have legally entered into the contract with Walters.

[26] The learned trial judge, in his further effort to render the contract between Harley Corporation and the bank void, was dismissive of the fact that the contract was further reduced to writing on 8 February 1995. He emphasized that the special condition speaks to the contract coming into effect upon the execution by the parties. This in itself, would in no way invalidate the receipt which had been previously issued to Harley Corporation in setting the sale in motion. Even if the bank had failed to prepare the written contract setting out fully all the terms and conditions, a contract would have been in existence, the performance of which the bank would have been bound to honour. Harley Corporation relying on **Steadman** could have successfully brought an action against the bank, grounded on the receipt of 5 January 1994, to have the contract specifically performed. The receipt would doubtlessly go to show that the parties had made an enforceable agreement to enter into contractual

relations.

[27] The learned trial judge, in further support of his finding that Walters had a binding contract with Daley, found that Walters had no knowledge of the mortgage at the time at which he entered into the contract. There was an existing mortgage on the land. This was land registered under the Registration of Titles Act. As rightly submitted by Mr Nelson, the land being registered land, Walters would have been put on notice of the existence of the mortgage.

[28] Importantly, the learned trial judge failed to direct his mind to the provisions of section 108 of the Act which shows that upon transfer of property by a mortgagee who sells under his powers of sale, the interest of the mortgagor vests in the purchaser. Section 108 of the Act reads:

> "Upon the registration of any transfer signed by a mortgagee or annuitant, or his transferees, for the purpose of such sale as aforesaid, the estate and interest of the mortgagor or grantor in the land herein described at the time of the registration of the mortgage or charge, or which he was then entitled or able to transfer or dispose of under any power of appointment or disposition, or under any power herein contained, shall pass to and vest in the purchaser, freed and discharged from all liability on account of such mortgage or charge, and of any mortgage, charge or incumbrance, registered subsequently thereto, excepting a lease to which the mortgagee or annuitant, or his transferees, shall have consented in writing; and the purchaser when registered as the proprietor shall be deemed a

> transferee or such land, and shall be entitled to receive a certificate of title to the same."

[29] The bank, by virtue of the mortgage, holds a legal interest in the property. The mortgage was in default. The bank exercised its right of sale and having done so, legally transferred the property to Harley Corporation.

[30] Further, sections 70 and 71 of the Act afford a defensible armour and protection to a party in whom registered lands are vested. It is not without significance that, save and except in the case of fraud, the Act confers an indefeasible interest upon a registered proprietor of land. The sections state:

Section 70

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

the certificate of title or instrument evidencing the title of such proprietor not being a purchaser for valuable consideration or deriving from or through such a purchaser."

Section 71

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

[31] The foregoing clearly demonstrates the conclusive character of ownership under the Act. In the absence of fraud, an absolute interest remains vested in a registered proprietor. All rights, estate and interest prevail in favour of the registered proprietor. Harley Corporation being registered as the proprietor of the land holds a legal interest therein which can only be defeated by proof of fraud. We will say more about this later.

Estoppel

[32] Mr Nelson submitted that the learned trial judge incorrectly applied the principle of estoppel. He argued that the mortgage deed imposed on Daley a duty to make payments as required by the mortgage and he was in breach of the mortgage agreement. He further argued that the

sale to Walters took place in 1992 and it was not until two years later that Daley and himself attended the bank at which time a payment was made to the bank. He contended that any agreement to vary the mortgage contract must be in writing and the learned trial judge, relying on the evidence of Daley, Traille and Walters, failed to appreciate that their evidence did not fall within the exceptions to the parol evidence rule, and ought to have been rejected. The mortgage deed, he contended, cannot be varied, qualified or contracted by viva voce evidence outside of the mortgage document as covenant 1(d) of the mortgage contract expressly prohibits, among other things, the sale of the property without the bank's written consent. The learned trial judge, he argued, erred when he found that the acts of Traille, are those of the bank, as, it is clear that she could not be regarded as having directed the mind of the bank.

[33] Mr Batts submitted that the issue is not one of variation but as to whether the bank had acquiesced in or waived any right it had prior to the sale by Daley to Walters. The bank, he argued, had a right to written consent from the mortgagor, however the bank ought to have given Daley notice before redeeming and none was given. The fact that Daley and Walters attended the bank, Daley paid money to the bank which reduced the balance owing on the mortgage is supported by the bank

statements and receipts and Mrs Traille, the bank's loans officer, having taken the payment clearly shows that the bank acquiesced in or waived its rights with respect to the sale by Daley, he argued.

[34] In the alternative, he argued, if it is found that the bank did not acquiesce in or waive its rights with respect to the sale by Daley, then the doctrine of estoppel would arise as Daley would have been induced by the bank to continue with the sale to Walters as he would have been given the impression that the property would not have been put up for sale. The contract between Daley and Walters is valid and enforceable and the existence of a consent clause in the mortgage does not render the contract void, he contended.

[35] We think it apt to first address Mr Batts' submission as to the service of the statutory notice on the 1st respondent. Daley stated that the notice was served at an incorrect address and he did not receive it. The fact that he was not in receipt of the notice would in no way bar the mortgagee from exercising its power of sale. Where a mortgage has been in default for a period of 30 days, sections 105 and 106 of the Registration of Titles Act make provision for a notice of demand in writing to be given to a mortgagor by a mortgagee and on the expiration of 30 days after the service of such notice if the default continues, the mortgagee is at liberty to sell the mortgaged property.

[36] Clause 2(f) of the mortgage contract expressly empowers the bank to proceed to invoke its powers of sale without issuing a statutory notice of demand, in the event of default by the mortgagor. Under section 128 of the Act any covenant in the mortgage deed may be negatived or modified. The section states:

> "Every covenant and power to be implied in any instrument by virtue of this Act may be negatived or modified by express declaration in the instrument."

This provision confers upon a mortgagee power of sale without the requirement for the service of a statutory notice or demand or consent provided the mortgage contract so stipulates - see **Jobson v Capital and Credit Merchant Bank and Others** Privy Council Appeal No 52 of 2006 delivered on 14 February 2007. Consequently, Mr Batts' complaint of the want of the service of statutory notice would in no way affect the sale of the property by the bank.

[37] In a sworn declaration, Daley stated that in or about August 1984, Walters and himself attended the bank and met with Mrs Traile when he informed her of the agreement for the sale of the property between Walters and himself. She offered no objection to the sale. This, the learned trial judge accepted. He also accepted that Walters attended on Mrs Traille and told her that a man informed him that he had

purchased the land. He found that the doctrine of estoppel arose, and at paragraph 157 he said:

> "… Mr. Kelman submits that where a written document that expressly states that any alteration to it must be in writing cannot be altered otherwise. He submitted that parol evidence and extrinsic evidence cannot vary a contract required by law to be made in writing or evidenced by writing. Mr. Kelman has forgotten that [the] doctrine of estoppel arose because any mature and fair system of justice would recognize and that there would [be] instances where it would be unfair and unjust to allow a party to operate in [a] manner contrary to the written agreement and then fall back on the strict contractual provisions when things go awry. This is one of those cases. Mrs. Traille was told that the property was sold to Mr. Walters. As I said earlier, there is no more serious sin a guarantor can commit than selling the security for a loan and yet she is silent about her conduct and response when she admits that Mr. Walters told her he bought the property. It cannot now be right, just or fair for the bank, in light of Mrs. Traille's representation to resile from that position. When Mrs. Traille acted, she was not acting in a personal capacity but for and on behalf of the bank…"

[38] The equitable doctrine of proprietary estoppel was pronounced by Lord Kingsdown, in the well known and often cited case of **Ramsden v Dyson** [1866] LR 1 HL 129, when at page 170, he said:

> "If a man, under verbal agreement with a landlord for a certain interest in land, or, what amounts to the same thing, under an expectation, created or encouraged by the landlord, that he shall have a certain interest,

> takes possession of such land, with the consent of the landlord and upon the faith of such promise or expectation, with the knowledge of the landlord, and without obligation by him, lays out money upon the land, a court of equity will compel the landlord to give effect to such promise or expectation."

[39] The principle has been redefined and expanded over the years. A claimant who seeks to invoke the doctrine must demonstrate that the party against whom he seeks to create an equitable entitlement, allowed or encouraged him in believing that he would have a certain interest in land, or that party permitted him to act in the expectation that he would become the owner of the land and in relying on that belief, he acted to his detriment - see **Wilmot v Barber** (1880) 15 Ch. D. 96; **In Re Basham** [1987] 1 All ER 405; **Inwards v Baker** [1965] 1 All ER 446 and **AG of Hong Kong and Anor v Humphreys Estate (Queen's Gardens) Ltd** [1987] 2 All ER 387. In all these cases owners of land made promises not to insist on their legal rights in the strict legal sense. It was intended that the promisees would act upon these promises and they so acted but to their detriment. A common thread which runs through all these cases is that the owners of the lands, allowed or encouraged expenditure on the land and the parties expending the money did so in the belief that they would enjoy some right or benefit which the owner sought to deny. The owners were accordingly estopped from asserting their right to the lands.

[40] The critical question arising is whether Walters had an equitable right which ought to be postponed to Harley Corporation's statutory right. It is clear that he did not. Even if there was an enforceable contract between Daley and Walters, in order to found estoppel, Daley would have had to show that at the time Walters and himself entered into the agreement, the bank created or encouraged a belief or expectation that it would have had no objection to the sale and that he relied on that belief or expectation and acted to his detriment.

[41] The learned trial judge acted on the evidence of Walters, Daley and Mrs Traille in finding that the bank consented to the sale to Walters. As a general rule, where parties embody an agreement in a written document, oral evidence is inadmissible for the purpose of subtracting from, varying, or in any way modifying the written agreement – see **Reliance Marine Insurance v Douskers** (1914) 3 KB 907; and **Jacob v Behari and Anor** (1924) 1 Ch 287. There are, however, exceptions to this rule. Extrinsic evidence may be admitted to show that, on the face of it, what seems to be a binding contract is not in fact a contract – see **Mackinnon v Foster** (1869) LR 4 CP 704; and **Lewis v Clay** (1898) 67 LJ QB 224. Such evidence may also be admitted to prove the true nature of an agreement between parties or the question of their legal relations. Its admissibility may also be used to show custom of a particular locality – see

Smith v Wilson (1892) 3 B & Ad 728, or a particular trade - **Grant v Maddix** (1846) SM & W 737.

[42] The evidence adduced by Daley concerning the attendance of Walters and himself at the bank and Mrs Traille consenting to the agreement does not fall within any of the foregoing exceptions, nor does Walters' statement about receiving certain assurances from Mrs Traille. There was no evidence before the learned trial judge, beyond the statement of Walters, informing Mrs Traille of the sale. As a consequence, there was no evidentiary material on which he could have properly found that Mrs Traille's failure to act on Walter's report, amounted to consent on the part of the bank. He incorrectly found that Mrs Traille's conduct of inertia and inactivity was not only consistent with prior knowledge of the sale but was also consistent with Walters' statement that she said he need not worry about Harley's visit. He erroneously gave consideration to material which undoubtedly falls outside of the permitted realms of the rules of evidence.

[43] At the time of Daley's sale, the mortgage was fully operational. The mortgage deed precluded the sale of the property without the written consent of the mortgagee. Daley entered into the agreement with Walters two years before the bank became aware of it. As earlier stated, the bank's written consent would have had to be secured prior to the

time the agreement was made. This consent having not been obtained, Daley would not have been entitled to sell and accordingly, could not have legally disposed of the property. The bank therefore could not be estopped from carrying out the sale to Harley Corporation.

[44] Mr Batts contended that a payment of $35,000.00 was made by Daley when Walters and himself attended the bank, at which time the payment was accepted and applied to the mortgage loan and that they both stated that the funds for the payment originated from Walters. There is evidence, he argued, from Daley and Walters that Traille informed Daley that the bank would have offered no objection to the sale. This act on the part of the bank, Mr Batts submitted, amounted to a waiver of the bank to forego its right of sale in favour of the sale by Daley, or an acquiescence by the bank to the sale.

[45] It cannot be denied that a party to a contract who is entitled to a benefit of a stipulation thereunder may voluntarily accede to a request made by the other party to waive his rights and permit a transaction to proceed notwithstanding the existence of the stipulation. Such waiver may be expressed or implied. Mr Batts contended that the waiver had been expressly given by Mrs Traille. As already shown, there is no evidence that Mrs Traille, on the bank's behalf, had consented to the sale. In the circumstances it cannot be said that the bank had waived its right

and permitted the sale by Daley.

[46] Equally, there is no evidence of acquiescence on the part of the bank. It cannot be denied that a person who has interest in property and stands by and permits another to purchase the property to which he has a good title, cannot thereafter set up his title against the purchaser. - see **Sharpe v Foy** (1868) 4 Ch App. 35; and **Kirby v Cowderoy** [1912] AC 599 PC. In this case, there is nothing to show that the bank refrained from insisting on its legal rights while the rights are violated by Daley. Mr Daley was constrained by the mortgage deed which could not be varied without the bank's written consent. There was no evidence which could have complemented that which was lacking in support of Daley's breach of the mortgage agreement which would confirm that the bank waived its right with respect to the sale to Walters or that it had acquiesced in the sale.

Fraud

[47] Mr Nelson argued that the heart of the learned trial judge's findings was that Harley's failure in making an inquiry into the adequacy of the sale price is sufficient to defeat his interest in the property. Wilful blindness as found by the learned trial judge is insufficient to establish fraud, he argued. A purchaser need not take notice of any interest other than an interest on the document of title and the real question is what amounts to

fraud within the context of sections 70 and 71 of the Registration of Titles Act, he argued. He further argued that the statute speaks to actual fraud and the analysis of the learned trial judge is flawed as his findings with respect to the issue of fraud are inconsistent with the authorities.

[48] Dr Barnett submitted that the learned trial judge misdirected himself in concluding that Harley's failure to inquire into the adequacy of the sale price, and his, Harley's observation of the existence of buildings on the property occupied by persons was an inevitable finding of fraud. The Registration of Titles Act specifically provides that a transferee is under no obligation to make such inquiry, he submitted. The property was advertised and there is no evidence that a better price than that offered by Harley was obtainable, he contended. He argued that no actual or prior knowledge of an interest can affect the registered interest, nor was there any evidence of concealment by Harley.

[49] Mr Batts submitted that it is no longer necessary for the word "fraud" to be expressly used in a pleading, as the issue is whether the facts as pleaded are sufficient to support fraud. He argued that as prescribed by the Registration of Titles Act the question is whether there are acts which establish knowledge of fraud. Mr Harley, the managing director of Harley Corporation, knew the property was being sold by the bank under its power of sale, he had obtained a valuation and was aware that the

property was worth more than ten times the price at which the bank was selling, he had known that the bank was mistaken as to what it was selling and he was aware that the land had building on it, he argued. In light of these acts of dishonesty, he contended, Harley Corporation could not seek protection under the Act, it not being a bona fide purchaser for value.

[50] Miss Smith adopted the submissions of Mr Batts. She further submitted that there is no requirement under the Civil Procedure Rules that fraud should be expressly pleaded. She argued that Harley Corporation's acts of dishonesty were outlined in the statement of claim, accordingly fraud was implicitly pleaded. Allegations of fraud having been made, the learned trial judge looked at the allegations and correctly found that fraud was raised and proved, she argued.

[51] As earlier indicated, sections 70 and 71 of the Registration of Titles Act, confer on a proprietor registration of an interest in land, an unassailable interest in that land which can only be set aside in circumstances of fraud. In **Fels v Knowles** (1906) 26 NZLR 604 the New Zealand Court of Appeal in construing statutory provisions which are similar to sections 70 and 71 said at page 620:

> "The cardinal principle of the statute is that the register is everything, and that except in cases of actual fraud on the part of the person dealing

> with the registered proprietor, such person upon registration of the title under which he takes from the registered proprietor has an indefeasible title against all the world. Nothing can be registered the registration of which is not expressly authorized by the statute." ("By statute" would be more correct.) "Everything which can be registered gives, in the absence of fraud, an indefeasible title to the estate or interest or in the cases in which registration of a right is authorized, as in the case of easements or incorporeal rights, to the right registered."

[52] The true test of fraud within the context of the Act means actual fraud, dishonesty of some kind and not equitable or constructive fraud. This test has been laid down in **Waimiha Sawmilling Company Limited v Waione Timber Company Limited** [1926] AC 101 by Salmon LJ, when at page 106 he said:

> "Now fraud clearly implies some act of dishonesty. Lord Lindley in **Assets Co. v. Mere Roihi** (2) states that: 'Fraud in these actions' (i.e., actions seeking to affect a registered title) 'means actual fraud, dishonesty of some sort, not what is called constructive or equitable fraud—an unfortunate expression and one very apt to mislead, but often used, for want of a better term, to denote transactions having consequences in equity similar to those which flow from fraud."

The test has been followed and approved in many cases including **Stuart v Kingston** (1923) 32 CLR 309; and **Willocks v Wilson and Anor** (1993) 30 JLR 297.

[53] In placing reliance on an allegation of fraud, a claimant is required to specifically state, in his particulars of claim, such allegations on which

he proposes to rely and prove and must distinctly state facts which disclose a charge or charges of fraud.

[54] At the time of the commencement of the actions the Civil Procedure Code, was the relevant procedural machinery in place. Section 170 stipulated that certain causes of action, on which a party seek to rely, must be expressly pleaded. The section reads:

> "In all cases in which the party pleading relies on any misrepresentation fraud shall be stated in the pleading."

[55] In **Wallingford v The Directors of Mutual Society** [1880] 5 AC 685 at 697 Lord Selbourne succinctly defined the principle in this way:

> "With regard to fraud, if there be any principle which is perfectly well-settled, it is that general allegations, however strong may be the words in which they are stated, are insufficient even to amount to an averment of fraud of which any Court ought to take notice. And here I find nothing but perfectly general and vague allegations of fraud. No single material fact is condescended upon, in a manner which would enable any Court to understand what it was that was alleged to be fraudulent. These allegations, I think, must be entirely disregarded …"

[56] In **Davy v Garrett** [1878] 7 Ch D 473, Thesiger L.J at page 489 acknowledged the principle as follows:

> "In the Common Law Courts no rule was more clearly settled than that fraud must be distinctly

> alleged and as distinctly proved, and that it was not allowable to leave fraud to be inferred from the facts … It may not be necessary in all cases to use the word "fraud" … It appears to me that a Plaintiff is bound to shew distinctly that he means to allege fraud. In the present case facts are alleged from which fraud might be inferred, but they are consistent with innocence."

[57] The Civil Procedure Rules however do not expressly provide that fraud must be expressly pleaded. However, rule 8.9 (1) prescribes that the facts upon which a claimant relies must be particularized. It follows that to raise fraud, the pleading must disclose averments of fraud or the facts or conduct alleged must be consistent with fraud. Not only should the requisite allegations be made but there ought to be adequate evidentiary material to establish that the interest of a defendant which a claimant seeks to defeat was created by actual fraud.

[58] Fraud had not been pleaded in Daley's claim nor does it disclose any allegations of fraud. It had not been expressly pleaded in Walters' claims but Miss Smith contends that the particulars of claim disclose fraudulent acts on the part of Harley Corporation on which the learned trial judge had properly relied. It is perfectly true that although fraud has not been expressly pleaded, it may be inferred from the acts or conduct of a defendant - see **Eldemire v Honiball** (1990) 27 PC 5 of 1990 delivered on 26 November 1991. In order to determine whether it could be inferred

from the pleading that fraud had been raised, it will be necessary at this stage to outline paragraphs 6 – 26 of the claim as particularized by Walters:

> "6. On or about the 12th December, 1992 the Plaintiff and the First Defendant entered into an agreement for the Plaintiff to purchase from the Defendant vacant lot registered at Volume 1022 Folio 570 for the sum of $135,000.00.
>
> 7 The First Defendant explained to the Plaintiff that there was a loan of $80,000.00 due and owing on the said parcel of land with the Ocho Rios Branch of the Second Defendant's Bank.
>
> 8. The Plaintiff and the First Defendant visited the Ocho Rios Branch of the Second Defendant's Bank and the Plaintiff paid to the First Defendant the sum of $100,000.00 cash which the First Defendant undertook to pay to the Second Defendant on the loan, the security of which was the property which the Plaintiff was purchasing.
>
> 9. The Plaintiff saw and spoke with Mrs. Joy Traille an employee of the Second Defendant's Bank who assured the Plaintiff that the title would be released in order to effect a transfer of the property to the Plaintiff.
>
> 10. On the 12th December, 1992 the Plaintiff was placed in possession of the said parcel of land registered at Volume 1022 Folio 570 of The Register Book of Titles of Jamaica.
>
> 11. In or about the month of January, 1993 the Plaintiff commenced the construction of a dwelling house and a commercial building on the said property.
>
> 12. Sometime between January, 1993 and March 1993 the Plaintiff visited the Ocho Rios Branch of

the Second Defendant's Bank and paid directly to Mrs. Joy Traille, servant and or agent of the Second Defendant a further sum of $35,000.00, the balance of the Purchase Price on the said property.

13. The said Joy Traille advised the Plaintiff that the Title at Volume 1022 Folio 570 would now be released to Messrs Abendana & Abendana, Attorneys-at-Law for the First Defendant who would complete the transfer to the Plaintiff.

14. The Plaintiff further advised the said Joy Traille that he had commenced the construction of his dwelling house on the property as also a commercial building and needed to have the transfer completed as soon as possible.

15. That the said Joy Traille advised the Plaintiff that she would be asking the Bank's Attorneys-at-Law to prepare and file the relevant Discharge of Mortgage immediately.

16. The Plaintiff acting in good faith completed his dwelling house and commercial building during the month of July, 1993 and commenced occupancy thereof.

17. That between July, 1993 and December, 1995 the Plaintiff remained in undisturbed occupation of the property registered at Volume 1022 Folio 570 and that during this period the Plaintiff was in constant communications with the First and Second Defendant concerning the transfer of the property to him and was assured that the process was in motion and that he had no reason to fear that his interest in the property was being prejudiced in any way.

18. That sometime in or about the month of November, 1995 a representative of the Third Defendant attended the Plaintiff's property and informed him that the Second Defendant had

offered to sell the Company the property for $200,000.00 and that the Third Defendant was advised that the property consisted of a vacant lot.

19. That the Plaintiff explained to the Third Defendant that he had purchased the property from the First Defendant and that the Second Defendant was aware of the sale, his interest in the property and the fact that there were two buildings on the property constructed by the plaintiff.

20. Between the month of November, 1995 and March 1996 the Plaintiff communicated with the First and Second Defendants on numerous occasions and was advised that the premises were not being sold to the Third Defendant.

21. That in April, 1996 the Third Defendant informed the Plaintiff that he had purchased the property from the Second Defendant for $200,000.00 and that the Plaintiff should vacate the said property.

22. That between December, 1992 and April, 1996 the Plaintiff was never provided with the Title reference of the said property in order to lodge a Caveat to protect his interest.

23. That the First and Second Defendants are guilty of gross negligence in causing or preventing the transfer of the property to the Third Defendant well knowing of the interest of the Plaintiff in the said property.

24. That the First Defendant breached the implied contract between himself and the Plaintiff to effect a transfer of the property to the Plaintiff.

25. That the Third Defendant was at all material times aware of the Plaintiff's interest in the property, that the property was worth and valued far and in excess of $200,000.00 and that the Third Defendant is not a bona fide purchaser for value

without Notice of the Plaintiff's interest.

26. That a Valuation of the property conducted by Messrs S.A. McCalla & Associates on the 14th May, 1996 stated the value to be in a minimum of $2,600,000.00."

[59] An examination of the foregoing particulars of claim, does not reveal that the issue of fraud has been raised. The learned trial judge, however, found otherwise. In giving consideration to the issue, he carried out an extensive analysis of the evidence and review of several authorities and in concluding, at page 330 of the Record, he said:

> "Contrived ignorance or wilful blindness amounts to fraud under the RTA. In this case, Harley Corporation knew (a) that the property it saw did not match the description in the newspaper advertisement; (b) the property was obviously significantly improved and occupied by persons claiming to have purchased the property from the previous registered owner; (c) that the property was valued at much more than the $200, 000 it was told was the selling price. An honest man similarly placed would have made further enquiries. Harley Corporation knew that its conduct failed to meet the standards of the reasonable and honest purchaser. This makes a finding of fraud on the part of Harley Corporation inevitable."

[60] As can be readily observed, the learned trial judge found that the fact that (a) the property did not match the description as advertised; (b) it was substantially improved and (c) it was valued at a sum in excess of the selling price, Mr Harley deliberately failed to make such enquiries

which an honest person would make when his suspicions are aroused. This he said amounted to contrived ignorance or wilful blindness and consequentially, fraud. Fraud for the purposes of sections 70 and 71 of the Act must be born out of acts which are "designed to cheat a person of a known existing right" - see **Waimiha Sawmilling Company v Waione Timber Co; Bannister v Bannister** [1948] 2 All E.R 133 and **Binnons v Evans** [1972] Ch 359. It is clear that, as shown in **Asset Company Limited v Mere Roihi** (1905) AC 176, 210, acts founded on contrived ignorance or wilful blindness would be such acts arising out of constructive or equitable fraud.

[61] In addition to the purported acts of fraud abovementioned, the title of Harley Corporation was also impugned by the learned trial judge on the ground that Harley knew of an unregistered equitable interest in the property vested in Walters. He also found that Walters could not have lodged a caveat as he would have been unaware of the existence of the mortgage. The learned trial judge was, no doubt, oblivious to the fact that a purchaser is under no obligation to take notice of any interest in property other than that which is recorded on the title deed - see **The Presbyterian Church (NSW) Property Trust v Scots Church Development Limited** [2007] NSWSC 676**.** In the present case, there is nothing on the face of the certificate of title which would go to show that Walters has an

interest in the property.

[62] Further, the learned trial judge failed to appreciate that Walters ought to have taken the necessary steps to inform himself of the encumbrance on the certificate of title which is in the form of the mortgage. Walters is taken to have had notice of the mortgage. Of equal importance was the fact that Daley could not have created an enforceable agreement for the sale of the property to Walters. No act of fraud could in the circumstances arise.

[63] Interestingly, the learned trial judge, in ascribing fraud to Harley Corporation, found that Mr Harley, visited the property, saw the buildings on it, yet failed to disclose to the bank the enhanced value of the property. There is no evidence that Mr Harley was aware of the enhanced value. There is evidence from a valuer, Barry Wahrmann, that he visited the property in 2002, at the request of Harley Corporation. He submitted his first valuation report in 2005. This clearly would have been subsequent to Harley Corporation's purchase of the property.

[64] But assuming that Mr Harley had known the proper value of the land which he did not disclose to the bank, could that be regarded as an imputation of fraud? It would not. Surprisingly, the learned trial judge correctly stated that the bank failed to take reasonable precaution to

obtain the true value. He, however, imputed fraud on the part of Harley Corporation for its failure to inform the bank of the property's true value. Prior to the purchase of land, a buyer is under no obligation to disclose to a vendor the value of the land. This proposition was recognized by the learned authors of Law of Vendor and Purchaser at page 231, in the following context:

> "An intending purchaser is not bound to impart to the vendor information as to the value of the property, but very little conduct on the purchaser's part may alter this position. He is under no obligation to communicate to the vendor facts which might influence the vendor's conduct or judgment, such as disclosing the existence of mines under the vendor's land, or that the vendor's interest has increased by reason of an event of which the vendor is unaware."

No duty would have been cast on Mr Harley to have informed the bank of the true value of the property. Therefore Mr Harley's failure to disclose to the bank the true market value, even if he had known it, would not amount to fraud on Harley Corporation's part.

[65] Walters was not possessed of any right to the property. He had no interest therein. Daley was undoubtedly in breach of the mortgage agreement when he entered into an unenforceable agreement with him. There would have been no obligation on Mr Harley's part to have embarked upon any inquiry before purchasing the property. The acts of

fraud as found by the learned trial judge could not be said to be directly demonstrative of fraudulent or dishonest conduct on the part of Harley Corporation, within the purview of the Registration of Titles Act, namely, actual fraud. There is nothing to show that the acts were sufficient to demonstrate that they were deliberately designed to keep Walters securing an interest in the property.

[66] Daley was clearly in breach of a fundamental clause of the mortgage contract. There was no enforceable agreement between Daley and Walters. There is nothing in Walters' claim, nor that of Daley which points to or would establish fraud on the part of Harley Corporation. Walters' claim for a declaration of ownership against the bank and Harley Corporation fails. Daley's claim against Harley Corporation also fails. So far as his claims against the bank are concerned, he seeks damages for negligence and or breach of contract and or breach of fiduciary duty and/or breach of statutory duty as well as an indemnity, the bank having admitted liability to him for the sale of the property at an under value, the matter ought to be remitted to the Supreme Court for damages to be assessed.

[67] For the foregoing reasons we allowed the appeal.

DUKHARAN, JA

[68] I too have read the judgment of Harris, JA and agree with her reasoning and conclusions.