[2011] JMCA Civ 42

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 102/2005

BEFORE: THE HON MR JUSTICE MORRISON JA
THE HON MISS JUSTICE PHILLIPS JA
THE HON MRS JUSTICE McINTOSH JA (Ag)

BETWEEN **ILENE KELLY AND ERROL MILFORD (EXECUTORS OF ESTATE OF EVELYN FRANCIS, DEC'D)** **APPELLANTS**

AND **THE REGISTRAR OF TITLES** **RESPONDENT**

Mrs Melrose Reid instructed by Norman Samuels for the appellants

Mrs Trudy-Ann Dixon-Frith and Harrington A. McDermott instructed by the Director of State Proceedings for the respondent

22 June 2010 and 2 December 2011

MORRISON JA

[1] I have read in draft the reasons for judgment of my sister Phillips JA and agree with her reasoning and conclusion. I have nothing further to add.

PHILLIPS JA

[2] This appeal arises from the order of Brooks J made on 14 September 2005 striking out claim no. HCV 2308 of 2003 on the basis, *inter alia*, that it was an abuse of

the process of the court. The claim related to property comprised in certificate of title registered at volume 1059 folio 245, of the Register Book of Titles (the property), the ownership of which has been the subject of much litigation.

[3] On 22 June 2010, after hearing argument in the appeal, the court made the following orders:

> "1. Leave granted to file application for leave to appeal out of time.
>
> 2. Leave to appeal granted.
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> 3. The hearing of the application for leave to appeal is treated as the hearing of the appeal itself.
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> 4. Appeal dismissed, with costs to the respondent, to be agreed, if not sooner taxed."

These are the long promised reasons for this decision, with apologies for the delay.

[4] The appellants are the executors of the estate of Mrs Evelyn Francis, who is deceased (Mrs Francis). During her lifetime, Mrs Francis held the property in joint tenancy with her son, Fenton Downer (Mr Downer). On 25 August 1988, an instrument transferring all of Mr Downer's interest in the said property to Mrs Francis was registered on the certificate of title for the property and, on 13 April 1995, Mrs Francis entered into an agreement for sale of the property to purchasers, Percival and Polly Gager (the Gagers). Mrs Francis died on 23 July 1995.

[5] Mr Downer lodged a caveat against any dealings with the property and on 7 October 1997 filed suit no. E 357 of 1997 against the respondent (the Registrar), seeking to have the interest in the land determined. In this action, Mr Downer alleged fraud, in that he claimed he had at no time transferred his interest in the property to his mother. In default of the Registrar's defence to this action, on 4 December 1997 Panton J (as he then was) made an order in favour of Mr Downer, cancelling the purported transfer to Mrs Francis and declaring Mr Downer to be the registered proprietor in fee simple of the property, Mrs Francis having by this time died.

[6] The appellants and the Gagers filed suit no. E 299 of 1998 against Mr Downer, seeking, among other things, a determination of the rights of the Gagers, in the property as purchasers from Mrs Francis. This matter was heard in chambers by Courtenay Orr J on 29 June 1999, when a preliminary point of *res judicata* was raised on Mr Downer's behalf. However, no ruling was made on the merits of this objection at this time (the judge considering that, on both procedural and substantive grounds, the application was not then in order). The suit was subsequently discontinued by order of Reckord J made on 5 July 2000, on the application of the appellants and the Gagers, with no order as to costs.

[7] By a summons dated 4 October 1999 and filed in suit no. E 357 of 1997, the appellants and the Gagers then sought leave to set aside Panton J's judgment in default, as well as to intervene and to defend the action. This application was heard by

Beswick J on 31 July 2000, when it was dismissed, with costs to Mr Downer, on the bases, among others, that it was too late and that no merit had been disclosed. On 21 September 2000, the appellants and the Gagers sought leave to appeal Beswick J's order and on 31 May 2001 this application was heard and refused by K. Harrison J (as he then was), with costs to Mr Downer. The learned judge appears to have considered that there would be no purpose in setting aside a regularly obtained judgment in the absence of any evidence to meet Mr Downer's contention that he had not transferred his interest in the property to his mother. On 22 September 2003 (the appellants and the Gagers having in the interim filed a notice of appeal which was ineffective for want of leave), a motion for leave to appeal was heard and refused by this court.

[8] It is against this background that, on 26 November 2003, the appellants, acting in their capacity as Mrs Francis' executors, next filed action (claim no. HCV - 2308 of 2003) against the Registrar, pursuant to and by virtue of sections 164 and 166 of the Registration of Titles Act (the Act), for the loss of the property. In the claim form, the appellants stated that Mr Downer had obtained the order from Panton J cancelling the purported transfer to Mrs Francis, by default and that in those circumstances the Registrar was the proper party to be sued by virtue of the said provisions of the Act. The Registrar having failed to file a defence to the claim, judgment was entered in default. The Registrar later filed an application for an order striking out the claim, on the basis that it constituted an abuse of the process of the court and/or it disclosed no reasonable cause of action; or, in the alternative, setting aside the default judgment

and granting leave to file a defence. It is the success of the first limb of this application before Brooks J that has given rise to this appeal.

[9] Due to the fact that three actions and a multiplicity of applications were filed, I have set out below, separately and for clarity, the said suits under different headings, with their respective applications and the affidavits filed therein.

SUIT NO. E 357 OF 1997

[10] In this suit, as previously indicated, Mr Downer asked the court to order that transfer no. 474057 was null and void and should be cancelled. In an affidavit in support of the originating summons he testified that he and his mother responded to an advertisement in the late 1960s and decided to purchase together lot 262 in a housing development at Willowdene, Spanish Town in the parish of Saint Catherine. They signed an agreement to purchase the lot, contributed equally to the purchase price of £500.00, and the certificate of title registered at volume 1059 folio 245 of the Register Book of Titles was transferred into their joint names. Thereafter, he said, he initially constructed a board house and subsequently built a block and steel structure on the lot where he went to reside and was so residing when the matter went before Panton J.

[11] Mr Downer deposed that at first the title for the said property remained in his possession, as his mother was returning to England where she resided. Later on, she requested it of him through her daughter on the pretext of wishing to have it for safekeeping. He complied and had not had sight of it since then, save and except with

reference to the suit. He further testified that he heard that his mother wished to sell the property and he had indicated to her that she could not do so, as he was a joint owner. He also tried to purchase her interest. His mother, it seemed, wished to sell the property as she said that she could not "agree" with his wife. As a consequence, he instructed lawyers to lodge a caveat on the title. He stated that he was later informed about the transfer of his interest, that he was supposed to have effected, to his mother, for the amount of J$10,000.00. He denied ever having done so. He said he would not have sold his interest for that paltry sum when the house erected on the said property, in the main by him, was worth hundreds of thousands of dollars. Additionally, he had lived on the property continuously and uninterruptedly since 1972 with his wife and family, and he would not therefore sign away his interest in the said property as he had no other place to live with his family. His mother, he said, had lived on the property, on occasion, with him and his family. He indicated that despite several searches at the Office of Titles, the transfer allegedly signed by him had not been produced and he had been told that it could not be located.

[12] He attached to his affidavit the certificate of title for the said property with the transfer of his interest to his mother duly noted thereon. He also attached the certified copy of his mother's death certificate showing that she had died on 23 July 1995, which made him the sole owner of the said property, he said, as they had been joint owners. He maintained that as he had never signed away his interest, any purported transfer of the same would have been obtained by fraud, and the court should therefore make the

orders prayed for in the originating summons filed on his behalf. Panton J duly made the orders as prayed.

SUIT NO. E 299 OF 1998

[13] As indicated, the appellants and the Gagers filed suit no. E 299 of 1998 to obtain orders as to who was entitled to the said property, but very little documentation was placed before the court pertaining to that suit, perhaps because having filed suit in 1998, they had by 4 October 1999 filed a summons seeking the leave of the court to withdraw the same, which was granted on 5 July 2000. The contents of the affidavit filed by Mr Downer in this suit were similar to his affidavits filed in suit no. E 357 of 1997, thus no useful purpose would be served by repetition of their contents here. Suffice it to say that Mr Downer challenged the efficacy of the "Sales Agreement" between his mother and the Gagers stating that: the address given in the document as his address was inaccurate, and on investigation was found not even to exist; the address given for his mother was also inaccurate and none of the terms set out in the document had occurred; he had not received any money from the attorney-at-law allegedly having carriage of sale; he had never been notified of the completion date of any sale; he had not been requested to give up possession of the said land and had not done so; he had not been requested to pay any costs of the transaction and had not done so; and no apportionment of the payment of any taxes and water rates had been effected between him and anyone. He maintained that the agreement was fraudulent, had never been signed by him, and in any event, based on the order made

by Panton J on 4 December 1997, the appellants had no proprietary interest in the said property.

SUIT NO. E 357 OF 1997 REVISITED

[14] The appellants and the Gagers filed a summons on 4 October 1999 asking for leave to intervene in the E 357 of 1997 suit and to set aside the judgment of Panton J on the bases of the affidavits sworn to by them on the same date and filed on 5 October 1999. The appellants deposed to the fact that they were the duly appointed executors of Mrs Evelyn Francis' estate and that she was the sole registered proprietor on the certificate of title for the said property, her son having transferred the same to her. They deposed further that the agreement for sale of the property in the sum of $1,250,000.00 had been entered into with the Gagers before the death of Mrs Francis; that the deposit had been duly paid as required; and that they desired to complete the transaction, which could not be effected due to the order of Panton J. They stated that they had been advised that in their capacity as executors they had sufficient interest to apply to the court to set aside that order. They explained the delay by stating that they had commenced suit no. E 299 of 1998 but that had been adjourned sine die, and they had been advised to pursue this application.

[15] The Gagers filed an affidavit in support of the summons mentioned above. They deposed to the fact that they were motor vehicle inspector and housewife respectively. They confirmed that they had entered into the agreement for sale in respect of the property for the purchase price stated, had paid the required deposit of $190,000.00

and were ready and willing to pay the balance purchase price to complete the transaction. They further deposed that they were informed when Mrs Francis died, and were told that the documents of purchase had already been duly stamped and lodged at the Office of Titles, but the transaction was barred due to the caveat filed by Mr Downer. They stated that they were advised of the order of Panton J, and that, as purchasers, they should be joined as parties to the suit as they had sufficient interest in the said property and in transfer no. 474057 which had been declared null and void by the court, to enable them to apply to the court to have the order of Panton J set aside. This was the application that was dismissed by Beswick J.

[16] The Gagers filed an affidavit in support of the summons for leave to appeal the order of Beswick J. In that affidavit they indicated that the basis on which the learned judge dismissed the application was that the parties seeking to set aside the order of Panton J were not parties to the suit, and the procedure adopted was incorrect. They indicated that Beswick J had stated in her oral judgment that the order of Panton J was dated 1997 and there must be certainty in litigation; the defendant named in the suit appeared to be content with the judgment. Too much time had passed she said, since the order has been made, to allow the order to be set aside. Additionally, no proposed defence had been referred to by the applicants. The Gagers further deposed that the defendant, the Registrar of Titles, had no real or substantive interest in the matter, while they did. They claimed that the procedure adopted by them was the proper one and they attempted to explain some of the delay by the fact that they had not been parties to the suit originally. In fact, they had been excluded therefrom and therefore

had not had knowledge of what had occurred therein, and they had in the interim filed suit no. E 299 of 1998. They testified further that the essence of the proposed defence was that as purchasers they "had sufficient interest in the subject matter giving rise to the claim in which the judgment was being sought to be set aside and the proof of that interest would be the defence", and referred to the fact that the summons for leave to intervene and to set aside the default judgment had in its heading requested that the affidavits filed in support of the application be used "as a defence to the Plaintiff's claim". As previously indicated, leave to appeal was refused by K. Harrison J.

CLAIM NO HCV—2308 of 2003

[17] The motion for leave to appeal suit no E. 357 of 1997 filed in the Court of Appeal not having been successful, the appellants filed the above claim against the respondent for the loss of the said property as set out in paragraph [8] herein. The particulars of claim (POC) detailed the appellants' complaint. The POC stated that the Registrar was sued pursuant to section 164 of the Act, as the loss sustained was due to the circumstances set out therein. The history of the transaction and the litigation were pleaded chronologically. The appellants averred that, based on the order of Panton J cancelling transfer no. 474057, Mr Downer was the registered proprietor of the said land and they claimed that was due to the conduct of the Registrar in not defending suit no. E 357 of 1997, which failure, it was stated, was due to a breach of statutory duty and through negligence.

[18] The appellants further pleaded that pursuant to section 68 of the Act, the Registrar was obliged to protect the legal interests of Mrs Francis as a registered proprietor of the said property under the Act. Additionally, the appellants relied on section 164 of the Act, claiming that it imposed a duty on the Registrar not to allow the appellants to sustain any loss or damage, "due to omission, mistake or misfeasance of the Registrar of Titles".

[19] With regard to the claim for negligence, the appellants pleaded that, having been made aware of the suit and the demands therein, the Registrar ought not to have allowed the matter to go by default. Also, having known of the impending transfer of the property, she ought to have warned either the Gagers or the appellants of the claims and consequences of that suit. Finally, the appellants averred that the Registrar ought not to have resisted so strongly the appellants' and the Gagers' application to set aside the default judgment or the applications for leave to appeal the same.

[20] The appellants pleaded that they had complied with the procedural requirements of sections 164 and 166 of the Act prior to the commencement of the action, and claimed damages for the loss of the property and the threatened action from the Gagers to complete the transaction. They claimed special damages of $300,000.00 for legal expenses in the Supreme Court and the Court of Appeal and $1,250,000.00 as "the value of the said property lost at the time of the contract".

[21] The Registrar failed to file a defence in the requisite time allotted within which to do so, and the appellants on 11 March 2004 filed a request for default judgment to be

entered, and for "Special Damages for a sum to be determined by the Court with interest at a rate to be determined by the Court". This was accompanied by the interlocutory judgment in default for the failure to file defence to the POC, indicating that damages were to be assessed. The Registrar on 27 April 2004 filed an application to set aside the judgment entered in default, for leave to be granted and for extension of time to file a defence, on the grounds that the judgment was entered irregularly without due notice to the Crown, and therefore the Registrar was entitled to have the same set aside *ex debito justitiae*, or in the alternative that the judgment should be set aside so that the defence which had merit could be filed.

[22] The affidavit in support of the Registrar's application endeavoured to explain the delay in the filing of the defence, which was stated to be due to the fact that the instant suit arose from three previous actions, as a result of which the files relating to all the matters had to be located, which took some time. It was also the Registrar's contention that notice was required in law before judgment could be entered against the Registrar and, since no such notice had been given, the judgment would have to be set aside. The appellants in response set out the history of the matter and indicated that the original certificate of title in the name of Mrs Francis had been cancelled and a new title registered at volume 1336 folio 124 of the Register Book of Titles had been issued in the name of Mr Downer. The appellants explained that they had therefore filed suit no. HCV-2308 of 2003 calling upon the Registrar "to be answerable for the neglect in defending the said action and for breaches of the Statutory Duties under the Registration of Titles Act which allowed the said Fenton Downer to become the sole

registered owner of the said land". They pointed out that the prescribed notes to the defence were served with the claim form and POC and the defence was nonetheless filed 104 days late, and 12 days after the interlocutory judgment had been filed. In those circumstances, it was averred, the interlocutory judgment entered could not be irregular. The appellants also exhibited their statutory declaration indicating their intention to file this action which was sent to the Registrar allegedly in compliance with sections 165 and 166 of the Act. They requested that the court reject the Registrar's application.

The decision of Brooks J

[23] That was the state of the documentation and the history of the actions when the matter went before Brooks J. The Registrar also applied for the claim to be struck out on the basis that it was an abuse of the process of the court and that it disclosed no reasonable cause of action. I can only do justice to the judge's pellucid conclusion by setting it out in its entirety here.

> "Conclusion
>
> The executors have made this issue the subject of much litigation. In none of the various steps taken by them, have they indicated that they are in possession of any evidence that contradicts the evidence presented to this court when Mr. Downer was declared the sole proprietor of the property.
>
> Implicit in that declaration was a finding that Miss Francis was not the sole proprietor at the date of her death, and that the entry on the registered title, which purported to make her so, had been secured by a fraudulent instrument of transfer.The present claim therefore constitutes a collateral

> attack on that finding. It essentially insists that Miss Francis was the sole registered proprietor and that her estate suffered loss when the Registrar failed to enter an appearance to Mr. Downer's suit or to inform the executors of its existence. Without providing any evidence to show that the declaration by the court was erroneous, the present claim is doomed to failure and is an abuse of the process of the court."

The learned judge therefore, as indicated previously, struck out the claim.

The Appeal

[24] The appellants challenged several of the learned judge's findings of fact and law, and asked the court to set aside the judgment and allow the appellants to proceed to an assessment of damages on the following grounds:

> "1. The Learned Trial Judge erred in his conclusion that the action was an Abuse of the Process of the Court for two reasons:-
>
> (a) There was never any decision on the main issue of the claim adverse to the Claimants in any previous hearing.
>
> (b) The Claimants not having been allowed to intervene and defend the Originating Summons in E 357 of 1997 and the Defendant not having filed a Defence there was no basis on which the Learned Trial Judge could find that there was no scintilla of evidence on which the Claimants could succeed at the Trial therefore the action was an abuse of the process of the Court.
>
> 2. The Learned Trial Judge erred in not recognizing that the Registrar of Titles had a duty of care to the Claimants and to the Purchasers of the property in the estate of Evelyn Francis, deceased not to do any act or omit to do any act the result of which would do damage to the rights and property of the said estate of

the deceased Evelyn Francis and that that duty of care was both Statutory and at Common Law.

3. The Learned Trial Judge erred in his conclusion that at the stage in which the action had reached the Claimants had no "Scintilla of evidence" to succeed at a Trial when the Claimants' claim was not even challenged by a Defence.

4. The Learned Trial Judge failed to recognize the Overriding Objective of the Court Rule 1.1 (1) (2) (sic) Civil Procedure Rules 2002 that cases should be tried justly and fairly."

The submissions

Ground 1 – Did the action amount to an abuse of process and a collateral attack on the judgment of Panton J?

[25] The appellants contend that the action in the court below could not have been an abuse of the process of the court in that the previous litigation had not been heard and/or disposed of on the merits. It was fundamentally and significantly different from the matter under consideration by Brooks J, and so could not be considered re-litigation. The action below related to the failure of the Registrar to comply with her duty to protect the interest of the registered proprietor, the loss suffered thereby and the compensation payable as a result, charged to the Assurance Fund, pursuant to section 167 of the Act. The previous action was filed by the registered proprietor's son with different issues which remain undetermined by a court. Counsel relied on ***Hunter v Chief Constable of West Midlands and Another*** [1981] 3 All ER 727. Counsel also argued that the action could not be a collateral attack on the judgment of Panton J

as the matter was one of causation. The court only made the ruling because the Registrar did not attend or provide any information within her domain, namely whether the transfer had been duly endorsed on the title and the fact that no issue had arisen before the death of Mrs Francis.

[26] The Registrar, however, submitted that the action was an abuse of the process of the court and a collateral attack on the judgment of Panton J in that the question of whether Mr Downer had transferred his interest in the said property to Mrs Francis had been determined by the court and that determination had remained despite all the attempts by the appellants to have it varied. Further, any attempt in the action below to recover the said property meant that the appellants were claiming an interest in the same in circumstances where the court had determined that they had none. It was an effort to relitigate the issues as the appellants were attempting to obtain the value of the said property when they had failed in the earlier suit to recover the land. They had an opportunity of contesting the matter and so, it was argued, initiating a new suit because the decision in the earlier suit was adverse to them, amounted to an abuse of the court's process. Counsel referred the court to ***Jones and Another v Duke*** (1992) 43 WIR 39, and ***Henderson v Henderson*** (1843) 3 Hare 100, 115 and in urging the court to exercise its inherent jurisdiction to strike out pleadings or to dismiss proceedings which are an abuse of its process, relied on Halsbury Laws of England, 3rd edition, Vol. 30 paragraph 767 and ***Halstead v Attorney General of Antigua and Barbuda*** (1995) 50 WIR 98.

Ground 2 - Did the Registrar owe the appellants a duty of care?

[27] Counsel for the appellant argued that the Registrar was negligent in her duty in not filing a defence or attending court in the matter, particularly being a public servant, and she relied on section 164 of the Act in this regard. The Registrar, she submitted, had she attended court, would have been able to explain to the court the indefeasibility of the title and/or the perceived fraud, which could have affected the order of the court. As a public servant, a greater responsibility was imposed on her to comply with the duties set out above. She submitted that the Registrar was in breach of her statutory duty, even if by omission, which duty must be strictly construed. She referred the court to ***Attorney General for Canada et al v Hallet & Carey Ltd et al*** [1952] AC 427 and ***Henly v The Mayor of Lyme*** (1828) 5 Bing 91. But, in any event, if there was no express statutory power to protect the appellants' rights (which counsel appeared to have conceded in the court below) counsel relied on the common law duty of negligence and referred to the seminal speech of Lord Atkin in ***Donoghue v Stevenson*** [1932] AC 562. Counsel submitted that Mr Downer had sued the Registrar as the public entity responsible to put things right and so the Registrar must have a duty as the party in the suit to defend the matter and avoid the losses which occurred.

[28] Counsel for the Registrar submitted that the claim for compensation, being made under section 164 of the Act, could not succeed as, on a true construction of the provision, recovery of damages could only be obtained in instances of omission, mistake or misfeasance by the Registrar in the performance of her duties under the Act, and

since the Act imposed no duty on the Registrar to defend actions on behalf of parties or to inform them of court proceedings, no damages could flow. The common law duty also could not succeed in the light of the clear allegations of fraud, which the Act recognizes can defeat the indefeasibility of the title. The Registrar was not in possession of any information which would have permitted her to defend the case on its merits and so was not in a position, counsel submitted, to defend the action. It was therefore a matter to be decided by the court, which is what in fact occurred.

Grounds 3 and 4 - Was there evidence to succeed at a trial? Was the overriding objective to deal with cases fairly and justly applied?

[29] Counsel argued that as no defence had been filed, at that stage of the proceedings the learned trial judge erred in concluding that no "scintilla of evidence" existed to succeed in the action. Counsel submitted that the learned judge ought not to have tried the case when only affidavit evidence was before him. The case, counsel submitted, was not a frivolous or vexatious one. She relied on the statement of the learned trial judge, that it would have been preferable for the appellants to have been present at the hearing before Panton J, and, that as the Registrar would have known of the impending transfer to the purchasers, there may have been an obligation to inform the parties to the transfer of the existence of the suit, to mount an argument that in all the circumstances of the case, in dealing with the overriding objective to have a fair trial and, for matters to be dealt with in a just way, striking out the case did not serve those principles in any way whatsoever.

[30] The Registrar maintained that the overriding objective would not permit the abuse of the court's process or for the appellants to attempt a collateral attack on the judgment of the court, particularly when they could not substantiate that the Registrar was responsible for any alleged losses suffered.

Discussion

Ground 1

[31] Both counsel relied on the House of Lords' case of ***Hunter v Chief Constable of West Midlands et al,*** in which Lord Diplock explained the power to strike out for abuse of the process of the court in this way:

> "The inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people."

Lord Diplock indicated that in that case the particular abuse of process was:

> "...the initiation of proceedings in a court of justice for the purpose of mounting a collateral attack on a final decision against the intending plaintiff which has been made by another court of competent jurisdiction in previous proceedings in which the intending plaintiff had a full opportunity of contesting the decision in the court by which it was made."

He went on to say that the proper method of attacking the decision of the judge of first instance was to proceed to the appellate court and lodge the complaint as a ground of

appeal. That was not done in that case. In the instant case, there was an attempt to obtain a contrary order in the appellants' favour by initiating a new suit and then a further attempt to challenge the order of the court in the earlier suit, but the application to set aside the judgment in that earlier suit and to intervene therein, was not pursued in a timely way, did not contain persuasive information for the court, and, on appeal, was not effected correctly, procedurally.

[32] It is clear that the appellants commenced suit HCV 2308 of 2003 in an attempt to obtain a sum equivalent to the value of the said property on the basis that that represented their loss. It was supposed to be compensation due to them pursuant to the Act. I accept the arguments of counsel for the Registrar that in order to make such a claim, they had to be claiming some right or entitlement to the property, which a court of competent jurisdiction had ruled quite categorically that they had already lost. Indeed, at the time these proceedings were initiated in November 2003, Panton J, from December 1997, had ordered that Mr Downer was the sole registered proprietor in fee simple of the said land. They were bound by that decision until set aside, although not parties to that action, as it would be an abuse of the court's process as it would be manifestly unfair to the Registrar, a party in both proceedings, to have the same issues relitigated. If such relitigation were permitted, it would bring the administration of justice into disrepute (see ***Secretary of State for Trade & Industry v Bairstow*** [2004] Ch 1).

[33] I also agree, as counsel for the Registrar submitted and as the learned trial judge found, that the Registrar would not have been seised with any information which could have assisted the court with regard to whether any fraud had been committed by the deceased. In keeping with the court's order, the Registrar was obliged to endorse the cancellation of the transfer to Mrs Francis and issue the new certificate to Mr Downer. In those circumstances, it would be unfair for the Registrar to be forced to be a party to a further claim to have those same issues litigated when at this late stage, no facts have yet emerged from any source, and particularly not from the appellants, to refute the allegations of fraud which were the basis of the order of Panton J. In my view, the issues before the court in this suit are essentially the same as those in suit no. E 357 of 1997 and the filing of suit no. HCV 2308 of 2003 was a collateral attack on the order of Panton J and was an abuse of the court's process. This ground therefore failed.

Ground 2

[34] As indicated, the appellants argued that the Registrar was in breach of her statutory duty imposed by section 164 of the Act, and negligent at common law, in not filing a defence or appearing in court, to explain the indefeasibility of title or the alleged fraud, which resulted in their loss.

[35] In light of the heavy reliance placed on section 164, it is important to consider the section in detail.

> "164. Any person sustaining loss through any omission, mistake or misfeasance, of the Registrar, or any other officer or clerk, in the execution of their respective duties under the provisions of this Act or by an error, omission or

> misdescription in any certificate of title, or any entry or memorandum in the Register Book, or by the registration of any other person as proprietor, and who by the provisions of this Act is barred from bringing an action for the recovery of the land, estate or interest, may, in any case in which the remedy by action for recovery of damages as herein provided is inapplicable, bring an action against the Registrar as nominal defendant for recovery of damages:
>
> Provided that in estimating such damages, the value of all buildings and other improvements erected or made subsequent to the making of a contract of sale binding on the parties thereto, or subsequent to the deprivation, shall be excluded."

[36] In my opinion, the appellants have thus far failed to provide any evidence to show that they have suffered loss through any omission, mistake or misfeasance of the Registrar in the execution of her duties under the provisions of the Act. To the contrary, the learned judge found that there was no express duty under the Act to inform the executors of suit no. E 357 of 1997. I agree with him. The appellants have not shown that their alleged loss was due to the entry of any memorandum in the register book or by the registration of any other person as proprietor. They also have not shown that by the provisions of the Act they are barred from bringing an action for the recovery of the said property. In fact, as stated previously, the deceased lost her estate in the said property because of the adjudication on all the circumstances by a competent court of law. There is also no error or misdescription in the certificate of title for the said property. On the true construction of this provision, the appellants could only proceed to bring an action against the Registrar if:

(a) barred by the provisions of the Act from bringing an action for recovery of land ; and (b) the action for recovery of damages as provided for under the Act is inapplicable. It is important to note that proceeding under this section is acceptable only if no other alternative remedy is available.

[37] This court has also already held that all the above stated circumstances must be satisfied before a person can bring an action against the Registrar as a nominal defendant pursuant to section 164 of the Act (see ***Registrar of Titles v Melfitz Ltd & Another*** (SCCA No. 9/2003, delivered 29 July 2005). In my view, the stated circumstances have not been satisfied here. The provisions of the Act which provide a bar to an action for the recovery of land and interest are sections 161 and 163. Section 161 addresses the certificate of title being a bar to all actions of ejectment save certain exceptions which are not relevant in this case. Section 163 provides protection for a bona fide purchaser of registered land for valuable consideration against actions for recovery of land or for recovery of damages, which provision is also not applicable in the circumstances of this case. The appellants could, have brought an action for recovery of the land or for damages against Mr Downer, who is still the registered proprietor of the said property. This they attempted to do in suit no. E 299 of 1998, and this perhaps was the litigation they ought to have pursued. In any event, it has been held (by the court in New South Wales, in construing section 127 of the Transfer of Land Act, 1958 (Vic), a provision similar to section 164 of the Act) that for a claim against the Registrar to succeed under the section, the alleged omission of the Registrar would have to be the sole cause of any loss sustained (***Oakden v Gibbs***

(1882) 8 VLR (L) 380). In the case before us the main actions to which any alleged loss of the appellants could be said to be attributable are those of Mr Downer who filed the action, failed to include the executors, and made the claim of fraud against Mrs Francis, which succeeded. Even if it could be argued that the omission of the Registrar enabled the order to have been made, it could only have done so indirectly as the endorsement of the registration of Mr Downer was by order of the court.

[38] In my view therefore, the appellants cannot claim the protection of section 164 of the Act and would therefore not be entitled to any compensation from the assurance fund, under sections 165,166 and 167 of the Act. The issue therefore with regard to whether the procedural requirements set out in sections 165, 166, and 167, had been complied with, although done in this case, became irrelevant and inapplicable.

[39] The appellants also submitted that had the Registrar defended the action, she could have relied on the certificate of title registered in the name of Mrs Francis being indefeasible pursuant to section 68 of the Act. This provision, it was submitted, imposes a duty on the court to accept as conclusive that the person named as proprietor in the certificate is seised of the legal interest in the property. Section 71 of the Act, however, specifically states that fraud is an exception to the principle of indefeasibilty and the provisions must be read together. The submission also ignores the power given to the court in certain circumstances, in section 158 of the Act, as found by the learned trial judge, to cancel or correct any certificate of title, and/or issue, make or substitute one. In this case, as stated previously, the respondent was not in a position to refute the

allegations made by Mr Downer. This resulted in the order of Panton J, the subsequent cancellation of the certificate of title in the name of Mrs Francis and the issuance of a new certificate of title in the name of Mr Downer.

[40] In all the circumstances of this case, and after a detailed review of the principles enunciated in ***Donoghue v Stevenson***, I am not of the view that the common law remedy of negligence is available to the appellants in this case, as there are specific remedies in the Act set out in sections 162 and 164. I therefore conclude that the Registrar did not owe a duty of care to the appellants either by statute or the common law and I find that the learned trial judge was correct on this. This ground also failed.

Grounds 3 and 4

[41] Bearing in mind all that has been said, it is clear that I agree with the learned trial judge that the evidence placed before the court was insufficient. The learned judge found that even if at common law a duty could have been imposed by the "neighbour principle", "the executors have not shown that it is the Registrar's omission that caused their loss". He continued:

> "Certainly the omission may have deprived them of the opportunity to resist Mr Downer's claim, but they have not shown that they had a scintilla of evidence with which they would have done so."

I entirely agree with that statement. This litigation has been ongoing for over a decade. There have been three actions filed and several affidavits and to date the lack of evidence, which is startling, remains the same, and has been the concern of all the

judges who have had to consider the sundry applications which have been filed. In my view, the court was correct to strike out the claim in the exercise of its inherent jurisdiction and pursuant to rule 26.3 (1)(b) of the Civil Procedure Rules. A court of competent jurisdiction had already decided that the land was not validly transferred to Mrs Francis and so there could be no issue of her estate suffering any loss since on her death the property passed to Mr Fenton Downer in accordance with the principles of survivorship. I also agree with counsel for the respondent that the overriding objective could not be used to advance and or sanction a fraudulent transaction. These grounds also failed.

Conclusion

[42] In light of the above reasons, I concur to the decisions made as set out in paragraph [3] herein, permission to appeal was granted, the hearing of that application was treated as the hearing of the appeal which was dismissed with costs to the respondent to be taxed, if not sooner agreed.

McINTOSH JA

[43] I too have read the draft reasons for judgment of Phillips JA and agree with her reasoning and conclusion.