IN THE COURT OF APPEAL OF BELIZE AD 2014
CIVIL APPEAL NO 42 OF 2011

JENNIFER F LONGSWORTH Appellant

v

CHARLESTON CLELAND Respondent

BEFORE
The Hon Mr Justice Dennis Morrison Justice of Appeal
The Hon Mr Justice Douglas Mendes Justice of Appeal
The Hon Mme Justice Minnet Hafiz-Bertram Justice of Appeal

Rodwell Williams SC and Miss Stevanni Duncan for the appellant
Mrs Sharon Pitts-Robateau for the respondent

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13 March and 27 June 2014

MORRISON JA

Introduction

[1] The appellant is the registered proprietor of Parcel 326 Block 45 Fort George/Pickstock Registration Section ('the disputed land'), registered pursuant to the provisions of the Registered Land Act ('the RLA'). The disputed land, which is comprised in Land Certificate No. 200902853 ('the land certificate'), is part Lot No. 1280A, situated at Wilson Street in Belize City.

[2] By a fixed date claim form dated 24 June 2009, the appellant sought an order for possession of the disputed land against the respondent. In his defence dated 16 November 2009, the respondent challenged the appellant's right to possession of the entirety of the disputed land, on the ground of his having acquired a right to a part of it by adverse possession. The respondent also counterclaimed for, among other reliefs, a declaration that the appellant's certificate of title to the disputed land is "null and void".

[3] In a judgment given on 20 October 2011, Awich J (as he then was) dismissed the appellant's claim and gave judgment for the respondent on his counterclaim. The learned judge also made an order directing the Registrar of Lands ('the Registrar') "to rectify the Register" by cancelling the appellant's title to the disputed land. The basis of this order was the judge's conclusion (at para 41 of his judgment) that the registration of the appellant as proprietor of the disputed land "was the result of mistakes of fact and law".

[4] By her notice of appeal filed on 9 December 2011, the appellant seeks an order that the decision of the judge be reversed. The principal issue that arises in the appeal is whether the learned judge was entitled to make an order cancelling the appellant's title in these proceedings.

The statements of case

[5] In her statement of claim filed on 24 August 2009, the appellant set out her claim as follows:

> "1. The Claimant, Jennifer F. Longsworth, is the proprietor and entitled to possession by virtue of the Land Certificate No. 200902853 dated 21st of April, 2009 in her name being the eastern portion of the Lot No. 128A [sic] situate on Wilson Street, Belize City, Parcel 326 Block 45 Fort George/Pickstock Registration Section ("the premises"). The said Land Certificate is annexed hereto as "Attachment 1".
>
> 2. One Audrey Cleland, the Defendant's mother and the Claimant made a verbal agreement on or about July 11, 2003, whereby the

Claimant allowed the said mother to erect a temporary structure on my premises to be removed upon completion of her permanent house on her own property. This is evidenced in writing by letter dated July 11th, 2003 to the said, Audrey Cleland, expressing the terms of the said Agreement. The said letter is annexed hereto as "Attachment II".

3. The Defendant and the said Audrey Cleland then went into possession of the premises.

4. The said Audrey Cleland, having built her own house on her own land, has since on or about July 1st, 2005 vacated the premises without paying any rent, but the Defendant refuses and despite notices to vacate and deliver up possession dated October 6th, 2004 and November 6th 2007, continues to refuse to vacate and deliver up possession of the said premises. Copies of the notices are annexed hereto as "Attachment III".

5. The Defendant has therefore trespassed and continues to trespass on the Claimant's premises.

6. By reason of the matter aforesaid, the Claimant has been deprived of the use and enjoyment of the said premises and has thereby suffered loss and damage."

[6] In his defence filed on 16 November 2009, the respondent, after foreshadowing in some detail the evidence upon which he intended to rely, denied that he was a trespasser and averred (at para 6) that:

> "…I stipulate that I have a right to the southern part of the land situate at lot No. 1280A Wilson Street, Belize City, Belize by way of adverse possession for having been in long, open continuous and undisturbed occupation thereof for more than 30 years, part of which is derived from my grandfather."

[7] On this basis, the respondent counterclaimed, seeking the following reliefs:

"a. A Declaration that the Defendant is the owner of all that portion of land being the southern portion of lot No. 1280A situate on Wilson Street, Belize City, Belize being 443 square yards being bounded on the north by lands now or formerly occupied by Melvin Cleland

and Bertie Cleland respectively and measuring 59 feet or thereabout, on the west by a portion of land now or formerly owned by Norman Tennyson measuring 73 feet, on the east by lands now or formerly owned by Dan Goff and one Baptist respectively measuring 85 feet and on the south by lands now or formerly owned by one Griffith and one Lucas respectively and measuring 49 feet; by reason of adverse possession having been in long, continuous, undisturbed and open occupation for in excess of thirty years part of which is derived from my grandfather Eric Cleland.

b. An Order that a right of way be given for me to access the land from Wilson Street.

c. A Declaration that the certificate of title of the Claimant is null and void.

d. An Order that the Registry Index Map be amended to reflect the true position that there are three parcels of land resulting from the fragmentation of lot 1280A situated on Wilson Street, Belize City, Belize.

e. An Order that my name be entered in the Land Title Register as the proprietor of the southern portion of lot No. 1280A situated on Wilson Street, Belize City.

f. An injunction restraining the Claimant whether by herself, her servants or agents or otherwise howsoever from entering, using or in any way dealing with the southern portion of lot No. 1280A Wilson Street, Belize City, Belize.

g. Further and other relief."

The evidence

[8] Awich J described this action (at para 3) as "a sorry story of two great-great grandchildren contesting the right of the other to a portion of land left and passed down by their great-great grandfather, Hendicott Cleland". And so it is. The summary which follows is based on the largely unchallenged (save where otherwise indicated) evidence given before the judge.

[9] According to Mrs Ivy Barrow Flowers, who was born in 1923 and was the only independent witness to testify before the judge, Lot No. 1280A "was a large piece of

land on which the Cleland family lived". Over the course of time, Lot No. 1280A came to be divided informally into three portions, identified as numbers 24, 26 and 30 Wilson Street respectively. In this judgment, I will refer to them as number 24, number 26 and number 30. Numbers 24 and 26 (described in the evidence as the north eastern and north western portions of Lot No. 1280A) fronted Wilson Street, while number 30 (described in the evidence as the "back part" or the "southern portion") lay to the rear of numbers 24 and 26. Access to number 30 from Wilson Street was gained through an alley running between numbers 24 and 26.

[10] There was a house on each of the three portions of Lot No. 1280A, each occupied by one of three Cleland brothers. The appellant's grandfather, Bertie Cleland ('Bertie'), occupied number 24, while the respondent's grandfather, Eric Cleland ('Eric'), occupied number 30. Number 26, which was occupied by Melvin Cleland, plays no part in this story. So the appellant's mother, Mrs Grace Longsworth ('Grace'), is Bertie's daughter; while the respondent's mother, Miss Audrey Cleland ('Audrey'), is Eric's daughter. (I naturally intend no disrespect by opting to refer, for convenience, to each of the actors, apart from the appellant and the respondent, by first name.)

[11] For a time before 1968, Grace, her five children (including the appellant) and her husband, Louis Longsworth, lived at number 24. According to the appellant's evidence, Grace, who was Bertie's eldest child, "had title to the place". In 1968, Grace went to live at 16 Nargusta Street, Belize City and, in 1980, the appellant relocated to the state of Colorado in the United States of America ('USA'), where she has resided since. In 1981 or 1982, Grace also moved to the USA (to the state of Florida), where she too continues to live. The respondent, Audrey's son, was born on 18 November 1981. He was raised by Eric and his wife Emma and had lived all his life at number 30. Eric, who was predeceased by Emma, died in 1997 and the respondent remained on the property up to the time of trial.

[12] In 1999, the appellant commissioned a survey of a portion of Lot No. 1280A. The survey was done by Mr G. V. Bautista (now deceased), a licensed surveyor. Mr, Bautista's survey plan dated 13 December 1999 depicted a lot, rectangular in shape

and comprising 538.407 square yards, running north to south along the eastern side of the property from Wilson Street to the back, or southern boundary, of Lot No. 1280A. In other words, Mr Bautista's survey plan enclosed number 24 with number 30. A copy of the survey plan is appended to this judgment.

[13] By Deed of Gift ('the deed') made on 21 February 2003, Grace granted the eastern portion of Lot No. 1280A, that is, the disputed land, to the appellant for natural love and affection and the sum of $1.00 (perfecting a gift which the appellant testified, had been made to her "verbally" in the 1990s). The deed recited that Grace was seised of the property by adverse possession, "having been in long undisturbed occupation thereof for upwards of thirty years and by divers other means", and described the subject matter of the gift as follows:

> "ALL THAT piece or parcel of land situate in Belize City Belize being the eastern portion of the Lot numbered 1280A situate on Wilson Street, Belize City comprising 538.407 square yards and more particularly bounded and described as shown on a plan of survey by G. V. Bautista Licensed Surveyor dated the 13th day of December 1999 and lodged at the office of the Commissioner of Lands and surveys Belmopan in Register No. 8 Entry No. 5060 TOGETHER with all buildings and erections standing and being thereon."

[14] During cross examination at the trial, the appellant was questioned about the extent of Grace's gift:

> "Q. But your mommy did not give you as a gift 30 Wilson Street?
>
> A. My mother refers to the entire property as 24 Wilson Street. From the street all the way to the back.
>
> THE COURT: From the street to?
>
> THE WITNESS: As shown in the survey Your Honour.
>
> THE COURT: From the street to what you said from the street?
>
> THE WITNESS: All the way to the property line with the Hemsley's as shown in the survey."

[15] Sometime in July 2003, the appellant testified, she gave her cousin Audrey permission “to erect a temporary structure on my premises to be removed upon completion of their permanent home on their own property”. As evidence of this agreement, the appellant produced a copy of a letter dated 10 July 2003 written by her to Audrey. Since much of what it says was among the few areas of dispute in the evidence at the trial, I cannot avoid quoting the letter in full:

> “July 10, 2003
>
> Ms. Audrey Cleland
> 24 Wilson Street
> Belize City, Belize.
>
> Regarding: 24 Wilson Street
>
> Dear Audrey,
>
> It was my pleasure meeting you and Wellington last week Friday at your office.
>
> Since we talked, my lawyer has advised me to go over our verbal agreement and to make some changes to that agreement. But first, I feel it is necessary to recap how you came to live in my property and why you are occupying my property, the abovementioned 24 Wilson Street.
>
> From our conversation I understand that you and your family:
>
> 1. Have temporally moved into the house at 24 Wilson Street without my permission. But, that you asked my Aunt (Marie Vernon) who told you that while she was not in a position to grant you that permission, however, that if it was just till your house (the one that you and Judith are building behind Mel’s house) was ready, then you could do so for a short time.
>
> 2. Have built a temporary shelter for your son to occupy on the said lot because the permanent structure could not accommodate everyone.
>
> 3. That the said temporary structure your son occupies will be removed once you [sic] new family home is completed.

4. That you and your common-law husband Wellington have made certain repairs at your expense to make the dwelling livable.

5. That you, your common-law husband and you [sic] sons are taking care that no other individual(s) occupies the lot.

6. That you, your common-law husband and your sons are keeping the property clean and cleared of high grass.

You have verbally agreed to keep me informed on the progress of you [sic] temporary occupancy of the property by writing me on a monthly basis as compensation for using the house and land. As part of that verbal agreement, I gave you my address in the United States to follow-up on said commitment. This action was mentioned in lieu of charging you a monthly rent for use of the permanent structure and for use of the land where your son has built the temporary structure behind the house.

However, since then, I have been advised by my attorney to amend our verbal agreement to **include** a minimal rent charge from you and your son for use of the property. Therefore, in taking his advice to heart, I asking that you begin to pay rent, which will be due and payable on the first day of each month beginning on September 1, 2003. The rent charge will be minimal as follows:

- For occupancy of the house at 24 Wilson Street -- $100.00 per month.
- For use of the land on which the temporary structure stands -- $50.00 per month.

These rental monies are to be deposited in my account at Holy Redeemer Credit Union on the first of each month, if the credit union does not receive a monthly deposit of $150.00, I will be notified and will have to ask you to pay late fees of 10% of the amount due by the 10th of each month.

Please acknowledge you [sic] agreement to these terms for the continuation of your living arrangements by signing and dating this letter below. Please make sure that your son print [sic] and sign [sic] his name as well. Have your signatures notarized and return it to my attention by certified mail as soon as possible.

Sincerely,

Jennifer F. Longsworth
10970 East Berry Place
Englewood, CO 80111

Cc: Rodwell Williams
Attorney at Law, Barrow and Williams"

[16] The appellant's evidence was that Audrey did not respond to this letter. However, Audrey, "having built her own house on her own land", vacated the premises at number 24 on or about 15 July 2005. But, the appellant testified, the respondent refused, despite notices to vacate the premises dated 6 October 2004 and 6 November 2007, to do so.

[17] Audrey's account of the circumstances in which she came to occupy number 24 temporarily at some point differed in significant respects from the appellant's. "Sometime ago", Audrey said in her witness statement, the appellant, who told her that the land at number 24 had been transferred to her by Grace, gave her permission to live there temporarily. Audrey's evidence was that she and her four children (not including the respondent) remained there for about three to five years. During this period, Audrey testified, the respondent continued to live in the house which he had occupied from birth, that is, Eric's house at number 30. At some point, she said further, that house having fallen into disrepair, the respondent "fix it up". But at no time did he build a structure of any kind on, nor did he ever occupy, number 24.

[18] On 6 October 2004, the appellant wrote a letter addressed to "Audrey and Charleston Cleland, 24 Wilson Street, Belize City, Belize", giving them "until November 26, 2004 to vacate my property". The letter advised that demolition of "both houses on the property will begin on November 27".

[19] Three years later, a further letter, dated 6 November 2007, was sent to the respondent by Messrs Barrow & Williams, attorneys-at-law acting on behalf of the appellant:

"Mr. Charleston Cleland
24 Wilson Street,
Belize City
Belize

Dear Mr. Cleland,

We write on behalf of Ms Jennifer F. Longsworth the owner of property being all that piece or parcel of land described as a portion of Lot No. 1280 A Wilson Street, Belize City by virtue of a Deed of Gift made February 21st, 2003 by Grace Longsworth recorded in Deeds Book Volume 9 of 2003 at folios 429 to 438.

It has come to our client's attention that you have erected a chattel house on her property without her consent sometime after October 2004. Your unlawful trespass and entry upon our client's property will not be tolerated.

We also understand that you claim to have a deed to the property by way of gift to a parent of yours, if so, please produce a copy of the deed to us.

You are hereby required to immediately remove your chattel house from our client's property by the close of business on December 31st, 2007.

Should you fail to heed this demand appropriate action will be commenced in the Supreme Court of Belize for trespass, damages and cost [sic] against you without any further notice."

[20] At the trial, the respondent could not recall having received any notices to vacate the premises and, as I have already indicated, he remained, on his account, in uninterrupted occupation of number 30. At the end of the day, the only difference of substance between the evidence given by and on behalf of the appellant and that given by and on behalf of the respondent related to whether Grace and/or the appellant had occupied number 30 at any time; or, to put it the other way, whether the respondent had at any time occupied number 24.

[21] But before coming to what the judge made of this evidence, I should complete this part of the story by indicating that, on 14 January 2009, Fort George/Pickstock, the area of Belize City in which Lot No. 1280A was situated, was declared a compulsory registration area under the RLA. Consequently, on 3 March 2009, the appellant applied for first registration of her title to the eastern portion of Lot No. 1280A and, on 21 April 2009, the Registrar issued the land certificate accordingly.

The judge's findings

[22] After initially seeming to suggest that, in considering and determining the appellant's application for first registration, the Registrar may not have followed the procedure set out in the RLA, the learned judge indicated (at para 24) that he would proceed on the basis that "the registration…was carried out in accordance with the provisions of ss:13 and 15…"

[23] Then, as regards the difference in the evidence described at para [20] above, the learned judge clearly preferred the respondent's version (paras 35–36):

> "35. The evidence of the claimant's own possession of No. 24 on the north-eastern portion of the eastern portion of Lot 1280 A from 21st February 2003, when the deed of gift was made was not contested, even though she did not demonstrate her possession by physical presence or receipt of rent. Also her possession of No. 24 prior to 21st February 2003, through the possession of her mother, was not contested.
>
> 36. But, her evidence that she and her mother occupied the eastern portion of Lot 1280A including the southern part, bordering Mr. Hemsley's land was strongly contested, and in my view, successfully. The claimant herself admitted that Eric Cleland lived in house No. 30 on the southern part. In addition the testimony of an independent witness, Ivy Barrow Flowers, born in 1923, left no doubt that the defendant's grandfather and grandmother occupied the southern part, and that the defendant was born and lived there since."

[24] Based on this finding, the learned judge concluded (at para 37) that the land certificate had been procured by the appellant by mistakes of fact and law. The mistake of fact was "the false presentation [to the Registrar] that she had possession of the entire land, the eastern portion of Lot 1280A, when in fact she had never occupied and had never claimed [a] right to possession of the southern part of the Lot…" Further, if Grace had not known that the respondent "lived on the southern part of the eastern portion of Lot 1280A, then that was another mistake of fact". The mistake of law was (para 38) "the representation that the [appellant] and her mother had, 'adverse possession'". Grace and the appellant had "never occupied or claimed a right, let alone openly and to the exclusion of others, to the southern part of the lot". Accordingly, the

judge held (at para 40), the assumption upon which Mr Bautista had prepared his survey diagram, that is, that the appellant, by herself or through her mother, occupied the entire eastern portion of Lot No.1280A, to the exclusion of others, including the respondent, "has been disproved by evidence".

[25] The learned judge therefore concluded as follows (at para 41):

> "The mistakes of fact and law endured and were acted upon by the Registrar of Lands when she registered the entire eastern portion of Lot 1280A, including the southern part that the defendant occupied, as Parcel 326, Block 45, Fort George/Pickstock Registration Section, in favour of the claimant. In my view, the registration of title in favour of Jennifer F. Longsworth by the Registrar was the result of mistakes of fact and law. Accordingly it is defeated under ***s:143 of the Registered Land Act***, by the mistakes. The title and Land certificate No. LRS 200902853 must be regarded as defeated."

[26] Awich J added (at para 42) a further reason for his conclusion, which was that, by virtue of section 31(1)(f) and (g) of the RLA, the appellant's title when acquired was subject to overriding interests in favour of the respondent as the person occupying the land.

[27] In the result, the learned judge made orders dismissing the appellant's claim and upholding the respondent's counterclaim, with costs to the respondent. However, the judge considered (at para 45) that he could not make an order granting the respondent title to number 30, together with a right of access, "straight away". He accordingly took the view that the respondent "would have to apply to the Registrar of Lands for title under the Act". The judgment concluded as follows (at paras 46 – 48):

> "46. The order that I make to meet the success of Charleston Cleland is that the Registrar of Lands is directed to rectify the register by cancelling the title of Jennifer Longsworth to Parcel 326, Block 45, Fort George/Pickstock Registration section which was the entire eastern portion of Lot 1280A, Wilson Street, Belize City. It is open however, for the claimant, and the defendant on the other hand, to apply to the Registrar of Lands for registration of title to the portion of the eastern portion of Lot 1280A that each claims a right to.

47. I did consider rectification that would not involve cancelling the Land Certificate of the claimant, and would accommodate the success of the counterclaim by the defendant. None came to mind readily, given that the plan filed by Mr. Bautista did not show demarcation between the north-eastern part and the southern part of Lot 1280A. The solution to the matter is, in my view, to require each party to apply to the Registrar of Lands for registration of his or her title or right, and to attach a survey plan showing the exact area of the land he or she claims title or right to."

The grounds of appeal and the submissions

[28] Dissatisfied with this result, the appellant filed four grounds of appeal:

"1. The Learned Trial Judge misdirected himself and erred in holding that the Appellant's registration as proprietor of Parcel 326 Block 45 Fort George/Pickstock Registration Section was based on a mistake of fact and law when no such mistake of fact and or law was pleaded and or proven by any evidence before him and or otherwise.

2. The Learned Trial Judge erred in ordering the Registrar of Lands, a non-party to the claim, to rectify the Register of Lands by cancelling the title of Jennifer Longsworth to Parcel 326 Block 45 Fort George/Pickstock Registration Section as the Registrar of Lands made no claim of mistake of fact or law or at all, against the registration of Jennifer Longsworth's title to the said land and in law and fact did duly register her as proprietor of the said land.

3. The Learned Trial Judge erred and misdirected himself in failing to appreciate that the issue before him for determination was whether the Appellant's registered title to Parcel 326 Block 45 Fort George/Pickstock Registrar Section was affected in any way by the Respondent's claim to occupation of the Southern portion of the said land, and if so, to what extent, if any.

4. The decision of the Learned Trial Judge was unreasonable and against the weight of the evidence."

[29] At the heart of the appeal is the appellant's contention, which is encapsulated in grounds one and two, that it was not open to the judge in these proceedings, either as a matter of pleading or evidence, to find that the registration of the respondent as owner

of the land comprised in the land certificate had been obtained by mistake, whether of law or of fact.

[30] Mr Williams SC submitted that, in this case, a case of registered title, the judge had done the impermissible by seeking to go behind the land certificate. For after having, with some hesitation, correctly determined to proceed on the basis that the appellant's first registration had been carried out in accordance with the RLA, Mr Williams submitted, the judge then incorrectly went on to contradict himself and to find that the registration was void due to mistakes of law and fact. In so doing, it was submitted that the judge had misunderstood and misapplied the provisions of the RLA, as well as the authorities which explained its operation.

[31] On ground three, Mr Williams' complaint was that, by his approach to resolving the matter, the judge failed to recognise the true issue in the case, *viz*, whether the respondent had proved that his own occupation of the back part of Lot No. 1280A, or his own occupation combined with that of others in succession, defeated the appellant's title. In order to prove this, it was submitted that the respondent had to prove that he was in open, continuous and undisturbed occupation of that portion of the property for upwards of 12 years and that, as successor, he was entitled to rely on his grandfather's previous occupation. This the respondent could not do, Mr Williams submitted, because of the fact that, as a minor of 16 years at the time of his grandfather's death in 1997, he lacked capacity to claim for himself. At best, his own adverse occupation could only have commenced in 1999, when he was 18 years old, and the serving of notices on him in 2004 and 2007, and the filing of this action in 2009, would have interrupted the period before the expiry of 12 years.

[32] In all these circumstances, the appellant contended, the decision of the judge was unreasonable and against the weight of the evidence.

[33] Mrs Pitts-Robateau for the respondent invited our attention to the respondent's defence and counterclaim, which, she submitted, set out clearly what the respondent's position was. She also reminded us of the judge's findings, especially as regards the

respondent's possession of number 30, submitting that these findings were consonant with what she described as "the justice of the case". Mrs Pitts-Robateau therefore urged us to find that, on the basis of those findings of fact and his application of the law to the facts, the judge's decision was correct and ought to be upheld.

[34] In my view, the grounds of appeal and counsel's submissions invite consideration of (i) the adequacy of the pleadings ('the pleading issue'); (ii) the circumstances in which the court can order rectification of the register under the provisions of the RLA ('the rectification issue'); (iii) the law of adverse possession ('the adverse possession issue'); and (iv) whether the judge's conclusions were supported by the evidence ('the sufficiency of evidence issue').

The pleading issue

[35] The learned editors of Bullen & Leake & Jacobs (Precedents of Pleadings, 16th edn, para 1-01) describe 'pleadings' as "a generic term to describe the formalised process by which each party states its case prior to trial". As regards the defence, the requirements are now to be found in Part 10 of the Supreme Court (Civil Procedure) Rules 2005 ('the CPR'). Rule 10.5(1) provides that the defence "must set out all the facts on which the defendant relies to dispute the claim", and rule 10.5(2) states that "[s]uch statement must be as short as practicable". Rule 10.5(4)(a) provides that, where he denies any of the allegations in the claim form or statement of claim, "the defendant must state the reasons for doing so"; and rule 10.5(4)(b) provides that "if the defendant intends to prove a different version of events from that given by the claimant, the defendant's own version must be set out in the defence".

[36] The rules governing counterclaims are to be found in Part 18, under the rubric "Ancillary Claims". An ancillary claim includes "a counterclaim by a defendant against the claimant" (rule 18.1(1)(a)) and falls to be treated "as if it was a claim for the purposes of these Rules except as provided by this Rule" (rule 18.2(1)). So rule 8.6(1)(b), which requires a claimant to "specify any remedy that the claimant seeks

(though this does not limit the power of the court to grant any other remedy to which the claimant may be entitled)", is equally applicable to a counterclaim.

[37] In **McPhilemy v Times Newspapers Ltd and others** **[1999] 3 All ER 775**, **792-793**, Lord Woolf MR commented on the requirements of pleading in the aftermath of the English Civil Procedure Rules 1998):

> "The need for extensive pleadings including particulars should be reduced by the requirement that witness statements are now exchanged. In the majority of proceedings identification of the documents upon which a party relies, together with copies of that party's witness statements, will make the detail of the nature of the case the other side has to meet obvious. This reduces the need for particulars in order to avoid being taken by surprise. This does not mean that pleadings are now superfluous. Pleadings are still required to mark out the parameters of the case that is being advanced by each party. In particular they are still critical to identify the issues and the extent of the dispute between the parties. What is important is that the pleadings should make clear the general nature of the case of the pleader. This is true both under the old rules and the new rules."

[38] Those observations, although made in a case of libel, have since achieved general currency and were cited with approval by the House of Lords in **Three Rivers District Council v Bank of England (No. 3)** **[2001] All ER 513** (per Lord Hope at para [50]), and applied by this court in **DMV Ltd v Vidrine** (Civil Appeal No. 1 of 2010, judgment delivered 20 October 2010, per Morrison JA at paras [56]-[64]). As the learned editors of Blackstone's Civil Practice 2012 observe (at para 8.21), "…it is clear from the comments of Lord Woolf MR in *McPhilemy v Times Newspapers Ltd*…that contests over the terms of statements of case are to be avoided".

[39] So the question in this case is whether the respondent's defence, when read along with the witness statements and other material provided by him in the case, conveyed sufficient information "to mark out the parameters of the case" that the appellant was to meet, particularly in the light of Mr Williams' complaint that it was not open to the judge on the pleadings to resolve the case by reference to section 143 of the RLA.

[40] In the main body of the defence (see para [6] above), the respondent rehearsed (in obviously far greater detail than was required to satisfy the rules) much of the history which I have attempted to describe in this judgment. The clear point made by the defence was that, while Bertie had occupied "the north eastern portion" of Lot No. 1280A (number 24), neither he nor the appellant had ever occupied the "back or southern half" (number 30), which had been occupied by Eric and, after his death, the respondent himself. Thus, the respondent averred (at para 4), "I verily believe that Mr Bautista made an error in his survey", when he "surveyed the land almost in a straight line from north to south along the eastern boundary…and in so doing he ignored all the other evidence of occupation and he took in a part of the southern or back portion of the land and in particular that portion of the land on which the house in which I live is situated".

[41] It is against this backdrop that the respondent counterclaimed for, among other reliefs, a declaration that the appellant's land certificate "is null and void" and an order "that my name be entered in the Land Title Register as the proprietor of the southern portion of Lot No 1280A…"

[42] In his witness statement dated 15 November 2010, the respondent retraced most of the ground that he had already covered in the defence. But, after stating that he had obtained a copy of Mr Bautista's survey plan dated 13 December 1999, which showed that the respondent had commissioned the survey of the eastern portion of Lot No. 1280A, the respondent added that he had been informed by his surveyor "that Mr Bautista and [the appellant] were both in error when she commissioned the survey of the entire eastern part of lot 1280A and Mr Bautista went on to survey the entire eastern part ignoring evidence of occupancy that existed at the time on what was 30 Wilson Street and other pertinent indications such as fences or portions of fences that were there".

[43] And in her witness statement dated 15 March 2010, Audrey asserted that "[n]either Grace Longsworth nor Jennifer Longsworth had ever been in occupation of any part of my parent's land which is known as 30 Wilson Street, Belize City, Belize".

[44] So the upshot of the respondent's defence and counterclaim, supplemented by the witness statements filed on his behalf, was that (i) neither the appellant nor Grace had ever lived at number 30; and (ii) both the appellant, who instructed him, and Mr Bautista were "in error" in proceeding on the basis that Grace's gift of "the eastern portion of Lot 1280 A" included number 30. On this basis, the respondent counterclaimed for an order that the appellant's land certificate in respect of the disputed land was "null and void".

[45] In these circumstances, it seems to me that it is difficult to maintain that the respondent's pleadings had not made it clear that, in the event that he succeeded in establishing his case at trial, he sought an order defeating the appellant's land certificate. In this regard, this case is in my view clearly distinguishable from **Marin v Betson & Attorney General** **(Civil Appeals Nos 26 & 28 of 2007**, judgment delivered 20 June 2008), to which we were referred by Mr Williams, albeit in a slightly different context. In that case, in an action for recovery of possession, damages or mesne profits and other reliefs, Carey JA, with whom the other members of this court (Mottley P and Morrison JA) agreed, observed of the respondent's counterclaim (at para 3) that "[i]t is clear that the counter claim made no claim against the plaintiff…It should have been struck out, unless amended, as disclosing no cause of action". The learned trial judge nevertheless found it possible to enter judgment for the respondent on the counterclaim and make an order directing the Registrar to cancel appellant's certificate of lease, which had been registered pursuant to the provisions of the RLA. In allowing the appeal against this order, the court had no difficulty in concluding that the question of rectification did not arise, either on the pleadings or on the evidence in the case (see paras 52-54).

[46] I would therefore conclude that, although the respondent did not advert specifically to section 143 of the RLA, which permits rectification of the register in certain

circumstances, including mistake, it was open to the judge on the pleadings to apply that section.

[47] In any event, I would be extremely hesitant in this, the post CPR era, given the primacy of the overriding objective of dealing with cases justly (rule 1.1 (1)) and all that, to hold that the learned trial judge should have decided a matter such as this, in which the issues between the parties were at the end of the day clearly drawn, purely on the basis of pleadings. In **State Government Insurance Commission v Sharpe (1996) 126 FCR 341, 344**, a decision of the Supreme Court of South Australia (Full Court), Millhouse J made the same point, far better than I have:

> "Pleadings in an action are to define the issues between the parties. Sometimes – perhaps this is one of those times – the pleadings may not do so at all or only imperfectly. As a rule, though, depending on the course of the hearing, that may not matter because the issues become quite plain as the hearing proceeds and no party is put at a disadvantage. That, I think, was so here. The day has well passed when decisions are based on the state of the pleadings, irrespective of the facts or justice."

[48] Commenting on this dictum, the learned editors of Bullen & Leake & Jacob observe (at para 1–08) that it "states the approach in terms similar to those likely to prevail in England in cases decided under the CPR". While not sanctioning any general departure from the principle that pleadings remain important to identify the issues and the extent of the dispute between the parties in a particular case (a point that the court also made in **DMV Ltd v Vidrine**, at para [64]), I would adopt the same approach in this case.

[49] But, that having been said, there is yet another aspect of the appellant's complaint on this score that caused the court considerable disquiet during the hearing of this appeal. Mr Williams told us at the outset (without demur from Mrs Pitts-Robateau) that there had been no mention of section 143 of the RLA during the trial, and no indication at all from the judge that the section might come into play. According to Mr Williams, the first time he became aware that there was an issue that the appellant's title may have been vitiated by mistake was when he saw it in the judge's reserved judgment.

[50] In my view, even if it was discernible from the statement of case and the evidence as it developed that this was a direction which was open to the judge, it would obviously have been desirable (and helpful) for counsel to be alerted to his thinking before seeing it manifested in his reserved judgment. Indeed, the court was sufficiently concerned by the fact that this was not done to canvass with counsel the possibility of a retrial of the matter, essentially on a natural justice basis (since no one doubts the power of the court in a proper case, pursuant to section 28 of the Supreme Court of Judicature Act, to "make any order as to the procedure to be followed or otherwise which the Court considers necessary for doing justice in the cause or matter, whether that order has been expressly asked for by the party entitled to the benefit thereof or not").

[51] But neither counsel was at all enthusiastic about this suggestion. Mr Williams, in particular, pointed out (again with Mrs Pitts-Robateau's concurrence) that all the evidence was before us and that this court was accordingly in as good a position as the court below to consider what should be the correct outcome of the case. In the light of my conclusion that the material provided by the respondent in the claim form, statement of claim and witness statements was sufficient to make the appellant aware of the shape of the case that she was being asked to meet, therefore, I have been content to proceed on this basis.

The rectification issue

[52] I start by considering some relevant provisions of the RLA. Section 13 deals with the procedure for securing first registration of land situated in a compulsory registration area. For present purposes, it is only necessary to refer to section 13(2) and (3):

> "(2) On receipt of an application for the first registration, the Registrar shall –
>
> > (a) publish in the Gazette and in at least one newspaper, a notice of his intention to register the land for the purpose of bringing it to the attention of persons who may be affected thereby;

(b) serve a notice on the owner of the land, if the owner is not the applicant, to submit an application for first registration in the prescribed form within such period as is stated in the notice, but the Registrar in his discretion may dispense with the submission of such application;

(c) examine the title and for that purpose may examine any deed recorded under the General Registry Act or summon any person to give evidence, if he considers such evidence likely to be relevant to the application.

(3) If, as a result of such examination, the Registrar is satisfied that a person –

(a) is in peaceful, open and uninterrupted possession of a parcel in accordance with the principles contained in section 139 and has been in such possession by himself or by his predecessors in title for an uninterrupted period of twelve years or more; or

(b) has a good documentary title to the land and that no other person has acquired a title thereto under any law relating to prescription or limitation, and that he would succeed in maintaining or defending such possession or title against any other person claiming the land or part thereof,

the Registrar shall record that person as the owner of the parcel and declare his title to be absolute."

[53] Section 15 prescribes the manner in which a first registration and every subsequent registration is to be effected:

"15.1(1) The first registration of any parcel shall be effected by the preparation of a register in accordance with the provisions of section 10 and the signing by the Registrar of the register of the particulars of encumbrances, if any, appearing thereon.

(2) Every subsequent registration shall be effected by an entry in the register in such form as the Registrar may from time to time direct, and by the cancellation of the entry, if any, which it replaces."

[54] Section 26 deals with the effect of the registration of any person as the proprietor of land with absolute title:

"26. Subject to section 30, the registration of any person as the proprietor with absolute title of a parcel shall vest in that person the absolute ownership of that parcel together with all rights and privileges belonging or appurtenant thereto, free from all other interests and claims whatever, but subject –

(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

(b) unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by section 31 not to require noting on the register:

Provided that –

(i) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee;

(ii) the registration of any person as the proprietor under this Act shall not confer on him any right to any minerals or any mineral oils unless the same are expressly referred to in the register."

[55] Next, there is section 31, which seeks to protect the position of persons with over-riding interests:

"31.1(1) Subject to subsection (2), unless the contrary is expressed in the register, all registered land shall be subject to such of the following over-riding interests as may for the time being subsist and affect it, without their being noted on the register –

(a) rights of way, rights of water and any easement or profit subsisting at the time of first registration under this Act;

(b) natural rights of light, air, water and support;

(c) rights of compulsory acquisition, resumption, entry, search, user or limitation of user conferred by any other law;

(d) leases or agreements for leases for a term less than two years, and periodic tenancies within the meaning of section 2;

(e) any unpaid moneys which, without reference to registration under this Act, are expressly declared by any law to be charged upon land;

(f) rights acquired or in the process of being acquired by virtue of any law relating to limitation or prescription;

(g) the rights of a person in actual occupation of land or in receipt of the rents and profits thereof except where inquiry is made of such person and the rights are not disclosed;

(h) electric supply lines, telephone and telegraph lines or poles, pipelines, aqueducts, canals, weirs and dams erected, constructed or laid in pursuance or by virtue of any power conferred by any law.

(2) The Registrar may direct registration of any of the liabilities, rights and interests hereinbefore defined in such manner as he thinks fit."

[56] And lastly for present purposes, there is the all-important section 143, which provides for the rectification of the register in certain circumstances:

> "143(1) Subject to subsection (2), the court may order rectification of the register by directing that any registration be made, cancelled or amended where it is satisfied that any registration, including a first registration, has been obtained, made or omitted by fraud or mistake.
>
> (2) The register shall not be rectified so as to affect the title of a proprietor who is in possession or is in receipt of the rents or profits and acquired the land, lease or charge for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake or substantially contributed to it by his act, neglect or default."

[57] The general effect of these provisions is therefore that the first or any subsequent registration of any person as the proprietor with absolute title of a parcel of land under the RLA vests in that person the absolute ownership of that parcel, free from all other interests and claims whatever. However, this is subject to any encumbrances,

conditions and restrictions shown in the register; and, unless the contrary is expressed in the register, to such over-riding interests affecting the land which are declared by section 31 not to require noting on the register. It is also subject to the court's power to order rectification of the register where it is satisfied that any registration, including a first registration, has been obtained, made or omitted by fraud or mistake.

[58] This case is concerned with the power given to the court by section 143 to rectify the register by reason of mistake. The governing authority on the construction and operation of the section is **Quinto & Quinto v Santiago Castillo Ltd [2009] UKPC 15**, ('**Quinto**'), a decision of the Privy Council on appeal from this court, in which Lord Phillips said this (at para 4):

> "Under the Torrens system registration confers title on the registered proprietor. A merit of the system is that a purchaser from the registered proprietor does not normally need to look further than the register for reassurance that the vendor has good title. Under some systems once a title is registered it is indefeasible. Under other systems the title of a bona fide purchaser from the registered proprietor will, once it is registered, be indefeasible. The indefeasibility of title is, however, capable of giving rise to injustice if the registration of the title is brought about by fraud, or by a mistake. For this reason, many Torrens systems make provision for rectification of the register, but the nature of such provision varies from system to system. The effect of each depends on its own terms."

[59] The appellant In **Quinto** was the owner of a parcel of land, which was not registered under the RLA. A woman called Ann Williams, who had no claim to ownership of it, succeeded in getting herself registered as the proprietor of the land by a sleight of hand: that is, by presenting documents as proof of her title which in fact related to another parcel of land in respect of which she had earlier obtained registration as proprietor. Had the registry inspected the documents, it would have been apparent that they did not relate to the parcel owned by the appellant. In due course, after publication by the Registrar of the appropriate advertisements of Ms Williams' application, Ms Williams was registered as the proprietor of the appellant's land. Just over a week later, the land was transferred to the respondent, which became the registered proprietor in Ms Williams' place. Unknown to the Registrar, three days after

the registration of Ms Williams as proprietor, before the transfer to the respondent, an application for first registration of the land had been lodged on behalf of the appellant.

[60] The appellant and the Registrar filed separate actions claiming rectification of the register under section 143 of the RLA. Conteh CJ held that they were entitled to succeed, but this court considered that they could not do so, because the case did not come within the language of section 143, which had to be interpreted restrictively. By the time the case reached the Privy Council the principal issue was whether, even assuming that Ms Williams' registration as proprietor of the appellant's land had been obtained by fraud or mistake, the remedy of rectification remained available, she having subsequently transferred the land to the respondent. In other words, could the court rectify the subsequent entry on the register of the respondent as proprietor on the strength of the same fraud or mistake by which Ms Williams had procured her registration as proprietor?

[61] Disagreeing with this court (and in agreement with Conteh CJ), the Board held (at para 39) that it could:

> "…the addition of the words 'including a first registration ' after the second 'any registration' [in section 143(1)] is a further indication that the registration in respect of which there has been a mistake or error need not necessarily be the registration in respect of which rectification is sought. We accept that this significantly diminishes the element of indefeasibility of registered title that is a feature of the Torrens system, but this is the manner in which the legislation of Belize has decided to balance the desirability of a simple system of land transfer with the interests of justice."

[62] In the result, the Board concluded (at para 41) that both the first registration of Ms Williams and the subsequent registration in favour of the respondent were obtained as a result of mistake and fraud:

> "The mistake was that of the Registrar and consisted in the erroneous belief that Ana Williams rather than the Quintos, had title to Parcel 869 at the time of the initial registration in Ann Williams' favour. The causative effect of that mistake persisted up to and resulted in the second

registration in favour of Santiago, and was augmented by a further mistake in that the Registrar was unaware that an application in respect of Parcel 869 had been made in behalf of the Quintos on 31 December 2004, before registration in favour of Santiago had been completed. But for these mistakes, the Registrar would plainly not have completed the registration in favour of Santiago, but would have placed a restriction order on the land until the position had been clarified by the court."

[63] Thus, although the court's jurisdiction to order rectification of the register in an appropriate case, being statutory, was never in doubt, **Quinto** provided important clarification as to its scope, by establishing that the court may order rectification on the ground of fraud or mistake in respect of "any registration", irrespective of whether the fraud or mistake relied on relates to the entry in the register which it is sought to rectify, or to some previous entry. The Board arrived at this conclusion by way of a close reading of the language of section 143 itself, even while recognising that this construction "significantly diminishes the element of indefeasibility of registered title that is a feature of the Torrens system". So it seems to me that it is important in each case to match the facts to the language of the statute, uninfluenced by any *a priori* notions derived from the philosophical underpinnings of the system.

[64] In this case, the respondent alleged two mistakes: the first by the appellant in commissioning a survey of the entire eastern part of Lot No. 1280A, without regard to the position of number 30 on the land; and the second by Mr Bautista, in enclosing number 30 with number 24 in his survey plan as though they were one holding. In my view, it is clear that, on the evidence, the greater part of which was virtually unchallenged, and the rest which the judge accepted, the respondent made good his contention on both counts. The evidence clearly established that numbers 24 and 30 were always treated as the separate property of Bertie and Eric respectively. There was absolutely no evidence that either Grace, through whom the appellant claimed, or the appellant, had ever occupied number 30. Indeed, when it was put to the appellant in cross-examination that "your mommy did not give you as a gift 30 Wilson Street", the best that she was able to offer in response was, "My mother refers to the entire property as 24 Wilson Street...[f]rom the street all the way to the back." If that was indeed Grace's assessment, then it seems to me that, on the evidence, she too was in error. In

this regard, I think it is clearly relevant to bear in mind that, by 2003 when Grace signed the deed, she had not actually lived at Wilson Street for 35 years and neither she nor the appellant had lived in Belize for over 20 years.

[65] These errors were further perpetuated by the deed itself. For in it, after reciting that she had been in “long undisturbed occupation” of the disputed land (including number 30) for upwards of 30 years, Grace purported to give it (“being the eastern portion of the Lot numbered 1280A situate on Wilson Street…and more particularly bounded and described as shown on a plan of survey by G. V. Bautista”) to the appellant. The deed was the foundation document upon which the appellant relied in support of her application for first registration.

[66] So what then is the effect of these compound errors? Section 143(1) provides that the court may order rectification of the register where it is satisfied that any registration “has been **obtained, made or omitted** by fraud or mistake” (my emphasis). In **<u>Quinto</u>**, the registration of Ann Williams as proprietor was, as the Board found, made by the Registrar by mistake. There is no evidence in this case of the processes that the Registrar went through in order to satisfy herself that the appellant was entitled to be registered with absolute title of the disputed land in accordance with section 13(3) of the RLA. But it seems to me that, for the reasons given in paragraphs [64] and [65] above, the registration of the appellant as proprietor of the disputed land, that is, the entire eastern portion of Lot No. 1280A, including number 30, was plainly obtained by the appellant by means of a mistake, within the meaning of section 143(1).

[67] I have therefore come to the conclusion that Awich J was right to conclude (at para 40) that the assumption on which Mr Bautista had prepared his survey plan was “disproved by the evidence”; and further (at para 41), that the mistake “endured and [was] acted upon the Registrar of Lands when she registered the entire eastern portion of Lot 1280 A, including the southern part that the [respondent] occupied”, in favour of the appellant.

[68] I should perhaps add for completeness that, in my view, rectification was not precluded in this case by section 143(2) of the RLA, since there was no evidence that the appellant was either in possession of or in receipt of the rents or profits of the disputed land. As the Board held in **Quinto** (at para 40), "'in possession' in section 143(2)…means actual physical possession".

[69] This conclusion makes it unnecessary to dwell on the second difficulty which the judge perceived in the appellant's case. That is, that the appellant's title was in any event subject to over-riding interests in favour of the respondent as the possessor of a right "acquired or in the process of being acquired by…limitation or prescription" (section 31(1)(f)) and as "a person in actual occupation of land" (section 31(1)(g)). It suffices to say, in my view, that, as at 21 February 2003, the date of the deed, it is strongly arguable that the respondent's position also attracted the protection given by section 31 to over-riding interests.

The adverse possession issue

[70] In the light of my conclusion on the rectification issue, it becomes unnecessary, in my view, to dwell too much on this issue. In the leading modern case on the subject, **J A Pye (Oxford) Ltd v Graham [2003] 1 AC 419**, the House of Lords held that, for the purposes of section 15 and para 8(1) of Schedule 1 of the English Limitation Act 1980, the elements of legal possession are (i) a sufficient degree of physical custody and control ('factual possession'); and (ii) an intention to exercise such custody and control on one's own behalf and for one's own benefit ('intention to possess', or, as it is often called, *animus possidendi')*. (Section 15 and para (8)(1) of Schedule 1 of the English Act are virtually identical to sections 12(2) and 18(1) respectively of the Belizean Limitation Act.)

[71] In the instant case, there was no challenge to the appellant's right to claim title to number 24 on the basis of the deed and Grace's assertion of possessory title to it. As regards number 30, on the other hand, Awich J found (at para 38), on plainly irresistible evidence to this effect, that the appellant and her mother "had never occupied or

claimed a right, let alone openly and to the exclusion of others, to the southern part of the Lot". In other words, the fact of possession of number 30 not having been established by Grace and/or the appellant, the question of the intention to possess did not arise.

[72] Nor does it arise in relation to the respondent's claim to number 30, at this stage anyway, since by the judge's order, which I support, that will be a matter for the Registrar's assessment and determination in due course.

The sufficiency of evidence issue

[73] There were clearly some significant gaps on both sides in the evidence in this case. On the appellant's side, there can be no doubt that a full and informed investigation of the issues would have been assisted by evidence from Grace, upon whose possession of the disputed land she based her case. On the respondent's side, it would also obviously have been helpful for the court to have heard evidence from a surveyor, with a view to elucidating the actual lay of the land on Lot No. 1280A. And lastly, in resolving the rectification issue, it would surely have been desirable for some indication to have been given in the evidence of the processes by which the Registrar considered and determined the appellant's application for first registration as proprietor of the disputed land.

[74] But all of this is, of course, pure hindsight. On the day, the judge was obliged to work with what was before him. And, at the end of the day, for the reasons I have already attempted to give on the rectification issue, I cannot say that the conclusion he reached was unreasonable in the light of the evidence which he heard.

Disposal of the appeal

[75] I would therefore dismiss the appeal and affirm the orders made by Awich J. As has been seen (see para [27] above), although the appellant's claim was dismissed, the learned judge did not find it possible to make an order granting title to number 30 to the

respondent. Instead he directed that both the appellant and the respondent should make separate applications for first registration in respect of numbers 24 and 30 respectively. It seems to me that, in all the circumstances, this was a perfectly sensible way of signposting the route to a resolution of this story.

[76] On the matter of costs, I would make a provisional order that the respondent should have the costs of the appeal. The parties will be at liberty to make an application to the court, by way of written submissions, for a different order within 21 days of the date of this judgment. In that event, the court will determine the issue of costs on paper without the need for any further hearing. In the event that neither party requests a different order, the provisional order will become absolute.

MORRISON JA

MENDES JA

[77] I have read with pleasure the closely reasoned judgment of Morrison JA. I originally had some concerns about what he refers to as the pleading issue, but he has persuaded me that at the end of the day neither party could justifiably complain about the fairness of the trial. I therefore agree with his conclusions and his disposal of the appeal and have nothing further which I can usefully add.

MENDES JA

HAFIZ-BERTRAM JA

[78] I concur in the reasons for judgment given by Morrison JA in his judgment, which I have read in draft.

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HAFIZ-BERTRAM JA