

IN THE SUPREME COURT OF BELIZE, A.D. 2017

CLAIM NO. 601 of 2016

ELTON AUDINETT

CLAIMANT

AND

**GERTRUDE GEORGIA MOORE
FIDELIA CUELLAR**

**1ST DEFENDANT
2ND DEFENDANT**

AND

REGISTRAR OF LANDS

INTERESTED PARTY

BEFORE the Honourable Madam Justice Sonya Young

Hearings

2017

30th January

Decision

2017

21st March

Mr. Darrell Bradley for the Claimant.

Mr. David Morales for the First Defendant.

Mrs. Melissa Balderamos-Mahler for the Second Defendant.

Ms. Leonia Duncan for the Interested Party.

Keywords: Application to Strike Out Claim – Res Judicata – Abuse of Process – Limitation – Evading the payment of Stamp Duty – Limitation Act Cap 170 – Stamp Duties Act Cap. 64 – Registered Land Act Cap. 194

DECISION

1. The applications now before the court to strike out the claim in its entirety

were made pursuant to Rule 26.3(1)(c) by both Defendants on substantially the same grounds.

2. The facts of this case may be briefly stated. The Claimant, in a previous matter (Action No. 576/2004) against the first Defendant, sought a declaration of his rights in property (The Property) acquired during the currency of their common law relationship. He sought, additionally, for The Property to be settled or transferred equally or equitably between them both. Alternatively, he asked for an order of sale and that he be paid the value of his interest from the proceeds.
3. During those proceedings he seemed well aware that The Property may have already been sold. He sought an interim injunction pursuant to which an Order (dated 26th November, 2004) was made in the following terms:

“IT IS ORDERED that the Defendant be restrained, whether by herself, her servants or agents or otherwise howsoever from selling, transferring, leasing, charging, or in any way dealing with the property located at #2217 Belama Extension, Phase 1, Belize City, Belize until trial or further Order of the Court.

AND IT IS FURTHER ORDERED that if there is a sale, that the sale be suspended until the hearing and determination of the substantive application.”

4. The Defendant apparently made no secret of the sale as his affidavit, dated 24th November, 2004, made in opposition to the interim injunction states:

“27. In September of this year, a Land Certificate was issued in my name. A copy of the said Land Certificate is now produced and shown to me marked “GGM6”.

28. I have since sold my property to a third party.

32. I am no longer in a position to sell, transfer, charge, lease, or in any way deal with the said property and, as such, cannot be restrained from so doing.”

5. Although this affidavit had a number of exhibits attached, there was nothing evidencing the alleged sale.

6. A reference to this sale also appears in the Claimant's own filed affidavit in those proceedings:

“31. On the 16th of November, 2004, my attorneys applied for an injunction which was opposed by the Respondent on the 24th November, 2004 in which the Respondent declared that the property was sold.”

7. Following the interim injunction the Claimant seems to have lodged a caution at the Land Registry, against The Property. The date of entry for that caution is 21st December, 2004 and that for the Land Certificate issued to Ms. Cuellar (the second Defendant herein and registered proprietor of The Property) is 1st November, 2004.

8. The court on the 23rd October, 2007, in its final determination of the matter following trial, declared and ordered:

- “1. The Applicant is entitled to half interest in the property situated at No. 2217 Belama Extension, Phase 1, Belize City, Belize.*
- 2. If the property has been sold, the Applicant is entitled to half of whatever sum constituted the purchase price.*
- 3. Costs in the sum of \$20,000.00 awarded to the Applicant.”*

9. An application for extension of time in which to appeal this order was filed on the 4th June, 2008 but was apparently refused. Sometime in 2009, then counsel for the Claimant filed a curious application in the same proceedings, *“Pursuant to Rule 149 of BELIZE LAW OF PROPERTY ACT, CHAPTER 190 REVISED EDITION 2000 ... – (1) Except as provided in this section, every transfer made, whether before or after the commencement of this Act; with intent to defraud creditors, shall be voidable, at the instance of any person thereby prejudiced.”*

10. The following reliefs were sought:

- “1. *Set aside the sale of the property at 2217 Belama Extension Phase 1, Belize City, Belize C.A.*
2. *Add to the order the value of the labour to construct and develop the property.*
3. *The third party/Respondent Fidelia Cuellar, vacate the premises by the end of one month.*
4. *Such further or other reliefs as the Court see fit.*
5. *Costs.*”

11. On the 16th June, 2009, that application, unsurprisingly, was dismissed by the Registrar. No reasons for that decision are before the court. After the dismissal of this application there was nothing further.

12. Eleven years hence the present Fixed Date Claim has been filed. This claim joins the registered proprietor of The Property as a Defendant along with Ms. Moore and the Registrar of Lands as an Interested Party. That claim seeks the following Orders:

(1) *A declaration that the First Defendant defrauded the Claimant by stating an incorrect and grossly undervalued consideration or purchase price for the sale of Parcel 2217 Block 16 in the Caribbean Shores/Belize Registration Section in a transfer instrument dated 1 November, 2004 signed between the First Defendant as transferor and the Second Defendant as transferee, thereby fraudulently and wrongly depriving the Claimant of the value of his interest in the said parcel.*

(2) *A declaration that the transfer instrument dated 1 November, 2004 signed between the First Defendant as transferor and the Second Defendant as transferee is null and void, and that no legal interest thereby passed to the Second Defendant, on the basis that the parties stated an incorrect and grossly undervalued consideration or purchase price for the sale of the said parcel and the parties failed to pay the appropriate sum for stamp duty and defrauded the government revenue in violation of the Stamp Duties Act.*

- (3) *A declaration that the transfer instrument dated 1 November 2004 signed between the First Defendant as transferor and the Second Defendant as transferee is null and void, and that no legal interest thereby passed to the Second Defendant, on the basis that the transfer instrument was signed contrary to an interim injunction in Claim No. 567 of 2004 restraining the First Defendant from transferring her interest in Parcel 2217 Block 16 in the Caribbean Shores/Belize Registration Section.*
- (4) *An order directing the Registrar of Lands in accordance with the Registered Lands Act to rectify the register for Parcel No. 2217 Block 16 in the Caribbean Shores/Belize Registration Section in terms that the Certificate of Title issued in the name of the Second Defendant for the said parcel be cancelled and that a new Certificate of Title be issued in the joint names of the Claimant and the First Defendant equally as tenants-in-common on the grounds of fraud against the Claimant and in accordance with the judgment and order of the Supreme Court of Belize dated 12 May, 2008 in Claim No. 576 of 2004.*
- (5) *An order for the immediate sale of Parcel No. 2217 Block 16 in the Caribbean Shores/Belize Registration Section by public auction or by private treaty and for the proceeds of sale, after deductions for reasonable expenses associated with the sale of the said parcel, to be divided equally between the Claimant and the First Defendant in accordance with a judgment and order of the Supreme Court dated 12 May, 2018 in Claim No. 576 of 2004.*
- (6) *An injunction restraining the First and Second defendants from in any way dealing with Parcel No. 2217 Block 16 in the Caribbean Shores/Belize Registration Section, including from selling, leasing, transferring, mortgaging, charging or otherwise disposing of their legal interest in the said parcel.*
- (7) & 8

13. Both Defendants say this claim form must be struck out in its entirety because it is totally without merit. They raise res judicata first and contend that the issues now before the court have already been litigated and determined in Action 576 of 2004. Moreover, they insist that what the Claimant seeks to bring before the court now, he ought rightly to have brought under the previous case. This, they say, is an obvious abuse of process, which the court ought to righteously guard itself against. Finally, they submit that pursuant to the Limitation Act the claim is statute-barred. They allege that by the Claimant's own admission he was aware of the circumstances and facts on which he now relies since 2004. He had six years (first Defendant) or 12 years (second Defendant) since then to make any new claim. It is their submission that by 2016, he was clearly outside the limitation period.
14. The second Defendant states further that the Claimant ostensibly has no standing to bring a claim alleging fraud in regard to the Stamp Duties Act. This, she says, is properly the right of the Registrar of Lands, the Commissioner of Stamps or any other appropriate lands officer.
15. In conclusion, she urges that there is no proper claim against the second Defendant. She speaks to a lack of evidence which suggest that she was anything other than a bona fide purchaser for value and she alludes to deficiencies in the pleadings as they relate to any allegations of fraud.
16. To all of this the Claimant insists that not only is his present claim entirely different from the original, but he highlights the different parties involved and the fresh causes of action. He maintains that there is nothing at all abusive about his conduct, he simply wants justice. He places the limitation

on his action at twelve years and says such period had not yet elapsed when his claim was filed. He adds that on a proper interpretation of the relevant section of the Stamp Duties Act, he is well within his right to bring the action he has brought. Further, his cause of action against the second Defendant is properly pleaded and any additional evidence needed could be provided through witness statements as is the usual and proper procedure.

Preliminary Issue (on the court's own volition):

17. The court notes that this claim was brought by way of a Fixed Date Claim Form. Counsel for the Claimant insists that it is a claim for possession. It is not. This is an action to void the transfer of land on allegations of fraud, all else is, at best, consequential if the Claimant is successful. The Claimant's own submissions disclose his candid appreciation of the matter when he states at paragraph 21 "*The Claimant's case is essentially to strike down the transfer of Parcel 2217 from the First Defendant to the Second Defendant on the basis of fraud....*".
18. Rule 8.1 (2)(a) with Rule 27.2 provide landowners etc with an efficient summary remedy to remove trespassers from their land. Such a claim can be brought by anyone with better title than the defendant. At present the second Defendant has better legal title to The Property than the Claimant. The Claimant is therefore not entitled summarily to eject the second Defendant unless and until he can prove that he is entitled to do so perhaps through some declaration which he now seeks.
19. More importantly, allegations of fraud undoubtedly involve substantial factual dispute and require proper pleading and particularization. Such a claim must be brought by way of an ordinary Claim Form with a properly

drafted Statement of Claim. I shall discuss the state of the pleadings subsequently. Suffice it to say that this incorrect procedure as adopted and presented would not be entertained.

The Issues falling to be determined are:

20.
 1. Are there reasonable grounds for bringing this claim
 2. Is the claim barred by principles of res judicata.
 3. Is the claim an abuse of process.
 4. Is the claim statute barred.
 5. Does the Claimant have standing to bring a claim under section 36 of the Stamp Duties Act.
 6. Is there a proper claim of fraud against the second Defendant.

Are there reasonable grounds for bringing the claim:

21. The law relating to striking out is quite settled and need not be discussed here in any great detail. In any event all counsel by their submissions shown a keen understanding and appreciation of the area. I reiterate only that the court's jurisdiction to strike out a claim should be cautiously and sparingly exercised. Counsel for the second Defendant referred the court to Note 23.24 in the Caribbean Civil Court Practice which addresses the two situations in which the court ought to strike out a claim:
 1. *Where the content of a statement of case is defective in that, even if every factual allegation contained in it were proved, the party whose statement of case it is cannot succeed; or*
 2. *Where the statement of case, no matter how complete and apparently correct it may be, will fail as a matter of law.*

Consideration:

22. Although the assault to most of this claim will be considered under the res judicata or abuse of process subheadings, there are some parts which fall to be considered here. The claim for a declaration that the transfer instrument was signed contrary to an interim injunction, is one such as the court finds it to be unsustainable.
23. The transfer instrument was plainly recorded at the Land Registry on the 1st November and the injunction was not made until the 16th November. A restraint is only effective once it has been issued. Any property conveyed before the court could prevent it, will not be disturbed by an interim restraint which merely suspends sale. Such a suspension may hold a sale in abeyance and thus ultimately restrain transfer, but sale and transfer are distinct legal concepts attracting different legal effects. Registered title to land is indefeasible and can only be impeached by reason of fraud or mistake. An interim injunction suspending a sale is not sufficient to defeat registration or disturb a third party's title.
24. Moreover, there is no action against the Land Registry for, perhaps, fraud, conspiracy or collusion. In fact the Registrar of Lands is only an interested party to these proceedings. It must not be forgotten that a cause of action comprises the minimum facts that a Claimant must prove in order to succeed on a claim – **Letang v Cooper [1965] 1 QB 232**, per Diplock LJ at **p243**. Further, the final order of the court in fact discharged that injunction when it recognized the very sale which had been 'suspended' and gave the Claimant an interest in the proceeds. This claim is bound to fail in law and will accordingly be struck out.

25. The Claimant also seeks to have the property transferred into his and the first Defendant's joint names pursuant to the Order of the court in the previous matter. That Order, which is reproduced in its entirety at paragraph 5, above, states nothing about placing the property in their joint names. But, by giving the Claimant a half interest, he obtains an equitable proprietary right or equitable ownership. Encompassed in such ownership is the right to call for the immediate transfer of legal title – *Saunders v Vautier (1841) Cr & Ph 240, 41 ER 482*. Through that original order he therefore has the right to have The Property registered in his and the first Defendant's joint names. The doctrine of merger prevents the Claimant from bringing a new cause of action to enforce the original. This claim must likewise fail.
26. So too must the Claimant's application, against the first Defendant, for an order for sale of The Property. Such an application may perhaps be enforcement proceedings in relation to the previous judgement if the Claimant is successful in avoiding the sale of land to the second Defendant.
27. The court now turns its attention to examining whether res judicata principles are applicable otherwise.

Is the claim barred by principles of res judicata:

28. The full defence of res judicata is constructed on two strong latin maxims which when interpreted are 1. the unquestionable need for finality in litigation (which expresses the strong public interest) and 2. the complete acceptance that justice demands that the same party ought not to be harassed twice (an expression of private justice). Together, they underscore the importance of judgements, in litigation, which bind the parties and define their rights. The Eastern Caribbean Supreme Court case of *Thelma Hall nee*

Russell et al vs Randolph Russell High Court Claim No. 227 of 2008

succinctly and adequately explains the principle at paragraph 17 and 18:

“975: Essentials of res judicata. In order that a defence of res judicata may succeed it is necessary to show not only that the cause of action was the same but also that the plaintiff has had an opportunity of recovering, and but for his own fault might have recovered in the first action that which he seeks to recover in the second. A plea of res judicata must show either an actual merger, or that the same point has been actually decided between the same partiesit is not enough that the matter alleged to have been estopped might have been put in issue, or that the relief sought might have been claimed. It is necessary to show that it actually was so put in issue or claimed.”

The Learned Justice of Appeal then referred to Thomas v Attorney General of Trinidad and Tobago (1982) A.C. 113 P.C. Lord Jauncey:

“It is in the public interest that there should be finality to litigation and that no person should be subjected to action at the instance of the same individual more than once in relation to the same issue. The principle applies not only where the remedy sought and the grounds therefore are the same in the second action as in the first but also where, the subject matter of the two actions being the same, it is sought to raise in the second action matters of fact or law directly related to the subject matter which could have been but were not raised in the first action.”

29. For the application of these two distinct forms of res judicata, issue estoppel and cause of action estoppel, strict adherence to their elements is required. **Arnold v National Westminster Bank Plc [1991] 2 AC 93, 104** Lord Keith of Kinkel helpfully defines issue estoppel as *“..... when a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involved a different cause of action to which the same issue is relevant, one of the parties seeks to reopen the issues.”* Whereas cause of action estoppel *“...applies where a cause of action in a second action is identical to a cause of action in the first, the latter having been between the same parties or privies and having involved the same subject matter.”*

Consideration:

30. The remaining issues raised in this matter touch and concern the bona fides of the sale of the same subject property from the previous matter. Two of the parties here are the same, two are different. Issue estoppel is therefore not applicable. The causes of action are also different. There was no action related to any fraud between these same parties. I do agree that some attempt had been made through the after trial application to have an issue of fraud ventilated.

31. However, from what was headed statement of issues in that application, the Registrar, (before whom the matter was heard) seemed to have been called upon to undertake an impossible task. In post-trial circumstances, she was required to determine complex issues of fraud, conspiracy to defraud and to pronounce on the validity of a sale sans pleadings (the affidavit supporting the ordinary application does not constitute a pleading), the alleged co-conspirator as a party or any evidence tested by cross-examination. None of the information presently before the court convinces me that there could have been any presentation or determination of this particular cause of action. The procedure was patently wrong. And while I am of the view that the issue of avoiding the sale could well have been dealt with in the original claim by amendments to the Statement of Case, it had not been. What is now before the court is a new cause of action entirely which had not been litigated before.

Findings:

32. I therefore find that the causes of action and the issues ventilated before the court in action number 576 of 2004 are not the same as those which the

Claimant seeks to be heard on in the instant case. I also find that the Claimant is not estopped from bringing these proceedings against the defendants on principles of res judicata. Having thus found, consideration of abuse of process is now appropriate.

Is the claim an abuse of process:

33. Although neither Defendant launched an attack under Rule 26.3(b) it is clear from the applications that abuse of process was definitely a ground. The submissions by all parties confirm that it was a live issue between them.
34. Counsel for both Defendants referred to the case of *Henderson v Henderson* [1843 – 60] All ER Rep. where the court set down the principles to be applied in an abuse of process case when a matter was being raised which should have or could have been raised in previous proceedings. Now, there is a difference between res judicata and abuse of process not qualifying as res judicata, as explained in *Bradford v Bingley Building Society v Seddon* 1991 1 WLR 1482 1490-1491:

“Thus abuse of process may arise where there has been no earlier decision capable of accounting to res judicata (either or both because the parties or issues are different) for example, were liability between new parties and how determination of new issues should have been resolved in the earlier proceedings.”

35. In *Trinidad Santiago Juan and Maria Azucena Juan de Mahmum v Rodolpho Juan Claim No. 439 of 2013* also relied on, Justice Olivetti stated:

“The rule in Henderson v Henderson 3 Hare 100 is very well known. It requires the parties, when a matter becomes the subject of litigation between them in a court of competent jurisdiction, to bring their whole case before the court so that all aspects of it may be finally decided (subject, of course, to any appeal) once and for all. In the absence of special circumstances, the parties cannot return to the court to advance arguments, claims or defences which they could have put

forward for decision on the first occasion but failed to raise. The rule is not based on the doctrine of res judicata in a narrow sense, nor even on any strict doctrine of issue or cause of action estoppel. It is a rule of public policy based on the desirability, in the general interest as well as that of the parties themselves, that litigation should not drag on forever and that a defendant should not be oppressed by successive suits when one would do. That is the abuse at which the rule is directed.” P. 27 Lord Bingham of Cornhill.

23. *The court however went on to explain and amplify the rule and held as summarized in the headnote. 1. I am guided by the rule in Henderson v Henderson and the broad approach to it taken in Johnson – 1 “there was a public interest in the finality of litigation and in a defendant not being vexed twice in the same matter, but that whether an action was an abuse of the process as offending against the public interest should be judged broadly on the merits taking account of all the public and private interests involved and all the facts of the case, the crucial question being whether the plaintiff was in all the circumstances misusing or abusing the process of the court and that in all the circumstances the plaintiff’s action was not abusive.”*

“But Henderson v Henderson abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all...

It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. While the result may often be the same, it is in my view preferable to ask whether in all the circumstances a party’s conduct is an abuse than to ask whether the conduct is an abuse and then, if it is, to ask whether the abuse is excused or justified by special circumstances. Properly applied, and whatever the legitimacy of its descent, the rule has in my view a valuable part to play in protecting the interest of Justice.”

36. Counsel for the second Defendant went on to cite ***Yat Tung Investment Co. Ltd. v Dao Heng Bank Ltd.***[1975] AC 581 where Lord Kilbrandon said that “... it becomes an abuse of process to raise in subsequent proceedings matters which

could and therefore should have been litigated in earlier proceedings.” The court is besieged to strike out the claim because the fraud action could have and should have formed part of the earlier matter. However **Johnson v Gorewood & Co. [2002] 2 AC** firmly established that this application or interpretation of the principle went too far and was far too restrictive. It determined instead, (as did Olivetti J in **Trinidad Santiago**) that the court ought to make *“a broad merits-based judgement which takes account of the public and private interests involved and also takes account of all the facts in the case, focusing attention on the crucial question whether, in all the circumstances a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before.”* The modern test is therefore to consider whether in all the circumstance a party’s conduct is abusive and if it is, whether or not there are special circumstances that could either justify or excuse that abuse.

37. ***Yat Tung Investment Co. Ltd. v Dao Heng Bank Ltd.***[1975] AC 581 at 590 warns that a litigant ought not to be deprived of his right to bring his matter before the court *“without scrupulous examination of all the circumstances.”* So let us now consider the circumstances.

Consideration:

38. The Claimant obtained judgment in an action for the declaration of rights and interest in property pursuant to section 148.05 of the Supreme Court of Judicature Act. That section allows for the division of property acquired by the parties to a common law union during the subsistence of the union. The declarations were not made in equity but on the statutory requirement that they be just and equitable. By section 148.05(6) the court is also allowed to make consequential orders as to sale etc.

39. In the original matter, the court, having considered all that was before it, made an order that Mr. Audinett was entitled to a half interest in The Property and consequently, if it had already been sold he was to have half of the purchase price. There was no order for a valuation of the property. There is no indication that the judge was aware of the purchase price or any terms of the sale. Moreover, the Defendant's own affidavit says there was a sale but offered nothing in support. But what is certain is that the judge was aware of a possible (not definite) sale of The Property as both his interim injunctive order and final order refer to a sale. If he was aware, the parties were also aware.
40. I do not know and I cannot speculate why an interim injunction was requested if there was no real risk that The Property would be dissipated. So once it was revealed that The Property may have already been sold, why did the Claimant not look to properly secure the potential fruits of his judgment. The Property was after all, the subject matter in issue. If it was already legally and beneficially in the name of a third party, who was not a party to the matter and against whom there was no ancillary, incidental or independent claim, what really was the value of the injunction to the Claimant. Why wasn't the court then called upon to consider whether the conveyance constituted some economic misconduct, wasteful or fraudulent dissipation of the relationship assets. And if it so found, urged to make the necessary orders to right wrongs.
41. However this omission does not of itself constitute an abuse. The Claimant has obtained a valid judgment in hand the true fruits of which he says he cannot secure because of some fraud.

42. The relevant question now is whether it could be said that the Claimant is abusing or misusing the court process. Is this fresh action an unjust harassment of both or any of the Defendants. The first trial never touched or concerned the validity of the sale, only his questionable after trial application did this. His attempt to appeal, out of time was thwarted when his application was denied. In any event an appeal from the original judgement could not affect the validity of the sale any more than that the after trial application could.
43. Further, the fact that his final order states: *“If the property has been sold ...”* is instructive. ‘If’ is conditional, it says that the judge was not in a position to speak definitively about the possible sale. It also imports the concept of **validity** into that sale. It would be absurd to interpret the order to include a sale which has been voided for whatever reason since such a sale would be void ab initio - as if it never happened. At this time, to secure such a declaration a new action would of necessity have to be brought.
44. In an attempt to balance the private and public interest the court accepts that the procedures adopted by the Claimant prior may not have been the most appropriate, may have wasted time and money and delayed determination of the issues. However, the court also appreciates that this Claimant is attempting to have the fruits of his judgment. The essence of his attack surrounds the circumstances of the sale and allegations of mal fides and fraud. The relief sought is therefore based on a new cause of action which could properly be subject of a fresh claim. I cannot in all fairness find his conduct to be harassing far less unjustly so and warranting sanction through striking out.

Is the Claim Statute Barred:

45. Counsel for the second Defendant was never clear about the particular provision being relied on to support her six year limitation. To my mind this action attracts a twelve year limitation as submitted by the Claimant and the first Defendant. Time begins to run from the date the alleged fraud was discovered. This is a question of fact to be determined at trial.

Does the Claimant have standing to bring a claim under section 36 of the Stamp Duties Act:

46. The Claimant has asked that the transfer be avoided pursuant to section 36 of the Stamp Duties Act which reads:

“If, with intent to evade the payment of duty under this Act, a consideration or sum of money shall be expressed to be paid on any instrument less than the amount actually paid or agreed to be paid, every such instrument shall be void.”

47. I find this section to be similar to section 73:01:

- (5) *An agreement, instrument, deed or share referred to in subsection (1) or (3), or in section 71(4) shall, unless the stamp duties payable therefore have duly been paid -*
- (a) *be incapable of creating or transferring any legal rights or interests; and*
- (b) *have no effect unless and until registered.”*

48. The latter is a section on which the courts have made findings between private parties with no difficulty whatsoever. I see no reason why the court cannot make a finding and a declaration in relation to section 36 once all the salient requirements for proof have been met. Such proof is not simply that the sum stated is less than that actually paid or agreed to be paid, but that this was done with the specific intent of evading payment of duty. These are not issues which concern only the authorities or regulators. They also

concern the parties to the transaction and inform the effect their wrong doing has on the instrument. Truth be told it has less to do with what stamp duty has in fact been paid and more to do with the stated purchase price and the intent to defraud the revenue. However, the only way the court can make a determination on this is through the consideration of evidence and argument in the usual way at trial as these are all issues of fact.

Is there a proper claim for fraud against the second Defendant:

49. Under the Registered lands Act the registered proprietor of any estate has an indefeasible title. Such title could only be impeached if it is proven to be tainted by fraud or mistake. This fraud is actual fraud, not constructive or equitable and must be specifically pleaded. Plead, not in general terms but as explained in *Wallingford v The Directors & c of the Mutual Society (1880) 5 AC 685 at 710*:

“Now I take it to be settled as anything well can be by repeated decision that mere averment of fraud; in general terms; is not sufficient for any practical purpose in the defence of a suit. Fraud may be alleged in the largest and most sweeping terms imaginable.”

50. It is clear from the Claimant’s affidavit in support of the Fixed Date Claim Form that the Claimant alleges that the first and second Defendants conspired to defraud him of the value of his interest in The Property. He imputed bad faith through the alleged gross inadequacy of the stipulated purchase price, the close familial ties between the purchaser and the vendor and the sum for which The Property was mortgaged very soon after the transfer.
51. With such allegations I cannot find merit in this objection. Whether the transfer was done for the purpose of devaluing the Claimant’s interest is a

question of fact which can be proven with cogent evidence of fraud. The Claimant ought to be given the opportunity to prove fraud in the usual way.

52. Accordingly, leave will be granted to the Claimant to file an ordinary claim form with a proper Statement of Claim. Since both sides have seen some level of success costs shall be in the cause.

IT IS HEREBY ORDERED:

1. The claims for the immediate sale of The Property or registration of The Property in the joint names of the Claimant and the first Defendant are struck out.
2. The claim for a declaration that The Property was transferred to the second Defendant contrary to an interim injunction in Claim No, 567 of 2004 is likewise struck out.
3. The Claimant is granted leave to file an ordinary claim form with a Statement of Claim no later than the 29th March, 2017.
4. The Defendants are both granted leave to file their defence 28 days after the date of filing of the said claim.
5. The matter is listed for Case Management Conference on the 2nd May, 2017.
6. Costs shall be in the cause.

**SONYA YOUNG
JUDGE OF THE SUPREME COURT**