

IN THE SUPREME COURT OF BELIZE A.D. 2017

CLAIM NO. 694 of 2016

OSTROV ISLAND INC.

CLAIMANT

AND

ATTORNEY GENERAL

DEFENDANT

BEFORE the Honourable Madam Justice Sonya Young

Hearing

15.5.2017

Submissions

Claimant – 2.6.2017

Defendant - 1.6.2017

Decision

11.8.2017

Mrs. Deshawn Arzu-Torres for the Claimant.

Ms. Nichola Cho for the Defendant.

Keywords: Land Law – Registration – Cancellation of Land Certificate – Rectification of the Register – Powers of the Registrar of Lands – Fraud – Mistake – Registered Lands Act Cap. 194 – National Lands Act Cap. 191 – General Registry Act Cap. 327

JUDGMENT

1. This claim concerns two parcels of land situated in San Pedro (The Parcels) which Ostrov Island Inc. (Ostrov) says it owns, having bought them both on the 17th January, 2013 from two different owners. Ostrov said that after being registered as the proprietor of and issued with land certificates to The

Parcels they found out that another company, Bracilette Investment Company Limited (Bracilette) had subsequently been recorded as the proprietors with land certificates issued on the 2nd December, 2014. Originally, Bracilette had been joined as a Defendant. A discontinuance was filed against them and they never sought to be made a party thereafter. That Ostrov has removed Bracilette as a party indicates that Ostrov no longer has an interest in a claim against Bracilette

2. Ostrov asserts that without any notification whatsoever The Registrar of Lands (The Registrar), somehow cancelled its land certificates to The Parcels (which even now, they hold in their possession) and accordingly, rectified the register thereby removing it as proprietor. These, it says, were unlawful acts done without due authority. Ostrov seeks a declaration of proprietorship, rectification of the register and damages for loss of use and/or opportunity. In the alternative it also seeks redress by way of damages for the wrong done.
3. The Attorney General, as legal representative of The Registrar, and the Commissioner of Lands and Survey does not deny that Ostrov had originally been registered as proprietor of The Parcels and duly issued with land certificates to same. Nor is it denied that Ostrov was removed from the register and Bracilette subsequently entered thereon as Proprietor. What they advance, however, is that Bracilette was in fact the holder of a First Certificate of Title (FCT) to The Parcels which had been issued by the Land Registry since 6th March, 2008 pursuant to the General Registry Act. Registration of which, under the Registered Lands Act (RLA), by some omission had not been "*effected.*" They maintain that by virtue of section 142 of the RLA, The Registrar had the power to rectify the register and cancel

the land certificates issued to Ostrov because of this error or omission. They add that since The Registrar exercised that power in good faith, Ostrov ought to be denied any of the reliefs it seeks.

4. The Attorney General then counterclaimed for declarations avoiding the transfers of land to, and the issuing of the land certificates in the name of, the Claimant. As well as orders effecting or confirming the rectification of the register to remove the Claimant's name as proprietor on the basis of fraud or mistake. This court agrees that neither the fraud nor the mistake was as clearly or properly pleaded as it could have been. However, since the Claimant/Counter Defendant joined issue and never sought to strike out the counterclaim both the fraud and the mistake will be considered in this judgment. The court also feels there is sufficient presented in the statement of case and the witness statements to detail precisely the allegations and issues.
5. Fraud in the counterclaim is predicated on a prohibition, against aliens holding national land, in the National Lands Act. The Attorney General asserts that Ostrov, (an alien), circumvented this restriction by acting through agents or co-conspirators who were nationals. These agents or co-conspirators obtained title to what was believed to be national lands and then swiftly transferred or facilitated transfer of same to Ostrov. They allege that the nationals were at all times acting on Ostrov's behalf thereby tainting the original transfers with fraud.
6. The counterclaim further alleges that through this fraud The Registrar made a mistake in registering the two transferors and then Ostrov as proprietors. The two transferors were, however, not joined as Ancillary Defendants.

Ostrov strenuously denies the allegations of fraud and mistake. It stresses that the prohibition is irrelevant since it purchased private land, not national land. And in any event they were not privy to any actions the vendors took to obtain title. They at all times acted in good faith and in accordance with the RLA.

The issues for the court to determine on the claim are:

7. 1. Whether the Registrar's purported rectification of the register and cancellation of Ostrov's title to The Parcels were lawfully done.
2. If the Registrar's actions were unlawful what remedies if any is Ostrov entitled to.

Whether the Registrar's purported rectification of the register and cancellation of Ostrov's title to The Parcels were lawfully done:

8. Now, it appears that The Registrar relied on section 142 of the RLA for her authority to rectify the register. Section 142 provides:

"142.-(1)The Registrar may rectify the register or any instrument presented for registration in the following cases-

- (a) in formal matters and in the case of errors or omissions not materially affecting the interests of any proprietor;*
- (b) where any person has acquired an interest in land by prescription under Part IX;*
- (c) in any case at any time with the consent of all persons interested;*
- (d) where, upon resurvey, a dimension or area shown in the register or Registry map is found to be incorrect, but in such case the Registrar shall first give notice to all persons appearing by the register to be interested or affected of his intention to rectify.*

(2) Upon proof of the change of the name or address of any proprietor, the Registrar shall, on the written application of the proprietor, make an entry in the register to record the change."

9. In this court's opinion, The Registrar can find no shelter here, since if she corrected under subsection (a) (the only one of possible applicability) the

interest of the then registered proprietor would necessarily have been materially affected. This restricts any exercise of her power entirely. This court is of the view that the defence is well aware of this limitation as they also set up a counterclaim which seeks to give effect to or confirm what had been done by The Registrar. The correct procedure ought to have been the making of an application to the court (whether by the Registrar or Bracillette), (pursuant to section 143 of the RLA) for rectification of the register and cancellation of the registration on the ground of either mistake, fraud or both. What the Attorney General attempts to do now is what ought to have been done then.

10. Their submission that the RLA does not clarify what “*materially affecting the interest of any proprietor*” means, requires no earnest discussion here. The words are all plain English words which ought to be given their ordinary dictionary meaning, save and except ‘proprietor’ which is adequately defined in section 2 of the RLA as the registered owner of the interest (leasehold or freehold). No argument could be reasonable sustained that where a registration as proprietor is entirely deleted, the interest of the ousted proprietor has not been directly, significantly and prejudicially affected.
11. Any correction to the Register must be done in accordance with statute, there is no other way. When the Registrar purported to correct the register in circumstances where she simply did not have the statutory authority to do so, her action amounts to a nullity and any consequences flowing therefrom are void.

12. This court therefore finds that the Registrar's rectification of the register, cancellation of Ostrov's certificates and issuing of certificates of title to Bracilette have all been done without any lawfully authority whatsoever. Consequently, they are all invalid and of no effect. However, the court cannot make an order to correct the Register where Bracilette is not a party to the proceedings. This is so because it is unknown whether Bracilette is in actual possession of the Parcels and the availability of rectification turns on possession (we will discuss this in detail further on).
13. This court has no intention of ordering a correction of the register as requested by the Claimant or giving effect to the Registrar's improper cancellation as requested by the counter-claimant. Having made the finding above, the Registrar is empowered under section 16 of the RLA to "*cancel any entry which he is satisfied has ceased to have effect*". She must exercise her discretion in accordance with the order this court intends to make. That makes short shift of this issue. Any remedies available to the Claimant will be discussed at the end of this judgment.
14. Let us now consider the counterclaim and whether the court could and ought to exercise its power under section 143 of the RLA which reads:

"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 in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default."

The issues which arise to be determined on the counterclaim are:

15. 1. Can the court now order rectification for a. Mistake and/or b. Fraud.

Can the court now order rectification:

A. Mistake

16. It is obvious from the undisputed evidence presented in the court that the first registrations to the two nationals were done through a series of mistakes. Ostrov submits firstly that mistake was not particularized in the Attorney General's pleadings. This objection must be overruled when one considers paragraphs 4, 5, 6 and 7 of the defence which are repeated in the counterclaim by virtue of the opening phrase of the counterclaim which states: "*The Defendant, The Attorney General of Belize, repeats the defence herein and further claims ...*" Especially when these are viewed in light of the pretrial memorandum filed by each party.
17. Next they say that a mistake sufficient to invoke section 143 was not proven at the trial. Such a mistake, they purport, must have been on Ostrov's part, not the Registry. It is true that the term 'correcting a mistake' is not defined in The RLA. Although there is no clear interpretation, there is nothing in the section to indicate that the mistake must have been made by the registered proprietor. Ostrov claims to place reliance for this proposition on the case of **Jimmy Quinto and Anor v Santiago Castillo Ltd (Belize) [2009] UKPC15**. However, this case clearly allowed a rectification of the register where a very similar error had been made by the registry.
18. The problems in the case at bar seemed to have begun with the Commissioner of Lands. Lands which were not national Land and for which the Commissioner had no right to deal with under the National Lands Act,

were given first registration as such under the RLA and was dealt with as such when transferred to Raul Gonzalez and Saul Lemus (Raul and Saul).

19. What is significant here is that pursuant to section 14(1) of the RLA, first registration of national land follows a different procedure to that of private land. The Commissioner of Lands need only notify the Registrar in writing of the particulars of any national land falling within the compulsory registration area. The Registrar must then prepare a register for every such parcel. There are none of the usual inquiries as with private land. Even the register is prepared differently as there is no requirement for any entry under the proprietorship section - Section 10(3). Further, sections 14 to 22 of the National Lands Act cease to apply on registration. Instead, the Minister by a mere disposition registered under the Act may now dispose of national land in accordance with the National Lands Act.
20. The precise process of determining what land is or is not national land was never before the court. Jose Chulin, a principal surveyor in the Lands and Survey Department of the Ministry of Natural Resources (who was not personally involved with The Parcels) explained how there came to be two plans authenticated and registered for The parcels.
21. The general authentication process, as explained by Mr. Chulin, seemed to include some preliminary checks involving any previous surveys of the particular property. This was glossed over even under cross-examination and never discussed in examination-in-chief. It appears that the department when giving permission to survey a particular piece of land also directs that the survey be conducted by a licenced land surveyor. That surveyor is expected to bring any evidence of any existing survey to the attention of the

department. The Land Surveyors Regulations also require the surveyor to obtain information in respect of previous surveys of the land being surveyed as well as any adjoining land. The Lands and Survey Department may or may not make a site visit.

22. From what this witness presented, it seems that his department placed the responsibility for the error squarely on the shoulders of the licenced surveyor. They spoke authoritatively to the licenced surveyor's responsibility as opposed to their own, the possible proximity of his markers to suspected existing markers and gave reasons why they suspected (not knew) that original markers still existed since perhaps (not definitely) 2007. It was not until the end of cross-examination that Mr. Bobadilla, the National Estate Officer accepted that the Lands and Survey Department had made errors.
23. The Registrar proceeded to give first registration to the Parcels as national lands. She seemed not to have realized that the Parcels had already been registered and certificate of title issued to Bracilette under the General Registry Act. Now, the Registrar is under a statutory duty, on the declaration of a compulsory registration area, to immediately prepare a register showing all the subsisting registered particulars under the General Registry Act. She clearly failed to do this although the area was so declared on 14th March, 1990. Had this been done, Bracilette would have been automatically registered, given notice to surrender its Certificate of Title and issued with a Land Certificate on compliance.
24. It is the current Acting Registrar's evidence that section 12 of the RLA, which imposes this duty, has never been implemented because of human

resource, financial and space constraints. Full and I dare say, misplaced dependence is therefore placed on the proprietor to make an application for first registration. This is quite a disturbing state of affairs because there is no evidence whatsoever of the public being informed that it was somehow incumbent upon them (despite the clear directive of the RLA) to ensure that their proof of ownership had been recorded under the RLA. More importantly, the Act does not allow for any such application to be made for land which is already registered under the General Registry Act. Such an application can only be made pursuant to section 13 where the land is not so registered. In any event, why should such a burden be placed on an already registered owner (albeit under another Act). In fact, the RLA is not applicable to land already registered under the General Registry Act until that land is transferred to the land register by the Registrar. But the blame cannot lie solely with the registrar who works under certain constraints. Perhaps there is an urgent need for full government commitment to the proper implementation of and conversion from the old to the new system.

25. To my mind what has occurred here could well have been avoided had those mistakes not been made. They are mistakes which could very easily occur again if the situation in the Land Registry is not adequately addressed.
26. The question for the court now is whether these mistakes are of the nature sufficient to invoke its rectification powers under Section 143 of the Act. At pages 12-13 of the **Jimmy Quinto case (ibid)** the Privy Council thoroughly explains the applicability of this section:
27. *The findings of the courts below:*
 33. *Conteh CJ started by finding that “at the very least” the first registration in favour of Ann Williams was by mistake. The mistake was the failure to realise that the Quintos were the registered owners of the land under the General Registry Act. That was an*

enduring mistake that applied equally in the case of the second registration in favour of Santiago. The mistake “ineluctably coloured and affected the subsequent registration” of Santiago (para 31). The mistake was fraudulently procured by Ann Williams when she secured the registration in respect of Parcel 869 by producing papers that had nothing to do with it (para 45).

35. On these findings Conteh CJ ordered the rectification sought by the claimants.

36. In the Court of Appeal Morrison JA held that the Chief Justice had been wrong to hold that the mistake in respect of the first registration in favour of Ann Williams was an “enduring mistake” so as to render Santiago’s title vulnerable to attack. Such a finding subverted the objectives of certainty and security of title that the Torrens system was designed to promote (paras 53). Where section 143 referred to “any registration” having been obtained, made or omitted by fraud or mistake, “any registration” had to be given a restrictive interpretation so as to apply only to the registration that it was sought to impugn. There was no mistake that related to the obtaining of the second registration.

Conclusions of law

“39. The Board differs from the conclusion of the Court of Appeal in relation to the construction of section 143(1) of the Act. It would have been easy and natural for the draftsman to use the phrase “such registration” in place of the second “any registration” if that is what he had intended the phrase to mean. He did not, and the addition of the words “including a first registration” after the second “any registration” 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. The remedy of rectification lies within the discretion of the court and is subject to the protection given to the bona fide purchaser in possession by section 143(2).....

40. As for the meaning of “in possession” in section 143(2), the Board is satisfied that this means actual physical possession. Were this not so the addition of “or is in receipt of the rents or profits” would make little sense.”

28. Following this decision, this court can see no reason why it ought not to exercise its discretion and order such rectification, unless section 143(2) could be relied upon by Ostrov. Possession is the only real exception to

rectification by the court and as explained in **Jimmy Quinto (ibid)** there must be actual possession. This means that the registered proprietor, having acquired the property for valuable consideration, must be physically on the land or in control of it whether personally or by a tenant or licensee. In such a case no correction for a mistake or fraud could be made unless the registered proprietor was a party to or aware of the mistake or fraud. In short, rectification by the court is not permitted where it would prejudice a registered bona fide purchaser for value in possession.

29. Now while this court feels that the effect of a mistake in the registration of a previous proprietor ought to be approached with greater restraint when it affects an acquirer, **Jimmy Quinto** has made it clear that under the legislation, a mistake in the previous registration, even the first registration, could enure to subsequent registered proprietors. Thus, correcting a mistake extends to correcting its consequences as well.
30. This court holds the humble view that taking such a position regarding correction, where the acquirer is one step or more removed from the mistake, resounds in unregistered land rules in a way which seems to give less security to a registered land owner under the RLA than to a bona fide purchaser for value of yore. I say this because the registered land owner now has to be not only a bona fide purchaser for value without notice (equity's darling) but also be in actual possession, to be beyond the reach of the exercise of the judge's discretion to correct.
31. I do not believe that this Claimant is that far removed from the original purchasers since it was well aware, before it began making arrangements to purchase, that the Parcels were supposedly national lands. It was also aware

that the persons from whom it hoped to purchase were attempting to purchase in accordance with the National Lands Act.

32. Be that as it may, Ostrov has presented no evidence demonstrating that it is or was in actual possession or in receipt of rents or profits. Some coconut trees were planted and that is insufficient as proof of actual possession. Therefore, issues of valuable consideration, knowledge, awareness, neglect or default become irrelevant to the court's consideration.
33. Following **Jimmy Quinto (ibid)**, that registrar's original error in the first registration endured though to Ostrov's registration. Her failure to realise that Bracilette was already registered as owner of The Parcels under the General Registry Act caused her to fall into the error of registering the parcels as national land. This court is satisfied that the registrations by Ostrov were all obtained by virtue of The Registrar's own mistake in the registration process and accordingly, rectification of the register and the cancellation of Ostrov's certificates of title are hereby ordered pursuant to section 143 of the RLA.

B. Fraud

34. Section 143 of the RLA makes no distinction between correction for mistake or for fraud. The use of the word "or" indicates that proof of either in the already explained circumstances would suffice. Having already found sufficient reason to order rectification of the register there is no need to discuss whether fraud has been proven or not except that proof of Ostrov's fraud would mean that Ostrov was not a bona fide purchaser.

The Law:

35. In the New Zealand case of *Assets Company Ltd v Mere Roihi (1904-07)* **ALLER Rep Ext 1599** (relied on in **Jimmy Quinto**) Lord Lindley delivering the judgment of the Privy Council stated as follows:

“Further it appears to their Lordship that the fraud which must be proved in order to invalidate the title of a registered purchaser for value, whether he buys from a prior registered owner or from a person claiming under a title certified under the Native Land Acts, must be brought home to the person whose registered title is impeached or to his agents. Fraud by persons from whom he claims does not affect him unless knowledge of it is brought home to him or his agents. The mere fact that he might have found out fraud if he had been more vigilant, and had made further inquiries which he omitted to make, does not of itself prove fraud on his part. But if it be shewn that his suspicions were aroused, and that he abstained from making inquiries for fear of learning the truth, the case is very different, and fraud may be properly ascribed to him. A person who presents for registration a document which is forged or has been fraudulent or improperly obtained is not guilty of fraud if he honestly believes it to be a genuine document which can be properly acted upon”.

Discussion

36. The distilled evidence as presented by the Attorney General in support of his allegation of fraud is as follows:
1. The Claimant is an alien and is prohibited, through section 49 of the National Lands Act, from holding national land.
 2. The Claimant knew that Raul and Saul did not own the lands in issue but were only in the process of obtaining title to what was believed to be national land.
 3. The Claimant’s agent must have known of the prohibition and so opted to purchase from Raul and Saul.
37. Now it is the Defendant’s own evidence that Raul and Saul began their quest to lease and or purchase this presumed national land since 29th May, 2012. They both submitted their request on the same date and their approvals and

title processes and documents seemed to have taken an identical route at identical times. They both had the same surveyor and submitted a joint report. While this may raise some suspicion as to Raul and Saul's behavior, I do not feel that it is sufficient to find any fraud or wrong doing on the part of Ostrov or its agent. The Attorney General says that a letter signed on Ostrov's behalf which predates the transfer instruments from Raul and Saul pushes their assertion of fraud towards proof. However, that letter is in general terms. It makes no reference to the Parcels. Moreover, Florin Pindic-Blaj, a director of Ostrov explained that he did not reside in Belize and so had instructed that this letter with its attachments be left with his agent as he intended and had prepared in advance to purchase property in Belize. I found this to be nothing more sinister than prudence.

38. Ostrov has never denied that it is an alien within the context of the National Lands Act, but they deny having bought national lands and this court agrees. The evidence presented by the Attorney General is entirely circumstantial and tenuous at best.
39. It was noticeable that no one dealing directly with the transfer of national lands testified. What was more noticeable is that the counterclaimant seems to be postulating a conspiracy, a ring of co-conspirators intent on defrauding the state. Yet they have joined none of these others or called any of them to testify, (particularly the very persons to whom the purported national lands were sold). The departments which approved certain aspects in pursuit of registration, in tandem, may (on the premise of the Attorney General's case for fraud) have been involved. No one knows and this court refuses to speculate.

40. Far worse is that the Attorney General seems to place the onus of conducting a search beyond the land register solely on the shoulders of the purchasers. They questioned the purchaser's representative and its agent about not seeing boundary markers or any evidence of adverse ownership when they visited the island. This, they contend, ought to have raised Ostrov's suspicion. Ironically, under the very same circumstances, the Commissioner of lands proceeded, erroneously, to claim the very same land as national land.
41. Perhaps, it was simply hoped that the terms of the National Lands Act would be presented, Ostrov's success at allegedly circumventing that act would be demonstrated and somehow this would be equated to fraud. However, Ostrov has never wavered from its position, and I could find no reason to doubt, that it learnt that two locals intended to purchase The Parcels, it's director expressed an interest and did all that was required by law to do to purchase same from them. Ostrov acted in good faith and without more, I cannot hold it guilty of any fraud. If any fraud existed, the court cannot say that Ostrov knew of, caused or substantially contributed to it. Fraud has simply not been proven to the requisite standard.

Conclusion:

42. Since the register was opened as a national lands' register in error, this court finds that the Registrar should use her power under section 17 to open a new edition of the register in accordance with section 12. All the other entries which have been corrected by the court or ceased to have effect should be omitted.

43. The Registrar has acted outside her authority in purporting to correct the land register under the RLA and the Claimant has suffered loss. The Commissioner of Lands purported to sell land which was not national land pursuant to the National Land Act, they therefore had no title to convey and the Claimant has consequently been deprived.
44. The Claimant has lost its right to registration owing to the fact that it was not in actual possession. Where the court orders the correction of the register it can award no indemnity since this is not prescribed by the RLA. To my mind, that secondary rectification could be ordered, significantly undermines the system particularly because there is no compensation mechanism for errors or fraud. But as stated in *Jimmy Quinto (ibid)* at paragraph 39:

“.....The Board does not consider that it is irrational to strike the balance in this way, particularly having regard to the fact that the Act, despite the title of the relevant Part, makes no provision for indemnification of a person unfairly prejudiced by the operation of the system.”

45. However, the submissions before the court on any entitlement to damages and the quantum were quite inadequate and I shall give both sides the opportunity to address me further in writing. I shall also reserve any order as to costs until final determination of this matter. In the circumstances the court will make none of the declarations prayed by the Claimant or the counter Claimant but is prepared to make the following orders:

On the claim

IT IS ORDERED:

1. That the unlawful correction of the register by the Registrar of Lands, whereby she purported to remove Ostrov Island Inc. and insert Bracilette

Investment Company Limited as the registered proprietor of Parcels 10406 and 10407, Block 7, San Pedro Registration Section is null, void and of no effect.

2. Further written submissions by the Claimant to be filed no later than 31st August, 2017.
3. Written submissions in response by the Defendant to be filed no later than the 22nd September, 2017.

On the counter claim

IT IS ORDERED:

1. That the Registrar of Lands cancels the first registrations which describes Parcels 10406 and 10407, Block 7, San Pedro Registration Section as national land.
2. That the Registrar of Lands cancels the current registrations of Ostrov Island Inc. as the registered proprietor of Parcels 10406 and 10407, Block 7, San Pedro Registration Section.
3. That the Registrar of Lands opens a new edition of the register relating to Parcels 10406 and 10407, Block 7, San Pedro Registration Section in accordance with section 12 of the Registered Land Act.

**SONYA YOUNG
JUDGE OF THE SUPREME COURT**