

SYLVINA LOUISIEN

Appellant

v.

JOACHIM RODNEY JACOB

Respondent

FROM

**THE COURT OF APPEAL OF
ST LUCIA**

JUDGMENT OF THE LORDS OF THE JUDICIAL
COMMITTEE OF THE PRIVY COUNCIL

Delivered the 9th February 2009

Present at the hearing:-

Lord Scott of Foscote
Lord Rodger of Earlsferry
Lord Walker of Gestingthorpe
Lord Brown of Eaton-under-Heywood
Lord Mance

[Delivered by Lord Walker of Gestingthorpe]

Introductory

1. This is an unfortunate property dispute between different branches of the Felicien family. It is also a striking illustration of how much time, costs and effort can be wasted in interlocutory skirmishing about issues of law while important issues of fact remain unresolved (and indeed have not so far been addressed in any evidence, written or oral). The proceedings have been on foot since 1999, and in the meantime some members of the family (who may have important evidence to give) are getting elderly. The disputed issues of fact include the pedigree of the Felicien family, what happened at the demarcation of the boundaries of the disputed land in 1985, and who (if anyone) is in possession of the disputed land.

The introduction of the Torrens system

2. In these circumstances the better course (adopted by Mr Guthrie QC in opening the appeal) is to begin with the legal framework. In the early 1980s St Lucia decided to adopt the Torrens system of registration of title to land (named after Sir Robert Torrens, who originally introduced it in South Australia: see Professor Greg Taylor, *Is the Torrens system German?* (2008) 29 *JLH* 253). To give effect to this decision two statutes were enacted in 1984, the Land Adjudication Act, Act 11 of 1984, now cap. 5.06 in the Revised Edition of the Laws of St Lucia (“the LAA”) and the Land Registration Act, Act 12 of 1984, now cap. 5.01 (“the LRA”). The LAA (“an Act to provide for the adjudication of rights and interests in land and for connected purposes”) came into force on 8 August 1984. The LRA (“an Act to make provision for registration of land and for dealing in land so registered and for connected purposes”) came into force on 15 July 1985.

3. This sequence of commencement dates reflects the fact that the LAA provided in detail for the appointment of officers to undertake the task of advertising for and receiving claims to ownership, investigating the claims, adjudicating on rival claims to the same land, and eventually (subject to various processes of review and appeal) passing the results in the form of a certified adjudication record to the Registrar of Lands as the basis for first registration of title under the LRA.

4. The LAA was therefore concerned with an important but essentially short-term activity, the production of adjudication records which were to form the basis of first registration of title under the LRA. All the officers appointed under the LAA have long since completed their duties. The LRA, by contrast, was a substantial enactment (extending to 119 sections) providing not only for first registration of title to land adjudicated under the LAA, but also for the operation of the whole system of registered land for the indefinite future. So far as the statutes dealt with first registration, however, they were clearly intended to operate consistently with each other.

The Land Adjudication Act

5. Parts 1 and 2 of the LAA provided for the Minister having responsibility for Agriculture to make orders designating adjudication areas, and to appoint an adjudication officer for each adjudication area. The adjudication officer was a responsible official with power to administer oaths and take affidavits. He was to appoint demarcation officers, recording officers and survey officers to act under his direction. Demarcation officers and survey officers had statutory rights of entry and of requiring information as to the boundaries of land. The Minister was also to appoint a Land Adjudication Tribunal with a legally qualified chairperson.

6. Under Part 3 (Claims and demarcation) the adjudication officer was (section 5) to subdivide his area into two or more adjudication sections, and

(section 6) to prepare, publish and advertise a notice inviting claims in respect of each adjudication section, and fixing a time limit for the submission of claims. He had power (section 9) to proceed as if a claim had been made on behalf of owners who were absent or under full age. The demarcation officer was then to give notice (section 10) of any intended demarcation of boundaries, and require every claimant to indicate the boundaries which he claimed. Boundaries of both claimed and unclaimed land, and public rights of way, were the responsibility of the demarcation officer, who had limited powers (sections 11 and 12) to award compensation and costs, and to apportion expenses.

7. The survey officer was (section 13) responsible for any necessary surveys, and for coordinating progress in a demarcation index map of the whole adjudication section. Section 14 (Duties of recording officer) provided as follows:

“The recording officer shall consider all claims to any interest in land and after such investigation as he or she considers necessary shall prepare in accordance with the provisions of section 18 a record in respect of every parcel of land shown on the demarcation map.”

Section 15 (Disputes) provided as follows:

“(1) If in any case—

- (a) there is a dispute as to any boundary whether indicated to the demarcation officer or demarcated or readjusted by him or her, which the demarcation officer is unable to resolve; or
- (b) there are two or more claimants to any interest in land and the recording officer is unable to effect agreement between them,

the demarcation officer or the recording officer as the case may be shall refer the matter to the adjudication officer.

(2) The adjudication officer shall adjudicate upon and determine any dispute referred to him or her under subsection (1), having due regard to any law which may be applicable, and shall make and sign a record of the proceedings.

(3) Where the adjudication officer has adjudicated on any dispute under this section the Minister or any other person who is dissatisfied with the decision of the adjudication officer shall give written notice to the adjudication officer of his or her intention to appeal.”

8. Part 4 of the LAA (Principles of adjudication and preparation of adjudication record) began with principles (section 16) and rules (section 17) relating to the process of adjudication. Section 17(6) provided:

“Where the persons claiming are entitled as proprietors in common to the unadministered estate of an ascendant who was solely entitled to the land, the recording officer shall record that the heirs of that ascendant are owners of the land.”

Section 18(1) provided in detail for the form of the adjudication record in respect of each parcel of land. It was to show (a) the number and approximate area of the parcel; (b) (except for a Crown title) the name and description of the person entitled to be registered as owner, with particulars of his title; (c) particulars of any registerable adverse rights (such as a lease or hypothec); (d) particulars of the guardian of any owner under disability; (e) a list of the documents produced to the recording officer; and (f) the date of completion of the form.

9. Section 18(2) provided:

“When completed, the form shall be signed by the recording officer and, in the case of privately owned land, shall, where possible, include an acknowledgement signed by the owner of the parcel and by any person recorded under the provisions of subsection (1)(c) as having an interest in such parcel that such owner and every such person accepts the record.”

10. Section 19 (Notice of completion of adjudication record) provided:

“When the adjudication record in respect of any adjudication section has been completed, the adjudication officer shall sign and date a certificate to that effect and shall give notice of the completion thereof and of the place or places at which the same can be inspected together with the demarcation map.”

11. Part 5 of the LAA (Objections and finality) contained (sections 20, 21, 22 and 24) various rights of review and appeal which need not be described in detail, since it is common ground that there was no resort to any of them in this case. Section 23 (Finality of adjudication record) provided:

“After the expiry of 90 days from the date of publication of the notice of completion of the adjudication record or on the determination by the adjudication officer of all petitions and appeals presented in accordance with section 20, whichever shall be later, the adjudication record shall, subject to the provisions of the Land Registration Act 1984, become final and the

adjudication officer shall sign a certificate to that effect and shall deliver the adjudication record and the demarcation map to the Registrar together with all documents received by him or her in the process of adjudication.”

This section was amended in 1986 to omit the reference to appeals, but nothing turns on that amendment.

The Land Registration Act

12. Part 2, Division 2 of the LRA provided for the establishment and maintenance of the Land Register. Section 9(1) provided:

“The Land Register shall comprise a register in respect of every parcel which has been adjudicated in accordance with the Land Adjudication Act and a register in respect of each lease required by this Act to be registered.”

By section 9(2) the register was to show the land as private or Crown land and the title as absolute or provisional, with a property section, a proprietorship section and an encumbrances section. Section 10 provided:

“Whenever an adjudication record has become final under section 23 of the Land Adjudication Act and the adjudication officer has delivered the adjudication record to the Registrar, the Registrar shall prepare a register for each parcel shown in the adjudication record and for any lease required to be registered, and shall register therein any of the particulars in the adjudication record which requires registration.”

13. Part 10 of the LRA dealt with rectification of the register, and compensation in respect of rectification or other errors. Section 97 conferred relatively limited powers of rectification on the Registrar. Section 98 conferred wider powers on the Court:

“(1) Subject to the provisions of subsection (2) the Court may order rectification of the register by directing that any registration be 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 and acquired the land, lease or hypothec for 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 or her act, neglect or default.”

14. Section 99 provided qualified rights to compensation:

“(1) Subject to the provisions of this Act and of any written law relating to negative prescription, any person suffering damage by reason of—

- (a) any rectification of the register under this Act;
- (b) any mistake or omission in the register which cannot be rectified under this Act, other than a mistake or omission in a first registration; or
- (c) any error in a certificate of official search issued by the Registrar or a copy of or extract from the register or in a copy of or extract from any document or plan, certified under the provision of this Act,

shall be entitled to be compensated by the Government out of money provided from the Consolidated Fund.

(2) No compensation shall be payable under this Act to any person who has himself or herself caused or substantially contributed to the damage by his or her fraud or negligence, or who derives title (otherwise than under a registered disposition made in good faith and for consideration) from a person who so caused or substantially contributed to the damage.”

It is to be noted that section 98(1)(a) contemplates rectification of a first registration, but section 99(1)(b) excludes compensation for loss caused by a mistake or omission in a first registration which cannot be rectified under the LRA.

The facts (agreed or disputed)

15. As already noted, there are many disputed issues of fact in this case. There are some puzzling variations in the names of some of the individuals (living or dead) who feature in the story. But some of the background is common ground. The disputed land (a little over 41 acres in extent, and the subject of claim 4A 681) was part of a larger area, known as Case Café (“The Estate”) at Gros Islet in the northern part of the island. In 1880 the Estate was purchased by Arscenne Felicien, née Petit Frere (“the widow Arscenne”), the widow of Brann Felicien deceased. It appears that in 1917 she sold two carrés (or plots) of the Estate to her son Nemorin (see the schedule to the probate of her will). The widow Arscenne died on 19 November 1919 having made her will before a notary two days before. She disposed of the remaining part of the Estate by clauses 3, 4 and 6 of her will:

“3. I give, devise and bequeath to my daughter Nettie Petit Frere, two carrés of land to be taken from my Estate known as Case Café situate in the quarter of Gros Islet aforesaid.

4. I give, devise and bequeath to my other children named (1): St Martin Felicien; (2) Joseph Felicien; (3) Nemorin Felicien; (4) Felicien Felicien of Gros Islet aforesaid all the remainder of my property moveable and immoveable wherever the same may be situate in share and share alike and in equal portions hereby constituting them my Universal legatees and devisees.

...

6. I give to my daughter Hortense Deterville born Felicien, two carrés of my said lands at Case Café and my bedstead.”

By clause 5 she appointed her son St Martin Felicien as her executor, and he proved her will on 5 November 1920.

16. In a joint declaration made on 18 September 1959 by Hortencia Joseph (née Felicien) and Louisa Felicien (two of the five children of St Martin Felicien, who died on 23 January 1940) they referred to St Martin’s “brothers, Joseph Felicien, Nemorin Felicien and Felicien Felicien”). But the case for the other side of the family (represented by the three grandchildren of one Theodule Jacob Marc) is that Felicien Felicien was female, and married Theodule Jacob Marc in 1881, and that they were survived by two sons, Jean Theodule Jacob and Charles Leonty Theodule Jacob. In the heading to their statement of claim the three representative plaintiffs describe their grandmother as “Philomene Alexandre Felicien, also called Felicia Felicien, also called Felicien Felicien, also called Felicienne Felicien, also called Madam Symphorien Jacob.” Their Lordships will refer to this putative individual, without making any finding, as “Philomene.” Against that the defendant, representing the heirs of St Martin, pleads (in paras 6 and 8 of the defence):

“Anscenne [Arscenne] had six (6) children, four boys i.e. St Martin, Nemorin, Joseph and Felicien Felicien and two (2) girls, Nettie Petit Frere and Hortense Deterville.

Philomene Felicien is unknown and is not an heir at law entitled to any part of the Estate of widow Felicien Alexandre [Arscenne].

Felicien Felicien was a man and brother of St Martin, he is not and was not a woman who is also known as Felicienne Felicien, Philomene Felicien, Madam Symphorien Jacob, Felicia Felicien.”

17. Before the Board the appellant is Sylvina Louisien (a granddaughter of St Martin and the defendant at first instance) representing the heirs of St Martin. The respondents (the plaintiffs at first instance) are Philomene’s three grandchildren already mentioned, representing the heirs of Philomene.

18. As to the disputed land, it is common ground on the pleadings that there was a survey plan produced in June 1921 (dated either 11 or 16 June) but there is no agreement as to its significance. The heirs of Philomene plead that it was lodged with the Commissioner of Crown Lands and was the basis of a partition of the Estate effected on 15 June 1921. Their case is that on the partition the disputed land was allocated to Philomene (also known as Felicienne). The heirs of St Martin plead that there was no partition, and no proof that the survey plan was ever lodged with the Commissioner.

19. The heirs of Philomene plead that since 1921 she and her successors have been and are in “sole, peaceable, public, unequivocal and undisturbed possession” of the disputed land. The heirs of St Martin deny this and assert that St Martin and his children have been and are in possession of the disputed land.

20. There is some common ground about the process of adjudication in respect of the disputed land. It was in section 4A of the statutory area. The responsible recording officer was Mr T J B Viney and the demarcation officer was his son, Mr T Viney. On 25 February 1985 the claimant Mr Rodney Jacob (also known as Joachim Rodney Jacob) made a claim under the LAA in respect of the disputed land, described as an area of 41 acres, 3 rods, 31 perches on the Estate. He named as claimants himself, Vera Pamphile, Edna Jacob, Harty Jacob and Palmer Jacob. He referred to an unspecified deed of sale as the root of title, and described himself as not living on the island.

21. Mr Rodney Jacob’s claim was designated as 4A 681, as appears from a demarcation certificate prepared by Mr Viney Jr and dated 17 July 1985. In the section of the certificate headed Notes it reads:

“Lot as shown on plan

Mr Jacob had cleared boundaries but after survey these turned out to be incorrect. He has been informed and we now await his response.”

Those entries are initialled, apparently by Mr Viney Jr. Below is another entry, possibly in the same hand, but not signed or initialled:

“Absolute Title to Heirs St Martin Felicien (evidence in Declaration in 4A 165 by Louisa Felicien indicates that this land was partitioned in 1920’s).”

The copy of the accompanying plan shown to the Board is not complete, but it appears to show adjacent areas of land as owned by St Martin Felicien, Joseph Felicien and Madame Symphorien. The first of these areas is designated as claim no. 4A 165, and described as 35 acres, 2r, 6p in area. The third is

designated as claim 4A 168 and is described as 41 acres, 3r, 31p in area. The claim numbers are in a different hand and may have been written later.

22. Mr Dexter Theodore, appearing for the heirs of Philomene, told their Lordships that he had a copy of the 1921 survey plan, but accepted that it had not been put in evidence below. No formal application was made to have it admitted in evidence before the Board. Their Lordships did have a cursory sight of the plan but in the circumstances it would be inappropriate to say anything about it except that if it is in due course proved and put in evidence it may have a bearing on the partition issue.

23. It is not suggested that the heirs of St Martin made a claim under the LAA to ownership of the disputed land, or that a claim was treated as made on their behalf under section 9 of that Act. It is apparent that they (or one of them) made a claim, designated as 4A 165, in respect of adjoining land shown on the plan accompanying the demarcation certificate. The only claim in respect of the disputed land was by Mr Rodney Jacob on behalf of himself and the other persons claiming to be heirs of Philomene. There was therefore no contested adjudication process conducted by the adjudication officer for section 4A.

24. Instead Mr T J B Viney, the recording officer, prepared and signed on 3 September 1985 an adjudication record on the appropriate printed form. Its headings correspond (although not in the same order) to the requirements of section 18(1) of the LAA. It gave the claim no. as 4A 681 and the parcel no. as 1656B 9. It listed the documents produced to the recording officer as the sale in 1880 to the widow Arsienne and the probate in 1920 of the will of the widow Arsienne. It made no reference to the partition mentioned on the demarcation certificate. It stated the owners as Heirs of St Martin Felicien c/o Plamer Jacob, La Borne, Monchy PO. The last section of the form ("Action, if any, taken under section 22 or as a result of a petition under section 20") was blank, and was not signed by the adjudication officer.

25. In these circumstances registration of title to the disputed land was effected, without any protest or appeal under the LAA, by the Registrar on 19 November 1986. The relevant instrument was recorded as the adjudication record. The name and address of the proprietor(s) were recorded as "Heirs of St Martin Felicien, c/o Plamer Jacob, La Borne, Monchy PO, St Lucia."

26. These matters rested until 1995, when Mr Evans Calderon, a solicitor acting for the heirs of Philomene, applied to the Land Registry for rectification of the register. On 5 April 1995 the Deputy Registrar purported to alter the proprietorship register to read "Heirs of Felicienne Felicien, c/o Jn Baptiste Jacob, La Borne, Monchy PO, St Lucia." He noted,

"This rectification is to give effect to the last will and testament of Arsienne Felicien. The Adjudicator erroneously omitted to record the proper Heirs to the said parcel. See file for the application of Evans Calderon, solicitor."

27. However on 2 August 1995 the Registrar imposed a restriction on the title for reasons which appear from his order:

“The Land Register was rectified under Instrument No. 1367/95 and the name of the proprietor now shown on the Land Register is Heirs of Felicieenne Felicien.

The rectification is purported to be supported by an instrument evidencing the probate of the Last Will & Testament of Arsienne Felicien Registered Vol 74A No. 41050. The Will & Testament of the late Arsienne Felicien does not confer the estate of the deceased to any person named Felicieenne Felicien.

This order seeks to prevent improper dealings which are likely to be caused by the current faulty entry in the Register.”

28. Then on 20 December 1995 Sylvina Louisien obtained leave to apply for mandamus directed to the Registrar, and on 23 August 1996 the Court directed the Registrar to restore the original entry in the proprietorship section of the Register, which the Registrar did on 10 September 1996. On 10 April 1997 the entry was altered to four named children of St Martin (Hortencia, Anazilta, Louisa and Salmond) as trustees for sale. To that has since been added the note “Pending decision of the High Court, Suit No. 827/99.”

The proceedings

29. Two of the heirs of Philomene applied to the High Court to set aside the order of mandamus, but that application was rejected on 18 March 1998. Then on 29 October 1999 the plaintiffs issued a writ and statement of claim seeking rectification in favour of the heirs of Philomene of the register of title to the disputed land.

30. On 19 April 2000 the defendant applied for the action to be dismissed on the ground of *res judicata*. On 24 June 2000 the plaintiffs applied for judgment in default of defence. On 26 September 2000 the defendant made a further application by what was described as a notice of preliminary objections. On 21 February 2001 Barrow J (Ag) gave leave to the plaintiffs to amend their statement of claim and on 7 March 2001 the statement of claim was amended by the addition of three new paragraphs, including particulars of “a mistake made in the land registration process”, the last paragraph of those particulars being as follows:

“The Recording Officer in issuing the Adjudication Record considered a Deed of Declaration by Louisa Felicien which Deed substantiates the claim of Louisa Felicien to Parcel 1656 B6, not 1656 B9, which said claim was made on 25 April 1985.”

31. The defendant put in her defence on 25 February 2003, asserting that the issue was *res judicata*, having been (as was pleaded in paras 21 and 22) adjudicated on by a tribunal with competent jurisdiction.

32. The defendant's application by way of notice of preliminary objections came before Edwards J in May 2004, and she handed down a ruling on it on 7 September 2004. It is worth reiterating that the judge had no oral or affidavit evidence before her, except (it seems) copies of the 1959 declaration, the claim form 4A 681, and the demarcation certificate and the adjudication record for the disputed land (Barrow JA recorded, in para 32 of his judgment, that claim form 4A 165 was not before the judge). The judge had the doubtful benefit of unsworn and inconsistent versions of the facts set out in the parties' skeleton arguments, the plaintiffs' skeleton argument stating, bizarrely, that the facts were not in dispute.

33. In her judgment Edwards J gave an imperfect summary of the facts, without any clear distinction between agreed and disputed facts. In particular, in para 2 of her judgment she seems to have confused the generations by identifying the widow Arscenne with Madam Symphorien (that is, on the plaintiffs' case, Philomene). The judge then listed (para 16) seven issues (A to G) which had been agreed between counsel for her to decide. In their Lordships' view the judge was unwise to accept counsel's invitation to embark on these seven overlapping issues, some of which went far beyond simple issues of law, when there was no evidence at all (apart from the few documents mentioned above) on important and disputed issues of fact. That is especially true of issue D: "Whether the Land Adjudication Record issued in respect of Parcel 1656B9 [the disputed land] is null and void?"

34. The judge went on to make some findings of fact which can only be described, with all respect, as speculative and unwarranted inferences. In particular she confidently concluded (para 59) that there were competing claimants for parcel 1656 B9; that there was a boundary dispute or problem (para 63); and that there was a dispute as to ownership (para 69). These were not matters on which the judge could properly draw such inferences. There was no evidence to support them, and the weight of the documentary evidence was against them. As Barrow JA pointed out in his judgment (para 32) it was equally possible (in their Lordships' view, much more probable) that claim 4A 165 related to another parcel of land, that is 1656B6.

35. This faulty analysis led the judge to conclude that the recording officer acted beyond his statutory powers in deciding a dispute which should have been decided by the adjudication officer; and that there was, in line with the reasoning of Byron JA in *Webster v Fleming* 8 May 1995 Civ App No 6 of 1993 (Anguilla), a mistake in the registration process. The adjudication record was in her judgment a nullity (that was her answer to issue D), and so when the Registrar gave effect to it what happened was a mistake in the registration process. The record does not contain a copy of the order of Edwards J and it

may be that no formal order was ever produced (it would not be an easy drafting exercise).

36. The Court of Appeal (Gordon, Barrow and Rawlins JJA) upheld the decision of Edwards J by a majority (Barrow JA dissenting). Gordon JA (with whom Rawlins JA agreed) posed three issues:

- (1) Could the adjudication record be subject to any sort of review in the High Court?
- (2) Could the claim to rectification under section 98 of the LRA succeed in the absence of pleaded particulars of mistake in the registration process, and not the adjudication process?
- (3) Can a recording officer's *ultra vires* act during the adjudication process make the adjudication record a nullity?

Gordon JA referred to *Webster v Fleming* and to the earlier case of *Skelton v Skelton* (1986) 37 WIR 177. He concluded that in this case, as in *Webster v Fleming*, the recording officer had acted beyond his statutory powers in deciding a disputed claim; that that made the adjudication record a nullity; and that this amounted to a mistake in the registration process. Gordon JA found it necessary to answer only the third of the three questions which he had posed.

37. Barrow JA, in a clear and careful dissenting judgment, agreed with the majority, in line with previous authority, that the Court's jurisdiction to rectify the register under section 98 of the LRA depends on a mistake in the registration process. He analysed the judgment of Edwards J and drew attention to the speculative conclusions which their Lordships have already mentioned. Thus far in his judgment his reasoning and conclusions are in their Lordships' opinion to be preferred to those of the majority. But in their Lordships' view Barrow JA went too far the other way in his conclusion (para 53):

“that the respondents cannot challenge the registered title of the appellant as proprietors of the disputed land and, hence, the statement of claim discloses no cause of action that is capable of succeeding.”

38. Barrow JA would have struck out the statement of claim and entered judgment for the appellant. In their Lordships' view, for the reasons set out below, the right course would have been to order that the case should go to trial, unencumbered by any conclusions depending on the judge's unwarranted inferences.

Rectification of the Register by the Court

39. The LAA and the LRA were intended to operate as two interlocking elements of the process of first registration of title. The LAA was concerned,

as its name indicates, with the adjudication of claims to land ownership. If there were competing claims the adjudication officer was to decide them in a quasi-judicial capacity, weighing up the evidence and applying principles of land law. Even if there was no contest between claims, the recording officer still had to subject the claim to scrutiny (section 14 refers to “such investigation as he or she considers necessary”) before completing and signing the adjudication record for certification by the adjudication officer. Once it became final the certified record was to be passed to the Registrar (as provided in section 10 of the LRA) for first registration. If the confirmed adjudication record appeared to be in order there would be no reason for the Registrar to seek to go behind it.

40. It is clear that rectification of the register under section 98 of the LRA can sometimes be ordered in respect of a first registration. That is clear from the words “subject to the provisions of the Land Registration Act” in section 23 of the LAA, and from the references to first registration in sections 98(1) and 99(1)(b) of the LRA. But it is also clear from the authorities that rectification is not intended to be an alternative remedy for a claimant under the LAA who, having failed in a contested claim before the adjudication officer, omitted to use the avenues of review and appeal provided for by sections 20 and 24 of the LAA. This conclusion does not depend on *res judicata* or estoppel properly so called; it follows simply from a correct understanding of the statutory machinery (see Byron JA in *Portland v Joseph*, 25 January 1993, Civ App No. 2 1992).

41. There is a line of jurisprudence on section 98 of the LRA and similar enactments in force in other Caribbean countries, indicating that rectification of the register is available only if the mistake in question (or, no doubt, the fraud, when fraud is in question) occurred in the process of registration. See *Skelton v Skelton* (1986) 36 WIR 177, 181-182; *Portland v Joseph*; and *Webster v Fleming*. Their Lordships consider that this principle is a correct and useful statement of the law, but would add two footnotes by way of explanation or amplification.

42. “A mistake in the process of registration” is a useful phrase, but it is judge-made, not statutory language, and its scope must depend on a careful evaluation of the facts of the particular case. Moreover the fact that there has been a mistake in the course of the adjudication process does not automatically exclude the possibility of the same mistake being carried forward, as it were, so that it becomes a mistake in the registration process.

43. Several different situations can be imagined. First, an entirely correct adjudication record, confirmed by the adjudication officer, is passed to the Land Registry, where one of the staff makes a mistake in transcribing the contents of the record into the Register. In that case there is plainly a mistake in the process of registration (there has been no mistake in the process of adjudication). Rectification is available. Secondly, suppose there has been a mistake in the process of adjudication, such as a recording officer acting

beyond his statutory authority by altering the record after its confirmation by the adjudication officer. In a case of that sort there is a serious mistake (probably amounting to nullity) in the process of adjudication. That mistake gets carried forward to the registration process, since the staff of the Land Registry are presented with a record which does not correctly embody the adjudication officer's final decision. Again, rectification is available. That is *Webster v Fleming*.

44. In their Lordships' opinion the same principle may extend to a case in which the adjudication record, although not a nullity, contains on its face an obvious error or inconsistency such as to put the staff of the Land Registry on enquiry as to the correctness of the record. If they were to omit to make such enquiries, and proceed on the basis of a defective adjudication record, that may amount to repeating the original mistake so that it becomes part of the process of registration. In a case of that sort, again, rectification would be available.

45. It is not for their Lordships to express any view on issues of fact which remain to be investigated at trial, but they note the following points.

- (1) The adjudication record was not signed by the adjudication officer, and no separate written confirmation by the adjudication officer has so far been produced.
- (2) The last entry on the demarcation certificate recognised the significance of the 1959 declaration (which the recording officer had apparently seen in connection with claim 4A 165) but the 1959 declaration was not mentioned in para 2 of the adjudication record relating to the disputed land.
- (3) The adjudication record also made no reference to any partition effected in 1921 or thereabouts (that is, soon after the death of the widow Arscenne) although a partition "in 1920's" was referred to in the demarcation certificate. In the absence of any partition or other disposition noted under para 2, it would have been expected that the owners would be the heirs of the widow Arscenne, not the heirs of St Martin.
- (4) Section 17(6) of the LAA applies only to the unadministered estate of a sole landowner. The widow Arscenne had been dead for 65 years when the adjudication took place, and it seems unlikely that her estate could have remained unadministered for so long; while the pattern of holdings apparent from the index map might have suggested that St Martin was unlikely to have been the sole owner of two separate areas of land under his mother's will.

Conclusion

46. All that is however for the future. No more can be decided on this appeal than that Edwards J erred in her inferential findings of fact, and that the

plaintiffs' amended pleading, though not without its difficulties, is not so obviously defective as to warrant the drastic remedy of striking out. The case must go to trial if it cannot be settled in the meantime. Apart from that conclusion their Lordships are largely in agreement with the dissenting judgment of Barrow JA.

47. If the case is to go to trial both sides may wish to consider applying for leave to amend or re-amend their pleadings. But their Lordships express no view whatsoever as to how the Court should exercise its discretion if any such applications are made.

48. In these circumstances their Lordships will humbly advise Her Majesty that the appeal should be allowed and Edwards J's answer to question D set aside (leaving that question to be answered at trial). The parties may make written submissions as to costs within 14 days.