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1 IN CHAMBERS  
2  
3 IN THE GRAND COURT OF THE CAYMAN ISLANDS  
4  
5 CAUSE NO 135 OF 1996

8 BETWEEN: (1) PETER JONES  
9 (2) DANIELLE BOUCHARD  
10 (3) THE BANK OF NOVA SCOTIA

APPLICANTS

14 AND: (1) THE REGISTRAR OF LANDS

RESPONDENT

17 (2) FIRE AND CASUALTY INSURANCE  
18 COMPANY OF CONNECTICUT

INTERVENOR

Appearances:

22 Ross McDonough of Bruce Campbell & Co. for the applicants.  
23 Julene Banks, Crown Counsel for the respondent.  
24 Stephen Hellman of Quin & Hampson for the intervenor.

JUDGMENT

27 This action is about competing claims to residential property located in  
28 Grand Cayman and registered as West Bay Beach South, Block 12C, Parcel  
29 117 ("the property").

1 The first and second applicants (“the applicants”) claim as bona fide  
2 purchasers for value without notice and the third defendant (“BNS”) asserts  
3 its contingent interest with them as chargee having provided a loan to them  
4 for the purchase of the property.

5

6 The applicants have unfortunately become involved in this dispute because  
7 of a fraud the proceeds of which have been traced to the property but of  
8 which, it is acknowledged by all, they had no notice.

9

10 The alleged fraud

11 The following background is apparent from the pleadings filed in the related  
12 Cause 115 of 1996 brought by the intervenor. The intervenor (hereafter  
13 “F&C”) is an insurance company organised and existing under the laws of  
14 Connecticut, in the United States of America. Among other things, it  
15 underwrites workers’ compensation insurance to clients throughout the  
16 United States. F&C contracts its underwriting through commissioned  
17 brokers. One such broker was a Pennsylvanian company called Asset  
18 Protection Management Inc. (“APM”) of which David Bockius was a  
19 principal shareholder and operative. As its broker, APM had developed  
20 with F&C a relationship of trust and confidence. In that context the breach  
21 of trust which Bockius allegedly perpetrated to defraud F&C was of the  
22 most obvious kind. He arranged for large sums of premium - to the order of  
23 over USD600,000 - to be paid by a client of F&C to his firm APM and then  
24 misappropriated some USD400,000 of it to his own ends. This was done  
25 during the first six months of 1995.

1 In the belief that the Cayman Islands was a convenient place, Bockius  
2 brought that money here. It is averred that he brought with him  
3 USD300,000 - cash from the proceeds of the fraud - in a suitcase.

4  
5 He arranged for the formation of a Cayman Islands company - Little  
6 Mermaid Limited ("LML") - through which he eventually purchased the  
7 property in the manner alleged as follows.

8  
9 At first Bockius offered to purchase the property with cash in the entire  
10 amount of the purchase price, approximately USD175000, but the real  
11 estate broker refused. Bockius then deposited the cash with a local bank  
12 then, with a cashier's cheque issued by it - the bank having exercised less  
13 diligence than it should have - ultimately succeeded in purchasing the  
14 property in the name of LML. The transfer was concluded on the 29th  
15 September 1995 and LML became the registered proprietor of the property.

16  
17 Bockius' fraudulent scheme was further perpetrated - in an attempt to cover  
18 his trail - by a purported transfer of the property to one Claudius Helvester.  
19 To that end, Bockius executed a form of transfer to Helvester which on its  
20 face purported to show a consideration in exactly the same amount LML  
21 paid for the property - USD175000. Revealingly however, instructions had  
22 been given to LML's nominee directors to arrange for this "sale" to  
23 Helvester even before LML had acquired title. That transfer, now  
24 admittedly having been for nil consideration - as Helvester paid nothing - is

1 in breach of section 105(3) of the Registered Land Law (“the RLL”); on  
2 which more follows below.

3

4 The transfer to Helvester was executed by LML on the 25th August 1995;  
5 fully a month before LML acquired legal title, but it was not presented for  
6 registration. Instead Helvester subsequently purported to transfer to the  
7 applicants by a further deed of transfer which was executed on the 31st  
8 January 1996.

9

10 The applicants - (using their own money to the amount of some 42000CI  
11 dollars and the loan from BNS for the balance) - paid over to Helvester  
12 175000 CI dollars. Regrettably they did so only on the strength of the  
13 unregistered deed of transfer which Helvester presented to them, ie: that  
14 which had been executed by LML to him.

15

16 The applicants had, however, taken the precaution of obtaining the consent  
17 of LML (as registered proprietor) to search the register and its consent to the  
18 imposition of a stay of any proposed dealings, pursuant to section 42 of the  
19 RLL. That had occurred on the 24th January 1996.

20

21 Priority of applications

22 By section 42(1) it is provided that a stay is operative for 14 days and that  
23 obtained by the applicants therefore expired on 7th February 1996.

24

1 Some issues now joined in the dispute between the parties and primarily to  
2 be resolved, centre around events which occurred during the pendency of  
3 that stay.

4

5 On the 1st February 1996 attorneys on behalf of the applicants submitted to  
6 the Land Registry for registration the deed of transfer from LML to  
7 Helvester (“the first transfer”), the deed of transfer from Helvester to the  
8 applicants (“the second transfer”) and the charge in favour of BNS given by  
9 the applicants (“the charge”). Except when each document is singularly  
10 referred to I will refer to that application and to those accompanying  
11 documents together hereafter as “the application”. The application also  
12 included a cheque for fees and stamp duty in the appropriate amounts,  
13 correctly calculated to cover late registration fees and penalties for late  
14 stamping.

15

16 On the 2nd February 1996 F&C issued proceedings in this court in Cause  
17 42 of 1996 against LML, Bockius and others, to restrain dealings with the  
18 property. On that same date it obtained orders which included an inhibition  
19 pursuant to section 124 RLL and which was immediately entered on the  
20 register inhibiting the registration of any further dealings with the property.

21

22 This inhibition was therefore entered notwithstanding the stay which was  
23 then in place.

24

1 The applicants now seek, among other relief, rectification of the register by  
2 the removal of the inhibition. They also seek orders directing the registrar  
3 to rectify the register by the registration of the application. That would  
4 mean, in order - the registration of the first transfer from LML to Helvester,  
5 then of the second transfer and then of the charge.

6

7 These are remedies claimed by the applicants on the primary basis that such  
8 remedies would provide only the same secured position they would have  
9 achieved in respect of the property had their application been entered as  
10 they argue it should have been upon presentation, and so by redressing the  
11 grant of priority to F&C's inhibition.

12

13 The first issue for consideration I can address simply *en passant* by virtue  
14 of a ruling by way of case stated given on an earlier occasion by the learned  
15 Chief Justice at the instance of the registrar, pursuant to section 146 of the  
16 RLL.

17

18 The effect of that ruling is that an inhibition - even though an order of the  
19 court - assumes no priority of registration during the pendency of a stay of  
20 registrations effected pursuant to section 42 RLL, as an inhibition takes  
21 effect only upon registration. I extract the relevant passages of the ruling:

22

23 "My view is that the definition of "instrument" in  
24 section 2 of the Registered Land Law ("the Law")  
25 includes an inhibition and that its registration is  
26 stayed during the suspension period provided for  
27 under section 42 of the Law.

1  
2 Unlike most court orders, an inhibition is not  
3 effective per se, but only on registration. This  
4 fortifies my view that it does not have “superior  
5 quality” in relation to section 42 and that the  
6 purpose of that section, which must be to  
7 crystallise during the suspension period the rights  
8 shown on the register affecting the land, is  
9 paramount. Any other view would introduce  
10 uncertainty as to the finality of the result of the  
11 official search.”

12  
13 The ruling is to be read in the context of section 42 of the RLL which  
14 provides:

15  
16 “42. (1) Where any person proposing to deal  
17 with registered land has, with the consent in  
18 writing of the proprietor, applied for an official  
19 search and has stated in his application the  
20 particulars of the proposed dealing, the  
21 registration of any instrument affecting the land to  
22 be comprised in or affected by the proposed  
23 dealing shall be stayed for a period (hereinafter  
24 referred to as the suspension period) of fourteen  
25 days from the time at which application for the  
26 search was made, and a note shall be made in the  
27 register accordingly.

28  
29 (2) If, within the suspension period, a  
30 properly executed instrument *affecting* the  
31 proposed dealing is presented for registration,  
32 such instrument shall have priority over any other  
33 instrument which may be presented for  
34 registration during the suspension period, and  
35 shall be registered notwithstanding any caution or  
36 other entry for which application for registration  
37 may have been made during the suspension  
38 period.

1  
2 (3) Subject to subsection (2), any  
3 instrument or document for which application for  
4 registration is made during the suspension period  
5 other than that *affecting* the proposed dealing shall  
6 be dealt with in the same manner, have the same  
7 priority and be as effectual as if no stay of  
8 registration had been obtained. (emphasis  
9 supplied).

10  
11 It is plain, and I accept as counsel have all submitted, that the word  
12 “affecting” as it appears in subsections (2) and (3) should read “effecting”.  
13 Thus construed, section 42 clearly seeks to accord priority to an instrument  
14 properly executed and which gives *effect* to the proposed dealing for which  
15 the search was initiated and the stay imposed.

16  
17 That is in keeping with the conclusion of the learned Chief Justice. No one  
18 took issue before me with his ruling, and I see no reason for departing from  
19 it and now record that I entirely agree with it.

20  
21 That, however, does not resolve the matter of priority, as the registrar relies  
22 on other reasons for having refused the registration of the application.

23  
24 Before dealing with those reasons, I should here note that they ultimately  
25 proved to be academic in light of the outcome on the applicants’ summons  
26 for the substantive equitable relief of rectification which they seek. I take  
27 the time to deal with them nonetheless because of their general importance  
28 to registry practice and to the questions of priority which are involved.

1 The Application Book

2 Mrs Banks on behalf of the registrar has argued that the application was  
3 substantially defective and that the refusal of its registration was justified  
4 having regard to the established registry practice as laid down in the manual  
5 of registry procedure ("the manual") which she submits, carries the force of  
6 law.

7

8 In response, the applicants cite the important distinction between the two  
9 stages of the registration process required by the RLL. The first stage is that  
10 of the entry of the application for registration in the applications book,  
11 pursuant to section 4(d) of the RLL. The next, and more important,  
12 assuming the application is eventually accepted, is the actual entry by way  
13 of registration of the instrument upon the register in respect of the parcel  
14 involved and which serves to establish title in the case of a transfer, in the  
15 transferee.

16

17 In this case the application was not entered in the application book. Instead  
18 the following chronology developed. The next day - 2nd February 1996 -  
19 the inhibition was obtained and registered in favour of F&C . Five days  
20 later, on 7th February 1996, the stay expired. Two days later, a letter from  
21 the Lands and Survey department - (which is charged with the responsibility  
22 within the land registry system of assessing stamp duties) - was sent to the  
23 applicants' attorneys informing them that the amount remitted in respect of  
24 stamp duty was incorrectly calculated. However, after consultation with the

1 attorneys, Lands and Survey subsequently admitted the error to have been  
2 theirs.

3

4 That concession notwithstanding, the application remained unentered in the  
5 application book. Instead, on 14th February 1996, the application was  
6 returned to the applicants' attorneys with a pro forma requisition requiring  
7 further information and steps to be taken. These were:

8

9 (i) the initialling of amendments appearing on  
10 the face of the documents;

11

12 (ii) the requirement of a certificate of good  
13 standing for LML it being the registered  
14 proprietor and the purported first transferor;  
15 and

16

17 (iii) the removal of the inhibition which was by  
18 then registered.

19

20 Significantly though, the pro forma requisition concluded with the  
21 following: "*Please attend to the above and return documents together with*  
22 *this form as soon as possible so that I may be able to register them without*  
23 *delay.*" It was signed on behalf of the registrar.

24

25 On 27th February 1996 the documents were resubmitted by the attorneys to  
26 the registrar but without the certificate of good standing. Instead the  
27 attorneys advised the registrar in their covering letter that the registrar of  
28 companies had confirmed LML to be in good standing and would be

1 prepared to so advise the registrar. The application nonetheless remained  
2 unentered in the application book.

3

4 Hence this action.

5

6 Although by the time of that last refusal the allegations of fraud may well  
7 have been known to the registrar, his continued refusal was in no manner  
8 expressed as related to those allegations. Those issues of fraud are now  
9 raised as a basis for this Court's refusal of the relief sought by the  
10 applicants. They can, therefore, be separately addressed. I will first address  
11 the issue of the registrar's refusal on the basis of what is described on his  
12 behalf as the "substantial defectiveness" of the application.

13

14 I begin with the observation that - as a matter of fact - the argument now  
15 that the application was rejected for being substantially defective does not  
16 comport with the closing paragraph of the pro forma requisition from the  
17 registrar. That document, on the contrary, indicated his intention to have  
18 proceeded with registration once the required formalities were satisfied.  
19 And formalities they were:- the requirement that the inhibition be first  
20 removed, though not a formal matter, was wrong in the circumstances and  
21 in light of the Chief Justice's ruling.

22

23 The removal of the inhibition as a formal prerequisite to the application  
24 being accepted in that light to have been wrong, was not canvassed on  
25 behalf of the registrar during the arguments.

1

2 In that same light the miscalculation of stamp duties should not have been  
3 raised as an issue in the first place; and the refusal of 9th February 1996 on  
4 that basis served only to delay proceedings.

5

6 The Certificate of Good Standing and Registry Practice

7 In the end the arguments centred around the company's certificate of good  
8 standing and the fact that, up until this hearing, it had not been produced in  
9 writing.

10

11 The registrar's position on this centred around section 154 of the RLL  
12 which prohibits the *registration* of a body corporate as a proprietor of land  
13 if it is not in compliance with the requirements of registration under the  
14 Companies Law, ie: a company which is registered on the registry of  
15 companies and has not been struck off.

16

17 Section 154 of the RLL also provides, however, that a body corporate not in  
18 good standing has no power "*in any other manner to hold land in the*  
19 *Cayman Islands.*" In light of those further provisions of section 154, it  
20 could not be held that the Registrar's requisition was unreasonable,  
21 although LML was already the registered proprietor. By way of illustration,  
22 Mrs. Banks cited a possible reason for the requisition: LML, if struck off  
23 since being registered, would no longer in law be the legal owner of the  
24 land, as title would have vested immediately in the Financial Secretary for  
25 the benefit of the Islands. This is correct - see section 180 of the Companies

1 Law (1995 Revision) - and was therefore a reasonable concern of the  
2 registrar.

3

4 That, however, could not reasonably to my mind, be regarded as a  
5 “substantial defect” in the application. It was a matter which could readily  
6 have been resolved and was so regarded by the registrar himself, as was  
7 indicated in the final paragraph to the pro forma requisition. Indeed I  
8 conclude that the application as constituted at the time of lodging ought not  
9 to have been regarded as a hopelessly unregistrable dealing for any of the  
10 reasons cited.

11

12 On the then known facts it was prima facie entitled to prioritisation. And  
13 that prioritisation is the very reason for the two stages of the registration  
14 process: first entry in the application book, and then entry in the formal  
15 register, once the requirements are met.

16

17 The importance of entry in the application book is the reason why section  
18 4(d) of the RLL is expressed in mandatory terms:

19

20 “4. There shall be established and maintained at  
21 Grand Cayman a land registry in which there shall  
22 be kept -

- 23 (a) a register ....  
24 (b) ....  
25 (c) ....  
26 (d) a book, known as the  
27 application book in which  
28 shall be kept a record of all  
29 applications numbered

1 consecutively in the order in  
2 which they are made at the  
3 registry.”  
4

5 The Manual

6 I am also asked to address the question whether current practice within the  
7 registry reflects what the RLL section 4(d) literally provides. Chapter 11 of  
8 the manual describes a number of procedural steps to be satisfied before an  
9 instrument will be accepted. It specifically identifies certain defects set out  
10 at chapters 11 and 12 for which instruments “should be rejected and  
11 returned and no application book number accorded.” Many of those may  
12 well be described as fundamental and - even within the mandatory regime  
13 of section 4(d) - may well be regarded as justification for rejection as  
14 stipulated in the manual. Obvious examples arise where there is an  
15 impediment to registration - such as a caution shown in the register; or if the  
16 name of the proprietor shown on the instrument does not accord with that  
17 shown in the register.

18  
19 The absence of a certificate of good standing of a corporate proprietor, is  
20 however, not such a fundamental matter and is nowhere so mentioned in the  
21 manual. Nor - from my reading of the manual - are the other formalities  
22 requiring of perfection as per the pro forma requisition sent to the applicants  
23 by the registrar.

24  
25 On this point my conclusion then is that absence of the certificate of good  
26 standing was not a matter which justified the refusal of entry in the

1 application book and of the priority which that entry would at least prima  
2 facie, have afforded the applicants.

3

4 Indeed, it seems to me that the perfection of such formalities in the usual  
5 case must be included within the rationale for the hiatus afforded by entry in  
6 the application book.

7

8 The practice is helpfully discussed in Land Law and Registration by E.  
9 Rowton Simpson, Cambridge University Press a work which discusses,  
10 among others, the Kenya Registered Land Act and Rules on which the RLL  
11 is patterned. At pages 354 to 355:

12

13 "In the application book (called the presentation  
14 book in the Kenya Registered Land Act) are  
15 recorded the particulars of all applications made to  
16 the registry, in the order in which they are made  
17 .... In busy registries there may be a considerable  
18 delay between the time an instrument is presented  
19 and the time it is actually recorded in the register.  
20 Provision must therefore be made to ensure that it  
21 is not overtaken (or, worse still, overlooked or  
22 even mislaid) while it is still in the "pipeline" and  
23 so particulars of an application *must* be recorded  
24 as soon as it is received." (emphasis supplied).

25

26 At page 393 the author explains in more detail the advisable practice:

27 "Entry in the application book. By whatever  
28 method the application is presented, the counter  
29 clerk (or whatever the clerk responsible -- is  
30 called) should cursorily examine the application  
31 himself to satisfy that it appears in order, and  
32 should forthwith enter the particulars in the

1 application book”, according the application the  
2 next consecutive serial number. This serial  
3 number must then be inscribed in the instrument  
4 itself. Entry in the application book establishes  
5 priority but does not, of course, carry any  
6 implication that the transfer will necessarily be  
7 made ---- . If, however, the transaction *is*  
8 registered, then the date of registration is the date  
9 of presentation, not the date on which the entry is  
10 actually made in the register or the date of the  
11 instrument.”

12  
13 Such a practice recognises the importance of the priority which the RLL  
14 affords and mandates in section 4(d) and reinforces in similar terms in  
15 section 41(1):

16 “Interests appearing in the register shall have  
17 priority according to the order in which the  
18 instruments which led to their registration were  
19 presented to the registry, irrespective of the dates  
20 of the instruments and notwithstanding that the  
21 actual entry in the register may be delayed.”

22  
23 Rowton Simpson in his book also advises upon the next step. This is  
24 normally the examination of the register - which would involve a number of  
25 the inquiries and steps which are envisaged in the manual in chapter 11, but  
26 there instead envisaged as usually to be taken *prior* to entry in the  
27 application book.

28  
29 The observation I make for the sake of guidance, is that the registrar’s  
30 directives in this regard - as embodied in the manual - while intended to  
31 serve as directives pursuant to section 11(2) of the RLL, can only properly  
32 so be regarded when they comply with the other strict and clear  
33 requirements of the RLL.

1 Any directed practice which would operate to deny priority to an instrument  
2 which should otherwise be afforded the priority envisaged by section 4(d)  
3 would therefore be impermissible.

4

5 In this case - although now rendered academic for other reasons - that was  
6 the result of the failure to enter the application in the application book when  
7 the imperfections were clearly remediable.

8

9 In this context I was referred to the dictum of Collett CJ (as he then was) in  
10 Cause 56 of 1988 The Proprietors of Strata Plan No. 66 v R.P.

11 Development and Others (written judgment given on 7th October 1988).

12 The point then under consideration was the enforceability of a directive in  
13 the manual which stipulates that no entry in the proprietorship section of a  
14 register has validity until it is signed in the last column by the registrar.

15

16 At page 11 that learned judge described the manual thus:

17                    " This manual was intended to operate as a  
18                    direction in terms of section 11(2) of the Law (the  
19                    RLL) and in my judgment it does so."

20

21 General though his description seems, I am of the view that in so  
22 concluding he accepted specifically only the validity and enforceability of  
23 the particular directive then under discussion. Contrary to the submissions  
24 on behalf of the registrar, I do not accept that his words were intended to  
25 convey a finding as to the general validity, vires or appropriateness of the  
26 manual.

27

1 The further observation is also to be made in the present context: That to  
2 the extent the practice laid down in the manual conflicts with the provisions  
3 of the RLL itself, then the practice would be ultra vires.

4

5 Section 3 of the RLL is very much in point:

6

7

8

9

10

11

“Except as otherwise provided by this Law, no other law and no practice or procedure relating to land shall apply to land registered under this Law so far as it is inconsistent with this law ....”

12 And in this context there is also to be found very helpful dicta in the case  
13 law. In Smith v Morrison Ch. D 1974 1 W.L.R. 659 at 681 Plowman J  
14 advised the following approach which is as applicable to the Cayman  
15 Islands registration system as to that of the United Kingdom:

16

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“... in my judgment, the mere fact that it is necessary for the Land Registry to return a document for amendment before it can be registered does not necessarily involve the conclusion that the application was not “in order” in the first instance. It depends, in my view, upon the nature of the defect. The rules of 1969 relating to official searches ought to be construed if possible, in such a way as to give them practical efficacy. So great is the number of applications lodged with the Land Registry that if every application had to be in perfect order before it was accepted, a large proportion of the applications would fail to get priority under the rules of 1969 owing to formal defects, and the whole official search procedure would be in jeopardy. In my judgment therefore the words “in order” can fairly

1 and should be construed as “substantially in order”  
2 rather than “in perfect order.”  
3

4 Though in the result of the present case it will be academic I make the  
5 specific finding that the practice of refusing entry in the application book  
6 due to the remediable absence of a certificate of good standing is contrary to  
7 section 4(d) of the RLL.

8  
9 Acceptance for entry had also been refused in this case because of the  
10 miscalculation of stamp duty. Directive 11.5 of the manual lays down that  
11 an application cannot be formally accepted for entry in the application book  
12 until stamp duty has been assessed and paid.

13  
14 The difficulty that directive creates for an applicant arises from the fact that  
15 stamp duty is assessed within the registry itself, by the Lands and Survey  
16 department and thus an application there must first be made before stamp  
17 duty can be assessed. That is a function entirely of the Administration. A  
18 bona fide applicant, who presents his application otherwise completely in  
19 order, ought not to lose his priority for the sake of the ease of  
20 administration.

21  
22 In this case, in light of the admission that the referral on assessment of  
23 stamp duty was erroneous, the registrar has implicitly accepted that the  
24 refusal of entry in the application book for that reason was also wrong. I  
25 mention also section 108 of the RLL in this context to make the distinction  
26 between its requirement of stamping of instruments *prior to registration*

1 and that of stamping *prior to entry in the application book*, which is the  
2 current practice, although not a requirement of the RLL.

3

4 In light of those errors which resulted in the applicants' loss of priority, Mr.  
5 McDonough submitted that rectification should automatically follow. He  
6 cited the case of Strand Securities Ltd v Caswell and Another [1965] 1 All  
7 E.R. 820 - in which the practice of requiring production of the land  
8 certificate as a prerequisite to the registration of a sub-lease and despite  
9 production of the head-lease; was found to be erroneous and the prior  
10 registration of a subsequent lease was rectified. The important distinction  
11 between that and the present case is, however, that there no element of fraud  
12 was involved.

13

14 Application hopelessly unregistrable for fraud

15 Mrs. Banks and Mr. Helman both submitted that it was incumbent on the  
16 applicants to ascertain that Helvester, as the person from whom they were to  
17 get title, was the duly registered proprietor. As he was not, then the  
18 applicants can have no claim to the scheme of protection afforded by the  
19 RLL, as that scheme is predicated upon dealings with a registered  
20 proprietor.

21

22 In this respect section 38(1) of the RLL provides:

23

24 "No person dealing or proposing to deal for  
25 valuable consideration with a proprietor shall be  
26 required or in any way concerned -  
27

1 (a) to inquire or ascertain the  
2 circumstances in or the consideration  
3 for which such proprietor or any  
4 previous proprietor was registered;

5  
6 (b) to see to the application of any  
7 consideration or any part thereof;

8  
9 (c) to search any register kept  
10 under the Public Recorder Law  
11 (Revised) or the Registration (Land)  
12 Law.”  
13

14 This provision is indeed central to the land registration system as it  
15 embodies the Legislature’s relative assurance of indefeasibility of title to  
16 registered land. But it is clearly right that the applicants may not rely on it  
17 as the person from whom they purport to take legal title was not and is not a  
18 “proprietor” as defined in the RLL.

19  
20 Equally though, the RLL admits of no equitable doctrine of notice by which  
21 F&C could assert that bona fide purchasers such as the applicants must be  
22 deemed to have had constructive notice of F&C’s equitable claim: Myles  
23 and Winton v Prospect Properties Limited and Woolf [1994-95] CILR I.

24  
25 For that reason F&C does not, primarily, argue that the applicants are to be  
26 deemed to have had constructive notice of its equitable claim. Its claim in  
27 Cause 115/96 against LML, Bockius and Helvester alleges a conspiracy to  
28 defraud which imputes notice of the theft by Bockius to LML and to  
29 Helvester in turn and by virtue of which F&C avers that the transfer to

1 Helvester from LML was a fraudulent disposition and therefore null and  
2 void and of no legal effect. If that is so, then F&C primarily argues that  
3 Helvester could pass no legal or beneficial interest to the applicants: *nemo*  
4 *dat quod non habet*.

5

6 I turn next to consider the first plinth of F&C's case: That Helvester could  
7 pass no *legal* title to them under the RLL because he was not the registered  
8 proprietor.

9

10 Legal title

11 Legal title can pass only in accordance with the RLL which requires that a  
12 person passing legal title must be a proprietor as defined therein, ie: a  
13 registered owner. Section 2 provides:

14

15 "“Proprietor” means the person registered under  
16 this Law as the owner of land or a lease or a  
17 charge.”

18

19 Sections 37(1), 83(1) and (12) and 106(1) when read together  
20 make the effect of this clear: Section 37(1):

21

22 “No land lease or charge registered under this Law  
23 shall be capable of being disposed of except in  
24 accordance with this Law, and every attempt to  
25 dispose of such land, lease or charge otherwise  
26 than in accordance with this Law, shall be  
27 ineffectual to create, extinguish, transfer, vary or  
28 affect any estate, right or interest in the land, lease  
29 or charge.”

29

30 Section 83(1) and (2):

1           “(1) *A proprietor*, by an instrument in the  
2           presented form, may transfer his land, lease or  
3           charge to any person with or without  
4           consideration.

5  
6           (2)   The transfer shall be completed by  
7           registration of the transferee as proprietor of the  
8           land, lease or charge and by filing the instrument.

9  
10   Section 106(1):

11           “Every instrument evidencing a disposition shall  
12           be executed by all persons shown by the register to  
13           be proprietors of the interest affected and by all  
14           other parties to the instrument ----”

15  
16   The combined effect of these provisions is that Helvester not being the  
17   registered owner, could pass no legal title by the bare execution by him of  
18   the deed of transfer. It follows, therefore, that the applicants may not  
19   invoke the provisions of section 38(1) of the RLL - they have proceeded  
20   without having first insisted that Helvester became the registered owner.

21  
22   The case sadly reverberates the words of Lord Watson in the Privy Council  
23   judgment given in Gibbs v Messer [1891] A.C. 28 at 258-259:

24  
25           “The (respondents) cannot bring themselves  
26           within the protection of the statute, because the  
27           mortgage which they put upon the register is a  
28           nullity. The result is unfortunate, but it is due to  
29           their having dealt, not with a registered proprietor,  
30           but with an agent and forger, whose name was not  
31           on the register, in reliance upon his honesty.”  
32

1 Competing equities

2 Could Helvester have nonetheless passed an equitable interest such as to  
3 entitle the applicants - who remain bona fide purchasers for value without  
4 notice - to priority and to be registered?

5

6 I was invited by agreement of the parties to approach this case on the basis  
7 of the following assumptions, the factual background earlier outlined not  
8 being disputed:

- 9 (i) that Bockius stole monies from F&C;
- 10 (ii) that those monies were used by LML to
- 11 purchase the property;
- 12 (iii) LML was controlled by Bockius;
- 13 (iv) Helvester was a party to Bockius fraudulent
- 14 designs and knew that the property had been
- 15 purchased using stolen money;
- 16 (v) Helvester paid no consideration to LML;
- 17 (vi) the Registrar had no notice of any of (i) -
- 18 (v) above and, of course, the unchallenged
- 19 evidence of the applicants that
- 20 (vii) the applicants had no notice of any of (i) -
- 21 (v) above.

22

23 The question arising from the foregoing assumptions is whether F&C and  
24 the applicants claim under competing equities.

25

26 F&C asserts its equity on the primary basis that its monies are traceable to  
27 the property. To that end F&C asserts an initial fiduciary relationship  
28 between itself and Bockius upon which it founds its claim as beneficial  
29 owner with an equitable proprietary interest in the property. As LML was  
30 Bockius' alter ego and deemed to have knowledge of that equitable

1 proprietary interest, LML in turn became constructive trustee of the  
2 property for F&C. In that manner F&C asserts a prior equitable interest to  
3 any which the applicants may have subsequently acquired.

4

5 There is settled authority that LML's legal title will be subordinated to  
6 F&C's equity as LML holds in trust for F&C in those circumstances - see:  
7 Ebanks v Clarke 1992-1993 CILR 33 and Assets Company Ltd v Mere  
8 Roihi [1905] A.C. 176.

9

10 F&C also, as a necessary prerequisite, avers its right in equity to trace as the  
11 property is readily identifiable as having been acquired with its money.

12

13 It is unchallenged in this case that the money is traceable and I proceed on  
14 the basis that it clearly is traceable to the property. In the circumstances  
15 F&C would, on settled authority, be entitled to trace: Lipkin Gorman v  
16 Karpnale Ltd [1992] 4 All E.R. 512 at 528 g.

17

18 The applicants claim, for their part, as bona fide purchasers on the basis also  
19 of settled authority, that although property can be traced into the hands of  
20 persons who took with notice of a pre-existing equity (in this case LML and  
21 Helvester) the right to trace cannot be exercised against a bona fide  
22 purchaser for value without notice of the equity: Re Diplock [1948] Ch 465  
23 at 539 and Taylor v Blakelock (1886) 32 Ch. D 560.

24

1 There is, however, equally clear and settled authority that the bona fide  
2 purchaser must have already attained not only an equitable interest but also  
3 the position of legal entitlement in order to defeat a pre-existing equitable  
4 entitlement. That, - regrettably so far as the applicants are concerned and  
5 decisively in my judgment - is not the position which the applicants have  
6 managed to secure and not a position which this court can properly seek to  
7 secure for them by way of rectification.

8

9 The principle is succinctly set out in The Law of Real Property 5th Edition:  
10 Megarry and Wade at 144:

11

12 “The purchaser (for value without notice) must  
13 have the legal estate properly vested in him (e.g.  
14 by a conveyance) before he will be safe. If he has  
15 paid the purchase-money, but then gets notice of a  
16 prior equitable interest before the purchase is  
17 completed *by the conveyance of the legal estate*,  
18 he will take subject to the equity.”

19

20 This is a long-standing principle and Wigg v Wigg (1739) 1 Atk 382 at  
21 384 is there in the textbook cited as authority.

22

23 The reason is that the bona fide purchaser who has not secured legal title  
24 will have acquired at best only an equitable interest and where the equities  
25 are equal, the first in time prevails. It is only acquisition of the legal estate  
26 for value and without notice which will reverse the natural order of priority.  
27 An illustration of this principle is Cave v Cave (1880) 15 Ch. D 639 - where  
28 land held upon trust was fraudulently mortgaged, first to legal and later to

1 equitable mortgagees, none of whom had notice of the trust. It was held  
2 that the legal mortgagee took priority over the beneficiaries of the trust, but  
3 that the equitable mortgagees did not.

4

5 Here the applicants' claim to the legal estate is by way only of the  
6 fraudulent and imperfect transfers and therefore their claims - being in  
7 equity - is subordinated to the prior equity of F&C: Wigg v Wigg and Cave  
8 v Cave (both supra).

9

10 The applicants do not and could not plead an estoppel against F&C which  
11 was first in time and which, therefore, had no notice of and was not a party  
12 to either of the fraudulent transfers: Sharpe v Foy (1868) 4 Ch. App. 35 and  
13 Halsburys Laws 4th Edition (reprint) para. 1024.

14

15 The situation here is that neither the applicants nor F&C has managed to  
16 acquire the legal estate and so priority as between them must be determined  
17 according to the principle "*qui prior est tempore potior est jure*", and so the  
18 first in time, F&C, must prevail.

19

20 This conclusion is to my mind unavoidable especially in light of the  
21 decisions of the Court of Appeal in Myles v Prospect Properties (supra), and  
22 of the Judicial Committee of the Privy Council in Assaf v Fuwa [1955] A.C.  
23 215. The latter was given on an appeal from Nigeria where the law of real  
24 property was then governed by common law and equitable principles in the

1 absence of a system of registration such as that now prevailing in the  
2 Cayman Islands.

3

4 The case was a dispute between two equitable claimants each having paid  
5 the owner purchase monies without first securing a legal conveyance and  
6 the second in time without notice of the first claimant's interests. The  
7 property had been earlier mortgaged and so legal title was not vested in the  
8 owner, but in a mortgagee. The question was to whom - of the two rival  
9 equitable claimants; the second in time having in the meantime entered into  
10 actual possession - was the mortgagee obliged to reconvey the legal estate  
11 [The law then prevailing in Nigeria vested the legal estate in the mortgagee  
12 and the owner/mortgagor having a mere equity of redemption - not as in  
13 England since 1925 or in Cayman under the RLL - mandating that legal title  
14 remains in the owner subject to a charge to the lender].

15

16 It was held that the first in time, having a prior equitable claim, should  
17 prevail as the second had acquired also only an equitable claim. This was  
18 notwithstanding that the owner, having redeemed the mortgage debt and so  
19 entitled to reconveyance of the legal estate, had also executed a deed of  
20 conveyance to the second: The owner had not secured the reconveyance or a  
21 redelivery of the title deed from the mortgagee, and so had not effectively  
22 passed legal title to the second claimant.

23

24 For the reason that the competing interests of the parties in the present case  
25 do not depend on legal title and must therefore be resolved outside the RLL,

1 the principles upon which the case of Assaf v Fuwa turned are, to my mind,  
2 a priori applicable. Section 164 of the RLL advises that approach:

3 “Any matter not provided for in this or any other  
4 law in relation to land, leases and charges  
5 registered under this Law, and interests therein,  
6 shall be decided in accordance with the principles  
7 of justice, equity and good conscience.”

8  
9 I should also for the sake of completeness disabuse any notion that a better  
10 right to call for a transfer of a legal estate is to be equiparated with the  
11 applicants’ actual possession of the property in this case. That notion is not  
12 one which the principles of equity would accept and was also rejected in  
13 Assaf v Fuwa (supra) at 229-230.

14

15 The foregoing analysis of the principles results in the rejection of the  
16 submission that the applicants had acquired a prior beneficial interest in the  
17 property by virtue of the payment to Helvester without having notice of the  
18 fraud and by virtue of the execution by Helvester of the deed of transfer to  
19 them.

20

21 Nemo dat quod non habet

22 This rule already touched upon and now to be discussed, is another and  
23 more immediate answer to the applicants’ case: Helvester having no interest  
24 he could pass none - neither equitable nor legal - to them.

25

1 As LML must be deemed constructive trustee of the property for F&C,  
2 LML could pass no equitable or legal title to Helvester, as the latter took  
3 with notice of F&C's interests and for no consideration.

4  
5 This basis of F&C's case is, of course, also fortified by the fact that the  
6 purported deed of transfer to Helvester is itself ex facie fraudulent as it  
7 shows consideration as having been paid when none was paid. For that  
8 reason it was also in breach of section 105(3) of the RLL which provides:

9

10 "Instruments shall contain a true statement of the  
11 amount or value of the purchaser price, loan or  
12 other consideration (if any), and an  
13 acknowledgement of the receipt of the  
14 consideration".

15

16 By virtue of the strict application of section 37(1), the first transfer is  
17 therefore for that reason also not a "properly executed instrument" and not  
18 one which is registrable as it does not comply with the RLL.

19

20 And equity will not permit a statute to be an instrument of fraud - Ebanks v  
21 Clarke (supra p.46 line 20) - as would be the result if the first transfer to  
22 Helvester were to be registered so as to vest legal title in him. That being a  
23 necessary prerequisite to title being registered in the names of the  
24 applicants, their claim is barred.

25

26 And so the outcome proves to my mind, inevitable, notwithstanding the  
27 niceties of the case. It is nonetheless one of those unfortunate cases which

1 still occur despite the protective measures which now exist within statutory  
2 schemes such as the RLL. It is, in the words of Vice Chancellor Bacon in  
3 Taylor v Blakelock (supra): “one of those painful cases in which, as  
4 between two innocent (parties), a loss having been sustained, the court is to  
5 decide upon whom that loss should fall.”

6  
7 And although the applicants may be less well placed to sustain the loss than  
8 F&C, that is not a consideration, as the principles show, which can  
9 influence the outcome. In the result, I am obliged to refuse the relief of  
10 rectification which they seek. It follows that the charge in favour of BNS,  
11 being but an interest contingent upon that of the applicants - (Myles v  
12 Prospect Properties (supra)) - may not be registered either.

13  
14 As the applicants have been unsuccessful and their application is to be  
15 regarded as hopelessly unregistrable there is no point to an order removing  
16 the inhibition which was, in the then known circumstances, erroneously  
17 entered in favour of F&C.

18  
19 I should not pass from this matter without taking further note of the leading  
20 Privy Council cases from New Zealand - (where a similar Torrens land title  
21 registration system prevails) - in which the indefeasibility of *registered title*  
22 in a bona fide purchaser has been affirmed and reaffirmed, in spite of fraud  
23 on the part of predecessors in title: Assets Company v Roihi (supra); Frazer  
24 v Walker [1967] 1 A.C. 569.

25

1 In those cases bona fide purchasers had managed to attain the safety of  
2 actual registration of title and actual registration was deemed to have  
3 severed the new entitlement in the innocent purchaser from the history of  
4 fraud. The distinction between those cases and this is therefore obvious.

5

6 In this case, although on the then known facts entry in the application book  
7 should have been afforded, that could not have been equiparated with  
8 registration, which had to be refused once the instrument presented proved  
9 to be, before registration, unfit for registration.

10

11 This view as a matter of principle very forcibly commends itself: The  
12 strictness of the rules of indefeasibility of title must surely equally demand  
13 the strict application of the rules by which that position of indefeasibility  
14 can be attained.

15

16 This case more closely resembles that other leading Privy Council case  
17 Gibbs v Messer (supra) where a mortgage of innocent mortgagees, though  
18 registered, was ultimately defeated. They had purported to deal with a  
19 registered proprietor who did not exist, a fictional person created by a  
20 fraudster - the solicitor who had the owner's power of attorney and who got  
21 the fictional name entered on the register for the purpose of obtaining the  
22 mortgage. The true owner, Mrs. Messer, knew nothing of this until she was  
23 called upon to redeem the mortgage. She successfully challenged the  
24 registration of the mortgage - ultimately because the court regarded the

1 mortgagor as a “myth”, having no existence, who could neither execute a  
2 transfer nor a mortgage.

3

4 The case was one from Australia and was dealt with under the Victorian  
5 Transfer of Land Statute which was a precursor to the modern Torrens  
6 System which now prevails but which had, nonetheless, equally afforded  
7 the assurance of indefeasibility of title registered under it to bona fide  
8 purchasers or mortgagees for value without notice. The reasoning appears  
9 in the opinion of the Board delivered by Lord Watson (at p.255):

10

11 “The protection which the statute gives to persons  
12 transacting on the faith of the register is, by its  
13 terms, limited to those who actually deal with and  
14 derive right from a proprietor whose name is upon  
15 the register. Those who deal, not with the  
16 registered proprietor but with a forger who uses  
17 his name, do not transact on the faith of the  
18 register, and they cannot by registration of a  
19 forged deed acquire a valid title in their own  
20 person, although the fact of their being registered  
21 will enable them to pass a valid right to third  
22 parties who purchase from them in good faith and  
23 for onerous consideration.”

24

25 Although the case has been described sometimes narrowly as a “forgery”  
26 case and as a “nullity” case - (see for example “The Torrens System in  
27 Australia” by Douglas J Whalan; chp. 23 The Law Book Company, Sydney)  
28 - it is clear the Board was there reflecting on the *fictional nature of the title*  
29 shown on the register and found to be so notwithstanding that the

1 mortgagees who took under it were innocent. As neither the mortgagor nor  
2 the title existed, nor could the title of the mortgagees.

3

4 In this case Helvester's title is no less a fiction - being a mere chimera of  
5 F&C's title - than was the title a figment of the fraudster's wrong-doing in  
6 Messer's case. Moreover, because in this case Helvester's "title" was never  
7 registered, the position of those taking under him must be even less tenable  
8 than that of the mortgagee in Messer's case, whose title had actually been  
9 registered. Having taken directly from the fraudster the mortgagee attained  
10 no proper title and so the register could be rectified.

11

12 Costs

13 The remaining issue is as to costs, and in that regard I make no order. The  
14 reason is that although the applicants have been unsuccessful and costs  
15 would normally follow the event, neither the registrar nor F&C - which has  
16 intervened with the agreement of the applicants - can complain.

17

18 As has been shown by the facts of the case, the registrar's actions required  
19 clarification and F&C's position could not have been recognised without  
20 first the applicants' being resolved.

21

22 Having so concluded, I cannot however, grant F&C the final relief which  
23 they must secure against LML as the registered proprietor. That is the  
24 subject of Cause 115 of 1996 which has not been, for practical reasons,  
25 consolidated with this action. In the context of that other action F&C will

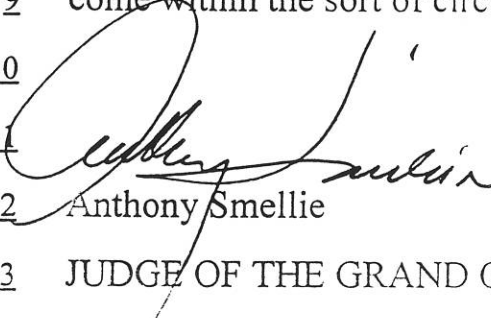
1 need to establish, even if only formally, strict proof of the derivation of its  
2 title.

3

4 This matter has proceeded on the basis that the outcome might well serve to  
5 shorten all proceedings by the determination of the parties' relative  
6 positions on the agreed facts. Notwithstanding the general advice of the  
7 House of Lords against proceeding in such a manner - given in Tilling and  
8 Another v Whiteman [1979] 1 All E.R. 737 -this case appeared to me to  
9 come within the sort of circumstances there also recognised as justification.

10

11

12  Anthony Smellie

13 JUDGE OF THE GRAND COURT

14

15 Dated this 3rd day of February 1998