

IN THE CAYMAN ISLANDS COURT OF APPEAL
HOLDEN AT GEORGE TOWN, GRAND CAYMAN
CIVIL APPEAL NO. 16 OF 1991

BEFORE: THE HONOURABLE MR. JUSTICE ZACCA, PRESIDENT
THE HONOURABLE MR. JUSTICE HENRY, J.A.
THE HONOURABLE MR. JUSTICE KERR, J.A. (Ag.)

BETWEEN: EDEN KENSINGTON COOK BODDEN Plaintiff/Appellant

A N D: MOSES I. KIRKCONNELL Defendants/Respondents
A N D MABRY KIRKCONNELL

Mr. Enos Grant for Appellant

Mr. Pierre LaMontagne Q.C. and Mr. Charles Adams for Respondents

April 7, June 25, 1992

ZACCA, P. :

By Originating Summons the appellant sought rectification of the land Register under S. 140(1) of the Registered Land Law on the ground of mistake.

The mistake was alleged to have arisen during the course of the process under the Land Adjudication Law, 1971 and reflected in a first registration.

It was agreed that the question of whether the Court had power to order rectification of the register in such circumstances should be determined as a preliminary issue.

The learned trial Judge held that the Court had no power to order rectification of the register in the circumstances of this case and the action was dismissed. From this Order the appellant who was Plaintiff in the action now appeals.

On 24th February 1976, land known as Little Cayman West Block 82A, Parcel 7 was entered as a first registration in the name of the personal representatives of the estate of Alvernie Kirkconnell. It now stands registered under

the names of the Respondents, Moses and Mabry Kirkconnell.

The appellant was substituted as personal representative of the estate of William Eden on 22nd November, 1979. He replaced Charles A. Eden who had died in 1925 without completing the administration of the estate.

This action was commenced by Originating Summons in 1986. An Order was made on a Summons for Direction on 3rd September, 1991 setting down the action for trial on 21st October, 1991. This action was therefore commenced some ten years after the first registration.

In 1971, the Land Adjudication Law together with Companion Legislation, the Registered Land Law were passed. The purpose and intent of the Legislation was to place all land in the Cayman Islands which had been adjudicated upon a Land Register.

It will be necessary to look at some of the provisions of the Land Adjudication Law which led to land being placed in the Register.

Section 14 states :

" The Records Officer shall consider all claims to any interest in land and after such investigation as he 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 16(1) states :

" In preparing the adjudication record -

(a) if the Records Officer is satisfied that a person -

(i) is in open and peaceful possession of a parcel and has been in such possession by himself or by his predecessors in title for an uninterrupted period of twelve years or more ;
or

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

possession or title against
any other person claiming
the land or any part thereof,

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

Part V of the Land deals with objections and the
finality of the adjudication record.

Section 20 states :

" Any person (including the Administrator)
who is aggrieved by any entry in or omission
from any completed adjudication record may,
at any time during the period declared under
section 19, petition the Tribunal in respect
of such entry or omission and the petition
shall be heard by the Tribunal and determined
or re-determined in accordance with the pro-
visions of section 4(1). "

Section 22 provides :

" After the expiration of the period declared
under section 19, or when all petitions presented
to the Tribunal under section 20 have been
determined, whichever is the later, the
Adjudicator shall sign and date a certificate
to the effect that the adjudication record is
final, and forthwith give notice of such
certificate and of the place and times at
which the final adjudication record or an
official copy thereof can be inspected and
deliver to the Registrar for compilation of
the register in accordance with the provisions
of the Registered Land Law, 1971, the
adjudication record, demarcation map and all
other documents received by him in the pro-
cess of adjudication. "

Section 23(1), (2) and (3) gives the right of appeal to any
person who is aggrieved by any act or decision of the
adjudicator.

Section 23 states:

"(1) Any person (including the Administrator)
who is aggrieved by any act or decision of
the Adjudicator and desires to question it
or any part of it on the ground that it is
erroneous in point of law or on the ground
of failure to comply with any procedural
requirement of this Law, may appeal to the
Court within thirty days from the date of
the certificate of the Adjudicator given
under section 22 or within such extended
time as the Court may, on good cause being
shown, allow.

(2) On such appeal the Court may, if
satisfied that the decision is erroneous
in point of law or that the interests of
the appellant have been substantially

"prejudiced by failure to comply with the procedural requirements of this Law, make such order or substitute for the decision of the Adjudicator such decision as it may consider just and may order in such manner as it may think fit rectification of the register kept under the Registered Land Law, 1971.

(3) Any person (including the Administrator) who is aggrieved by an order or decision of the Court may appeal to the Court of Appeal in accordance with the provisions of the Judicature (Administration of Justice) Law governing appeals in civil proceedings (but restricted to the matters stated in subsection (1)) and the Court of Appeal may upon such appeal either affirm, reverse or amend the order or decision of the Court and may order in such manner as the Court of Appeal may think fit rectification of the register kept under the Registered Land Law, 1971, and may also make such orders as to costs in the Court, and as to costs of the Appeal as the Court of Appeal thinks proper. "

The Land Adjudication Law therefore provides several stages for challenging the Adjudication Record :

1. The Tribunal could be petitioned by any person aggrieved by an entry in or omission from any completed adjudication record ;
2. An appeal to the Grand Court after the Adjudication Record becomes final ;
3. A further appeal to the Court of Appeal.

It is to be observed that under the Land Adjudication Law both the Grand Court and the Court of Appeal are given the power to order rectification of the Register.

No appeal having been brought against the decision of the Adjudicators as provided for in the Land Adjudication Law, can the Grand Court now order rectification of the Register with respect to the first registration in 1976 ?

Mr. Grant for the appellant, submitted that the learned trial Judge was in error in holding that the Court

could not in the circumstances of this case order rectification of the register. He argued that there must be circumstances under which the Court could order rectification of a first registration. It was submitted that the right to seek rectification of the Land Register under s. 140(1) of the Registered Land Law was an optional remedy which was open to the appellant. If therefore the Adjudicator made a mistake in coming to his conclusions, the Grand Court could invoke s. 140 to correct the mistake.

The Registered Land Law provides for the opening of a Land Register and the manner in which the register was to be compiled.

Section 9(1) states :

" The Land Register shall comprise a register in respect of every parcel which has been adjudicated in accordance with the Land Adjudication Law, 1971 and a register in respect of each lease required by this Law to be registered. "

Section 10 provides :

" Whenever an adjudication record has become final under section 22 of the Land Adjudication Law, 1971 and the Adjudicator 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 on the adjudication record which requires registration. "

Section 11 states :

"(1) The first registration of any parcel shall be effected by the preparation of a register in accordance with the provisions of section 9 and the signing by the Registrar of the particulars of the ownership and the particulars of incumbrances, if any, appearing thereon. "

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

Section 140(1) of the Registered Land Law reads as follows :

" Subject to any provisions of the Land Adjudication Law, 1971 and 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. "

In coming to his decision Harre, J. accepted the decision of Summerfield, C.J. as expressed in Ebanks v.

Powery [Cause No. 571/1978].

In that case, Summerfield, C.J. states :

" Although section 140(1) permits rectification of a first registration, I am of the opinion that this does not permit the re-opening of the adjudication process itself. There must be some fraud or mistake subsequent to the adjudication to permit these provisions to be invoked. For example, the adjudication may have been incorrectly reflected in the final adjudication record submitted for entry in the Land Register by reason of mistake or fraud; the result of an appeal may have been incorrectly reflected in the final adjudication record; the officials in the Land Registry may have made incorrect entries from the final adjudication record or other source because of some fraud or mistake.

The only way to have challenged the adjudication record before it became final, or any other decision in the course of the adjudication process, was pursuant to sections 15, 20 and 23 of the Land Adjudication Law, i.e. by reference of the dispute to the Tribunal, petition and appeal to this court and thereafter to the Court of Appeal.

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"Those provisions gave a claimant every facility for the redress of any legitimate grievance in the course of the adjudication process. He cannot stand by, fail to avail himself of these ample facilities and then seek to re-open the adjudication years after the event by summons under section 140(1). If it were otherwise there would be no finality about the judicial process. No land owner would know where he stands. The certainty sought by the Registered Land Law would be undermined. "

In the case of Wood v. Wood et al [Cause No. 411 of 1980] Summerfield, C.J. adopted the view he expressed in Ebanks and Powery and went on to state :

" Once the Adjudication Record becomes final under section 22 of the Land Adjudication Law (read with section 21) it extinguishes all legal estates and registrable rights and interests in land not reflected in the adjudication record. Any person claiming a legal estate or registrable right or interest not reflected in the adjudication record had his remedy under sections 15, 20 or 23 of that Law. This Court cannot allow any other process to debase the finality of the final adjudication record by way of alteration or the setting up to additional registrable estates or rights or interests in land. The plaintiff had his remedies under those sections. "

Summerfield, C.J., however, went on to say :

" If I have taken too rigid a view over the finality of the final adjudication record and it is the case that a person can invoke section 140(1) of the Registered Land Law to have the Register rectified by reason of fraud or mistake in the process leading up to the final adjudication, e.g. by a fraudulent representation to a tribunal, then I should examine the consequences of such an interpretation. "

In any event, he found that neither fraud nor mistake had been established.

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The case of Wood v. Wood [1980-83] C.I.L.R. 281 was considered by the Court of Appeal. However, the Court of Appeal did not consider it necessary to express a view as to the correctness of whether the Court had the power to order rectification of the Register under s. 140(1).

In his judgment Carberry, J.A. said at page 293 :

" In the event, the learned Chief Justice found for the respondents, the two sisters, on two bases: (a) that on his construction of the relationship between the provisions of the Land Adjudication Law, 1971, and the Registered Land Law (Revised), it was not open to a person who had failed to use, or exhaust the provisions in the Land Adjudication Law with respect to the prosecuting of disputed claims to land being adjudicated on, to come forward and invoke the provisions of s. 140 of the Registered Land Law (Revised) and invite the courts once more to review his claims. He had had the chance to seek the court's intervention under s. 23 of the Land Adjudication Law, and it seemed anomalous that he should have a second chance to do so under the Registered Land Law (Revised). The Chief Justice regarded the finality of the land adjudication process under s. 22 of that Law as extinguishing "all [other] legal estates and registrable rights and interests in land not reflected in the adjudication record. "

There is much to be said in favour of this point of view, both as a matter of common sense and of law; we are not, however, presently prepared to endorse it and wish to leave the matter open for argument in some future case. (The argument in the present case turned largely on the Limitation of Actions Law).

We have observed that there is absent from the Land Registration Law the equivalent of s.70 of the Jamaican Registration of Titles Law, which can be described as the very kernel of all Torrens systems of land registration. It specifically provides for the extinguishment of all prior rights, save in the case of fraud (or double or overlapping registrations). Section 23 of the Cayman Registered Land Law (Revised) falls short of achieving this and it is to be observed that s. 140(1), as noted earlier, specifically provides for the

"court to rectify "any registration, including a first registration" where the same has been "obtained, made or omitted by fraud or mistake".

In the case of Juneau v. Gynell [1984] C.I.L.R. 1, the Court considered the question of rectification under s. 140(1).

In his judgment, Summerfield, C.J. at page 7, said :

" In my view, ignorance of the law cannot be a foundation for mistake under s. 140(1) of the Registered Land Law. It must be a mistake based on fact. I cannot see how a court can allow the re-opening of the adjudication proceedings - because that is what this amounts to - by a different route merely because someone was ignorant of the process under the Land Adjudication Law. That could lead to endless cases being re-opened and defeat one of the main purposes of that Law - to ensure quiet titles.

I have already expressed certain views on this matter in Ebanks v. Powery (4) and Wood v. Wood (5) and I need not repeat them here. It was unnecessary for the Court of Appeal to deal with the point on the appeal from the latter case but the point could arise in this case if it goes to appeal. However, while not resiling from those views until the Court of Appeal pronounces otherwise, this case can be approached from basic principles on the assumption that my view is incorrect and determined thereon. "

In Wilson v. Bodden [Cause 195 of 1980] in considering the scheme of the Land Adjudication Law, Collett, C.J. said :

" On behalf of the Defendants it was submitted that this could not be the case because the scheme of the Land Adjudication Law was to declare only existing rights for purposes of registration rather than to create any new rights. I agree that this was the intention of the Legislature as is apparent from the wording of the statute but it is equally clear that this intention was imperfectly carried out. Adjudication in the manner it laid down is a process of quieting of titles. It is an inescapable feature

"of such a process that, unless corrected in the course of the in-built appellate provisions, a mistake on the part of those responsible for a particular adjudication is one apt to become final, binding and conclusive in law despite the absence of any adequate basis for the decision in question in the first place.

This Court is not entitled to go behind such a final adjudication or the first registration of any parcel which features on the Register under the 1971 legislation but I am not on that account obliged to assume that the legal rights accepted in the adjudication process must necessarily have had their origin in the documents which were submitted during that process. Nor will the Court do so where there is no indication that those rights have their actual origin in any of those documents which have been put in evidence before it.

I find that if those responsible for the adjudication of the land which subsequently became registered as parcels 88 and 42 respectively had had before them the evidence which is presently before this Court, their proper course would have been to record the 20 foot strip at the northern extremity of which is now parcel 88 as part of parcel 42 and to have included no reference to any vehicular right of way. They did not do so. We are bound by what they did do. "

In the case of Skelton v. Skelton [1986] 37 W.I.R. 177 the Court of Appeal of the Eastern Caribbean States considered the question of whether the High Court of the British Virgin Islands had the power to rectify the Land Register. The scheme of bringing all lands in the British Virgin Islands upon a Land Register is set out in the Judgment of Robotham, C.J. at page 177 where he stated :

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" During 1970, certain land reform measures were introduced in the British Virgin Islands. One such Act was "An Ordinance to provide for the adjudication of rights and interests in land and for purposes connected therewith and incidental thereto". That Act was the Land Adjudication Ordinance 1970. The whole purpose and intent of this was to place all land in the British Virgin Islands which had been adjudicated upon a Land Register, for which purpose companion legislation in the form of the Registered Land Ordinance 1970 was also passed. There was an important amendment in 1971 to the Land Adjudication Ordinance 1970, and this is to be found in Law No. 13 of 1971.

This appeal turns solely on whether or not a High Court judge sitting in her original jurisdiction has the right to alter or amend a final decision of the adjudication officer, by invoking the provisions of section 140 of the Registered Land Ordinance (there having been no appeal), after a lapse of nine years from the date of the decision of the adjudication officer. Section 140(1) reads as follows :

"Subject to the provisions of subsection (2) of this section, 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. "

It will be observed that unlike the Cayman Legislation, s. 140(1) of the Registered Land Ordinance 1970 is not made subject to the Land Adjudication Ordinance 1970.

In referring to the sections dealing with the making of objections and the finality of the adjudication record, Robotham, C.J. said at page 180 :

" Under section 21, the adjudication officer may correct any error or omission in the record at any time before it becomes final after giving interested parties notice and opportunity to be heard. Section 22 reads :

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'After the expiry of ninety days from the date of publication of the notice of completion of the adjudication record or on determination of all petitions presented in accordance with section 20, whichever shall be the later, the adjudication record shall, subject to the provisions of the Registered Land Ordinance 1970 become final and the adjudication officer shall sign a certificate to the effect and shall deliver the adjudication record and the demarcation map to the registrar together with all documents received by him in the process of adjudication. '

This section is designed to bring to a finality the adjudication process and firmly bring the land under the provisions of the Registered Land Ordinance 1970, section 9(1) of which reads :

'The Land Register shall comprise a register in respect of every parcel which has been adjudicated in accordance with the Land Adjudication Ordinance 1970'

Although section 22 speaks of the finality of the adjudication record, a further right of appeal is given under section 23 which reads :

'(1) Any person including the administrator who is aggrieved by any act or decision or omission of the adjudication officer and desires to question it or any part of it on the ground that it is erroneous in point of law or on the ground of failure to comply with any procedural requirement of this Ordinance may within ninety days from the date of the certificate of the adjudication officer under section 22 or within such extended time as the Court of Appeal, in the interests of justice, may allow, appeal to that court in the form prescribed in the Court of Appeal, Rules for civil appeals from the High Court.

(2) On an appeal the Court of Appeal may, if it is satisfied that the act, decision or omission is erroneous in point of law or that the interests of the appellants have been substantially prejudiced by failure to comply with the procedural requirements of this Ordinance make such order or substitute for the act decision or

'omission of the adjudication officer such decision as it may consider just and may under section 140 of the Registered Land Ordinance 1970 order rectification of the register, and the order or decision of the Court of Appeal shall be final and conclusive and shall not be questioned in any proceedings whatsoever.'

It is again to be observed that unlike the Cayman legislation, the British Virgin Islands Land Adjudication Ordinance in section 23(2) states : "and the Order or decision of the Court of Appeal shall be final and conclusive and shall not be questioned in any proceedings whatsoever."

In his conclusions the learned Chief Justice at page 181 states :

" I would agree that, if the expression of the final decision of the adjudication officer was incorrectly recorded on the Land Register, section 140 could be resorted to. I cannot, however, accept that it can be applied in the original jurisdiction of the High Court to alter in a material particular his individual findings of fact, based upon his own inquiry, simply because the judge sitting in an original jurisdiction is of the opinion that his findings were erroneous. That is not the type of mistake contemplated by section 140. No doubt counsel had in mind the pronouncement sometimes in judicial quarters that it does not matter through which door a litigant enters the judicial forum. The qualification to this, however, is that he must do so in pursuit of a legitimate claim.

I am of the view that the respondent not having exercised his right to petition the adjudication officer, and not having exercised his right of appeal to the Court of Appeal, nor sought an extension of time within which to appeal, and lastly (but by no means least) not having done anything for a period of nine years cannot now impeach the finding of the adjudication officer by an ingenious action for rectification in the High Court. What the trial judge did in this case was a function which was open only to the Court of Appeal, had the respondent sought relief therein in accordance with the established statutory rights. "

It appears that this case was decided on the provisions in section 23(2) of the Land Adjudication Ordinance to the effect that there was a right of appeal to the Court of Appeal and that the Order of that Court was final and

conclusive.

This restriction is not to be found in the Cayman Law and this case whilst of some assistance cannot of itself determine the question this Court is asked to answer.

However, after the decision in the instant case, another decision was handed down by Schofield, J. in the case of Ebanks v. Madie Mae Clarke [Clause No. 233 of 1990]. This case specifically dealt with the question of rectification under s. 140(1) and the arguments were similar to the arguments in the instant case, to the effect that there was no power in the Court to grant rectification on a first registration obtained pursuant to the adjudication process. Schofield, J. found that the registered Title had been obtained fraudently and granted rectification under the provisions of s. 140(1) of the Registered Land Law.

In his judgment, Schofield, J. having considered the cases of Ebanks v. Powery, Wood v. Wood, Wilson v. Bodden stated :

" However, those decisions cannot be said to put the seal on the matter because they did not involve an application for rectification of the land register. The action involved a dispute over a right of way and the learned Chief Justice was considering his powers to look behind the register as it stood. Nevertheless the passage cited shows a consistency of approach with the earlier cases.

Harre J. reviewed all of these decisions in the most recent application for rectification to come before this Court. The application was made on the grounds of mistake. The plaintiff in that case sued as the personal representative of the estate of William Eden and was not in such a position when the adjudication process was carried out. Harre J. said :

' Now a feature of Ebanks v. Powery and Wood v. Wood was that in each case there was an element of neglect to use the Land Adjudication Law, 1971.

' No such criticism can be laid personally against the plaintiff in this case. He had no locus standi in the matter at the relevant time'".

He went on :

' Is the absence of any claim on behalf of an estate by reason of the fact that the estate had remained unrepresented and unadministered since 1925 a situation which leads to the same conclusion as that arrived at by Summerfield, CJ. in Ebanks v. Powery and Wood v. Wood ? In my view the answer to that is "yes". I can find no sufficient ground for distinguishing the present case. An element of neglect over many years existed. The matter was left open for argument by the Court of Appeal but I do not take that as an invitation to this Court to ignore what was said by the learned Chief Justice, any more than would be the case if the matter had not been before the Court of Appeal at all.'

I take that passage as saying no more than on the facts of the case before him the learned Judge would follow the views of Summerfield, C.J. "

However, in his Judgment, Harre, J. in the instant case stated :

" I was at one stage of this judgment inclining to the view that had I been approaching this matter de novo I might have come to a conclusion different to his. One of the factors which drew me back to the opposite conclusion was section 141 of the Registered Land Law. A mistake or omission in a first registration which cannot be rectified does not give rise to an entitlement to indemnity under the section, whereas other such mistakes or omissions do. What can those mistakes or omissions in a first registration be which not only cannot be rectified but which give no entitlement to indemnity? They must, in my view, be those which arose out of the adjudication process. There are undoubtedly some first registrations which can be rectified. Section 140(1) says so and examples are given in the

"judgment in Ebanks and Powery of frauds or mistakes subsequent to the adjudication which could ground a claim to rectification. Consequently the right to indemnity in respect of these arises under s. 141(1)(a). This distinction, in my view, lends support to the proposition that the adjudication process was intended to be and is, veiled in all respects from scrutiny under the powers of rectification contained in S. 140 of the Registered Land Law. That is the view to which I have come. "

In granting rectification, Schofield, J. did not seem to be disagreeing totally with the reasoning of Summerfield, C.J. because he said :

" But the facts of all the cases I have reviewed are very different from the facts of this case. It appears that this is the first time the Grand Court has been asked to rectify the land register on grounds of out-and-out fraud. I am, with respect to Summerfield, C.J. unable to agree that in the face of blatant fraud the provisions of section 140 of the Registered Land Law together with the provisions of the Land Adjudication Law can be read so as to preclude rectification. Certainly the provisions of section 140 are declared to be "Subject to any provisions of the Land Adjudication Law, 1971". Respect must be given to that Law and the procedures laid down by it. It would not be right for issues which had been determined by the adjudicator, which had gone through the review and appeal process provided for under the Law of 1971 and had been there determined upon, to be re-opened by means of an application for rectification of the register. There must be an element of finality about the adjudication and registration process. But the Court should never, in its desire to bring certainty and finality into a process, permit fraud to prevail. A fraud on the adjudication process itself must always be open to review. In a desire to sanctify the land register we must be careful not to sanctify the results of fraudulent or dishonest actions. "

He, however, found in the alternative that the defendant held the land in trust for the Plaintiff.

" If I am wrong in that then I still consider that the plaintiff is entitled to his alternative remedy which is a declaration that the defendant holds this land in trust for the plaintiff. "

Schofield, J. observed that the case under review was one of blatant fraud. One can understand his concern at the injustice which can be caused by denying rectification in such circumstances. The Law, however, makes no distinction between fraud and mistake.

In the present case there is no evidence to suggest that if there were persons holding an interest in the land other than the Respondents, they were not aware of the adjudication process leading to the first registration of the land known as Little Cayman West Block 82A, Parcel 7.

The law gave every such person ample opportunity to challenge the adjudication process.

The words "subject to the Land Adjudication Law" in s. 140(1) of the Registered Land Law must be given some meaning. This must mean that the power of rectification under s. 140(1) is to be subject to the finality of the adjudication process under the Land Adjudication Law.

The intention of the Legislature is reflected in the stated memorandum of objects and reasons which states in part :

" This Law is designed to pave the way for the establishment of a modern system of land registration, whereby titles to all land in the Islands will become certain and guaranteed by the Government, and transfers and other dealings in land can be accomplished simply and expeditiously. "

" One effect of this Law will be to put an end to any existing uncertainty over land ownership. "

Section 141(1)(b) of the Registered Land Law provides for a right of Indemnity by the Government of the Cayman Islands to any person suffering damage by reason of any mistake or omission in the Register which cannot be rectified, other than a mistake or omission in a first registration.

This section would seem to indicate the finality of the Adjudication process in respect of a first registration where a mistake or omission has occurred and where the Register cannot be rectified.

In my view rectification of the Register under s. 140(1) of the Registered Land Law of a first registration on the ground of fraud or mistake is only available if the alleged fraud or mistake occurred subsequent to the adjudication process under the Land Adjudication Law.

The mistake alleged in the instant case occurred during the adjudication process and therefore the appellant is not entitled to rectification under section 140(1).

I would hold that the learned trial Judge was correct in his decision that the Respondents succeeded on the preliminary point of law and that the summons should be dismissed.

The appeal will therefore be dismissed with costs to the Respondents to be agreed or taxed.

JUDGMENT

HENRY J.A.

On February 24, 1976, following adjudication in accordance with the Land Adjudication Law, 1971, land known as Little Cayman West Block 82A, parcel 7, was entered in the Land Register pursuant to the Registered Land Law as a first registration in the name of the personal representatives of the estate of Alvernie Kirkconnell. On April 24, 1978 the land was registered and now stands in the name of the Respondents.

On November 22, 1979 the Appellant was substituted as personal representative of the estate of William Eden, Senior in place of Charles A. Eden. In that capacity on December 29, 1986 the Appellant filed an originating summons seeking "an order for rectification of the Land Register for property situate at Registration Section Little Cayman West Block 82A, parcel 7 by cancellation of the present registration and registration of the [Appellant] as administrator of the estate of William Eden as proprietor".

When the matter came up for trial the Grand Court at the request of the parties agreed to determine as a preliminary issue the question of "whether the Court has the power to order the rectification of the Land Register when such rectification is sought under the provisions of section 140(1) of the Registered Land Law on the ground of mistake alleged to have arisen during the course of the process under the Land Adjudication Law, 1971

and to be reflected in the first registration in the Land Register". The Grand Court answered this preliminary question in the negative and ordered that the Appellant's application by originating summons be dismissed with costs to be taxed or agreed. This is an appeal against that order.

The appeal turns on the interpretation of section 140 of the Registered Land Law and its relationship with the Land Adjudication Law. Section 140 of the Registered Land Law provides as follows:

"140 (1) Subject to any provisions of the Land Adjudication Law, 1971 and 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 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."

In relation to the section the learned trial judge adopted the views of Summerfield C.J. expressed as follows in Ebanks v. Powery (cause 571/1978) and Wood v. Wood et al. (cause 411/1980) respectively:

"Although section 140(1) permits rectification of a first registration I am of the opinion that this does not permit the re-opening of the adjudication process itself. There must be some fraud or mistake subsequent to the adjudication to permit these provisions to be invoked. For example, the adjudication may have been incorrectly reflected in the final adjudication record submitted for entry in the Land Register by reason of mistake or fraud; the result of an appeal may have been incorrectly reflected in the final adjudication record; the officials in the Land Registry may have made incorrect entries from the final adjudication record or other source because of some fraud or mistake.

The only way to have challenged the adjudication record before it became final, or any other decision in the course of the adjudication process, was pursuant to sections 15, 20 and 23 of the Land Adjudication Law, i.e. by reference of the dispute to the Tribunal, petition and appeal to this court, and thereafter to the Court of Appeal. Those provisions gave a claimant every facility for the redress of any legitimate grievance in the course of the adjudication process. He cannot stand by, fail to avail himself of these ample facilities

and then seek to reopen the adjudication years after the event by summons under section 140(1). If it were otherwise there would be no finality about the adjudication process. No land owner would know where he stood. The certainty sought by the Registered Land Law would be undermined."

"Once the adjudication record becomes final under section 22 of the Land Adjudication Law (read with section 21) it extinguishes all legal estates and registrable rights and interests in land not reflected in the adjudication record. Any person claiming a legal estate or registrable right or interest not reflected in the adjudication record had his remedy under section 15, 20 or 23 of that Law. This court cannot allow any other process to debase the finality of the adjudication record by way of alteration or the setting up of additional registrable estates or rights or interests in land."

He referred also to the following dictum of Collett C.J. in Wilson v. Bodden et al. (cause 195/1983) which was approved by this court on appeal:

"On behalf of the defendants it was submitted that this - that is to say the proposition that the right of way in dispute had its origin in the adjudication process itself - could not be the case because the scheme of the Land Adjudication Law was to declare only existing rights for purpose of registration rather than to create any new rights. I agree that this was the intention of the Legislature as is apparent from the wording of the statute but it is equally clear that this intention was imperfectly carried out. Adjudication in the manner it is laid down is a process of quieting of titles. It is an inescapable feature of such a process that, unless corrected in the course of the inbuilt appellate provisions, a mistake on the part of those responsible for a particular adjudication is one apt to become final, binding and conclusive in law despite the absence of any adequate basis for the decision in question in the first place.

This court is not entitled to go behind such a final adjudication or the first registration of any parcel which features on the Register under the 1971 legislation but I am not on that account obliged to assume that the legal rights accepted in the adjudication process must necessarily have had their origin in the documents which were submitted during that process. Nor will the court do so where there is no indication that those rights have their actual origin in any of those documents which have been put in evidence before it."

Counsel for the Appellant submitted that these dicta reflect a restricted interpretation of the section, the effect of which was to permit the Law to be used as an instrument of fraud in certain cases. Such an interpretation, he submitted, ought not

in principle to be adopted. In support of his submission counsel cited the judgment of Schofield J. in Ebanks v. Clarke (cause 323/1990) in which, after reviewing the authorities referred to above, he said:

"But the facts of all the cases I have reviewed are very different from the facts of this case. It appears that this is the first time the Grand Court has been asked to rectify the land register on grounds of out-and-out fraud. I am, with respect to Summerfield C.J. unable to agree that in the face of blatant fraud the provisions of section 140 of the Registered Land Law together with the provisions of the Land Adjudication Law can be read so as to preclude rectification. Certainly the provisions of section 140 are declared to be "Subject to any provisions of the Land Adjudication Law, 1971". Respect must be given to that Law and the procedures laid down by it. It would not be right for issues which had been determined by the Adjudicator, which had gone through the review and appeal process provided for under the Law of 1971 and had been determined upon, to be reopened by means of an application for rectification of the register. There must be an element of finality about the adjudication and registration process. But the court should never, in its desire to bring certainty and finality into a process, permit fraud to prevail. A fraud on the adjudication process itself must always be open to review. In a desire to sanctify the land register we must be careful not to sanctify the results of fraudulent or dishonest actions."

While there is much to be said in principle for this approach, I cannot, with respect, see that it can be adopted in the face of what seem to me to be the clear provisions of section 140. In any event, as the learned judge himself observed later in his judgment, in cases of fraud an alternative remedy in equity is available by way of a declaration that the party who obtained the property by fraud holds it in trust for the victim of that fraud.

It is interesting to observe that in the British Virgin Islands, where similar legislation has been enacted, section 21 of the Land Adjudication Ordinance, 1970 (which corresponds to section 22 of the Cayman Islands Lands Adjudication Law, 1971) provides that "the adjudication record shall, subject to the provisions of the Registered Land Ordinance, 1970, become final".

Section 140(1) of the British Virgin Islands' Registered Land Ordinance, unlike the Cayman Islands' Law, is not expressed to be "Subject to any provisions of the Land Adjudication Law". On the face of it the provisions of section 21 of the British Virgin Islands Ordinance would seem to suggest that the "finality" of the adjudication record would be subject to rectification pursuant to the Registered Land Ordinance. Nevertheless the Court of Appeal of the Eastern Caribbean States in Skelton et al v. Skelton (1986) 37 W.I.R. 177 held that while section 140 could be resorted to if the final decision of the adjudication officer was incorrectly recorded in the Land Register it could not be applied in the original jurisdiction of the High Court to alter his individual findings of fact, based upon his own inquiry, simply because the judge sitting in an original jurisdiction was of the opinion that the findings were erroneous. That function, the court found, was open only to the Court of Appeal on an appeal pursuant to the provisions of the Land Adjudication Ordinance.

By contrast in the Cayman Islands, not only is the adjudication record not made final "subject to the provisions of the Registered Land Law", but it is section 140 of that Law which is expressed to be "Subject to any provisions of the Land Adjudication Law, 1971". It seems to me that the clear intention of the legislature must be that the power of rectification conferred by section 140 is to be subject to the finality of the adjudication process under the Land Adjudication Law, 1971. That intention is understandable in view of the elaborate provisions in the Law for a quasi judicial investigation designed, as the memorandum of objects and reasons states, "to pave the way for the establishment of a modern system of land registration whereby titles to all land in the Islands will become certain and guaranteed by the government" and "to put an end to any existing uncertainty over land ownership".

Section 3 of the Law provides for its application to an area of land specified in a declaration by the [Administrator] in Council published by Government Notice for three successive weeks. Part II of the Law provides for the establishment of

a Land Adjudication Tribunal for any area so specified, consisting of an Adjudicator and two Assessors having local knowledge of the adjudication area. Part III provides for notice to potential claimants and for the making of claims by persons claiming an interest in land in the adjudication area as well as for the representation of persons under disability. It also provides for the reference of disputes to the Tribunal. Part IV sets out the principles of adjudication and preparation of the adjudication record and provides for notification of completion of the record. Part V provides for objections and appeals to the Grand Court and then to the Court of Appeal. Those provisions must be intended to provide for full investigation of claims to land, initially by persons with local knowledge of the area. They must also be intended to eliminate fraud and mistake in the course of the adjudication process and to ensure finality at the end of that process. As a consequence, in my view, where it is alleged that a first registration has been obtained, made or omitted by fraud or mistake, rectification under section 140 of the Land Registration Law is only available if the alleged fraud or mistake occurred other than in the course of the adjudication process under the Land Adjudication Law, 1971.

In the present case the mistake is alleged to have occurred during the course of the adjudication process. In those circumstances in my view rectification under section 140 is not available to the Appellant. As the learned trial judge observed, this conclusion would seem to be supported by the provisions of section 141 of the Registered Land Law whereby a mistake or omission in a first registration which cannot be rectified does not give rise to an entitlement to indemnity although other such mistakes or omissions do. The mistakes or omissions in a first registration which cannot be rectified and do not give rise to an entitlement to indemnity must, it would seem, be those which occurred during the course of the adjudication process.

In my view the learned trial judge was correct when he answered in the negative the question posed for trial as a preliminary issue. I would dismiss the appeal

Kerr, J.A.

In the register established in accordance with the provisions of the Registered Land Law, 1971 (RLL), there is a parcel of land described and registered as Little Cayman West, Block 82A, Parcel 7. It was first registered in 1976 in the name of the personal representatives of the estate of Alvernie Kirkconnell pursuant to adjudication proceedings under the provisions of the Land Adjudication Law, 1971. It now stands registered under the names of the respondents. The plaintiff/appellant was substituted as personal representative for the estate of William Eden, on 22nd November, 1979, replacing Charles A. Eden, who died in 1925 without completing the administration of the estate. By his amended originating summons filed 29th December, 1986, the appellant sought an order for rectification of the register in relation to the said parcel by cancellation of the existing registration and substitution of himself "as Administrator of the Estate William Eden as Proprietor". He relied on the provisions of section 140 of the RLL on the grounds of mistake arising during the adjudication process. Section 140 reads:

"(1) Subject to any provisions of the Land Adjudication Law, 1971 and 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 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."

It was agreed that the question whether the court had power to order rectification in such circumstances should be determined as a preliminary issue.

After considering the arguments pro and con and certain relevant authorities, Harre J, for the reasons set out in his written judgment, dismissed the plaintiff's application, declaring that the court did not have the power to order rectification. From this decision the plaintiff appealed.

In coming to his decision Harre J accepted the reasoning and opinion of Summerfield, C.J., as expressed first in Ebanks v. Powery (Cause No. 571 of 1978) thus:

"Although section 140(1) permits rectification of a first registration I am of the opinion that this does not permit the re-opening of the adjudication process itself. There must be some fraud or mistake subsequent to the adjudication to permit these provisions to be invoked. For example, the adjudication may have been incorrectly reflected in the final adjudication record submitted for entry in the Land Register by reason of mistake or fraud; the result of an appeal may have been incorrectly reflected in the final adjudication record; the officials in the Land Registry may have made incorrect entries from the final adjudication record or other source because of some fraud or mistake.

The only way to have challenged the adjudication record before it became final, or any other decision in the course of the adjudication process, was pursuant to sections 15, 20 and 23 of the Land Adjudication Law, i.e. by reference of the dispute to the Tribunal, petition and appeal to this court and thereafter to the Court of Appeal. Those provisions gave a claimant every facility for the redress of any legitimate grievance in the course of the adjudication process. He cannot stand by, fail to avail himself of these ample facilities and then seek to re-open the adjudication years after the event by summons under section 140(1). If it were otherwise there would be no finality about the adjudication process. No land owner would know where he stands. The certainty sought by the Registered Land Law would be undermined."

In the case of Wood v. Wood et al (Cause No. 411 of 1980) Summerfield, C.J., after reaffirming his opinion in the Ebanks's case, said:

"Once the adjudication record becomes final under section 22 of the Land Adjudication Law (read with section 21) it extinguishes all legal estates and registrable rights and interests in land not reflected in the adjudication record. Any person claiming a legal estate or registrable right or interest not reflected in the adjudication record had his remedy under sections 15, 20 or 23 of that Law. This court cannot allow any other process to debase the finality of the final adjudication record by way of alteration or the setting up of additional registrable estates or rights or interests in land. The plaintiff had his remedies under those sections."

The strong positive tenor of these statements was somewhat mollified when he made the following obiter concession:

"If I have taken too rigid a view over the finality of the final adjudication record and it is the case that a person can invoke section 140(1) of the Registered Land Law to have the Register rectified by reason of fraud or mistake in the process leading up to the final adjudication, e.g. by a fraudulent representation to a tribunal, then I should examine the consequences of such an interpretation."

Although he was obviously unhappy with the possible existence of this remedy he went on to find that neither fraud nor mistake had been established. He also found that the plaintiff was barred by the Limitations of Actions Law.

On appeal - Wood v. Wood (1980-83) CILR 281 - the judgment was upheld on this alternative ground.

In delivering the judgment of the Court of Appeal, Carberry, J.A., said at page 231:

"In the event, the learned Chief Justice found for the respondents, the two sisters, on two bases: (a) that on his construction of the relationship between the provisions of the Land Adjudication Law, 1971, and the Registered Land Law (Revised), it was not open to a person who had failed to use, or exhaust the provisions in the Land Adjudication Law with respect to the prosecuting of disputed claims to land being adjudicated on, to come forward and invoke the provisions of S. 140 of the Registered Land Law (Revised) and invite the courts once more to review his claims. He had

had the chance to seek the court's intervention under S. 23 of the Land Adjudication Law, and it seemed anomalous that he should have a second chance to do so under the Registered Land Law (Revised). The Chief Justice regarded the finality of the land adjudication process under S. 22 of that Law as extinguishing "all (other) legal estates and registrable rights and interests in land not reflected in the adjudication record."

There is much to be said in favour of this point of view, both as a matter of common sense and of law; we are not, however, presently prepared to endorse it and wish to leave the matter open for argument in some future case. (The argument in the present case turned largely on the Limitation of Actions Law).

We have observed that there is absent from the Land Registration Law the equivalent of S. 70 of the Jamaican Registration of Titles Law, which can be described as the very kernel of all Torrens systems of land registration. It specifically provides for the extinguishment of all prior rights, save in the case of fraud (or double or overlapping registrations). Section 23 of the Cayman Registered Land Law (Revised) falls short of achieving this and it is to be observed that S. 140(1), as noted earlier, specifically provides for the court to rectify "any registration, including a first registration" where the same has been "obtained, made or omitted by fraud or mistake." "

Thus Carberry, J.A., while expressing appreciation for the considerations which moved Summerfield, C.J., to reason and conclude as he did, nevertheless, with his usual prudence declined then to affirm unreservedly the positive statement of Summerfield, C.J. Instead he diligently distinguished the Cayman Legislation from the Jamaican. For the present it is enough to say that the unchallengable finality of registration (except in the case of fraud) expressly given by the Jamaican Law being absent from the Cayman Law ought not to be presumed - a fortiori - when to do so would result in manifest injustice. However, unlike this earlier case, rectification under the provisions of section 140(1) was the pivotal question in Juneau v. Gynell (1984) CILR 1 but Summerfield, C.J., did not

rely solely on the positive statements in the earlier cases but in dismissing the application said:

"In my view, ignorance of the law cannot be a foundation for mistake under s. 140(1) of the Registered Land Law. It must be a mistake based on fact. I cannot see how a court can allow the re-opening of the adjudication proceedings - because that is what this amounts to - by a different route merely because someone was ignorant of the process under the Land Adjudication Law. That could lead to endless cases being re-opened and defeat one of the main purposes of that Law - to ensure quiet titles.

I have already expressed certain views on this matter in Ebanks v. Powery (4) and Wood v. Wood (5) and I need not repeat them here. It was unnecessary for the Court of Appeal to deal with the point on the appeal from the latter case but the point could arise in this case if it goes to appeal. However, while not resiling from those views until the Court of Appeal pronounces otherwise, this case can be approached from basic principles on the assumption that my view is incorrect and determined thereon."

For the purpose of determining this preliminary question it is not necessary to go into the merits of the application or refer to the general hurdles an applicant seeking this equitable remedy has to overcome. The facts relevant to the existence of the mistake are here and now irrelevant. It must be assumed for the purposes of argument that there was a mistake, for which the respondents were responsible or had the requisite knowledge. Notwithstanding whether in fact this is so and whether it influenced the adjudication process remain live issues; no is the denial of jurisdiction in subsection 2 of section 140 in the circumstances described herein, relevant to this question. Accordingly, I am in agreement with Mr. Lamontagne that only the following grounds of appeal are relevant:

- "(a) The Learned Judge erred in law in his ruling that the kinds of "mistake" which are available to a Plaintiff seeking rectification of the Register under section 140 of the Registered Land Law are limited to:

- (i) The incorrect reflection of the adjudication in the final adjudication record submitted for in the Land Register or
 - (ii) The incorrect reflection of the result of appeal in the final adjudication record or
 - (iii) Incorrect entries by officials in the Land Registry from the final adjudication record.
- (b) -----
- (c) The Learned Judge erred in law, in holding that section 141 of the Registered Land Law was aid to the construction of section 140 and that as the Plaintiff/Appellant would not have been entitled to claim an indemnity under section 141, his claim for rectification failed."

In support of these grounds Mr. Grant committed to writing the following submissions:

"The decision of the Learned Trial Judge on the Preliminary point argued before him certainly cannot mean that in no circumstances can the court rectify the register in respect of the first registration; it must mean that on the facts before him the court has no jurisdiction to rectify the register; in this regard, I submit that he misdirected himself."

I am of the view that this does not accurately reflect the learned trial judge's approach. Implicit in his acceptance of the statement of Sir John Summerfield, C.J., in Ebanks v. Powery is that rectification under section 140 was limited to those cases described and exemplified in the passage quoted ante and that the application did not fall within the ambit so circumscribed.

On the interpretation of section 140(1) Mr. Grant submitted that the "finality" of the adjudication process is subject to rectification for fraud or mistake; that the section seeks to remedy the situation where the person taking advantage of the adjudication has made a mistake or is in fraud with the knowledge contemplated in subsection (2). In the instant case there was a blatant error.

In reply Mr. Lamontagne referred to certain sections of the Land Adjudication Law and submitted that that Law laid down a scheme to determine the ownership of land [see Porter v. Frett (1973 21 WIR p. 543)] and the memorandum of objects and reasons to the law indicate finality of the adjudication process; and the resultant registration confers the absolute ownership as defined in section 23 of the RLL. He referred to Skelton v. Skelton (1986) 37 WIR 177.

He submitted that section 140 applies equally to fraud as well as mistake; further, just as there can be no rectification where subsection 2 applies, so in like manner where the registration is subject to the provisions of the Land Adjudication Law - e.g., a first registration pursuant to the adjudication process; a first registration can be other than by the adjudication process, e.g., where there has been a subdivision.

In Skelton v. Skelton the question before the Court of Appeal of the Eastern Caribbean States was stated in the judgment of Robotham, C.J., thus:

"During 1970 certain land reform measures were introduced in the British Virgin Islands. One such Act was "An Ordinance to provide for the adjudication of rights and interests in land and for purposes connected therewith and incidental thereto". That Act was the Land Adjudication Ordinance 1970. The whole purpose and intent of this was to place all land in the British Virgin Islands which had been adjudicated upon a Land Register, for which purpose companion legislation in the form of the Registered Land Ordinance 1970 was also passed.

This appeal turns solely on whether or not a High Court Judge sitting in her original jurisdiction has the right to alter or amend a final decision of the adjudication officer, by invoking the provisions of section 140 of the Registered Land Ordinance (there having been no appeal), after a lapse of nine years from the date of the decision of the adjudication officer. Section 140(1) reads as follows:

"Subject to the provision of subsection (2) of this section, 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".

Now, unlike the Cayman provision, there is no reference to the Adjudication Act and, therefore, its influence must be by implication. To that end the Chief Justice reviewed Part V of the L.O.A. - which he considered germane to the appeal as it dealt with the making of objections and the finality of the adjudication record. These sections set out the procedure, timetable, ways and means of redress to be determined by the adjudication officer. The consequences determined by that officer is set out in section 22 which reads:

"After the expiry of ninety days from the date of publication of the notice of completion of the adjudication record or on determination of all petitions presented in accordance with section 20, whichever shall be the later, the adjudication record shall, subject to the provisions of the Registered Land Ordinance 1970 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 in the process of adjudication."

Robotham, C.J., commented thus:

"This section is designed to bring to a finality the adjudication process and firmly bring the land under the provisions of the Registered Land Ordinance 1970, section 9(1) of which reads:

"The Land Register shall comprise a register in respect of every parcel which has been adjudicated in accordance with the Land Adjudication Ordinance 1970 ...".

After referring to the submissions of Counsel in relation to the question identified by him concluded:

"I would agree that, if the expression of the final decision of the adjudication officer was incorrectly recorded on the Land Register, section 140 could be resorted to. I cannot, however, accept that it can be applied in the

original jurisdiction of the High Court to alter in a material particular his individual findings of fact, based upon his own inquiry simply because the judge sitting in an original jurisdiction is of the opinion that his findings were erroneous. That is not the type of mistake contemplated by section 140. No doubt counsel had in mind the pronouncement sometimes in judicial quarters that it does not matter through which door a litigant enters the judicial forum. The qualification to this, however, is that he must do so in pursuit of a legitimate claim.

I am of the view that the respondent not having exercised his right to petition the adjudication officer, and not having exercised his right of appeal to the Court of Appeal, nor sought an extension of time within which to appeal, and lastly (but by no means least) not having done anything for a period of nine years, cannot now impeach the finding of the adjudication officer by an ingenious action for rectification in the High Court. What a trial judge did in this case was a function which was open only to the Court of Appeal, had the respondent sought relief therein in accordance with his established statutory rights."

No cases were referred to and with due deference to the Court of Appeal of the East Caribbean States the manner in which this wide restriction on the jurisdiction of the High Court was reached seems somewhat pontifical.

The provisions of the Land Ordinance Act in the circumstances defined therein confers on the Court of Appeal provision to rectify the register on the grounds of fraud or mistake. It does not, however, follow that in doing so it excludes the High Court nor does section 140 limit the nature of mistake or of fraud for that matter. However, in the light of the definition of "Court" in the Registered Land Law of the Cayman Islands no such extensive restriction of the Grand Court's jurisdiction is maintainable in relation to section 140(1) of the RLL. For these reasons I am unwilling to accept Skelton v. Skelton as sufficiently persuasive to determine this highly debateable question.

On the other side of the line, are two cases, one from the Turks and Caicos, Action No. 8/82, Lightbourne v. Astwood

judgment dated 20th August, 1982, and one from this jurisdiction

Cause No. 233 of 1990 - Willard Ebanks v. Madre Mae Clarke.

In Lightbourne v. Astwood, it was argued on behalf of the defendant before Hercules, J (Acting) thus:

"Counsel for the first named defendant as also the Learned Attorney General have both argued, inter alia, that the provisions of Section 20(1) of the Land Adjudication Law should be very strictly construed and adhered to. This Section gives any person aggrieved by the decision of the Adjudication Officer the right to appeal to the Magistrate within 90 days of the date upon which the notice of completion of the adjudication record is published. This was not done. And so they contend that the other heirs of Diana Harvey are now precluded from coming to this Court to rectify what was manifestly a mistake on the part of the Adjudication Officer, because his decision according to their interpretation of the section is final."

Hercules J, rejected that contention. He held that by virtue of section 140(2) of the Registered Land Law, the Court had authority to order rectification of the register by directing any registration to be cancelled or amended where there has been a mistake.

Because of the obvious difference in the wording of the provisions of the relevant Turks and Caicos Islands legislation to that of the Cayman Islands, I am unwilling to rely on it as an aid to the interpretation of section 140(1) of the RLL.

More directly in point is the judgment of Schofield, J.A., in Ebanks v. Mae Clarke, because unlike Ebanks v. Powery and Wood v. Wood, the plaintiff expressly sought rectification and the arguments challenging the power in the Court to grant that remedy on a first registration obtained pursuant to the adjudication process were similar to those advanced in the instant case.

The plaintiff had instituted proceedings in the Grand Court seeking a declaration that he was entitled to be registered as the proprietor of land described and registered

as Little George Town Central, Block 14CF, Parcel 130. The land was first registered pursuant to the adjudication process in the name of Fred Connor, the plaintiff's brother. Prior to this Fred Connor had transferred, in consideration of the plaintiff at Connor's request, paying up a pressing mortgage debt, his interest in the land and buildings thereon (save the right to live in a house on the land) by a duly executed and recorded deed of gift. There was no reference in the register to the deed of gift. In 1987 Fred Connor by voluntary transfer had the land registered in the names of himself, Ellen Glenvaugh with whom he was living and her daughter, the defendant, as joint tenants. Although plaintiff was residing in Grand Cayman it was only after Ellen Glenvaugh's death in 1989, that he was aware of the registration of the land and on his instructions his Attorney requested Fred Connor to rectify the register but Fred Connor died in 1990 without responding to the request leaving the defendant as the sole survivor on the register.

From the evidence, Schofield J, found that Fred Connor obtained the registered title on the land fraudently and granted rectification as asked under the provisions of section 140(1) of the RLL. In doing so he had considered the legislative intent of the Land Adjudication Law and the purpose of the adjudication process, the effect of registration under section 23 of the RLL, the statements of Summerfield, C.J., in Ebanks v. Powery and Wood v. Wood and the Court of Appeal judgment in Wood v. Wood and the opinion of Collett, C.J., in Wilson v. Bodden CC 195 of 1983.

Although conceding that in these cases there was a consistency of approach he interpreted Harre J's judgment in the case now on appeal before us as saying no more than "on the facts of the case before him, the learned judge would follow the views of Summerfield, C.J.". He based this interpretation on the following passages from the judgment of Harre, J:

"Now a feature of Ebanks v. Powery and Wood v. Wood was that in each case there was an element of neglect to use the Land Adjudication Law, 1971. No such criticism can be laid personally against the plaintiff in this case. He had no locus standi in the matter at the relevant time."

and

"Is the absence of any claim on behalf of an estate by reason of the fact that the estate had remained unrepresented and unadministered since 1925 a situation which leads to the same conclusion as that arrived at by Summerfield, C.J. in Ebanks v. Powery and Wood v. Wood? In my view the answer to that is "yes". I can find no sufficient ground for distinguishing the present case. An element of neglect over many years existed. The matter was left open for argument by the Court of Appeal but I do not take that as an invitation to this court to ignore what was said by the learned Chief Justice, any more than would be the case if the matter had not been before the Court of Appeal at all."

His interpretation of these passages is fair and reasonable. But Harre, J, went on to deal with the general question of jurisdictional competence thus:

"I was at one stage of this judgment inclining to the view that had I been approaching this matter de novo I might have come to a conclusion different to his. One of the factors which drew me back to the opposite conclusion was section 141 of the Registered Land Law. A mistake or omission in a first registration which cannot be rectified does not give rise to an entitlement to indemnity under the section, whereas other such mistakes or omissions do. What can those mistakes or omissions in a first registration be which not only cannot be rectified but which give no entitlement to indemnity? They must, in my view, be those which arose out of the adjudication process. There are undoubtedly some first registration which can be rectified. Section 140(1) says so, and examples are given in the judgment in Ebanks and Powery of frauds or mistakes subsequent to the adjudication which could ground a claim to rectification. Consequently the right to indemnity in respect of these arises under S 141(1)(a). This

distinction, in my view, lends support to the proposition that the adjudication process was intended to be and is, veiled in all respects from scrutiny under the powers of rectification contained in S. 140 of the Registered Land Law. That is the view to which I have come."

Schofield's interpretation seems but a detour on his way to granting rectification when he said:

"But the facts of all the cases I have reviewed are very different from the facts of this case. It appears that this is the first time the Grand Court has been asked to rectify the land register on grounds of out-and-out fraud. I am, with respect to Summerfield, C.J., unable to agree that in the face of blatant fraud the provisions of section 140 of the Registered Land Law together with the provisions of the Land Adjudication Law can be read so as to preclude rectification. Certainly the provisions of section 140 are declared to be "Subject to any provisions of the Land Adjudication Law, 1971". Respect must be given to that Law and the procedure laid down by it. It would not be right for issues which had been determined by the Adjudicator, which had gone through the review and appeal process provided for under the Law of 1971 and had been there determined upon, to be re-opened by means of an application for rectification of the register. There must be an element of finality about the adjudication and registration process. But the Court should never, in its desire to bring certainty and finality into a process, permit fraud to prevail. A fraud on the adjudication process itself must always be open to review. In a desire to sanctify the land register we must be careful not to sanctify the results of fraudulent or dishonest actions."

Schofield J, however, hedged his judgment with the following alternative:

"If I am wrong in that then I still consider that the plaintiff is entitled to his alternative remedy which is a declaration that the defendant holds this land in trust for the plaintiff."

However admirable this approach granting rectification in the pursuit of substantial justice may be, it leaves

unanswered Mr. Lamontagne's submission that section 140 makes no difference between mistake and fraud. Accordingly, praying in aid the general fundamental principle that equity will not permit the statute to be an instrument of fraud, does not answer the question as to the limits placed upon the jurisdiction to order rectification of the register by the words "subject to any provisions of the Land Adjudication Law".

The same approach is applicable to Mr. Lamontagne's submission to the effect that as there can be first registrations other than from the adjudication process, e.g., as a result of a sub-division, then those are the type of first registration, he argued that are subject to rectification.

In my view, the section makes no such distinction and the subsection is intelligible and useful without implying such a distinction. I am comforted in this by the following from S. Rowton Simpson's Law and Registration [Kenya Registered Land Act, 1963]:

"Rectification by court

143 (1) Subject to subsection (2) of this section, the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than 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 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."

Footnote: "Subsection (1) permits rectification by the court where there has been fraud or mistake, but subject to subsection (2) which contains the vital provision that the possession of the bona fide purchaser for value shall not be disturbed unless he had knowledge of the fraud or mistake, or was negligent. This is in line with the provisions of E 82, but the wording has been simplified (e.g. such mystifying cliches as "party or privy to' have been eliminated)."

"It will be noted that 'first registrations' are excepted from rectification. This is clearly undesirable. If a first registration is wrong and can be put right without harming any third party, it ought to be put right."

(Emphasis supplied)

The conclusion seems inescapable that the inclusion of the words "first registration" was purposeful and intended to include a first registration regardless how obtained. To hold otherwise would be to put the purchaser for value of a subdivision with knowledge of fraud or mistake in a worse position than one who obtained registration by his own fraud or by misleading the adjudication by omitting information that would be obtainable had he made the enquiries that any reasonable man in the circumstances would have made.

However, the phrase in section 140(1) of the RLL "subject to any provisions of the Land Adjudication Law, 1971" must be given meaning and effect. Mr. Grant, in his earnest endeavours, was moved to suggest that "subject to" should be interpreted as "notwithstanding". This would be doing unwarranted violence to the meaning of the phrase.

In Wilson v. Bodden, Cause 195 of 1980, in the following passage Collett, C.J., dealt with the scheme of the Land Adjudication Act, thus:

"On behalf of the defendants it was submitted that this "- that is to say the proposition that the right of way in dispute had its origin in the adjudication process itself - could not be the case because the scheme of the Land Adjudication Law was to declare only existing rights for purposes of registration rather than to create any new rights. I agree that this was the intention of the Legislature as is apparent from the wording of the statute but it is equally clear that this intention was imperfectly carried out. Adjudication in the manner it laid down is a process of quieting of titles. It is an inescapable feature of such a process that, unless corrected in the course of

the in-built appellate provisions, a mistake on the part of those responsible for a particular adjudication is one apt to become final, binding and conclusive in law despite the absence of any adequate basis for the decision in question in the first place.

This Court is not entitled to go behind such a final adjudication on the first registration of any parcel which features on the Register under the 1971 legislation but I am not on that account obliged to assume that the legal rights accepted in the adjudication process must necessarily have had their origin in the documents which were submitted during that process. Nor will the Court do so where there is no indication that those rights have their actual origin in any of those documents which have been put in evidence before it.

I find that if those responsible for the adjudication of the land which subsequently became registered as parcels 88 and 42 respectively had had before them the evidence which is presently before this Court, their proper course would have been to record the 20 foot strip at the northern extremity of what is now parcel 88 as part of parcel 42 and to have included no reference to any vehicular right of way. They did not do so. We are bound by what they did do."

Here the learned C.J. was dealing with an oblique endeavour by a party to reopen the adjudication proceedings by tendering evidence (which had always been available) to maintain his contention as to the width of a right of way which was not referred to in the register. The Court of Appeal in Civil Appeal No. 28 of 1989 approved of this statement made against the background of the issues raised in that case. Here in contrast, the instant case is directly concerned with the limitations to be placed upon the jurisdiction conferred on the Grand Court in section 140 of the RLL by the reference to the Land Adjudication Law. In my view the phrase means that an application for rectification should not be entertained where adequate remedy and redress were available to a party under the Land Adjudication Act. As stated by Summerfield, C.J., in Ebanks v. Powery:

"Those provisions gave a claimant every facility for the redress of any legitimate grievance in the course of the adjudication process. He cannot stand by, fail to avail himself of these ample facilities and then seek to reopen the adjudication years after the event by summons under section 140(1)".

In short, the phrase presents a preliminary hurdle that a person seeking the remedy provided by the section must first clear before his application is entertainable. However, I am unwilling to place upon the subsection the same limitations as Sir John Summerfield, C.J. - namely, that power to order rectification must be in relation to events occurring subsequent to the adjudication process and limited to the cases exemplified by him. There may be cases where the perpetrator of the fraud or the person responsible for the mistake has deliberately covered up his fraud or error to the extent that the party suffering damage could not by reasonable diligence discover the fraud or fault before the conclusion of the adjudication process. The party seeking rectification must, therefore, prove that in the circumstances the remedies under the Land Adjudication Law were not then available.

The limitations as interpreted by Summerfield, C.J., would enable such a wrong-doer who obtained a first registration through the adjudication process to have an unassailable registration in his name. The provisions in section 140 clearly contemplate rectification after the conclusion of the adjudication process. Such restrictions would render the provisions incapable of remedying the mischief for which it was obviously intended, namely, that "if a registration is wrong and can be rectified without harming any third party it ought to be done". To hold otherwise would permit, despite its provisions, the perpetuation of a manifest injustice. This equitable remedy of rectification is generally not easily obtainable and I reiterate for emphasis that the limitation on the jurisdiction in section 140(1) has

first to be overcome by a party in pursuit of rectification of the register.

However, in the instant case, Harre J rested his judgment on the answer to two rhetorical questions; an affirmative answer to either would be sufficient, in my view, to uphold his judgment.

The answer to the second question is in the passage quoted earlier and deals with the general competence of the Court to grant rectification and in which he accepted the limitations expressed by Summerfield, C.J. On this I have already expressed my own opinion.

The first question was postulated and answered in the passage quoted earlier and referred to by Schofield, J, in Ebanks v. Clarke. In this answer, Harre J was concerned in effect with the question whether the plaintiff had overcome the "primary hurdle". The question and answer were relevant to the preliminary issue. In that regard, the finding of Harre, J, to the effect that there was manifest neglect at the time material to the adjudication proceedings by whoever had an interest to protect and a corresponding right to intervene, is unchallengeable. The plaintiff as succeeding Administrator could be in no better position than they and the fact that between the death of Charles Eden whom he succeeded and his appointment as Administrator estate William Eden there was an inter regnum of Administrators, does not excuse such neglect.

Accordingly, I am of the view that Harre, J, correctly answered this relevant rhetorical question in the affirmative and the plaintiff had, therefore, failed to overcome the primary hurdle presented by the reference in section 140(1) to the Land Adjudication Law. In the circumstances his application for rectification was quite properly refused.

For these reasons I would dismiss the appeal.