

IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN

Cause No. 233 of 1990

19-03-92

WILLARD EBANKS

PLAINTIFF

v.

MADRE MAE CLARKE

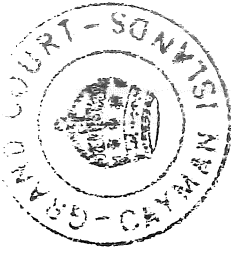
DEFENDANT

Mr. Norman Hill, QC, and Ms. Maierhofer for the Plaintiff
Mr. Pierre Lamontagne, QC, and Mr. Nelson for the Defendant

JUDGMENT

Schofield J.

The plaintiff in this action is a 67 year old Caymanian who spent most of his working life at sea. He stopped going to sea in about 1978, but managed to get work on the docks in George Town. He has little formal education and in fact cannot read or write. When he was away at sea he kept in touch with his family and sent money to Cayman, to Miss Una Bush at the George Town Post Office, who kept it for him. In this way he accumulated a little money. His mother at one time owned the plot of land in George Town which is the subject matter of this suit. It measures 0.10 acre and is adjacent to the Caribbean Utilities Station. The plaintiff's mother sold the land but eventually it found its way back into the family and into the ownership of the plaintiff's half-brother Fred Connor. Fred Connor was literate. In 1972 Fred Connor ran into money difficulties and he asked the plaintiff to pay off the bank mortgage on the land. They went together to the bank and the plaintiff paid off Fred Connor's loan and they received the title documents to the land. They then went to Ms. Anna Bodden, who practised as an attorney, and she drew up a deed of gift by which the land, together with two dwelling houses thereon, was transferred to the plaintiff, and by which Fred Connor was entitled to occupy the smallest of those dwelling houses for life. The plaintiff and Fred Connor then went on to Berkley Bush, a Justice of the Peace, and Fred Connor

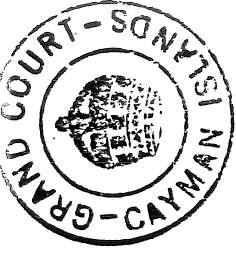


attested the deed before him. According to the plaintiff Mr. Bush asked Fred Connor if he knew what he was signing and received an affirmative reply. The document was duly registered in the Public Record Office of these Islands on the 5th July, 1972.

It is accepted by all parties that the document exhibited to Court as that deed is a true document, duly registered, and by such document the plaintiff was given proper title to the land in dispute.

Fred Connor continued to live on the land. He lived there with a lady called Edith Flennaugh. The plaintiff was away at sea much of the time, but sent money back for maintenance and improvements to his house and yard. Even when he left the sea the plaintiff, according to his evidence, helped to maintain Fred Connor and Edith Flennaugh, and when the small house fell into disrepair he invited them to move in to the larger house with him. In 1974 the land adjudication process took place in the area where the land is situated. The documentation does not show by whom, but a claim was made and documents were tendered to the Records Officer appointed under the Land Adjudication Law, 1971. The documents so tendered were conveyances, the last one being to Fred Connor. The deed of gift to the plaintiff is not recorded as having been produced to the Records Officer.

The plaintiff has testified that he must have been out when the officers from the adjudication department visited his home because he knew nothing about their visit. He thinks he was in Cayman at the time but he may have been out at work. His testimony is to the effect that he did not know that the adjudication process was being carried out. The land, now given the title George Town Central, Block 14 CE, parcel number 120, was registered in the name of Fred Connor. The defence contend that it is not proved that Fred Connor was responsible for such registration. There is exhibited, however, an application for



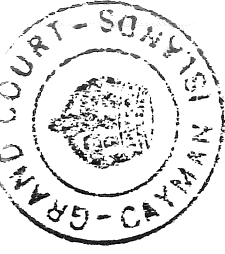
land certificate dated 15th October 1974 which bears Fred Connor's signature. The land was registered in his name and he applied for the land certificate.

Edith Flennaugh had a daughter by the name of Madre Mae Clarke. She is the defendant to this action. In 1987 Fred Connor transferred the land to himself, Edith Flennaugh and the defendant jointly. It is conceded by the defence that there was no valuable consideration for this transfer. The transfer was registered with the Land Registry on 24th August, 1989.

Edith Flennaugh died some time in 1989. The plaintiff's testimony is that he heard something which caused him to ask his niece Beverly Corita Mendoza Crasas to check the land register. This was, he thinks, after Edith Flennaugh died. When Mrs. Crasas learned that the land was registered in the joint names of Fred Connor, Edith Flennaugh and the defendant she reported this to the plaintiff. The plaintiff's reaction was one of shock and he asked Mrs. Crasas to instruct the attorney Warren Connolly. On instructions Mr. Connolly wrote to Fred Connor on the 14th September, 1989, asking him to rectify the matter. It seems there was no response to that letter.

Fred Connor died on or about the 5th April, 1990. Shortly before or shortly after his death the defendant instructed that a bulldozer go on the land. Presumably feeling threatened by this action the plaintiff saw another attorney. As a result these proceedings were brought seeking a declaration that the plaintiff is entitled to be registered as the proprietor of the land in question, seeking an order for rectification of the land register and other consequential orders.

The land was registered in the name of Fred Connor. Although we do not know, by direct evidence, how this occurred it is accepted that he applied for the land registration certificate. His signature is on the application form. He was living on the



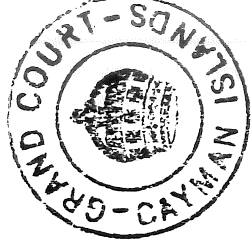
land. Of anyone in being he would have access to the conveyances produced to the Records Officer. From all that and from Fred Connor's subsequent dealings with the land I am driven to the conclusion that Fred Connor was responsible for having the land registered in his own name.

He was responsible for the purported transfer of the land in 1987 to himself, Edith Elenough and the defendant. Were his actions fraudulent? I have been referred to the following passage from the Privy Council decision in Maimiha Saw Milling Co., Ltd. v. Waione Timber Co., Ltd. [1926] A.C. 101, 106-7:

"Now fraud clearly implies some act of dishonesty. Lord Lindley in Assets Co. v. Mere Roihi [1905] A.C. 176, 210 states that: "Fraud in these actions: (i.e., actions seeking to affect a registered title) means actual fraud, dishonesty of some sort, not what is called constructive or equitable fraud—an unfortunate expression and one very apt to mislead, but often used, for want of a better term, to denote transactions having consequences in equity similar to those which flow from fraud."

If the designed object of a transfer be to cheat a man of a known existing right, that is fraudulent, and so also fraud may be established by a deliberate and dishonest trick causing an interest not to be registered and thus fraudulently keeping the register clear. It is not, however, necessary or wise to give abstract illustrations of what may constitute fraud in hypothetical conditions, for each case must depend upon its own circumstances. The act must be dishonest and dishonesty must not be assumed solely by reason of knowledge of an unregistered interest."

The Court of Appeal for Trinidad and Tobago followed this decision in Roberts v. Toussaint and others (1963) 6 W.I.R. 431 where Wooding C.J. said, at page 434, that "proof of fraud or dishonesty depends upon certainty.....". Fred Connor knew he had transferred the land to the plaintiff. The evidence is that he was asked when he signed the deed whether he knew what he was signing. From then on he lived on the land in the smaller house and the plaintiff was clearly exercising proprietary rights over the land. How could Fred Connor honestly obtain registered



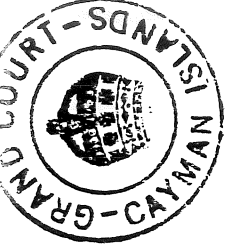
title to the land in these circumstances? How could he thereafter obtain the land certificate in his own name, apply for a copy (as the documentation shows he did) and later purport to transfer of the land to himself, his lady friend and her daughter if he was acting honestly? Of course, the Court does not have direct evidence of fraud or dishonesty, but the Court is driven to find, from all the evidence before it, that Fred Connor obtained title to the land fraudulently. Because the Court does not have direct evidence of the fraud in no way means that the Court is assuming fraud. It is driven to find that fraud existed from all the circumstances of the case.

The plaintiff seeks rectification of the land register pursuant to section 140 of the Registered Land Law, which reads:-

"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 it by his act, neglect or default."

The defendant says that I cannot order rectification of the register pursuant to this section in the case of a first registration made consequent upon the land adjudication process. The Land Adjudication Law, 1971, paved the way for the establishment of a modern system of land registration so that title to land in these Islands could be certain and the dealing with land could be accomplished simply and expeditiously. The



dominant feature of the system is the land register and the land register was first compiled consequent upon an adjudication process set out in the Law of 1971. A system of adjudication was set up to resolve claims. It is not disputed in this case that the plaintiff did not take part in this process, despite the statutory notices having been posted and it being common knowledge in the area that the adjudication process was underway. Anyone aggrieved by a decision made under the adjudication process had a right of appeal to the Grand Court and thereafter to the Court of Appeal within a given time frame. Once the adjudication record was final the Adjudicator appointed under the Law had to deliver a copy of the final adjudication record to the Registrar of Lands for compilation of the register. The effect of registration is set out in Section 23 of the Registered Land Law as follows:

"23. Subject to the provisions of section 27, the registration of any person as the proprietor with absolute title of a parcel shall vest in that person the absolute ownership of that parcel together with all rights and privileges belonging or appurtenant thereto, free from all other interests and claims whatsoever, but subject -

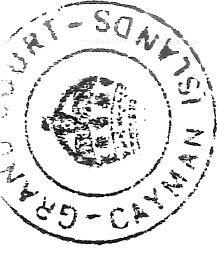
(a) to the leases, charges and other incumbrances and to the conditions and restrictions, if any, shown in the register; and

(b) unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register:

Provided that -

(i) nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee;

(ii) the registration of any person under this Law shall not confer on him any right to any mineral oils unless the same are expressly referred to in the register."

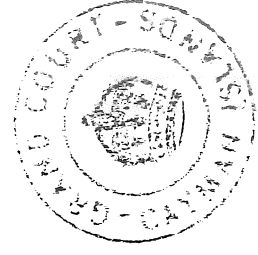


So in this case the Adjudicator must have delivered to the Registrar of Lands an adjudication record which showed that Yred Connor was entitled to be registered as the sole proprietor of the land in dispute and he was so registered as having absolute title to the land which became known as George Town Central, Block 14CF, parcel 120. No other interest, and in particular no interest of the plaintiff, was shown in the register.

The defendant says that if registration of title to land is obtained consequent upon that adjudication process such title cannot be impeached; it is not open to the Court to go behind the adjudication process, for to do so would be to add a further step in a process which is designed to be final and to give certainty to land titles. An appeal process is set up by the Land Adjudication Law and it would not be proper to add a further appeal process to the system. Section 140 of the Registered Land Law does indicate that its provisions are subject to the provisions of the Land Adjudication Law, and once title is obtained consequent upon the process set up under that Law section 140 has no effect. On these submissions the defendant's counsel cited powerful persuasive authority.

In Henry Lee Ebanks v. Myrtis Pomeroy (CC. 571 of 1978) Summerfield CJ. was asked to exercise this jurisdiction to rectify the land register, but on the grounds of mistake not of fraud. He had this to say:

"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.

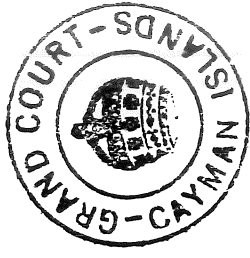
The only way to have challenged the adjudication record before it became final, or any other decision in the course of the adjudication process, was pursuant to sections 15, 20, and 23 of the Land Adjudication Law, i.e. by reference of the dispute to the Tribunal, petition and appeal to this court and there after 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 Kelsey Wood v. Doris Wood and anor (CC. 411 of 1990) the learned Chief Justice repeated that passage and went on to say:

"I formally adopt that view now. 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 final adjudication record by way of alteration or the setting up of additional registrable estates or rights of interests in land. The plaintiff had his remedies under those sections."

Wood went to appeal and the Court of Appeal had this to say about the learned Chief Justice's view:

"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



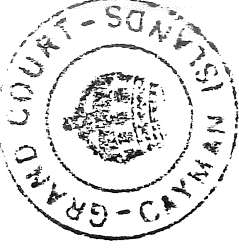
on the Limitation of Actions Law)."

So we are left with very strong persuasive argument, but not binding authority, for the propositions put forward in this case by the defence. The following passage of Collett CJ. from Joan Evangelina Wilson v. Marcella Bodden and another (CC. 195 of 1983) was approved by the Court of Appeal in Civil Appeal 28 of 1989:-

"On behalf of the Defendants it was submitted that..... 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.

The 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."

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. Poverly and Wood v. Wood was that in each case there was an element of neglect to use the Land Adjudication Law, 1971.

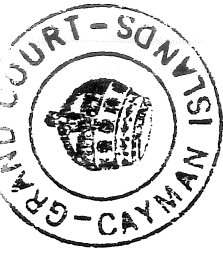
"No such criticism can be laid personally against the plaintiff in this case. He had no locus standi in the matter at the relevant time."

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. Poverly 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 CJ.

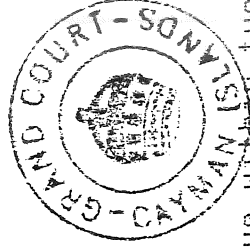
But the facts of all the cases I have reviewed are very different from the facts of this case. It appears that this is the first time the Grand Court has been asked to rectify the land register on grounds of out-and-out fraud. I am, with respect to Summerfield CJ., unable to agree that in the face of 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.

What if the plaintiff had been away at sea for the whole of the period during which the adjudication process was being carried out? On his return from the sea and on finding himself dispossessed of his land and with nowhere to live because of his half-brother's fraud on the Adjudicator could it be said, in the face of the wording of section 140, that he had no remedy? I can see no difference in principle between that situation and the actual situation in this case where the plaintiff, being illiterate, just did not know that his land was being registered in his half-brother's name. If the Legislature had wanted a first registration consequent upon the adjudication process to be outside the rectification jurisdiction provided for in section 140, then it could have devised appropriate wording for the statutory provision. The wording as enacted demands that his Court pay due respect to the provisions of the Land Adjudication Law, 1971, but it does not, in my judgment, preclude a rectification of a first registration made pursuant to the adjudication process in the circumstances of the present case.

The defendant pleads limitation. In her amended defence she



avers that the plaintiff's claim did not accrue within twelve years before the commencement of the action. In his submissions learned counsel for the defendant submitted that as this is an action based on fraud, a tort, the limitation period is six years. For our purposes it is irrelevant whether the period is six or twelve years. The plaintiff claims that he was deprived of title by concealed fraud and that the time began to run against him when he discovered that Fred Connor, Edith Ellenough and the defendant were registered as the proprietors of the land. That is some time in 1989.

For the plaintiff to succeed in this contention four circumstances must concur: (1) there must have been a fraud; (2) that fraud must have deprived the plaintiff in title of the estate; (3) such fraud must have been concealed; and (4) the concealment must have been such that it could not with reasonable diligence have been discovered sooner that it was in fact discovered (see Willis v. Earl Howe [1893] 2 Ch. 545).

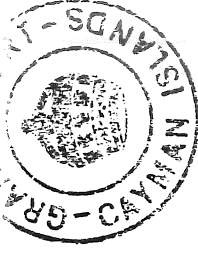
I am satisfied that there was fraud. Such fraud deprived the plaintiff in title of the estate. Was such fraud concealed?

"But there may, in my opinion, be fraudulent concealment of a course of action which is not subsequent to the act which gives rise to the cause of action; it may acquire its character as such from the very manner in which that act is performed."

So said Lord Greene M.R. in Keaman v. A.R.I.S. Ltd. [1949] 1 K.B. 550, 559.

In the present case Fred Connor surreptitiously got his name on the land register and kept that fact from his half-brother whom he knew to be illiterate. I am satisfied the fraud was concealed.

Could the plaintiff with reasonable diligence have sooner discovered the fraud? The defendant says that the fraud, if such

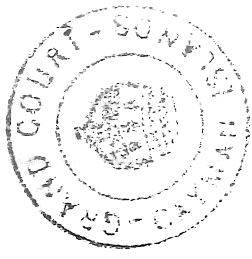


it was, was plain to see on the registry; that it was not hidden; that any person living in these Islands should and would have known of the adjudication process as it was being carried out. In that connection the plaintiff's lack of formal education and illiteracy is very relevant. He could not read the notices. He had no reason to suspect that his title to the land, duly registered with the Public Record Office, would be undermined during the adjudication process. He had a deed in his hand and it had been recorded with those in authority. He is not a man who would be expected to go looking for the adjudicating officers. Even when he became suspicious about matters, when certain things were related to him, he had to send his niece to the Land Registry to ascertain the true state of affairs. The plaintiff is not the kind of man who is comfortable dealing with bureaucracy. He relies on others when documents are to be dealt with. I am satisfied that this man, in the circumstances of his relationship with Ered Connor and Edith Flennaugh, could not have been expected to exercise greater diligence than he did. I find that time began to run against him in 1989.

The defendant is not in possession of the land. She did not acquire the land for valuable consideration. Subsection (2) of Section 140 of the Registered Land Law does not save her.

Accordingly it is my judgment that the plaintiff is entitled to his declaration that he is entitled to be registered as proprietor of the property located at George Town Central, block 14CF, parcel 120 and to an order for rectification of the land register to give effect to that declaration.

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. Courts of Equity convert a party who has obtained property by fraud into a trustee for the party who is a victim of that fraud. Lord Westbury had this to say in McCormick v. Grogan



"My Lords, the jurisdiction which is invoked here by the Appellant is founded altogether on fraud. It is a jurisdiction by which a Court of Equity, proceeding on the ground of fraud, converts the party who has committed it into a trustee for the party who is injured by that fraud. Now, being a jurisdiction founded on personal fraud, it is incumbent on the Court to see that a fraud, a *malus animus*, is proved by the clearest and most indisputable evidence. It is impossible to supply presumption in the place of proof, nor are you warranted in deriving those conclusions in the absence of direct proof, for the purpose of affixing the criminal character of fraud, which you might by possibility derive in a case of simple contract. The Court of Equity has, from a very early period, decided that even an Act of Parliament shall not be used as an instrument of fraud, and if in the machinery of perpetrating a fraud an Act of Parliament intervenes, the Court of Equity, it is true, does not act aside the Act of Parliament, but it fastens on the individual who gets a title under that Act, and imposes upon him a personal obligation, because he applies the Act as an instrument for accomplishing a fraud. In this way the Court of Equity has dealt with the Statute of Frauds, and in this manner, also, it deals with the Statute of Wills. And if an individual on his deathbed, or at any other time, is persuaded by his heir-at-law, or his next of kin, to abstain from making a will, or if the same individual, having made a will communicates the disposition to the person on the face of the will benefited by that disposition, but, at the same time says to that individual that he has a purpose to answer which he has not expressed in the will, but which he depends on the donee to carry into effect, and the donee assents to it, either expressly, or by any mode of action which the donee knows must give to the testator the impression and belief that he fully assents to the request, then, undoubtedly, the heir-at-law in the one case, and the donee in the other, will be converted into trustees, simply on the principle that an individual shall not be benefited by his own personal fraud."

I am satisfied, as I have indicated earlier, that fraud has been proved by the clearest and most indisputable evidence, even though that evidence was circumstantial. I do not consider that in referring to "direct proof" Lord Westbury was meaning direct evidence in the strict sense, for there will seldom be direct evidence of fraud. He meant that the evidence must be conclusive, as I have found it was in this case. Equity provides that Fred Connor, when he obtained registration of this land in

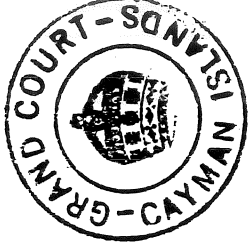
his own name, became a trustee of the land for the plaintiff. In purporting to pass title to the defendant he passed no more than he himself possessed, a trusteeship. I therefore find that the defendant holds the land in trust for the plaintiff and as an alternative remedy would grant a declaration to that effect and an order that the land register be rectified to give effect to that declaration.

One final matter needs to be addressed. The defendant has given First Home Banking a collateral charge over the land. The plaintiff needs to be protected against the defendant's possible default and the plaintiff seeks orders that the defendant execute a discharge of such charge or provides an indemnity in respect of the charge. I invite further argument on this point.

Costs of the suit will, in any event, go the plaintiff.



D. Schofield
JUDGE



Dated this 19th day of March, 1992