

A Review of The Land (Title Proceedings) Act 2011

by William J. Chandler, High Court Judge

**Presented at the seminar of the Barbados Bar Association at the Hilton Hotel,
Needham's Point St. Michael on Saturday January 28th 2017.**

1. Good afternoon. Madame President and members of the Barbados Bar Association, thank you for your kind invitation to address you on the Land (Titles Proceedings) Act of Barbados (the Act). My presentation includes the following:
 - a) The need/purpose of the Act;
 - b) An overview of the foreclosure suit in Barbados;
 - c) The role of Attorneys-at-law in the process of titling land;
 - d) The role of the Land Surveyor in the land titling process, and
 - e) The certificate of title and its effects.
2. To place the Act in context, I will briefly explain the foreclosure suit which many of you have heard about or have indirectly participated in by the preparation of plans. In this explanation you will see why the need arose for the Act under discussion.

The Suit and some of the reasons for it

3. The foreclosure suit in Barbados is a legal fiction developed by practitioners as a means of obtaining legal title to property for persons who, though entitled to land, had no papers to prove that they were the owners of that land or whose papers did not form a good root of title through the vicissitudes of time and circumstances. In many cases persons had lived on the land for many years or the land had been in their families for generations. Persons had died without a will (intestate) or leaving a will (testate) and no one had applied for letters testamentary to the estates of the deceased. Over several generations and with

the death of beneficiaries, the situation would become worse. Tracing title might be impossible or rendered more difficult by the fact that beneficiaries had emigrated and could not be traced or deceased beneficiaries had left children who did not take out representation to their estates. The foreclosure suit was a weapon in the arsenal of lawyers in trying to solve some of the problems thrown up by the aforementioned examples.

The Suit briefly explained

4. Under and by virtue of the suit the Defendant/client charged by way of legal mortgage their interest in the property to a mortgagee who, invariably, was the clerk or secretary of the Attorney-at-Law. A deed of indemnity was prepared so that any liability incurred by the mortgagee would be reimbursed by the client. This included not only filing costs and other out of pocket expenses but also a situation where a claim might be made to the property by a third party requiring a hearing in Court and in which the innocent mortgagee might be exposed to real costs in a fiction not of his own making.
5. A writ now an application under form 2 of the Supreme Court of judicature (Civil Procedure Rules) 2008 (CPR) would be issued and served on the Defendant claiming the sum secured by the mortgage or, in the alternative, possession of the property, or in the further alternative, sale or foreclosure. The defendant would acknowledge service of the writ/Application and acknowledge his indebtedness to the Claimant. Following default in payment, the mortgagor submitted to the entry of judgment upon him and an order for sale of the property would be made by the court under **Order 31** of the **Rules of The Supreme Court 1982**. Hence the term Order 31 proceedings (See the transitional provisions below).
6. It bears mentioning that an affidavit (2) had to be filed by the mortgagor setting out the basis of his/her claim and by the Attorney-ay-Law certifying that, in

his opinion, the facts set out in his client's affidavit(s) sufficiently established his client's title to the property. Notices were published in the daily newspapers and the official gazette and on the land by the Chief Marshall so that anyone having a claim might file that claim at the Registration Department. Notice had to be given to all persons in occupation of the land and evidence of compliance, in affidavit form, filed with the Registration Department prior to the hearing of the application for orders for sale and distribution.

7. The purpose of these procedures was to ensure that there was a legitimate entitlement to the land bearing in mind the factual basis upon which he claim was founded. This, in my opinion, placed a duty upon Attorneys-at-law to ensure that the claim was legitimate to the best of their knowledge, information and belief, since, in addition to the duty owed to the client, they owe a higher duty to the Court.
8. If there were no claims filed, generally speaking the order for sale would be made and a conveyance from the Registrar of the Supreme Court (the Registrar), executed under the provisions of the Judicial Sale of Land Act Chapter 227 of the Laws of Barbados following a purchase by the mortgagor and payment of the purchase price to the Registrar. A full treatise on the foreclosure suit may be read at the UWI and was written by one of our own eminent counsel at the Inner Bar Ms. Mollie Ann Reid Q.C now deceased. It is entitled "**The foreclosure Suit in Barbados.**"

A real and present problem

9. A very real problem for lawyers and clients alike was the payment in to the Registrar of the Supreme Court of the purchase price of the land. Even though the suit was fictitious, the purchase price had to be paid and the RSC would subsequently repay the moneys. In practice few clients could afford the

moneys up front and some lawyers obliged by paying it in from their own resources or from clients' accounts hoping that the repayment would be expeditious. This presented obvious risks for the Attorneys who ought not to use their client's accounts for these purposes however altruistic. If the price was not paid the suit languished until funds were available causing delays. This problem, as we shall see, has been obviated by the new procedure.

10. When I joined the Bar in 1981, most lawyers felt that foreclosure proceedings were the subject matter of the Judge's "rubber Stamp" It was a fait accompli that orders for sale would be given. In recent years that has not been the case. We have witnessed the refusal of applications and orders of Court for the filing of further affidavits to support claims for ownership. In some instances, the Defendant/mortgagee simply deposes that he has been in possession for ten years and upwards without acknowledging the right or title of any other person thereto, the standard language of the Limitation of Actions Act. Is that enough?
11. In my respectful submission, the answer is no. How did he/she get on the land or get to exercise authority over the land. There have been instances where persons have been exercising rights as trustees or under a power of Attorney and at the death of their constituent, sought to claim title. Without more, the beneficiaries under the trust would be disentitled by the very persons whose duty it is to protect their interests. The same is true for minors, idiots and imbeciles who hold a very special position in law and whose rights must be protected. I have given you the legitimate use of the foreclosure suit. I must, however, inform you that this procedure has been the subject of abuse. I will give just two examples of how the suit has been misapplied.

Example No. 1

12. In **Jeffrey v Griffith and another (1975) 27 WIR P. 29(Jeffrey)** the plaintiff, as administratrix of her father George Lyte Kirton, sued the second defendant the executrix of the estate of GB Niles deceased Attorney at law. Mr. Kirton died in 1954the USA possessed of 11 acres, 11 perches of land at Apple Hall St Phillip. After his death, his brother Dr. Aubrey Kirton looked after the land on behalf of the estate until his own death in 1958. Afterwards another brother Dr. Leonard Kirton (Dr. Leonard) controlled the land on behalf of G.L. Kirton's estate. Around 1965 he began to assume the role of owner and in 1966 appointed Mr. Niles as his Attorney. He mortgaged the land to Mr. Samuel Marshall who in 1967 foreclosed on it and obtained a Registrars conveyance. In 1968 Mr. Marshall sold the property to Mr. Niles and the defendant Griffith in equal shares as tenants in common. Mr. Griffith acted as solicitor for Dr. Leonard in the matter.
13. The plaintiff sought an order for cancellation of this transaction or in the alternative that the defendants held their interest in the property in trust for the estate of G. L. Kirton. The court held that Dr. Leonard in selling the property had acted in breach of the obligation undertaken to his brother's estate. In effect he was a trustee of his brother's interest in the property. The transaction between Dr. Leonard and Mr. Niles and Mr. Griffith was voidable at the instance of Dr. Leonard and the plaintiff, as administratrix of the estate, whose confidence Dr. Leonard had breached, and she was entitled to avoid the conveyance. In the course of his decision Williams J, as he then was said:

“The foreclosure suit is used in this island as a means of securing a formal title to land where this lacking. The owner who uses this device is provided with a title through the court which facilitates dealings with the land. Such is the legitimate purpose and the

accepted basis for the fictitious suit. It is improper to use the device as a means of unjust or unlawful enrichment at another's expense. It is improper for a person with no real interest in land to seek to be clothed with a formal title thereto." He continued:

"Attorneys who advise, or receive instructions for, the institutions of these suits must bear in mind that they have a duty to the court as well as to their clients. The usefulness of the device is recognized, but the court must at the same time be concerned to see that the rights of others here and abroad are not violated. There must therefore be careful investigation and where necessary, full disclosure. No Attorney should casually engage in the institution of such a suit". Williams J said further, in relation to the conduct of the Attorney-at-Law:

"If Mr. Griffith had checked on the land tax records he would have found that the estate of George L Kirton deceased was entered therein in respect to the land. He would then have been bound to inquire as to Dr. Leonard's assumption of title. If he had gone to the land and made enquiries in its vicinity, he would almost certainly have met Mrs. Crichlow and from what I have seen of her, he would have been given the full history of the family and of the land.

But Mr. Griffith did none of these things. He was content merely to process the necessary papers according to the customary office routine". See now Section 16 of the Act which creates an offence of fraudulent misrepresentation punishable by a fine of \$25, 000 or imprisonment for 4 years or both.

Example No. 2

14. A man foreclosed on a large parcel of land. No notice is given to his neighbour. After the surveyors went in to put down new land marks, the neighbor realized that marks had been put on his plot. He successfully challenged the Registrar's conveyance. The evidence revealed that the person foreclosing was brought on to the land by the neighbour's mother, now deceased. The deceased's house, in which her only son lived, was clearly visible; had been improved over time and there was a vacant lot between the two properties which had never been tenanted. It was clear that there was no proper basis upon which this suit was founded. The parties settled the matter and the person who foreclosed on the land was ordered to convey to the claimant the lot on which he and his mother had lived for so many years. (**Octavia Rock and Harold Forte v Eustace Connelly**).

Example No. 3

15. A man forecloses on two parcels of land. When the matter comes on for hearing on the application for sale of the land and distribution of the proceeds of sale the Judge raises with counsel the existence of a will where one parcel is devised to the applicant and the other to his brother. Counsel submits that the applicant will hold the brother's lot in trust for him. In the absence of a power of attorney how can this happen. It is obvious that if the purport of now Section 5 of the Act was adhered to this would never had occurred. The order was not given with respect to the brother's parcel.
16. It is against the background of the potential for abuse and, in some cases, actual abuse of the suit that it was felt that the system was in need of reform. In **Jeffrey**, in 1975, **Williams J.** (later **Sir Denys Williams C.J.**) described the foreclosure suit as "... the device which has become so notorious as a means of seeking to deprive people of their land." Former Chief Justice, **Sir David**

Simmons C.J. made it clear that he wanted to eliminate fraud in foreclosure suits. Some senior practitioners felt likewise. Mr. Colin A Williams Justice of Appeal (**Williams J.A.**), deceased felt very strongly about the need for reform and championed the move in this direction. He gathered information on the suit and looked at statutory arrangements in other jurisdictions. I held on to his gown and followed him. The judicial Council established a committee to look into the matter. It comprised, myself as Chair (after the death of **Williams J.A.**), Mr. G. Clyde Turney QC, Mr. Keith A E Mayers QC, Mr. G H Andrew Brewster, Ms. Kim Parris, the Registrar and a representative of the Chief Parliamentary Counsel's office. Following consultations, oral and written submissions from the members, the Act was approved by Parliament and passed into law. I must commend the members for their commitment to the cause and the breadth of their submissions based upon their considerable collective experiences which they unselfishly brought to the table. The out turn of all this is the Act which we now are considering.

17. Of major concern to the committee was the creation of a statutory regime to replace an antiquated legal fiction so that the obtaining of a legal title to land now has a juridical basis. The elimination of fraud was pivotal in the development of this regime. Transparency and accountability are also essential pillars of the new system. It bears noting that the foreclosure suit involved the use of the machinery of the Court in an exercise that is largely fictitious. The execution by the Registrar of a conveyance to the purchaser involves the provisions of the Judicial sale of Land Act Chapter 227 of the laws of Barbados, Section 16 (1) of which provides:

Subject to subsection (2), all conveyances executed by the Registrar in pursuance of an order, directing the sale of any land or any interest therein shall effectually pass such interest in the land, thereby expressed to be conveyed as specified in the conveyance and shall effectually discharge such land from all estates, rights,

interests, liens and encumbrances of all persons, including the Crown, except as specified in such conveyance and subject and liable to which the Registrar conveys the land.

From this brief discourse, I hope that you will appreciate the fact that Court will not allow its machinery to be used as an instrument of fraud, hence the need for the new regime under the Act.

A BRIEF LOOK AT THE ACT

18. The Act was designed to reform the law relating to foreclosure suits which was antiquated, expensive and time consuming. Its preamble states that it is “An Act to reform the law relating to the method of obtaining title to land through the procedure known as “a title suit” or “a foreclosure suit”. It commenced on the 10th March 2011. The fictitious nature of the foreclosure suit was prone to fraud and uncertainty as above outlined. The Act sought to put claims upon a statutory footing and establish a procedure which would be simple, transparent, inexpensive and would eliminate fraudulent claims.

Who may apply?

19. Section 3 gives the right to apply for a declaration of title to land to persons who are:
1. in possession of documents of title which do not establish a good and marketable root of title (e.g. deeds of gift, wills with specific devise) and
 2. persons not in possession of deeds but who claim by adverse possession, inheritance, devise, purchase, adverse possession, prescription or otherwise (e.g., Property left by will but there are no title deeds, persons in possession for ten years or upwards and who have barred the rights of the freeholder). All of these situations are legitimate ones where ownership exists but there are no proper documents of title.

How to apply

20. The application is in statutory form in Schedule 1 of the Act and it is accompanied by an affidavit in support. (Section 4 (1). The applicant is referred to as claimant in keeping with the new nomenclature in the **Supreme Court Civil Procedure Rules 2008 (the CPR)**.

What must accompany the application?

21. An affidavit in support of the application (in form 2 of schedule 1), evidence of title, a plan of the land and an affidavit in respect of any adverse claims must be filed by the Claimant with the application (section 4(2)). The affidavit is a sworn document and provides to the court the evidential basis upon which the claim is made. This ought not to be taken lightly since onerous penalties are imposed for fraudulent representations made to the court. Counsel must also note the responsibility they have under section 5(a) and (f) which can result in liability for failure to properly discharge their duties under the Act.
22. A plan and any existing evidence of title must accompany the form. The plan provides certainty as to the exact lot or parcel which is being claimed and ought to disclose any encroachments or adverse rights of adjoining owners.
23. A plan and any existing evidence of title must accompany the form. Section 6 of the Act provides that:

The Evidence of Title

24. Section 5 (a) to(h) provides that the following must be included in the evidence of title so far as applicable namely:
 - (a) all documents of title including copies and other evidence of title in the possession or custody or under the control of the claimant;

- (b) certified copies of all recorded documents not in the possession or custody or under the control of the claimant which provide any evidence of title;
- (c) an abstract of the title of the claimant signed by an attorney-at-law and deducing title for a period of 20 years or for so much of that period as is possible together with a written statement by an attorney-at-law setting forth the result of all relevant or requisite searches;
- (d) a concise statement, signed by the claimant, of facts that support the title but are not established by the documents produced pursuant to paragraph (a) or (b), as the case may be, or other documents supporting the claim
- (e) evidence by affidavit or otherwise supporting any facts referred to in paragraph (d) and, where the claimant relies on possession or enjoyment under the *Limitation of Actions Act* or the *Limitation and Prescription Act*, as the case may be, affidavits by at least two persons as to that possession or enjoyment;
- (f) where an attorney-at-law has prepared a written opinion relating to the title and the opinion is in the possession or custody or under the control of the claimant, a copy of the opinion;
- (g) an affidavit by some person other than the claimant who can swear positively to the facts verifying the claim and all documents other than affidavits and exhibits thereto supporting the claim; and
- (h) a statement of all known encumbrances affecting the land other than those revealed in the documents referred to in paragraphs (a) and (b), and including any charges created by operation of law.

The plan

25. The plan must be not less than 10 years old but if the Court permits an older plan may be used. Section 6 provides that the plan referred to in paragraph (c) of section 4(2).

The plan referred to in paragraph (c) of section 4(2) shall

- (a) be a plan of the land that is the subject of the claim prepared from a

survey of the land provided that the survey was made or the plan certified not more than 10 years prior to the presentation of the claim;
or

- (b) be, with the leave of the court, any plan or plans prepared or certified more than 10 years prior to the presentation of the claim and which, in the opinion of the court, is or are sufficient to identify the land that is the subject of the claim.

The Land Surveyor and Inspection

26. At a date not earlier than three 3 months prior to the hearing of the claim the claimant must cause an inspection of the land to be done by a land surveyor or other person approved by the court. A copy of the plan is provided. An affidavit of the person making the enquiry must be filed at least 7 days before the hearing of the claim. It is useful to reproduce Section 8 of the Act for its full purport and intent:

(2) A person who conducts an inspection pursuant to subsection (1) shall

- (a) take with him a copy of the relevant plan from the claimant;
- (b) observe the nature of the land and of the growth thereon;
- (b) examine the land for any notice boards, boundary posts, buildings, structures, footpaths, signs of cultivation or any other matters or things whatsoever, that might tend to reveal evidence as to possession by the claimant or any adverse claim in respect of all or any part of the land;
- (d) for the purpose of discovering evidence as to possession by the claimant or any adverse claim, make diligent enquiry of
 - (i) any occupiers of the land or any part thereof;
 - (ii) any persons appearing to be the owners or occupiers of any contiguous land;
 - (iii) any persons appearing to be the owners of any easement or right or privilege affecting the land; and

(iv) any other person in the vicinity of the land in respect of whom, in the circumstances, it would be reasonable to make an enquiry; and

(e) at the time of the inspection make a note or record of the results of the observation, examination and enquiry.

27. A close examination of section 8(2) shows that there is a heavy onus placed on the person charged with the responsibility of conducting the inspection. The requirement in Section 8(2) (a) is an obvious one since the surveyor/inspector must have a plan to allow him to demarcate the boundaries of the land. Section 8(2) (b) requires him to look at the nature of the land and the growth thereon. He must observe whether the land is overgrown or is used for residential or other purposes. This may be used by the court to assess any claim as to the user of the land made by the claimant. 8(2) (c) is a visual observation of the land that might reveal its user, whether there are any easements or rights of way across the land (footpaths) suggesting rights of other users which may be materially affected by the claim. Section 8(2) (d) (i), (ii), (iii) and (iv) are of great importance.

The affidavit of the inspector

28. Section 8 (3) provides that a claimant shall, at least 7 days prior to the hearing of the claim, file an affidavit of the person who conducted the inspection and enquiry in respect of the land, setting out the results of the inspection and enquiry. The inspector's report is therefore evidence before the Court on which the Court can act. It is an invaluable source of evidence of encroachments, profits a prendre, easements or other encumbrances affecting the subject property. The ability to make enquiry of occupiers verifies or negates the affidavit evidence of the Claimant/applicant. This gives the Court

an independent professional opinion on which to decide the legitimacy of the claim and any adverse interests that may be affected.

29. To highlight the importance of this section, I refer to **Jeffrey** previously cited. In that case, a witness Mrs. Ada Crichlow gave evidence that she lived a stone's throw away from the land for 47 years. Her husband was placed in charge of the land by George Lyte Kirton who came from the USA in the 1930's and the subsequent dealings with the land after GL Kirton's death. She gave evidence also of correspondence between herself and Leonard Kirton which the Court found very helpful in determining that Leonard Kirton looked after the land on behalf of his late brother's estate.
30. The evidence of neighbours and persons knowledgeable about the history of the land is, therefore, important in assisting the Court to decide the bona fides of the claim. The requirement of keeping a record in (iii) is obviously to serve as an aide memoire. The responsibility for having the inspection done is that of the Claimant (See Sec 8).
31. You should note that Land Surveyors, by virtue of their specialized training will invariably be treated by the Court as expert witnesses. Though employed by the Claimant, the surveyor is in effect the Court's witness and is under a duty to help the Court impartially on the matters relevant to the expert's expertise. This duty overrides any obligation to the person by whom the expert is instructed or paid. CPR 32.3 (1) and (2). See also Part 32.12 of CPR.

Advertisements

32. S9 provides for notice to be served on any adverse claimant that the Applicant is aware of. Notice of the claim is advertised at intervals of **14 days three times** in at least 2 local newspapers and in the official gazette. The Court may order further publications or notices to any persons necessary in the interest of justice S9 (2). Time limits for filing adverse claims are set out in sec 11, 21 days after service or last publication of notices, however, the Court may extend

the time for filing claims under section 11 (2). Notice is important for informing the public of the application and allowing anyone having a claim to make the appropriate claim to the court. This is another aspect of the thrust towards eliminating fraud in titling land. **Some lawyers have complained that the cost of advertising is sometimes burdensome to clients. That is a matter for the legislature and cannot be addressed by the court.**

33. The court may order that further notice (in form 6 of schedule 1) be given to any person known or unknown who may have an adverse claim at any time between presentation of the claim and its final determination (section 10 (1) (a) and (b) and the court direct the method of service under section 10 (2).

Directions

34. Section 12 gives the court power to make directions on an application made without notice by the claimant with respect to:

- (a) the extent to which any other evidence or documents are required in order to comply with section 4;
- (b) all matters connected with any notices and further notices given under sections 9 and 10, respectively; and
- (c) such further matters, if any, as may be prescribed by the Rules.

(3) At any time, upon the application of any party or upon its own motion, the court may give such directions or further directions as to the procedure to be followed in respect of any claim or adverse claim as the court considers proper and necessary to determine the validity of the claim and to ensure the absence of fraud or mistake in the making of a declaration of ownership under section 15.

All adverse claims or matters affecting the claim must be disclosed.

Evidence

35. Section 13 establishes the procedure for taking evidence. Section 13 (1) (b) gives power to hear evidence not otherwise admissible in Court provided it has probative value. This is very important as it eliminates undue formality

and allows the Court to look at the substance of the claim and adverse claims and to do justice by eliminating fraudulent or unmeritorious claims.

The referee

36. Section 14 gives the Court power to refer claims or questions arising therefrom to a referee who may conduct an enquiry and report his findings to the Court.
37. Section 15 gives the Court power, after conducting the hearing and having satisfied itself of the veracity of the claim, to make a declaration of ownership in favour of the claimant or adverse claimant and the estate or interest of that person in the property.
38. At any stage before making the declaration, the Court may order such further enquiries or inspections as it deems necessary section 15 (2).

Offences under the Act.

39. Section 16 of the Act provides that it is a criminal offence punishable on conviction on indictment with a fine of \$25,000.00 or imprisonment for 4 years or both for a person who, in the course of any proceedings, whether acting as principal or agent, **fraudulently, knowingly and with intent to deceive (emphasis added)**
 - (a) makes or assists or joins in or is privy to the making of any material, false statement or representation: or
 - (b) suppresses, withholds or conceals or assists or joins in or is privy to the suppression, withholding or concealing from the court of any material document, fact, matter or information.

This is a deterrent to frauds. Examples are the failure to disclose a will which has been executed but not lodged, non-disclosure of unrecorded conveyances, deeds of gifts or orders of court affecting the property, such as declarations and/or variations of property interests under sections 56 and 57 of the Family Law Act Chapter 214 of the Laws of Barbados. The mens rea required for the offences is set out in the Act and is highlighted above. Attorneys-at-law and Land Surveyors as well as Claimants and adverse Claimants must, therefore, be careful to disclose the existence of any information coming to their knowledge and materially affecting the claim.

The Order of Court

40. The Court may order that a certificate of title be issued by the Registrar of the Supreme Court to the claimant or adverse claimant. The certificate of title defines the interest in the land of the claimant or adverse claimant as ordered by the Court. All encumbrances, conditions easements or other matters affecting the title and disclosed on the hearing of the claim or brought to the Attention of the Court which are valid and subsisting are noted on the certificate of title under the order of Court. There is a statutory form of the certificate in Form 9 in the First Schedule.
41. The importance of the issuance of a certificate of title for practitioners and applicants is that there is no longer the necessity to pay in the purchase price of the property to the RSC, thus eliminating the problem I highlighted above.

Effect of the Certificate of Title

42. Sec 19 provides the effect of the certificate of title. 19 1(B) provides that the certificate shall effectively vest the estate or interest specified therein an expressed to be conveyed as specified in the certificate in the person to whom the certificate was granted (c) binds all parties and (d) notwithstanding sec 50 and 51 of the Property Act be sufficient for the commencement of title in respect of a purchaser of land.

Section 19

(1) Subject to the provisions of this Act and notwithstanding any other law, a certificate of title granted under this Act shall

(a) be conclusive evidence

(i) as to the accuracy of the contents of the certificate and of any plans annexed to the certificate; and

(ii) that all the requirements of this Act and the Rules have been complied with;

(b) effectively vest the estate or interest specified therein and expressed to be conveyed as specified in the certificate, in the person to whom the certificate was granted;

(c) be binding on all persons; and

(d) notwithstanding sections 50 and 51 of the *Property Act*, be sufficient for the commencement of title in respect of a purchaser of land.

(2) Every certificate of title shall, except in so far as is otherwise provided in the certificate, be subject to

- (a) such rights and interests, if any, as are by the certificate excepted from its operation;
- (b) all public rights, if any, including any public highways;
- (c) the rights, if any, of any person claiming through or under the person to whom the certificate is granted by virtue of any instrument duly recorded when the certificate is granted; and
- (d) the rights, if any, of any other person to whom a certificate has been granted under this Act or under any other enactment relating to land.

The invalidation of a certificate of title

43. Fraudulent misrepresentation or suppression or concealment of material information from the Court may result in the invalidation of a certificate of title. It stands to reason that these are the grounds upon which an action may be mounted in Court to challenge a certificate of title.
44. The rights of a bona fide purchaser for value without notice are protected. S16. This preserves the equitable rule that those who have paid value for property and have no notice of the improprieties of their predecessors in title should not suffer for the misdeeds of others. Provision is made for the discontinuation of claims in S17.

Legal Fees and Costs

45. The legal fees for services rendered under this Act have been statutorily imposed and are set out in the second schedule to the Act.

46. Where legal costs are incurred the court may order any party to the proceedings to pay them.

Compensation

47. Sec 21 provides for the payment of compensation to any person who suffers loss by reason of the grant of a certificate of title by presenting a claim to the court in respect of which the attorney general shall be made a defendant. The procedure shall be such and may be prescribed by the rules. The limitation period is three 3 years.
48. Sec 21(2) outlines the criteria which have to be fulfilled by a claimant in order to claim compensation and is now reproduced.

S21 (2) Where the claimant establishes to the satisfaction of the court that

- (a) immediately before the grant of the certificate of title the claimant was entitled to some estate or interest in the land that is the subject of the certificate;
- (b) the certificate has barred or diminished the value of that estate or interest; and
- (c) the claimant had no notice of the proceedings leading to the grant of the certificate, the claimant shall be entitled to compensation in respect of the loss caused to him by the grant of the certificate.

Limitation period

49. S21 (3) No application for the recovery of compensation may be made under this Part where more than 3 years have elapsed since the claimant knowingly suffered the loss.

50. Determination of compensation

S21 (4) All compensation shall be determined in relation to the value of the estate or interest of the claimant in the land at the date when the certificate of title was issued; and no claimant shall be entitled to compensation in excess of that value.

Loss of the right to compensation

51. S21 (5) provides the circumstances in which the right to compensation is lost.

S21 (5) No compensation shall be payable to any person who

(a) has himself caused or substantially contributed to the loss by his fraud or negligence; or

(b) derives title from the person referred to in paragraph (a), otherwise than under a disposition for value to a purchaser without notice of any such fraud or negligence.

The Attorney General's right to an indemnity

52. A right of indemnity in favour of the Attorney General against the certificate holder is provided by subsection (6).

S21 (6) Where a claim for compensation succeeds, the Attorney- General shall have a right of action for indemnity against the person to whom the certificate of title in respect of which the claim was made was granted; but it shall be a defence to any action for indemnity if that person establishes to the reasonable satisfaction of the court that in his application for the certificate of title, there was in the proceedings pursuant to which the certificate of title was granted, no wilful default or culpable non-disclosure of the rights of the person entitled to compensation

Persons under disability

53. Persons under disability-infants or mentally disordered persons may make application under section 22 of the Act through their guardians or such persons as the Court may appoint.

22. (1) Where any person who otherwise might have made any application or claim, given any consent, done any act or been party to any proceedings under this Act is an infant, a person to whom Part IV of the *Mental Health Act* applies, or a person of unsound mind, the guardian of the infant or a person appointed by the court to act on behalf of the person to whom Part IV of the *Mental Health Act* applies or the person of unsound mind, may make such application or claim, give such consent, do such act and be party to such proceedings as the infant or other person might have done had he not been under a disability, and shall otherwise represent the infant or other person for the purposes of this Act.

(2) Where there is no guardian or person appointed in accordance with subsection (1) in relation to a person referred to in that subsection, the court may, on the application of any person, appoint any suitable person to exercise all the powers of a guardian or person appointed to act on behalf of the infant or other person referred to in subsection (1), as the case may be, for the purposes of this Act.

Minors

54. Subsection (3) provides that a certificate of title may be granted in the name of a minor but he may not dispose of it or any interest therein. See also subsection

(5). Both sub-sections are now reproduced:

(3) For the avoidance of doubt, subject to subsections (4) to (5), a certificate of title may be granted in the name of a minor.

(4) Nothing in this section enables a minor to make a disposition of land or any interest in land by virtue of the grant of a certificate of title.

(5) Where a certificate of title is granted in the name of a minor, the Registrar shall enter in the register to be kept pursuant to section 18(2), a restriction against any dealing with the land.

This is a revolutionary innovation and highlights the difference between a certificate of title and a conveyance. Note also that by virtue of Section 185 of the Property Act Chapter 236 of the laws of Barbados a minor cannot hold a legal estate in land.

55. Note Section (22) which deals with persons under disability and their representation by their respective guardians or receivers under the act.

56. Note sections (28) and (29) which deal with the power of the rules committee of the Supreme Court to amend the 1st and 2nd schedules.

Transitional Provisions

57. Section (31) provides for the continuation of existing matters under order 31 of the Rules of the Supreme Court. It is to my knowledge that Attorneys-at-law have voiced their concerns over the stage at which matters under the old Order 31 procedure or foreclosure suits become ripe for transition into the new procedure. We quite understand the importance of this to lawyers and practitioners alike in relation to payment of the purchase price to complete old Order 31 foreclosures. As Chairman of the committee, I have to convene another meeting to thrash out this matter. We already have a fair idea of what stage this should occur but I am not at liberty to say anything until we meet and take a collective position on it. This will occur very shortly.

31. (1) Notwithstanding anything to the contrary in this Act and Part 73.3 of the *Supreme Court (Civil Procedure) Rules, 2008*, any proceedings that were filed

(a) under Order 31 of the *Rules of the Supreme Court, 1982*; or

(b) on or after the 1st of October, 2009, purportedly under Order 31 of the *Rules of the Supreme Court, 1982*, but before the commencement of this Act, may

(i) be continued under that Order as if that Order were still in force; or

(ii) may be treated as an application under section 3 of this Act and this Act shall apply thereto.

(2) The proceedings referred to in subsection (1), and any conveyances issued by the Registrar on or after the 1st of October, 2009 in respect

thereof and before the commencement of this Act, shall not be regarded as invalid by reason only of the fact that no statutory authority existed during that period to give effect thereto.

58. **S32.** This Act does not apply to land that is registered land or land in a registration district within the meaning of the *Land Registration Act*.

59. The Crown is bound by the Act.(S33)

Registrar's Functions:

60. The Registrar shall (1) issue the certificate of title under the order of Court; (2) keep a register of titles and (3) ensure that the certificate contains the interest declared by the Court and the encumbrances to which the land is subject.

S18 (2) (2) The Registrar shall

- (a) keep a separate index of certificates of title in a register;
- (b) enter the certificates of title in the register in the order in which they were granted and number them accordingly; and
- (c) enter in the register
 - (i) the names of the claimants and of any adverse claimants;
 - (ii) short particulars of the land;
 - (iii) any restrictive covenants, easements, conditions and stipulations to which the land is subject;
 - (iv) any adverse claims; and
 - (v) any other matters which the court may direct or the Registrar may consider appropriate to be entered in the register.

Rectification of certificates of title

61. S18 (3) The Registrar may rectify the register or any certificate of title where

- (a) that rectification relates to errors or omissions not materially affecting the interests of any party; and
- (b) consent for the rectification has been given by all the parties interested.

(4) Where, upon a re-survey of land described in a certificate of title or in the register it is established that there is a mistake respecting the area of that land, the Registrar shall, after giving notice to all persons interested, rectify the certificate of title and register.

(5) The Registrar shall, upon notice in writing being given to him of a change of the address of a person to whom a certificate of title is granted, record that change in the register.

Legal Fees and Costs

- 62. The legal fees for services rendered under this Act have been statutorily imposed and are set out in the second schedule to the Act.
- 63. Where legal costs are incurred the court may order any party to the proceedings to pay them.

Preparation of Orders and Certificates of title

- 64. Attorneys-at-law should exercise care in the preparation of Court orders and certificates of title. It is important to ensure coincidence between orders and certificates so that the Registrar is better enabled to execute her functions. Regard should be had to Section 19 of the Act. Consider if one was applying for a certificate of title to a lot in a development without disclosing the easements covenants restrictions and stipulations to which the land was subject, a certificate holder relying on his certificate which did not make his lot subject to the covenants, could materially affect the character of the development. Adherence to your duty in disclosing all matters materially

affecting the property would avoid this problem and avoid unnecessary and costly lawsuits.

Conclusion

65. Credit ought to be given to those to whom it is due. It is respectfully submitted that the Act has accomplished much of what was highlighted in **William J's** decision in **Jeffrey** with respect to the elimination of fraud in title proceedings. His brother and brother Judge Colin A. Williams J.A. was an experienced conveyancer and legal practitioner and a strong advocate for the modernization of the law with respect to land title proceedings which was also dear to the heart of Sir David Simmons C. J. Credit is due to the members of the Committee established to look into the law relating to foreclosures who contributed selflessly to the Act we are now considering and to Ms. Molly Anne Reid, Attorney-at-law and now of late memory for her treatise which is a lasting record of what will soon be a passing chapter in Barbadian legal history. I wish also to thank Ms. Rochelle Lashley, my judicial Assistant, for assisting with the audio visual aspect of this presentation.

I thank you

William J. Chandler
High Court Judge