# COMMONWEALTH OF THE BAHAMAS

## IN THE SUPREME COURT

## COMMON LAW AND EQUITY DIVISION

**1985/CLE/gen/510**

**BETWEEN**

**ARAWAK HOMES LIMITED**

**Plaintiff**

**AND**

**NEVILLE N. JOHNSON**

**(As Court appointed representative of Thaddeus**

**Johnson, Deceased)**

**1st Defendant**

**TANICA FERGUSON**

**(Substituted for Eleazor Ferguson, Deceased)**

**2nd Defendant**

**C.B. BAHAMAS LIMITED**

**3rd Defendant**

**Before:** The Honourable Madam Justice Indra H. Charles

**Appearances:**  Mr. Neville Smith QC and Mr. Tavares Laroda of Sharon Wilson & Co. for the Plaintiff

Mr. Carlton Martin of Martin, Martin & Co. for the 2nd Defendant

**Hearing Dates:** 26 September, 31 October 2016, 21 November 2016

(Trial on submissions only as directed by the Court of Appeal)

**Civil - Action remitted to Supreme Court by Court of Appeal for hearing on submissions only as against 2nd Defendant – No live factual issue to be tried – No issue of fraud committed by 2nd Defendant**

**Quieting Titles – Certificates of Title – Fraud of 1st Defendant already determined by Court –Validity of certificate of title of 2nd Defendant who bought land from 1st Defendant – Whether 1st Defendant can pass good title to subsequent purchasers.**

On 28 January 1985, certificates of titles were granted to the 1st and 2nd Defendants in a Quieting Petition Action No. 10 of 1982. The 1st Defendant was the Petitioner and the 2nd Defendant was an adverse claimant. The 2nd Defendant bought the land in question from the 1st Defendant while the action was extant.

At a directions hearing, the trial judge ordered a trial on submissions only but when the matter came for trial, an application was made to strike out the Plaintiff’s case for want of prosecution due to inordinate and inexcusable delay. Instead of proceeding with the trial on submissions only, he entertained the application and dismissed the case against the 2nd defendant for want of prosecution. He however, set aside the 1st Defendant’s certificate of title for fraud.

The Plaintiff appealed the decision of the trial judge in favour of the 2nd defendant to the Court of Appeal. For reasons, which the Court of Appeal found puzzling, it remitted the matter to the Supreme Court for a trial on submissions only.

The 2nd Defendant alleged that since the Plaintiff has alleged fraud as against the 2nd defendant, there ought to have been a full-blown trial with witnesses’ testimony and as a consequence of the remitting order, there can be no such trial and therefore, the action ought to be dismissed. The 2nd Defendants raised a number of other issues; some of which have already adjudicated upon and/or irrelevant as to whether the 2nd defendant’s certificate of title ought to be set aside.

**HELD:**

**Declaring that the certificate of title granted to Eleazor Ferguson on 28 January 1985 is null and void and of no effect**

1. A full blown-trial would have been a colossal waste of precious judicial time as there are no issues of fact to be tried;
2. Previous rulings of the courts have highlighted overwhelming evidence of fraud committed by the 1st Defendant.
3. The same fraudulence that doomed the certificate of title granted to the 1st Defendant must of necessity taint and doom the certificate of title granted to the 2nd Defendant since the certificate of title granted to the 2nd defendant was grounded on the Petition of the 1st Defendant.
4. The 2nd Defendant could have put in some evidence, affidavit or documentary to show that he was a bona fide purchaser for value without notice. This he has failed to do.

**Cases referred to in the judgment**

1. Texan Management Limited & Ors v Pacific Electric Wire & Cable Company Limited [2009] UKPC 46.
2. C.B. Bahamas Limited v Arawak Homes Limited No. 355 of 1985 (unreported).
3. C.B. Bahamas Limited v Arawak Homes Limited Civil Appeal No. 11 of 1987; Court of Appeal, Bahamas (unreported).
4. Arawak Homes Limited v Mergil Chisholm Johnson (as Executrix of the Estate of Thaddeus Johnson, deceased) & Ors – Judgment delivered by Allen J on 20 April 2004 [unreported]
5. Dennis Dean and another v Arawak Homes Ltd [2014] UKPC 24
6. Arawak Homes Limited v Neville N. Johnson & Ors – Judgment delivered by Adderley J on 29 July 2011 [unreported]

**JUDGMENT**

**Charles J:**

**Introduction**

1. On 14 March 2016, the Court of Appeal remitted this action to the Supreme Court for trial on submissions only as against the 2nd Defendant, Tanica Ferguson (substituted for Eleazor Ferguson deceased) and for the matter to be heard expeditiously.
2. The matter came before me for the first time on 26 September 2016. As the Order of the Court of Appeal directed that this court hears the matter on submissions only, there was effectively no hearing. That being said, the Plaintiff (“Arawak Homes”) took the quantum leap and filed its submissions ahead of the hearing date. However, learned Counsel Mr. Martin who appeared for the 2nd Defendant implored the Court to give him some time to submit written submissions since he was recently retained and there was no order of this court for him to do so. As a consequence, I gave directions for the 2nd Defendant to file and serve her submissions by 31 October 2016. Arawak Homes responded to these submissions on 21 November 2016. The court sincerely apologizes for the protracted delay in the delivery of this judgment.

**Action No. 510 of 1985**

1. On 29 May 1985, Arawak Homes instituted Action No. 510 of 1985 (“the present action”) against the 1st Defendant, (“Thaddeus Johnson”), the 2nd Defendant (“Eleazer Ferguson”) and the 3rd Defendant, C. B. Bahamas Limited (“CB”) seeking the following:
	1. A Declaration that the Certificate of Title granted on 28th January 1985 by the Supreme Court to Thaddeus Johnson in Action No. 10 of 1982 with respect to Blocks 87, 88, 92, 93, 95, 98, 99, 100-107 inclusive, 120-128 inclusive, 137, 139, 140-144 inclusive, 155-163 inclusive as identified on a 1926 plan of the Nassau Village Subdivision is null and void and of no effect.
	2. **A Declaration that the Certificate of Title granted to Eleazer Ferguson on 28th January 1985 by the Supreme Court in the same action with respect to Blocks 89, 90, 91, 94, 127, 135, 136, and 164 as identified on the 1926 plan aforesaid is null and void and of no effect** [emphasis added] and
	3. A Declaration that the purported conveyance by Thaddeus Johnson to CB dated 29 January 1985 of Blocks 155, 156 and 157 contained in the Certificate of Title granted to Thaddeus Johnson is null and void and of no effect.
2. The declarations sought in (i) and (iii) have already been adjudicated upon by previous judges of the Supreme Court and the Court of Appeal. On 17 May 2012, Adderley J (as he then was) set aside the certificate of title which was granted to Thaddeus Johnson on 28 January 1985, and, on 11 April 1986, Gonsalves-Sabola J (as he then was) found that CB was not a *bona fide* purchaser for value without notice of Blocks 155, 156 and 157 contained in the certificate of title to Thaddeus Johnson. CB appealed the decision of Gonsalves-Sabola J. The Court of Appeal unanimously dismissed the appeal and confirmed the finding of the Supreme Court that the certificate of title obtained by Thaddeus Johnson was fraudulently procured. Melville JA found that “the evidence of fraud was overwhelming”.
3. As it now stands, the sole remaining issue to be determined by this court is whether the certificate of title granted to Eleazor Ferguson on 28 January 1985 with respect to Blocks 89, 90, 91, 94, 127, 135, 136, and 164 as identified on the 1926 plan of the Nassau Village Subdivision is null and void and of no effect.

**Historical facts**

1. The present action has a long and chequered history. It all started on or about 17 August 1982 when the late Thaddeus Johnson (“Thaddeus Johnson”) commenced Quieting Petition No. 10 of 1982 (“Action No. 10 of 1982”) claiming to be the legal and beneficial owner in fee simple in possession of lands the subject matter of the present action.
2. On 16 September 1983, the court ordered Thaddeus Johnson to give notice of the Petition in the usual way.
3. On or about 15 August 1984, the late Eleazor Ferguson (“Eleazor Ferguson”) bought land (which was the subject matter of his ensuing certificate of title) from Thaddeus Johnson. Shortly before the Petition was heard, Eleazor Ferguson was joined as an adverse claimant.
4. On 28 January 1985, Thaddeus Johnson was granted a certificate of title under the Quieting Titles Act, 1959 (“the QTA”) in Action No. 10 of 1982. Eleazor Ferguson was also granted a certificate of title on the same day by virtue of his purchase from Thaddeus Johnson.
5. On or about 2 April 1985, CB commenced legal proceedings against Arawak Homes (“Action No. 355 of 1985”) claiming, among other things, possession and damages for trespass in respect of a portion of the land the subject matter of Thaddeus Johnson’s certificate of title. Arawak Homes (the defendant in that action) counterclaimed alleging that Thaddeus Johnson’s certificate of title was obtained by fraud. In a well-reasoned judgment delivered on 11 April 1986, Gonsalves-Sabola J stated:

**“On 17th August, 1982 one Thaddeus Johnson petitioned the Supreme Court in Equity Action No. 10 of 1982 to quiet title to 41 blocks of land in Nassau Village Subdivision, New Providence. He alleged himself to be in open and undisturbed possession of the land in question since 1935 and prayed the court to grant him a certificate of title. There were adverse claimants who opposed Thaddeus Johnson’s petition. They were one Joseph Finlayson, one Eleazar Ferguson and Pinewood Gardens Ltd (In Liquidation) among others.**

**On the date of the hearing of the petition it was presented to the trial judge on behalf of the petitioner that, with one exception, all adverse claims were withdrawn and the judge thereafter proceeded to determine the petition and to grant to Thaddeus Johnson a certificate of title. On the petitioner’s concession of the adverse claim of Eleazar Ferguson, a certificate of title was simultaneously granted to him in respect of the blocks he had claimed. This was the one exception. Both certificates were granted on the 28th January, 1985 and issued on 30th January, 1985. The certificates of title were granted on the basis of the particular plan that was annexed to the Thaddeus Johnson’s petition. That plan was a copy of a Nassau Village Subdivision plan dated January 1926. It is at the very heart of the plea of fraud now raised by the defendant (Arawak Homes) with respect to the grant to Thaddeus Johnson of his certificate of title, that the Nassau Village Subdivision plan was misleading to the court in that it was not a survey plan and it failed to show the proprietary interest of Pinewood Gardens Ltd (In Liquidation) or that of any adjacent owner, which interest would have been shown had a recent survey plan been filed in support of the petition. Let me state right away that I have had no hesitation in concluding that the annexed plan of the Nassau Village Subdivision drawn, according to the date it bears, 56 years earlier, did not faithfully portray the existing situation on the ground. It signally failed to reflect the existence of what I find to be the approved contemporary Subdivision, the Pinewood Gardens Subdivision, which was visible in a large sweep of development at the time the petition was presented as well as when it came on for hearing and determination. The land in question fell within the Pinewood Gardens Subdivision.”**[Emphasis added]

1. Gonsalves-Sabola J. declared, among other things, the following:
	1. **As between CB and Arawak Homes the certificate of title granted to Thaddeus Johnson in respect of Blocks 155, 156 and 157 of the Nassau Village Subdivision was ineffective in law to constitute a root of title to CB and**
	2. **CB was not a *bona fide* purchaser for valuable consideration without notice of the said blocks of lands in terms of s. 27 of the QTA.**
2. The learned judge had before him the record of the application to quieten the title and heard evidence from Thaddeus Johnson himself. Thaddeus Johnson struck him as a man “getting on in years whose thought processes were not fully in command of the somewhat involved business transaction in which he, nominally, was a central figure.” The Learned judge also found Thaddeus Johnson to be a man of humble means, had acted throughout the application on behalf of a Mr. Robinson, who controlled CB. **He held that CB could not rely on the certificate of title because Thaddeus Johnson’s application was based on an outdated plan from 1926 which did not portray the existing situation on the ground** [Emphasis added]. But the learned judge refrained from making a ruling on the validity of Thaddeus Johnson’s title as he was not a party to the action and no order was sought against him.
3. Aggrieved by the judgment of Gonsalves-Sabola J, CB appealed to the Court of Appeal – No. 11 of 1987. On 18 June 1992, the Court of Appeal dismissed the appeal with costs to Arawak Homes. The Court promised to give written reasons which it did on 5 October 1992. Melville JA found that ‘the evidence of fraud was overwhelming”. At page 9 of his judgment, he had this to say:

**“The plan which was part of the petition in suit No. 10 of 1982 was done in 1926 – some 56 years earlier – and was a complete misrepresentation of the true position on earth at the time of the hearing of the Quieting Title petition. The evidence of Mr. Chee-a-Tow, a surveyor with some 35 years of Bahamian experience, and which the trial judge accepted, was that he prepared a plan of Pinewood Gardens Subdivision in 1972. When that plan was compared with the 1926 Nassau Village Subdivision plan there was overlapping, the disputed blocks which were in the southern portion of the 1926 plan were really a part of the Pinewood Gardens Subdivision. The 1926 plan was a paper sub-division which was never laid out on the ground. The streets and lots and other physical amenities which were laid out in the 1972 plan were all absent from the 1926 plan.** [Emphasis added]

**The description of the property which was published in the notices required by section 6(1) of the Act in the Quieting Title proceedings was so misleading that even when Mr. Coakley, the president and director of the Respondent [Arawak Homes] was served with an interim injunction, he was unable to identify the land mentioned in the order of the court….**[Emphasis added]

**Mr. Chee-a-Tow’s evidence was that at the time of his survey in 1972, the disputed blocks were in fact virgin territory. This would clearly give a lie to Mr. Johnson’s evidence in the Quieting Title proceedings that he had cultivated the disputed blocks up until 1975. One would have some difficulty in accepting Mr. Johnson’s evidence (the proceedings in action No. 10 of 1982 were put in evidence before the trial judge in this action) that he had been cultivating some 500 acres, including the disputed lots from 1935 when he was a mere stripling of approximately 10 or 12 years of age. These matters were all part of Mr. Johnson’s petition, so that he was most certainly aware of them, or presumed to be aware of them, they knowingly and deliberately misled the court in granting the certificate of title to him.”**[Emphasis added]

1. As Gonsalves-Sabola J said, he did not make a ruling on the validity of Thaddeus Johnson’s title because he was not a party to Action No. 355 of 1985 and no order was sought against him.
2. On 20 May 1985, Arawak Homes instituted the present action. For present purposes, the court is only concerned with the 2nd Defendant. Arawak Homes seeks to have the certificate of title granted to Eleazor Ferguson on 28 January 1985 by the Supreme Court in the same action with respect to Blocks 89, 90, 91, 94, 127, 135, 136, and 164 as identified on the 1926 plan aforesaid set aside.

1. By its Re-Amended Statement of Claim filed on 21 May 1986, Arawak Homes alleged at paragraph 14 that the Ferguson certificate of title was obtained fraudulently or by falsehood. The particulars of fraud are set out in paragraph 14 (i)-(iv) of the Re-Amended Statement of Claim.
2. Eleazor Ferguson filed an Amended Defence with Thaddeus Johnson on 10 February 1986. He did not file a Re-Amended Defence to the Re-Amended Statement of Claim. I agree with learned Counsel Mr. Martin that if the amendments are classified as minor or not new, a defendant does not have to respond to every minor amendment/s to a plaintiff’s re-amended statement of claim: see Order 20 r 3(6) of the Rules of the Supreme Court (“RSC”).
3. Trial of the present action was begun before Allen J. [as she then was] on 8 and 9 February 2001. Before the trial even got off the ground, the Defendants raised two points *in limine* namely (i) whether Arawak Homes has *locus standi* to bring the present action and; (ii) whether, given the judgment in Action No. 355 of 1985, the doctrine of *res judicata* estops Arawak Homes from maintaining the action. On 20 April 2004, Allen J. dismissed the Defendants’ application on the preliminary issues and ordered that trial of the substantive issue ought to proceed.
4. In 2010, the substantive action was assigned to Adderley J [as he then was]. At a directions hearing held on 12 November 2010, a trial date was fixed for 11 February 2011 and the learned judge ordered that **the trial be heard on submissions**: paragraph 38 of the decision of Adderley J delivered on 29 July 2011 (“Adderley J’s judgment”). On 11 February 2011, Mr. Martin who, at that time, appeared for the 1st and 3rd Defendants, having just been retained, applied for an adjournment to prepare for the trial. The trial (on submissions) was then adjourned to 14 April 2011.
5. On 14 April 2011, instead of hearing the trial on submissions, the learned judge proceeded to hear a Summons filed on 17 March 2011 to have the present action dismissed for want of prosecution pursuant to Order 25 r.1(4) of the Rules of the Supreme Court, 1978. On 29 July 2011, he made the following order:
6. The action is dismissed as against the Second Defendant for want of prosecution with costs to the Second Defendant to be taxed if not agreed;
7. Judgment is given to the Plaintiff [Arawak Homes] against the First Defendant and the Third Defendant with costs to the Plaintiff to be taxed if not agreed.
8. By this Order, Adderley J set aside the certificate of title granted to Thaddeus Johnson but found in favour of Eleazor Ferguson making a finding that “*no finding was made as to his [Eleazor Ferguson] complicity in fraud as was made in respect of Thaddeus Johnson and CB*.” Arawak Homes appealed Adderley J’s judgment in favour of Eleazor Ferguson to the Court of Appeal.

**Appeal to the Court of Appeal and subsequent remission to the Supreme Court**

1. The oral ruling of the Court of Appeal was delivered by the learned President, Dame Anita Allen on 14 March 2016. She had this to say:

**“In the first place, the trial in this case before Allen J (as she then was) who, after dealing with certain preliminary issues arising in the case ordered on 20th April 2004 that the trial of the substantive issue ought to proceed. Additionally, the learned judge himself at paragraph 38 of his judgment said that the trial date was set by him for 11th February 2011, and was adjourned by him on the application of counsel for the defendants to 14th April 2011, to allow counsel as opportunity to prepare his case for trial. On the date for the hearing of the trial, instead of proceeding with the trial, the application to strike out the Writ and Statement of Claim was made and disposed of in the manner indicated. It confounded us, to say the least, that the learned judge, after setting the date for trial on submissions, would thereafter entertain the application of the defendants to strike out the Writ and Statement of Claim for want of prosecution.**

**Indeed, at the time of the learned judge’s decision to have the matter tried on submissions only, he was aware of the Re-amended Statement of Claim in which it was pleaded that the certificate of title of the second defendant based, as it was, on Thaddeus Johnson’s certificate was fraudulent.**

**We would venture to say that it was because the learned judge was aware of this that he decided earlier that there were no issues of fact to be tried and that the matter ought to be tried only on submissions. It was therefore simply an interpretation of the various decisions which the court had already made in relation to the certificate of title granted to Thaddeus Johnson and, indeed, to Eleazor Ferguson which the judge would be concerned with on trial”.** [Emphasis added]

1. The Court of Appeal was puzzled that the learned judge struck out Arawak Homes’ Writ and Statement of Claim against Eleazor Ferguson on the basis that no findings were made against him in Action 355 of 1985, and that since that was the case, there would be a need for a full trial against him and that, inasmuch as there had been inordinate and inexcusable delays by Arawak Homes, any such action should be dismissed for want of prosecution on the basis that any trial which ensued would be unfair.
2. On 14 March 2016, the Court of Appeal allowed the appeal and remitted the action to the Supreme Court **for trial on submissions only** as against the 2nd Defendant, Tanica Fergsuon since Eleazer Ferguson had, by then, gone to the Great Beyond.
3. Learned Counsel Mr. Martin submitted that the remitting order, not having been made a part of these proceedings, by lodging it or entering it upon the record, it is open to the court to ignore it. This argument is preposterous because it is an order of a superior court directing an inferior court what to do. Why should such an order be lodged or entered? Even if there is a rule saying that the order ought to be lodged or entered, I am always reminded of Lord Collin’s judicious introductory words in **Texan Management Limited & Ors v Pacific Electric Wire & Cable Company Limited** [2009] UKPC 46– appeal from the British Virgin Islands, where the learned law lord stated: ***“it has often been said, in the pursuit of justice, procedure is a servant and not a master.”***

**The pleadings**

1. In its Re-Amended Statement of Claim, Arawak Homes alleged that it along with its predecessor in title Pinewood Gardens Limited (In Liquidation) (“Pinewood”) is and was at all material times the fee simple owner in possession of the property situate in the Eastern and Southern Districts of New Providence known as the Pinewood Gardens Subdivision save for a number of lots which, prior to March 1983, was sold by Pinewood.
2. At paragraph 2, Arawak Homes relies on documentary title and can show its root to title dating back to 1942. In particular:
	1. A conveyance dated 20 November 1942 between Joseph Garfunkel and Amusement Ltd. and recorded in the Registry of Records in Book M. 15 at pages 108 and 109;
	2. Affidavit of Joseph Garfunkel dated 21 September 1956 recorded in Volume 39 at pages 534 to 537;
	3. A conveyance dated 22 September 1956 between Amusements Ltd and International Agencies Limited and recorded in Volume 39 at pages 538 to 542;
	4. A conveyance dated 6 April 1957 between International Agencies Limited and Alexia Nihon and Godfrey Kenneth Kelly and recorded in Volume 57 at pages 193 to 197;
	5. A Crown Grant of 19 December 1961 by the Queen to Alexis Nihon and recorded in Volume 472 at pages 518 to 519;
	6. A conveyance dated 1 May 1972 between Alexis Nihon and Pinewood Gardens Limited and recorded in Book 1927 at pages 349 to 354;
	7. Assignment of the Equity of Redemption dated 8 March 1983 between Pinewood Gardens Limited (In Liquidation) and George Clifford Culmer and the Plaintiff and recorded in Volume 3980 at pages 477 to 517.
3. At paragraph 5, Arawak Homes alleged that the 2nd Defendant is the holder of a certificate of title (“the Ferguson certificate of title”) granted on 28 January 1985 and issued on 30 January 1985 by the Supreme Court in Action No. 10 of 1982. The land in respect of the Ferguson certificate of title is described therein as comprising all of Blocks Nos. 89, 90, 91, 94, 127, 135, 136 and 164 of Nassau Village Subdivision which blocks were also identified by means of the 1926 plan of Nassau Village Subdivision and comprise land of which Arawak Homes and/or Pinewood is and was at all material times the fee simple owner in possession.
4. At paragraph 6, Arawak Homes alleged that the 2nd Defendant who was an adverse claimant in Action 10 of 1982 claims title to the said blocks of lands described in paragraph 4 on the basis of his having bought his interest from Thaddeus Johnson by a conveyance dated 15 August 1984, some two years after the presentation of the Quieting Petition in Action No. 10 of 1982 and before the grant of the Johnson’s certificate of title.
5. Arawak Homes alleged at paragraph 9 that “[T]he said certificates of title granted to the 1st and 2nd Defendants were based on a survey plan of the Nassau Village Subdivision which plan is a “paper subdivision” and failed to show the Pinewood Gardens Subdivision as laid out on land the subject of the certificates of title and as would of necessity have been shown on a proper modern survey plan following a current survey prepared by a competent registered surveyor as is required by the Act.”
6. At paragraphs 10 and 11, Arawak Homes averred that by the interlocutory order made on 16 September 1983 in Action No. 10 of 1982 it was ordered that notice of the Petition be served upon the adjoining owners and/or occupiers and occupants of the land the subject of the said Action; and no such notice was served on Pinewood the predecessor in title to Arawak Homes or Arawak Homes itself even though there were obvious and inescapable signs of occupation of the subject land by Pinewood such as the layout of roads and lots according to the Pinewood plan which differs significantly from the outdated Nassau Village plan.
7. At paragraph 13, Arawak Homes alleged that the Johnson certificate of title was obtained fraudulently or by falsehood. The particulars of fraud are set out in 13 (i) to (v).
8. At paragraph 14, Arawak Homes alleged that the Ferguson certificate of title was obtained fraudulently or by falsehood. The particulars are set out in 14 (i) to (iv) namely:
9. The Ferguson certificate of title was granted based upon the said Plan which said plan was misleading to the Court in that it failed to show the proprietary interest of Pinewood Gardens Limited (In Liquidation) or that of any adjacent landowners, which interest would have been shown had a recent survey been filed in support of the Petition. The Second Defendant knew or ought to have known that the aforesaid proprietary interests were not shown on the said Plan. This knowledge of a material particular was withheld from the Court.
10. The Ferguson certificate of title was granted based upon an inaccurate and misleading description in the Petition in No. 10 of 1982 of the land sought to be quieted and in the conveyance dated 15th August 1984 of the land alleged to have been purchased by the Second Defendant. The Second Defendant knew or ought to have known that the said description was inaccurate and misleading. This knowledge of a material fact was withheld from the Court.
11. The Ferguson certificate of title was sought by the Second Defendant as the Second Defendant knew or ought to have known that the First Defendant had no title to the said land.
12. The Ferguson certificate of title was granted after the consent thereto given by the First Defendant. The Second Defendant knew or ought to have known that the First Defendant had no title to the said land which material knowledge was withheld from the Court by the Second Defendant.
13. Arawak Homes seeks a declaration that the Ferguson certificate of title granted to Eleazer Ferguson to the said land is null and void and of no effect.
14. As stated earlier, the 2nd Defendant filed an Amended Defence on 10 February 1986. Arawak Homes’ Re-Amended Statement of Claim was filed on 21 May 1986 without leave of the court but it is too late to raise any issue of procedural irregularity. Be that as it may, the 2nd Defendant did not answer the Re-Amended Statement of Claim. But, as I indicated earlier, a defendant does not have to. That being said, the Amended Defence filed on 10 February 1986 is the 2nd Defendant’s pleading. Other than the Amended Defence, the 2nd Defendant has not put in any evidence, affidavit or documentary.
15. Paragraph 2 of the Amended Defence states that “the 1st Defendant was the Petitioner and the 2nd Defendant was an adverse claimant in Equity Action No. 10 of 1982 in which the 1st Defendant claimed to be the owner of the fee simple estate **in the land referred to in paragraphs 3 and 4 of the Amended Statement of Claim** …” [Emphasis added]. In my opinion, this suggests that there is no dispute as to the lands in question, as is now being alleged by the 2nd Defendant.
16. At paragraph 3, the 1st and 2nd Defendants alleged that the documents disclosed in paragraph 2 of Arawak Homes’ Re-Amended Statement of Claim are only a portion of the documents of title in the knowledge of Arawak Homes and Pinewood. In the said paragraph 3, they itemised a litany of other documents. I must confess that I have great difficulty appreciating the relevance of these documents since the 2nd Defendant can show its root of title in a certificate of title granted in 1985 under the QTA whereas Arawak Homes’ title stems from a conveyance, an assignment of an equity of redemption which predates the 2nd Defendant’s conveyance as well as its root certificate of title.
17. At paragraph 7 of the Defence, the 1st and 2nd Defendants alleged that Thaddeus Johnson’s Petition was based on actual possession and cultivation of parts of the land from 1933 to 1976. In effect, Thaddeus Johnson claimed to be in open and undisturbed possession of the land from 1933.
18. At paragraph 9, the 2nd Defendant averred that Arawak Homes has no *locus standi* to impeach the Certificates of Title in Action No. 10 of 1982 but even if Arawak Homes has a proprietary interest in the subject land that interest was not a fee simple estate because Arawak Homes purported to convey that estate to the Royal Bank of Canada by way of a legal mortgage prior to the commencement of this action, by reason whereby the 1st and 2nd Defendants deny paragraph 1 of the said Amended Defence. Both of these matters have already been determined by the courts and as such, do not warrant my further consideration.

**Discussion**

1. Learned Counsel Mr. Martin submitted that the principal issue for consideration is whether Eleazor Ferguson committed fraud in the obtaining of his certificate of title so as to have it rendered null and void under section 27 of the QTA. He asserted that Arawak Homes has pleaded that Eleazor Ferguson committed fraud in the obtaining of his certificate of title and this issue together with the issue of precisely where the land (the subject matter of the present action) is located cannot be dealt with without evidence, and there is no, and cannot be any evidence, for this purpose, or at all, in light of the remitting order.
2. Counsel next submitted that another important issue is the question of how did Eleazor Ferguson come about the land to which he obtained his certificate of title and what was his involvement in the action as an adverse claimant. According to him, there is no evidence to establish or determine this issue beyond the acceptance of the pleadings which say that Eleazor Ferguson bought the land from Thaddeus Johnson, and no evidence can be led at this hearing. Learned Counsel submitted that a case involving fraud, cannot be heard only on submissions, since fraud has to be specifically pleaded and proven, and, since Arawak Homes sought and obtained such an order, it is open to this court to find that, having considered all of the submissions of the parties, it is unable to conclude on such submissions that there has been a commission of fraud by Eleazor Ferguson. In those circumstances, judgment will have to be given in favour of the 2nd Defendant.
3. Learned Counsel also attacked Arawak Homes’ pleaded case on a litany of other legal challenges; some of which have already been adjudicated upon by other courts; for example, the standing of Arawak Homes: see judgment of Allen J delivered on 20 April 2004 and section 121 of the Evidence Act 1996 as well as judgments *in rem* and/or judgments *in personam*: see Privy Council’s judgment in **Dennis Dean and another v Arawak Homes Ltd** [2014] UKPC 24 at paragraph 20.
4. As I scrutinized the skillfully-crafted written submissions of the 2nd Defendant, it immediately crossed my mind that the majority of sub-issues raised in the written submissions were introduced to muddle up the sole issue which confronts this court namely the validity of Eleazor Ferguson’s certificate of title. As I see it, issues such as the definition of a declaration/declaratory judgment; Order 14 r 1; the maxim “*res inter alios acta alteri nocere non debet”;* article 20(8) of the Constitution vis-à-vis Article 6(1) of the European Convention on Human Rights; inordinate and inexcusable delay and severe prejudice grounds; limitation period and the Limitation Act, judgments *in rem/* judgments *in personam* and section 3 of the Civil Procedure Act, 1833 among others have no relevance to the present action and as such, they do not warrant my consideration.

**Analysis and disposition**

1. The sole issue for consideration relates to the validity of the certificate of title granted to Eleazor Ferguson in Action 10 of 1982. Does a resolution of this issue necessitate a full-blown trial or a hearing on submissions only as ordered by the Court of Appeal and Adderley J at a directions hearing on 12 November 2010?
2. The 2nd Defendant asserted that a full-blown trial is necessary in a case of fraud. Learned Counsel Mr. Martin submitted that the estate of the 2nd Defendant would be seriously prejudiced by the inability of Eleazor Ferguson to give evidence, call witnesses and to cross-examine others because potential witnesses who would likely have given evidence for the 2nd Defendant died between 2004 and 2007. This is also a finding that Adderley J reached even after he directed a trial on submissions only.
3. Expounding on this point, let me assume that Eleazor Ferguson is alive and there is a trial. What will his testimony and/or that of any potential witnesses be? I suppose that he will call Thaddeus Johnson to testify on his behalf because it was Thaddeus Johnson who sold the land to him. It cannot be gainsaid that in Action 355 of 1985, both the Supreme Court and the Court of Appeal made factual findings of Thaddeus Johnson. In his judgment delivered on 11 April 1986, Gonsalves-Sabola described Thaddeus Johnson “*as a man of humble means who was getting on in years whose thought processes were not fully in command of the somewhat involved business transaction in which he, nominally, was a central figure*”. At page 9 of his judgment. Melville JA said that “*[O]ne would have some difficulty in accepting Mr. Johnson’s evidence (the proceedings in action No. 10 of 1982 were put in evidence before the trial judge in this action) that he had been cultivating some 500 acres, including the disputed lots from 1935 when he was a mere stripling of approximately 10 or 12 years of age. These matters were all part of Mr. Johnson’s petition, so that he was most certainly aware of them, or presumed to be aware of them, they knowingly and deliberately misled the court in granting the certificate of title to him*.”
4. In my considered opinion, the above opinions of two courts; one a superior court, are sufficient to discredit the credibility of Thaddeus Johnson. And what would Eleazor Ferguson’s evidence be since he has put in no evidence, affidavit or documentary after 26 long years (he died in 2011)? As I see it, it could only be the following:
5. He bought lands (described in the Ferguson’s Certificate of Title as comprising all of Blocks numbered 89, 90, 91, 94, 127, 35, 136 and 164 of the Nassau Village Subdivision which blocks were also identified by means of the 1926 plan which was filed in support of Thaddeus Johnson’s Petition) from Thaddeus Johnson: see Conveyance dated 15 August 1984;
6. The lands were bought some two years after the presentation of the Petition and before the grant of the Thaddeus Johnson’s Certificate of Title on 28 January 1985;
7. He was an adverse claimant in Action No. 10 of 1982; and
8. He is the holder of a certificate of title granted on 28 January 1985 and issued on 30 January 1985 in Action No. 10 of 1982;

1. In my opinion, a proper interpretation of the previous judgments of the Supreme Court, the Court of Appeal and the Privy Council together with the pleadings and evidence in this action is all that the court needs to determine the validity of the certificate of title which was granted to Eleazor Ferguson in 1985. As I see it, a full-blown trial would be or could have been a colossal waste of precious judicial time.
2. The 2nd Defendant admitted that the certificate of title granted to Eleazor Ferguson was out of the same plan and subject matter that Thaddeus Johnson used when he [Thaddeus Johnson] petitioned the court to have himself declared the owner of what he fraudulently claimed. I agree with learned Queen’s Counsel Mr. Smith that the said fraudulence that doomed the certificate of title granted to Thaddeus Johnson (and that certificate has already been set aside by the court for fraud), must of necessity taint and doom the certificate of tile granted to Eleazor Ferguson. The certificate of title granted to Eleazor Ferguson was grounded on the Petition of Thaddeus Johnson. Eleazor Ferguson bought from Thaddeus Johnson long after Thaddeus Johnson had filed his quieting petition and indeed while the petition was being dealt with by the court.
3. In **CB Bahamas Limited v Arawak Homes Limited (**Appeal No. 11 of 1987) the Court of Appeal unanimously confirmed the Supreme Court finding that the certificate of title granted to Thaddeus Johnson was obtained by overwhelming evidence of fraud which also meant that the certificate of title granted to Eleazor Ferguson (out of the same fraud) would itself have been obtained by fraud. And this is exactly what Arawak Homes is saying. It is not saying that Eleazor Ferguson himself committed the fraud to obtain the certificate of title.
4. In **Dennis Dean and another v Arawak Homes Ltd** [2014] UKPC 24, the Board emphasized the importance of the Supreme Court judgment in **CB Bahamas Limited v Arawak Homes Limited** (No. 355 of 1985) [supra] where the issue of whether the judgment was *in personam* or *in rem* arose for consideration. Learned Counsel Mr. Martin submitted that **Dennis Dean** and **CB Bahamas** have no relevance to the present case. He asserted that the matter of the finding of fraud in **CB Bahamas** has no legal bearing or effect on the present case which must be determined on its own evidence in the course of a full blown trial.
5. At paragraph 17, in dealing with the relevance of the judgment in **CB Bahamas**, the Board stated:

**“In any event, Arawak won the battle of documentary titles because Mr. Johnson was not able to give anybody a good title. The courts were able to conclude either by concession in one action or because in the other actions, the courts, without objection, looked at the decision of Gonsalves-Sabola J in action no. 355 of 1985 as part of the agreed evidence.”**

1. At paragraph 19, the Board continued:

**“It is clear from Gonsalves-Sabola J’s judgment that he was dealing with an action *in personam* and that his decision did not bind Mr. Johnson, who was not a party to the action. But his decision was presented to the Chief Justice as part of the agreed evidence in the agreed bundle of documents in action no. 727 of 2008….It provided the basis for the findings (i) that Mr. Johnson had acted fraudulently and (ii) that the judgment in action no. 355 of 1985 prevented subsequent purchasers from Mr. Johnson from being able to claim protection as *bona fide* purchasers for value.”**

1. At paragraph 21, the Board made an important point which is at the heart of this case. The Board stated:

**“Although the certificate of title which Mr. Johnson obtained in 1985 had not been declared a nullity in an action to which any predecessor in title of Mr. and Mrs. Dean was a party until the judgment in action no. 510 of 1985 in 2011 (para 8 above), the evidence of Mr. Johnson’s fraud, which was led in action no. 355 of 1985, was properly before the courts below in the actions which are the subject of this appeal. That entitled the Court of Appeal to observe that the Certificate of Title had been obtained through fraud. As a result, Mr. and Mrs. Dean had to show that they were *bona fide* purchasers without notice. This they failed to do.”**

1. These judicious words need reverberating. The 2nd Defendant has failed to adduce any evidence to demonstrate that Eleazor Ferguson was a *bona fide* purchaser for value without notice. Learned Counsel Mr. Martin shifts the blame of inordinate and inexcusable delays in the prosecution of the present action on Arawak Homes. I agree that a plaintiff has the more important role of prosecuting his case but my understanding of Order 31A of the RSC, 2007 is that a defendant has a corresponding duty. In fact, all parties are to assist the court in achieving its overriding objective of dealing with cases promptly, effectively, efficiently and impartially. At the very least, the 2nd Defendant could have put in some evidence, whether affidavit or documentary to show that Eleazor Ferguson was a *bona fide* purchaser for value without notice. This she has failed to do.
2. I therefore agree with learned Queen’s Counsel Mr. Smith that there are no live issues of fact which should or ought to be determined rendering a full-blown trial unnecessary. As I trawled through the pleadings and the judgments, there was never any issue as to the identity of the land. The drawing which Thaddeus Johnson used as a plan was not a plan to satisfy the provisions of the Quieting Title Regulations and, as Gonsalves-Sabola J found, it was not committed to any land in The Bahamas. The learned judge found that the diagram used by Thaddeus Johnson was not set out on the ground and therefore a useless paper. All that the diagram purported to demonstrate fell within lands belonging to Arawak Homes.

**Conclusion**

1. There will be judgment for Arawak Homes with costs to be taxed if not agreed. In addition, the court declares that the certificate of title granted to Eleazor Ferguson on 28 January 1985 by the Supreme Court in Quieting Action No. 10 of 1982 with respect to Blocks 89, 90, 91, 94, 127, 135, 136 and 164 as identified on the 1926 plan is null and void and of no effect.

**Dated this 23rd day of August, A.D. 2017.**

**Indra H. Charles**

**Justice**