COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
Common Law and Equity Division
2017/CLE/gen/00378

BETWEEN:

ESTER STURRUP
(THE EXECUTRIX OF THE ESTATE OF JULIUS CORNELIUS RAHMING**)**

PLAINTIFF

AND
RUBIN SMITH
AND
ANGELA SMITH

DEFENDANTS

Before: The Hon. Mr. Justice Loren Klein
Appearances: Kenneth Wallace Whitfield for the Plaintiff
Lessiah Rolle for the Defendants
Hearing date: 22 June 2021

RULING

KLEIN, J.

Quieting Titles Act 1959 ("QTA")—Certificate of Title (COT)—Plaintiff and defendants adverse petitioners in quieting title action—Defendants and plaintiff making overlapping claims to disputed parcel of land—Defendants operating tire shop and other business on disputed parcel—Parcel awarded to Plaintiff—Defendants challenging COT granted to them on basis that it did not match their claim based on their amended plan and was inconsistent with the Judgment—Vacant possession—Summary Judgment—Mesne Profits and Damages for Trespass—Setting Aside summary judgment—Whether viable defence disclosed—Summons to set aside COT on grounds of fraud—Need for allegations of fraud to be specific—Extension of time to file Statement of Claim (SOC) and Counter-Claim—Writ of Possession—Application for stay or setting aside of Writ—Grounds—Notice of Intention to Proceed—Whether relating to filing of documents or taking of proceedings—Proprietary Estoppel—Whether proprietary estoppel a defence or claim to justify setting aside summary judgment—Costs—Indemnity Costs

INTRODUCTION AND BACKGROUND

1. This is an application by way of summons brought by the defendants to set aside the plaintiff's writ of possession and the summary judgment on which it is based in respect of a parcel of land occupied by the defendants, but to which both parties lay claim ("the disputed land").

2. The dispute arises from Quieting Titles Action ("QTA") No. 1995/CLE/Qui/00016, in which the plaintiff and defendants were both successful adverse claimants and made overlapping claims to the disputed parcel. That parcel was eventually awarded to the plaintiff following the

trial of that action in 2012, and the certificate of title ("COT") was filed in 2015. This was followed by an appeal to the Court of Appeal by the unsuccessful petitioners in the action, which was dismissed in 2017. However, the defendants refused to vacate the land and the plaintiff filed a writ in 2017 seeking, *inter alia*, vacant possession, which was granted on a summary judgment application in 2018 that was initially contested by the defendants. A writ of possession was later issued in April 2021, and served, but not fully executed.

3. The defendants dispute the accuracy of the COT granted to them on the grounds that it does not include the additional land claimed on their amended plan filed in the QTA action, which included the disputed parcel. Their chief complaint is that as the Judgment itself did not specify the dimensions of the properties to which the Court found the adverse claimants entitled, it must be construed to mean that the defendants had been granted what they claimed. Moreover, they allege that the omission to exclude the additional land from their COT—incidentally drafted by counsel for the plaintiff in an attempt to have the certificates of title perfected before the Judge's imminent retirement from that post—was intentional and amounted to "fraud" and a misrepresentation of the Judgment.

4. I have given careful consideration to the claims of the defendants and there is no need to draw out the result in this matter. In my judgment, and for the reasons given below, the claims of the defendants are misconceived and must be dismissed.

Factual and procedural background

5. This matter cannot be understood without a brief factual and procedural chronology. The defendants are two of six successful adverse claimants in the consolidated Quieting Petition of *Thomas Bertie Davis and High Hills Investment Company Ltd.* (1995/CLE/Qui/00016). The claim involved a large tract of land ("the property") comprising some 18 acres located on Prince Charles Drive, slightly east of Fox Hill Road, in the Eastern District of New Providence. The property is bisected by Prince Charles Drive and the portion on the northern side was designated as "Parcel A" and the southern side as "Parcel B". "Parcel B" is irrelevant to this claim.

6. Following the trial (or more properly the re-trial) of the action during November of 2012, Barnett CJ ("the Judge") refused the claim of the petitioners and granted COTs to six adverse claimants (including the parties in this action) out of "Parcel A" as follows: (i) Parce1 A1 – the Estate of Julius Cornelius Rahming; (ii) Parcel A2 – Mary Gwendola Ferguson; (iii) Parcel A3 – The Estate of Sir Cecil Wallace Whitfield; (iv) Parcel A4 – Mark Bowe; (v) Parcel A5 – Rubin Smith and Angela Smith; and (vi) Parcel B – Roger Lunn Taylor. Esther Sturrup is the Executrix of the Estate of Julius Cornelius Rahming ("the Rahming Estate") and the plaintiff in the writ action out of which these applications arise.

7. I have indicated that the matter was a "retrial" because the trial by Barnett CJ was a retrial of the consolidated petition of *Thomas Bertie Davis,* No. 72 of 1971, heard in 2008. In that trial, Mohammed, J dismissed the claims of the adverse claimants and granted title to some 16.234 acres

to *Bahamas Variety (1989) Company Ltd.* That judgment was set aside by the Court of Appeal (*Calvin George Major v Bahamas Variety (1989) Company Ltd*., SCCivApp. No. 151 of 2008), and a retrial ordered. Coincidentally, the Orders emanating out of 2008 trial were not perfected prior to the retirement of Mohammed J., and the circumstances of the 2012 Judgment and the imminent retirement of the Judge were eerily familiar. Thomas Bertie Davis and High Hills Ltd. were substituted as the petitioners in the 2012 trial.

8. Without the aid of a plan, some description of the geographical configuration of the property is necessary to illustrate the context of the claims. Parcels A5 (Smiths) and A4 (Mark Bowe) have frontage on Prince Charles Drive, but otherwise they are encircled on all sides by the land (3.945 acres) that was awarded to the Estate of Julius Cornelius Rahming. In fact, A5 and A4 were carved out of the claim by the Rahming Estate, which was to the entirety of Parcel A. The grant to the Smiths only included their house and the fenced-in area around it, occupying 9,577 sq. ft. (or 0.241 of an acre).

9. By an amended plan filed 17 August 2012 in the QTA, which was based on a survey commissioned during August of 2012 by the defendants, the defendants claimed an additional area of vacant land of 19,457 sq. ft. to the back (north) and west of their house, totaling 29,034 sq. ft., including the area of the house. That additional land was not granted in their COT. This was the genesis of the problem, because on a small strip of land west of the parcel granted to them (some 3, 390.00 sq. ft., and which has been identified as "A6" on the plans), the Smiths operated a tire repair shop ("R&A Tire Repair") since January 2015, were alleged to have added a catering business in 2016 ("By Faith Catering Food Trucks")—although this was subsequently discovered to have been an operation by a third party facilitated by the Smiths—and expanded the tire bay in 2017.

10. The Orders and COTs emanating from the 2012 QTA were perfected on 19 January 2015, and as related, it appears that counsel for the plaintiff took the lead in drafting them, on the understanding that the Judge was soon to retire from his post, and seeking to avoid a repeat of the situation with the first trial.

11. The defendants are staunchly of the view that they are entitled to the additional property. They say this is so because the Judge simply granted the COTs claimed by the successful adverse claimants without specifying the dimensions of the grant in the Ruling, and therefore he must have had in mind their amended plan when he made the grant. They also contend that the COT does not match the Judge's ruling, as illustrated by the paragraphs where he deals with their adverse claim. Furthermore, they say the dimensions inserted in the COT, and procured by counsel for the plaintiffs, who also represented, *inter alia*, the Rahming Estate in the QTA, fraudulently omitted the proper dimensions of their claim. I will return to this discussion later in this Ruling, but for the time being I return to the procedural history of the matter.

12. On 24 March 2017, the plaintiff filed a generally indorsed writ seeking, among other reliefs, possession of the entirety of Parcel A1, including the area which has been identified as A6,

an order for the defendants to pull down the tire bays and other structures erected on Parcel A6, and damages for trespass and *mense* profits. The statement of claim ("SOC") was filed on 24 March 2017 setting out the claim. The defendants filed a notice and memorandum of appearance on 19 April 2017, at this time represented by the Firm of Cedric Parker & Co.

13. On 2 May 2017, the plaintiff filed a summons pursuant to *R.S.C.* Ord. 14, rule 2, and Ord. 19, rule 7, respectively seeking summary judgment on the reliefs claimed in the SOC and injunctive relief. On that same date, they also filed a Certificate of Default of Defence. Nothing turns on this, however, as it seems the default judgment was never pursued. An affidavit of Esther Sturrup was filed 9 May 2017 in support of the summary judgment application.

14. In response, the defendants filed a summons on 13 June 2017 for a stay of the summary judgment application pending the hearing and determination of an application in QTA No. 00016 of 1995 for the COT granted 19 January 2015 to be amended in accordance with the amended plan filed by the defendants in the quieting title action. This application was dated the 10 May 2017, but it does not appear that it was ever filed.

15. On the 17 January 2018, the plaintiff's summons for summary judgement was heard before Winder J. (as he then was). There does not appear to be a written ruling, but the Order made 17 January 2018 (filed 6 November 2018), recorded that at the hearing the defendants withdrew their summons filed 13 June 2017 for a stay. The summary judgment Order provides as follows:

(i) The defendants deliver to the plaintiff vacant possession of the land the property of the plaintiff situate at Prince Charles Drive, Nassau, Bahamas, known as Parcel A1 (inclusive of Parcel A6), as described in para. 6 of the SOC filed on 25 March 2017 [*metes and bounds description set out*];

(ii) The defendants, whether by themselves or by their servants or agents or visitors or otherwise howsoever be restrained from entering, or crossing or remaining upon the aforesaid land the property of the plaintiff situate at Prince Charles Drive, Nassau, Bahamas, known as Parcel A1 (inclusive of Parcel A6);

(iii) The defendants do pay to the plaintiff damages or *mesne* profits to be assessed for the period from the 19th day of January 2015 until vacant possession is delivered up;

(iv) The defendants do pay to the plaintiff interest pursuant to the Civil Procedure (Award of Interest) Act 1992, on such sum as may be found to be due at the rate of 6.75% per annum from the 19th day of January 2015 to the date of payment.

(v) The plaintiff be at liberty to enter judgment against the defendants in the terms of the statement of claim filed herein;

(vi) The defendants do pay the plaintiff's costs of the action, to be taxed if not agreed.

16. By *ex parte* summons filed 18 February 2019, the plaintiff applied for leave to issue a writ of possession, as well as filed a notice for assessment of damages and *mesne* profits. The application for vacant possession was supported by an affidavit filed by Kenneth Wallace

Whitfield, counsel for the plaintiff, also filed 18 February 2019. The order for leave to issue a writ for vacant possession was granted 22 May 2019, and the Writ of Possession issued 20 April 2021.

17. On 7 June 2021, at this point represented by current counsel (Rolle & Associates), the defendants filed their defence and counterclaim (it appears without leave), and the current summons, by which they seek the following main reliefs:

(i) An order setting aside or staying the Writ of Possession filed the 20th April 2021;
(ii) An order extending or abridging the time within which the defendants are allowed to enter a defence and counterclaim in the matter;
(iii) An order setting aside the judgment in default of defence and/or summary judgment, if any, for being irregularly obtained;
(iv) An order setting aside the Certificate of Title "*drafted by the plaintiff's attorneys on behalf of the Defendants without the Defendants' permission or consent and filed the 19th January 2015, which amounts to fraud*";
(v) An order setting aside the Plaintiff's amended Certificate of Title filed the 6th November 2018, "which amounts to fraud"; and
(vi) An order granting leave that a new certificate of title be issued the Defendants reflecting the defendants' said amended plan filed the 17th August 2012.

The application was supported by the affidavit of Rubin Smith filed 8 June 2021.

18. The defendants contend that the following issues arise for the consideration of the court:

(i) Whether the defendants satisfy the criteria for the grant of a stay;
(ii) Whether the Order filed 19 January 2015 reflects the Judgment of the Court;
(iii) Whether the COT filed 9 January 2015 amounts to fraud;
(iv) Should the Court discharge or stay the Plaintiff's Writ of Possession; and
(v) Are the defendants entitled to the relief of Proprietary Estoppel.

DISCUSSION AND ANALYSIS

19. I deal with the issues raised concerning the 2015 QTA Judgment (orders sought at "iv"-"vi" and issues "ii" and "iii") as preliminary matters, and only briefly, because in my view they are not properly raised on this application and in any event are misconceived. I address them only out of deference to the parties' submissions and, hopefully, to dissuade the defendants from pursuing what is a hopeless cause—alas, aided by counsel.

20. I start with the procedural observation that no relief can be granted in the current Writ action (2017/CLE/gen/00378) in respect of the 2015 Orders made in the Quieting Title Action. If, as the defendants contend, they were of the view that there was an inconsistency between the Judge's ruling and the Order/COTs emanating from it, they could have taken out a motion to have

the Order/COT corrected to align with the Ruling. This could have been done under the court's inherent jurisdiction or what is sometimes called the "*Re Barrell*" jurisdiction at any time before the order was sealed (see, **Re L-B** [2013] UKSC, applied by this Court in **Gabriele Volpi v. Delanson Services Ltd. et. al. & Delanson Services Ltd. v Matteo Volpi et al**. [2020/APP/sts/00013, 00018 & 202/CLE/gen/000632, 22 June 2022]. After sealing, the Court's power would have been limited to correcting clerical errors or accidental slips under what is called the slip rule (formerly *R.S.C.* Ord. 20, r. 1, now *CPR* 42.10). Once the order is sealed, and the error is not accidental or clerical, but substantive, the only remedy is to appeal (**Stewart v Engel and another** [2000] EWCA Civ J0517-3). The defendants were parties to the unsuccessful petitioners' appeal, but made no application in that appeal.

The 2015 QTA claims

21. For what it is worth, the defendants make several points impugning the COT granted to them: (i) that it did not correspond with the amended plan filed in the QTA, and that the Court could only have had their amended claim in mind when granting the order, as no dimensions were specified in the Ruling; and (ii) that the COT is not consistent with the Judgment, which suggests that the entirety of the land claimed by them was awarded. In this regard, the defendants put particular stock on para. 118, 119 and 124 of the Judgment, where the Court said (in relevant part) as follows:

> "118. The Smiths bought their properties on Parcel A from Campbell Davis in 1991 and have been living there and operating a business there since 1991. …
> 119. As at today's date both Mr. Bowe and the Smiths have been in exclusive occupation for more than 20 years. At no time did the Estate of Kaju [son of Julius Cornelius Rahming] seek to challenge their occupation by injunctive or other relief. It they were now to seek to evict them from the properties the Estate would be met by an unassailable defence under the Limitation Act.
> 124. In summary, I will grant Certificates of Titles to the estate of Julius Cornelius Rahming […] and Ruben and Angela Smith."

22. Further, and strikingly, counsel for the defendants submitted that because the COT does not correspond with the amended plan filed by the defendants, it "*suggests that the said Certificate of Title amounts to fraud*", and asks this Court to declare the COT void *ab initio* and grant leave to amend the COT. (I point out, in passing, that the remedies of a declaration seeking to void the COT and at the same time seeking leave to amend are inconsistent remedies, but nothing turns on this, for the reasons given below.)

23. The plaintiff contends that the defendants' claim is misconceived, as there is no inconsistency in the judgment. She submits that the Judge clearly accepted that the defendants were in possession of the house and the property on which it was located for more than 20 years at the date of the Judgment (the 20-year limitation period applied, under the *1874 Real Property Limitation Act*). But on the defendants' own evidence at trial, they stated that they only entered into occupation of the surrounding or additional property, including A6, from about "2008". They

therefore could not and did not establish the requisite adverse possession over the "additional land" including that on which the tire shop is situated.

24. The plaintiff submits further that once granted, a COT is conclusive and binding, and may only be set aside for fraud as defined in s. 27 of the *Quieting Titles Act 1959*, which imposes a very stringent standard. In **Johnson v Exuma Estates** (1965-70) 1 LRB 214, Smith J. said: "*The general principle is that the court requires a strong case to be established before it will allow judgment to be set aside on this ground*." Section 27 provides as follows:

> "s. 27: If in the course of any proceedings under this Act any person acting either as principal or agent fraudulently and knowingly and with intent to deceive makes or assists or joining in or is privy to the making of any material false statements or representations, or 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 or matter of information, any certificate of title obtained by means of such fraud or falsehood shall be null and void except as against a bona fide purchaser for valuable consideration without notice."

25. The plaintiff submits that the defendants are clearly not able to establish any of these propositions (and in fact they do not purport to rely on any of the statutory grounds) and as a result the claim must be dismissed. Furthermore, they contend that there is nothing on the facts of this case which would bring in within s. 27 of the Quieting Titles Act.

26. They point out, for example, that the evidence in the affidavits of Esther Sturrup, filed in support of the application before this court, and the Wallace Whitfield affidavits clearly show that the alleged "inconsistencies" between the Judgment and Order/COTs were discussed with then counsel for the defendants on 13 January 2015, followed up by email on 19 January 2015, and later in the Judge's chambers on 19 January 2015 with the defendants (or one of them) being present *before* the Order was perfected. The Court confirmed the Order as eventually made, with the grant limited to what was stated in it (the area containing the house). At this point, the defendants were represented by Counsel Elva V. Douglas-Sands. It appears that the Judge (now sitting in a different capacity) was approached a second time by counsel for the plaintiff and defendants (now represented by counsel from Cedric Parker & Co.) at some point before the hearing of the summons for vacant possession on 17 January 2018 for further clarification of the Order. However, the Judge was by this point *functus officio*.

27. Further, it appears that by letter dated 6 February 2018, the defendants (now represented by counsel from Cedric Parker & Co.), offered to purchase not only the area defined as A6, on which the tire repair shop was located, but the adjoining larger area staked in the amended plan. The plaintiff was prepared to sell, as indicated by its reply letter dated 29 June 2018, but on apparently terms were not able to be agreed with the defendants. The significance of this, is that it constitutes acknowledgement of the plaintiff's title, and therefore significantly diminishes if not erodes the defendants' claim to ownership of the property, or that there was any fraud in their COT.

28. The statement in the Judgment that the defendants were occupying the "properties" on which the house was built and operating their business from there since 1991 could possibly have created some uncertainty as to the property being referred to. In this regard, the defendants' evidence was that they had entered onto the disputed property in 2008, but Mr. Smith had also said in evidence that they had cleared parts of the property since the 1990's, and may have parked vehicles on it. The Court obviously did not accept this as sufficient evidence of possession. In any event, the reference to the property occupied by the Smiths was to that bought "*from Campbell Davis*", which was the parcel on which the House was located, as nothing else was sold to the defendants.

29. All of this is academic so far as the proceedings before me are concerned, however. It is clear that this Court has no jurisdiction at all in respect of the Order or COT. The Judge himself became *functus officio* once the Orders were sealed, and the defendants' only remedy was in appeal, or exceptionally in a claim in the QTA based on fraud, which as has been indicated is not borne out on the facts of this case. In any event, it is undisputed that the issue was raised before the Order was perfected by counsel (with parties present). Against this factual background, it is extremely difficult to see how it could lie in the mouths of the defendants to make any allegations of fraud. In my view, the 2015 QTA Judgment is *res judicata*. It has not been appealed by the defendants and the fraud claim is completely without merit.

Application to set aside plaintiff's amended COT

30. The defendants also sought an order setting aside the plaintiffs' amended COT filed 6 November 2018, which they say amounts to fraud. For the reasons given above, such an application is not properly before the Court. But in any event, it can be dealt with in short shrift. It appears this claim arises because the plaintiff, at the hearing of an application for amendment pursuant to *R.S.C.* Ord. 20 on 6 November 2018, was granted leave to amend and the amended COT was filed 6 November 2018. However, the purpose of the amendment was only to add the following to the metes and bounds description of the land's westward boundaries: "…*and partly by land the property of Mark Bowe and running thereon One Hundred and Eighty-nine Hundredths* (108.89) feet…". This is an amendment that clearly came within the slip rule or a clerical amendment, and no issue can be taken with it. As indicated, the claim to set aside the plaintiff's COT is not properly before the Court, but for the record it is dismissed in any event.

Reliefs relating to Writ action

31. As set out above, the defendants seek Orders as follows: (i) setting aside the writ of possession or staying it (apparently pending the trial of the writ action); (ii) extending the time to allow the filing of a defence and counterclaim; and (iii) setting aside the summary judgment. Again, for the reasons given below, I am not of the view that there is merit in any of these claims.

32. As to the stay, the defendants cite the case of **Richard Hayward et al v Striker Trustees Limited et. al.** [2010/CLE/gen/01137], where Charles J. (as she then was) reiterated the wide

jurisdiction of the Court to grant a stay, provided the claimant could show that he would be "ruined" without the stay and was able to establish special circumstances justifying the stay.

33. The principles relating to the grant of a stay are not in doubt, and do not require any exposition here. In my opinion, the only factor asserted by the defendants that might validly be taken into consideration is the claim that the tire shop located on the disputed property is their only source of income. All of the other factors relied on concern the 2015 QTA Judgment, which, as has been indicated, is not properly before this court and in any event is *res judicata.* Further, the stay is only sought (and can only be sought) pending the trial of the action. However, as discussed, the action was tried summarily under *R.S.C.* Ord. 14 on 17 January 2018, and the order for vacant possession granted, as well as leave to enter judgment in the terms of the statement of claim. There is no indication that the defendants appealed the summary judgment. There is, therefore, no basis for a stay unless the Court determines that the summary judgment should be set aside (see further below).

34. In any event, it is to be noted that in cases involving trespassers (and the defendants have been adjudged to be trespassers in the summary judgment) where the claimant proves a title (the plaintiff has a COT), there is generally no discretion to delay enforcement of the writ (**Bibby v Partap** [1966] 1 WLR 931.

35. Turning to the request to set aside the writ, the Court will only set aside a writ of possession if there are proper grounds, such as procedural irregularity or failure to grant proper notice to all occupants, lack of jurisdiction, fraud, abuse of process or oppression.

36. The defendants argued loosely that the writ of possession ought to be discharged on the grounds of "irregularity", which they said was caused by the failure of the plaintiff to make full and frank disclosure of the following: (i) that the defendants had filed an amended plan in the QTA; (ii) that the defendants had filed a summons dated 13 June 2017 to have the COT amended; and (iii) that the plaintiff did not give the one-month notice of an intention to proceed after the elapse of a year or more since the last proceeding required by Ord. 3, r. 5.

37. The plaintiff countered that the defendants' claim of failure to make full and frank disclosure is misplaced and does not arise on the fact of this case. This is because the plaintiff's summons for vacant possession and summary judgment was heard *inter partes* and the defendants summons of the 13 June 2017, along with the affidavit of Rubin and Angela Smith filed 13 June 2017, were before the Court. To the contrary, they contend that it is defendants who have failed to make disclosure of the meetings with the Judge in which the grant was confirmed, the withdrawal of their summons at the hearing of the summary judgment application, and the request by the defendants to purchase the property from the plaintiff.

38. Further, the plaintiffs submit that the application is an abuse of the process of the Court, as virtually all of grounds taken in the summons in opposition to the writ of possession were contained in the 13 June 2017 summons in opposition to the application for the order for vacant

possession on the summary judgment application. As has already been pointed out, the plaintiff also contends that the orders and reliefs sought at paras. "iv" to "vi" of the Summons cannot be made in the "trespass action' (the current action) but only in the Quieting Action (with which the Court agrees).

39. In my view, the allegations of failure to make full and frank disclosure are misplaced on both sides. The hearing on 17 January 2018 for summary judgment for vacant possession and other relief, was *inter partes*, and the Order made on that hearing recorded that counsel for the defendants withdrew their summons of 13 June 2017 seeking a stay of the possession summons pending hearing of their application to amend the COT, which as noted was supported by the affidavits of Rubin Smith, in which the claims in respect of the QTA action had been made. Thus, it was clearly the case that the representations made in relation to the 2015 proceedings were before the Judge. Equally so, the events which it is claimed the defendants failed to disclose are set out in the affidavits of the plaintiff and her counsel, and therefore are currently before the Court. In my view, the allegations of failure to make "*full and frank disclosure to the Court of all matters affecting the claim(s)*" do not advance the case of the plaintiff or the defendants.

40. I also find that the defendants' claim as to lack of proper notice is not sustainable. As indicated, the summons for summary judgment and vacant passion was heard 17 January 2018. According to the affidavit evidence, the defendants were served with the vacant possession order (with a penal notice endorsed) on 22 November 2018. The defendants alleged a violation of Ord. 3, r. 5 because the plaintiff filed a Notice of Intention to Proceed ("NOIP") and the *ex-parte* summons for leave to issue a writ of possession on the same day, 18 February 2019, and a further NOIP was filed on 21 April 2021, one day after filing the writ of possession on the 20 April 2021.

41. There is no merit in these contentions. The plaintiff is right to point out that a correct reading of the Rule is that there should be a least one month's notice before proceedings are *heard* following the last proceeding, not in relation to the sequence of the filing of documents (see, in this regard, the *Commentary 3/6/1* of *The Supreme Court Practice*, ("The White Book") 1995). In this case, the application for leave to issue the writ was not heard and the Order made until the 10 May 2019, and the signed writ of possession dated 9 April 2021, did not issue until 20 April 2021, all well over a month since the NOIP was filed on 18 February 2019.

42. The other provision on which the defendants could possibly rely to assert lack of notice is Ord. 45, r. 3, although this was not specifically invoked. That provision requires that leave is not to be given for the issue of a writ of possession unless every person in actual possession of the whole or any part of the land "*has received such notice of the proceedings as appears to the Court sufficient to enable him to apply to the Court for any relief to which he may be entitled*" before the Court would give permission for the issue of the writ. However, the case law is clear that this rule simply requires the court to be satisfied that the occupant knows sufficient about the "proceedings" to be able to apply for appropriate relief, and does not require notice of the application for leave (see, **Partidge v Gupta** [2018] 1 WLR 1). In fact, the *R.S.C.* specifically provides for an application for leave to be made *ex parte* (Ord. 46, r. 4).

43. In this regard, there is no doubt that the defendants were clearly sufficiently aware of the proceedings to apply for appropriate relief and in fact, the summons taken out to stay the summary judgment application for vacant possession, although later withdrawn, clearly indicate that they did pursue some relief. But the defendants clearly knew that the clock was ticking towards an eventual application by the plaintiff to recover possession.

44. When all of these matters are taken together, there is no credible basis on which the writ of possession can be impugned.

Extension of time to file defence and counterclaim

45. I can take the claim for extension of time in which to file the defence and counterclaim along with the claim to set aside the summary judgment together, since the former is dependent on the outcome of the latter. No submissions were addressed to me on the principles relating to extension of time, but these are settled and generally the court must consider the delay, whether there are any reasons and the question of prejudice to a party (see this Court's decision in **Lucayan Towers South Condominium Association v. Grand Bahamas Utility Company et. al.** (2018/CLE/gen.01480), 212 October 2022).

46. In my view, these principles really do not require any treatment here, as I am unpersuaded that there is any basis on which this Court could or would disturb the summary judgment. As has been related, that judgment was given on 17 January 2018, after a hearing in which counsel for the defendants fully participated and withdrew the summons seeking a stay to allow them to pursue an application to "correct" the COT in the QTA. Even though there does not appear to be a written judgment, the Court clearly accepted that the defendants did not have any defence to the action (the pre-requisite for the grant of summary judgment), and to the extent that their defence was based on the 2015 QTA, it appears that they implicitly conceded this by withdrawing their summons. It also appears that the defendants took no steps to challenge or appeal the summary judgment.

Summary judgment

47. The primary ground for setting aside a summary judgment under Order 14 is if the party against whom judgment has been entered can show a real prospect of success in its defence (or counterclaim) or there are other compelling reasons why it should go to trial (**British and Commonwealth Holdings Plc v Quadrex Holdings Inc.** [1989] EWHC Civ. J0223-3). If the judgment was obtained by fraud, collusion or deliberate misrepresentation, the court may also set it aside (see **Joseph Ackerman v Andrew Robert Thornhill QC and Others** [2017] EWHC 99.

48. A perusal of the defendants' statement of claim and counterclaim (which can only be a draft, as no leave was obtained), reveals that the defendants rely on the same claims raised in

respect of the 2015 Quieting Title Action. Further, as may be seen from para. 26, the defendants repeat the fraud claim as follows:

> "26. The Plaintiff have (*sic)* misrepresented the said judgment of the Court by drafting and filing the fraudulent Certificate of Title and Amended Certificate of Title on behalf of the Defendants and the Plaintiff."

49. The critical question which falls to be considered is whether the defendants can show that they have a real prospect of setting aside the summary judgment, either on the grounds that they have a real prospect of success on their defence and counterclaim, or that the judgment was obtained by fraud. With respect to the first, I am of the opinion that the defendants' draft defence and counterclaim does not disclose any real prospect of success. As has been noted, the Judge clearly confirmed prior to perfecting the Order that the order was consistent with his intent, and in fact the evidence clearly supports this.

50. As to the fraud claim, it is clear that a COT granted by the court is virtually indefeasible, but for a successful allegation of fraud, which the defendants cannot meet. In cases where the party seeks to set aside a ruling on the grounds of fraud (as in all cases involving allegations of fraud), the party must provide clear and convincing evidence of the fraud and not just mere allegations (see **Joseph Ackerman v Andrew Robert Thornhill QC**). In this regard, the Court had before it the defendants' summons and affidavits in support, containing material relating to the challenge to the 2015 Ruling. There is absolutely no factual basis on which the defendants are able to construct a claim that the summary judgment ruling was procured by any misrepresentation of the facts to the court.

51. I therefore conclude that there is no cogent basis on which the 2018 summary judgment should be set aside and it is barred by the principles of *res judicata*. Consequently, there is no basis on which any extension of time should be granted to file the defence and counterclaim and I order those struck out.

Propriety estoppel

52. I note in concluding this section that the defendants also claim, in paragraph 18 of the counterclaim and in their amended summons, filed 24 June 2021 (without leave), that they are entitled in the alternative to the relief of propriety estoppel in respect of the disputed land, and that the Court should compel the plaintiff to convey the fee simple interest in that land to the defendants. They cite the old case of **Willmott v Barber** (1880) 15 Ch. D. 96, which sets out the following elements for a claim founded on proprietary estoppel: (i) that A (the defendants in this case) made a mistake as to his legal rights; (ii) that A expended money or did some other act on the faith of his mistaken belief; (iii) that B (the owner of the property) knew that the rights claimed by A were inconsistent with his rights; (iv) that B knew of A's mistaken belief of his rights; and (v) that B encouraged A in his expenditure of money or in other acts, either directly or by not taking any action to assert his rights. The more modern authorities on proprietary estoppel

highlight assurance, reliance, detriment and unconscionable conduct by the defendant (**Yeoman's Row Management Ltd. and another v. Cobbe** [2008] UKHL 55.

53. In my view, this is not a relief that could in any event be claimed by way of summons, although the defendants have also pleaded it in their draft defence and counterclaim. But while in principle a losing party may assert a claim of proprietary estoppel to claim property rights even after a court has declared that the other party holds the fee simple title, such a claim is likely to be met with the opposing claims of cause of action and issue estoppel, which would create a bar to re-litigating the same issues that could, or should, have been raised in earlier proceedings. In any event, the defendants cannot possibly make out the necessary elements of proprietary estoppel, as they cannot be heard to say that in any way they acted to their detriment in reliance on any assurance or lack of action from the plaintiff. The evidence is uncontroverted that the plaintiff asserted its legal rights to possession of the property and sued for it, and in fact the defendants attempted to purchase the property in 2018.

54. In the result, I find that the claim in propriety estoppel is not properly before the Court on the defendants' summons, and in any event the relief sought cannot be granted on a summons. To the extent that it is pleaded as a potential defence or counterclaim in relation to the plaintiff's SOC and the summary judgment, I am not of the view that it discloses a defence or claim with any real prospect of success, and therefore does not constitute reason to disturb the summary judgment and order a trial.

CONCLUSION

55. In conclusion, and for the reasons given above, I refuse all of the reliefs and orders sought by the defendants in their summons filed 7 June 2021, and amended summons filed 24 June 2021, and would order both summonses struck out and dismissed. I also refuse the Order to extend time to enter a defence and counterclaim, and consequently those pleadings are also struck out.

Costs

56. Counsel for the plaintiff claimed costs on an indemnity basis for the defendant's "*conduct and failure to make full and frank disclosure to the court*." Aside from this statement, the plaintiff did not specify the conduct which was said to justify such an award, although it might be surmised that the plaintiff had in mind that the defendants were pursuing a weak or hopeless claim. The case law is clear that indemnity costs are only appropriate when the conduct of the party is unreasonable to a high degree, or where there is some conduct or other circumstance that takes it well outside the norm: see, **Richmond Pharmacology Ltd. v Chester Overseas Ltd**. [2014] EWHC 3418 (Ch. 2014). In that case, Stephen Jourdan QC, sitting as a deputy High Court judge, summarized the principles and said at "f":

> "(f) The pursuit of a weak claim will not usually, on its own, justify an order for indemnity costs, provided that the claim was at least arguable. However, the pursuit of a hopeless claim or a claim

> which the party pursuing it should have realized was hopeless) may lead to such an order. In *Wates Construction Ltd. v HGP Greentreen Alchurch Evans Ltd.* [2006] BLR 45, HHJ Coulson said: "I consider that to maintain a claim that you know, or ought to know, is doomed to fail on the facts and on the law, is conduct that is so unreasonable as to justify an order for indemnity costs."

57. I will say at once that I was initially attracted to the submission for indemnity costs, as the defendants seem to have thrown caution to the wind in their dogged determination to fight an unwinnable cause, burning through at least four different counsel in the attempt. But I have concluded that it is more in keeping with the principles of fairness that costs be assessed on a standard basis. One of my reasons for coming to this conclusion is that the plaintiff failed to specify the conduct or circumstances said to be egregious enough to take the case out of the norm and attract indemnity costs, and therefore the defendants were not afforded an opportunity to address that claim.

58. Having said that, I think it is also right to point out that counsel has a duty not only to his client, but also to the Court, to refrain from advancing completely hopeless claims and in particular to avoid making allegations of fraud which cannot be substantiated on the facts of the case.

59. I therefore award costs to the plaintiff, which I will summarily assess. In this regard, I request that the parties submit brief written submissions on costs, including any draft statement of costs from the receiving party, within 14 days of this Ruling.

Klein J.

11 September 2025