



In The Supreme Court of Bermuda

CIVIL JURISDICTION

2021: No. 246

BETWEEN:

SAMUEL ANDREW BANKS

Plaintiff

v

**SIMON STOREY
DEIRDRE STOREY**

Defendants

RULING

Date of Hearing: 28 July, 18 October 2023

Date of Ruling: 8 April 2024

Appearances: Jeffrey Elkinson, Britt Smith, Conyers Dill & Pearman, for Plaintiff
Keith Robinson, Oliver MacKay, Carey Olsen Bermuda Limited, for Defendants

RULING of Mussenden J

Introduction

1. This matter appears before me on two Summonses as follows:
 - a. The Plaintiff's Summons dated 25 May 2023 pursuant to Order 24 Rule 3 and/or Rule 7 and/or Rule 16 of the Rules of the Supreme Court seeking orders for specific

discovery of trust documents (“**Trust Documents**”) from the Defendants (“**Specific Discovery Application**”), namely:

- i. All deeds and documents relating to the Vita Bella Trust (the “**Trust**”) including the Trust Deed; and
 - ii. All documents touching on or setting out the relationship between the Defendants and the current Trustee and the predecessor trustee of the Trust regarding the ownership, lease and use of the property at 13 Inglewood Lane, Paget, Bermuda (“**13 Inglewood**” or the “**Property**”);
 - iii. All correspondence and documents relating to any permission sought by and/or given to the Defendants from the current Trustee and the predecessor trustee of the Trust in relation to 13 Inglewood and its use; and
 - iv. All correspondence and documents relating to any governmental notices given by the Defendants to the current Trustee and the predecessor trustee of the Trust in relation to 13 Inglewood.
- b. The Specific Discovery Application is supported by the Seventh Affidavit of the Plaintiff (“**Banks 7**”). The application is opposed by the Defendants and is supported by the Fourth Affidavit of Oliver Jake MacKay of Carey Olsen (“**MacKay 4**”).
- c. The Plaintiff’s Summons dated 28 June 2023 pursuant to Order 15, rule 6 and Order 20 rule 5 for Omnium Trust Company Limited and Clarien Trust Limited¹ as trustees of the Trust be joined as Second Defendants to these proceedings (“**Joinder Application**”) and that the Specially Endorsed Writ of Summons and Statement of Claim dated 23 August 2021 be amended in the form of the attached draft.
- d. The Joinder Application is supported by Banks 7 and the Eighth Affidavit of the Plaintiff (“**Banks 8**”). The application is opposed by the Defendants and is supported by the MacKay 4.

¹ It was not in dispute that Omnium Trust Company Limited and Clarien Trust Limited amalgamated and as a result, Omnium Trust Company Limited has ceased to exist as a distinct corporate entity.

General Background

2. The parties are neighbours. The Plaintiff is the owner, since 2001, of 17 Inglewood Lane (“**17 Inglewood**”) in Paget Parish and the Defendants are the owners, since 2012, of the neighbouring property 13 Inglewood. Disputes have arisen between them in respect of trespass and nuisance. A Specially Endorsed Writ of Summons was issued 23 August 2021 (the “**Writ**”). The Statement of Claim (the “**SOC**”) set out that there are boundary issues of trespass, nuisance, and conversion and seeks various orders including injunctions and damages.
3. A Defence and Counterclaim has been filed and a Reply and Amended Defence to the Counterclaim has been filed.
4. On 18 March 2022 the parties provided discovery by mutual exchange of lists of documents and subsequently exchanged copies of the documents referenced therein. There have been further applications, Orders and additional discovery and production on the part of both parties.
5. I have set out the detail background in previous Rulings in this matter.

Joinder Application

The Limitation Act

6. Section 33(1) and (2) of the Limitation Act 1984 state as follows:

“Fraud; concealment; mistake

(1) Subject to subsection (3), where in the case of any action for which a period of limitation is prescribed by this Act, either—

(a) the action is based upon the fraud of the defendant; or

(b) any fact relevant to the plaintiff’s right of action has been deliberately concealed from him by the defendant; or

“(c) the action is for relief from the consequences of a mistake, the period of limitation shall not begin to run until the plaintiff has discovered the fraud, concealment or mistake (as the case may be) or could with reasonable diligence have discovered it.

Reference in this subsection to the defendant include references to the defendant's agent and to any person through whom the defendant claims and his agent.

(2) For the purposes of subsection (1), deliberate commission of a breach of duty in circumstances in which it is unlikely to be discovered for some time amounts to deliberate concealment of the facts involved in that breach of duty."

Rules of the Supreme Court 1985 ("RSC") governing Joinder and Amendment

7. RSC Order 15 rule 6 states as follows:

"15/6 Misjoinder and non-joinder of parties

(1) No cause or matter shall be defeated by reason of the misjoinder or nonjoinder of any party; and the Court may in any cause or matter determine the issues or questions in dispute so far as they affect the rights and interests of the persons who are parties to the cause or matter.

(2) At any stage of the proceedings in any cause or matter the Court may on such terms as it thinks just and either of its own motion or on application—

(a) ...

(b) order any of the following persons to be added as a party, namely—

(i) any person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon, or

(ii) any person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which in the opinion of the Court it would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter;

but no person shall be added as a plaintiff without his consent signified in writing or in such other manner as may be authorised."

8. RSC Order 20 rule 5 states as follows:

"20/5 Amendment of writ or pleading with leave

(1) Subject to Order 15, rules 6, 7 and 8 and the following provisions of this rule, the Court may at any stage of the proceedings allow the plaintiff to amend his writ, or any party to amend his pleading, on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct.

(2) Where an application to the Court for leave to make the amendment mentioned in paragraph (3), (4) or (5) is made after any relevant period of limitation current at the date of issue of the writ has expired, the Court may nevertheless grant such leave in the circumstances mentioned in that paragraph if it thinks it just to do so.

(3) An amendment to correct the name of a party may be allowed under paragraph (2) notwithstanding that it is alleged that the effect of the amendment will be to substitute a new party if the Court is satisfied that the mistake sought to be corrected was a genuine

mistake and was not misleading or such as to cause any reasonable doubt as to the identity of the person intending to sue or, as the case may be, intended to be sued.

(4) ...

(5) An amendment may be allowed under paragraph (2) notwithstanding that the effect of the amendment will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the action by the party applying for leave to make the amendment.”

The Plaintiff's Submissions

9. Mr. Elkinson submitted that the Plaintiff seeks to join a party who is the owner of 13 Inglewood as a defendant to the proceedings. This is a result of the Defendants informing the Plaintiff that that the second purchaser and owner of 13 Inglewood is Clarien Trust Limited (“**Clarien**” or the “**Trustee**”), merged with Omnium Trust Company Limited, described as trustee of the Trust. Mr. Storey is settlor of that Trust.
10. Banks 8 set out that the Defendants only recently disclosed that they are beneficiaries of the Trust and that 13 Inglewood was purchased jointly with the Trust and is controlled by the Trust. It asserted that counsel for the Storeys have put forward that the Storeys are the “real owners” by virtue of having a life interest in 13 Inglewood.
11. Mr. Elkinson submitted that an important indicia of “real ownership” is missing. A real owner can hold and produce the Deed Pack for the property when legally required, in this case, as ordered by the Court, so that documents which this Court has held are relevant to the action would be disclosed by the Storeys. However, the Court was informed that the Storeys do not have them, that they are held by someone called a trustee and the Court has heard how not only could the Storeys not produce them but that the Storeys needed to give permission to divulge who the trustee is. Further, that they need the Trustee’s permission to have the Deed Pack - which the Defendants had refused for the best part of a year to disclose, with three had fought applications made by the Plaintiff to obtain documents which should have been disclosed in March 2022 but were not - to be told that the Trustee will only allow limited access to view limited documents in the Deed Pack. The resultant position was that 16 months since mutual discovery, the Plaintiff still has not seen a

complete copy of the Deed Pack contrary to the Court Order that the Defendants produce it.

12. Mr. Elkinson submitted that the Defendants are described by their attorneys as beneficiaries, thus it is clear that the Defendants hold a beneficial interest in the property and that they have a life interest. In respect of the same, the law in Bermuda was clear as regards the rights and interest of life tenants which differs to English law which did not apply. A conveyance, dated 17 December 2012, conveyed 13 Inglewood from various parties to the Storeys (the “**Conveyance**”) as “First Purchasers” and the Westport Trust Company Limited as the Trustee of the Trust as “Second Purchaser”. The document expressly provided that there are two purchasers and that 13 Inglewood is conveyed to the First Purchasers for their joint natural lives and upon the death of the survivor onto the Second Purchaser, that is, the Trustee in fee simple.

13. Mr. Elkinson submitted that it is only an estate in fee simple which approaches as near to absolute ownership as the system of tenure will allow. Thus the Trustee is the absolute owner. In respect of life interest, the position at general law as it applies in Bermuda is set out in *Halsbury’s Laws of England (First Edition)* para 328 et seq Section 3 “*Estate for Life*”.

“328. An estate for life is an estate of mere freehold as distinguished from estates of inheritance. The estate may be for the life of the tenant or for the life or lives of the other persons. These estates are known as an estate for life and an estate pur autre vie, respectively.

330. An estate for life arises expressly where land is granted to a person for his life. If the estate is given for life, but without mentioning whose life, it is presumed to be for the life of the grantee, unless the grantor has only power to grant as estate for his own life, and then the estate is for the life of the grantor.

An express estate for life may be limited so as to be determinable during the life on a specified event, such as a limitation to a woman during widowhood, and, although a clause merely prohibiting alienation is repugnant and void, yet the clause is effectual if it is expressed so as to make the estate determinable on bankruptcy or alienation.

333. A tenant for life has the right to the full enjoyment of the land during the continuance of his estate, subject to the duty of leaving it unimpaired for the remainderman; this duty is defined by the doctrine of waste. Waste is either voluntary, such as felling timber, opening mines, and pulling down houses; or permissive, such as allowing houses to fall apart into disrepair. A tenant for life is liable for voluntary

waste, but not for permissible waste, unless his estate is expressly made subject to the condition of maintaining the premises.

334. A tenant for life may, on the creation of his estate, be made dispensable for waste. This is done by limiting the estate to him for life “without impeachment for waste”, and such exemption may be either general, or may exclude a particular kind of waste. He is then liable only in respect of the excepted waste, if any, and also in respect of such waste – known as equitable waste – as in the view of a court of equity is not properly within the exemption, that is, the wanton destruction of houses and the felling of timber planted or left standing for ornament or shelter.

14. Mr. Elkinson relied on the *Lewis Bowles Case* [1558 – 1774] All ER Rep 534 which set out the general principle:

“It is without question that the lessor has the general ownership and the right of inheritance of the houses and timber trees, and the lessee has but a particular interest, and therefore, be they pulled down or felled by the lessee or any other, or by wind or tempest blown down, or by any other means disjoined by the inheritance, the lessor shall have them in respect of his general ownership, and because they wear his inheritance.”

15. Mr. Elkinson submitted that the case law prior to the English Settled Land Act 1882 (and the later 1925 Act) is informative and applicable although Bermuda did not introduce them. Thus, the position at general law prior to that time is clear: the lessor has general ownership and the lessee has but a particular interest, that is, a beneficial interest. Further, the Conveyance itself confirms the position at law – upon the sale of 13 Inglewood, the former owner conveyed the property to the First and Second Purchasers and subject to powers and provisions of the Settlement. Thus, that is how the Defendants hold 13 Inglewood.

Joinder and amendment

16. Mr. Elkinson submitted that the joinder application is required as a necessary party is missing from the action, that being the Trustee who is the joint purchaser, trustee and reversionary interest holder of 13 Inglewood. The application was made pursuant to Order 15, rule 6 of the RSC. Mr. Elkinson submitted that the test in Order 15, rule 6(2)(b)(i) and (ii) apply in this case as the Trustee is a necessary party and there is a question or issue arising out of the relief claimed which would be just and convenient to determine between it and the parties to the action. Further, the application also seeks consequential

amendments to the Writ and SOC although such amendments do not include a new cause of action or new particulars. Mr. Elkinson argued that Order 15 rule 6 prevents an action being defeated by the misjoinder or nonjoinder of parties and it provides for any necessary amendment in respect of the parties to an action being made at any stage of the proceedings. He relied on *Van Gelder v Sowerby Bridge Society* (1890) 44 Ch. D. 374 at 391 and 394, CA and referred to the 1999 White Book at para 15/6/2.

17. Mr. Elkinson submitted that the rule should be construed such that it brought all parties to a dispute relating to one subject matter before the Court at the same time so that disputes could be determined without the delay, inconvenience and expense of separate actions and trials. He relied on Lord Esher M.R. in *Byrne v Brown* (1889) 22 Q.B.D. 657 at 666-7, *Montgomery v Foy* [1895] 2 Q.B. 321 at 324 and *The W. H. Randall* [1928] P. 41, CA.
18. Mr. Elkinson submitted that the court retains a discretionary power to refuse the Order, relying on *Lancaster Banking Co. v Cooper* (1879) 9 Ch. D 594 or to impose terms. However, generally the Court will make all such changes in respect of parties as may be necessary to enable an effectual adjudication to be made concerning all matters in dispute, again relying on *Van Gelder v Sowerby Bridge Society* and other cases.
19. Mr. Elkinson submitted that the 1999 White Book provides that this rule must be read closely with and subject to the provisions of section 35 of the English Limitation Act 1980 which is different from the Bermuda Limitation Act 1984 which does not have an equivalent to section 35. He referred to Carey Olsen's position that it was not permissible to join the Trustee due to the "relation-back" rule which, it was asserted, would deny the Trustee a limitation defence. Mr. Elkinson submitted that that rule is a feature of English law which derived from section 35 of the English Limitation Act 1980 and which should be treated with caution as section 35(1) provides that new claims made in the course of an action shall be deemed to have commenced on the same date as the original action rather than on any later date, such as the date of service of the amended application. The effect would allow a plaintiff to pursue actions that would have been time barred thus depriving

defendants of limitation defences. Mr. Elkinson stressed that no new causes of action were being added by the joinder.

20. Mr. Elkinson submitted that the Defendants mischaracterize the proposed amendments to the Writ and SOC as amendments under RSC Order 20 whereas the application is strictly for joinder and it is only where an amendment is found to be more than consequential or necessary that an Order under RSC Order 20 becomes necessary. Thus, the Defendants have erroneously relied on the “relation back” point. Mr. Elkinson asserted that the Plaintiff’s position is that the period of limitation has not expired due to the fact that the Plaintiff only learned of the Defendant’s wrongful acts in 2019 and is therefore entitled to rely on an extension of the ordinary time limits under section 33 of the Limitation Act 1984. Additionally, Mr. Elkinson submitted that the proposed amendments do not seek to add a new cause of action or new particulars – they are consequential upon the relatively recently disclosed existence of the Trustee, stressing that the Defendants continues to fail to properly make discovery of all the documentation between them and the joint purchaser, the Trustee. To that point, the joinder does not give rise to a new set of facts, there is nothing new for the Trustee to investigate beyond the existing claim and thus there can be no prejudice.
21. Mr. Elkinson submitted that should orders under RSC Order 20, rule 5 become necessary, then it need not go beyond seeking relief pursuant to rule 5(1) and that rule 5(2) is not relevant because the limitation period has not expired, noting that that rule gives the Court power to allow the amendment in circumstances where time has expired.
22. Mr. Elkinson submitted that it is a guiding principle of cardinal importance that generally speaking, all such amendments ought to be made “for the purpose of determining the real question in controversy between the parties to any proceedings or of correcting any defect or error on any proceedings, relying on Jenkins L.J. in *G. L. Baker Ltd. v Medway Building & Supplies Ltd* [1958] 1 W.L.R. 1216 at 1231 and Bowen L.J. in *Cropper v Smith* (1883) 26 Ch.D. 700 at 710-711 where he stated “... *It seems to me that as soon as it appears that the way in which a party has framed his case will not lead to a decision of the real matter*

in controversy, it is as much a matter of right on his part to have it corrected if it can be done without injustice, as anything else in the case as a matter of right". Thus Mr. Elkinson submitted that it was matter of right to have the 'mistake' corrected noting that the 'mistake' was no fault of the Plaintiff as the true ownership had been concealed until the admission that they were beneficiaries.

23. Mr. Elkinson submitted that in essence, the Trustee needed to be a party to the action because there are orders sought that may affect their interest, namely that part of the house has been constructed on the Plaintiff's property and the Plaintiff has a claim for adverse possession as against the owner of the land to the north of the Trustee's property. Also, there is an issue of the deemed knowledge of the Trustee in relation to the construction of the part of the house that is on the Plaintiff's property, the construction of the roadway constructed over the Plaintiff's property which engaged the destruction of woodland reserve of 6000 to 70000 square feet on the Plaintiff's property as well as the destruction of coastal and woodland reserve on the Trustee's property. Thus, the trustee's interest in the matters in dispute arises out of its interest as the legal owner of the Property. Further, the party which has legal ownership is the party which ought to be joined and would have been joined if the Defendants had not pleaded that they were the owners of the property.

24. Mr. Elkinson submitted that in respect of Carey Olsen's suggestion that rather than join the Trustees in the present action, the Plaintiff could issue separate proceedings and thereafter consolidate the actions, was not an appropriate solution. He asserted this would only be appropriate if the relation back rule was relevant, which it was not and where the exception was not engaged. However, the exception rule was engaged.

The Defendants' Submissions

25. Mr. Robinson submitted that in respect of Clarien, it had been explained to the counsel for the Plaintiff that joinder would be contrary to the RSC. It was also explained why the Plaintiff has erroneously attempted to join Omnium Trust Company Limited to the proceedings. In its letter dated 10 July 2023 to Conyers, Carey Olsen set out that the draft

Amended Writ pleads, inter alia, a claim in tort against Clarien. Should the Plaintiff be permitted to amend his Writ, then Clarien would, because of the “relation back” principle, be denied an accrued defence pursuant to the Limitation Act 1984. Thus, the appropriate course of action is to issue separate proceedings against Clarien and then apply pursuant to Order 4 of the RSC to have the actions consolidated or heard at the same time. Carey Olsen explained that they had instructions to accept service of any such proceedings issued against Clarien and would not object to any subsequent application pursuant to Order 4.

26. Carey Olsen also explained in its letter that Banks 8 had referred to the trustees of the Trust “...as owners” of 13 Inglewood and of the subject property being “held in trust”. Reference was made to paragraph 6 of Banks 8 where it was asserted that “*the Trustees have an interest in the matters in dispute and questions or issues to be determined as legal owner of the property where the Defendants are beneficiaries of the Vita Bella Trust and occupy the property owned by the Trustees*”. Relying on MacKay 4, Carey Olsen explained that Banks 8 contained materially false averments because Clarien’s interest in the property is a remainder interest in fee simple with the Defendants holding title to the property for their natural lives. The Deed stated that in relation to the conveyance from the previous owners that:

“unto the First Purchasers [the Defendants] and the Second Purchaser [now Clarien Trust] ALL THAT Property TO HOLD the same onto the First Purchasers for the duration of their joint natural lives without impeachment for waste and upon the death of the survivor of the First Purchasers unto the Second purchaser in fee simple upon the trusts and subject to the powers and provisions of the Trust.

27. Mr. Robinson submitted that in a case where the evidence in support of the Joinder Summons contained materially false apprehensions, forming the evidential basis for the Joinder Application, it should be dismissed.

Specific Discovery Application

Rules of the Supreme Court 1985 (“RSC”) and the White Book governing Discovery

28. RSC Order 24 rule 1 and states as follows:

“24/1 Mutual discovery of documents

(1) After the close of pleadings in an action begun by writ there shall, subject to and in accordance with the provisions of this Order, be discovery by the parties to the action of the documents which are or have been in their possession, custody or power relating to matters in question in the action.”

29. The White Book at 24/2/11 in relation to the words “relating to matters in question” states as follows:

“These words refer, not to the subject matter of an action, but to the questions in the action. So, in an action for possession of title of land, where the plaintiff’s title is in question, they refer to the title, not the land ... any document which is reasonable to suppose, “contains information which may enable the party (applying for discovery) either to advance his own case or to damage that of his adversary, if it is a document which may fairly lead him to a train of inquiry which may have either of those consequences” must be disclosed. (Compagnie Financiere du Pacifique v Peruvian Guano Co (1882) 11 QBD 55 at 63)”

30. RSC Order 24 rule 3 states as follows:

“24/3 Order for discovery

(1) Subject to the provisions of this rule and of rules 4 and 8, the Court may order any party to a cause or matter (whether begun by writ, originating summons or otherwise) to make and serve on any other party a list of the documents which are or have been in his possession, custody or power relating to any matter in question in the cause or matter, and may at the same time or subsequently also order him to make and file an affidavit verifying such a list and to serve a copy thereof on the other party.

(2) Where a party who is required by rule 2 to make discovery of documents fails to comply with any provision of that rule, the Court, on the application of any party to whom discovery was required to be made, may make an order against the first-mentioned party under paragraph (1) of this rule or, as the case may be, may order him to make and file an affidavit verifying the list of documents he is required to make under rule 2 and to serve a copy thereof on the applicant

(3) An order under this rule may be limited to such documents or classes of document only or to such only of the matters in question in the cause or matter, as may be specified in the order.”

31. RSC Order 24 rule 7 states as follows:

“24/7 Order for discovery of particular documents

(1) Subject to rule 8, the Court may at any time, on the application of any party to a cause or matter, make an order requiring any other party to make an affidavit stating whether any document specified or described in the application or any class of document so specified or described is, or has at any time been in his possession, custody or power, and if not then in his possession, custody or power when he parted with it and what has become of it.”

(2) An order may be made against a party under this rule notwithstanding that he may already have made or been required to make a list of documents or affidavit under rule 2 or rule 3.

(3) An application for an order under this rule must be supported by an affidavit stating the belief of the deponent that the party from whom discovery is sought under this rule has, or at some time had, in his possession, custody or power the document, or class of document specified or described in the application and that it relates to one or more of the matters in question in the cause or matter”

32. The White Book at 24/7/2 provides the following commentary:

“... the second (and more important) qualification is that under the present rule an application may be made for an affidavit as to specific documents or classes of documents. This must be supported by an affidavit stating that in the belief of the deponent the other party has or has had certain specific documents which relate to a matter in question. But this is not sufficient unless a prima facie case is made out for (a) possession, custody or power, and (b) relevance of the specified documents. (Astra National Productions Ltd. v Neo Art productions Ltd [1928] W.N. 218). This case may be based merely on the probability arising from the surrounding circumstances or in part on specific facts deposed to.”

33. RSC Order 24 rule 8 states as follows:

“24/8 Discovery to be ordered only if necessary

On the hearing of an application for an order under rule 3 or 7 the Court, if satisfied that discovery is not necessary, or not necessary at that stage of the cause or matter, may dismiss or, as the case may be, adjourn the application and shall in any case refuse to make such an order if and so far as it is of opinion that discovery is not necessary either for disposing fairly of the cause or matter or for saving costs.”

34. RSC Order 24 rule 11 states as follows:

“24/11 Order for production for inspection

(1) If a party who is required by rule 9 to serve such a notice as is therein mentioned or who is served with a notice under rule 10(1)—

(a) fails to serve a notice under rule 9 or, as the case may be, rule 10(2), or

(b) objects to produce any document for inspection, or

(c) offers inspection at a time or place such that, in the opinion of the Court, it is unreasonable to offer inspection then, or, as the case may be, there, then, subject to rule 13(1), the Court may, on the application of the party entitled to inspection, make an order for production of the documents in question for inspection at such time and place, and in such manner, as it thinks fit.

(2) Without prejudice to paragraph (1), but subject to rule 13(1) the Court may, on the application of any party to a cause or matter, order any other party to permit the party applying to inspect any documents in the possession, custody or power of that other party relating to any matter in question in the cause or matter.

(3) An application for an order under paragraph (2) must be supported by an affidavit specifying or describing the documents of which inspection is sought and stating the belief of the deponent that they are in the possession, custody or power of the other party and that they relate to a matter in question in the cause or matter.”

35. RSC Order 24 rule 13 states as follows:

“24/13 Production to be ordered only if necessary, etc.

(1) No order for the production of any documents for inspection or to the Court shall be made under any of the foregoing rules unless the Court is of opinion that the order is necessary either for disposing fairly of the cause or matter or for saving costs.

(2) Where on an application under this Order for production of any document for inspection or to the Court privilege from such production is claimed or objection is made to such production on any other ground, the Court may inspect the document for the purpose of deciding whether the claim or objection is valid.”

36. RSC Order 24 rule 16 states as follows:

“24/16 Failure to comply with requirement for discovery, etc.

(1) If any party who is required by any of the foregoing rules, or by any order made thereunder, to make discovery of documents or to produce any documents for the purpose of inspection or any other purpose fails to comply with any provision of that rule or with that order, as the case may be, then, without prejudice, in the case of a failure to comply with any such provision, to rules 3(2) and 11(1), the Court may make such order as it thinks just including, in particular, an order that the action be dismissed or, as the case may be, order that the defence be struck out and judgment entered accordingly.”

The Plaintiff's Submissions

37. Mr. Elkinson submitted that not one document on the Defendant's List of Documents relates to the Trust or its purchase of 13 Inglewood with the Storeys. The Trustee was described on the Conveyance which Mr. Benedek produced as the “Second Purchaser”.

Mr. Elkinson submitted that the verifying affidavit of Mr. Storey does not make any reference to the Trust and it was clear that Mr. Storey did not want the existence of the Trust to be disclosed.

38. Mr. Elkinson submitted that as it is now known that the Trust exists, the date of the settlement, that the trustee was the Second Purchaser contemporaneously with the Defendants, that it has an interest in 13 Inglewood and that the Defendants are beneficiaries of it. Thus the Plaintiff seeks specific discovery of a number of documents set out in the Specific Discovery Application.

39. Mr. Elkinson submitted that it was evident that there is insufficient disclosure as set out in Banks 7, namely Trust Documents which are relevant. Further, it was clear from the Defendants' own documents that there has been non-compliance with the Defendants' discovery obligations. Thus the Trust Documents requested are necessary for the proper determination of the issues in these proceedings, without which there was a real risk that any default in discovery would prejudice the Plaintiff, render the fair trial of the action impossible and any judgment in favour of the Defendants unsafe.

40. Mr. Elkinson submitted that under Order 24, rule 16, if the party who is required by Order 24, rule 3 and/or 7, or by any order made thereunder to make discovery of documents, and fails to comply, then the Court may make any order that the action be dismissed or that the Defence be struck out and judgment entered accordingly. With reference to the White Book 1999 at 24/16/2, the usual application and order would be that the action is dismissed or the Defence struck out unless the party complies with the rule or order by a stated date and time.

41. Mr. Elkinson submitted that the relief sought is that a failure at this stage is a peremptory order that the Defendants' Defence and Counterclaim be struck out and judgment entered accordingly in light of the Defendants' prior and repeated non-compliance with their discovery obligations, deliberate concealment of the existence and the name of the Trustee, and deliberate suppression of documents, which should have been disclosed in March

2022. Mr. Elkinson referred to *Re Jardine Strategic Holdings Limited* [2022] SC (Bda) 90 Civ where Hargun CJ stated that there can be no cross-examination on an affidavit of documents. Thus the alternative relief available to the Plaintiff is the granting of an order under Order 24, rule 16.

The Defendants' Submissions

42. MacKay 4 set out a number of issues with the Specific Discovery Application including that: (i) the Trust Deed contains confidential information relating to the beneficiaries, which is not relevant to any matter in issue in these proceedings; (ii) the issues of ownership and the occupation of 13 Inglewood as well as the relationship between the Defendants and the Trustee were not issues in dispute and therefore not relevant to any matter; (iii) the information sought is in any event evident from the Conveyance; (iv) Banks 7 has failed to show how documents concerning prior trustees of the Trust are relevant; and (v) Banks 7 has failed to provide evidence for the belief that any governmental notices exists.
43. Mr. Robinson submitted that the Plaintiff's application is imprecise and conflates a number of types of discovery applications. He also submits that the Plaintiff has not evidenced, and is unable to demonstrate, that the threshold for discovery, set out in RSC Order 24, rule 3 along with Order 24, rule 11, is met by any of the categories of documents, namely that none of the documents relates to "*one or more of the matters in question in the cause*".
44. Mr. Robinson submitted that he reason for this is because the Plaintiff has misunderstood the basis of the Defendants' and Clarien's title to 13 Inglewood despite having received a copy of the Conveyance. That Conveyance set out successive interests in that: (i) the Defendants were conveyed a life interest, meaning they own the property for the duration of their lives; and (ii) Clarien was conveyed the fee simple in remainder by the prior owns of the fee simple when the life estate was conveyed to the Defendants. Thus, Clarien's interest in the land is a future interest, postponed until the time of the later of the two Defendants' deaths. Mr. Robinson submitted that the two distinct types of estate co-exist

but carry different rights, most importantly the right to possession and enjoyment of the property. He relied on *Wylie, Irish Land Law* at paras 4.143, 4.145, 5.002 and 5.007.

45. Mr. Robinson submitted that assertions in Banks 7 and Banks 8 were not correct to state that the Defendants were occupying 13 Inglewood as beneficiaries of a trust, meaning that the Plaintiff is proceeding on an incorrect basis that the current right of possession of 13 Inglewood is as asset of the Trust and that Clarien therefore has the only estate in the property and has given the Defendants some form of permission to reside there. Thus, this basis is wrong. Mr. Robinson argued that the correct position was that the Defendants are not occupying 13 Inglewood with permission of Clarien as they do not need permission, rather they have a current right of possession during their lifetimes, whilst Clarien has no right of possession. It has the remainder interest in the fee simple of 13 Inglewood.
46. Mr. Robinson submitted that it was understandable that Clarien held the deeds of 13 Inglewood as it was because of the Conveyance provision and thus it was logical to do so. He relied on *Re Trott (Deceased); Raynor v Wilson* [2005] Bda LR 7 at 3/37.
47. Mr. Robinson submitted that in light of the reasons stated above, Banks 7 cannot and does not identify any matter in issue in these proceedings to which Trust Documents could relate, Further, there is no claim or counterclaim made in any pleading, nor any dispute between the parties, as to: (a) the ownership of 13 Inglewood; (b) the relationship between the Defendants and the Trustee; or (c) the occupation of 13 Inglewood. Also, none of these issues are in dispute because the Conveyance evidences all of these on its face and that evidence cannot be contravened. Thus, the Defendants came into possession of 13 Inglewood by way of the Conveyance and it is during that possession that the alleged tortious acts have occurred.
48. Mr. Robinson submitted that it is for the same reasons that there is no basis upon which information concerning the Trust arrangements between Clarien and the Defendants could advance the Plaintiff's case on trespass or nuisance or damage the Defendants' case on

trespass or nuisance. Thus, the fact of the Trust relationship does not and cannot assist or prejudice either party's claims in tort.

49. Mr. Robinson submitted that paras 31 and 32 of Banks 7 was not correct to seek to connect the issues to the proceedings on the basis that the parties' respective property rights could be affected by the remedies sought as Clarien only has a remainder interest in the property, gaining possession only after the death of the both Defendants. Further, the future right to possess does not make the Trust Documents relate to the disputed issues in the proceedings. In any event, any information concerning Clarien's remainder interest is contained in the Conveyance and would not be found in the Trust Documents.

50. Mr. Robinson submitted that Order 24, rule 8 outlines a second requirement; that neither a verified list pursuant to Order 24, rule 3, or an Order 24, rule 7 affidavit will be ordered where the court considers that discovery is not necessary either for disposing fairly of the cause or matter or for saving costs. He submitted that there was no information that could be contained in any of the documents sought in discovery that could dispose of the matter or save costs. The documents described in the Plaintiffs' discovery application pertain to the relationship between the Defendants and a third-party trustee with a remainder interest. The questions to be disposed of are whether trespass and/or nuisance have been committed and what the appropriate remedies are if they have. Further, the Plaintiff had not identified any information in the trust Documents that would assist the Court in making those findings. There is no question or issue concerning the trust relationship in this matter.

51. Mr. Robinson submitted that the discovery application was a fishing expedition, noting that no lease existed as the Defendants are the current owners and no lease was required. Thus, the answer to the issue as to who holds title to 13 Inglewood is that it is the Defendants and therefor the Trust Documents are not relevant to the pleaded case.

Analysis of the Applications

Joinder Application

52. I am satisfied that I should refuse the Plaintiff's applications for joinder and specific discovery for several reasons. First, I am satisfied that the Conveyance sets out successive interests in 13 Inglewood such that the Defendants have been conveyed a life interest, meaning that they own 13 Inglewood for the duration of their lives. Upon the death of both of them then Clarien has interest by way of being conveyed the fee simple in remainder when the life estate was conveyed to the Defendants. It follows that I am not satisfied that the Defendants occupy 13 Inglewood as a beneficiary of the Trust. I rely on Halsbury's *Halsbury's Laws of England (First Edition)* para 328 et seq Section 3 "Estate for Life" and *Wylie, Irish Land Law* in essence that an estate for life arises expressly where land is granted to a person, in this case, two people, for their lives. Further, as again stated in *Wylie, Irish Land Law* at para 5.002, a future interest in land may be described as any interest with respect to which the enjoyment of the land is postponed to sometime in the future, and at para 5.007 that a remainder is an estate which comes into possession in the future on determination of a prior estate granted by the same conveyance.
53. Second, as *Halsbury's* set out at para 333 the tenant for life has the right to the full enjoyment of the land during the continuance of his estate, subject to the duty of leaving it unimpaired for the remainderman, this duty being defined by the doctrine of waste. I do not accept Mr. Elkinson's argument that because the relief sought will affect the interests of the Trust, that it should be joined to the proceedings at this stage. Rather, I prefer the argument of Mr. Robinson that all the actions complained of have taken place during the possession of the Defendants and thus the doctrine of waste is not engaged.
54. Third, on the basis that only the Defendants enjoy current possession and that the Trust does not and will not until their deaths, I am not satisfied that the requirements of Order 15 (6)(2)(b)(i) and (ii) are met as the Trust is not an entity whose presence is necessary to ensure that all matters in dispute in this case may be determined or adjudicated upon or further whose presence is necessary in relation to the relief and remedy that is sought in

the Writ and SOC which would be just and convenient to determine between the parties to the action.

55. Fourth, although I have set out my findings above to deny the applications, I now turn to the issues about joinder and the defence of limitation. I accept Mr. Elkinson's submission that the Bermuda Limitation Act 1984 does not have a provision that is similar to section 35(1) of the English Limitation Act 1980 which deals with the addition of new claims. To that point, Mr. Elkinson argued that no new claims were being added and the Defendants' misunderstanding of this has led them to stray into the "relation back" terrain. He also argued that all the claims are within the limitation period, a point hotly disputed by the Defendants who have pleaded the defence of limitation in their Defence [at para 11]. I have considered the case of *Lucy v W.T. Henleys Telegraph Works Co. Ltd. Imperial Chemical Industries Ltd., Third Party* [1970] 1 Q.B. 393 (C.A) where the footnotes at [394] show in effect that the RSC Order 15, rule 6 and Order 20, rule 5 as the same as the RSC of Bermuda. In that case it was held [at 395G and at 412C] that "*The inference from the RSC (Order 15, rule 6 and Order 20, rule 5) is that an amendment to add a new defendant is not permissible when a relevant period of limitation affecting the proposed defendant has expired.*" In my view, if I had decided above that the Trust was a necessary party to the proceedings then, notwithstanding the application of section 33 of the Limitation Act 1984 to extend the limitation period in respect of the concealment and mistake issue, I would have still denied the applications because of the contested issues of whether or not one or more of the claims are within the limitation period. I would have done so on the basis that there was available to the Plaintiff an alternative to issue separate proceedings against the Trustee which could then be the subject of a consolidation action, which Carey Olsen has stated on record that the Defendants and Trustee would make no objection.

56. Fifth, I accept that it is understandable that Clarien holds the Deeds for 13 Inglewood. As stated in *Re Trott (Deceased); Raynor v Wilson*, Bell J (as he then was) stated that "*Given that the plaintiff herself had a remainder interest in the property, the likelihood is that she held the deeds both in her personal capacity and in her capacity as a receiver.*"

Specific Discovery Application

57. Sixth, in light of my findings above and decision to not grant the Joinder Application, in my view, it follows that the Specific Discovery Application must fail. To that point, I agree with Mr. Robinson that:

- a. There is no claim or counterclaim made in any pleading, nor any dispute between the parties, as to: (a) the ownership of 13 Inglewood; (b) the relationship between the Defendants and the Trustee; or (c) the occupation of 13 Inglewood;
- b. None of these issues are in dispute because the Conveyance evidences all of these on its face and that evidence cannot be contravened;
- c. There is no basis upon which information concerning the Trust arrangements between Clarien and the Defendants could advance the Plaintiff's case on trespass or nuisance or damage the Defendants' case on trespass or nuisance; and
- d. The fact of the Trust relationship does not and cannot assist or prejudice either party's claims in tort.

58. Seventh, the issues in this case and the questions to be disposed of are whether trespass and/or nuisance have been committed and what the appropriate remedies are if they have. In my view, the Plaintiff has failed to identify any information in the Trust Documents that would assist the Court in determining those issues. Further, I am not satisfied that the disclosure is necessary either for disposing fairly of the case or for saving costs.

Conclusion

59. For the reasons as set out above, I refuse the Plaintiff's Joinder Application and the Specific Discovery Application.

60. Unless either party files a Form 31TC within 7 days of the date of this Ruling to be heard on the subject of costs, I direct that costs in respect of the Plaintiff's Applications shall

follow the event in favour of the Defendants against the Plaintiff on a standard basis, to be taxed by the Registrar if not agreed.

Dated 8 April 2024



LARRY MUSSENDEN
CHIEF JUSTICE