COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

COMMON LAW & EQUITY DIVISION

IN THE MATTER OF THE QUIETING TITLES ACT 1959

2014/CLE/QUI/01039

IN THE MATTER OF ALL THAT piece parcel or lot of land being lot No. 5 block 22539 situate in Fleming Street in the Southern District of The Island of New Providence, Bahamas.

AND

IN THE MATTER OF THE PETITIONERS Kranston Key, Verna Brown, Gerard Brown, Wendall Pedican, John Adderley, Anthony Harris, Denice Black, Tariano Adderley, Anya Jasmin, Shando Johnson, Ellamae Evans and Sharon Whylly

APPLICANTS

AND

ADVERSE CLAIMANT
WALTER CAPRON Respondent

BEFORE: The Honourable Mr. Justice Keith H. Thompson

APPEARANCES: Ms. Maria Daxon of Counsel for the Applicants
Mr. Brian Dorsett of Counsel for the Respondent

HEARING DATES: 04th December, 2018
24th December, 2019

[1] This is an application made by Summons and filed November 26, 2019 by the Respondent pursuant to Order 18 Rule 19(1), (a), (b), (c) and/or (d) and under the inherent jurisdiction of the Court. It is supported by an Affidavit of Walter Capron.

1. That the Petition filed in these proceedings on the 23rd day of July, A.D., 2014 be struck out on the grounds that:-

   a) It discloses no reasonable cause of action as against the Respondent;

   b) It is scandalous, frivolous or vexatious;

   c) It may prejudice, embarrass or delay a fair trial of this action; and/or;

   d) It is otherwise an abuse of the process of the Court.

2. This action be dismissed and that any and all Orders made herein against the said Respondent be set aside or discharged.

3. The Petitioners be made to pay the costs of this application AND such further or other relief as the court may deem just.

HISTORY:

[2] On or about the 4th day of July 2014, the Respondent in the instant matter moved the Magistrates Court in Case No. 5234 of 2014 against the Applicants and obtained an Eviction Order as against the Applicants.

[3] The Applicants/Petitioners filed a Notice of Intention to Appeal in the Supreme Court in APP/00018/2014 BUT FAILED TO FILE THE REQUIRED BOND.

[4] On July 2, Mr. Justice Winder dismissed the Applicants/Petitioners said appeal pursuant to a Notice of Motion filed by the Adverse Claimant on February 27th, 2015.

[5] On the 11th September, 2017 the Adverse Claimant filed his bill of costs in the Supreme Court Appeal Action which said costs were taxed and remain outstanding up to the time of writing this decision.

[6] On November 14th, 2017 the Adverse Claimant filed and subsequently served an Order from the Magistrates Court for vacant possession against the Petitioners in reference to the subject property.

[7] On October 24th, 2018 the Applicants/Petitioners filed an Originating Notice of Motion for Constitutional Relief in Action No. 2018/PUB/CON/00038 supported by an affidavit of Kranston Key on behalf of the Applicant/Petitioners. This particular application was heard by me and at no time during the hearing of the Exparte Application was it disclosed to the Court that the matter had its beginnings in the Magistrates Court. In fact the Court asked counsel why was the matter being brought as a constitutional matter, and counsel simply responded by saying that; "there are several issues but we feel it's a constitutional matter." The genesis of the application was a stay of the Magistrates Order. There was no mention of an appeal nor a written decision and Order from Mr. Justice Winder dismissing the appeal.

[8] The Injunction obtained from me was dated 24th December, 2018. It was perfected on the 04th January, 2019, but never properly served on the Adverse Claimant. Counsel for the Adverse Claimant only received an e-mailed copy in late December, 2019, almost a year after it was perfected.

[9] Action No. 2018/PUB/CON/00038, Action No. 2014/CLE/GEN/QUI/01039 and Civil Appeal No. 14 of 2014 all consist of the same subject matter and parties.

ACTION No. 2014/CLE/QUI/01039.

[10] The Adverse Claimant has made application to have the Petition struck out on the ground set out below:-

Order 18 rule 19, (1), (a), (b) (c) and (2) and (3) provide;

(19) (1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that-

(a) it discloses no reasonable cause of action or defence, as the case may be; or

(b) it is scandalous, frivolous or vexatious; or

(c) it may prejudice, embarrass or delay the fair trial of the action; or

(d) it is otherwise an abuse of the process of the court;

and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

(2) No evidence shall be admissible on an application under paragraph (1) (a).

(3) This rule shall, so far as applicable, apply to an originating summons and a petition as if the summons or petition, as the case may be, were a pleading.

THE RESPONDENT/ADVERSE CLAIMANT'S CASE:

[11] The Applicant/Respondent by way of its summons filed November 26th, 2019 seeks among other things the following;

(a) That the petition filed in these proceedings on the 23rd July 2014 be struck out on the grounds that:-

(i) It discloses no reasonable cause of action as against the Respondent.

(ii) It is scandalous, frivolous or vexatious.

(iii) It may prejudice, embarrass or delay the fair trial of the action; and/or

(iv) It is otherwise an abuse of process.

(b) This action be dismissed and that any and all Orders made herein as against the said Respondent be set aside or discharged.

[12] The Respondent/Adverse Claimant says that these proceedings are the culmination of a series of actions commenced by the Petitioners in an attempt to remain on land which they entered as tenants.

[13] In March 2014, the Respondent/Adverse Claimant obtained Letters of Administration with the Will annexed in the Estate of Eva Musgrove who was the previous owner of the subject property situate Fleming Street.

[14] In July 2014, the Applicant/Respondent took out a summons in the Magistrates Court claiming arrears of rent and an eviction Order against the Petitioners who all occupied the subject land.

[15] Around about July 4th, 2014, subsequent to the obtaining of the Eviction Order, the Petitioners filed a Notice of Appeal in the Supreme Court to set aside the Magistrates Eviction Order.

[16] The Petitioners, via their counsel, in the face of an ongoing appeal of the Magistrates Eviction Order, filed a quieting action on July 23rd, 2014. The Petitioners allowed the Quieting Action (this one) to lay dormant and in abeyance until they ran out of options to prevent their eviction from the subject property.

[17] The appeal from the Magistrate's decision was dismissed on or about July 02nd, 2016 by Mr. Justice Ian Winder, with liberty to apply.

[18] The Petitioners made an application to have the appeal restored but upon hearing the application to restore, the judge dismissed the summons with costs to the Adverse Claimant/Respondent.

[19] The Respondent/Adverse Claimant sought thereafter to enforce the Magistrates Eviction Order in December, 2017 after giving the Petitioners a reasonable period in which to give up vacant possession of the subject land.

[21] That injunction was eventually discharged in December of 2018. On October 24th, 2018, the Petitioners then filed an Originating Notice of Motion for Constitutional Relief pursuant to Articles 15, 17, 20(8), 21, 27 and 28(3).

[22] The Originating Notice of Motion was supported by an affidavit of Kranston Key, which I set out in its entirety to show that it's the same relief which was sought in the appeal of the Magistrates decision and the quieting action.

COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Public Law Division

2018

PUB/Con/0038

IN THE MATTER of a certain provisions of The Bahamas Independence Order 1973 (**"the Constitution"**) and **Articles 15, 17, 20 (8), 21, 27, and 28 (3)** certain other provisions of the Constitution of the Commonwealth of The Bahamas.

AND

IN THE MATTER of **Sections 12, 15, 52,** and **53** of the **Magistrates Act 1897** and certain other provisions of the **Magistrates Act 1897.**

AND

IN THE MATTER of the Decision of Senior Stipendiary and Circuit Magistrate Derence Rolle-Davis making a Decision to grant an Order for Vacant Possession to Mr. Walter Capron on the 4th July, 2014.

AND

IN THE MATTER of the Decision of Senior Stipendiary and Circuit Magistrate Derence Rolle-Davis making a Decision to grant an Order of Immediate Possession, dated the 25th October, 2017 and filed on the 14th November, 2017, against the Applicants to have them vacate premises immediately, whose ownership were being disputed before the Supreme Court.

BETWEEN:-

KRANSTON KEY, VERNA BROWN, GERARD BROWN, WENDALL PEDICAN, JOHN ADDERLEY, ANTHONY HARRIS, DENICE BLACK, TARIANO ADDERLEY, ANYA JASMIN, SHANDO JOHNSON, ELLAMAE EVANS AND SHARON WHYLLY
Applicants

AND

SENIOR STIPENDARY AND CIRCUIT MAGISTRATE DERENCE ROLLE-DAVIS
Respondent

AFFIDAVIT OF KRANSTON KEY

I, **KRANSTON KEY**, of the Western District of the Island of New Providence, one of the Islands of the Commonwealth of The Bahamas made oath and says as follow: -

1. That I make this Affidavit in support of the Applicant's application for Constitutional Relief from the Learned Stipendiary and Circuit Magistrate Derence Rolle Davis' Order dated 4th day of July, 2015, signed on the 25th day of October, 2017 and filed on November 14th, 2017. It stated that the Applicants are ordered to vacate the premises immediately.

2. That I have read the Constitution Motion prepared by my Attorney at law and confirm that the factual assertions are true.

3. That on the 4th July, 2014, I along with the other Applicants appeared before the Respondent for the hearing of Summons filed on the 19th May, 2014, by Mr. Walter Capron for the payment of outstanding rent.

4. That I retained Ms. Clarita Lockhart to represent me in the action commenced by Mr. Capron.

5. On the date of court, Ms. Lockhart was not able to appear at the time of the hearing, because she was dealing with another matter before the Supreme Court. That we informed the Respondent that we had an attorney and that she was in the Supreme Court, but he insisted that the matter proceed without our attorney.

6. The Respondent then asked us to give him reasons why we should be allowed to stay on the property. I informed him that we had a right to the property, because we were on the property for over twelve (12) years without paying rent to anyone and that we truly believed that we were the owners of the property and not Mr. Capron. The Respondent responded by saying "So!"

7. The lawyer who was representing Mr. Capron told the court that the Applicants owe The Respondent a sum of six years rent. He also said that "he doesn't want any rent, he just want them of the property". What was so surprising to me was the fact that we had never paid Mr. Capron any rent at all. We don't know anything about Mr. Capron ever having any dealings with this property. The last time I paid rent was during the year 1999. I had gotten permission from Mr. Glee Musgrove who was the owner of the property to remain on the property as long as I continued to maintain that said property. During this time the Respondent never had given me or the other Applicants the opportunity to question Mr. Capron as to why we should have started to pay him rent. The Judge never gave us the opportunity to take the stand to state our case. I was put at a disadvantage because my attorney was not present and I honestly believed if the judge had heard the matter he would have been able to make a determination that Mr. Capron had no right to claim that property after the statute of limitation was already past.

8. The Respondent, however, ruled in favour of Mr. Capron and went on to ask us how much time we needed to leave the property. We told him one month, but he gave us two (2) weeks.

19. Upon my arrival, I met Mr. Capron along with two gentlemen unknown to me changing my locks. I was told by Police Officers that I had to leave the property, so I sat across the road from the property and observed what they were doing.

20. I truly believe that the Respondent's decision to grant an Order of Vacant Possession to Mr. Capron was not right.

21. I am therefore requesting the court's assistance to determine whether the Respondent had the jurisdiction to make the Orders that were made and whether or not those Orders were in violation of our constitutional rights; as we were not afforded a fair trial and forced to give up our homes.

22. That I believe that the Respondent by the making said Order signed on 25th October, 2017 and filed on the 14th November, 2017 exceeded his Jurisdiction because of the fact that the matter was already statute bared because I had never made any agreement with Mr. Capron Further and the last person whom I made an agreement with had died over 12 years prior to me being brought to court.

23. That the contents of this affidavit are correct and true to the best of our knowledge information and belief.

Sworn to at Nassau)
On the 24th day of)
October
, A.D., 2018)

KRANSTON KEY

BEFORE ME,

NOTARY PUBLIC

[23] When counsel for the Petitioners appeared before me she never disclosed to the court that there was an appeal of the Magistrates Decision nor did she disclose the quieting action which was then before Madame Justice Cheryl Grant-Thompson. Counsel also never disclosed that there was an injunction in the quieting action, which was discharged and that there was an order which sought to move the quieting matter forward. That Order was dated May 17th 2018, perfected November 5th, 2018 and filed May 23rd, 2019.

The following was ordered;

1. All documents are to be filed and served by 28th June, 2018, by Counsel of the Applicants.
2. Response of the Adverse Claimant and the written submissions by counsel of the Applicants to be filed and served by 15th, July, 2018.
3. Response by the Adverse Claimant by 27th July, 2018.

APPLICANTS/PETITIONERS:

[24] It is the position of the Applicants/Petitioners that the instant action is outside the Statute of Limitation Act, 1995 pursuant to s.17 (2), which provides;

> ***"Where any person brings an action to recover any land of a deceased person, whether under a Will or on an Intestacy, and the deceased person was on the date of the death in possession of the land re; in the case of a rent charge created by Will or taking effect upon the death, in possession of the land charged, and was the last person***

entitled to the land to be in possession thereof, the right of action shall be deemed to have accrued on the date of the death."

[25] It is the further position of the Applicants/Petitioners that they have been in exclusive possession of the subject land and claim or seek title to it pursuant to Section 16 (3) of the Limitation Act 1995.

[26] Section 16 (3) of the Limitation Act, 1995 provides;

> **"No action shall be brought by any person to recovers any land after the expiry of twelve years from the date on which the right of action accrued to such person or, if it first accrued to some other person through whom such person claims, to that person. Provided that if the right of action first accrued to the Crown and the person bringing the action claims through the Crown, the action may be brought at any time before the expiry of the period during which the action could have been brought by the Crown as of twelve years from the date on which the right of action accrued to some other person other than the crown, whichever period first expires."**

THE LAW:

[27] It is of special note that at paragraph 10 of the submissions of the Petitioners/Applicants they say; that the Applicants/Petitioners were given the opportunity to comply with the Quieting of Titles Act.

Paragraph 10 provides:

"It is noted that we disagree with para 3.11 in that the Petition was not bogus nor is it without merit as the Applicants/Petitioners are still in possession of the land. The delay in this matter was due to the illness of the attorneys of the Applicants/Petitioners. The current attorneys attempted to withdraw the Petition in order to commence a new action because the previous attorneys failed to comply with all of the requirements of the Quieting Titles Act. It is noted that the Courts never addressed the application to withdraw nor did the current attorney pursue this application as the Courts had given the Applicants/Petitioners attorneys the opportunity to comply with the Quieting Titles Act."

[28] The submissions provided by counsel for the Petitioners/Applicants only speak to the substantial issue as to whether the Petitioners//Applicants can succeed in obtaining a Certificate of Title. What they do is cite s. 17 (2) and S16 (3) of the Limitation Act, 1995.

[29] What counsel for the Petitioners failed to grasp is that the application is a striking out application. Counsel for the Petitioners never addressed anything related to the striking out of the Petition on the grounds set out above. Thus the submissions laid over by counsel for the Petitioners/Applicants provide no reply or answer (s) to the application before me. The Petitioners/Applicants remain indebted to the Adverse Claimant/Respondent. There is an outstanding cost order against the Petitioners/Applicants and in the face of that they have continued to ignore the outstanding costs and take steps albeit by starting two new actions. The Petitioners/Applicants therefore are in a state of continuing contempt.

[30] LORD HALSBURY LC in the case of REICHEL V. MAGRATH (1889) 14 App Cas 665 at 668 said;

"... I think it would be a scandal to the administration of justice if, the same question having been disposed of by one case, the litigant were to be permitted by changing the form of the proceedings to set up the same case again."

[31] In the case of HENDERSON V HENDERSON (1843) 3 Have 100) VICE CHANCELLOR Sir James Wigram said. ***"In trying this question I believe I state the rule of the court correctly when I say that, where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstance) permit the same parties to open the same subject of litigation in respect of matters which might have been brought forward as part of the subject in contest but which was not brought forward only because they have from negligence, inadvertence or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties exercising reasonable diligence, might have brought forward at the time."***

[32] In this regard, I hasten to point out that the Petitioners/Applicants had every opportunity to complete litigation via the appeal from the Magistrates Court. As if not pursuing the appeal was not bad enough, they then commenced a quieting action to claim the same land from which they were evicted while at the same time obtaining an injunction to stay the Magistrate's eviction order in the very same quieting action.

[33] Upon the setting aside of that injunction, the Petitioners/Applicants commenced yet another action under a constitutional disguise and obtained yet another injunction which continues in place. It was on the application of the last injunction that the Petitioner/Applicants misled this honorable court by not giving FULL and FRANK DISCLOSURE.

[34] In the case of **BORCH V. REPUBLIC OF DJIBOUTI & OTHERS [2015] EWHC 769**, the Honourable Mr. Justice Flaux said at paras 224 – 226;

> **224. "In my judgment it must be right that, although the duty of full and frank disclosure does not apply at the *inter partes* stage, the court should apply the same principles by analogy when considering the duty not to mislead the court (which applies at any stage) and the consequences of a breach of that duty. It would be very odd if different legal principles applied to a deliberate breach of duty and different consequences followed from that breach depending upon whether the misleading was at the *ex parte* stage (when a duty to make full and frank disclosure also applies) or at the *inter partes* stage. That point is made good here because the effect of the deliberate misconduct was to mislead not only the court but Mr. Butcher QC, Mr. Boreh's counsel, so in one sense the misleading is as serious, if not more serious, that if it had occurred on an *ex parte* application. Thus, as I see it, the cases on the effect of a deliberate failure to make full and frank disclosure provide a useful analogy and guide in the present case.**
>
> **225. In the context of the duty of full and frank disclosure on an ex parte application for an injunction, both parties agreed that [62]-**

[63] of any judgment in *congentra AG v Sixteen Thirteen Marine SA ("The Nicholas M") [2008] EWHC 1615 (Comm); [2008] 2 Lloyd's Rep 602* was an accurate summary of the applicable legal principles:

62. "As the Court of Appeal stated in *Brink's Mat Ltd. v. Elcombe [1988] 1 WLR 1350* and as has been repeated in subsequent cases, the purpose of this rule is to deprive a wrongdoer of an advantage improperly obtained and to serve as a deterrent to others to ensure that they comply with their duty to make full and frank disclosure on ex parte applications. However, even if there has been material non-disclosure being established of any fact known to the applicant which is found by the Court to have been material, although it would only be in exceptional circumstances that a Court would not discharge an order where there had been deliberate non-disclosures or misrepresentation." It is not alleged in the present case that any of the alleged non-disclosure to say that even if the relevant matters had been placed before the Court, the result would have been the same, that is a relevant consideration in the exercise of the Court's discretion.

63. In exercising that discretion, the overriding question for the Court is what is in the interests of justice. This is very clear from all three judgments in the Court of Appeal in *Brink's Mat.* Ralph Gibson LJ was prepared to continue the order on the basis that he had no doubt that even if the additional information had been disclosed, the judge at the ex parte hearing would have made the same order on the same terms. Balcombe LJ at 1358E said this;

"Nevertheless, this judge made rule cannot be allowed itself to become an instrument of injustice. It is for this reason that there must be a discretion in the court to continue the injunction, or to grant a fresh injunction in its place, notwithstanding that there may have been non-disclosure when the original ex parte injunction was obtained." (my underlining in [62]).

Boreh v Republic of Djibouti & Ors (2015) EWHC 769 (Comm) (23 March 2015)

226. **The decision of the Court of Appeal in Behbehani v Salem [1989] WLR 723 provides helpful guidance as to the approach to be adopted where the failure to make full disclosure was deliberate and conscious. There the judge on the *inter partes* hearing held that the failure to make full and frank disclosure at the *ex parte* application for a *mareva* injunction was a deliberate and conscious failure by the plaintiff's solicitor, albeit not a contumacious one in the sense that he knew that what was concealed would have an effect on the judge's mind. He discharged the injunction and awarded indemnity costs against the plaintiff, but then re-granted the injunction on the same terms. The Court of Appeal reversed the learned judge and discharged the second injunction."**

and paras 231 he said,

231. **"Second, in *Re OJSC Ank Yagraneft v Sibir Energy [2008] EWHC 2614 (Ch);* [2010] BCC 475 Christopher Clarke J had to consider an application by Millhouse and Mr. Abramovich to set aside an order for appointment of a**

provisional liquidator which had been made *ex parte.* It is only necessary for present purposes to refer to the statement of the relevant principle which the court should adopt at [106];

"As with all discretionary considerations, much depends on the facts. The more serious or culpable the non-disclosure, the more likely the Court is to set its order aside and not renew it, however prejudicial the consequences. The stronger the case for the order sought and the less serious or culpable the non-disclosure, the more likely it is that the Court may be persuaded to continue or re-grant the order originally obtained. In complicated cases it may be just to allow some margin of error. It is often easier to spot what should have been disclosed in retrospect, and after argument from those alleging non-disclosure, than it was at the time when the question of disclosure first arose."

[35] Further at paras 232 – 239 he goes on to opine on the **"CLEAN HANDS DOCTRINE."** He said;

232. "Turning to the "clean hands" doctrine, it is a well-established principle that misconduct in the presentation of an application for equitable relief, including for an injunction, can itself give rise to a defence based on the equitable maxim "*he who comes into equity must come with clean hands.*" In *Fiona Trust v Privalov* [2008] EWHC 1748 (Comm) Andrew Smith J

summarized the effect of three earlier decisions of the Court of Appeal at [20].

> **"Mr. Hamblen relies upon three decisions of the Court of Appeal in which claimants have been deprived of equitable relief because of their misconduct in connection with the presentation of their case in the course of the litigation: *Armstrong v Sheppard & Short Ltd. [1959] 2 QB 384; J Willis & Son v Willis [1986]* 1 EGLR 62; and *Gonthier v Orange Contract Scaffolding Ltd. [2003] EWCA Civ 873.* These authorities are examples of cases in which the court regarded attempts to mislead the courts as presenting good grounds for refusing equitable relief, and show that this is so not only where the purpose is to create a false case but where it is to bolster the truth with fabricated evidence: see *Gonthier v Orange Contract Scaffolding Ltd* especially at para 36. Further, as is clear from *J Willis & Son v Willis*, such misconduct can deprive a party of equitable relief notwithstanding the trickery was detected and therefore not pursued to the trial of the claim. However, in all these cases the misconduct was by way of deception in the course of litigation directed to securing equitable relief..."**

233. As Lord Falconer correctly pointed out, the scope of the doctrine is limited. The misconduct complained of must bear an *"immediate and necessary relation"* to the equity that is sued for, here the Freezing Order: see the well-known statement of principle by Eyre LCB in Dering v Earl of Winchelsea (1787) 1 Cox 318:

"It is not laying down any principle to say that his ill conduct disables him from having any relief in this Court. If this can be found on any principle, it must be, that a man must come into a Court of Equity with clean hands: but when this is said, it does not mean a general depravity; it must have an immediate and necessary relation to the equity sued for; it must be a depravity in a legal as well as in a moral sense.

234. This principle was recently applied by the Court of Appeal in *Royal Bank of Scotland Plc v Highland Financial Partners LP [2013] EWCA Civ 328; [2013] 1 CLC 596.* In the case the Court of Appeal set aside a summary judgment granted in favour of RBS by Burton J which the bank had obtained by dishonestly suppressing relevant facts. The bank had also applied to the learned judge for an anti-suit injunction on the basis that the defendant had commenced proceedings in breach of an exclusive jurisdiction clause. The Court of Appeal upheld the judge's conclusion that, notwithstanding the valid exclusive jurisdiction clause, the bank had engaged in misconduct which had an immediate and necessary relation with the equitable relief claimed; the bank had suppressed facts in the course of the substantive proceedings before the English court and had continued to argue, even after discovery of the true position that it had not concealed those facts.

235. The relevant principle and how it should be applied were set out in the judgment of Aikens LJ (with which Sir Maurice Kay V-P and Toulson LJ agreed) at [159] and [163] to [165]:

"159. It was common ground that the scope of the application of the "unclean hands" doctrine is limited. To paraphrase the words of Lord Chief Baron *Eyre in Dering v Earl of Winchelsea* (1787) 1 Cox 318 at 319 the misconduct or impropriety of the claimant must have "an immediate and necessary relation to the equity sued for". That limitation has been expressed in different ways over the years in cases and textbooks. Recently in *Fiona Trust & Holding Corporation and others v Yuri Privalov and others [2008] EWHC 1748 (Comm)* Andrew Smith J noted that there are some authorities [the three Court of Appeal cases he referred to] in which the court regarded attempts to mislead it as presenting good grounds for refusing equitable relief, not only where the purpose is to create a false case but also where it is to bolster the truth with fabricated evidence. But the cases noted by him were ones where the misconduct was by way of deception in the course of the very litigation directed to securing this equitable relief. *Spry: Principles of Equitable Remedies 8th edition (2010)* suggests that it must be shown that the claimant is seeking "to derive advantage from his dishonest conduct in so direct a manner that it is considered to be unjust to grant him relief". Ultimately in each case it is a matter of assessment by the judge, who has to examine all the relevant factors in the case before him to see if the misconduct of the claimant is sufficient to warrant a refusal of the relief sought.

163. In my view it is vital to identify carefully the two elements with which we are concerned; that is "the equity sued for" and "the misconduct" said to make RBS' hands unclean. The "equity sued for" in an injunction to restrain Highland and Scott Law from continuing to be in breach of (or in

Scott Law's case refusing to be bound by) the jurisdiction clause in the FLD by bringing proceedings in which it is alleged that RBS had "knowingly misrepresented material facts and withheld critical information from [Highland] as part of [RBS] scheme to acquire the 36 Loans at severely understated values". The misconduct alleged against RBS, through SC, falls into two Stages. First, there is the fact that RBS did not accept without challenge the judge's findings made in the Quantum judgment about the matters surrounding the transfer of the 36 Loans, the BWIC and the subsequent suppression of facts until the Quantum trial itself. Secondly, the fact of the lies of SG in the 2012 trial in trying to challenge the findings that the judge had made in his Quantum judgment.

164. As I read [185] – [192] of the 2012 judgment, Burton J accepted that if the misconduct of RBS (through SG) had ended with an acceptance of the conclusions made in the Quantum trial, then he would not have regarded the misconduct of RBS as being sufficiently immediate and having the necessary relation to the equity sued for to fall foul of the "unclean hands" doctrine. Thus, at the start of the 2012 trial, even though RBS might have pleaded a challenge to the various findings Burton J had made in the Quantum trial, if RBS had then accepted them, the judge would have held that RBS had not come to court with "unclean hands" because, to continue the metaphor, RBS would have "washed them". Therefore, it seems, the judge would have rejected Highland/Scott Law's

"unclean hands" defence to RBS' claim for an anti-suit injunction.

165. But what tipped the balance the other way was the action of RBS in continuing to challenge four principal findings of fact made by Burton J in the Quantum trial, which I have summarized at [58] above, particularly through the evidence of SG in the 2012 trial, Burton J's reaffirmation of his Quantum judgment findings (save for the more nuanced finding in relation to motivation for termination) and his conclusion that SG had lied again. Does the fact that RBS persisted in challenging the judge's findings of fact in his Quantum judgment and its insistence that there had been no concealment of "The Suppressed Fact" constitute misconduct" and, if so, does it have the necessary immediate and close relationship to the particular anti-suit injunction claimed? In my view the answer to both questions is "yes" and I shall briefly explain why."

236. One respect in which the application of the clean hands doctrine seems to me to have a wider impact than the application of the duty not to mislead the court, although ultimately the distinction may not matter for reasons I will come to, concerns the effect of the equivocation and evasion by Mr. Gray between September and December 2014 and the further deliberate misleading of the court in his fourth affidavit. So far as that breach of the duty not to mislead the court is concerned, it seems to me that, if I were to conclude that, notwithstanding that the deliberate misleading of the court in September 2013 should lead to the Freezing

Order being set aside, it was appropriate to grant a fresh Freezing Order, the fact of the deliberate misconduct in September to December 2014 would not of itself be a reason not to grant that fresh Order.

237. However, when that deliberate misconduct is viewed as a failure to come to equity with clean hands, then it seems to me it would be a basis for refusing to grant a fresh Freezing Order, by parity with the reasoning in the *Royal Bank of Scotland* case. It seems to me there is an immediate and necessary relation between the misconduct of deliberately misleading the court in September to December 2014 and the equity now sought of a fresh Freezing Order. Nevertheless, it is not necessary to decide whether there is this distinction to be drawn between the application of the two principles, because, for reasons set out below, I do not consider it appropriate to grant a fresh freezing injunction, on the basis of the original deliberate misconduct.

238. One other aspect of the applicable legal principals which arises is the relevance, if any, of the fact that the relevant misconduct is that of the solicitor and not of the client. Lord Falconer submitted that in those circumstances, the Freezing Order should not be set aside. In my judgment there are two answers to that submission. The first is that, as a matter of principle, where a court is being invited to impose some sanction for negligence or misconduct, solicitor and client are to be regarded as indivisible. The principle applied before the enactment of the CPR as demonstrated in cases of dismissal for want of prosecution by the decision of the House of Lords in *Birkett v James* [1978] AC 297.

239. **The same principle applies post-CPR. Mr. Kendrick QC drew my attention in that context to the decision of the Court of Appeal in Daryanani v Kumar [2001] C.P. Rep 27. In that case the judge at first instance had declined to strike out a claim on the basis of prejudice caused by delay on the ground that he drew a distinction between the claimant and his solicitor, the latter being to blame for the delay. In concluding that the judge was wrong to draw that" distinction, Mantell LJ at [29] held that the approach of not distinguishing between solicitor and client still applied under the CPR.**

29. **In The context of this appeal and concentrating on the particular issue, the underlying thought processes might well be those articulated by Lord Justice Ward in *Hytec Information Systems v Coventry City Council* [1997 1 WLR 1666 at 1675:**

> **"Ordinarily this court should not distinguish between the litigant, himself and his advisors. There are good reasons why the court should not: first if anyone is to suffer for the failure of the solicitor it is better that it be the client than another party to the litigation; secondly, the disgruntled client may in appropriate cases have his remedies in damages or in respect of the wasted costs; thirdly, it seems to me that it would become a charter for the incompetent... were this court to allow almost impossible investigations in apportioning blame between solicitor and counsel**

on the one hand, or between themselves and their client on the other."

Is that way of thinking still valid? In my view it is. There does not seem to be any post CPR authority directly in point but in *Burt –v- Montague Wells* (Unreported 26 July 1999) this court declined to distinguish between a claimant and his solicitors in what was described as an "unhappy wrangle about costs" Sedley LJ stating that "the acts of one are the acts of the other" and in *Training in Compliance Ltd. v Dewse* (Unreported 10 July 2000), which was an appeal against a condition imposed that the defendant Mr. Dewse should pay £100,000 into court as a condition of getting leave to amend, at p. 66 of the transcript Peter Gibson LJ said this;

> **"There is no doubt that the CPR give the court greater powers, enabling the court to choose between a wider range of remedies and sanctions, and that in the exercise of its powers the court must have regard to the overriding objective which recognizes the principle of proportionality. The CPR relate to the making of a wasted costs order against legal representatives, as had the RSC; but I see no justification for Mr. Pooles' submissions on the CPR requiring the court to draw distinctions between a party and his legal representatives. Of course, if there is evidence put before the court that a party was not consulted and did not give his consent to what the legal representatives had done**

in his name, the court may have regard to the fact, though it does not follow that that would necessarily, or even probably, lead to a limited order against the legal representatives. It seems to me that, in general, the action or inaction of a party's legal representatives must be treated under the CPR as the action or inaction of the party himself. So far as the other party is concerned, it matters not what input the party himself has made into what the legal representatives have done or have not done. The other party is affected in the same way; and dealing with a case justly involves dealing with the other party justly. It would not in general be desirable that the time of the court should be taken up in considering separately the conduct of the legal representatives from that which the party himself must be treated as knowing, or encouraging, or permitting. However, in the present case there is in fact no evidence at all as to what the defendant knew of the action or inaction on his behalf taken by those representing him. In my judgment, therefore, in this case there is even less scope for making an order against the legal representatives which would leave the defendant himself without any sanction against them."

[36] I cannot help but recall that when the injunction application came on for hearing before me on December 24th, 2018, counsel did not disclose to the Court that there was another action involving the same parties and same subject property. Neither

did counsel disclose to the Court that there was an appeal from the Magistrate's Decision to evict and that there was an eviction order. Nothing was said about the series of events which took place in reference to the outstanding court's order and dismissal of the appeal and application to resolve the appeal which was within the personal knowledge of counsel for the Petitioners/Applicants. Counsel was privy to everything which took place regarding the matter and the parties. I say that counsel deliberately misled the Court to obtain an injunction under the disguise of a constitutional issue knowing quite well at the time that there was a quieting action before my sister judge for the same subject property involving the very same parties. To make it worse, the Court specifically ask counsel why was she bringing the matter under sections of the constitution and she squandered that opportunity to make full and frank disclosure. Instead she simply said; "There were some other issues but she considered it a constitutional matter."

[37] It now becomes patently clear that counsel did not come to the Court of Equity with clean hands. In this regard, we cannot distinguish between the Petitioners/Applicants and their counsel, they are to be regarded as indivisible. This is a classic example of "SHARP PRACTICE".

[38] As it relates to Order 18 rule 19 (1), I hereby set aside the Petition principally on the following;

a) It discloses no reasonable cause of action or defence as the case may be.

b) It is scandalous, frivolous or vexatious.

c) It may prejudice, embarrass or delay the fair trial of the action.

d) It is otherwise an abuse of the process of the court.

[39] I have concluded the above after having considered all of the arguments and all the circumstances.

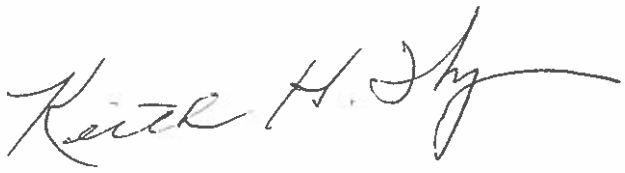
[40] I therefore order the following;

A. The Petition is hereby set aside.

B. Costs to the Adverse Claimant/Respondent to be taxed if not agreed.

C. A separate application to be made on an urgent basis to have the injunction in the constitutional matter dissolved

Dated this 16th day of June A.D., 2020.



Keith H. Thompson
Justice