

COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
Common Law & Equity Division
2018/CLE/gen/00540

BETWEEN

HARVEY NIXON, TROY NIXON & AMBROSE NIXON
(EXECUTORS OF THE ESTATE OF KING RICHARD NIXON, DECEASED)

Plaintiffs

AND

GARDIE RICHARDSON NIXON

First Defendant

AND

SAMUEL BURROWS

Second Defendant

AND

ARCHIPELAGO DEVELOPMENT & RESORTS III CO. LTD.

Third Defendant

AND

WAYDE JAMES NIXON

Fourth Defendant

AND

JIM CAY COMPANY LTD

Fifth Defendant

Before Hon. Chief Justice Ian R. Winder

**Appearances: Gail Lockhart Charles with Lisa Esfakis for the Plaintiffs
Craig Butler with Caleb Alexander Dorsett for the 1st, 2nd, 3rd
and 5th Defendants
Rionda Godet for the 4th Defendant**

19, 20 and 21 October, 4 November 2021 and 27 January 2022

JUDGMENT

WINDER, CJ

This is the plaintiffs' application for an order setting aside the Certificate of Title granted in Supreme Court Action 2016/CLE/qui/01247 (the Certificate) in respect to: *All that piece parcel or lot of land known as Lumber Cay situate approximately Seven Hundred feet south of Staniel Cay containing 30 acres and all the piece parcel or lot of land known as Jim Cay containing 8 acres situated North of Lansing Cay between Musher and Hog Cay, Exuma, one of the islands in the Commonwealth of the Bahamas* (the Properties) and for declarations as to validity of conveyances purportedly made subsequent to the grant of the Certificate.

Dramatis Personae

[1.] The main actors in this action are the following:

- (1) King Richard Nixon (King) is the patriarch of the Nixon family who died on 5 December 2015 survived by his 10 children. King died leaving a Last Will and Testament dated 8 September 1980 leaving all of his children as executors.
- (2) Harvey Nixon (Harvey), Troy Nixon (Troy) and Ambrose Nixon (Ambrose) are 3 of the children of King and who were appointed as the executors of King's estate.
- (3) Wayde Nixon (Wayde) is one of King's sons living and working on Staniel Cay Exuma.
- (4) Gardie Nixon, the first defendant, is King's eldest son. He was passed over as an executor of the Will by Order of the Supreme Court on 15 November 2018. Gardie was one of the grantees of the Certificate.
- (5) Samuel Burrows (Samuel) is the brother-in-law of King and the uncle of Harvey, Troy, Ambrose, Wayde and Gardie. Samuel was one of the grantees of the Certificate along with Gardie.

Common law action 2016/CLE/qui/02147

[2.] Common law action 2016/CLE/qui/01247 (the quieting action) was commenced by Gardie and Samuel by Petition to the Supreme Court on 23 August, 2016 claiming to be the owners in fee simple in possession of the Properties.

[3.] The Abstract of Title filed on 23 August, 2016 along with the Petition, setting out Gardie and Samuel's claim to the Properties, contains the following alleged particulars:

[4.] Gardie and Samuel both swore affidavits in support of the quieting application. At the trial of the quieting action Gardie and Samuel gave evidence in support of their cases and called Darren Higgs as well as the surveyor A. Balder Campbell. At the conclusion of the quieting action the Court granted a Certificate of Title jointly to Samuel and to Gardie with respect to the Properties. The Certificate of Title was granted on 18 July 2017.

[5.] On 1 December, 2017 the Properties were conveyed to the 3rd defendant Archipelago Development & Resorts III Company Limited (Archipelago) for \$1,000,000. Samuel and Gardie's attorney, Andrew Allen, who acted for them on the quieting petition is also a director of Archipelago. The conveyance to Archipelago was signed by Andrew Allen as the President of Archipelago.

[6.] The plaintiffs commenced this action seeking declaratory relief as follows:

- (1) A Declaration that the Certificate of Title granted in Supreme Court Action 2016/CLE/qui/ 01247 to the First and Second Defendants in respect of Lumber and Jim Cays, Exuma be set aside and declared null and void under the provisions of Sections 26 and 27 of the Quieting Titles Act, 1959;
- (2) A Declaration that King Richard Nixon and/or The Estate of King Richard Nixon's ownership and interest in the land is superior to that of the Defendants;
- (3) A Declaration pursuant to s. 5 of the Fraudulent Conveyances Act Ch. 150 Statue Laws of The Bahamas, that the Conveyance dated 15 October 2017 between Gardie Richardson Nixon and Samuel Burrows of the one part and Jim Cay Company Ltd a company incorporated under the laws of the Commonwealth of The Bahamas of the other part shall be deemed void for fraud and of no effect.
- (4) A Declaration pursuant to s. 5 of the Fraudulent Conveyances Act Ch. 150 Statue Laws of The Bahamas, that the Conveyance dated 1 December 2017 between Gardie Richardson Nixon and Samuel Burrows of the one part and Archipelago Development Resorts Company III Ltd a company incorporated under the laws of the Commonwealth of The Bahamas of the other part shall be deemed void for fraud and of no effect.
- (5) An injunction restraining the Defendants or their agents and each of them by themselves from any further dealings with Lumber Cay and or Jim Cay.

[7.] The Statement of Claim provides as follows:

1. The Plaintiffs are the sons and three of the original five named Executors of the Last Will and Testament dated 8 September 1980, hereinafter the said

Will, of King Richard Nixon, Deceased, herein after the Deceased, who died on 15 December 2005.

2. The First Defendant is the son of the Deceased and formerly one of the original executors named in the said Will, having been removed as executor on 15 day of November 2018 by Order of the Supreme Court on its Probate Side. The Plaintiffs intend to refer to and rely on the said Order for its terms and full effect at the trial or further hearing of this matter.
3. The Second Defendant is the brother in law of the Deceased and the maternal uncle of the Plaintiffs and First and Fourth Defendant (sic).
4. The Third Defendant is a company incorporated under the Laws of The Commonwealth of The Bahamas on 13 January 2017, and beneficially owned by one Mr. David Tilton of Virginia, United States of America or the Tilton Family Trust. The Third Defendant is also a purported purchaser of Lumber Cay an island within the Exuma Cays in the Commonwealth of The Bahamas.
5. The Fourth Defendant is the son and one of the named executors of the said Will of the Deceased.
6. The Fifth Defendant is a company incorporated under the laws of The Commonwealth of The Bahamas on 22 January 2019, and the purported purchaser of Jim Cay, one of the Cays within the Exuma Cays in the Commonwealth of The Bahamas.
7. At the time of his death, the Deceased was survived by his wife Shirley Nixon who died on 30 December 2009 and eleven children, namely Gardie Richardson Nixon (the First Defendant), Wayde Nixon (the Fourth Defendant), Troy Nixon, Ambrose Nixon, Harvey Nixon (the Plaintiffs herein) Patrice Nixon, Michelle Nixon, Rosemary Nixon, Bridgette Nixon, Sonia Nixon and Jason Nixon.
8. The original Executors according to the tenor of the Deceased's Will were Gardie Richardson Nixon, Harvey Nixon, Wayde James Nixon, Troy Nixon and Ambrose Nixon. The Plaintiff intends to refer to and rely on the said Will for its terms and full effect at the trial or further hearing of this matter.
9. By virtue of a Confirmatory Conveyance dated the 14 November 1990 and recorded in the Registry of Records in book 5592 at pages 40 to 43, at the time of his death the Deceased was seised in fee simple in possession of the said Lumber Cay and Jim Cay hereinafter collectively referred to as "the Cays". The Plaintiff intends to refer to and rely on the said Confirmatory Conveyance for its terms and full effect at the trial or further hearing of this matter.
10. On the 15 December 2018 the Plaintiffs made application to the Probate Registry of the Supreme Court for Grant of Probate which said application is still pending. The Plaintiff intends to refer to and rely on the said application for Grant of Probate for its terms and full effect at the trial or further hearing of this matter.
11. In or around 2016 the First and Second Defendants commenced an Action in the Supreme Court on its equity side for a Grant of Certificate of Title with respect to the said Cays and by that said action namely CLE/qui/01247/2016 a Certificate of Title to the said Cays was issued to the First and Second

Defendants. The Certificate of Title is recorded in the Registry of Records in the City of Nassau in Volume 12857 at pages 78-83.

12. The Plaintiffs were not aware of the commencement of the said action until around or about December 2017 or January 2018, and shortly thereafter were advised that a Certificate of Title had in fact been issued to the First and Second Defendants on 18 July 2017. The Plaintiff intends to refer to the said Certificate of Title at the trial or further hearing of this matter.
13. The First Defendant and Second Defendants (sic) with the advice counsel and or assistance of Andrew Allen, the attorney for the First and Second Defendant (sic) and the President director and shareholder of the Third and Fifth Defendants knowingly, willfully and deliberately deceived and/or misled the Court and obtained the said Certificate of Title by fraud.
14. By reason of the matters aforementioned the Plaintiffs have suffered loss and damage.

PARTICULARS OF FRAUD

- a. The First and Second Defendants with the advice counsel and or assistance of Andrew Allen, the attorney for the First and Second Defendant (sic) and the President director and shareholder of the Third and Fifth Defendants knowingly, willfully and deliberately deceived and/or misled the Court in representing under Oath in their affidavits dated 7 day of March 2017 and 26 October 2016 respectively that they were in exclusive possession of the said Cays, when they each had direct and personal knowledge that: the Deceased died Testate and seised in fee simple of the said Cays and appointed all of his sons executors of his Will and beneficiaries of his estate including but not limited to the said Cays.
- b. The First Defendant, with the advice counsel and or assistance of Andrew Allen, the attorney for the First and Second Defendant (sic) and the President director and shareholder of the Third and Fifth Defendants fraudulently, knowingly and with intention to deceive misrepresented to the court that he is the owner of the said Lumber Cay and Jim Cay and the said Cays were vested in him by virtue of Deed of Confirmation in the name of the Deceased.
- c. The First and Second Defendant (sic) with the advice counsel and or assistance of Andrew Allen, the attorney for the First and Second Defendant (sic) and the President director and shareholder of the Third and Fifth Defendants fraudulently, knowingly and with intention to deceive failed to fully and fairly disclose all facts material to the title claimed to the said Cays.
- d. The First and Second Defendant (sic) with the advice counsel and or assistance of Andrew Allen, the attorney for the First and Second Defendant (sic) and the President director and shareholder of the Third and Fifth Defendants fraudulently, knowingly and with intention to deceive caused Daron Higgs to give false evidence under Oath stating that the Second Defendant resided on Lumber Cay for over twenty years when they had direct and personal knowledge that he in fact lived on Great Guana Cay the Exumas during said period.

- e. The First and Second Defendants with the advice counsel and or assistance of Andrew Allen, the attorney for the First and Second Defendant (sic) and the President director and shareholder of the Third and Fifth Defendants fraudulently, knowingly and with intention to deceive included the statement that King Richardson Nixon died intestate leaving his eldest son and heir at law Gardie Richardson Nixon in the Abstract of Title of the said Andrew Allen when they had direct knowledge of the said Will.
- f. The First and Second Defendant (sic) with the advice counsel and or assistance of Andrew Allen, the attorney for the First and Second Defendant (sic) and the President director and shareholder of the third and Fifth Defendants fraudulently, knowingly and with intention to deceive stated that they posted a Notice of Petition and Plan outside the Commissioner's or Island Administrator's offices and Police Station.
- g. First and Second Defendant (sic) with the advice counsel and or assistance of Andrew Allen, the attorney for the First and Second Defendant (sic) and the President director and shareholder of the third and Fifth Defendants fraudulently knowingly and with intent to deceive withheld or failed to disclose to the Court that they were in negotiations for the sale of the said Cays to the Third and Fifth Defendants which were to be incorporated by the said Andrew Allen for this purpose.
- h. First and Second Defendant (sic) with the advice counsel and or assistance of Andrew Allen, the attorney for the First and Second Defendant (sic) and the President director and shareholder of the third and Fifth Defendants fraudulently, knowingly and with intent to deceive made material false statements and representations, suppressed, withheld and concealed material documents, facts and matters of information concerning the Cays from the Court namely:
 - i. That the said Andrew Allen was instructed by one Mr. David Tilton who desired to purchase the said Cays for a substantial commercial venture.
 - ii. That the said Andrew Allen stood to benefit financially from the sale of the said Cays to Mr. Tilton.
 - iii. That the said Andrew Allen initiated contact with the First and Second Defendants who had purported to Mr. Tilton that they were the owners of the said Cays with the specific instruction from the said Mr. Tilton to perfect the First and Second Defendant's (sic) purported title.
 - iv. That the cost of the Quieting Action was paid for by the Tiltions directly to one of the accounts of the said Andrew Allen.
- 15. On 1st December 2017, the First and Second Defendants conveyed Lumber Cay to the Third Defendant for a purported consideration of \$1,000,000.00 in the Currency of The Bahamas the said conveyance is as at the filing of this statement of claim about to be recorded.
- 16. The First and Second Defendants and the Third Defendant fraudulently and with the intent to deceive and defraud inter alia the Plaintiffs and in breach of the relevant provisions of The International Persons Landholding Act and Stamp Act, executed the said Conveyance.

PARTICULARS OF FRAUD

- a. At the time of the said purported conveyance the said Lumber Cay and Jim Cay had an estimated market value of \$20,000,000.00 and \$9,000,000.00 respectively. This appraisal was commissioned by Andrew Allen on behalf of the Tiltens and or the First and Second Defendants and they each were at all material times aware of the true appraised market value.
 - b. Andrew Allen concealed the foreign beneficial ownership (sic) of the Third Defendant and failed to make the appropriate application under the International Persons Land Holdings Act.
 - c. The value of the said Lumber Cay constituted a gross undervalue for the purpose of defrauding and or avoiding paying the applicable Value Added Tax (VAT) on the transaction.
17. On 15th October 2017, The First and Second Defendants and the Third Defendant fraudulently and with the intent to deceive and defraud an (sic) in breach of Sections 3 and 4(1) of The International Persons Landholding Act executed a Conveyance from the First and Second Defendants to Jim Cay Limited, the Fifth Defendant for a purported consideration of \$800,000.00 said conveyance is recorded in The Registry of Records in Volume 13137 at pages 560 to 565.

PARTICULARS OF FRAUD

- a. At the time of the said purported conveyance the said Lumber Cay and Jim Cay had an estimated market value of \$20,000,000.00 and \$9,000,000.00 respectively. This appraisal was commissioned by Andrew Allen on behalf of the Tiltens and or the First and Second Defendants and they each were at all material times aware of the true appraised market value.
- b. Andrew Allen concealed the foreign beneficial ownership (sic) of the third Defendant and failed to make the appropriate application under the International Persons Land Holdings Act.
- c. The value of the said Jim Cay constituted a gross undervalue for the purpose of defrauding and or avoiding paying the applicable Value Added Tax (VAT) on the transaction.

AND THE PLAINTIFFS' CLAIM:-

1. A Declaration that the Certificate of Title granted in Supreme Court Action 2016/CLE/qui/01247 to the First and Second Defendants in respect of Lumber and Jim Cays, Exuma be set aside and declared null and void under the provisions of Sections 26 and 27 of the Quieting Titles Act, 1959;
2. A Declaration that King Richard Nixon and/or The Estate of King Richard Nixon's ownership and interest in the land is superior to that of the Defendants;
3. A Declaration pursuant to s. 5 of the Fraudulent Conveyances Act Ch. 150 Statue (sic) Laws of The Bahamas, that the Conveyance dated 15 October 2017 between Gardie Richardson Nixon and Samuel Burrows of the one part and Jim Cay Company Ltd a company incorporated under the laws of the Commonwealth of The Bahamas of the other part shall be deemed void for fraud and of no effect.

4. A Declaration pursuant to s. 5 of the Fraudulent Conveyances Act Ch. 150 Statue (sic) Laws of The Bahamas, that the Conveyance dated 1 December 2017 between Gardie Richardson Nixon and Samuel Burrows of the one part and Archipelago Development Resorts Company III Ltd a company incorporated under the laws of the Commonwealth of The Bahamas of the other part shall be deemed void for fraud and of no effect.
5. An injunction restraining the Defendants or their agents and each of them by themselves from any further dealings with Lumber Cay and or Jim Cay;
6. Damages;

[8.] The Defence filed in this matter on behalf of the defendants (except for Wayde) provides, in part, as follows:

- ...
6. Paragraph 6 of the Statement of Claim is admitted save that the Fifth Defendant was at all times a bona fide purchaser for value without notice of any defect in title (if any).
- ...
8. In Paragraph 9 of the Statement of Claim the Plaintiffs allege that the one King Nixon "the Deceased") (sic) purchased the relevant Cays sometime prior to November 14th, 1990. By Conveyance dated 14th November 1990, William "Bulla" Davis, heir-at-law of The Estate of Samuel Davis, of Barreterre (sic), Exuma, purports to confirm onto the Deceased, a conveyance of "The Cays". In the confirmatory conveyance, the said William "Bulla" Davis recites an Indenture of Conveyance "dated sometime in May 1985, and made between the parties hereto and not recorded." In the said confirmatory conveyance, the consideration for the two (2) Cays is Fifteen Thousand Dollars (\$15,000.00), "as expressed in the principal Indenture." The Plaintiffs are put to strict proof to show that Samuel Davis or William "Bulla" Davis, acquired the said Cays. The Plaintiffs are also put to strict proof to establish that the person who executed the confirmatory conveyance owned the cays purportedly conveyed by confirmation.
- ...
11. As regards paragraph 12 of the Statement of Claim, the First and Second Defendants made full disclosure to the Court in the said quieting of title action and complied with all orders by the honourable court with respect to service and public notices. Neither the First nor Second Defendant (sic) were obligated to personally notify the Plaintiffs.
 12. Paragraphs 13 and 14 of the Statement of Claim are denied. The Plaintiffs are put to strict proof to establish the ownership which they rely on, and to ground and/or establish their claim that the Deceased lawfully acquired the Cays. The Plaintiffs are put to strict proof of the particulars of fraud as set out in paragraph 14 of the Statement of Claim. The Third Defendant denies that the Tilton's paid the costs of the said quieting action either directly or indirectly. The Tilton's paid consideration as agreed for the purchase of the cays after the quieting action was concluded.

13. Paragraph 15 of the Statement of Claim is admitted.
14. Paragraphs 16 and 17 of the Statement of Claim are denied. The Plaintiffs are put to strict proof of the particulars of fraud as set out in paragraphs 16 and 17 of the Statement of Claim. The value of said Cays did not constitute a gross undervalue and Andrew Allen did not conceal any foreign beneficial ownership of the Cays. Additionally, paragraph 16 of the statement of claim is irrelevant in as much as the matters raised therein (if true) do not go to the issue of the certificate of title obtained by the First and Second Defendants and the validity of the subsequent sale to the Third and Fifth Defendants. The failure of Andrew Allen to obtain a permit pursuant to the International Persons (Landholding) Act, 1993 as amended is a matter between Andrew Allen and the eventual beneficial owners of the Third and Fifth Defendants.
15. At no time was the Deceased the owner of the cays as alleged in the statement of claim.
16. That the Plaintiffs rely on a deed of confirmation with no evidence of the truth of the recitals contained therein to support their assertions that the Deceased purchased the cays.

...

Law:

[9.] Sections 5 and 27 of the Quieting Titles Act (QTA) provides as follows:

5. The affidavit in support of the petition shall confirm all the facts set out in the petition and shall be made by the petitioner or may, with leave of the court, be made by some person other than the petitioner or as to part by one person and as to part by another and shall in addition set out whether any person is in possession of the land and under what claim, right or title, and shall state that to the best of the deponent's knowledge, information and belief, the affidavit and the other papers produced therewith fully and fairly disclose all facts material to the title claimed by the petitioner, and all contracts and dealings which affect the title or any part thereof or give any rights as against him.

...

27. If in the course of any proceedings under this Act any person acting either as principal or agent fraudulently, knowingly and with intent to deceive makes or assists or joins in or is privy to the making of any material false statement or representation, 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.

[10.] Section 5 of the QTA obliges the petitioner(s), seeking to quiet property, such as Gardie and Samuel, to verify the contents of the petition and to fully disclose all facts material to the title claimed and all dealings with the property which affect the title or any part thereof or give any rights as against these petitioners. They must also set out whether

any person is in possession of the land. Section 27 of the QTA empowers the court to make null and void any Certificate that is obtained by misleading, suppression of information or fraud.

[11.] In the Court of Appeal decision of **C.B. Bahamas Ltd. v. Arawak Homes Ltd.** - [1992] BHS J. No. 169, Henry P confirmed that it was necessary for a challenger to prove title to the land in question before a certificate could be challenged. The challenger/claimant must prove that their failure to establish an adverse claim or bring the claim to the attention of the Court for notice of issue under section 7(1) of the Quieting Titles Act was not due to their own fault but to the fraudulent act or omission of the Petitioners or his agents within Section 27 of the Quieting Titles Act (the Act).

[12.] I accept the submission of the plaintiffs that fraud is an extrinsic, collateral act which vitiates the most solemn proceedings of courts of justice and a judgment obtained by fraud is a nullity (See **Duchess of Kingston's Case** - [1775-1802] All ER Rep 623 and **Earl of Bandon v Becher** (1835) 3 Cl & Fin 479, HL; **Regina V. Bow Street Metropolitan Stipendiary Magistrate And Others, Ex Parte Pinochet Ugarte (No. 2)** - [2000] 1 A.C. 119).

[13.] The plaintiffs contend that the recorded Deed of Confirmation establishes King's interest (and by extension the estate's) in the Cays. The evidence was also that King claimed a possessory title to the property. In fact it is claimed that such possession as is claimed by Samuel, having been put there by King as he claimed, was that of King (now his estate). Further, the plaintiffs say that the Estate of King could not prove an interest in the Cays or establish an adverse claim because the Defendants deceived the Court. The evidence of Harvey, Troy and Wayde is that they did not know of Gardie and Samuel's intention to acquire or the acquisition of Lumber and Jim Cay until after the Certificate of Title was granted.

[14.] In **Strachan v. Strachan and another** - [2014] 3 BHS J. No. 18, Barnett CJ (as he then was) set aside the Certificate of Title on the ground of fraud. He stated at paragraph 31 that:

"31. In my judgment, the certificate must be set aside. The Court must be vigilant in preventing its process under the Act from being abused. Section 27 of the Act gives the Court the power to dismiss an application for a

certificate under the Act. If, as is apparent, there is a dispute between the Plaintiff and the Defendants as to the Plaintiff's right to be on Lot #3, then the Defendants claim based upon exclusive possession could not succeed."

In this case Barnet CJ found that the Certificate of Title should be set aside as a result of the falsehoods which came to light in the fraud action, coupled with the deliberate concealment from the Court of material information which would have alerted the Court to the identity of other persons who may have had a claim adverse to or inconsistent with that claimed by the petitioner in respect of the subject land.

[15.] In upholding Barnet CJ, in ***Strachan and another v. Strachan*** the Court of Appeal reasoned that the Certificate could not stand where the learned Chief Justice was prevented from giving directions as required by section 7(1) of the Act for the service of notice of the quieting action on the challengers enabling any claims which they had to have been investigated in the quieting action.

Analysis and disposition

[16.] At trial Harvey and Ambrose gave evidence in the plaintiffs' case. Although Wayde was listed as a defendant he too gave evidence in support of the case of the plaintiffs and against Samuel and Gardie.

[17.] The defendants called Nikeah Haven and Darren Higgs (Higgs) to give evidence in support of the case for the defence. Whilst both Gardie and Samuel filed witness statements neither of them gave evidence, notwithstanding allegations and direct testimony to the effect that the Certificate was obtained by fraud.

[18.] Having heard the evidence adduced at trial, and examined the demeanour of the witnesses as they gave their evidence I have no hesitation in indicating that I prefer the evidence of the plaintiffs. I found, on balance, that Harvey, Ambrose and Wayde were truthful witnesses. Samuel nor Gardie gave evidence in support of their case and I did not find Higgs to be a truthful witness.

[19.] I am satisfied that Samuel and Gardie fraudulently, knowingly and with intent to deceive made material false statements and/or representations, and/or suppressed, withheld or concealed from the court of material documents, facts or matters of

information to procure the Certificate of Title to the Properties. This included, but was not limited to the following:

Failed to disclose the existence of the Will of King Richard Nixon

[20.] Item 4 in the Abstract of Title, Gardie and Samuel say:

4. 15 December, 2005 King Richardson Nixon dies intestate leaving his eldest son and heir – at law- Gardie Richardson Nixon his estate.

This is false on all fronts. King did not die intestate and his estate was not left to Gardie but to his 10 children.

[21.] The statement therefore, that King Nixon died intestate was proven to be untrue by the evidence of Ambrose, who gave evidence that he found his father's will in his bedroom at his parent's house sometime in 2010, the year after his mother's death. His evidence is that upon advice of a Justice of the Peace, he gave some of his siblings (including Gardie) a copy of the will and kept the original. I am satisfied that Gardie was aware of the existence of the Will at the time the abstract was made and the quieting action launched.

Failed to disclose that they were aware that the plaintiffs and Wayde were also claiming an interest in the property through the Estate of King

[22.] The undisputed evidence is that King died Testate. In his Last Will and Testament dated 15 November 2018, King appointed five of his sons executors of his Will and all his children beneficiaries of his estate which it is said included the Property. The Will was eventually admitted to Probate and the Court ordered the passing over and removal of Gardie as a named executor.

[23.] Having accepted the evidence of Wayde that it was he who put Samuel onto Lumber Cay, the Court was misled by the Affidavit of Compliance which states that "*there was no adjoining owners/occupiers of the land and therefore it is not necessary for the Petitioner to serve a copy of the said Notice in the same form as that posted as aforesaid on the same.*" I am satisfied that Samuel misled the Court in failing to disclose that it was Wayde who caused him to be on the property as a caretaker.

[24.] Gardie and Samuel relied on the title of King whether documentary and/or possessory. I am satisfied that they knew that the other children of King would make adverse claims if notified of the petition. Whilst Gardie advised the Court in the quieting action, at the prodding of the Court, that he had siblings he omitted to indicate that all of his siblings were claiming an interest in the property through a Will of King. I am satisfied that he was aware that the Will existed. Samuel lived on Lumber Cay with the permission of the Wayde, who lives on Staniel Cay a stone's throw away from Lumber Cay

Misrepresented evidence of occupation on the Properties

[25.] As to occupation, in item 2 of the Abstract of Title Gardie and Samuel say:

2. Around this time [1988] Samuel Burrows took up residence on Lumbar Cay with the permission of Gardie Richardson Nixon

This representation had its peculiar challenges as King's death occurred in 2005. At trial in the quieting action Samuel's evidence was that he lived on Lumber Cay since 1992 and built structures on the Properties over the years. Further, that he was brought to the Properties by King who had documentary title to the Properties and that he was under the belief that he and King would jointly own the Properties.

[26.] The case of the plaintiffs and Wayde was that neither Gardie nor Samuel were in fee simple in possession of the Properties. Their evidence was that King and or his estate have been in absolute actual possession of the Properties prior to the 1990 Confirmatory Deed and at no time was he dispossessed. They say that Samuel was on Lumber Cay by invitation as a caretaker for the children of King.

[27.] Wayde's evidence under cross examination on this issue, which I accept, is instructive. A portion of that evidence provided:

Q. Now, one other thing. Let me ask you, relative to the property, the Lumber Cay property, what's on Lumber Cay in terms of buildings?

A. Well, back in the day, back when I had Sam came there, me and Sam -- well, when I came there, there was nothing but the coconut tree that my daddy plant there. And Sam, as my uncle, when he came there I tell him you can stay on the cay but we gatta put up a shack. And that's when I bought some plywood, and he use to go back and forth from Great Guana and me and him, we set up the shack, and he do most of the work, but we

set up with the stuff that I brought over there, buy from Nassau to bring there, because he say we need plywood and we need cement. Time after time, we build a lil shack and then he start to stay there. And after he stayed there for a while, then he start to put up other lil structure. But I tell him I don't want too much of garbage on the cay, you know. "I don't want you to put too much of lil place all over the place, all over the cay." So, he say "Okay." Well, I send some cement there for him and he make like a lil walkway and a lil fish bench cause we use to do fishing together. I had him, you know, take him out -- when I use to bring tourists over to the island and he go to the island and fishing, we would clean our fish right there to the fish bench he had there, that's how the first building got there.

[28.] I remind myself that the burden is on the plaintiffs to prove their case against the defendants to the requisite standard. I nonetheless take note that in the face of this evidence, neither Gardie nor Samuel chose to take the stand to contradict this evidence and to be cross examined.

[29.] In the Abstract Gardie and Samuel state that Samuel took up residence on Lumber Cay in 1988 with the permission of Gardie. Further, the abstract asserts that on 15 December 2005 King died intestate leaving his eldest son and heir at law Gardie his estate. As indicated, the case of the plaintiffs and Wayde was that Samuel's residency on the Cay was by the invitation of Wayde in 2010 after Wayde's mother's death. Wayde also states that he not only invited Samuel to stay on Lumber Cay, but that he got him a job with his client Morris Kuhn who owned a cay opposite Lumber Cay. When Wayde was questioned about this bit of evidence, that exchange was as follows:

- Q. And in your witness statement you -- In your witness statement you say that your uncle lived -- your uncle was invited to live on Lumber Cay as a caretaker?
- A. Yes. I brought my uncle to Lumber Cay down there. After my mother died, I brought him down there to give him some work. He was like a caretaker for me and my family them to look after the cay at that time. And I even got him a job with one of my clients, Mr. [Kuhn], and that's how Sam get on the island.

Again, in the face of these allegations Samuel did not seek to challenge them by taking the stand and subjecting himself to cross examination.

[30.] Subsequent to the quieting action Darren Higgs recanted his evidence in an affidavit dated 24 April 2018; wherein he states that Gardie and Samuel offered to buy him a boat and a house if he testified that the Samuel lived on Lumber Cay for the last

twenty years. In the affidavit he admitted that he gave the testimony knowing that Samuel in fact lived on Great Guana Cay, The Exumas. At the trial he sought to recant the affidavit albeit admitting that he made the affidavit of 24 April 2018. The relevant exchange was as follows: "

Q. And isn't what's written down in that document the truth and isn't that why you signed it?

A. This it right here.

Q. It's true isn't it Mr. Higgs? I mean you're oath today, you swore to tell the truth. This is another document that you signed before that was true. Isn't that document -doesn't that document speak the truth, Mr. Higgs?

A. Well, whatever you see here, that's what I sign.

Q. I know. But I mean, Mr. Higgs, you signed your name, you swore that this was the truth, and I'm asking you isn't that the truth what's in that document on the screen?

A. Yes, ma'am

As I have indicated I am satisfied that the evidence of Darren Higgs is wholly unreliable.

Preliminary submission of Gardie and Samuel

[31.] Gardie and Samuel's principal complaint was a preliminary one, contending that the plaintiffs have no locus standi to bring this claim in that there is no interest in King or his estate to the Properties. As such, they say, there can be no challenge by the plaintiffs to the Properties. They say that the title granted to Samuel and to Gardie was based upon a possessory claim as there was no title in King Nixon to be relied upon.

[32.] This is indeed an incredible submission and I rejected it. Incredible as Gardie and Samuel both relied upon King as the foundation of their claim. The Abstract provides that clearest example of Samuel and Gardie's volte face: The Abstract begins by citing a May 1985 Deed of Conveyance from William Bulla Davis, Executor of the Estate of Samuel Davis purportedly conveying Lumbar Cay to King. It then speaks to a subsequent confirmatory Conveyance dated November 14 1990 where William Bulla Davis is said to have executed a confirmatory conveyance in favor of King. Samuel and Gardie then abstracts the death of King as having occurred intestate and asserts that King left the estate to his heir at law Gardie. Finally, although the Abstract cites Gardie as having given Samuel permission to occupy the property his evidence reflected that it was King which

gave him permission to occupy the property and the understanding was that they would share the property.

[33.] Despite what is lately asserted by way of submission, the entire claim in the quieting action ran through King. The substratum of their claim in the quieting action was the interest of King, through which they claimed.

[34.] Gardie and Samuel now assert that there was no title in King and that they were granted the Certificate based solely upon the possessory claim. At trial, Gardie and Samuel called a research clerk Nekiah Wright Haven to challenge the validity of the confirmatory conveyance.

[35.] Gardie, the eldest son of King, is a Prison Officer stationed in New Providence for the 37 years leading up to the hearing of the quieting action and had no connection to the Property other than through his father King. If, as they assert, the Court merely considered a possessory claim, he was not in occupation of the property or in possession of it. He gave no evidence of under what authority he could give Samuel permission to stay on the Cays while his father was still alive.

[36.] I am satisfied that the preliminary submission is wholly without merit as King is clearly, on the evidence, interested in the Properties. In fact as both Gardie and Samuel's documentary and/or possessory claim, as abstracted, pass through King, it is incredible to suggest that they had a claim superior to his or that King had no title to the property but they did. The logical conclusion would be that the same title was good enough to sustain the Certificate for Gardie and Samuel but not good enough a title for the plaintiffs to assert to support locus standi.

What is the effect of the actions of Gardie and Samuel on the new conveyances?

[37.] The plaintiffs claim that the conveyances of Properties to Archipelago and the Fifth Defendant Jim Cay Co. Limited (the Purchasers), who are both non-Bahamians are null and void for lack of the requisite permit by virtue of Sections 3 and 4 of the **International Persons Land Holding Act (IPLH)**. Sections 3 and 4 of the **IPLH** properties:

3. (1) A non-Bahamian (other than a permanent resident or non-Bahamian acquiring land or an interest in land under a devise or by inheritance) who intends to acquire

land or an interest in land either by way of freehold or leasehold and which acquisition is not within section 2(1) shall obtain a permit from the Board to make the acquisition by making the requisite application and producing to the Secretary to the Board evidence that the appropriate fee specified in the Schedule has been paid to the Public Treasury otherwise any acquisition shall be null and void and be without effect for all purpose of law in the absence of such a permit; but the non-Bahamian making the acquisition shall be entitled to recover with such legitimate deductions as may be justified in law any and all monies paid by him as consideration for the acquisition.

(2) The Board may with respect to an application for a permit in its absolute discretion grant or refuse to grant a permit.

(3) An application to the Board for the grant of a permit shall be in writing signed by the non-Bahamian seeking the permit or his attorney and shall be in the form in the Schedule.

(4) Notwithstanding anything contained in subsection (1) the Board may in its absolute discretion and on such terms and conditions as it may think fit validate any purported conveyance, mortgage, transfer of mortgage or other acquisition of an interest in land made contrary to subsection (1) by issuing a permit to the non-Bahamian; and the exercise of the power by the Board under this subsection shall have the effect of causing the conveyance, mortgage, transfer of mortgage or other acquisition which by subsection (1) is to be null and void to be valid and of full effect as if it were made subsequent to the grant of a permit.

4. (1) The documents whereby any acquisition by a non-Bahamian of an interest in land is made and to which section 2 applies together with the respective certificate issued by the Secretary to the Board shall be recorded in the Registrar General's Department and where the acquisition is recorded in that Department without requisite certificate that registration shall be null and void and be without effect for all purposes of law.

(2) The documents whereby an acquisition of an interest in land is made and to which section 3 applies shall on being recorded in the Registrar General's Department be accompanied by the requisite permit otherwise the recording in that Department without the permit shall be null and void and be without effect for all purposes of law.

(3) The priority of the transactions relating to the acquisition of land by non-Bahamians shall be no different from that which relates to the acquisition of real property not affected by this Act.

There is merit in the plaintiffs' submission as the beneficial owners of the Purchasers are not Bahamians. I accept therefore that the conveyances are not valid as the statute provides.

[38.] In the event I am incorrect as to this issue, that there was no valid conveyance of the property by Gardie and Samuel, I am nonetheless satisfied that the Purchasers are

not bona fide purchasers for value within the meaning of Section 27 of the QTA. This could not be said to have been an *arm's length* transaction. Additionally, the ultimate beneficial owner of the Purchasers was the person who funded the quieting action. Section 27 of the QTA grants protection only to bona fide purchasers for value without notice of the fraud. Andrew Allen is a director and controlling mind of the Purchasers. Allen is the attorney for the Purchasers as well as for Gardie and Samuel in the transaction. Allen was also the counsel and therefore agent for the Gardie and Samuel in the preparation of the quieting action. In the circumstances, given the relationships, I am satisfied that such knowledge of the fraud as Gardie and Samuel may have possessed, ought to be imputed to the Purchasers (See *Denise Barnes v Pearl Moxey and another [2019] 1 BHS J. No. 123*). In which case, the Purchasers are not bona fide purchasers for value.

Conclusion

[39.] In applying the dicta in *Strachan* to these proceedings the Certificate ought to be set aside on account of the falsehoods which came to light in this trial. In addition, there was the deliberate concealment from the Court of material information which would have alerted the Court to the knowledge that Gardie's siblings had adverse and active claims (through the Will of King) to the Properties. In particular the concealment of the active participation of Wayde who would have put Samuel onto Lumber Cay as caretaker. Unaware of this information, the Court was prevented from giving directions as required by section 7(1) of the Act for the service of notice of the quieting action on the plaintiffs.

[40.] In all the circumstances I give judgment as follows:

- (1) I declare that the Certificate of Title granted to the First and Second Defendants in 2016/CLE/qui/01247 of 2016 must be set aside as the same was procured by fraud.
- (2) I declare that the Conveyance dated 15 October 2017 between Gardie and Samuel of the one part and Jim Cay Company Ltd be deemed null and void and of no effect.

(3) I declare that the Conveyance dated 1 December 2017 between Gardie and Samuel be deemed null and void and of no effect.

[41.] I will hear the parties by way of written submission within 21 days as to the appropriate order to be made on the question of costs to be awarded.

Dated this 12th day of September 2022

A handwritten signature in black ink, appearing to read 'I. Winder', with a stylized flourish extending from the end.

Ian R. Winder

Chief Justice