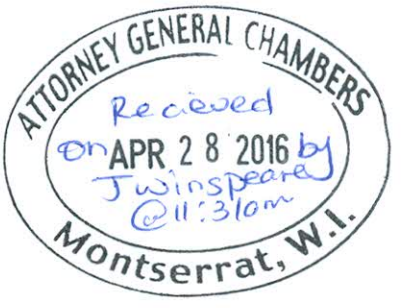
AG

THE EASTERN CARIBBEAN SUPREME COURT
COLONY OF MONTSERRAT CIVIL

IN THE HIGH COURT OF JUSTICE



CLAIM NO: MINIHCV2012/0035
CONSOLIDATION OF CLAIMS
MNIHCV2012/0014
MNIHCV2012/0015
MNIHCV2012/0016
MNIHCV2012/0017
MNIHCV2012/0019
MNIHCV2012/0020

BETWEEN:

CLIFTON CASSELL
KENNETH ALLEN
YVONNE DALEY-WEEKES
KATHLEEN ALLEN-FERDINAND
KHARK MARKHAM
ALYN RUSSEL KRAUSE
GAIL ANN CIMONO-KRAUSE
PHILIP BRELSFORD
JOEL OSBORNE
INGRID OSBORNE
CLIFFORD WEST

Claimants

and

PROVIDENCE ESTATE LIMITED
OWEN ROONEY

Defendants

Appearances:

Mr. Kharl Markham with Ms Chivone Gerald for the Claimants
Owen M Rooney in person and on behalf of the First Defendant

2016: April 20
2016: April 28

JUDGMENT

Purchase of land – Bona fide purchaser for value without notice – meaning of notice – purchase from a company - application of the indoor management rule

BACKGROUND

1. **Bristol, J. [AG]:** Each of the Claimants bought land from either Warren Cassell (WC) and Cleo Cassell (CC), as predecessor in title of Providence Estate Limited, the First Defendant (PEL), or directly from PEL.

2. At all material times WC held himself out as representing PEL as a director and/or shareholder.

3. On or about the 16th of February, 2012, after the said land purchases, WC was convicted in the criminal assizes in Montserrat of, inter alia, conspiracy to defraud PEL and/or Owen Rooney, the Second Defendant (OR). These convictions were in respect of PEL's land sales.

4. The claims are brought by the several Claimants to confirm their titles to their respective parcels in light of the said convictions. The convictions are not otherwise relevant for the determination of the issues in these proceedings.

5. The Second Defendant is a shareholder and director of PEL.

6. At the Pre-Trial conference held on the 20th April 2016, Counsel for the Claimants agreed that the knowledge of a solicitor is knowledge of the client. This is correct in law as notice to a solicitor of a transaction, and about a matter as to which it is part of his duty to inform himself, is actual notice to the client. **[Rolland v Hart (1871) L.R. 6 Ch. App. 678].** It is accepted that WC was at all material times a partner of Cassell & Lewis.

THE CLAIMS

MNIHCV2012/0014 Clifton Cassell (Parcel 72)

MNIHCV2012/0020 Clifford West (Parcel 71)

7. These Claims are identical.

8. Each Claimant bought from WC and CC.

9. Both Claimants aver that they were not aware of any material irregularity within PEL when WC and CC bought from PEL and they acted in good faith and in reliance on the clear title as registered and were bona fide purchasers for value without notice.

10. PEL by way of defence denies that the Claimants were bona fide purchasers for value without notice and counterclaimed for, inter alia, a declaration that PEL is the owner of the particular parcels.

11. A simple Defence to Counterclaim was filed repeating the Statement of Claim.

MNIHCV2015/0015 Kenneth Allen & Ors (Parcel 59)

MNIHCV2012/0016 Alyn Krause & Anr (Parcel 14)

MNIHCV2012/0017 Phillip Brelsford (Parcel 15)

MNIHCV2012/0019 Joel Osborne & Anr (Parcel 56)

12. These Claims are identical.

13. Each Claimant bought from PEL.

14. The Claimants all aver that:

    (i) At all material times WC represented PEL who held himself out to be a director, agent, attorney and or officer of PEL.

(ii) They were bona fide purchasers for value without knowledge of any omission, fraud or mistake committed by PEL or WC or Cassell & Lewis (WC's law firm), and they did not contribute to any omission, fraud or mistake.

15. Allen & Krause, in addition, plead that they were not aware of any material irregularity within PEL and dealt with WC in good faith, relied on the indoor management rule and assumed that all necessary internal approvals of PEL had been satisfied.

16. The material parts of the Defences are identical as PEL avers that:
    (i) The Claimants were not bona fide purchasers for value without notice.
    (ii) WC was never a director of PEL.
    (iii) The instruments of transfer were not executed as required by Section 107 of the Registered Land Act as no seals were affixed neither were the required signatures of a director and secretary.
    (iv) The common seal of PEL was not affixed as required by section 25(6) of the Companies Act.

17. PEL counterclaims for a declaration that PEL is the owner of the relevant parcels.

18. The Defence to Counterclaim simply repeats the Statement of Claim.

THE EVIDENCE – PEL

19. Counsel for the Claimants agreed that recourse may be had to PEL's records at the Companies Registry, being public documents. It is accepted that these documents are being referred to, not as to the truth of their contents, but as to the fact of their existence.

20. The relevant records show as follows:

(i) 7th September 1989 – PEL incorporated.

(ii) 7th September 1989 – First directors were John Stanley Weekes and Elsa Weekes.

(iii) 4th September 2001 – PEL struck off register (S511 Companies Act – failure to file annual returns).

(iv) 9th August 2007 – share transfer from Walter Wood to Cassell & Lewis filed.

(v) 9th August 2007 – WC applies to restore PEL to the Register ('the Restoration Application"). Names himself as ***"a director"*** of PEL purportedly in compliance with the prescribed form but he was not a director at this time.

(vi) 4th September 2007 – WC files affidavit in support of Restoration Application. He swears that he is the ***"intended director"*** of PEL. Affidavit refers to Walter Wood as, inter alia, a ***"former director"*** of PEL.

(vii) 21st September 2007 - Walter Woods files an affidavit in support of the Restoration Application. He refers to himself, inter alia, as ***a director*** (as opposed to **"The Director"**). Walter Woods also deposes that he transferred his shares to WC and wishes to have WC appointed ***a director*** (as opposed to **the "Only" Director**) in his place.

(viii) 21st September 2007 – Order for restoration made.

(ix) 24th September 2007 – Notice of Change of Directors filed. Removes Walter Wood and OR as directors. Appoints WC effective the 21st September 2007. Form does not comply with Section 76 of the Companies Act as it is not in the prescribed form in that no signature section is provided for and neither is the form signed by a director or other authorised officer in accordance with the instructions to the form.

(x) 4th December 2007 – Shareholders' Resolution filed removing Walter Wood and OR as directors effective 21st September 2007 and appointing WC director effective **1st July 2007 (whilst PEL was struck off)**. Resolution states that "notice waived" and that OR being removed as he has refused to return to Montserrat and has made no contact with members of PEL for several years. Resolution signed by Meredith Lynch as secretary.

(xi) WC by this resolution purported to ratify his acts as director. There are two problems with this document and which on inspection would have been evident to the Claimants' respective lawyers on the transactions.

(xii) First, WC purports to waive notice of the meeting but such waiver was to be that of OR and not WC as provided for in Section 112 of the Companies Act. It applied where one attends the meeting notwithstanding that notice was not received. OR never attended the meeting.

(xiii) Secondly, if WC could not locate OR, the proper course was to apply to the court, pursuant to Section 131 of the Companies Act for an order calling a meeting.

THE EVIDENCE – TRIAL

MNIHCV2012/0014 Clifton Cassell (Parcel 72)

MNIHCV2012/0020 Clifford West (Parcel 71)

21. The Claimants each filed witness statements which were not controverted in cross-examination mainly due to the fact that the Defendants did not adduce any evidence and had to rely on the documents referred to at trial for their effect.

22. The Claimants rely on the conclusive effect of registration under Section 23 of the Registered Land Act and their respective Land Certificates issued on the 14th April 2011 and 31st January 2011, respectively. Save for a mortgage in favour of the Bank of Montserrat noted on Clifford West's Land Certificate, the titles are free from all other interests and claims whatsoever.

JUDGMENT

MNIHCV2012/0014 Clifton Cassell (Parcel 72)

MNIHCV2012/0020 Clifford West (Parcel 71)

23. In the circumstances, I am of the opinion and find that the Claimants, having purchased from WC and CC, as opposed to PEL, are entitled to rely on the said Land Certificates without further inquiry and I therefore find that both cases are made out and award judgment on the claims and dismiss the counterclaims.

24. I therefore grant the reliefs prayed for in paragraphs 1-4 of the respective Statements of Claim.

25. There is no award of damages as no evidence was led in this regard.

26. I make no order as to costs as these claims arose through no fault of the Defendants but were instituted merely to confirm title in light of the convictions of WC.

THE EVIDENCE – TRIAL

MNIHCV2015/0015 Kenneth Allen & Ors (Parcel 59)

THE DOCUMENTS

27. The transaction documents are as follows:

(i) 8th October 2007 - Instrument of Transfer. **The Claimants however signed in September 2007 before PEL was reinstated.**

(ii) 22nd October 2007 – Land Certificate Issued.

WITNESS EVIDENCE

28. Kenneth Allen, one of the Claimants, was the only witness in the trial.

29. In his witness statement he says, inter alia, as follows:

(i) WC presented himself as acting on behalf of PEL during the year 2007.

(ii) He verbally agreed with PEL (represented by WC) to purchase the land.

(iii) WC held himself out as a Director, Agent and Officer of PEL.

(iv) He was not informed of any matter which may have affected free and clear title to the land.

(v) He negotiated the purchase of the land with WC in good faith and had no reason to doubt or question his authority to sell the land on behalf of PEL.

(vi) WC appeared to be openly conducting the affairs of PEL.

(vii) There was nothing about the transaction which gave him cause for concern or raise any suspicion.

(viii) He was fully aware that WC was an attorney at law practising in Montserrat and at no time did it occur to him that WC may not have been properly appointed as a director, attorney or officer of PEL.

(ix) In dealing with WC he had no knowledge of any omission, fraud or mistake on the part of PEL, WC, Cassell & Lewis or any person relating to ownership of the land; or of any misrepresentation by any person which would have affected his decision to purchase the land and he did not contribute to such omission, fraud or mistake.

(x) And by amplification, that:

(a) His lawyers, Allen Markham and Associates, conducted the transaction on his behalf.

(b) He was not at the material time aware of any irregularities regarding PEL and WC.

(c) He was not associated or related to WC in any way at the material time that is, the period leading up to the transaction and the transaction itself.

(d) He was not aware of any dispute between OR and WC.

30. In cross-examination he said, inter alia, that:

(i) WC and not PEL held himself out.

(ii) He believed WC was an officer of PEL.

(iii) When he dealt with WC, WC was already negotiating and selling land at Providence. There were no bells in his head.

(iv) In response to the question as to what steps he took to ensure that WC was entitled to act on behalf of PEL, he replied that he was represented by counsel in the transaction and they did all that.

(v) He did not remember the date on which he accepted the offer. At every stage he was represented by his lawyer and left it to the firm.

31. In re-examination he said, Inter alia, that:

(i) "Offer" means the negotiations he had with WC and these negotiations resulted in an offer to purchase the land.

32. It is neither pleaded nor does it appear in the evidence that the Claimants' lawyer conducted any due diligence searches on PEL.

33. Counsel for the Claimants, in his closing submissions (at paragraph 24) attempts to infer that because counsel was retained on the transaction this implies that such due diligence was in fact carried out. There is no such inference as a matter of law and, in any event, the evidence does not support that inference. In fact, the Instrument of Transfer was executed by

the Claimants while PEL was struck off and no lawyer worth his or her salt, being aware of that fact, could properly advise a client to deal with that company. Indeed, the fact that the transaction proceeded despite the glaring omissions and inconsistencies in the company's records (as referred to above), are indicative that no search was done as it is difficult to imagine a lawyer advising a client to proceed in light thereof. Surely, had this information been communicated to the Claimants, it is difficult to envisage that they would not have doubted or questioned WC's authority to sell the land on behalf of PEL.

34. The Claimants plead that they are relying on the indoor management rule and their Counsel is aware (as appears in his submissions at paragraphs 24 and 25) that reliance on this rule is only possible if recourse had been had to the company's records and, therefore, this critical evidence should have been put before the court. After all, it is their case.

35. The Claimants by their very evidence relied on the fact that WC was a practising Attorney-at-law and also on the fact that he was openly conducting the affairs of PEL and, as a result, there was no reason to doubt or question his authority.

36. I therefore find as a fact that the Claimants never, either by themselves or by their lawyers, carried out the necessary due diligence checks on PEL by having recourse to the company's records but relied on WC's representations and acts as evidence that WC was authorised to act on behalf of PEL.

MNIHCV2012/0016 Alyn Krause & Anr (Parcel 14)

THE EVIDENCE – TRIAL

THE DOCUMENTS

37. The transaction documents are as follows:

(i) 9th November 2007 – Agreement for Sale signed by WC alone.

(ii) 11th January 2008 – Instrument of Transfer. Signed by WC alone on behalf of PEL with seal affixed.

(iii) 11th January 2008 – Instrument of Transfer.

WITNESS EVIDENCE

38. Alyn Krause, one of the Claimants, was the only witness in the trial.

39. In his witness statement he says, inter alia, as follows:

(i) WC presented himself as acting on behalf of PEL.

(ii) Agreement for purchase executed on 9th November 2007 at which date WC held himself out as a Director, Agent and Officer of PEL.

(iii) The formal transfer document was signed by WC and the Claimants.

(iv) On 25th January 2008, the property was registered in the Claimants' names.

(v) Prior to the purchase, he was not informed nor was he aware of any matter which may have affected free and clear title to the land.

(vi) The purchase of the land was negotiated in good faith and he had no reason to doubt or question the authority of WC to sell the land on behalf of PEL.

(vii) WC appeared to be openly conducting the affairs of PEL and there was nothing about the transaction which gave him cause for concern or raise any suspicion.

(viii) He was aware that WC was an Attorney-at-lawyer practising in Montserrat and at no point did it occur to him that WC may not have been properly appointed as a Director, Attorney or Officer of PEL.

(ix) He would not have risked spending the purchase price if he had known or suspected that WC was not authorised to conduct the sale of the land on behalf of PEL.

(x) And by amplification, that:

(a) He was represented by his lawyer David Brandt.

(b) He was not aware of any dispute between PEL and WC at the material time.

(c) He was not aware of any dispute between OR and WC at the material time.

(d) He was not aware of any irregularities whatsoever with respect to PEL at the material time.

40. In cross-examination he said, inter alia, that:

(i) The name Owen Rooney does not appear on the land transfer document, neither does his signature.

(ii) He had no agreement with OR.

(iii) He was not aware that the company (PEL) seal was counterfeit.

41. There was no re-examination.

42. It is neither pleaded nor does it appear in the evidence that the Claimants' lawyer conducted any due diligence searches on PEL.

43. Counsel for the Claimants, in his closing submissions (at paragraph 24) attempts to infer that because counsel were retained on the transaction, this implies that such due diligence was in fact carried out. There is no such inference as a matter of law and, in any event, the evidence does not support that inference. Indeed, the fact that the transaction proceeded despite the glaring omissions and inconsistencies in the company's records (as referred to above), are indicative that no search was done as it is difficult to imagine a lawyer advising a client to proceed in light thereof.

Surely, had this information been communicated to the Claimants, it is difficult to envisage that they would not have doubted or questioned WC's authority to sell the land on behalf of PEL.

44. The Claimants plead that they are relying on the indoor management rule and their counsel is aware (as appears in his submissions at paragraphs 24 and 25) that reliance on this rule is only possible if recourse has been had to the company's records and, therefore, this critical evidence should have been put before the court. After all, it is their case.

45. The Claimants by their very evidence relied on the fact that WC was a practising Attorney-at-law and also on the fact that he was openly conducting the affairs of PEL and, as a result, there was no reason to doubt or question his authority.

46. I therefore find as a fact that the Claimants never, either by themselves or by their lawyers, carried out the necessary due diligence checks on PEL by having recourse to the company's records but relied on WC's representations and acts as evidence that WC was authorised to act on behalf of PEL.

MNIHCV2012/0017 Phillip Brelsford (Parcel 15)

THE EVIDENCE – TRIAL

THE DOCUMENTS

47. The transaction documents are as follows:

(i) 7th January 2008 – Agreement for Sale signed by WC alone on behalf of PEL.

WITNESS EVIDENCE

48. Philip Brelsford, the Claimant, was the only witness in the trial.

49. In his witness statement he says, inter alia, as follows:

(i) During January 2008, he entered negotiations to purchase the land from PEL.

(ii) WC presented himself as acting on behalf of PEL.

(iii) On 7th January 2008, he executed the purchase agreement.

(iv) At the date of entering the agreement for the purchase of the land, WC held himself out to him as a director, agent and officer of PEL.

(v) The formal transfer document was signed by WC.

(vi) On 19th February 2008, the property was registered in his name.

(vii) Prior to the purchase he was not informed, nor was he aware of any matter which may have affected free and clear title to the land.

(viii) He negotiated the purchase of the land with WC in good faith and had no reason to doubt or question his authority to sell the land on behalf of PEL.

(ix) WC appeared to be openly conducting the affairs of PEL and there was nothing about the transaction which gave him cause for concern or raise any suspicion.

(x) He was aware that WC was an Attorney-at-law practising in Montserrat and at no point did it occur to him that WC may not have been properly appointed as a director, attorney of officer of the PEL.

(xi) He would not have spent the sums for the land if he had known or even suspected that WC was not authorised to conduct the sale of land on behalf of PEL.

(xii) In dealing with WC he had no knowledge of any omission, fraud or mistake on the part of PEL, WC, Cassell & Lewis or any person relating to ownership of the land; or of any misrepresentation by any person which would have affected his decision to purchase the land and he did not contribute to such omission, fraud or mistake.

(xiii) And by amplification, that:

(a) He was represented by his lawyer, David Brandt.

(b) He was not aware of any irregularities between WC and PEL at the material time.

(c) He was not aware of any dispute between PEL, OR and WC at the material time.

50. In cross-examination he said, inter alia, that:

(i) At the time he purchased, he was informed by his legal representative that there was appropriate access to the land.

(ii) He did not take any steps to ascertain if there was access but relied on his legal representative.

(iii) His legal representative did not tell him that he was a law partner of WC.

(iv) WC signed the agreement for sale.

(v) He had no suspicion that WC was not a Director of PEL.

(vi) As far as he was concerned, WC was a Director of PEL (he referred to paragraph 4 of his witness statement).

(vii) He bought the land from PEL in good faith.

(viii) As to the question whether he paid PEL, he said that he paid for the land based on the representation of his counsel as per the purchase document (he referred to paragraph 4 of his witness statement).

(ix) As to the question whether he paid PEL or WC, he referred to paragraph 4 of his witness statement.

(x) He first knew of the land being available for sale in late 2007 from advertisements placed by Sun Island Real Estate.

(xi) In answer to the question whether he knew if Sun Island Real Estate was authorised to represent PEL as an Estate Agent, he said that he relied on his attorney with respect to that issue and that he did not know of his own knowledge.

(xii) In answer to the question whether PEL delivered the transfer document, he said that the documentation was arranged by his counsel and that he presumed that his counsel would do all necessary searches etc. on his part.

51. In respect of paragraph 4 of his witness statement, the Learned Trial Judge asked him if WC held out to him via his lawyer and he responded that the holding out was done in the presence of his lawyer.

52. There was no re-examination.

53. It is neither pleaded nor does it appear in the evidence that the Claimant's lawyer conducted any due diligent searches on PEL.

54. Counsel for the Claimant, in his closing submissions (at paragraph 24) attempts to infer that because counsel was retained on the transaction, this implies that such due diligence was in fact carried out. There is no such inference as a matter of law and, in any event, the evidence does not support that inference. Indeed, the fact that the transaction proceeded despite the glaring omissions and inconsistencies in the company's records (as referred to above), are indicative that no search was done as it is difficult to imagine a lawyer advising a client to proceed in light thereof. Surely, had this information been communicated to the Claimant, it is difficult to envisage that he would not have doubted or questioned WC's authority to sell the land on behalf of PEL.

55. The Claimant's counsel submits that reliance is being placed on the indoor management rule and counsel is aware (as appears in his submissions at paragraphs 24 and 25) that reliance on this rule is only possible if recourse had been had to the company's records and,

therefore, this critical evidence should have been put before the court. After all, it is his case.

56. The Claimant by his very evidence relied on the fact that WC was a practising Attorney-at-law and also on the fact that he was openly conducting the affairs of PEL and, as a result, there was no reason to doubt or question his authority.

57. I therefore find as a fact that the Claimant never, either by himself or by his lawyer, carried out the necessary due diligence checks on PEL by having recourse to the company's records but relied on WC's representations and acts as evidence that WC was authorised to act on behalf of PEL.

MNIHCV2012/0019 Joel Osborne & Anr (Parcel 56)

THE EVIDENCE – TRIAL

THE DOCUMENTS

58. The transaction documents are as follows:

(i) 16th August 2007 – Letter from Cassell and Lewis to Joel Osborne confirming payment toward purchase price re: Parcel 40 as opposed to Parcel 56 which latter Parcel is the subject matter of these proceedings. Letter signed by WC.

(ii) 16th August 2007 – Bank of Montserrat Manager's Cheque from Joel Osborne to Cassell and Lewis re: purchase of Parcel 40.

(iii) 21st September 2007 – Instrument of Transfer executed but filed 31st October 2007. Transfer signed on behalf of PEL by WC as Director and M. Lynch as Secretary. No seal affixed.

(iv) 17th October 2007 – Stamp Duty Receipt re: Parcel 56

WITNESS EVIDENCE

59. Joel Osborne, one of the Claimants, was the only witness in the trial.

60. In his witness statement he says, inter alia, as follows:

(i) During August 2007, he and his wife Ingrid Osborne entered negotiations for the purchase of land from PEL.

(ii) WC of the Law Firm Cassell & Lewis presented himself as acting on behalf of PEL.

(iii) During the month of August 2007, the Claimants agreed to purchase the land.

(iv) During the period of negotiating and finalizing the agreement, WC held himself out as a director, agent and officer of PEL.

(v) The formal transfer document was signed by WC and the Claimants.

(vi) On 31st October 2007, title was registered in the names of the Claimants.

(vii) Prior to the purchase he was not informed nor was he aware of any matter which may have affected free and clear title to the land.

(viii) The purchase of the land was negotiated in good faith.

(ix) He had no reason to doubt or question the authority of WC to sell the land on behalf of PEL.

(x) WC appeared to be openly conducting the affairs of PEL and there was nothing about the transaction which gave him cause for concern or raised any suspicion.

(xi) He was aware that WC was an Attorney-at-law practising in Montserrat and at no point did it occur to him that he may not have been properly appointed as the director, attorney or officer of PEL.

(xii) Under no circumstances would he have risked spending the sums which he did for the land purchased if he had known or suspected that WC was not authorised to conduct the sale on behalf of PEL.

(xiii) And by amplification, that:

(a) David Brandt was his legal counsel with respect to the land purchased.

(b) He was not aware, at the material time, of any irregularities regarding PEL and WC.

(c) He was not associated with PEL in any way.

(d) He was not aware of any dispute between WC and OR.

61. In cross-examination he said, inter alia, that:

(i) He was unaware that his lawyer, David Brandt, was the law partner of WC in Brandt & Cassell Law Firm.

(ii) He lived in Montserrat all his life.

(iii) He was not aware that David Brandt, as of the 19th September, 2007, had been holding himself out as the lawyer for PEL.

(iv) The Instrument of Transfer was signed by him on the 21st September 2007. (Page 34 of Core Bundle 3).

(v) He acknowledged the correctness of the stamp duty receipt (Page 33 of Core Bundle 3).

(vi) He could not remember when he first paid WC for the land.

(vii) He acknowledged that he knew about the bank draft dated 16th August 2007.

(viii) He did not recall if he entered into the agreement with WC to purchase the property on the 16th August 2007. He said that he paid the money on that date but entered into the agreement in August of 2007.

(ix) He said that he paid for the land on the 16th of August 2007.

(x) In response to the Learned Trial Judge, he confirmed that he entered into the purchase agreement before he paid for the land.

(xi) He said that the signature on the Instrument of Transfer above the word Director looks like WC's signature.

(xii) He said that he did not know who signed as the Secretary.

(xiii) He said that he didn't know who signed as Commissioner for Oaths.

(xiv) He said that he did not act as agent for WC.

(xv) He said that he did not act as a go-between WC and Howard Fergus

(xvi) He said that David Brandt did not act for him in this transaction.

62. There was no re-examination.

63. It is neither pleaded nor does it appear in the evidence that the Claimants' lawyer conducted any due diligence searches on PEL.

64. Counsel for the Claimants, in his closing submissions at paragraph 24 attempts to infer that because counsel was retained on the transaction, this implies that such due diligence was in fact carried out. There is no such inference as a matter of law and, in any event, the evidence does not support that inference. Indeed, the fact that the transaction proceeded despite the glaring omissions and inconsistencies in the company's records (as referred to above), are indicative that no search was done as it is difficult to imagine a lawyer advising a client to proceed in light thereof. Surely, had this information been communicated to the Claimants, it is difficult to envisage that they would not have doubted or questioned WC's authority to sell the land on behalf of PEL.

65. The Claimants' counsel submits that reliance is being placed on the indoor management rule and counsel is aware (as appears in his submissions at paragraphs 24 and 25) that reliance on this rule is only possible if recourse has been had to the company's records and, therefore, this critical evidence should have been put before the court. After all, it is their case.

66. The Claimants by their very evidence relied on the fact that WC was a practising Attorney-at-law and also on the fact that he was openly conducting the affairs of PEL and, as a result, there was no reason to doubt or question his authority.

67. I therefore find as a fact that the Claimants never, either by themselves or by their lawyer, carried out the necessary due diligence checks on PEL by having recourse to the company's records but relied on WC's representations and acts as evidence that WC was authorised to act on behalf of PEL.

THE LAW – BONA FIDE PURCHASER FOR VALUE WITHOUT NOTICE – WHAT AMOUNTS TO NOTICE

68. The doctrine of notice lies at the heart of equity. Given that there are two innocent parties (PEL and the Claimants), each enjoying rights, the earlier right (that of PEL) prevailed against the later right if the acquirer of the later right (Claimants) knows of the earlier right (actual notice) or would have discovered it had he taken proper steps (constructive notice). In particular, if the party (Claimants) asserting that he takes free from the earlier rights of another (PEL) knows of certain facts which put him on inquiry as to the possible existence of the rights of that other (PEL) and he fails to make such inquiry or take such other steps as are reasonable to verify whether such earlier right does or does not exist, he will have constructive notice of the earlier right (that of PEL) and take subject to it. [1]

[1] Barclays Bank PLC v O'Brien [1994] 1 A. C. 180 at 195

69. In dealing in matters of business regard is had to the usual course of business; and the purchaser who wilfully departs from it in order to avoid acquiring a knowledge of his vendor's title is not allowed to derive any advantage from his wilful ignorance of defects which would have come to his knowledge if he had transacted his business in the ordinary way.[2]

70. As was stated by North, J., the law does not allow anything so absurd as to suggest that if a man was content to purchase property on the condition he should not inquire into the title, he would acquire a title free from any existing restrictions, and would not have constructive notice of any incumbrance.[3]

71. In my opinion, prudent business practice dictates that when someone is purchasing from a company, inquiries must be made by way of conducting a search at the company's registry to ascertain the standing of the company, the officers authorised to transact the business of the company and the manner in which the authority of those officers is to be carried out.

72. I find therefore that, as a matter of law, in the circumstances of these cases, the several Claimants having not, as previously found, made any such inquiries, have constructive notice that PEL did not consent to any of the land purchases and, therefore, they take subject to PEL rights. This is sufficient to find in favour of PEL. However, counsel for the Claimants in his submissions seeks to rely on the indoor management rule.

THE INDOOR MANAGEMENT RULE

73. At common law, a person dealing with a company, assuming that he or she is acting in good faith and without knowledge of any irregularity, need

[2] Bailey v Barnes [1894] 1 Ch. 25 at 35
[3] Cox & Neve's Contract [1891] 2 Ch. 109 at 118

not inquire about the formality of the internal proceedings of the company, but is entitled to assume that there has been compliance with the articles and by-laws.[4]

74. If the rule applies in the instant cases, then the Claimants will be able to rely on the notice appointing WC as a Director and therefore having authority to act as such.

75. However, the indoor management rule does not apply where the person seeking to rely on it has no knowledge of the articles of association and, in this case, the notice appointing WC as a Director.

76. A person who, at the time of purporting to make a contract with a company, who has no knowledge of the company's articles of association, cannot rely on those articles as conferring ostensible or apparent authority on the agent with whom he dealt. The doctrine of constructive notice of a company's registered documents, such as its memorandum of association, its articles of association, its special resolutions, etc., does not operate against a company, but only in its favour. Put in the converse way, the doctrine of constructive notice operates against the person who has failed to inquire, but does not operate in his favour. There is no positive doctrine of constructive notice, it is a purely negative one. A person cannot set up an ostensible or apparent authority unless he relied on it in making the contract or supposed contract.[5]

77. Ostensible or apparent authority must, be something emanating from the company and not from the person who seeks to defraud it and the other party.[6]

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[4] Royal British Bank v Turquand (1856) 5 El. & Bl. 248
[5] Rama Corporation Ltd v Proved Tin & General Investments Ltd [1952] 1 All ER 554 at 556 per Slade J.
[6] Ibid at page 571.

78. Having already found as a fact that no inquiries were made, I now find that, as a matter of law, the indoor management rule does not apply.

79. Even if the indoor management rule does apply, it does not avail the Claimants.

80. I agree with counsel for Claimants submissions (at paragraph 21) that Section 20 of the Companies Act has now codified the indoor management rule and **"most"** of the common law exceptions to the indoor management rule.

81. At common law, the indoor management rule did not apply where the person seeking to rely on it was put on inquiry.

82. The exception in section 20 is as follows: ***"except where that person has or ought to have by virtue of his position or relationship to the company, knowledge to the contrary."***

83. In my opinion, the statutory exception does not replace the common law exception. A codifying statute does not amend. Parliament could not have intended to create an ambiguity when none existed given that the codification is to make the law clearer. Indeed, to assert that the exception only applies where an outsider has a "relationship" to the company will drive a coach and horses through the equitable doctrine of notice.

84. Counsel for the Claimants relies on the judgment in the Australian case ***Lyford v Meade Portfolio Ltd (1989) 7 ACLC 271***. However, this was a first instance decision and later decisions both from the High Court and Court of Appeal disagree with a narrow interpretation of the statutory

exception holding that it is unlikely that Parliament intended a radical narrowing of the qualification to the common law rule.[7]

85. In a later case, the Australia Court of Appeal referring to ***Advance Bank*** stated that the indoor management rule due inquiry exception can be read as included within the operation of the statutory exception. Kirby P said that ***"the question of what activates the requirement of an inquiry is best answered by the common law and the statutory exception does not involve a test more restrictive than that which exists at common law".***[8]

86. In a more recent decision from Australia, Hedigan J. said that ***"In the present context the difference between being put on inquiry and whether one ought to have known of the want of authority may be more apparent than real".***[9]

87. Nathan J. in another case agreed with Hedigan J. in ***Sixty-Fourth Throne*** stating that the difference between being put on inquiry and being in the position where one ought to know were "the same side as one coin".[10]

88. I therefore find that as a matter of law, the common law exception of due inquiry still applies notwithstanding the codification and if, as is contended by counsel for the Claimants, recourse was had to the company's records, then those records, as stated earlier in this judgment, are such as to put them on inquiry. There is no evidence, nor any assertion, that any inquiry was carried out. In the circumstances the Claimants took subject to PEL's interest which conclusion is, in essence, no different from that which I arrived at in respect of the bona fide purchaser for value without notice.

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[7] Advance Bank of Australia Ltd v Fleetwood Star Pty Ltd & Anor (1992) 10 ACLC 703 at 638-639
[8] Bank of New Zealand v Fiberi Pty Ltd (1994) 12 ACLC 48 at 54-56
[9] Sixty-fourth Pty Ltd v Macquarie Bank (1996) 14 ACLC 670 at 673
[10] Pyramid Building Society v Scorpion Hotels Pty Ltd (1996) 14 ACLC 679 at 696

SECTION 82 OF THE COMPANIES ACT

89. Counsel for the Claimants, in his submissions (at paragraph 27) seeks to place reliance on this section which states as follows:

> "An act of a director or officer is valid notwithstanding any irregularity in his election or appointment, or defect in his qualification."

90. In my judgment, this section does not assist the Claimants as this section is designed as a machinery to avoid questions being raised as to the validity of transactions where there has been a slip in the appointment of a director and not to override substantive provisions relating to such appointments.[11]

91. There is a vital distinction between an appointment in which there is a defect and no appointment at all. In the first case, it is implied that some act is done which purports to be an appointment but is by reason of some defect inadequate for the purpose; in the second case, there is not a defect, but there is no act at all. The section does not say that the acts of a person acting as a director shall be valid notwithstanding that it is afterwards discovered that he was not appointed a director. It would be doing violence to the plain language to construe the section as covering a case in which there has been no genuine attempt to appoint at all.[12]

SECTION 107 OF REGISTERED LAND ACT

92. I agree, as the Defendants contend, that section 107 (2) of the Registered Land Act was not complied with in that the transfers were not signed as required and find so as a fact.

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[11] Morriss v Kanssen & Ors [1947] AC 459.
[12] Ibid at page 471 per Lord Simmonds

JUDGMENT

MNIHCV2015/0015 Kenneth Allen & Ors (Parcel 59)

93. In the circumstances I enter judgment as follows:

(i) The Claim is dismissed.

(ii) The Counterclaim is allowed.

(iii) It is declared that the Claimants are not the absolute owners of Block 13/10 Parcel 59.

(iv) It is declared that Providence Estate Limited is the absolute owner of Block 13/10 Parcel 59.

(v) It is ordered that the Register be rectified pursuant to Section 140 of the Registered Land Act by removing the Claimants as the Registered Proprietors and substituting Providence Estate Limited as Registered Proprietor.

(vi) It is ordered that the Claimants do pay to the Defendants prescribed costs on the value of the Claim which I deem to be the purchase price of EC$418,967.25 and which costs amount to EC$50,646.72.

MNIHCV2012/0016 Alyn Krause & Anr (Parcel 14)

94. In the circumstances I enter judgment as follows:

(i) The Claim is dismissed.

(ii) The Counterclaim is allowed.

(iii) It is declared that the Claimants are not the absolute owners of Block 13/10 Parcel 14.

(iv) It is declared that Providence Estate Limited is the absolute owner of Block 13/10 Parcel 14.

(v) It is ordered that the Register be rectified pursuant to Section 140 of the Registered Land Act by removing the Claimants

as the Registered Proprietors and substituting Providence Estate Limited as Registered Proprietor.

(vi) It is ordered that the Claimants do pay to the Defendants prescribed costs on the value of the Claim which I deem to be the purchase price of EC$537,300.00 and which costs amount to EC$61,361.00.

MNIHCV2012/0017 Phillip Brelsford (Parcel 15)

95. In the circumstances I enter judgment as follows:

(i) The Claim is dismissed.

(ii) The Counterclaim is allowed.

(iii) It is declared that the Claimants are not the absolute owners of Block 13/10 Parcel 15.

(iv) It is declared that Providence Estate Limited is the absolute owner of Block 13/10 Parcel 15.

(v) It is ordered that the Register be rectified pursuant to Section 140 of the Registered Land Act by removing the Claimant as the Registered Proprietor and substituting Providence Estate Limited as Registered Proprietors.

(vi) It is ordered that the Claimant do pay to the Defendants prescribed costs on the value of the Claim which I deem to be the purchase price of EC$216,000.00 and which costs amount to EC$29,500.00.

MNIHCV2012/0019 Joel Osborne & Anr (Parcel 56)

96. In the circumstances I enter judgment as follows:

(i) The Claim is dismissed.

(ii) The Counterclaim is allowed.

(iii) It is declared that the Claimants are not the absolute owners of Block 13/10 Parcel 56.

(iv) It is declared that Providence Estate Limited is the absolute owner of Block 13/10 Parcel 56.

(v) It is ordered that the Register be rectified pursuant to Section 140 of the Registered Land Act by removing the Claimants as the Registered Proprietors and substituting Providence Estate Limited as Registered Proprietor.

(vi) It is ordered that the Claimants do pay to the Defendants prescribed costs on the value of the Claim which I deem to be the purchase price of EC$67,500.00 and which costs amount to EC$10,125.00.

.....

James Bristol
High Court Judge
(Ag)