# In The Supreme Court of Bermuda

CIVIL JURISDICTION

2014: No. 255

BETWEEN:

KEVIN WAKEFIELD SAMPSON

Plaintiff

-v-

THE ESTATE OF NINA MAE JOELL

ALBERT JOELL JR

(Estate Representative)

2nd Defendant

ESTATE OF CLIFFORD WAKEFIELD SAMPSON

3rd Defendant

## RULING ON STRIKE OUT APPLICATION

(in Chambers)

Date of hearing: January 8, 2015
Date of Judgment: February 1, 2015

Mr. Vaughan V. Caines, Marc Geoffrey Barristers and Attorneys Ltd, for the Plaintiff
Mr. Paul Harshaw, Canterbury Law Limited, for the 1st and 2nd Defendants

**Background**

1. By a Re-Amended Writ of Summons issued on November 18, 2014, the Plaintiff primarily seeks a declaration that he is entitled to a ½ interest in 'Chula Vista', 44 North Shore Road, Pembroke ("the Property"). The background facts are essentially common ground.

2. The Plaintiff is the great-grandson and the 1st Defendant the grandson of the late Dorothy Louise Sampson ("the Testator"). By her Last Will and Testament ("the Will"), the Testator devised the Property in equal shares to the Plaintiff and the 1st Defendant, subject to a life interest in favour of her daughter, the late Iva Etoile Anderson. The 2nd and 3rd Defendants, both now deceased, were named in the Will as executors of the Testator's estate. The Testator died on or about June 3, 1980. The Plaintiff and the 1st Defendant became entitled to joint ownership in the Property on June 1, 1988.

3. The executors were granted probate in respect of the Testator's estate on or about November 4, 1980. By a Vesting Deed dated May 26, 1981, the executors conveyed the life interest granted by the Will to the life tenant. No vesting deed was apparently executed in respect of the remainder interest of the Plaintiff (then only 21 years of age) or the 1st Defendant. Iva Etoile Anderson died on or about June 1, 1988. The 1st Defendant assumed exclusive possession of the Property as of that date.

4. By a Summons dated October 12, 2015, the 1st and 2nd Defendant applied to strike out the Plaintiff's claim on the grounds that it either failed to disclose a reasonable cause of action or, *inter alia*, was an abuse of process.

5. By the end of the hearing it was clear that the action was liable to be struck out for failing to disclose a reasonable cause of action which would not be defeated by the Defendants' limitation defence. The present action was commenced more than 25 years after it was admitted the 1st Defendant assumed exclusive possession of the Property.

6. However, the far more difficult question was whether or not the Plaintiff had demonstrated sufficient grounds for being afforded an opportunity to apply for leave to further amend the Re-Amended Statement of Claim. This question entailed balancing:

    (a) the right of the Defendants to be protected from being belatedly pursued in relation to a very stale claim; and

(b) the right of the Plaintiff to have a full hearing of a claim relating to what was undoubtedly intended by the Testator to be his inheritance.

7. As the only pleaded claim was against the 1st Defendant, detailed attention will be given to his portion of the strike out application. The distinct position of the 2nd and 3rd Defendants will be considered more briefly below.

**The pleadings and agreed and contentious facts**

**The pleadings**

8. The Re-Amended Statement of Claim makes the following central averments:

> "*11. In accordance with Dorothy Louise Sampson's Will, on 1st June 1988 the Plaintiff's and the 1st Defendant's inheritance on an equal basis was realised upon the passing of Iva Anderson…*
>
> *13. The Defendant mistakenly believed that the property…was his alone…Accordingly the Defendant under a mistake of fact possessed the property…*
>
> *16. THE PLAINTIFF AND THE DEFENDANT MISTAKENLY BELIEVED THAT THE DEFENDANT WAS THE SOLE OWNER OF THE PROPERTY.*"

9. No case is pleaded at all against the 2nd or 3rd Defendant.

**The evidence**

10. It is common ground that the 1st Defendant has solely possessed the Property since his mother died in 1988.

11. An attendance note prepared by a probate lawyers at Conyers Dill and Pearman on July 14, 1980 makes mention of the Plaintiff's joint interest in the Property and the fact that he was then a minor who would become an adult on in January 1981. Did he receive notice of his interest in the Property at this time? Mr Harshaw argued that he probably did as in the ordinary course of business he ought to have been notified. The Defendants' Affidavits in support of their strike out application do not positively

assert that the Plaintiff had or ought to have had knowledge of his interest in the Property prior to 1988 or at any other time.

12. Why a Vesting Deed was executed conferring the life interest only and not mentioning the remainder interests conferred on the Plaintiff and the 1st Defendant is a mystery which will probably never be explained.

13. The Plaintiff contends that he did not learn of his interest until 2012 when his cousin Colin Anderson told him about the Will and he obtained a copy from the Supreme Court. His Aunt Roslyn Anderson deposes that she and her husband Collingwood supplied him with a copy of the Will in 2012 and that prior to this he was unaware of his interest. The Plaintiff further deposes that when he confronted the 1st Defendant with the Will, he denied any knowledge of the Will. He states that he had been advised that occupation by one tenant in common did not qualify for the purposes of acquiring rights by virtue of adverse possession; this point was not pursued in argument and is not pleaded. On the other hand, while he deposes that he believed the Testator died intestate, the Plaintiff offers no explanation at all as to why he could not have made appropriate enquiries within the 1998-2008 limitation period to ascertain the true position.

14. Mr Caines argued that it is inherently unbelievable that the Plaintiff would with knowledge of the gift contained in the Will have simply ignored his interest for so many years. I agree. The evidence strongly suggests that the Plaintiff was not made aware of the Will and the half-interest in the Property which was conferred upon him in or about 1980 or before in or about 2012. He appears to have a genuine grievance about what, on the face of it, appears to be a serious injustice.

15. The Court should accordingly be cautious about denying the Plaintiff an opportunity to have his claim heard on its merits unless it is very clear indeed that his claim is bound to fail.

**Legal findings**

**The Limitation Act 1984**

16. Once the limitation period prescribed for bringing an action to recover land (20 years, section 16) expires, whatever title the claimant may have had is extinguished. Section 18 of the Limitation Act provides:

"*18. Subject to this Act at the expiration of the period prescribed by this Act for any person to bring an action to recover land (including a redemption action) the title of that person to the land shall be extinguished.*"

17. Where the claimant is dispossessed (or, by analogy, never enters into possession when his interest crystallizes), time starts running for limitation purposes from the date the defendant enters into possession: First Schedule, paragraph 1. It was common ground that the effect of these provisions as applied to the agreed facts of the present case was that, absent some legal basis for postponing the commencement of the limitation period to a date subsequent to June 1, 1988, the Plaintiff's title to the Property was extinguished on June 1, 2008.

18. Mr Harshaw rightly submitted that where one of two tenants in common entitled under a will occupies the devised property for more than 20 years, the title to the co-tenant's share will be extinguished: *Paradise Beach and Transportation Co. Ltd.-v-Cyril Price-Robinson* [1968] A.C. 1072 (Privy Council).

19. It was also common ground that the only provision in the 1984 Act the Plaintiff could potentially rely upon was the following:

"***Fraud; concealment; mistake***
*33 (1) Subject to subsection (3), where in the case of any action for which a period of limitation is prescribed by this Act, either —*

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

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

*(c) the action is for relief from the consequences of a mistake,*

*the period of limitation shall not begin to run until the plaintiff has discovered the fraud, concealment or mistake (as the case may be) or could with reasonable diligence have discovered it.*

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

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

*(3) Nothing in this section shall enable any action—*

*(a) to recover, or recover the value of, any property; or*

*(b) to enforce any charge against, or set aside any transaction affecting, any property,*

*to be brought against the purchaser of the property or any person claiming through him in any case where the property has been purchased for valuable*

*consideration by an innocent third party since the fraud or concealment or (as the case may be) the transaction in which the mistake was made took place.*

*(4) A purchaser is an innocent third party for the purposes of this section —*

*(a) in the case of fraud or concealment of any fact relevant to the plaintiff's right of action, if he was not a party to the fraud or (as the case may be) to the concealment of that fact and did not at the time of the purchase know or have reason to believe that the fraud or concealment had taken place; and*

*(b) in the case of mistake, if he did not at the time of the purchase know or have reason to believe that the mistake had been made.*"

**The legal requirements for relying upon mistake for the purposes of section 33 (1)(c) of the Limitation Act 1984**

20. Due to the passage of time, the executors of the Testator's estate have long since died and the lawyer involved in administering the estate, if still alive, cannot easily be traced. Mr Caines sensibly conceded that the most he could do was to rely on mistake, rather than fraud or deliberate concealment. Mr Harshaw, however, submitted that the averments presently contained in the Plaintiff's pleading did not disclose a reasonable cause of action in that they did not allege facts and matters amounting to mistake in the requisite legal sense.

21. Section 33(1)(c) of the Limitation Act 1984 is based on section 32(1)(c) of the 1980 Limitation Act (UK). The UK provision is discussed in McGee, '*Limitation Periods*', 6th edition, at paragraphs 20.030-20.033. Authorities on the identical statutory provision from which our own section 33(1(c) is derived will be highly persuasive in the local courts. The English view appears clearly to be that mistake in this statutory context does not mean mistake in the broad sense that laymen would understand it, embracing a "*mistaken (as distinct from fraudulent-now deliberate) concealment of facts relevant to the cause of action*": McGee, paragraph 20.030, citing Pearson J in *Phillips-Higgins-v-Harper* [1954] 1 QB 411. Instead, mistake has been held to apply only to freestanding causes of action designed to obtain relief from the consequences of having paid money (or conferred some other benefit) under a mistake of fact or of law.

22. The most eminent authority supportive of this view is to be found in the following observations of Lord Goff in *Kleinwort Benson-v- Lincoln CC* [1999] 2 A.C. 349 at 388D-389C:

"*The submission of Kleinwort Benson was that their actions for the recovery on the ground of mistake of law of money paid under void interest swap*

*agreements were actions for relief from the consequences of a mistake within section 32(1)(c) of the Act of 1980. In support of this submission, they relied, first, on In re Diplock [1948] Ch. 465, in which the Court of Appeal stated (at pp. 515-516) that section 26 of the Act of 1939 would operate to postpone the running of time in the case of an action at common law to recover money paid under a mistake of fact, and would likewise apply to an analogous claim in equity to recover money paid under a mistake of law. Second, they relied on the judgment of Pearson J. in Phillips-Higgins v. Harper [1954] 1 Q.B. 411 , in which he stated (at p. 418) with reference to section 26 of the Act of 1939 that the essential question was whether the action was for relief from the consequences of a mistake, a familiar example of which was an action for the recovery of money paid in consequence of a mistake. On this basis, it was submitted, Kleinwort Benson's causes of action in the present cases fell clearly within section 32(1)(c) of the Act of 1980.*

*In answer to this submission, the submission of the local authorities was twofold. First, they submitted that there was no mistake on the part of Kleinwort Benson; but I have already explained that I am satisfied that they indeed paid the money in question under a mistake of law. Second, they submitted that section 32(1)(c) does not on its true construction apply to mistakes of law. In this connection they relied in particular on the fact that the mistake of law rule was in full force in 1939, when the provision was first enacted; and they further submitted that the words of the subsection, which referred to a mistake being 'discovered', showed that the legislature was referring to mistakes of fact rather than mistakes of law–of which it would not be apt to refer to such a mistake being "discovered", still less "discovered with reasonable diligence". In my opinion, however, this verbal argument founders on the fact that the pre-existing equitable rule applied to all mistakes, whether they were mistakes of fact or mistakes of law: see, e.g., Earl Beauchamp v. Winn (1873) L.R. 6 H.L. 223, 232-5, and the dicta from In re Diplock to which I have already referred.*

*I recognise that the effect of section 32(1)(c) is that the cause of action in a case such as the present may be extended for an indefinite period of time. I realise that this consequence may not have been fully appreciated at the time*

*when this provision was enacted, and further that the recognition of the right at common law to recover money on the ground that it was paid under a mistake of law may call for legislative reform to provide for some time limit to the right of recovery in such cases. The Law Commission may think it desirable, as a result of the decision in the present case, to give consideration to this question indeed they may think it wise to do so as a matter of some urgency. If they do so, they may find it helpful to have regard to the position under other systems of law, notably Scottish and German law. <u>On the section as it stands, however, I can see no answer to the submission of Kleinwort Benson that their claims in the present case, founded upon a mistake of law, fall within the subsection.</u>*" [Emphasis added]

23. What was in dispute in *Kleinwort* was whether the British equivalent of our own section 33(1)(c) applied to mistakes of law as well as mistakes of fact. Otherwise, Lord Goff's views reflected the unanimous views of the House of Lords. As Lord Hoffman observed (at page 398 ):

> "*It is no mere form of words to say that I have had the privilege of reading in draft the speech of my noble and learned friend Lord Goff of Chieveley. It is, if I may be allowed respectfully to say so, one of the most distinguished of his luminous contributions to this branch of the law. On all but one of the questions debated before your Lordships, I understand that it commands unanimous assent.*"

24. It appears to have been accepted by the parties and judges as uncontroversial in the case from which this passage is taken, that the type of mistake which could potentially stop time running for limitation purposes was a mistake which formed the basis for a remedy under the law of restitution. Such remedies are designed to afford relief to parties who have entered into transactions usually involving the payment of money, but invariably involving the transfer of some form of property benefit, in circumstances that make it inequitable for the recipient to retain the property transferred. Mistake in this narrow technical legal sense, it is very clear and obvious, is wholly different to mistake on the ordinary broad sense of the word. Further

support for this construction of the doctrine of mistake under the Limitation Act is provided in the more pithy and somewhat qualified observations of Lord Browne-Wilkinson in *Deutsche Morgan Grenfell Group Plc-v-Inland Revenue Commissioners* [2007] 1AC 558 (a case mentioned also by *McGee*):

> "*146…The rule that in order to come within section 32(1) a mistake must be an essential ingredient of the claimant's cause of action rests on a surprisingly uncertain basis, that is a view expressed by Pearson J in Phillips-Higgins v Harper [1954] 1QB 411, 419. Nevertheless it has been generally accepted (with some dissentient academic voices raised against it) for over fifty years.*"

25. If one looks at the words of section 33(1)(c) of the 1984 Act again, with the benefit of the light shone upon it by the legal luminaries upon whom Mr Harshaw relied, the picture becomes far more clear. It is not any type of mistake which is contemplated by the statute, but only a mistake which provides a substantive ground for seeking relief. The section applies to circumstances where (a) the action is based on fraud, (b) the defendant has deliberately concealed facts from the claimant, and/or:

> "*(c) the action is for relief from the consequences of a mistake…*"

26. The other requirement which a claimant must meet to be able to benefit from section 31 at all is establishing that he could not before the relevant time have discovered the fraud, concealment of facts or mistake "*with reasonable diligence*". I accept the submission of Mr Harshaw in this regard, which was supported by paragraph 20.007 of *McGee* where the learned author cites the following observations of Millett LJ (as he then was) in *Paragon Finance plc-v- D.B. Thakarar & Co. (A Firm)* [1999] 1 All E.R. 400 at 418 as reflective of the position in relation fraud, concealment and mistake:

> "*The question is not whether the plaintiffs should have discovered the fraud sooner; but whether they could with reasonable diligence have done so. The burden of proof is on them. They must establish that they could not have discovered the fraud without exceptional measures which they could not reasonably have been expected to take.*"

**Findings: should the Plaintiff's claim be struck out?**

27. The Plaintiff's claim as presently formulated does not disclose a reasonable cause of action because on its face it does not advance a claim "*for relief from the consequences of a mistake*" in a legally valid or recognised sense. The Writ seeks declaratory relief by way of enforcement of the Plaintiff's rights under the Will. The Re-Amended Statement of Claim avers that the remainder interest in the Property passed to the Plaintiff and the 1st Defendant on the death of the life tenant, in effect by operation of law. The pleaded mistake is an explanation as to why the Plaintiff allowed the 1st Defendant to take sole possession of the Property after the life tenant's death, and through that sole occupation potentially extinguish the Plaintiff's co-ownership rights. There is no transaction pleaded under which the Plaintiff mistakenly transferred his interest to the 1st Defendant.

28. Properly analysed (and assuming the Plaintiff was not informed by the executors of the bequest made in his favour by the Testator under the Will as he alleges), what occurred is that the Plaintiff effectively abandoned the interest in the Property which he had acquired by operation of law because he did not know that the interest existed. He conferred a continuing benefit on the 1st Defendant by allowing him to treat the Property as if he solely owned it for more than 30 years. This was unjust in a general sense, but does not remotely correspond to the generally recognised instances of unjust enrichment whereby a transaction consciously entered into has an unintended effect. In *Benedetti-v-Sawiris* [2014] AC 938, which Mr Harshaw also placed before the Court, one gleans a sense of the scope of the recognised doctrine of unjust enrichment as a remedy for mistakes from the following passages in the judgment of Lord Reed:

> "*97. In Kingstreet Investments Ltd v New Brunswick (Finance) [2007] 1 SCR 3 Bastarache J, giving the judgment of the Supreme Court of Canada, stated at para 32:*
>
> > *'Restitution is a tool of corrective justice. When a transfer of value between two parties is normatively defective, restitution*

> *functions to correct that transfer by restoring parties to their pre-transfer positions. In Peel (Regional Municipality) v. Canada [1992] 3 SCR 762, McLachlin J (as she then was) neatly encapsulated this normative framework: 'The concept of 'injustice' in the context of the law of restitution harkens back to the Aristotelian notion of correcting a balance or equilibrium that had been disrupted' (p 804).'*
>
> *98. That dictum might be related to Lord Wright's observation in Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd [1943] AC 32, 64–65, in the context of unjust enrichment arising from the frustration of a contract after part of the contract price had been paid:*
>
> > *'There was no intention to enrich [the defendant] in the events which happened… The payment was originally conditional. The condition of retaining it is eventual performance. Accordingly, when that condition fails, the right to retain the money must simultaneously fail."*

29. It may well be that the concept of restitutionary remedies for unjust enrichment are sufficiently flexible to afford relief not just to invalidate property lost through specific transactions, but also by a course of conduct which results (through the unintentional abandonment of rights) in a third party receiving a benefit which is unjust. I accept that broad statements of the doctrine of unjust enrichment suggest that the doctrine is fluid enough to encompass such factual scenarios. I need not decide this somewhat complicated conceptual issue, however. For present purposes, the central and more practical point is the interpretation of the language of a limitation statute.

30. The crucial conclusion I reach is that the accepted meaning of "*action…for relief from the consequences of a mistake*" in section 33(1)(c) of the Limitation Act contemplates a claimant advancing a substantive claim seeking relief from the consequences of mistake, a mistake which would still be complained of even if it was brought within

the limitation period. This view of the scope of this provision is too clearly established by highly persuasive authorities to permit a reformulation of the law at the first instance level.

31. The clearest demonstration of the fact that the Plaintiff's claim is not in this sense substantively grounded in mistake is that if the claim was not time-barred, he would simply have sought a declaration of his undoubted title to the Property. The mistake on which he now relies is, in substance, simply an explanation as to why he did not pursue his substantive proprietary claim within the primary limitation period. The authorities suggest that section 33(1)(c) is not intended to permit such circularity of reasoning. The provision is not intended to apply to any circumstance where the claimant can argue that but for a mistake about the existence of a non-mistake-based claim, he would have asserted that other claim within the limitation period. I find that the same mistake must found both the pre-limitation period and post-limitation period claims. A contrary interpretation would mean that section 33(1)(c) would be operating in a manner which effectively creates an entirely new, statutory, mistake-based cause of action.

32. The existing pleading is any event liable to be struck out because it fails to plead any case in support of the other essential element required by section 33(1), namely establishing that with reasonable diligence the mistake could not have been discovered before June 1, 2008.

33. This leaves the pivotal question of whether the Plaintiff should be given an opportunity to apply to re-re-amend the Statement of Claim with a view to pleading a more viable claim. Mr Caines' most persuasive arguments centred on encouraging the Court to take this course. The key question is whether there is any reasonable prospect of the Plaintiff being able to formulate a viable claim.

34. The right of access to the court, even in relation to claims of considerable financial and sentimental importance to litigants is not an unconditional right. It is right to seek an adjudication of claims which can only be pursued to trial if the claims have some prospect of success. The Court's processes are intended to be deployed in trying cases which have some prospect of success. It is a misuse of the process of the Court (or an

abuse of process) to pursue claims which the Court, at an early stage, can fairly determine are very clearly bound to fail. These umbrella principles must especially be borne in mind when a claimant, like the Plaintiff in the present case, seeks to remedy what in general terms appears to be a clear injustice in circumstances where it seems clear that no legal relief is available.

35. The Overriding Objective requires the Court in handling cases to:

    (a) *allot* "*an appropriate share of the court's resources, while taking into account the need to allot resources to other cases*" (Order1A/1(2)(e)); and

    (b) decide "*promptly which issues need full investigation and trial and accordingly disposing summarily of the others*" (Order1A/4(2)(c)).

36. Can the Plaintiff improve upon the way in which he has pleaded mistake in circumstances where he is bound to concede that he cannot rely on fraud or deliberate concealment of facts? If am right in finding that, as a matter of law, the doctrine of mistake only applies to benefits resulting in unjust enrichment which are conferred by transactions consciously entered into by the transferor, then it is plain and obvious that the Plaintiff cannot possibly plead a viable case and potentially benefit from the provisions of section 33(1)(c) of the Limitation Act.

37. Can the Plaintiff possibly establish that he "*could not have discovered the* [mistake] *without exceptional measures which* [he] *could not reasonably have been expected to take*"? The Plaintiff's own sworn evidence is that as soon as he was told that the Testator had a will and left him an interest in the Property, he came to the Supreme Court and obtained a copy of the Will. The Plaintiff attained majority before the Vesting Deed was executed in favour of the life tenant. Before his interest in the Property was extinguished on June 1, 2008 over 35 years after his Great-Grandmother's death, he could reasonably have taken a variety of steps which would likely have revealed his interest in the Property. The most obvious include:

    (a) making enquiries of various family members; and

(b) carrying out searches at the Supreme Court.

38. The Plaintiff has not addressed this issue at all either by way of pleading or evidence. I cannot fairly find at this stage that he could not possibly establish this statutory requirement. However it seems very improbable, bearing in mind the close family connection, that he can justify making no enquiries about the Testator's estate for such a long time. The threshold of proof would likely be far lower had the gift been a bequest by a stranger. This defect in the pleaded case does not provide a freestanding basis for striking out the present proceedings.

39. For the above reasons, and not without considerable sympathy for what appears to quite possibly be a serious injustice done to the Plaintiff who should have received his inheritance through a vesting deed in or about 1981, I find that the only proper way to exercise my discretion in disposing of the present strike out application lies in striking-out the Plaintiff's Writ and Statement of Claim as against the 1st Defendant. The Court can only hope that the 1st Defendant if persuaded of the moral merits of the Plaintiff's claim may see fit to voluntarily make some form of reparation to him.

**The case against the 2nd and 3rd Defendants**

40. While the 3rd Defendant has not been served, the pursuit of the present proceedings against him would equally be bound to fail and are liable to struck out for essentially the same reasons as the case against the 2nd Defendant.

41. In reality no coherent case was or could be pleaded against the estate representatives of the Testator's executors in respect of their administration of her estate in or about 1980 to 1981. It could perhaps be established through the Plaintiff's own evidence that the executors negligently failed to inform the Plaintiff of his interest in the Property and/or negligently failed to convey it to him. Here the limitation period would have been six years running, perhaps, from the date that the Vesting Deed was executed in favour of the life tenant (1981 at the earliest) or upon the death of the life tenant (1988 at the latest).

42. While the Re-Amended Writ sought an accounting from the 2nd Defendant of the Testator's estate, it sought no relief at all as against the 3rd Defendant, who is not even properly identified or named. The Re-Amended Statement of Claim pleads no case at all against either of the 2nd or 3rd Defendants. They are entitled to a limitation defence and the Plaintiff would face the same (if not greater) hurdles in terms of bringing himself within section 33(1) of the Limitation Act, obstacles which he has failed to surmount as against the 1st Defendant.

43. Accordingly, the 2nd Defendant is entitled to an Order striking out the present proceedings against him.

44. Of the Court's own motion, the claim as against the 3rd Defendant should also be struck out.

**Conclusion**

45. The Plaintiff's claim shall be struck out as against all Defendants. Unless any party applies within 21 days to be heard as to costs, the costs of the present application shall be awarded to the 1st and 2nd Defendants, to be taxed if not agreed.

Dated this 1st day of February, 2016 _____

IAN RC KAWALEY CJ