IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2013 CD 00020

BETWEEN	**LLOYD MICHAEL POMMELLS**	**CLAIMANT**
A N D	**EW LEWIS INVESTMENTS & FINANCE LTD**	**DEFENDANT**

Nigel Jones and Kashina Moore instructed by Nigel Jones and Company for the claimant Christopher Dunkley and Tameka Dunbar instructed by Phillipson Partners for the defendant

Heard: 1 and 22 May 2013

WHETHER CLAIMANT BOUND BY REPRESENTATION MADE BY ATTORNEY- WHETHER DEFENDANT IS ENTITLED TO WITH HOLD CLAIMANT'S CERTIFICATES OF TITLE

SINCLAIR-HAYNES, J

[1] This is an application for summary judgment by Lloyd Michael Pommells (the claimant). His application emanates from his claim against E W Lewis Investments & Finance Limited (the defendant) for the delivery up of six certificates of title and for damages.

BACKGROUND

[2] The claimant is the owner of property which overlooks the Constant Spring Golf Course. The said property was registered at Volume 1438 Folio 155 of the Register Book of Titles. In or about the year 2009, he and Plantation Development Company

Ltd. (Plantation) entered into a contract whereby he sold the said property to Plantation for its conversion into 18 apartments for the affluent. The consideration was both monetary and an apartment. The development was appropriately named “Front Nine” because of its proximity to the golf course. Unfortunately it is now at the “front line” of a legal battle.

THE CLAIM

[3] In furtherance of the agreement between the parties, the claimant gave the title to the said property which was registered at Volume 1438 Folio 155 to Mrs. Jennifer Messado, the Attorney-at-Law who represented them (claimant and Plantation). She was also given a Power of Attorney for the purpose of facilitating “the continuation and completion of Front Line.” In order to facilitate the development, 18 splinter titles were obtained in the name of the claimant and the original title which was registered at Volume1438 Folio 155 was cancelled.

[4] The parties agreed that the duplicate certificates of title would remain the property of the claimant until the completion of the development at which point he would transfer the titles to the purchasers. The attorney, however, handed over the said titles to the defendant without the permission and knowledge of the claimant hence the claim for the delivery up of the six titles, which the defendant has its in possession, and for damages *inter alia*.

THE DEFENCE

[5] The essence of the defence is that the claimant’s attorney represented that she had the requisite authority to pledge the title. The only issue taken by the defendant in its defence with the claimant’s claim is that the titles were given to the defendant by the attorney with the knowledge and permission of the claimant. The defence essentially is that the defendant has a history of providing financing to Plantation and its principal, Christopher Kerr, for which security was always provided. Mrs. Messado (who also represented the defendant) exercised authority over such security. It asserts that by virtue of a Power of Attorney which the claimant executed, Plantation’s principal,

Christopher Kerr, was authorized to use the titles in negotiations and in securing financing for Plantation and Christopher Kerr.

[6] Portions of the defence are drafted in a circumlocutory manner. So as not to misquote the defendant's assertion, it is necessary to set out those portions. At paragraph 7 of the Defence it reads:

> "*The Defendant Institution further relied on the representations of Jennifer Messado & Company derived through the common representation of the Claimant and Plantation and Christopher Kerr of authority to act in the matter of Front Line Development."*

[7] I deduce from that rather convoluted statement that the defendant is asserting that by virtue of Jennifer Messado & Company representing Plantation, Christopher Kerr and the claimant, and by representations made by the attorney, the said attorneys were authorized to act in matters concerning Front Line Development.

[8] The Defence further reads at paragraph 10:

> "*The Defendant Institution will further say that at all material times, the Claimant's Attorneys represented that they had the joint authority of Plantation/Christopher Kerr and their development partners, the respective property owners, in respect to all titles for property under development by Plantation, to include the Claimant in relation to the titles at issue, which was communicated to the Defendant Institution on several instances*."

[9] My interpretation of that statement is that the defendant was informed on several occasions by Messado & Company, the claimant's attorney, that they (the attorneys) were authorized by Plantation, Christopher Kerr and their partners in the development, including the claimant, to utilize the titles.

Paragraph 12 states:

> *"In response to paragraphs 11-12 of the Particulars of Claim, the Defendant Institution will say that the Claimant, through his Attorneys, did lawfully permit the deliver (sic) the titles at issue to the Defendant Institution (with whom the Claimant is partnered for the purchase and development of his property), as a continuing security for Plantation's financing, to facilitate the release the Certificates of Title for a prior*

security, Grand Oaks, held by the Claimant's Attorneys, which development was completed by Plantation and Christopher Kerr."

[10] From that statement, I decipher that the claimant permitted his attorney to deliver the Certificates of Title to the defendants who are partners in the purchase and development of the property. The titles were delivered for the purpose of providing continuing security for financing Plantation. The primary reason was to enable the release of the Certificates of Title in relation to an earlier, completed development (Grand Oaks) by Plantation.

THE EVIDENCE

[11] Aspects of the affidavit of Mr. Everton Lewis, the defendant's director filed January 7, 2013, are nebulous. There is no divergence between the allegations made in the defence and the averments in Mr. Lewis' affidavit in objection to the claimant's application. My conclusions in relation to the defence apply equally to his affidavit evidence. However, In the interest of justice, it is necessary to quote extensively from the said document:

"*That the Claimant's Attorneys represented to me, as Managing Director of the Defendant Institution, on several instances that they had the joint authority of Plantation/Christopher Kerr and their development partners, (the respective property owners), over all Certificates of Titles for properties under development by Plantation, and in this case the Claimant, in relation to the titles at issue.*

That the Claimant's attorneys represented, that by virtue of a power of attorney executed by the Claimant in favour of Plantation and/or Christopher Kerr, they had those parties' authority to deal with the titles at issue in the negotiation and securing of financing for Plantation and Christopher Kerr.

That at all material times, it was the Claimant's attorneys who were in possession of, and represented they had authority to deal with, the titles at issue, and who advised the Defendant that the Claimant was in a Development Agreement with Plantation, which formed the basis for the aforementioned authority to act in the matter of Front Nine Development,

That the Claimant's attorneys did lawfully deliver the titles at issue to the Defendant Institution as a continuing security for Plantation's financing, in order to facilitate the release of Certificates of Titles for a prior, completed

development of Plantation and Christopher Kerr, Grand Oaks, held in the custody of the Claimant's attorneys, acting for Plantation, as security for the Defendant Institution.

That the Defendant Institution has at all material times represented to the Claimant's attorney that on settlement in full of the financing extended by us to Plantation and its principal/owner, Christopher Kerr, the Claimant's titles would be released to his attorneys-at-law from whence they came.

[12] Mr. Everton Lewis further deponed that the claimant failed to make full and frank disclosure because the claimant failed to disclose a letter which was sent to the defendant after the Certificates of Title were delivered to the defendant. According to the defendant, the said letter states the basis on which the said Certificates of Title were delivered. The letter reads:

"*We refer to our discussions and confirm that we act on behalf of Plantation Development Company Limited who are the developers for the complex at No. 54 Norbrook Drive, Kingston 8 in the parish of Saint Andrew.*

We confirm that you hold six (6) duplicate Certificates of Title for the units which are held as security.

Accordingly, this letter serves as our professional undertaking to pay to you the sum of One Million United States Dollars (US$1,000,000) on completion of the construction of the units and the collection of the sale proceeds from the individual purchasers.

Please sign and return the attached copy letter in confirmation of your acceptance and acknowledgement of the undertaking herein."

CLAIMANT'S VERSION

[13] The claimant's evidence is that he has never had any dealings with the defendant. He is aware that the defendant and Plantation are in a relationship and that Plantation's past developments were financed by the defendant. He however avers that he had nothing to do with those developments. It is his evidence that this is the first and only development he has done with Plantation and therefore would never agree to his

titles being used as security for financing which the defendant would have provided to Plantation for their earlier developments.

[14] He steadfastly maintains that the Certificates of Title were not pledged to the defendant to be used as security. It is his evidence that he executed a Power of Attorney which conferred limited power upon Plantation. The Attorney and Plantation were permitted to sell the property comprised in the splinter titles and to obtain building approvals. Upon completion of the property, he expected to be fully compensated. Consequently he deliberately retained control and oversight over the said property. He is described on the said titles as the registered proprietor and therefore has the sole authority to deal with the said property. He avers that the splinter titles were sent to the defendant by Mrs. Messado without his knowledge or instruction. The defendant has ignored his demand to return the said titles.

[15] As a result of the defendant's refusal, failure and/or neglect to return the said titles, the development has come to a halt. The inability to provide splinter titles has resulted in Plantation not obtaining financing. There would otherwise be no difficulty in obtaining financing because the land is unencumbered. It is his intention to utilize his apartment as investment property. He has however been unable do so because of the defendant's withholding of the said titles. Similar properties are rented for US $2,600.00 per month.

THE LAW

[16] The application is made pursuant rule15.2b of the **Civil Procedure Rules** 2002 which reads:

> *"The court may give summary judgment on the claim or on a particular issue if it considers that:*
>
> *(a) The defendant has no real prospect of successfully defending the claim or the issue."*

The test to be applied is that enunciated by Lord Woolf in **Swain v Hillman** [2001] 1 All ER 91: whether the defendant has a realistic as opposed to a fanciful prospect of succeeding.

[17] A hopeless claim should not be allowed to continue. Part 1 of the **Civil Procedure Rules** states the overriding objective of the court as enabling the court to deal justly with cases. In giving effect to the overriding objective of dealing justly with cases, judges must ensure that matters are dealt with expeditiously. It is also in the interest of the litigant to be informed as soon as possible if his defence is doomed to failure.

[18] Lord Woolf in his oft cited statement in **Swain v Hillman** [2001] 1 All ER 91 said:

> *"It is important that a judge in appropriate cases should make use of the powers contained in Part 24. In so doing he or she gives effect to the overriding objectives contained in Part 1. It saves expenses; it achieves expedition; it avoids the court's resources being used up on cases where this serves no purpose and I would add, generally that it is in the interest of justice."*

It is therefore the court's duty to prevent its limited resources from being expended on hopeless matters. I am nevertheless cognizant, that although there is substantial evidence against a defendant, if there are issues of fact which could be decided in favour of the defendant, the matter is not appropriate for summary disposal.

ARE THERE TRIABLE ISSUES?

[19] Mr. Dunkley submits that there are triable issues, as the purpose for which the titles were sent to the attorney is disputed. He argues that the claimant entrusted Plantation with the development of his property for reward. The fact that Plantation has authority to develop and sell the property gives it the right to deal with the titles. It is his further submission that "development requires financing and the Power of Attorney authorized Plantation to secure financing for the development of the Property in question." According to him, the claimant is unable to assert that Front Nine was not financed by the defendant. Moreover, the claimant, having sold the land to Plantation, it

is entitled to treat with the titles in the manner it did. The Claimant's interest is now monetary and a unit.

RULING

[20] The unchallenged evidence is that there was never any relationship between the defendant and the claimant. In none of the defendant's three affidavits has he averred otherwise. The claimant, not being privy to the alleged agreement between the defendant and Plantation, is therefore a stranger to any such agreement and cannot be bound.

[21] It is Mr. Lewis' evidence that Messado & Company represented that they had authority to deal with the titles. Mrs. Jennifer Messado denies representing to the defendant that she was authorized by the claimants to pledge the titles. In response to Mr. Lewis' assertion otherwise, in her affidavit filed January 21, 2103, she averred:

> "*That in response to paragraph 8 of Mr. Lewis' affidavit, I deny that I represented that I or the firm Jennifer Messado & Co had authority to deal with the titles the subject of this claim.*
>
> *In response to paragraph 10 of Mr. Lewis' affidavit I sent the titles to the Defendant as Mr. Lewis requested as a favour that the titles be sent to him to enable him to satisfy the Financial Services Commission that the Defendant had adequate security for the loans it provided. The titles were not sent to the Defendant to provide continuing security for Plantation's financing as alleged by the Defendant and/or to release Certificates of Titles for Grand Oaks. The Defendant at no time had the certificates of title for Grand Oaks.*

[22] In her 2nd Affidavit dated March 8, 2013 she further averred.

> *"That my letter dated February 28, 2011 which is exhibited to the Defendant's third affidavit was not exhibited to my previous affidavit as same was prepared solely for the benefit of the Defendant and no copy was retained on the file. That in any event, the said letter was previously indicated in my earlier affidavit and was sent to the Defendant at Mr. Lewis' request to enable him to satisfy the Financial Services Commission, hereinafter referred to as the "FSC" that the Defendant had adequate security for the loans it provided.*

That my letter was not written with the intention of pledging the title on behalf of Mr. Pommells.

That I recall Mr. Everton Lewis showed me a letter from the FSC to the Defendant in which they indicated that the Defendant was to provide proof of proper security for all the loans the Defendant had issued."

[23] There is, in the circumstances, a sharp divergence in the evidence. Is this a conflict in the evidence which cannot be resolved on the material so far presented? If its resolution requires a finding as to the credibility of the witnesses and/ or the adducing of further evidence by way of cross-examination or other evidence, then this is not an appropriate matter for summary disposal.

[24] Apart from the defendant's allegation that Messado & Company informed him that they had the authority to use the titles, there is no documentary or other support for the allegation. Assuming the said representation was indeed made, the pertinent question is whether the claimant is bound by representations allegedly made by its attorney. If this question is capable of being answered solely by the examination of the material before me, the matter then falls within the category of matters which can properly be disposed of summarily.

IS THE CLAIMANT BOUND BY THE REPRESENTATIONS BY ITS ATTORNEY TO THE DEFENDANT?

THE LAW

[25] Mr. Nigel Jones submits that the claimant is not bound by any representation made by Mrs. Messado that she was authorized to pledge his titles. He relies on the English case of **Overbrooke Estates Ltd. v Glencombe Properties Ltd. [1**974] 1 WLR 1335. Brightman J in **Overbrooke Estates** said:

"*An agent, as between himself and a third party, has such authority as is actually conferred on him by his principal, or such authority as has ostensibly been conferred on him because of the manner or circumstances in which he has been held out as an agent.."*

[26] The following statements of the learned authors of **Bowstead and Reynolds on Agency 19th Edition** and **Freeman and Lockyer (a firm) v Backhurst Park**

Properties (Mangal and another) [1964] 1 ALL ER 630 were cited as representing the law authoritatively by the Court of Appeal in **Eagle Merchant Bank of Jamaica Ltd. v Lets Ltd; Lets Ltd v RBTT Bank Jamaica Ltd and National Commercial Bank Jamaica Ltd**. an unreported decision which was delivered on 22 February 2008.

[27] Dukharan JA (Ag) as he then was, at page 29 of the judgment said:

> "…What are the principles to be applied here? The author in **Bowstead and Reynolds on Agency** at para. 8-013 states:
>
> '*Where a person by word or conduct represents or permits it to be represented that another person has authority to act on his behalf, he is bound by the acts of that other person with respect to anyone dealing with him as an agent in the faith of any such representation to the same extent as if such other person had the authority that he was represented to have, even though he had no such actual authority.'*
>
> *And in **Freeman and Lockyer** (supra). Lord Diplock at p.644 said:*
>
> *'An 'apparent' or ostensible authority, on the other hand, is a legal relationship between the principal and the contractor created by a representation made by the principal to the contractor, intended to be and in fact acted upon by the contractor that the agent has authority to enter on behalf of the principal into a contract of the kind within the scope of the 'apparent' authority, so as to render the principal liable to perform any obligations imposed upon him by such contract. To the relationship so created the agent is a stranger. He need not be (although he generally is) aware of the existence of the representation, but he must not purport to make the representation as principal himself. The representation when acted upon by the contractor, by entering into a contract with the agent operates as an estoppel, preventing the principal from asserting that he is not bound by the contract. It is irrelevant whether the agent had authority to enter into the contract.'"*

[28] Was there representation made by the claimant or conduct by him which could be construed as conferring on the attorney the authority to pledge the title or to deal with the titles without restraint? The evidence regarding the scope of the attorney's authority is contained in the Power of Attorney. The said Power of Attorney limits the attorney's authority to the sale and development of the property. It is necessary to set out the terms:

1. ***NOW THEREFORE KNOW YE*** *that, my Attorney having consented, I,* ***LLOYD MICHAEL POMMELLS HEREBY APPOINT*** *my Attorney to sell to any person or persons all or any portion of* ***ALL THAT*** *parcel of land known as Lot Number 11 Constant Spring Estate in the Parish of Saint A ndrew and being all the lands comprised in Certificate of Title registered at Volume 1438 Folio 155 of Register Book of Titles known as No. 54 Norbrook Drive, Kingston 8 in the Parish of Saint Andrew which has been subdivided into* ***Eighteen (18) Strata Lots*** *in accordance with Strata Plan No. 2473 and being all the lands comprised in Certificates of Title registered at Volume* ***1447 Folios 295, 296, 297, 298, 299,300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311 and 317*** *respectively of the Register Book of Titles belonging to me by virtue of the Registration of Titles Act (hereinafter called "such lands").*

2. *That this is an up-market residential development of eighteen (18) two bedroom apartments.*

3. *To obtain all building approvals and relevant documentation for the completion of the real estate development situated at No. 54 Norbrook Drive, Kingston 8 in the parish of Saint Andrew and to all such acts, matters and things as may be necessary or expedient for carrying out the powers hereby given by this document.*

4. ***GENERALLY, I DECLARE*** *that this Power of Attorney shall continue in force until construction of the development is satisfactorily completed and it is understood and agreed that this Power of Attorney is limited in all respects to the construction of the development of the said property at No. 54 Norbrook Drive, Kingston 8 in the parish of Saint Andrew hereinbefore described and for no other reason whatsoever.*

[29] There is no dispute between the claimant and the attorney that indeed the attorney's authority was so confined. It is significant that the splinter titles were all issued in the claimant's name. This supports his contention that he never intended to relinquish control over his property until the development was concluded and he duly received consideration.

[30] Mr. Dunkley's submission that the Power of Attorney authorized Plantation to use the title to secure financing is unsustainable. The Power of Attorney specifically confined Plantation and the attorney's authority to the construction of the development at 54 Norbrook Drive, not to any other development or for any other reason.

In the Australian Supreme Court case of **Tobin v Broadbent** [1948] 1 ALR 25 the plaintiff executed a Power of Attorney in favour of a stockbroker, which conferred extensive powers over his property. He subsequently emigrated. The stockbroker was permitted to exercise total control over the plaintiff's share investments. He was allowed to buy and sell shares, pay calls, take up options and advance money to facilitate all the transaction without consulting the plaintiff.

[31] In 1943, the stockbroker fraudulently pledged with the defendant, another stock broker, and the plaintiff's share certificates which were registered in the name of the plaintiff as part of the security for an advance made by the defendant. At the time of this transaction the plaintiff was not indebted to the stockbroker in respect of whom he had executed the Power of Attorney. The defendant made the advance to the stockbroker as a principal without any intention of entering into contractual relations with the plaintiff. There was no dispute that the said stock broker dealt with the defendant *bona fide.*

[32] The stockbroker endorsed the share certificates and signed blank transfers as attorney for the plaintiff. The document contained a further endorsement that the Power of Attorney was produced to the companies in which the shares were held. The defendant failed to examine the power of attorney and to make inquiries as to the stockbroker's authority to pledge the shares.

[33] Latham CJ, in determining 'whether the stockbroker had actual authority to pledge the said shares, or, if he did not have such authority, whether the plaintiffs were estopped from denying that he had that authority' said:

> "*In my opinion no case can be made for the respondent upon the basis of estoppel. The plaintiff never had any relations with Broadbent and made no representation of any kind to him: therefore Broadbent did not act on any such representation, nor by reason of so acting did he suffer any detriment."*

[34] He further considered whether the plaintiff might have been estopped by "assisted representation" that is, whether the plaintiff allowed the stockbroker to

represent that he had the authority to pledge the shares. On that issue, he concluded thus:

> "*But, whatever the assumption was, it was not induced by any act of the plaintiff unless, indeed, it could be said that the fact that they had allowed Hodgetts to have possession of the scrip was an act which entitled third parties to assume that Hodgetts had authority from the owners to pledge the scrip, whoever the owners might be. The fact that a servant or other person is entrusted with the possession of goods does not involve a representation to any person that he is entitled to pledge or sell them (**Hoare v Parker** is an old authority to that effect and **Mercantile Bank of India Ltd. v Central Bank of India Ltd.** a modern authority; and see **Halsbury's Laws of England**, 2nd ed vol 25 p 11"*

[35] Regarding the Power of Attorney he said:

> *"It is a long established rule that general words in a power of attorney are to be strictly construed: **Attwood v. Munning; Bryant v. La Banque du Peuple.** There is no doubt that under the Power of Attorney Hodgetts had authority to sell any shares belonging to Dr. or Mrs. Tobin (cl. 8). But a pledge is essentially different from a sale. The distinction has been emphasized in many cases, but perhaps nowhere more strongly than in **City Bank v. Barrow** where Lord Selborne said:- "It is manifest that when a man is dealing with other people's goods, the difference between an authority to sell, and an authority to mortgage or pledge, is one which may go to the root of all the motives and purposes of the transaction. The object of a person who has goods to sell is to turn them into money, but when those goods are deposited by way of security for money borrowed it is a transaction of a totally different character. If the owner of the goods does not get the money, his object and purpose are simply defeated; and if on the other hand, he does get the money, a different object and different purpose are substituted for the first, namely that of borrowing money and contracting the relation of debtor with a creditor, while retaining a redeemable title to the goods, instead of exchanging the title to the goods for a title, unaccompanied by any indebtedness, to their full equivalent in money.*
>
> *The Power of Attorney in this case contains an express power to sell, and no express power to pledge. The power of pledging is such a different power from that of selling that, in my opinion, in view of the strict rules applied to the construction of Powers of Attorney, it should not be held that the general words in the Power of Attorney conferred a power to pledge for Hodgetts' own purposes"*

[36] There is not a scintilla of evidence that the defendant was induced by any conduct of the claimant. Indeed, the evidence of Mrs. Messado is that the defendant

negotiated loans with Dean Evans of Plantation and Promissory Notes were signed by Christopher Kerr. The property at 54 Norbrook Drive was not included among the properties pledged. The incontrovertible evidence, that is, the Promissory Notes, are exhibited to her affidavit of 13 March 2013. Mr. Lewis' evidence confirms that the titles were not pledged in relation to financing for Plantation, but for an earlier development, Grand Oaks.

[37] The learned author of **Chitty on Contracts** (29th edition paragraph 31-056) states the law thus:

> *"Where a person by words or conduct represents to a third party that another has authority to act on his behalf, he may be bound by the acts of that other as if he had in fact authorized them. This doctrine, called the doctrine of apparent or ostensible authority, applies to cases where a person allows another who is not his agent at all to appear as his agent, to cases where a principal allows his agent to appear to have more authority than he actually has, to cases where a principal makes a reservation in his agent's authority that limits the authority which such agent would normally have but fails to inform the third party of his…."*

WHETHER DEFENDANT CAN RETAIN TITLES AS SECURITY FOR FINANCING PLANTATION

[38 It is Mr. Nigel Jones' further submission that even if a court accepts that the claimant's attorney indeed represented to the defendant that she had the authority to treat with the titles in the manner alleged, the defendant is not entitled to withhold the claimant's titles. He submits that the defendant's defence does not contain any defence which entitles him to possession of the titles. The defendant has not demonstrated that it did due diligence and that it was as a result of claimant's negligence or dishonesty, it acted to its detriment. The land tiles, he submits, relate to registered land. The purpose of registering land is to enable persons to examine the register. He relies on section 58 of the **Registration of Titles Act** which states:

> *"Every duplicate certificate of title shall be deemed and taken to be registered under this Act when the Registrar has marked thereon the volume and folium of the Register Book in which the certificate is entered; and every instrument purporting to affect land under the operation of this Act shall be deemed and taken to be registered at the time when produced for registration, if the Registrar shall subsequently enter a*

memorandum thereof as hereinafter described in the Register Book upon the folium constituted by the existing certificate of title and also upon the duplicate; and the person named in any certificate of title or instrument so registered as the proprietor of, or having any estate or interest in or power over the land herein described or identified, shall be deemed and taken to be the duly registered proprietor thereof, or as duly registered in respect of such estate, interest or power…"

[39] He postulates that the defendant was required to contact the claimant and view the Power of Attorney which was relied upon by the attorney. He also relies on Section 63 of the **Registration of Titles Act** which provides:

"When land has been brought under the operation of this Act, no instrument until registered in manner herein provided shall be effectual to pass any estate or interest in such land, or to render such land liable to any mortgage or charge; but upon such registration the estate or interest comprised in the instrument shall pass or, as the case may be, the land shall become liable in manner and subject to the covenants and conditions set forth and specified in the instrument, or by this Act declared to be implied in instruments of a like nature; and should two or more instruments signed by the same proprietor, and purporting to affect the same estate or interest, be at the same time presented to the Registrar for registration, the Registrar shall register and endorse that instrument which shall be presented by the person producing the certificate of title."

[40] He submits that the claimant has not signed any instrument which would convey any interest to the defendant nor has any instrument been registered by the defendant against the claimant's titles. The unchallenged evidence of the claimant is that his titles are free and clear. He submits that the defendant is not asserting that it derives an interest or estate from the claimant. There is no assertion that the claimant has derived any benefit from its financing of Plantation.

[41] The defendant's sole contention is that it is entitled to hold the claimant's titles as continuing security for a loan it gave to Plantation because the Claimant is doing a development with Plantation. He submits that in the absence of the registration of any instrument created in favour of the defendant, the claimant's titles ought not to be "rendered liable to any mortgage or charge".

RULING

[42] With those submissions this Court agrees. I am fully persuaded that this matter is eminently appropriate for summary disposal. Farwell J in **Rimmer v Webster** [1902]2 Ch. 163 expounded the law thus at paragraph 37 of his judgment.

> *"A man is entitled to deposit his deeds with his solicitor or his banker, or to send his certificates to his broker, or to vest his property in the name of another person and hand him the title-deeds, without thereby giving rise to any implication inconsistent with his own beneficial title, because his acts are in accordance with the common usage of mankind; and no other member of the community, therefore, is entitled to allege that such a course of action contains any invitation to him to act, from which a duty to him can be inferred."*

[43] The statement of Blackburn LJ in **Swan v The North British Australasian Company (limited)** (1863) 2 Hurlstone and Coltman 175 - para. 181-182 also further clarifies the law. He said:

> *"…Now I agree that a party may be precluded from denying against another the existence of a particular state of things, but then I think it must be by conduct on the part of that party such as to come within the limits so carefully laid down by Parke, B., in delivering the judgment of the Court of Exchequer in* ***Freeman v. Cooke****. It is pointed out by Parke, B., in the course of the argument in that case, that in the majority of cases in which an estoppel exists, "the party must have induced the other so to alter his position that the former would be responsible to him in an action for it;" and he had before pointed out that "negligence," to have the effect of estopping the party, must be "neglect of some duty cast upon the person who is guilty of it." And this, I apprehend, is a true and sound principle. A person who does not lock up his goods, which are consequently stolen, may be said to be negligent as regards himself, but inasmuch as he neglects no duty which the law casts upon him, his is not in consequence estopped from denying the title of those who may have, however innocently, purchased those goods from the thief, unless it be in market overt.*
>
> *And in the considered judgment of the Court, Parke B., lays down very carefully what are the limits. He says, that to make an estoppel it is essential "if not that the party represents that to be true which he knows to*

be untrue, at least, that he means his representation to be acted upon, and that it is acted upon accordingly; and if, whatever a man's real intention may be, he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it, and did act upon it as true, the party making representation would be equally precluded from contesting its truth; and conduct, by negligence or omission, where there is a duty cast upon a person, by usage of trade or otherwise, to disclose the truth, may often have the same effect."

In the circumstances,

The defendant is to forthwith deliver up to the claimant Certificates of Title registered at

(a) Volume 1447 Folio 297

(b) Volume 1447 Folio 299

(c) Volume 1447 Folio 300

(d) Volume 1447 Folio 303

(e) Volume 1447 Folio 304

(f) Volume 1447 Folio 311

Damages to be assessed.

Costs to be agreed or taxed.

Stay of execution of order of court regarding delivery of titles granted for 7days of the date hereof.