ARAWAK homes

OCTOBER 22nd, 2010

FOR IMMEDIATE RELEASE

PRESS RELEASE

CHIEF JUSTICE RULES IN FAVOUR OF ARAWAK HOMES LTD.:

Dennis Dean and The Nassau Village & SeaBreeze Property Owners Association

v Arawak Homes Ltd.

Case No. CLE/gen/836/2010;

and

Arawak Homes Limited v Dennis Dean and Barbara Dean

Case No. CLE/GEN/00727

Chief Justice Sir Michael Barnett yesterday ruled in favour of Arawak Homes Limited and dismissed the recent action brought by Dennis Dean and the Nassau Village and Seabreeze Property Owners Association in its entirety as an abuse of Court process. The Court held that Arawak Homes Limited is the owner of the land.

After considering extensive submissions by counsel for Mr. Dean and the Association, the Court found that all arguments that could have been advanced to defeat the title of Arawak Homes Limited were advanced. All of these arguments were rejected by the Court.

This means that within one month the Supreme Court has delivered three judgments affirming the ownership by Arawak Homes Limited of its land in the Sir Lynden Pindling Estates / Pinewood Gardens area. In addition, the title of Arawak Homes Limited has been reviewed in depth and accepted by the Court of Appeal and/or by the Supreme Court in at least four major actions[1].

In each instance, Arawak Homes Limited has been awarded costs by the Court. Anyone who contemplates further legal action is urged to please consider the direct financial risks to themselves associated therewith.

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[1]C.B. Bahamas Limited v Arawak Homes Limited No. 355 of 1985; Arawak Homes Limited v John Sands No 27 of 1991; Arawak Homes Limited v Horizon Systems Ltd. No 155 of 2004 and Arawak Homes Limited v Dean No. 1883 of 2002.

Despite its ownership of the land in question, Arawak takes every opportunity to emphasize to the public that THERE NEED BE NO FEAR OF SPONTANEOUS REMOVAL OF STRUCTURES. In each and every instance in which Arawak Homes has removed a structure on its land, it has done so only after exhaustive communications with the party affected.

Additionally, Arawak continues to have an open door policy welcoming any person who considers themselves affected, to seek reputable legal counsel and engage Arawak Homes in discussions to resolve any matter impacting them. Arawak is pleased that many persons have chosen this route and remains confident it can reach an amicable resolution with any person wishing to have one.

Arawak Homes published a comprehensive Report with supporting documentation dated October 8th, 2010. This report has been shared with the Government of The Bahamas, the public at large and is available at www.arawakhomes.com . Arawak welcomes communications with the Government, in an attempt to bring a universal resolution to this matter.

The Rulings of the Chief Justice are attached hereto.

COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

COMMON LAW & EQUITY DIVISION

2008/CLE/GEN/00727

B E T W E E N

ARAWAK HOMES LIMITED

Plaintiff

AND

DENNIS DEAN

First Defendant

AND

BARBARA DEAN

Second Defendant

Before: The Hon. Sir Michael Barnett, Chief Justice

Appearances: Mr. Neville Smith, Mrs. Donna Smith, Mr. Keith Bell and
Mr. Tavaris Laroda for Plaintiff
Mr. Carl Bethel for Defendant

Hearing Dates: 16th April, 14th & 16th, September, 2010

J U D G M E N T

Barnett, CJ:

1. This is a dispute about the ownership of land between two competing persons.

2. The Plaintiff and the Defendants both claim to be the owners of the property the subject of this action. The property in question is on the island of New Providence. The property is identified in the Statement of Claim as being various lots in a subdivision now known as Sir Lynden Pindling Estates. I will refer to the various lots simply as "the property".

3. The evidence in this matter is not in dispute. It is set out in the agreed bundle of documents which the parties stipulated should stand as the evidence in this action. The Defendants are on the property. The Plaintiff claims the property to be its own. It seeks injunctive relief to get the Defendants off the property and to remove buildings placed on the property by the Defendants.

4. Both the Plaintiff and the Defendants claim to be the owners by virtue of a documentary title.

5. The law relating to the competing titles was summarized by Lord Diplock in **Ocean Estates Ltd v Pinder [1969] 2 A.C. 19** where he said:

> **At common law as applied in the Bahamas, which have not adopted the English Land Registration Act, 1925, there is no such concept as an "absolute" title. Where questions of title to land arise in litigation the court is concerned only with the relative strengths of the titles proved by the rival claimants. If party A can prove a better title than party B he is entitled to succeed notwithstanding that C may have a better title than A, if C is neither a party to the action nor a person by whose authority B is in possession or occupation of the land. It follows that as against a defendant whose entry upon the land was made as a trespasser a plaintiff who can prove any documentary title to the land is entitled to recover possession of the land unless debarred under the Real Property Limitation Act by effluxion of the 20-year period of continuous and exclusive possession by the trespasser.** (my emphasis)

6. It is necessary to set out the respective documentary titles relied upon by the parties.

7. The Plaintiff claims title by virtue of an assignment of the equity of redemption dated 8th March, 1983 between Pinewood Gardens Ltd (in liquidation) and G.C. Culmer and the Plaintiff. The history of the Assignor's title is as follows:

(i) Conveyance dated 20th November, 1925 between Clarence P. Malcolm, Alice Malcolm, Madeline Malcolm, Kirkwood Graham and Joseph Garfunkel and Recorded in Volume H12 pages 490 to 495;

(ii) Conveyance dated 20th November, 1942 between Joseph Garfunkel and Amusements Ltd and Recorded in the Registry of Records in Book M at pages 108 and 109;

(iii) Affidavit of Joseph Garfunkel dated 21st September, 1956 Recorded in book Volume 39 pages 534 to 537;

(iv) Conveyance dated 22nd September, 1956 between Amusements Ltd and International Agencies Limited Recorded in Volume 39 at pages 538 to 542;

(v) Conveyance dated 6th April, 1957 between International Agencies Limited and Alexis Nihon and Godfrey Kenneth Kelly and Recorded in Volume 57 at pages 193 to 197;

(vi) Crown Grant of 19th December, 1961 by the Queen to Alexis Nihon Recorded in Volume 472 at pages 518 to 519;

(vii) Conveyance dated 1st May, 1972 between Alexis Nihon and Pinewood Gardens Limited Recorded in Book 1927 at pages 349 to 354; and

(viii) Assignment of the equity of redemption dated 8th March 1983 between Pinewood Gardens Limited (in liquidation) and George Clifford Culmer and the Plaintiff Recorded in Volume 3980 pages 477 to 517.

8. The Defendants rely upon conveyances dated 26th March, 1998 and 24th April, 1998 from Bahamas Variety Company (1989) Limited ('Bahamas Variety') to the First Defendant and a conveyance dated the 3rd December, 1998 from Bahamas Variety to the First and Second Defendants.

9. The documentary title of the Defendants is as follows:

(i) Certificate of Title issued to Thaddeus Johnson in Quieting Action No. 10 of 1982, dated the 28th January, 1985; and

(ii) Conveyance from Thaddeus Johnson to Bahamas Variety, dated 12th March, 1998;

10. It is necessary to deal first with the Defendant's title. Its title is derived from a Certificate of Title granted to Thaddeus Johnson on the 28th January, 1985 in Quieting Action Number 10 of 1982.

11. Section 19 of the Quieting Titles Act, Chapter 393 provides:

> **Subject to the provisions of section 27 of this Act and notwithstanding the provisions of any other Act or law, on and from the date of the certificate of title the same shall be –**
>
> **(a) conclusive as to the accuracy of the contents thereof (including any schedule thereto and any plan annexed thereto) and binding on the Crown and all persons whomsoever; and**
> **(b) conclusive evidence that every application, notice, publication, proceeding, consent and act which ought to have been made, given,**

taken or done before the granting of the certificate of title, have been properly, duly and sufficiently, made, given, taken and done.

12. Section 27 of the Act provides:

> **If in the course of any proceedings under this Act any person acting either as principal or agent fraudulently, knowingly and with intent to deceive makes or assists or joins in or is privy to the making of any material false statement or representation, or suppresses, withholds or conceals, or assists or joins in or is privy to the suppression, withholding or concealing from the court of any material document, fact or matter or information, any certificate of title obtained by means of such fraud or falsehood shall be null and void except as against a bona fide purchaser for valuable consideration without notice.**

13. It is common ground that the Plaintiff instituted an action against Thaddeus Johnson on the 28th May, 1985 to set aside the Certificate of Title on the ground of fraud. It is action number 510 of 1985. That action is still outstanding and the Certificate of Title has never been set aside.

14. It is also common ground that on the 29th January, 1985 (the day after the Certificate was granted) Thaddeus Johnson conveyed to C. B. Bahamas Limited all of the land the subject of the Certificate of Title granted to him. Ostensibly, by that conveyance Mr. Johnson had divested himself of all interest in the property and after that date had nothing to convey to Bahamas Variety.

15. It is further common ground that on the 2nd April 1985, C. B. Bahamas Limited instituted an action against the Plaintiff claiming possession of certain lands which were the subject of the Certificate granted to Thaddeus Johnson and conveyed by him to C. B. Bahamas Limited. That action gave rise to an investigation by the court of the circumstances which led to the grant of the Certificate to Thaddeus Johnson and the subsequent conveyance to C.B. Bahamas Ltd. That action resulted in a judgment of Gonsalves-Sabola J. dated 11th April, 1986. The judgment of Gonsalves-Sabola J (as he then was), was appealed to the Court of Appeal who

dismissed the appeal. In that action Gonsalves-Sabola J. granted the following declarations:

> **(a) as between [C B Bahamas Ltd] and [Arawak Homes Ltd] the certificate of title granted to Thaddeus Johnson in respect of Blocks 155, 156 and 157 of the Nassau Village Subdivision is ineffective in law to constitute a root of title to the plaintiff;**
>
> **(b) [C B Bahamas Ltd] was not a bona fide purchaser for valuable consideration without notice, of the said blocks of land, in contemplation of section 27 of the Quieting Titles Act; and**
>
> **(c) an injunction restraining [C B Bahamas Ltd] whether by its servants or agents or howsoever, from entering the said land, is granted.**

16. Although the Certificate of Title to Mr. Johnson was not formally set aside (Johnson not having been made a party to that action) the Court did find that the Certificate of Title was procured by the fraud of Thaddeus Johnson and that C. B. Bahamas Limited was privy to that fraud. It should be noted that Mr. Johnson gave evidence in that action against C. B. Bahamas Limited.

17. I quote extensively from that judgment:

> **On 17th August, 1982 one Thaddeus Johnson petitioned the Supreme Court in Equity Action No. 10 of 1982 to quiet title to 41 blocks of land in Nassau Village Subdivision, New Providence. ... ...The certificate of title was granted on the basis of the particular plan that was annexed to Thaddeus Johnson's petition. That plan was a copy of a Nassau Village Subdivision plan dated January 1926. It is at the very heart of the plea of fraud now raised by the defendant with respect to the grant to Thaddeus Johnson of his certificate of title, that the Nassau Village Subdivision plan was misleading to the court in that it was not a survey plan and it failed to show the proprietary interest of Pinewood Gardens Ltd. (In Liquidation) or that of any adjacent owner, which interest would have been shown had a recent survey plan been filed in support of the petition. Let me state right away that I have had no hesitation in concluding that the annexed plan of Nassau Village Subdivision drawn, according to the date it bears, 56 years earlier, did not faithfully portray the existing situation on the ground. It signally failed to reflect the existence of what I find to be an approved contemporary subdivision, the Pinewood Gardens subdivision, which was visible in a large sweep of development at the time the petition was presented as well as when it came on for hearing and determination. The land in question fell within the Pinewood Gardens Subdivision.....**

> **The plan of the land annexed to the petition of Thaddeus Johnson did not convey an accurate contemporary picture of the land whose title was sought to be quieted. Certainly, that plan did not put the court on notice that there were, or may have been affected interests inconsistent with the claim of the petitioner, as would have been indicated had a proper survey plan been submitted. Nor was the description of land which was duly published in the notice under Section 6 (1) of the Act, calculated to put on notice all likely adverse claimants or adjoining owners. Indeed, the attorney who represented Pinewood Gardens Ltd. (In Liquidation) as an adverse claimant was only able to testify that he became aware somehow of the quieting application of Thaddeus Johnson and then laid an adverse claim on his client's behalf. However truly the Nassau Village Subdivision plan may have represented the intentions of the Florida developers in 1926, it was in August 1982 when the quieting petition was filed, entirely superseded by the Pinewood Gardens Subdivision in relation to the whole area of land in which the disputed Blocks 155, 156 and 157 lie.....**
>
> **The latent misrepresentation in the plan and the description of the land was of a material kind. It was of a kind envisaged in Section 27 of the Act. Not only did the Nassau Village Subdivision plan as presented to the court tell a lie about itself in the sense that it purported to represent the actual layout of the land in question and its contiguous areas as being different from what it currently was, but ipso facto it withheld from the trial judge material information, the knowledge of which must have put him on inquiry whether notices under Section 7 (1) of the Act ought to be directed to be sent. The petitioner, Thaddeus Johnson, who was claiming to have been in undisturbed occupation of the 41 lots of land would not be heard to say that he was unaware of the misrepresentation. It was part and parcel of his own petition. He must be presumed to have intended to obtain title on the particular plan and description of the land which he submitted to the court. He cannot be taken to have intended otherwise. Nothing that he has said in evidence contradicts this presumption.**
>
> (my emphasis)

18. The effect of that decision was that the Court determined the Certificate of Title was procured by the fraud of the petitioner, Thaddeus Johnson, and that C. B. Bahamas Limited was privy to that fraud.

19. The judgment of the Court of Appeal dismissing the appeal by C. B. Bahamas Limited is also material.

20. In his judgment Campbell JA said:

> **...there was undoubtedly a deliberate and fraudulent suppression of material information relative to the interest of the Respondent by counsel for the petitioner [Thaddeus Johnson] at the hearing of the quieting suit, which suppression would equally by itself vitiate the Certificate of Title granted...**

21. And Melville JA said:

> **On the question of fraud, the evidence was overwhelming. The plan which was part of the petition in suit No. 10 of 1982 was done in 1926 - some 56 years earlier - and was a complete misrepresentation of the true position on earth at the time of the hearing of the Quieting Title petition. The evidence of Mr. Chee-a-Tow, a surveyor with some 35 years of Bahamian experience, and which the trial judge accepted, was that he prepared a plan of Pinewood Gardens Subdivision in 1972. When that plan was compared with the 1926 Nassau Village Subdivision plan there was overlapping, the disputed blocks which were in the southern portion of the 1926 plan were really a part of the Pinewood Gardens Subdivision. The 1926 plan was a paper sub-division which was never laid out on the ground. The streets and lots and other physical amenities which were laid out in the 1972 plan were all absent from the 1926 plan.**
>
> **The description of the property which was published in the notices required by section 6 (1) of the Act in the Quieting Title proceedings was so misleading that even when Mr. Coakley, the president and director of the respondent was served with the interim injunction, he was unable to identify the land mentioned in the order of the court. He had to consult Mr. Chee-a-Tow before he could discover what land was being mentioned. The 1926 plan certainly:**
>
> **"did not put the court on notice that there were, or may have been affected interests inconsistent with the claim of the petitioner, (Mr. Johnson) as would have been indicated had a proper survey plan been submitted. Nor was the description of land which was duly published in the notice under section 6 (1) of the Act, calculated to put on notice all likely adverse claimants or adjoining owners."**
>
> **Mr. Chee-a-Tow's evidence was that at the time of his survey in 1972, the disputed blocks were in fact virgin territory. This would clearly give the lie to Mr. Johnson's evidence in the Quieting Title proceedings that he had cultivated the disputed blocks up until 1975. One would have some difficulty in accepting Mr. Johnson's evidence (the proceedings in action No. 10 of 1982 were put in evidence before the trial judge in this action) that he had been cultivating some 500 acres, including the disputed lots from 1935 when he was a mere stripling of approximately 10 or 12 years of age. These matters were all part of Mr. Johnson's petition, so that he was most certainly aware of them, or presumed to be aware of them; they knowingly and deliberately misled the court in granting the Certificate of title to him.**
>
> (my emphasis)

22. All of these judgments were in the public domain when the Defendants purchased the property in 1998. They would have been discovered by any reasonable search by the Defendant and or their attorney in their investigation of the title of Bahamas Variety and Thaddeus Johnson. It

would be recalled that prior to the conveyance to Bahamas Variety, Mr. Johnson had conveyed the property to C. B. Bahamas Limited. The conveyance from Mr. Johnson to C. B. Bahamas Limited had been recorded in the Registry of Records and in their investigation of the title of Thaddeus Johnson and Bahamas Variety the Defendant and or their attorney would have discovered that conveyance.

23. By a reasonable investigation they would have also discovered the actions against Thaddeus Johnson and C. B. Bahamas Limited and would have discovered the findings of the Supreme Court and the Court of Appeal that the Certificate of Title was procured by the fraud of Mr. Johnson, and that C. B. Bahamas Limited was privy to that fraud. Those judgments are in my view admissible as evidence that the Certificate of Title was procured by the fraud of Mr. Johnson. They would have been aware that the conveyance from Thaddeus Johnson to C. B. Bahamas Limited had been set aside.

24. Section 52 of the Conveyancing and Law Property Act, Chapter 138 provides:

> **(1) A purchaser shall not be prejudicially affected by notice of any instrument, fact or thing unless-**
>
> **(a) it is within his own knowledge, or would have come to his knowledge if such inquiries and inspections had been made as ought reasonably to have been made by him; or**
>
> **(b) in the same transaction with respect to which a question of notice to the purchaser arises, it has come to the knowledge of his counsel, as such, or of his solicitor, or other agent, as such, or would have come to the knowledge of his solicitor, or other agent, as such, if such inquiries and inspections had been made as ought reasonably to have been made by the solicitor or other agent.**

25. In my judgment, notwithstanding that the Certificate of Title had not been set aside by the Court, neither the Defendants nor Bahamas Variety Ltd. could be regarded as bona fide purchasers for valuable consideration

without notice of the fraud by Thaddeus Johnson. They had knowledge of that fraud by Mr. Johnson. It is no answer to the Plaintiff's case that the Certificate of Title had not been set aside. A conveyance to a purchaser is ineffective if it is based upon a Certificate of Title procured by fraud if the purchaser at the time of the conveyance had notice of that fraud. This is so whether the Certificate has in fact been set aside as was determined in the **C. B. Bahamas Ltd v Arawak Homes Ltd** case itself.

26. I respectfully agree with the observations of Allen Sr. J in **Arawak Homes Ltd v Dennis Dean Action No. 1883 of 2002** in relation to other property which was the subject of the Certificate of Title to Mr. Johnson when she said at paragraph 54:

> **In order to get a good and marketable title, such title must begin with a root at least thirty years old and the risk is on the purchaser, who must satisfy himself by a full investigation of the title, before completing the purchase. It goes without saying that a bona fide purchaser who is giving value for his title would reasonably be expected to investigate the title by doing the usual and proper inquiries before paying for it. Had this been done, the Defendant, or any legal counsel working on his behalf, would have discovered the conveyances and Court orders affecting the subject land and would know that the vendor could not pass legal title to the subject land in 1999.**

27. The Defendants were badly advised by their attorneys if they were in fact advised by them that they were acquiring a good title. The Defendant's documentary title is woefully defective.

28. Counsel for the Defendants then asserted that the Plaintiff should not be granted any relief because they had a bad documentary title to the land.

29. I set out in its entirety the submission made by Counsel for the Defendants on this point:

> **A. THE PLAINTIFF'S ROOT OF TITLE IS A FRAUDULENT CONVEYANCE, OF WHICH THE PLAINTIFF HAD NOTICE**
>
> **1. Counsel for the Plaintiff sought to glibly deflect the submission relating to the lack of title of the Plaintiff by merely asserting that the Defendants are not in possession by virtue of the Malcolms, and none of**

the Malcolms have brought any suit against the Plaintiff, and relied upon an Affidavit sworn by Joseph Garfunkel in September 1956 (exhibited at Tab 5 of the Plaintiff's Bundle of Documents).

2. This Affidavit from all the circumstances was clearly sworn in support of the alleged title gained by Amusements Limited (Garfunkel's Company) by the 1942 Conveyance which the Plaintiff says is its root of title.

3. It is clear that Joseph Garfunkel was unable to satisfy Higgs & Kelly that he /Amusements Limited had a valid title to the land, which was eventually purchased by their client Alexis Nihon's company, International Agencies Limited, and that the Affidavit relied upon by the Plaintiff herein was required. (The Affidavit and Conveyance both being prepared by P.L. Adderley, were signed, and lodged for record by Higgs & Kelly on the same day.)

4. The fact that Joseph Garfunkel, notwithstanding the 1925 Conveyance, was constrained to assert that no claim of ownership had ever been made to him since 1925 (in paragraph 9) constitutes an admission by word and conduct that he acknowledged some defect in the "title" derived from the 1925 grant of land, which he sought to repair through the swearing AND RECORDING of the Affidavit.

5. Further, other averments in the said Affidavit Joseph Garfunkel constituted admissions which put any subsequent purchaser of the said land on notice that there was a problem with the documentary title upon which he was relying in 1956 by virtue of paragraphs 1 and 2 of the said Affidavit.

6. In paragraph 1. of the Affidavit, he recites that the named persons had "conveyed to me all their respective interests in a tract of land...". It is immediately apparent that he does not assert that they purported to convey "as beneficial owners". In failing so to do, there could be no application of the Statutory Covenants for Title. Secondly, the phrase "all their respective interests" immediately indicates that they did not purport also to convey their "estate, rights or title" which is the full phrase sometimes used, and seem to indicate only some form of equitable interests.

7. By way of contra distinction, in the next paragraph he recited his own act of conveying, not any "interest" in the land, but conveying the land itself, as "beneficial owner".

8. When viewed together it is clear that what Garfunkel was attempting to do was to merge the "respective interests" of the 1925 vendors into the fee simple estate which he claimed to have been able to pass to his alter ego, Amusements Limited in 1942; thereby creating a chain of title.

9. This attempt to convert a sale of unspecified and unascertained "Interests" in undivided portions of land into the fee simple estate shows the intention to deceive which is the necessary element of fraud.

10. Unfortunately for Joseph Garfunkel, the 1942 conveyance could not stand scrutiny as a root of title and he was forced to address the questions, which naturally arise from a reading of the 1925 Conveyance.

11. The answer to these questions, (1) what precisely were the "respective interests" purportedly conveyed, and (2) whether or not any other persons had any other interests in the land (not disclosed in the conveyance) but which inhibited the vendors from selling as beneficial owners and from selling more than their respective interests in the land, as opposed to selling the land, would have revealed to a reasonably prudent attorney that the 1925 vendors had at most an undivided interest in only an unascertained portion of the land.

12. His only answer in the Affidavit was, in effect, that no one else has made any claim to own the land. Such an answer was and is insufficient due to the provisions of Section 51 of the Conveyancing and Law of Property act, Chapter 138, SLB 2000 which limits the power of a conveyance to pass more than "all the estate, right, title, interest, claim or demand which the conveying parties respectively have, in to or on the property conveyed...". A conveyance cannot allow a person to convey any greater estate, right or interest than he actually has in land to himself or any other person. In other words, nemo dat quod non habet.

13. Interestingly, what the Affidavit of Joseph Garfunkel does not say is that he had caused the "respective interests" of the 1925 vendors to be researched and that it had been shown that they were the persons solely entitled to the entire fee simple estate in the land.

14. The use of the term "respectively have" and "respective interests" in both the Statute and the 1925 conveyance seem to indicate that the draftsman of the 1925 conveyance was familiar with the Statute. Yet, he only inserted an "interest" as being granted to Garfunkel, and not any "estate, right or title".

15. Knowing full well that he had only purchased unascertained "interests" in portions of the land in 1925, Joseph Garfunkel, knowingly and falsely executed a conveyance to his alter ego, Amusements Limited, in 1942, in which he falsely states that "the vendor is seised in fee simple in possession free from incumbrances of the hereditaments and premises hereby intended to be granted and conveyed" and falsely purported to convey all the land "as beneficial owner".

SUBMISSION No.1

It is clear that Joseph Garfunkel had a suspect title. Hence, the requirement for the swearing of the Affidavit; and it is, respectfully, submitted that the Plaintiff in this Action was put on inquiry by the 1956 Affidavit of Joseph Garfunkel (relied on by the Plaintiff herein) and that such inquiry, which ought to have been made, if made, would have inescapably revealed to the Purchaser or its Attorneys the fact that the 1925 conveyance was made by persons who had, at most, only partial unascertained interests in portions of the land, if any. The inquiry would also reveal that in 1942 Joseph Garfunkel purported to convey a larger interest in land than he had received in 1925; he purported to convey the fee simple estate.

The Conveyance (of the Equity of Redemption) to the Plaintiff was dated the 8th March, 1983. The Affidavit of Joseph Garfunkel was recorded on the 25th October, 1956 and was a recorded document which a title search by a reasonably prudent attorney would have disclosed, since it was a

document relating to title recorded by a predecessor in title within the Statutory period of thirty (30) years [Section 3 (4) CLPA].

SUBMISSION No.2

The Plaintiff relies on the provisions of section 3 (3) of the CLPA, Chap. 138, to assert that recitals and descriptions of facts in deeds more than 20 years old must be taken as sufficient evidence of their truth. The 1956 Affidavit of Joseph Garfunkel by reciting the terms of the 1925 conveyance, and the contradictory terms of the 1942 conveyance placed on record for all the world an admission by conduct that there was a problem with the quality and nature of the legal title claimed by Garfunkel. This admission by conduct and the terms and implications thereof are also to be taken to be sufficient evidence of the truth of the facts revealed thereby.

SUBMISSION No.3

The Plaintiff was not a bona fide purchaser of the land for value without notice of the fraudulent 1942 Conveyance to Amusements Limited (its professed root of title), and the 1956 Affidavit of Joseph Garfunkel which revealed all the elements of that fraud.

30. Without doing disservice to the breath of the submission, in a nutshell, counsel argued that Joseph Garfunkel never had any thing to convey to his company, Amusements Limited, and that the remaining purchasers in the Plaintiff's chain of title had no better title than Garfunkel, namely nothing at all. That Garfunkel obtained his title from a conveyance dated 20th November, 1925 from Clarence Malcolm et al to Joseph Garfunkel whereby the Vendors conveyed all their respective interests in a tract of land containing 590 acres. Counsel points out that the Vendors in the 1925 conveyance did not convey 'as beneficial owners'. He further submitted that the defect in Garfunkel's documentary title was recognized in 1956 by the purchaser, International Agencies Limited, who required Garfunkel to make an affidavit to the effect that *"From 1925 up the year 1942 [he] had undisturbed uninterrupted and undisputed possession of the said tracts of land and exercised full rights of ownership over the same without interruption or interference on the part of any person".* Counsel submits that this self serving affidavit could not strengthen or give Garfunkel or his company Amusements Limited any documentary or other title to the land which he never had in the first place.

31. Counsel also argued that notwithstanding that the Plaintiff's title had been accepted by the Court in at least four other actions namely, **C.B. Bahamas Limited v Arawak Homes Limited No. 355 of 1985; Arawak Homes Limited v John Sands No. 27 of 1991; Arawak Homes Ltd v Horizon Systems Ltd No. 155 0f 2004 and Arawak Homes Limited v Dean No. 1883 of 2002**, the argument that Joseph Garfunkel did not have anything to sell Amusements Limited was not fully canvassed before the courts on those occasions. The Court, he said, should not be persuaded by the fact that the Plaintiff's title had been accepted by this Supreme Court in those earlier cases.

32. With all due respect to Counsel for the Defendant, who advanced all arguments that could be advanced on the Defendant's behalf, I am not convinced that these arguments were not advanced in previous actions. In **C. B. Bahamas Limited v Arawak Homes Ltd (cited above)**, Gonsalves-Sabola J said:

> **Counsel for the plaintiff with much industry developed orally a number of written submissions dealing with alleged inadequacies in the root of title for the defendant's several predecessors in title.**

33. Indeed, the present submission appears to be a modified version of the submission advanced on behalf of the defendant John Sands in action No 27 of 1991. The argument was made in respect of the issue of locus standi. I recite from the judgment of Lyons J at paragraphs 229 to 238.

> **What the defendants argue was that James Malcolm was the original landholder. He died. By his will, his interest in the overall land was bequeathed to his five children as tenants in common. One of his children was Wellessley. Wellessley himself had eight children. When Wellessley died six of his eight children inherited his interest in the total overall land. As I understand it it was they who transferred their interest to Mr. Garfunkel.**
>
> **Mr. Garfunkel had a large amount of land that he owned. Arguably, perhaps, his interest was only as to one fifth or by a more accurate calculation, six fortieths.**

Mr. Garfunkel conveyed that interest on. It was that interest, so argues the defendants that the plaintiff eventually acquired.

The defendants appear to argue that whilst Mr. Garfunkel in 1926 owned a whole area of land in excess of five (500) hundred acres, he only conveyed on to the plaintiff's predecessors in title some one hundred and fifty (150) or so acres. The argument is rather curious. It seems to suggest that in so doing Mr. Garfunkel had effected a partition of the land. No authority was given for that. There is none. The simple answer is if in fact Mr. Garfunkel really, although thinking he purchased a hundred per cent interest in the whole land, only purchased six fortieths or one fifth interest in the land, then the interest that he conveyed to the plaintiff's predecessors in title was at very least that interest. There had been no partition.

If the defendant's argument holds true, then the subsequent purchasers (from the plaintiff's predecessors in title) took this "insignificant" interest of Mr. Garfunkel, the balance being owned by other persons.

Although it may have been an insignificant interest, it was an interest nonetheless.

It would not matter if it was one fortieth or one hundredth, the fact of the matter is that there was no partition of land and no matter how large or how small that interest in the land is, the plaintiff had that interest. Thus the plaintiff has an interest sufficient for them to bring an action pursuant to section 27.

That being the case, the plaintiff's interest is that of a documentary titleholder. The interest that John Sands, the first defendant, claimed was that of a trespasser. That is no interest at all until the land is quieted within the provisions of the Quieting of Titles Act.

Thus, had the plaintiff been party to the original quieting action, their interest (no matter how insignificant) would have been sufficient to defeat the "interest" as trespasser that Mr. Sands had.

Accordingly the defendants' argument is without merit.

34. The Court was satisfied that the Plaintiff had a sufficient documentary title to defeat the Defendant in that case who claimed under a Certificate of Title procured by fraud.

35. However, I will not simply rely on the decision of Lyons J. I propose to deal with the submission by counsel for the Defendant more substantively. In my judgment, the test of the two competing titles in this case must be done at the time that this action was commenced that is, as of 6th May, 2008.

36. Sections 3(3), (4) and (5) of the Conveyancing and Law of Property Act, Chapter 138 provides:

> **(3) Recitals, statements and descriptions of facts, matters and parties contained in deeds, instruments, Acts or declarations, twenty years old at the date of contract, shall, unless and except so far as they shall be proved to be inaccurate, to be taken to be sufficient evidence of truth of such facts, matters and descriptions.**
> **(4) A purchaser of land shall not be entitled to require a title to be deduced for a period of more than thirty years, or for a period extending further back than a grant or lease by the Crown or a Certificate of title granted by the court in accordance with the provisions of the Quieting Titles Act, whichever period shall be the shorter.**
> **(5) A purchaser of any property shall not require the production, or any abstract or copy, of any deed, will or other document, dated or made before the time prescribed by law, or stipulated, for commencement of the title, even though the same creates a power subsequently exercised by an instrument abstracted in the abstract furnished to the purchaser; nor shall he require any information, or make any requisition, objection or inquiry, with respect to any such deed, will or document, or the title prior to that time, notwithstanding that any such deed, will or other document, or that prior title recited, covenanted to be produced, or noticed; and he shall assume, unless the contrary appears, that the recitals, contained in the abstracted instruments, of any deed, will or other document, forming part of that prior title, are correct, and give all the material contents of the deed, will or other documents so recited, and that every document so recited was duly executed by all necessary parties, and perfected, if and as required, by acknowledgement, enrolment or otherwise.**

37. In my judgment, although it is not necessary to adduce a 30 year title to maintain an action in trespass, if the Plaintiff can establish a documentary title for a period of more than 30 years from the commencement of this action, it has established a sufficient title to maintain an action in trespass against the Defendants. The Plaintiff can easily establish that 30 year documentary title. The title documents upon which the Plaintiff relies contains recitals upon which it was entitled to rely upon in 1983 when the Plaintiff obtained its interest, and certainly in 2008 when the Plaintiff's title is being tested vis a vis the Defendants. There is no need to go behind the 1942 conveyance as the Defendant has invited the Court to do in this case. It must be recalled that 'there is no absolute title' and that 'where questions of title to land arise in litigation the court is concerned only with

the relative strengths of the titles proved by the rival claimants. If party A can prove a better title than party B he is entitled to succeed notwithstanding that C may have a better title than A, if C is neither a party to the action nor a person by whose authority B is in possession or occupation of the land." See **Ocean Estates Ltd v Pinder**.

38. I respectfully agree with the finding of Allen Sr. J in Action No. 1883 of 2002 which was between the Plaintiff and the First Defendant in respect of other property. The titles of the Plaintiff and the Defendants to that other property were the same as their titles to the property the subject of this action. In that case Allen Sr. J said at paragraph 22:

> **In any event, there is irrefutable evidence of the documentary title of the Plaintiff to the subject land, and applying the law as espoused by Lord Diplock in the case of Ocean Estates Ltd. v Pinder (1969) 2 AC 19, that where questions of title to land arise in The Bahamas, the Court is concerned only with the relative strengths of the titles proved by the claimants and that as against a defendant whose entry on the land was made as a trespasser, a plaintiff who can prove any documentary title to the land is entitled to recover possession of the land unless debarred by the period of limitation, I am satisfied on the evidence that the Plaintiff has If party A can prove a better title than party B he is entitled to succeed notwithstanding that C may have a better title than A, if C is neither a party to the action nor a person by whose authority B is in possession or occupation of the land.**

39. Indeed, the same point was made by Gonsalves-Sabola J in the **C. B. Bahamas Ltd case** where he said:

> **The foundation of [C. B. Bahamas Ltd's] cause of action in trespass is the conveyance by Thaddeus Johnson. Once that conveyance is impeachable under Section 27 of the Act on the ground that [C B Bahamas Ltd] was not a bona fide purchaser for value without notice of Thaddeus Johnson's tainted certificate of title, [C B Bahamas Ltd] is deprived of the only credentials it has for maintaining the present action in trespass. It is then no business of [C. B. Bahamas Ltd] whether some third person or persons may have legal grounds of challenge of [Arawak Homes Ltd's] title to the land. On the other hand, [Arawak Homes Ltd], relying on the locus standi given it by that title, is entitled to succeed in its counterclaim.**

40. Further, the Defendants cannot rely on a claim of continuous and exclusive possession for a period of 12 years immediately preceding the

commencement of this action so as to debar the Plaintiff by virtue of the Limitation Act. Indeed, the Defendants concede this point in paragraph 12 of their Defence filed on 9th February, 2010 where they plead:

> **The Defendants' possession and control of the said lots of land began on the 26th March, 1998 and their possessions and control thereof continued uninterrupted until 6th May 2008 when the Plaintiff commenced this action. Consequently the Defendants can only be disposed by a person having a better documentary title. As the Plaintiff title is equitable the Plaintiff is not entitled to possession of the land as against the Defendant.**

41. The Defendants were not in continuous and exclusive possession for 12 years immediately preceding the commencement of this action so as to debar the claim of the Plaintiff. I therefore reject the claim of the Defendants that any documentary title belonging to the Plaintiff was extinguished by adverse possession by the Defendants.

42. For all these reasons the Plaintiff must succeed in this action against the Defendants. In my judgment the Plaintiff is the owner of the properties the subject of this action. I will hear submissions as to whether an injunction should be granted as prayed for in the Relief and/or whether damages would be an adequate remedy as also prayed for in the relief.

43. The Defendants will pay the Plaintiff's cost of this action, such costs to be taxed if not agreed.

Dated this 21st day of October, A.D., 2010

The Hon. Sir Michael Barnett
Chief Justice

Michael L. Barnett
Chief Justice