

THE EASTERN CARIBBEAN SUPREME COURT
SAINT VINCENT AND THE GRENADINES

IN THE HIGH COURT OF JUSTICE

SVGHCV2015/0099

BETWEEN

GLENNIS MARLON MILLS

CLAIMANT

AND

CARIBBEAN RESORTS LIMITED

TRADING AS

MARINER'S HOTEL

FIRST DEFENDANT

AND

THE FRENCH VERANDAH INC.

SECOND DEFENDANT

Appearances:

Mrs. Zhinga Horne Edwards legal practitioner for the claimant.

Mr. Stanley John Q.C. with him Ms. Keisal Peters of Elizabeth Law Chambers,
legal practitioners for the defendants.

2018: Jun. 6
2019: Jul. 24
 Sept. 19
2020: Feb. 4
 Jul. 22

JUDGMENT

BACKGROUND

[1] **Henry, J.:** The circumstances which give rise to this claim are increasingly commonplace as disputes over division of matrimonial property spawn prolonged legal battles which sometimes

involve third parties. The main players in this matter are one such former spouse and two corporate entities in which the ex-husband is a director. Ms. Glennis Mills and Mr. Vidal Browne were divorced in 2003. During happier times, they jointly acquired a number of assets including shares in multiple corporate entities. Ancillary proceedings were protracted. Consequently, in 2010, Ms. Mills and Mr. Browne were still embroiled in the final stages of divorce proceedings for division of their matrimonial assets.

- [2] Around the same time, Ms. Mills took legal action against the companies Island Holdings Limited ('IHL'), Young Island Resorts Limited, St. Vincent Manufacturing Company Limited ('SVGML') and Caribbean Resorts Limited ('CRL') in which Mr. Browne was a director and/or shareholder. CRL carries on business in the State of Saint Vincent and the Grenadines ('State') under the name of Mariner's Hotel. Ms. Mills claimed in those proceedings ('the 2010 claim') *inter alia* that the companies' businesses were being conducted in an oppressive manner towards her and in a way which unfairly disregarded her interest as shareholder and director respectively. She indicated among other things, that she was interested in full ownership of CRL and all of its assets.
- [3] In 2011, the former couple finalized and executed a settlement agreement and a consent order regarding those two separate but related proceedings¹. Mr. Browne represented IHL, SVGML and CRL as their director and signed the agreement in that capacity on their behalf. In respect of the ancillary matrimonial proceedings, he signed it in his personal capacity.
- [4] The agreement provided that IHL 'transfer three (3) acres more or less of land situate at Villa adjacent to the Mariner's Hotel' ('the subject lands') to Ms. Mills, in consideration of "the parties'" mutual agreement to resolve their disputes and differences. A consent order was made by the Court² incorporating the terms and conditions in the agreement. A vesting deed (No. 2599 of 2011) referable to the subject lands was subsequently executed and registered. Ms. Mills claimed that before the transfer was made to her, CRL and the French Verandah Inc. ('TFVI')³ had used rent

¹ Matrimonial ancillary proceedings and the civil claim initiated by Ms. Mills.

² On 5th May 2011 and entered on 6th June 2011.

³ Referred to collectively as 'the defendants'.

free, 2 different portions of the 3 acres of land ('disputed lands') as a parking area for their respective adjacent hotel and restaurant businesses; and to place their signage.

- [5] She alleged that she did not object to them continuing to do so after she became the owner of the land and requested that they pay her rent for such use. Ms. Mills claimed that her repeated requests for payment of rent were unsuccessful and as a result she gave TFVI notice to quit. She contended that CRL and TFVI are trespassers since their tenancy at will has been terminated. She filed this claim⁴ against CRL trading as Mariner's Hotel⁵ and TFVI. She sought possession of the disputed lands; an injunction to restrain CRL and TFVI from trespassing on the disputed lands; *mesne* profits; interest and costs.
- [6] CRL and TFVI maintained that Ms. Mills does not own the areas of land which they occupy as a parking space and for signage purposes. They contended that they have acquired an interest in the subject land by adverse possession, having occupied it since 2003. They asserted that they carried out significant improvements on the disputed lands and have acted to their detriment in this regard. They submitted that it would be unjust and unconscionable for Ms. Mills to claim a beneficial right of ownership of the disputed lands and deny them proprietary rights to it. They insisted that the disputed lands have become a part of their property and that Ms. Mills is estopped from denying this. They deny that they are trespassers or that Ms. Mills has suffered any loss or damage. They contended further that Ms. Mills' claim is statute-barred.
- [7] The defendants claimed a declaration that Ms. Mills is not entitled to possession of the disputed property; a declaration that they are entitled to possession as owners and to maintain their signage on the knoll; an injunction restraining Ms. Mills from trespassing on the disputed lands and costs. I have found that Ms. Mills owns the disputed land and is entitled to *mesne profits* from CRL and TFVI.
- [8] The matter came on for trial on 6th March 2018. The parties were directed to file submissions as to whether the disputed lands were included in the referenced vesting deed, on the effect and import

⁴ On 15th July 2015.

⁵ Referred to hereafter as 'CRL'.

of the settlement agreement and the consent order on the proceedings in the present claim; whether and to what extent *res judicata* is applicable and if so, which parties are so bound; and whether enforcement proceedings under the CPR 2000 or a fresh claim would be the appropriate avenue for addressing matters arising from the referenced consent order or the settlement agreement. The parties filed their respective submissions and submitted that *res judicata* and merger did not arise in respect of all of the issues. A decision on those issues was deferred to the conclusion of the trial and will be addressed in this judgment.

ISSUES

[9] The issues are:

1. Whether the disputed land is included in the property conveyed to Ms. Mills by Vesting Deed No. 2599 of 2011?
2. Whether the principle of *res judicata* or *merger* is applicable to the present proceedings in light of the Release, Discharge and Settlement Agreement and consent order?
3. Whether Ms. Mills' claim is statute-barred?
4. Whether enforcement proceedings under the CPR or a fresh claim is the appropriate avenue for addressing the matters arising from the consent order and the Release, Discharge and Settlement Agreement?
5. Whether the defendants have trespassed on Ms. Mills' property?
6. To what remedies is Ms. Mills or the defendants entitled?

ANALYSIS

Issue 1 – Is the disputed land included in the property conveyed to Ms. Mills by Vesting Deed No. 2599 of 2011?

[10] Ms. Mills was adamant that the disputed land was conveyed to her by the Vesting Deed. CRL and TFVI were equally resolute in their contention that the disputed land is excluded from the Vesting Deed. In like manner, their respective evidentiary accounts contrasted.

[11] Ms. Mills testified that she is the registered owner of the subject lands by virtue of Vesting Deed No. 2599 of 2011. She averred that the subject land 'is described' on survey plan G3078. Ms. Mills acknowledged that before she became the owner the subject lands were owned by IHL, a

company in which she and Mr. Browne held shares and were the sole directors. She attested that about 4,687 sq. ft. of the subject lands was used by CRL and TFVI as a parking area for premises which serve as a CRL's hotel business (Mariner's Hotel) and TFVI's restaurant business. She stated that their signage was placed on another part of the subject lands, described as the knoll.

- [12] Ms. Mills indicated that the property was surfaced with concrete as a parking facility in the early 2000s. She recalled that before that the signage for Mariner's Hotel was located on a wall at the boundary to the hotel. She testified that at the time the area was developed into a parking facility she was not involved in and had no knowledge of CRL's, TFVI's or IHL's business dealings.
- [13] Ms. Mills averred that in or about July 2006 she saw an advertisement in a local newspaper for planning permission to build on lands belonging to IHL. She stated that although she was a shareholder and director of IHL, before she saw the newspaper publication, she had no knowledge of the plans to build or the application for planning permission. She said that she was not prepared to allow Mr. Browne or the companies to continue to disregard her interests in IHL, its subsidiaries and other investments. She therefore applied for and was granted an injunction against Mr. Browne (in the divorce proceedings) to restrain him from erecting any hotel or proceeding with any development on lands owned by IHL.
- [14] Ms. Mills averred that she believed that IHL gave CRL and TFVI permission prior to 2011 to use the disputed property. She added that IHL, CRL and TFVI act through Mr. Browne their director and shareholder. She testified that when CRL and TFVI started using the disputed property for parking and signage in the early 2000s, Mr. Browne controlled those companies. Ms. Mills testified further that she came to own the subject property by virtue of a release, discharge and settlement agreement and related consent order which emanated from the divorce proceedings and the 2010 claim.
- [15] She indicated that she wrote to CRL and TFVI by letters dated January 2nd, 2012, 24th August 2013, 5th September 2014 and 14th November 2014 seeking rent for their use of the disputed property. She stated that her lawyer wrote to them again in April 17th, 2015 for rent for the period June 2011

to April 2015 and demanding that they stop using the disputed lands within 30 days of the date of the letter. She averred that she believed that the disputed property could fetch approximately \$2,200.00 and \$300.00 per month respectively as a parking facility and signage knoll.

[16] Mr. Browne testified that CRL was encountering some difficulties due to a lack of adequate parking space for patrons and visitors to the hotel and restaurant premises. He stated that a small portion of adjoining lands owned by IHL was used to build a parking lot for the exclusive use of CRL and TFVI. He averred that he retained the services of Ralph Pope Construction Services to obtain an estimate in relation to construction of the parking lot, which was received on 13th February 2002. He asserted that CRL entered on to the disputed lands towards the end of 2002 and commenced construction of the parking area in late 2002, making substantial improvements to the lands, to the tune of \$140,585.30. He explained that CRL has enjoyed exclusive use of the disputed parking area from then up to the present.

[17] Mr. Browne averred that during 2003 IHL engaged licensed land surveyor Mr. Colin Alexander to excise and delineate the portion of land which had become designated as the parking area. He indicated that the resulting survey was registered at the Lands and Survey Department as plan No. G3078. He indicated that the clear intention was that the parking area would remain in CRL's exclusive possession. Mr. Browne testified that at all material times Ms. Mills was director of IHL and CRL and was fully aware of these matters. Ms. Mills denied having such knowledge.

[18] Mr. Browne acknowledged that arising from the referenced settlement agreement and consent order, IHL vested its proprietary interests to the subject lands in Ms. Mills. He asserted that CRL has continued to use and maintain the disputed parking area exclusively, while TFVI has continued its exclusive use of the disputed knoll under licence and permission from CRL. He averred that CRL placed its signage on the knoll over 20 years ago and has continued to do so up to the present. He accepted that CRL and TFVI received the requests for rent from Ms. Mills and indicated that they gave them no consideration due to the fact that CRL has been in undisturbed possession of the disputed lands in excess of 12 years and has exercised rights of ownership over them.

[19] The second schedule to the vesting deed describes the property conveyed as:

'ALL THAT Lot Piece or Parcel of land situate at Villa in St. Vincent and the Grenadines containing 3 acres 0 roods and 14 poles English Statute measure and abutted and bounded on the NORTH and NORTH EAST by the Windward Highway on the EAST by other lands formerly or presently of Robert Milton Cato on the SOUTH EAST and SOUTH by the sea and on the WEST by the sea and by lands of Kathleen Durrant and by a road leading to the Mariner's Inn and to the said lands of Kathleen Durrant or HOWSOEVER OTHERWISE the same may be abutted bounded known distinguished or described as the same is delineated and shown on a Plan or Diagram thereof dated the 21st day of December 1967 drawn by Clifford Williams Licensed Land Surveyor and lodged in the Surveys Office of St. Vincent and the Grenadines bearing number G593 **SAVE AND EXCEPT two parcels of lands** one parcel containing four thousand six hundred and eighty six (4,686) square feet acquired in or about the year 1968 by the Government of Saint Vincent and the Grenadines which said parcel of land is shown and delineated on a Plan lodged in the said survey's office under number G623 and another parcel containing two thousand and seventy (2,070) square feet forming part of lands sold to R. M. Cato as shown on a plan lodged in the said Survey's Office on the 3rd September 1969 under number G7/32 **together with all** ways waters watercourses rights lights liberties privileges and all other easements and appurtenances thereto belonging or usually held used occupied or enjoyed therewith or reputed to belong or be appurtenant thereto....' (bold and underlining added)

[20] It is evident from the foregoing description that the subject lands exclude two parcels, one amounting to 4,686 square feet as depicted on approved survey plan G623 and another parcel comprising 2,060 square feet as delineated on approved survey plan G7/32. The court must decide whether the lands described in this second schedule as having been transferred to Ms. Mills, include the disputed lands and if so whether CRL and TFVI own any beneficial interest in it.

[21] Ms. Mills argued simply that the vesting deed described the extent of the land conveyed to her. She added that two parcels of land are expressly excluded from the area so transferred. She concluded that the parking area and knoll used for signage are included in the land conveyed to her.

- [22] The defendants countered that although the description of the property in the second schedule does not expressly exclude the 'area comprising ... the disputed car park and signage', on a proper interpretation of the instrument, it does not vest the beneficial title to the car park in Ms. Mills. They argued that in the State there is a regime for registration of instruments, evidencing interest in land but none for registered title to land. The defendants submitted that the ownership of or title to real property, consists of the legal estate and the beneficial or equitable interests which are held in the property. They cited in support **Megarry & Wade's Law of Real Property** ⁶.
- [23] They contended that it is not 'unusual for the person in whom the legal estate is vested via paper title to be holding same on trusts for the benefit of another person ... who is entitled in equity as owner of the beneficial interests therein viz. a personal representative vis-à-vis a devisee of property subject to a specific bequest or devise under a will. They submitted that consequently while the legal estate 'may only be transferred via a deed, the beneficial estate may be the subject of an express trust or a resulting or constructive or statutory trust, or of equities, ... arising from circumstances impacting title to the property.' They advanced as authority **Snell's Equity**⁷ and **The Real Property Act**⁸.
- [24] They argued further that CRL has remained in exclusive possession of the disputed land since 2002/2003 and has undertaken no obligation by which it may be properly regarded as having disposed of those interests. They reasoned that based on such exclusive possession and the factual circumstances CRL has acquired ownership of the parking area even if the paper title may be vested in another person – IHL. They acknowledged that Ms. Mills was subsequently vested with the legal paper title by virtue of the vesting deed. They submitted that although it could have been so stipulated, there is no provision in the settlement agreement for CRL to relinquish possession of the parking area.
- [25] The defendants argued that CRL is not a party to the vesting deed. They submitted further that

⁶ 8th Edition page 102 para. 5-001 & 5-009 et seq.

⁷ 33rd Edition paragraph 2-001-2-005 page 21 et seq.

⁸ Cap. 331 of the Laws of Saint Vincent and the Grenadines, Revised Edition 2009, section 3.

under the Settlement Agreement the obligation rested solely on IHL to transfer to Ms. Mills the interests it held in the disputed lands. They contended that possession of real property is tantamount to ownership and only a person who has a better claim to possession may succeed against the occupant in a claim for trespass. Placing reliance on the **Law of Real Property**⁹, they argued that it does not follow that the paper title owner has a better claim to possession than the occupant.

- [26] The defendants submitted that CRL was not joined as a party to the instrument and did not transfer its interests in the car park to Ms. Mills through the vesting deed. They submitted that CRL had no obligations under that agreement to transfer its interests in and/or give up possession of the car park to her. They reasoned that notwithstanding the description of the land in the schedule to the vesting deed, the retention by CRL of possession of the car park area as owner 'is not contrary to any of the obligations to be performed under the agreement.'
- [27] The determination of whether the vesting deed conveyed the disputed lands to Ms. Mills has been reduced to 2 considerations by the opposing arguments raised by the parties. Firstly, does the vesting deed exclude from its description of the land conveyed either the parking area or the knoll used for signage; and secondly, if no, did the deed convey both the legal and equitable title, rights, interests and estate to Ms. Mills.
- [28] The defendants acknowledged that the vesting deed has not excluded the parking area and the knoll from its description of what was being vested in Ms. Mill by IHL. They accepted that IHL owned the disputed lands and all of the land transferred to Ms. Mills by the vesting deed. Mr. Browne admitted that IHL vested its proprietary interests in the lands shown on survey plan G3078 to Ms. Mills pursuant to the consent order made by the Court on 5th May 2011.
- [29] There is common ground among the parties that legal title to the disputed lands was transferred to Ms. Mills by IHL by vesting deed No. 2599 of 2011. I accept that this is so. Therefore, the first of the two questions posed at paragraph [27] must be answered in the affirmative. Resolution of the

⁹ At page 92, para. 4-012.

second question involves a consideration and interpretation of the vesting deed, the consent order from which it arises and aspects of the settlement agreement to ascertain the parties' intentions and the legal effect of the vesting deed.

[30] It is trite law that a transferor is capable in law of transferring to another only such interest as he owns in land. This principle of law is expressed by the Latin maxim *nemo dat quod non habet* which translates loosely to 'no one can convey what he does not own'. This concept is fundamental to ownership of land at common law although it does not govern the Torrens registered land system. Importantly, it finds expression in the **Registration of Documents Act**¹⁰.

[31] The learned authors of the **Law of Real Property**¹¹ point out that a transferee 'may take a title free from some incumbrance which was binding on' the transferor such as a trust or legal lease. However, in some instances, the transferee would be bound by an equitable lease, if for example the transferee had notice of it. The lessee might be granted an equitable remedy on a claim or counterclaim based on a judicial exercise of the court's discretion and due regard been given to the applicable rules of equity.¹²

[32] The foregoing principles are relevant to the issue under consideration. In this regard, the language of the vesting deed, the consent order and the settlement agreement will be examined to determine who were thereby bound and whether Ms. Mills holds legal title in it, subject to some equitable interest to which CRL and/or TFVI is entitled.

Consent Order

[33] The settlement agreement and the consent order were made on the same date – May 5th, 2011. It appears that approval by the Court of the consent order preceded execution of the settlement agreement because the order contains the following directive:

'IT IS HEREBY ORDERED AND DIRECTED BY CONSENT that the Claims of the Claimant

¹⁰ Cap. 132 of the Laws of Saint Vincent and the Grenadines, Revised Edition 2009, section 5.

¹¹ 5th Ed. by Sir Robert Megarry and H. W. R. Wade, at pages 102, 113 – 117.

¹² 5th Ed. Law of Real Property, at pages 113 -117.

are hereby compromised and settled as follows: -

1. That the parties do sign a Release Discharge and Settlement Agreement on or before the 9th day of May 2011... (underlining added)

[34] The consent order was made in claim numbered 109 of 2010. The heading on the order identified 'Glennis Marlon Veronica Mills' as claimant; 'Vidal St. Clair Browne' as 1st defendant; 'Island Holdings Limited' as 2nd defendant; 'Young Island Resorts Limited' as 3rd Defendant; 'St. Vincent Manufacturing Company Limited' as 4th defendant and 'Caribbean Resorts Limited' as 5th defendant. It follows therefore that all references to claimant are to Ms. Mills; and likewise references to 'parties' means the claimants and defendants; while references to each of the 1st, to 5th defendants refers respectively to one or other of them in that claim.

[35] Significantly, the order contains prefatory paragraphs which provide appropriate background to the agreement embodied in it; include the names of each legal practitioner in attendance and indicate which party they represent. It states:

'UPON READING the application of the Claimant filed by way of a Fixed Date Claim Form on the 22nd day of March 2010 and the Affidavit of Glennis Marlon Veronica Mills filed on the 22nd day of March 2010

'AND UPON HEARING Roger Forde QC and Mrs. Simone Churaman Counsel for the Claimant and Stanley K John Esq. Counsel for the 1st, 2nd, 4th and 5th Defendants respectively and R. Akin S. John Counsel for the 3rd Defendant'

[36] The only party that was not represented by eminent Queens Counsel was Young Island Resorts Limited. The order makes clear that each party made certain representations to the Court before the consent order was made. The order is signed by Ms. Mills and Mr. Browne in their personal capacities and by Mr. Vidal Browne as director for and on behalf of the 2nd, 4th and 5th defendants. He certified it by confirming that he had read it, had it explained to him and that he consented to it freely on behalf of those defendants. CRL does not dispute that it was a signatory and party to the claim out of which the consent order arose and also party to the order. I am satisfied that CRL was a fully informed party to it and is thereby bound by its terms in accordance with the applicable rules

of court¹³ and principles of law.

[37] The material part of paragraph 2 of the consent order provides:

‘2. That the real property interests of the parties abovementioned be divided and in that regard the Second Defendant shall on or before the 20th day of May 2011 execute and deliver all documents required to transfer and vest in the Claimant the entire beneficial title in fee simple absolute free from all encumbrances in respect of the following properties namely:-

(a) ...

(b) the three (3) acres more or (sic) less of land situate at Villa aforesaid adjacent to the Mariners Hotel which is owned by the Second Defendant and is more particularly described in a Deed of Conveyance dated 28th October 1987 and registered as Deed Number 2764 of 1987.’ (underlining added)

[38] This paragraph signals that the parties including CRL agreed that IHL would transfer to Ms. Mills all of its beneficial interests in the Villa property:

1. without any incumbrances; and
2. in fee simple absolute.

The terms ‘beneficial interests’, ‘incumbrances’ and ‘fee simple absolute’ have distinct legal meanings which must be explored to determine what the consent order directed should be conveyed to Ms. Mills, as agreed by the parties. Some of those expressions also appear in the Settlement Agreement and the vesting deed. They will be considered after they have all been highlighted.

Settlement Agreement

[39] The Release, Discharge and Settlement Agreement (‘the agreement’) was signed by Ms. Mills and Mr. Browne in their individual personal capacities and by Mr. Browne for and on behalf of IHL, St. Vincent Manufacturing Company Limited and CRL. It is therefore binding on those parties and is deemed to reflect their common agreement on the terms outlined in it. The headings on it are

¹³ Civil Procedure Rules 2000 (‘CPR’), Part 42.

identical to those in the pleadings in Claim No. 109 of 2010.

[40] The first two recitals state:

‘Whereas the Claimant [Ms. Mills] and the First Defendant [Mr. Browne] were spouses and during their marriage acquired assets which were vested in the Defendant Companies and the said Defendant Companies were managed for the joint benefit of the Claimant and First Defendant.

AND WHEREAS the said marriage having broken down irretrievably and divorce proceedings having been instituted in SVGHC Divorce Claim No. 8 of 2003 (“the divorce”), whereby the said marriage was dissolved.’

[41] The foregoing paragraph basically makes the connection between Ms. Mills, Mr. Browne and the defendant companies (IHL, Young Island Resorts Limited, St. Vincent Manufacturing Company Limited and CRL). It also highlights from the outset, the link between the matrimonial proceedings and the civil claim brought against the defendant companies.

[42] The third and fourth recitals provide:

‘AND WHEREAS further proceedings have been instituted on behalf of the Claimant in the captioned Claim (“the Lawsuit”), with the intention of procuring the effective division of their said assets and businesses in satisfaction of Ancillary Proceedings arising out of the Divorce.

AND WHEREAS the parties have arrived at an amicable settlement of their disputes for effecting the division of their said assets and businesses among themselves in the course of the said Proceedings and hereby wish to document their agreement as well as provide for the release and discharge of the Lawsuit and the said Ancillary Proceedings by both parties.’ (underlining added)

[43] These two provisions make a fuller association between the two sets of proceedings and summarizes the parties’ objectives behind concluding the agreement. It is to be noted that at times the term ‘parties’ is used to refer to Ms. Mills and Mr. Browne and at other times they and the

defendant companies, as explained later. For example, reference to the 'parties' arriving at an 'amicable settlement of their disputes' and for the 'release and discharge of the Lawsuit and said Ancillary Proceedings' clearly includes all parties to both proceedings. This interpretation does not necessarily apply with respect to 'effecting the division of their said assets and businesses among themselves'. Notwithstanding the imprecision in the language, there can be no doubt that CRL is one of the parties agreeing to and thereby undertaking to be bound by the terms of the agreement.

- [44] The main paragraphs of the agreement are preceded by a declaratory undertaking which removes any lingering doubt that the signatories expressly agreed to the terms and conditions outlined in it. That provision states:

'NOW THEREFORE IT IS UNDERSTOOD AND AGREED that in consideration of the mutual agreement to resolve their disputes and differences the parties hereto their successors and assignees agree and undertake the following namely:-' (underlining added)

- [45] By that clause, each signatory signified that she, he or it understood each of the terms and agreed to them and undertook to give effect to them. The first such term, agreement and undertaking appears in clause 1 of the agreement and deals partly with transfer of the matrimonial home and partly with transfer of the property at Villa. The portion referable to the matrimonial property is omitted for present purposes, as it is not relevant to these proceedings.

- [46] The material portion of clause 1 provides:

'That the Second Defendant shall on or before the 20th day of May 2011 sign and deliver all documents for the transfer to the Claimant of ... the three (2) acres more or less of land situate at Villa adjacent to the Mariner's Hotel which is owned by the Second Defendant in order to vest the same in the Claimant absolutely and free from all encumbrances. The Second Defendant shall pay the costs of the valuation and the parties shall accept the value/assessment made by Mr. Sebastian Alexander.' (underlining added)

- [47] By clause 1, IHL undertook and agreed to transfer the subject property to Ms. Mills 'free from all

encumbrances. By executing the agreement, CRL signified that it understood the obligation being undertaken and concurred. In this regard, the signature clause appearing immediately before Mr. Browne's signature is crystal clear. It states: "I, Vidal St. Clair Browne, in my capacity as a director on behalf of the 2nd, 4th and 5th Defendants respectively, have read the above order and have had the same explained to me and confirm that my consent has been freely given on behalf of the 2nd, 4th and 5th Defendants.' The term 'free from all encumbrances' will be examined later. It is important to underscore that CRL's free and full consent was thereby given.

[48] Clause 5 (b) of the agreement incorporates reference to the consent order and states:

'The Claimant and the First, Second, Fourth and Fifth Defendants shall execute a Consent Order whereby the division of their assets as abovementioned shall be appropriately set out and for obtaining the Court's imprimatur to the surrender by the Claimant of her shares and the reduction of the stated capital of the Second Named Defendant commensurate with the said lump sum representing payment of the Claimant for her shares in the companies' share capital and/or in respect of the real properties which are being vested in the Claimant and which no longer represent realisable assets of the companies.'
(underlining added)

[49] This clause suggests that perhaps the consent order was made after the agreement. Be that as it may, both were executed on the same date. Significantly, the parties and in particular, Ms. Mills, Mr. Browne, IHL, Young Island Resorts Limited, St. Vincent Manufacturing Company Limited and CRL committed to execute a consent order in similar terms to the agreement in relation to the transfer of the subject property at Villa to Ms. Mills. Moreover, they agreed that such conveyance would translate to and be regarded and treated by them as final and determinative of the interest, right and title to the same in favour Ms. Mills. To this intent, they agreed that on the property being vested in Ms. Mills pursuant to the agreement and consent order, none of the named defendant companies (IHL, Young Island Resorts Limited, St. Vincent Manufacturing Company Limited or CRL) could legally have recourse to the subject property as it would thereafter be regarded by them as an asset which is no longer realizable. It made no distinction between any part of the property and did not contain any exception, restriction or limitation in respect of any part.

Vesting Deed

[50] The vesting deed came into effect on the date of registration in May 2011¹⁴. It was entered into by IHL as grantor, Ms. Mills as grantee and Mr. Browne and Ms. Mills collectively as 'the shareholders'. The material parts of the first and second recitals state:

'WHEREAS under and by virtue of two indentures dated 28th October 1987 ... in the Registry of Deeds in the State of Saint Vincent and the Grenadines as Deeds No. 2764 of 1987 ... the Grantor became seized (sic) of the estates in fee simple absolute in possession free from encumbrances of the hereditaments and premises as are more particularly described in the ... Second Schedule hereto and intended to be hereby Granted Conveyed and Assured ("hereinafter referred to as the said hereditaments")-----

AND WHEREAS the First and Second Shareholders are the holders of all the Shares in the Grantor-----' (underlining added)

[51] By these recitals, IHL represented that it owned certain interests in the Villa Property (described in the second schedule) at the date it acquired the subject property and had continued to own those interests, rights and title up to the date the vesting deed was executed. The vesting deed expressly recorded that those interests were in effect an estate: -

1. of fee simple absolute;
2. in possession; and
3. free from encumbrances.

[52] Ms. Mills and Mr. Browne signed the vesting deed on behalf of IHL in their dual capacities as shareholders and directors of IHL. By the second recital, IHL expressly represented that it intended by the vesting deed to convey that distinctive interest, right and title to the transferee Ms. Mills. The term 'in possession' embodies a certain legal meaning and is important in assessing what the vesting deed actualized.

[53] The 5th and 6th recitals of the vesting deed are also germane. They provide in part:

¹⁴ In accordance with section 5 of the Registration of Documents Act, Cap. 132 of the Laws of Saint Vincent and the Grenadines, Revised Edition 2009.

'AND WHEREAS differences arose between the Shareholders in respect of the Management of the Grantor upon application made pursuant to ... in High Court Claim No. 109 of 2010, it was by order of the High Court ... ordered, directed and declared, inter alia, that the real property of the Grantor should be divided and the said hereditaments should be vested in the Grantee for an estate in fee simple in possession free from all encumbrances so as to achieve a property settlement between the First and Second Named Shareholders-----

AND WHEREAS the Grantor, acting pursuant to the said order of the High Court and through the First and Second named Shareholders, by this Vesting Deed now vests the said hereditaments in the Grantee free from all encumbrances-----' (underlining added)

[54] The foregoing recitals merely rehearse that the High Court had approved the parties' agreement in the form of the referenced consent order directing that the Villa property be transferred by IHL to Ms. Mills free from all encumbrances. Significantly, it captured that the estate to be transferred was the fee simple in possession.

[55] The vesting paragraph in the deed provides:

'NOW THIS INDENTURE WITNESSETH that in pursuance of the hereinbefore recited facts the Grantor as the beneficial owner doth hereby Grant and Convey unto the Grantee ALL AND SINGULAR the said hereditaments and ALL THE ESTATE right title interest claim and demand of the Grantor in to and upon the said hereditaments and every part thereof to HAVE and TO HOLD the same UNTO and TO THE USE of the Grantee FOREVER-----'(underlining added)

[56] By this clause, IHL declares that it is the beneficial owner of the Villa property, that it is free from encumbrances and that it was, by the vesting deed, transferring a clear ownership right, title and interest to Ms. Mills, with no incumbrances. The legal term 'beneficial owner' will be explained to capture the full effect of the interest being conveyed.

Fee simple absolute

[57] The expression 'fee simple' has been defined as an 'estate of freehold ... being the most extensive

interest that a man could have ... clear of any condition, limitation or restrictions to particular heirs'.¹⁵ 'Absolute estate' is defined as 'one granted without condition or termination.'¹⁶ Megarry and Wade states that the fee simple is the most ample estate which can exist in land. They recognized that while strictly speaking it is held in tenure and therefore falls short of absolute ownership, for practical purposes it constitutes absolute ownership; and 'was virtually eternal'.¹⁷

[58] The learned authors of **Words and Phrases Legally Defined** used similar language to elucidate the term 'fee simple'. They stated simply:

'A fee (with) the adjunct of simple annexed to it (... a fee-simple), ... is used in contradistinction to a fee conditional at the common law, ...; importing an absolute inheritance, clear of any condition, limitation, or restrictions to particular heirs, but descendible to the heirs general, whether male or female, lineal or collateral. ...

An estate in fee simple approaches as near to absolute ownership as the system of tenure will allow; when absolute and in possession it is the only estate of freehold which can now subsist at law.'¹⁸

In possession

[59] The **Law of Property** text provides guidance on the meaning of 'in possession' at common law. The learned authors write:

'An estate in land may exist in one of three different ways: in possession, in remainder or in reversion. An estate in possession gives an immediate right to possession and enjoyment of the land. Estates in remainder or reversion, on the other hand, are future interests, and meanwhile some other person is usually entitled in possession. "Remainder" signifies a future gift to some person not previously entitled to the land. "Reversion" signifies the residue of an owner's interest after he has granted away some lesser estate in possession to some other person.'¹⁹ (underlining added)

¹⁵ Osborn's Concise Law Dictionary, Seventh Edition, page 145 – 146.

¹⁶ At page 136 of Osborn's Concise Dictionary of Law.

¹⁷ At pages 59 and 39 respectively of Law of Property, 5th Ed.

¹⁸ Lexis Nexis Edition.

Incumbrances or encumbrances

[60] 'Encumbrance' is defined as 'a charge or liability'.²⁰ 'Incumbrances' is described by Megarry and Wade as covering 'all subsisting third party rights such as leases, rentcharges, mortgages, easements and restrictive covenants.'²¹ They explain that it 'includes statutory liabilities, if they are not merely potential or imposed on a property generally.'²¹

[61] Having regard to the definitions outlined above, it is discernible that an estate of 'fee simple absolute in possession without encumbrances or incumbrances' is one which bestows on the transferee an estate granted:

1. without condition, limitation, restriction or termination;
2. with an immediate right to possession and enjoyment of the land; and
3. not being subject to any charge or liability such as a lease, mortgage, easement or licence.

This is what the parties including CRL agreed to under the consent order. It was cemented in the vesting deed by Ms. Mills, Mr. Browne and IHL.

[62] The Settlement Agreement did not use the terms 'fee simple' or 'in possession'. It provided only that the 3 acres of land be vested absolutely in Ms. Mills by IHL free from all encumbrances. The word 'absolutely' is defined by the Merriam-Webster Dictionary as 'completely or totally'. Taken together with 'free from all encumbrances', it is beyond doubt that the parties to the Settlement Agreement contemplated and agreed that IHL would transfer to Ms. Mills a title to the subject land which would have no limitations, restrictions or conditions, legal, equitable or otherwise. None is reserved in the clear language of the agreement.

[63] Moreover, the insertion of the phrase 'the real properties which are being vested in the Claimant ... no longer represent realisable assets of the companies' reinforces the foregoing terms of the contract. In this regard, 'realisable' is defined as 'convert into actual money'.²² By acknowledging

¹⁹ At page 44 of Law of Property, 5th Ed.

²⁰ At page 131 of Osborn's Concise Dictionary of Law.

²¹ At page 611 of The Law of Property, 5th Ed.

²² Merriam-Webster Online Dictionary.

that the subject property will cease to be a realizable asset when it is transferred to Ms. Mills, the defendant companies (including CRL) which signed the settlement agreement signified their consensus and acceptance that the property was thereby shielded from any future claim by them whether at law or in equity.

Beneficial interest or beneficial owner

- [64] The consent order introduced the additional element of 'beneficial title in fee simple absolute free from all encumbrances' being vested in Ms. Mills, while the vesting deed expressly pronounced that IHL as grantor and 'beneficial owner' transferred to Ms. Mills all of its 'estate right title interest claim and demand'. The term 'beneficial' is used to describe an equitable (as opposed to a legal) interest in land or other property. As explained by Megarry and Wade, 'Often the legal estate in land carries with it the beneficial interest and no separate interest exists.'²³ They go on to explain that the beneficial owner of a legal estate may separate the legal interest from the beneficial, for example by the creation of a trust.²⁴
- [65] The words used by the respective parties to the consent order and the vesting deed attest to their acknowledgment that IHL owned the beneficial equitable interest in the subject lands at the time of execution of those legal documents and at the time of conveyance to Ms. Mills. Their use also bears witness that the defendant companies (including CRL) and Ms. Mills intended that the transfer to her would fully incorporate the beneficial interest, title and right to the said property, without encumbrances. I hasten to underscore that the court remains mindful that TFVI was not a party to any of those three instruments.

What was conveyed

- [66] In view of the foregoing, I am persuaded and am satisfied that CRL was a fully informed and willing party to the consent order and settlement agreement which expressly specified and stipulated what property was agreed to be transferred to Ms. Mills in settlement of Claim No. 109 of 2010. I am satisfied on a balance of probabilities that CRL agreed that IHL would transfer to Ms. Mills the

²³ At page 122 of The Law of Property, 5th Ed.

²⁴ At page 123 of The Law of Property, 5th Ed.

subject property comprising 3 acres of land at Villa, without incumbrances such as any beneficial interest enjoyed by CRL in it. CRL by virtue of the settlement agreement relinquished any claim to the subject property, by signifying that once vested in Ms. Mills, it would not be a realizable asset of CRL. Taken together, this translates to an undertaking by CRL not to pursue any claim to any equitable beneficial interest, right or title to which it may have been entitled to prior to the execution of the agreement and consent order.

[67] This accord is repeated and enlarged in the release and discharge clauses of the agreement (at clauses 5 and 7) which read, so far as relevant:

‘5. **IT IS UNDERSTOOD AND AGREED** that in consideration of the mutual agreement to resolve their disputes and differences:

(a) ...

(b) ...

(c) Upon the performance of all of their respective obligations in this Release and Discharge, the parties hereto shall not hereinafter bring or participate in any proceedings against each other or against any of the Defendant Companies their respective heirs administrators and assigns or successors and assigns, or their parent company and affiliates, in respect of any matters relating to the Lawsuit, and shall hold each other harmless in respect of any matters competent to be raised now whether known or unknown to them or either of them save for matters arising under the Release & Discharge which have been agreed to be performed by the parties and which remain unperformed at the expiration of the dates and times agreed or any agreed extension of same.

7. **THE PARTIES FURTHER AGREE THAT:**

(a) In consideration of the matters set out above, they do hereby each release and discharge each other from any and all claims and obligations pertaining to the matters in the Lawsuit howsoever arising and that all such matters are hereby fully and finally settled, PROVIDED that in the event that any party defaults in the performance of their obligations hereinbefore mentioned, the aggrieved party shall give to that party a Notice calling upon that party to remedy the default within fourteen days and in the

event that the defaulting party fails to remedy the default then the aggrieved party is entitled to register this Agreement without notice as an order of the Court and to enforce the provisions of the same as a said Order of the Court.' (underlining added)

[68] In clause 5 (c), the qualifier 'each other' to the expression 'the parties' reveals that the release and discharge captured there, relates to Ms. Mills and Mr. Browne and binds them from bringing the types of actions described there. That sub-clause places no restrictions against CRL or the other defendant companies.

[69] However, clause 7 hearkens back to the clauses and recitals which precede it. Unlike clause 5 (c) it does not contain any modifier of the term 'the parties' and properly should be construed as used in the very beginning - at the 4th recital. There the signatories acknowledged that they 'have arrived at an amicable settlement of their disputes'. While that recital appears to be ambiguous as to what is meant by 'the parties' it must be interpreted in accordance with established legal principles, to appreciate what the parties meant by its use there and elsewhere in the contract. Importantly, it is necessary to determine whether they used it to mean different things in clause 5 (c) and clause 7.

[70] The Court of Appeal outlined guiding principles for the interpretation of contracts in the case of **Donald Halstead v The Attorney General and others**. It was then considering what the parties intended by the agreement they formulated as a consent order and which was approved subsequently by the Court. Floissac C.J. opined:

'11 I start with the basic principle that the interpretation of a contract or the appropriate meaning of an ambiguous word or phrase of a contract is derived from the objective common intention of the parties to the contract. That objective common intention is an inference drawn from the word or phrase interpreted objectively in the light of its contractual context. That contractual context comprises the whole or every part of the contract and all relevant contractual surrounding circumstances which were known to and should be presumed to have been within the contemplation of the parties at the time of the

execution of the contract.²⁵

- [71] Quoting from the case of **Prenn v Simmonds**²⁶ the learned Chief Justice stressed that such an agreement must be placed in context of the facts out of which they arose; and the adjudicator must:

‘enquire beyond the language and see what the circumstances were with reference to which the words were used, and the object, appearing from those circumstances, which the person using them had in view. ... evidence of mutually known facts may be admitted to identify the meaning of a descriptive term.’²⁵

- [72] The Honourable Chief Justice highlighted a further applicable principle which was expounded in **Reardon Smith Line v Hansen-Tangen**²⁷. In this regard, he explained that interpretation of a contract to arrive at the intention of parties is to be approached objectively, by ascertaining ‘the intention which reasonable people would have had if placed in the situation of the parties. He pointed out that similarly, when one is speaking of aim, or object, or commercial purpose, one is speaking objectively of what reasonable persons would have in mind in the situation of the parties.’²⁷

- [73] The learned Chief Justice added:

‘14 The objective purpose of a contract is presumed to have been known to and to have been within the contemplation of the parties at the time of the execution of the contract. That objective purpose is a most important relevant contractual surrounding circumstance and a most significant component of the contractual context by reference to which the objective common intention of the parties may be inferred and the contract may be properly interpreted.’²⁸

- [74] He remarked further that this objective purpose is discernible by reference to the facts surrounding

²⁵ [1995] ECSCJ No. 18 at para. 11.

²⁶ (1971) 3 A.E.R. 237 at 239 & 240, per Lord Wilberforce.

²⁷ (1976) 3 A.E.R. 570 at 574.

²⁸ At para. 14 of the Donald Halstead case.

the contract, including the background facts to the conclusion of the contract, which form the factual basis for it. He reasoned that these must reasonably have been in the parties' contemplation when they made the contract; are relevant and 'are themselves ingredients of the contractual context by reference to which the objective common intention of the parties may be inferred and the contract may be properly interpreted.'

[75] Significantly, Chief Justice Floissac reasoned:

'19 In the present case, the appellant and the respondents were all parties to the consolidated motions numbered 99 and 100 of 1986 and the Consent Order. The Consent Order expressly refers or relates to the notices of the consolidated motions. The obvious objective purpose of the Consent Order was the judicial determination of the rights and causes of action expressed or implied in the notices of the consolidated motions. Consequently, in order to appreciate the scope of that objective purpose and thereby properly to interpret the Consent Order or ambiguous words or phrases therein, it is necessary to identify those adjudicated rights and causes of action and to do so by reference to the claims, facts and grounds asserted and relied on by the appellant in his notices of the consolidated motions.'²⁹ (underlining added)

[76] That approach commends itself in the instant case, since this matter also involves claims which were settled simultaneously although initiated separately. The parties to the instant claim filed an Agreed Statement of Facts and Chronology of Events on 4th August 2016 which assist in this process. They accepted that Ms. Mills instituted divorce proceedings against Mr. Browne on 22nd January 2003 by Divorce Claim No. 8 of 2003 and filed a without notice application in that matter, for an injunction to restrain Mr. Browne, his servants, agents and/or licensees (including Mariners Hotel) from mortgaging, charging or in any way dealing with IHL's assets. The injunction was granted on 21st July 2006, 2 days after the application was filed.

[77] They acknowledged further that on March 22nd, 2010, Ms. Mills filed Claim No. 109 of 2010, by which she sought against the defendant companies a declaration that their affairs were being con-

²⁹ At para. 19 of the Donald Halstead case.

ducted in a manner that was oppressive, unfairly prejudicial towards her and/or in a manner that unfairly disregarded her interests as a director and shareholder respectively. It is a matter of record that the settlement agreement, consent order and vesting deed were executed in respect of both claims. It is worth noting that other determinations were made regarding the payment of monies to Ms. Mills, connected to and in consideration of termination of her shareholding and directorship. Those terms have limited bearing on the case at bar.

[78] Notably, the parties in this suit included as part of the agreed facts the following:

‘In the Claimant’s affidavit in support of the claim which she instituted against the First Defendant and others in the High Court in 2010, she stated the following: “I do not desire to control any of the Defendant Companies except Caribbean Resorts Limited, which I wish to have full ownership of along with its assets including its real estate intact and with an adjustment to the title deed that would extend the boundaries of the property to encompass the existing car park”.³⁰

[79] The preceding 3 paragraphs coupled with the recitals in the settlement agreement circumscribe in precise terms, the main issues between the parties in Divorce Suit No. 8 of 2003 and Claim No. 109 of 2010. In the former, the issue concerned division of matrimonial property. In the latter, the central issues surrounded an assessment of and resolution by the parties of those matters and approval by the court of their agreement regarding the respective interests that Ms. Mills and Mr. Browne held and would hold in the defendant companies, including specifically Ms. Mills’ expressed interest in acquiring or retaining a controlling ownership in CRL and certain lands at Villa including the referenced car park.

[80] The Court notes that the parties place reliance on the referenced statement made by Ms. Mills in that affidavit filed in the 2010 proceedings. CRL and TFVI have invited the court to find that her statement is to be interpreted as an admission by her that CRL owned the disputed car park. Careful analysis of that statement suggests otherwise. The active words bear repeating. They are ‘I wish to have full ownership of (CRL) along with its assets including its real estate intact and with an

³⁰ Paragraph 11 of the Agreed Statement of Facts.

adjustment to the title deed that would extend the boundaries of the property to encompass the existing car park.’ Although the statement refers to CRL’s assets and real estate, it does not catalogue either. It qualifies reference to its real estate by a request that the title deed to CRL’s real estate be amended by including the car park. This contains an implicit acknowledgment that CRL’s title deed does not include the car park.

[81] It is worth noting that IHL was the owner of the parking area. It follows that Ms. Mills’ demand for CRL’s real estate must refer to property other than the car park and could possibly refer to the hotel and restaurant businesses mentioned by Mr. Browne³¹. I therefore make no finding that CRL owned the referenced car parking area or that Ms. Mills acknowledged such ownership in the referenced affidavit.

[82] Another issue before the court was whether there was merit to Ms. Mills’ assertions that the affairs of the defendant companies were being conducted in an oppressive or unfairly prejudicial manner towards her and/or in a manner that unfairly disregarded her interests as a director and/or shareholder. This Court notes that by the settlement agreement the parties accepted that it did not contain any acknowledgment of liability by them³², while acknowledging that the parties had amicably settled their disputes and made provision for the release and discharge of the ‘lawsuit and ... ancillary proceedings.’³³

[83] This is important. In furtherance of the Court’s statutory duty to ensure that the administration of justice is served in each case by comprehensively and finally resolving all matters in controversy to avoid multiplicity of legal proceedings³⁴, the court is mandated to guard its process in this manner even when an agreement is presented by parties for approval as a consent order. I presume that the referenced consent order was so formulated and did resolve all disputes between the several

³¹ At paragraph 3 of the Witness statement of Vidal Browne filed on 8th April 2016.

³² Clause 6(c) of the agreement.

³³ 4th recital.

³⁴ Section 20 of the Eastern Caribbean Supreme Court (Saint Vincent and the Grenadines) Act Cap. 24 of the Laws of Saint Vincent and the Grenadines, Revised Edition 2009.

parties to the separate actions.

- [84] In view of the fact that the settlement agreement and consent order expressly resolved those disputes, this confirms the court's presumption and must inform the interpretation of the settlement agreement. In this regard, the release and discharge undertaking outlined in clause 7 expressly absolves the parties to the lawsuit (including the defendant companies) from any claims or obligations in relation to the issues in Claim No. 109 of 2010. To interpret it otherwise would lead to absurdity and would not conform to what reasonably probably were the parties' intentions. I am therefore satisfied that the term 'the parties' in clause 7, was intended by the parties to include the defendant companies and I so find.
- [85] It follows that the release conferred on CRL by Ms. Mills released CRL from its obligations under the consent order to the extent that it performed or co-operated in the performance of those obligations. This necessarily includes CRL's agreement and concurrence with the transfer to Ms. Mills of the subject land including the car park, free from incumbrances. The Court remains mindful that the consent order was executed by CRL without protest and that CRL included an acknowledgement that it was signed freely and voluntarily. The Court also reminds itself of the stipulation in rule 42.7 (2) of the CPR which characterizes a consent order as one in which 'all relevant parties agree to the terms in which judgment should be given or an order made'.
- [86] In the premises, CRL cannot now be heard to challenge the transfer to Ms. Mills on the ground that it owned at that time and retains a beneficial interest in the subject property. Such insistence is in direct violation of the terms of the settlement agreement and consent order to which CRL was a fully informed and consenting party. Furthermore, the court cannot sanction such withdrawal from the settlement agreement and consent order by CRL. It cannot countenance such a retreat, as to do so would be inimical to the principles of equity which guide a court in the exercise of its equitable jurisdiction. I refrain from doing so. I find therefore that the release confirms the relinquishment by CRL of any claims to any beneficial interest in the subject property including the car park and the knoll.
- [87] I find further that the parties to the vesting deed intended that all the legal and equitable interest

right and title to the referenced 3 acres including the parking area and knoll described in the second schedule to the vesting deed be conveyed to Ms. Mills and were to belong to her absolutely. Accordingly, CRL retained no beneficial interest in the disputed land or the subject land. What of TFVI's claim to a beneficial interest? That is addressed together with issues of *res judicata* and merger.

Issue 2 - Whether the principle of *res judicata* or merger is applicable to the present proceedings in light of the Release, Discharge and Settlement Agreement and consent order?

Res judicata

[88] Ms. Mills submitted that *res judicata* is the legal doctrine that prohibits the same parties from re-litigating a claim, issue or cause of action that has been finally decided by a court of competent jurisdiction. She cited **Halsbury's Laws of England**³⁵. She submitted that the essential features of *res judicata* are succinctly stated by the learned authors as follows:

'Essentials of res judicata. In order that a defence of *res judicata* may succeed it is necessary to show not only that the cause of action was the same but also that the Plaintiff has had an opportunity of recovering, and but for his own fault might have recovered in the first action that which he seeks to recover in the second. A plea of *res judicata* must show either an actual merger, or that the same point has been actually decided between the same parties... It is not enough that the matter alleged to have been stopped might have been put in issue, or that the relief sought might have been claimed. It is necessary to show that it actually was so put in issue or claimed.'³⁶

[89] Ms. Mills contended that clause 7(b) of the settlement agreement provides for the parties to apply to the court for interpretation of its provisions. She argued that her claim for rent and damages for trespass to land cannot be brought under that clause. She argued further that on registration of the vesting deed she became entitled to the rights which attached to the subject land, including the right to possess it, use it, exclude others from it and receive rents and profits from it. She submitted that the instant claim does not relate to Claim No. 109 of 2010 and was not competent to be raised

³⁵ 4th Ed. Vol. 16. Para. 1526.

³⁶ At para. 1528 of Halsbury's Laws of England, 4th Ed. Vol. 16.

at the date the settlement agreement was executed, for the purposes of clause 5(c) of the settlement agreement.

[90] Ms. Mills submitted further that the settlement agreement does not preclude her from bringing the present claim for *mesne* profits since she hereby seeks to enforce her rights by fresh action, in response to events which have unfolded since the settlement agreement was signed. She contended that CRL by its counterclaim in the instant matter is seeking to re-litigate an issue which was settled by the settlement agreement. She argued that CRL filed no affidavit in the 2010 proceedings although it could have raised the same objections and claims it now makes in respect of its alleged expenditure on the parking area, the expectations that it and TFCVI might have had in respect of the use of the parking area and any alleged unconscionability in vesting the subject land in her. She submitted that they failed to do so at that time. Ms. Mills argued that based on the authority of **Newington v Levy**³⁷ they are estopped from relying on them in the present proceedings.

[91] Ms. Mills contended that the defence of *res judicata* will succeed only if the:

1. parties are the same in the original and subsequent proceedings;
2. cause of action in both proceedings are the same and if the claimant had the opportunity to bring before the court in the first action that which he seeks to recover in the second;
3. matter had been determined on its merits; and
4. matter had been decided by a court of competent jurisdiction.

[92] She argued that while she and CRL were party to the 2010 proceedings, TFCVI was not. She submitted that estoppel pursuant to the doctrine of *res judicata* may be raised against the parties to the original proceedings and also against their privies. She cited in support **Halsbury's Laws of England**³⁸ and **Bullen and Leake, Precedents of Pleadings**³⁹.

³⁷ (1870) L.R. 6 CP 180.

³⁸ 4th Ed. Vol. 16 at para 1543.

³⁹ 13th Ed. at pp. 1248 – 1249.

- [93] Ms. Mills reasoned that TFVI claims to be in possession of the subject land by virtue of a licence from CRL; thereby claims title under CRL; is accordingly its privy in estate and bound by the judgment. She argued that CRL is unable to confer on TFVI a title or estate that it does not have and is therefore caught by the principle *nemo dat quod non habet*.
- [94] She contended that the 2010 proceedings were a derivative action under the Companies Act in which she sought several reliefs against Mr. Browne and the defendant companies. She noted that her present claim is for possession, an injunction and *mesne* profits arising from the tort of trespass. She argued that the principle of *res judicata* does not apply because in 2010 she did not own the subject lands and became entitled to the rights she now seeks to enforce only after the land was transferred to her. She submitted further that she was not seeking possession of the subject lands in 2010 and could not have claimed *mesne* profits at that time.
- [95] Ms. Mills submitted further that while the consent order will not necessarily be treated as a judgment not arrived at on the merits, the circumstances in which a party will be estopped by *res judicata* in relation to a consent order are limited and seems to depend on whether pleadings were served. She cited in support **Halsbury's Laws of England**⁴⁰. She reasoned that CRL having consented to an order before serving pleadings in the 2010 proceedings, is not estopped by *res judicata* from pleading in a later action matters which could have constituted a defence then. She argued that those matters were never in issue and therefore do not give rise to a defence of *res judicata*.
- [96] Ms. Mills submitted further that the case of **Ackerman v Thornhill**⁴¹ demonstrates the approach of the court to settlement agreements entered into by parties to litigation. She argued that the parties settled an appeal by way of consent order in which the claimant agreed not to pursue his claims against the defendants. She noted that after becoming aware of two transactions between the defendants and her son (where the first defendant has served as an expert to determine an aspect of the case), the claimant brought a claim to set aside the consent order. She alleged that the second defendant and her son had bribed the expert. Ms. Mills submitted that the Court of Appeal

⁴⁰ 4th Ed. Vol. 16 at para. 1559.

⁴¹ [2017] EWHC 99 (Ch).

in striking out the claim commented that it is in the public interest that there should be finality in litigation, and this is reinforced where the parties have entered into a settlement agreement which should not be undermined except on the clearest possible grounds.

- [97] CRL and TFVI submitted that the issue of whether *res judicata* applies requires an examination of whether Ms. Mills or they are estopped from pursuing their respective claims in trespass or for a declaration that the latter owns a beneficial interest in the subject property. Quoting from **Halsbury's Laws of England**, they contended:

'It is a fundamental doctrine of all courts that there must be an end of litigation. Where *res judicata* is pleaded by way of estoppel to an entire cause of action, rather than to a single matter in issue, it amounts to an allegation that the whole legal rights and obligations of the parties are concluded by the earlier judgment, which may have involved the determination of questions of law as well as findings of fact. To decide which questions of law and fact were determined in the earlier judgment the court is entitled to look at the judge's reasons for his decision and his notes of the evidence, and is not restricted to the record; but, as a general rule, the judge's reasons cannot be looked at for the purpose of excluding from the scope of his formal order any matter which according to the issues raised on the pleadings and the terms of the order itself, is included in it.'⁴²

- [98] CRL and TVFI argued that the parties to the settlement agreement are Ms. Mills and Mr. Browne. They made no submissions regarding why it was therefore necessary for the defendant companies to sign the settlement agreement. In any event, they argued that no judgment emanated from the 2003 and 2010 proceedings to which the court may look for analysis of the judge's decision. They submitted that the case of **Halstead v Attorney General of Antigua and Barbuda** is instructive. They submitted that the Court of Appeal in that case held that 'the institution of the claim after obtaining the consent order was an abuse of process, even if the appellant might not strictly have been estopped *per rem judicatam* from instituting it; further, the appellant's rights of action and causes of action ... had been merged in the consent order (*'transit in rem judicatam'*) and had ceased to exist; the claim was also an abuse of the court and as the consent order had created a

⁴² Vol. 12 5th Ed. para. 1174.

promissory estoppel.’

[99] Echoing the words of Chief Justice Floissac in that case CRL and TFVI contended:

‘That principle (*res judicata*) is appropriate when a right or cause of action or an issue had arisen or could or should have been raised in previous civil proceedings and that right or cause of action or issue was expressly or impliedly determined on its merits by a final and conclusive judgment of a court of competent jurisdiction. In that case, the parties to the previous civil proceedings and their privies are inter se estopped per rem judicatam from relitigating that same adjudicated right or cause of action or issue in subsequent civil proceedings, unless there are special circumstances entitling one of the parties or privies to re-open that adjudicated right or cause of action or issue in the interest of justice. ...

A litigant is precluded from relitigating an adjudicated cause of action either by instituting a different kind of proceedings or by relying on a different right of action or by claiming a different remedy. If the previous and fresh proceedings could or should have been consolidated or the new right of action or remedy could or should have been claimed in the previous proceedings in which the original right of action was determined, the relitigation is regarded as an abuse of the process of the court.’⁴³

[100] CRL and TFVI submitted that they pleaded waiver and not *res judicata*. They argued that although they filed no reply to the defence to their ancillary claim, issue has been joined between the parties in connection with possession to the car park. They submitted that none of the parties in the instant claim have raised the issue of *res judicata* in their pleaded cases. They acknowledged that the court may nonetheless strike out any frivolous or vexatious claim or defence that has already been decided in a previous claim.

[101] They submitted that this was articulated by Chief Justice Floissac in the **Halstead case** when he stated:

‘There can be no doubt that the High Court has an inherent power and is under a duty to

⁴³ At paras. 32 and 34 of the Donald Halstead case.

exercise that power to strike out any pleading which is an abuse of the process or procedure of the Court. That power ... is exercisable whenever the circumstances of the pleading are such that the entertainment of the pleading would result in manifest injustice. These circumstances ... include (but are not confined to) the circumstances which make it appropriate to apply the principles of *res judicata* and merger in judgment and other related principles.’⁴⁴

[102] CRL and TFVI observed that the learned Chief Justice concluded in the **Halstead case**:

‘... the words ‘no further proceedings’ appearing in clause 4 of the consent order mean ‘no further civil proceedings in private law’. This conclusion is derived from the objective common intention of the appellant and the respondents. That objective common intention is an inference drawn from those words interpreted objectively in the light of their contractual context. That contractual context includes the objective purpose of the consent order having regard to the alleged facts or causes of action to which the consent order refers or relates and which were in the contemplation of the appellant and the respondents as constituting the factual basis of the consent order or the factual background against which the consent order was executed.’

[103] CRL and TFVI submitted that when those principles are applied to the consent order in the case at bar, would lead to a particular interpretation of the words ‘... any matters relating to the Lawsuit’ and ‘... any matters competent to be raised now whether or known or unknown to them or either of them...’ in clause 5 (c) and ‘... the matters in the Lawsuit howsoever arising ...’ in clause 7(a) of the agreement. They contended that when construed objectively in light of their contractual context must include CRL’s rights of possession of the car park having regard to the objective purpose of the consent order, the alleged facts or causes of action to which the consent order refers and which were in contemplation by the parties as the factual basis of the consent order and the factual background against which it was executed.

[104] In their closing written submissions, CRL and TFVI argued that the parties to the 2010 claim are

⁴⁴ At paragraph 30 of the Donald Halstead case.

inter se estopped *per rem judicatam* and/or by merger in judgment, and promissory estoppel, from relitigating the same adjudicated right or cause of action or issue in these subsequent proceedings, unless there are special circumstances entitling one of them to re-open that adjudicated right or cause of action or issue *inter se*. They submitted further that by her pleadings in 2010, Ms. Mills made possession of the car park one of the objects; placed it in issue and asked the Court to adjudicate the rights of ownership and possession of the car park, and for her to be granted the reliefs which she sought in that regard, including possession of the car park.

[105] They reasoned that although trespass was not alleged in the 2010 claim, where Ms. Mills was seeking, a partition of property and possession of the car park, it is identical with the relief sought in this claim. They argued that consequently, as regards the car park, a true question which was placed in issue on the pleadings in 2010 claim was whether Ms. Mills could obtain possession of the car park, which was then in CRL's possession. They submitted that the instant claim is concerned with litigation of a matter, which was brought forward then and which the Agreement and consent order were supposed to bring an end.

[106] CRL and TFVI contended that rights to possession of the car park may only be properly enforced between the parties, if at all, pursuant to the expressed provisions of the Agreement. They argued that Ms. Mills did not in the course of the Settlement Agreement and the consent order, choose to secure this relief for possession of the car park, a relief for which she pleaded in the 2010 claim and so it must be taken as having been provided for against her. They argued further that had it been addressed in those instruments in her favour, she would be entitled to enforce those terms against the CRL pursuant to clause 7 of the Settlement Agreement on the basis that it is a default in the performance of the latter's obligations.

[107] They invoked the rule in **Henderson v Henderson**⁴⁵ as being applicable to prevent Ms. Mills from bringing the present action. They submitted that it was applied in the case of **Morris v Wentworth-Stanley**⁴⁶ where the Court of Appeal held that an accord and satisfaction with one debtor in

⁴⁵[1843] 3 Hare 100]

⁴⁶ [1999] 2 W.L.R. 470

respect of a joint debt discharged the other joint debtors unless there was an express or implied agreement. They referred to the case of **Yat Tung Investment Co. Ltd v Dao Heng Bank** in which the learned judge distilled the principle which emerged from **Henderson v Henderson** ('the locus classicus' by stating 'there is a wider sense in which the doctrine [of *res judicata*] may be appealed to, so that it becomes an abuse of process to raise in subsequent proceedings matters which could and therefore should have been litigated in earlier proceedings.'⁴⁷

[108] They submitted that contents of the minutes of the meeting held among the parties and their respective counsel in London on 12th August 2010, all the correspondence passing between the parties during June 8th 2010 and in particular that Ms. Mills in the course of the Lawsuit asserted that the car park formed part of the Mariner Hotel property. They reasoned that a fresh claim where the court would be asked to determine whether the agreement provides for CRL to give up possession of the car park would be otiose.

[109] It is a matter of record that the parties in this claim did not present to this court the entire record of the minutes of the referenced meeting. CRL and TFVI referenced part of the minutes and exhibited a portion of them to Mr. Browne's witness statement⁴⁸. The court for obvious reasons does not consider that the excerpt can be viewed in isolation from the rest of the minutes of the meeting.

[110] CRL and TFVI argued that there will be no injustice to Ms. Mills if CRL remains in possession of the car park, but there will be grave injustice to it if after having acted to its detriment to develop the car park with the encouragement of IHL's director, it is now dispossessed. They submitted further that while Ms. Mills and CRL will be bound by the consent order, TFVI will not although it relies on CRL's permission to use the car park, based on third party rights.

[111] The parties have accurately and adequately expounded the legal principles surrounding application of the concept of *res judicata*. The court accepts that neither party pleaded *res judicata*. It is

⁴⁷ [1975] A.C. 581, 590 per Lord Kilbrandon.

⁴⁸ Filed on 8th April 2016.

mindful that it retains inherent jurisdiction to protect the court from any abuse of its process by the filing of multiplicity of claims in the manner described. I accept Ms. Mills' claim in trespass is not precluded by the concept of *res judicata*, for the reasons she has articulated. I find however that CRL's claim to a beneficial interest in the subject property could have been the subject of a defence in the 2010 proceedings. Both it and Ms. Mills were parties to the claim and the consent order.

[112] The cause of action which CRL seeks to bring in present proceedings could have been dealt with in the 2010 claim since part of the subject matter then (the disputed land) is the object of the present proceedings. It cannot be denied that CRL had the opportunity to bring before the court in those proceedings any beneficial claim it claimed to have had in that property based on adverse possession, proprietary estoppel or otherwise. It has pleaded and placed no reliance on anything that allegedly transpired after settlement of the 2010 claim by consent order by a competent court. I infer that the merits and demerits of the case were considered and factored into the determination in view of the very explicit terms of the settlement agreement and consent order together with the fact that the various sides were advised by experienced and senior legal practitioners.

[113] Nothing has been urged on this court constitutes special circumstances that justify a deviation from the established approach to be taken by the Court in such matters. I am satisfied that the facts as they unfolded demonstrate that this is an appropriate case in which the court should apply the doctrine of *res judicata* to prevent an abuse of the court's process by CRL and TFVI. It is accordingly declared that *res judicata* applies and CRL's claim against Ms. Mills is dismissed with costs. I agree with Ms. Mills' submissions on the point and find too that TFVI is a privy of CRL and is caught by that principle. Its claim against Ms. Mills is also struck out for this reason.

Merger

[114] CRL and TFVI made submissions on the doctrine of merger. They are considered for the sake of completeness. They observed that their submissions on this point were before the court at the start of the trial. They added that the Court's hesitation to dispose peremptorily of the claim and/or counterclaim by way of strike-out at that stage of the proceedings, was consistent with the approach which it is constrained to follow by applicable authorities. They observed correctly that

proper caution is required that the issue of abuse of process should be deferred and more fully examined with the possibility of more light being thrown on the matter by oral evidence.

[115] They argued further that Ms. Mills admits that CRL consented to an order being made before it served pleadings, and cannot therefore be estopped by *res judicata* (as against her) from pleading in a later action matters that could have constituted a defence because those matters have never been in issue. They submitted that Ms. Mills nonetheless attempts to rely on '*estoppel by waiver*' against the CRL's ancillary claim. CRL contended that its case in proprietary estoppel and/or estoppel generally, is well made out on a balance of probabilities and the mere vesting of the subject land in Ms. Mills' name is not decisive as to whether or not she is entitled to an order for possession as against CRL. The Court has addressed the effect of the vesting deed extensively. This submission does not erode the findings and ruling.

[116] CRL and TFVI argued Ms. Mills admitted that CRL may properly plead *res judicata* in these proceedings because she had served pleadings in the 2010 claim, 'save in the case of issue estoppel and/or abuse of process when there are special circumstances to prevent estoppel from applying to any subsequent action by Mariners to have the issue of its entitlement to possession relitigated.' They contended that Ms. Mills submitted further that such special circumstances exist in that at the time of the Settlement Agreement, she did not know that the defendants would not have given up possession afterwards and she did not have the Vesting Deed on the basis of which she now claims possession. CRL and TFVI argued that there are no such special circumstances, since their possession and occupation of the disputed land was extant and known to Ms. Mills at the time the Settlement Agreement and consent order were made and on her admission, provisions could have been made under those instruments for the defendants to remain on the land upon payment to her of rent or to make an offer to purchase same or to vacate the disputed land.

[117] They contended that applying the principles enunciated in **Ackerman v Thornhill** on which Ms. Mills relies, the only way in which her contention could possibly be admitted, would be if she could properly say that the factors listed there entirely changes the aspect of the case, and further that they were not, and could not by reasonable diligence have been, ascertained by her then. They

submitted that if Ms. Mills is now contending that the right to possession and/or entitlement to payment to her of rent were decided in her favour via the Settlement Agreement and the consent order, the proper course would be to enforce that obligation pursuant to clause 7 of the Settlement Agreement. They contended that if her right to possession and the payment of rent were not settled then, it should have with reasonable diligence been raised and provided for at the time of the Settlement Agreement. They reasoned that *res judicata* both in its cause of action and extended form (abuse of process) applies.

[118] CRL and TFVI argued that the provisions of the Settlement Agreement in themselves amount to special circumstances, on which they rely as a basis for Ms. Mills' claim for possession to be ruled an abuse of process of the court. They submitted that moreover, Ms. Mills' cause of action for possession has become merged in the Settlement Agreement and/or the consent order and Ms. Mills cannot properly contend that *merger in judgment* would be barred by her pleading estoppel or waiver. They reasoned that in the circumstances, the Court may pursuant to the overriding objective of the CPR exercise its inherent discretion and rule appropriately that the claim for possession is frivolous and vexatious and an abuse of the process as a result of *res judicata*, *estoppel per rem judicatam* and/or merger in judgment.

[119] The Court of Appeal considered the concept of merger in the case of **Stephen McBurnie v Irma Marryshow (In her capacity as administrator of the estate of Shebah Marryshow, deceased)**⁴⁹. In the written Judgment Thom JA stated:

[16] As early as 1844, Parke B in **King v Hoare**,¹⁴ explained the doctrine of merger in the following terms:

"If there be a breach of contract, or wrong done, or any other cause of action by one against another, and judgment be recovered in a court of record, the judgment is a bar to the original cause of action, because it is thereby reduced to a certainty, and the object of the suit attained, so far as it can be at that stage; and it would be useless and vexatious to subject the defendant to another suit for the purpose of obtaining the same result. Hence the legal maxim, "transit in rem judicatam" – the

⁴⁹ GDAHCVAP2016/0021.

cause of action is changed into matter of record, which is of a higher nature, and the inferior remedy is merged in the higher. This appears to be equally true where there is but one cause of action, and prevents its being the subject of another suit, and the cause of action, being single, cannot afterwards be divided into two. Thus it has been held, that if two commit a joint tort, the judgment against one is, of itself, without execution, a sufficient bar to an action against the other...”

[17] This statement of the law was affirmed by the Privy Council in **Rukhmin Balgobin** as a classic exposition of the principle of merger. The principle was applied by this Court in the case of **Halstead v Attorney General of Antigua and Barbuda** where the Court held that the appellants ‘cause of action was merged in a consent order obtained in previous proceedings and had therefore cease to exist.’⁵⁰ (underlining added)

[120] It is to be noted that what is merged is the cause of action from the original suit. Accordingly, the Court must ask itself what was the cause of action in the 2010 claim and the ancillary divorce proceedings. The Court must then determine whether the cause of action in the instant claim is identical or similar to the previous ones from which the consent order emerged. As explained earlier, the 2010 claim involved a derivative action under company law in which a shareholder and director was seeking to enforce her rights to be involved in the decision-making and control of the companies involved. The ancillary claim arose in matrimonial proceedings and dealt with division of property under the applicable law.

[121] The respective causes of action had nothing to do with the tort of trespass which is the cause of action in the case at bar. I am satisfied that the cause of action is neither identical nor similar to the 2010 claim or the ancillary claim. I find therefore that the doctrine of merger does not affect Ms. Mills’ claim in trespass. It may not be struck out on that basis and I make no order striking it out.

Issue 3 - Is Ms. Mills’ claim statute-barred?

[122] The determination immediately preceding this paragraph makes it unnecessary to consider further liability and defence issues relative to the defendants. It is however useful to examine this issue for

⁵⁰ At paragraphs 16 and 17.

efficacy. TFVI's case is best considered in light of CRL's assertions that it acquired an interest to the disputed car park and knoll by adverse possession. CRL and TFVI contended that Ms. Mills' claim in trespass is statute-barred. They argued that she is not the owner of the disputed land. They submitted that they have for a period in excess of 12 years been in undisturbed possession of the parking area and the knoll, and have been exercising acts of ownership over them, to the exclusion of Ms. Mills and her predecessor in title (IHL). They submitted that their possession has been adverse to any claim of ownership being made by Ms. Mills.

[123] They submitted further that in determining what constitutes 'adverse possession' the court should have regard to the definition in the **Possessory Titles Act**⁵¹, and decisions in **Powell v McFarlane**⁵², **JA Pye (Oxford) Ltd. and Another v Graham and Another**⁵³ and **Mathilda Antoine v Clause Theobalds & Ken Thomas**⁵⁴.

[124] They pointed out that adverse possession is defined as:

'factual possession of an exclusive and undisturbed nature of a piece or parcel of land in Saint Vincent and the Grenadines for a continuous period of 12 years or more accompanied by the requisite intention to possess the said land as owner thereof'⁵¹.

They submitted that similarly in the **JA Pye case** the court noted:

'The legal possession required is:

- (i) a sufficient degree of physical custody and control (factual possession) and
- (ii) an intention to exercise such custody and control on one's own behalf and of one's own benefit (intention to possess).'

[125] They contended that CRL entered on the disputed land at or about the beginning of 2003 and afterwards carried out substantial improvements in the constructing the parking area. They submitted that CRL has had exclusive use of the parking area from then up to the present and that TFVI has used it under licence from CRL. They submitted further that any right to possession

⁵¹ Cap. 328 of the Laws of Saint Vincent and the Grenadines, Revised Edition 2009, section 2.

⁵² (1977) 38 P & CR 452 Ch. D.

⁵³ [2003] 1 AC 419.

⁵⁴ SVGHCV2003/103 (unreported).

which Ms. Mills or IHL may have had was barred prior to the commencement of these proceedings.

[126] CRL and TFVI argued that the facts pleaded and adduced prove on a balance of probabilities that the disputed land was in CRL's physical custody and control exclusively from 2003 when time began to run in its favour. They argued that CRL has since then been exercising such custody and control on its behalf and for its own benefit as a car park.

[127] CRL and TFVI argued that the Limitation Act⁵⁵ establishes the limitation period for a person to initiate action to recover land, being a period 12 years from the date on which the cause of action accrued to him or to the person through whom he claims. They submitted that the right of action to recover land is extinguished at the expiration of that 12-year period in accordance with section 19 of the Limitation Act. They contended that Part 1 of the Schedule to the Limitation Act⁵⁶ is also applicable.

[128] CRL and TFVI pleaded that they have enjoyed exclusive possession of the disputed parking area since about 2003. Mr. Browne's testimony on this aspect of their case is revealing. As Managing Director for CRL and director for TFVI, he averred:

'The First Defendant was encountering some difficulties due to lack of adequate parking space for patrons and visitors to their hotel and restaurant premises.

To alleviate the parking problem, a small portion of adjoining land owned by Island Holdings Ltd on which the parking area is situated, was used to build a parking lot for exclusive use by the Defendants.

In February 2002, I retained the services of Mr. Ralph Pope of Ralph Pope Construction Services) in order to have a cost estimate prepared in relation (sic) the construction of the said parking lot. Mr. Pope issued the cost estimate on the 13th February 2002.'

[129] He continued:

'The First Defendant entered on the lands shown on survey Plan G3078 almost at the end of 2002...

⁵⁵ Cap. 129 of the Laws of Saint Vincent and the Grenadines, Revised Edition 2009, section 17.

⁵⁶ At paragraphs 1, 3 and 8.

Construction of the parking area commenced in late 2002 by cutting and levelling the area with a caterpillar earth moving machine...

Between February 2002 and July 2003 receipts were issued by Mr. Pope in relation to the car park project.

Mr. Pope and his employees continued work on the car park and the construction of the car park was completed in July 2003.

During 2003 Island Holdings Ltd engaged the services of Mr. Colin Alexander a Licensed Land Surveyor and gave him expressed instructions to excise and delineate the portion of land which had become designated as the parking area. The said survey plan dated 14th August 2003 was registered at the Land and Surveys Department as Plan G3078.

Our clear intention was that the subject parking area would remain in the First Defendant's exclusive possession.'

[130] Against this backdrop, CRL and TFVI contended that their use of the disputed parking area was unrelated to any conduct of IHL's geared at facilitating and accommodating them. Interestingly, Mr. Browne used the personal pronoun 'I' when speaking about actions undertaken by CRL in respect of the disputed land and referred to IHL by that name when he testified about the commissioning of the survey plan G3078. He accepted that the survey plan was prepared on instructions from him as director of IHL. Survey plan G3078 supports this and shows that it was approved and lodged at the Survey Department on 14th August 2002. I accept that this was at the instance of IHL under Mr. Browne's directorship. In this regard, I accept Ms. Mills' testimony that IHL was being managed wholly by Mr. Browne without input from her at that time.

[131] In considering this evidence, I find it more than coincidental that CRL and IHL were coordinating their efforts to transform the disputed area of land into a parking lot in the manner described by Mr. Browne, without there being a meeting of the minds between them. CRL's and TFVI's claim of adverse possession appears to have been helped along by IHL's decision around that time to demarcate the area and have a new survey plan prepared to effect a transfer to CRL. This does not strike me as an uncoordinated response by an uninterested owner of land in the face of trespass by a squatter.

[132] I factor into this determination the referenced assertions articulated by Ms. Mills in the 2010 claim to the effect that the defendant companies were being controlled and managed in a way which was oppressive and unfairly prejudicial to her. It does not escape the Court's attention that the other director whom she accused is none other than Mr. Vidal Browne or that Mr. Browne as remaining shareholder and director of CRL and TFVI stood to benefit from IHL's alleged implicit indifference to CRL's and TFVI's occupation of the disputed parking area and knoll for a period in excess of 12 years, on which they now seek to rely to found a claim to the land by adverse possession.

[133] I reject CRL's and TFVI's assertions that they enjoyed exclusive and undisturbed possession of the parking area. The circumstances surrounding their occupation of that area appears to have been orchestrated by the mind behind the corporate entities – their director Mr. Vidal Browne. I so find on a balance of probabilities. On this score and generally, I prefer Ms. Mills' testimony wherever it differs from Mr. Browne's. She impressed me as a witness of truth and her account regarding how the companies were managed and controlled at the material times was logical, credible and accords with common sense. I therefore reject CRL's and TFVI's claim to adverse possession of the disputed land. I find that Ms. Mills' claim is not statute-barred.

[134] The defence of limitation is raised by CRL and TFVI as a shield against Ms. Mills' claim for possession of the disputed land. It is useful to link the conclusion on this point with the earlier pronouncements on the *res judicata* and merger points in issue. Having found that CRL's claim is an abuse of the court's process on the ground that the doctrine of *res judicata* is operational, TFVI's claim is also caught in this scenario and its cause of action merged with CRL's in the 2010 proceedings. For those reasons, their reliance on adverse possession and limitation as defences to Ms. Mills' claim fail. There is no need to consider their claim to an interest in the disputed land by virtue of proprietary estoppel.

Issue 4 – Are enforcement proceedings under the CPR or a fresh claim the appropriate avenue for addressing the matters arising from the consent order and the Release, Discharge and Settlement Agreement?

[135] In light of the determination that Ms. Mills' claim is not affected by the principle of *res judicata*, it follows that a fresh claim was in order. It is clear that Ms. Mills would not have been able to pursue

her present claim for damages, possession and injunctive relief through enforcement procedures under the CPR or otherwise.

Issue 5 - Have the defendants trespassed on Ms. Mills' property?

[136] Trespass to property occurs when someone other than the owner or person rightfully in possession, enters land belonging to someone else and does some act there without the owner's consent, thereby interfering with his or her possession.⁵⁷ I accept Ms. Mills' account that she did not object to CRL and TFVI using the disputed property if they paid rent for such use. She submitted that they their failure to acknowledge her rights as owner and make suitable arrangements to satisfy her demands for rent and for possession of the disputed land violated her right as owner. She argued that their tenancy at will has thereby been terminated.

[137] CRL and TFVI submitted accurately that the person in possession of land is the only one with locus standi to maintain an action in trespass. They cited **Halsbury's Laws of England**⁵⁸. The learned authors describe a tenancy at will as one 'under which the tenant is in possession, and which is determinable at the will of either the landlord or the tenant. ... As in other tenancies, (it) arises by contract which binds both the landlord and the tenant; and the contract may be express or implied.'⁵⁹

[138] The learning is that an implied tenancy at will arises when 'a person is in exclusive possession by the owner's consent, and his possession is not as employee or agent or as a licensee holding under an irrevocable licence, and is not held in virtue of any freehold estate or of any tenancy for a certain term. Such a tenancy is implied accordingly in cases of mere permissive occupation without payment of rent.'⁶⁰ In view of this statement of the applicable legal principles, I am satisfied that

⁵⁷ Southport Corporation v Esso Petroleum Co. [1954] 2 Q.B. 182.

⁵⁸ 4th Ed. Vol. 45(2), p. 338.

⁵⁹ Vol. 62 (2016) para. 192.

⁶⁰ Halsbury's Laws of England, Vol. 62 (2016) para. 193.

Ms. Mills has established on a preponderance of the evidence that a tenancy at will was created as between her and CRL and TFVI when she permitted them to remain in occupation of the disputed land after she became the owner in 2011.

[139] The learned authors of **Halsbury's Laws of England** provide guidance on how such a tenancy is terminated. They stated 'A tenancy at will is determinable by either party on his expressly or impliedly intimating to the other his wish that the tenancy should be at an end. Until such an intimation is given, the tenant is lawfully in possession; and accordingly the landlord may not recover the premises in a claim for recovery of land without a previous demand for possession or other determination of the tenancy. ... the issue of a possession claim is a sufficient demand for possession to bring the tenancy to an end.'⁶¹ By initiating the instant claim, Ms. Mills terminated the tenancy at will which existed between her as landlord and CRL and TFVI as tenants. Their failure to deliver vacant possession constituted them as trespassers as they were occupying the land without Ms. Mills' permission. They thereafter became trespassers. I so find.

Issue 6 - To what remedies is Ms. Mills or the defendants entitled?

Possession

[140] Ms. Mills has established her claim in trespass. She is entitled to recover immediate possession of the subject property. I am conscious that CRL and TFVI would need to make alternative arrangements. I consider that a period of one week is sufficient. It is therefore ordered that CRL and TFVI shall deliver and cause their servants and agents to deliver vacant possession of the disputed land to Ms. Mills by 10.00 a.m. on July 30th, 2020.

Injunction

[141] Injunctive relief is at the Court's discretion. An injunction is an equitable remedy which the Court will grant if it is just and equitable to do so. The learned authors of **Halsbury's Laws of England** state:

'The court may grant an injunction ... to prevent a continuance or threatened repetition of a

⁶¹ Vol. 62 (2016) para. 196.

trespass to land.⁶²

The proceedings in this claim spanned a period of 5 years throughout which CRL and TFVI maintained their entitlement to occupy the disputed property. Having regard to all of the circumstances outlined in this judgment, I am satisfied that this case is an appropriate one in which justice requires that injunctive relief be granted.

- [142] It is therefore ordered that with effect from 10.00 a.m. on July 30th 2020, CRL and TFVI are restrained whether by themselves, their servants and/or agents from trespassing on, developing or erecting anything on the disputed property or from interfering, hindering, or obstructing in any way Ms. Mills and/or her servants' and/or her agents' enjoyment of the disputed property, registered by vesting deed No. 2599 of 2011.

Mesne Profits and Interest

- [143] Ms. Mills claimed *mesne profits* in the sum of \$2,200.00 per month in respect of the parking area and \$300.00 per month in respect of the knoll, both amounts chargeable from June 2011 and continuing. She stated that she believed that the parking area and knoll can fetch those respective amounts. She supplied no objective reference data as evidence from which the court can make a reasonable pronouncement one way or the other.

- [144] The learned authors of **Halsbury's Laws of England** state that a landlord in a claim for *mesne profits*:

‘... may recover ... the damages which he has suffered through being out of possession of the land or, if he can prove no actual damage caused to him by the defendant's trespass, ... the value of the premises to the defendant for the period of the defendant's wrongful occupation.’⁶³

‘In a claim of trespass, if the claimant proves the trespass he is entitled to recover nominal damages, even if he has not suffered any actual loss. If the trespass has caused the claimant actual damage, he is entitled to receive such an amount as will compensate him

⁶² (2015) Vol. 97, para. 592.

⁶³ Vol 62 (2016) at para. 279.

for his loss. Where the defendant has made use of the claimant's land, the claimant is entitled to receive by way of damages such a sum as should reasonably be paid for that use.'⁶⁴

[145] In accordance with this learning, Ms. Mills is entitled to recover as *mesne profits*, a reasonable sum which represents loss incurred by her through the use of the disputed property by CRL and TFVI as a parking area and signage knoll respectively from June 2011 to present. The court must consider specific information such as the market value of the property and/or what represents a reasonable damages award. This exercise is properly the subject of an assessment hearing at a later date and will necessarily include consideration of any award of interest. Ms. Mills will need to file and serve an application in this regard. She is required to do so on or before 17th September 2020. The defendants are not entitled to any relief, their claim having being struck out.

COSTS

[146] As the successful party, Ms. Mills is entitled to her costs. No monetary value was ascribed to the claim. None of the parties made an application for the claim to be valued.⁶⁵ In those circumstances, the appropriate measure of costs is prescribed costs pursuant to CPR 65.5 (2)(b). CRL and TFVI shall therefore pay to Ms. Mills prescribed costs of \$7,500.00.

ORDER

[147] It is accordingly ordered:

1. Judgment is entered for Glennis Mills.
2. Caribbean Resorts Limited and The French Verandah Inc shall by 10.00 a.m. on July 30th, 2020 deliver to Glennis Mills vacant possession of the disputed property at Villa comprising the parking area and knoll, being part of the land described in the Second Schedule to Vesting Deed No. 2599 of 2011.

⁶⁴ Vol 97 (2015) at para. 591.

⁶⁵ Pursuant to CPR 65.6.

3. Caribbean Resorts Limited and The French Verandah Inc. shall pay to Glennis Mills *mesne* profits for the period June 2011 to July 2020, to be assessed on application to be filed and served by her on or before September 17th, 2020.
4. Caribbean Resorts Limited's and The French Verandah Inc.'s ancillary claim is dismissed.
5. Caribbean Resorts Limited and The French Verandah Inc. shall pay to Glennis Mills if not agreed, prescribed costs of \$7,500.00 pursuant to CPR 65.5(2)(b).

[148] This judgment has taken some time to complete. The parties are entitled to an explanation as to the delay. This is partially due to lack of equipment and facilities at a critical stage of preparation. In addition, this matter was protracted over 18 months and involved copious pleadings, written and oral evidence and documentary exhibits. Much of the oral testimony was hand-written and required an extended period to type. The delay was also contributed to by the parties' failure to provide certain documents in editable unscanned MS Word format as ordered. This necessitated manipulation of the material and extensive typing by the judicial officer. The disruption caused by the COVID-19 adjustments was a small feature.

[149] The Court extends apologies for any inconvenience occasioned by the delay and express gratitude for the parties' forbearance. I am grateful to counsel for their comprehensive written submissions.

Esco L. Henry
HIGH COURT JUDGE

By the Court

Registrar