

Neutral Citation No: [2021] NICH 17

Ref: HUM11603

*Judgment: approved by the Court for handing down  
(subject to editorial corrections)\**

Delivered: 01/09/2021

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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CHANCERY DIVISION

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Between:

ANDREA McILROY-ROSE

and

ANDREA McILROY-ROSE AS PERSONAL REPRESENTATIVE OF THE  
ESTATE OF JOHN McILROY (DECEASED)

Plaintiffs

and

ROBERT McKEATING

Defendant

and

- (1) BARRY GILLIGAN  
(2) COLM McCAUGHLEY  
(3) DAIRE McCAUGHLEY  
(4) CONOR MULLIGAN  
(5) KEVIN STANLEY  
(6) KEVIN LAGAN  
(7) RUSKIN DEVELOPMENTS LIMITED

Defendants to Counterclaim

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Jonathan Dunlop (instructed by Pinsent Masons) for the Plaintiffs

The Defendant appeared in person

Richard Coghlin QC (instructed by Johns Elliot) for the First Defendant to Counterclaim

Michael Duffy SC (instructed by Campbell & Caher) for the Fifth Defendant to  
Counterclaim

David Dunlop QC (instructed by Carson McDowell) for the Fourth, Sixth and Seventh  
Defendants to Counterclaim

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## **HUMPHREYS J**

### **Introduction**

[1] This litigation is already over 5 years old although the issues between the parties date back to 2003 and have been the subject of several sets of proceedings before the Chancery Court. The Plaintiffs in this action issued proceedings in 2016 seeking injunctive relief and damages in respect of an alleged campaign of harassment which had been undertaken by the Defendant and Horner J granted an injunction on 18 February 2016 restraining the Defendant from carrying on any conduct that amounted to harassment of either of the Plaintiffs.

[2] The Defendant served a Defence and Counterclaim in the action alleging that the Plaintiffs were guilty of fraud, breach of contract, misrepresentation, negligence, breach of fiduciary duty, conversion, conspiracy and fraudulent misstatement. These causes of action were said to arise out of a land purchase transaction in which the first named Plaintiff, a solicitor, acted for Ruskin Developments Limited ('Ruskin'), a company of which her late father, the second named Plaintiff, was a director.

[3] Following the making of an unless order against the Defendant he issued an application in February 2018 seeking leave to join seven parties as Defendants to his Counterclaim. This application was opposed by those proposed Defendants. On 27 September 2019 McBride J made an Order granting leave to the Defendant to join those proposed Defendants to the Counterclaim. Following the making of a further unless order the Defendant served his Counterclaim against those joined Defendants on 13 May 2021. For the purposes of these applications, I have treated the original Counterclaim and the more recent pleading together as a single case being advanced by the Defendant.

[4] As will be evident from a consideration of the chronology of events this litigation has been beset by delay. Now before the court are applications on behalf of the Plaintiffs and the first, fourth, fifth, sixth and seventh Defendants to the Counterclaim to strike out the Counterclaim pursuant to Order 18 rule 19 of the Rules of the Court of Judicature (Northern Ireland) 1980 and/or the inherent jurisdiction of the court. The Defendant states that he has been unable to serve the Counterclaim on the second and third Defendants to Counterclaim.

[5] I am grateful to all the parties for their helpful skeleton arguments and analysis of the detailed and complex history of both the transactions in question and the litigation to date.

### **The Impugned Transaction**

[6] The Defendant is one of four sons of the late Mr Fred McKeating Senior and his wife Margaret. His brothers are Fred Junior, Dominic and James. His father was

the owner of around 0.64 acres of land in Nelson Street/Little Patrick Street in Belfast ('the Lands'). In 2003 and 2004 discussions took place between the late Mr John McIlroy on behalf of Ruskin and the agents engaged by Mr McKeating Senior in relation to the potential development of the Lands.

[7] Both parties to the proposed transaction had the benefit of legal advice and in the course of negotiations it was agreed that a joint venture company would be formed called Ruskin & McKeating Developments Limited ('RMKD'). The terms of the JV agreement entered into in July 2004 were that Mr McKeating Senior would provide his lands, which had a notional value of £900,000 and Ruskin would provide financial contribution of £900,000 to the JV company. Both parties to the JV agreement owned 50% of the company and therefore stood to gain equally from the proposed development of the site which was to be undertaken in conjunction with an adjoining site already owned by Ruskin.

[8] Mr McKeating Senior transferred the Lands into the joint names of himself and his wife by a deed dated 2 April 2004. On 11 February 2005 the Lands were transferred into the sole name of the eldest son Mr Fred McKeating Junior. The Defendant's father passed away in February 2006. In his Will, executed in July 2003, Mr McKeating Senior had sought to bequeath the Lands in various proportions to his wife and children, including 5% to the Defendant. However, by virtue of the transfers of the Lands which occurred in 2004 and 2005, the Lands were adeemed.

[9] Mr McKeating Junior, in his capacity as beneficial owner, transferred part of the Lands to Ruskin and part to RMKD by separate Conveyances dated 28 June 2006. The part of the Lands then owned by Ruskin was sold to Big Picture Developments Limited ('Big Picture') on 31 July 2006.

### **The Previous Proceedings**

[10] In May 2009 the fifth Defendant to Counterclaim and his business partner, Michael Stanley, issued proceedings in the Chancery Division against Dominic McKeating, Jim McKeating and the Defendant seeking injunctive relief restraining these Defendants from trespassing on lands at Great Georges Street and Nelson Street, Belfast, including those transferred by Ruskin to Big Picture in 2006. By this time, title to the lands had devolved to the Stanleys. On 23 June 2009 Deeny J made a final Order prohibiting the Defendants, and each of them, from entering upon the lands in question or interfering with the works being carried out thereon.

[11] In 2010 and 2011 Fred McKeating Junior issued two sets of proceedings in the Chancery Division:

- (i) An unfair prejudice petition in relation to the conduct of the affairs of RMKD; and
- (ii) A Writ action against John McIlroy, Kevin Lagan, Ruskin and RMKD.

[12] In turn, Ruskin issued a Winding Up Petition with respect to RMKD and a Writ against Fred McKeating Junior, Dominic McKeating and RMKD.

[13] In the unfair prejudice proceedings, Fred McKeating Junior sought an Order that Ruskin should purchase his shareholding in RMKD for the price which would have been obtained had it not been for the alleged breach of fiduciary duty of Ruskin by reason of the sale of that part of the Lands to Big Picture.

[14] The Writ action commenced by Fred McKeating Junior sought a declaration that the JV Agreement was void or voidable, rescission of the Agreement and damages.

### **The Terms of Settlement**

[15] Terms of settlement were entered into on 19 November 2013 between Ruskin, RMKD, Fred McKeating Junior (in his own capacity and as executor of his father's estate), the second Plaintiff, the sixth Defendant to Counterclaim and Margaret McKeating. These encompassed all the proceedings referred to above and also obliged Fred McKeating Junior and RMKD to discontinue proceedings which had been issued but not served on the first Plaintiff.

[16] All parties agreed to discontinue their extant proceedings and each agreed not to commence any fresh proceedings making the same or similar allegations or raising any other cause of action related to the same subject matter. It was agreed that a resolution be passed placing RMKD into voluntary liquidation. The part of the Lands still owned by RMKD at the date of liquidation were subsequently sold by the liquidator.

### **Judgment of McBride J**

[17] In resisting the applications to strike out, the Defendant places considerable reliance upon the judgment of McBride J handed down in September 2019. It is important to recognise that the learned Judge was adjudicating upon an application to join additional Defendants to the Defendant's Counterclaim, not upon an application to strike the Counterclaim out. As she said at paragraph [41]:

*"I do not consider that the test for joinder does or should include an evaluation of the merits of the case. Such an approach would unduly delay the administration of justice. If a proposed defendant wishes to make such an argument the time to do so is not at the joinder stage but later by application under Order 18 Rule 19 or at the hearing. Valentine on "Civil Proceedings of the Supreme Court" notes that the court usually permits joinder on the basis the defendant pays the costs thrown away. I consider that this is the correct approach"*

## The Counterclaim

[18] By his Counterclaim, the Defendant seeks to set aside the transfer of the Lands and claims damages against each of the Defendants to Counterclaim. The 2004 and 2005 transfers are not impugned, only those effected by Fred McKeating Junior in June 2006. The Defendant claims to be entitled to such relief by reason of the following causes of action:

- (i) Conspiracy;
- (ii) Fraud;
- (iii) Breach of fiduciary duty;
- (iv) Misrepresentation;
- (v) Negligence;
- (vi) Breach of contract; and
- (vii) Conversion.

[19] The facts pleaded by the Defendant are that his father was keen to develop the Lands by way of social housing, in keeping with his altruism and close connection to the local community. The JV Agreement foresaw development of both social housing and a building for the then Department of Health and Social Services. The part of the Lands earmarked for social housing was transferred to Ruskin (rather than RMKD) by reason of a stamp duty saving but also on foot of representations made that Clanmil Housing, the developer, would pull out of the deal unless these lands were transferred forthwith. In the event, these lands were 'flipped' to Big Picture Developments Limited, a company controlled by the first and fifth Defendants to the Counterclaim, for £3.5M, thereby generating a profit for Ruskin.

[20] The Defendant alleges that the second Defendant to the Counterclaim, who was employed by the NIHE as its Director of Housing and Regeneration, was connected to the transactions through his son, the third Defendant to Counterclaim, who was employed by Big Picture. The pleading avers that the conspiracy extended to the sale of other development lands at a significant undervalue to a separate company under the control of the sixth Defendant to Counterclaim.

[21] Paragraph 19 of the Counterclaim summarises the claims:

*"This was a carefully planned conspiracy, devised and supported by the plaintiffs, Kevin Lagan, Barry Gilligan and Mr McCaughley in the NIHE to (a) defraud the McKeatings of their land (b) transfer it to Barry Gilligan and (c) create a vast profit by having the entire parcel rezoned as development opportunity land"*

## The Applications Under Order 18 Rule 19

[22] Order 18 Rule 19 of the Rules of the Court of Judicature (NI) 1980 provides:

*“Striking out pleadings and indorsements*

*‘19. The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that:-*

- (a) it discloses no reasonable cause of action or defence, as the case may be; or*
- (b) it is scandalous, frivolous or vexatious; or*
- (c) it may prejudice, embarrass or delay the fair trial of the action; or*
- (d) it is otherwise an abuse of the process of the court,*

*and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.”*

[23] Ground (a) must be determined on the face of the pleading without evidence and the cause pleaded must be unarguable or almost uncontestably bad, all the averments in the pleading being assumed to be true. Gillen J stated in *Rush v PSNI* [2011] NIJB 28 at paragraph [10] as follows:

*"Where the only ground on which the application is made is that the pleading discloses no reasonable cause of action or defence no evidence is admitted. A reasonable cause of action means a cause of action with some chance of success when only the allegations in the pleading are considered. So long as the Statement of Claim or the particulars disclose some cause of action, or raise some question fit to be decided by a judge, the mere fact that the case is weak and not likely to succeed is no ground for striking it out."*

[24] A cause of action is a factual situation the existence of which gives rise to an entitlement on the part of one person to a legal remedy against another. In order to disclose a reasonable cause of action, the pleaded case must set out each element required to constitute a particular cause of action.

[25] Under the inherent jurisdiction and grounds (b)-(d), evidence by affidavit or otherwise is admissible and the Court can explore the facts fully, but should do so with caution. In *Mulgrew v O'Brien* [1953] NI 10 Black LJ made clear that on such an application, the Court will strike out:

*“...if it is manifest that the plaintiff's case cannot possibly succeed or if it is clear that the action is an abuse of the process of the court. In exercising this inherent jurisdiction the court is not confined to what appears on the face of the pleadings. Extrinsic evidence is admissible of the facts which it is contended should induce the court to act.”*

[26] In *Three Rivers District Council v Bank of England No 3* [2001] UKHL 16 (which involved an application to strike out allegations of fraud or dishonesty), the court approved the following principles:

- (i) Strike out is only appropriate for plain and obvious cases.
- (ii) Judges should not rush to make findings of fact on contested evidence at a summary stage.
- (iii) If an application to strike out involves a prolonged and serious argument, the judge should, as a general rule, decline to proceed with the argument unless he not only harbours doubts about the soundness of the pleading but, is also satisfied that striking out will remove the necessity for a trial or will substantially reduce the burden of preparing for, or the burden of the trial itself.
- (iv) Judges hearing strike out applications should not conduct mini trials involving protracted examination of the documents and facts (although sometimes a detailed analysis is appropriate).
- (v) A judge may refuse to hear a strike out application if the application:
  - a. is unlikely to succeed; or
  - b. will not be decisive or appreciably simplify the eventual trial.

## **Consideration**

[27] There is a fundamental question at the heart of the Defendant's Counterclaim, regardless of which of the causes of action is relied upon. To what extent can a litigant who is not a party to a deed transferring land seek to have it set aside on the grounds that some harm has been caused to him, in circumstances where the party to the deed has not sought rescission?

[28] The transfers which the Defendant seeks to set aside were entered into by Fred McKeating Junior in June 2006. He had title to the Lands, same having been transferred to him by his parents. Had those deeds of transfer been procured by fraud or some other legal wrong, Fred McKeating Junior could have sought to have

them rescinded. The history of the previous litigation and the terms of settlement entered into reveal that rescission was not sought or obtained by him.

[29] It is a well-established principle that a deed obtained by fraud is not void but rather voidable at the election of the party who has been defrauded – *Pilbrow v Pilbrow's Atmospheric Railway* [1848] 5 CB 440. In the absence of an election to rescind, therefore, such a deed remains valid and subsisting.

[30] There is no authority for the suggestion that a party in the position of this Defendant could intervene and seek to have a deed rescinded in circumstances where the parties to it have maintained its validity. Indeed, in this case, the parties affirmed the validity of the transfers of the Lands by entering into the terms of settlement.

[31] In his affidavit sworn in response to the applications, the Defendant makes the case that he has *locus standi* to pursue the claims by reason of the beneficial interest which he had in the Lands at the time of the impugned transfer. He makes the bald assertion:

*“At this time, my father communicated to my brother that these lands were to be held in trust for himself, my brothers James McKeating, Dominic McKeating and I.”*

[32] There are a number of problems with this claim. Firstly, there is no pleading in the Counterclaim itself of the creation or existence of any trust in relation to the Lands. If any claim is to be pursued by a litigant by virtue of his status as the beneficiary of a trust, it is essential that the existence and terms of that trust are pleaded.

[33] Secondly, the creation of a trust of land requires a degree of formality. By virtue of section 4 of the Statute of Frauds (Ire) 1695, such a trust must be evidenced in writing signed by some person able to declare the trust (in this case, Fred McKeating Senior). Not only is there no such pleading to this effect but the evidence reveals no such document exists. Although it is not mentioned in the Counterclaim, the Defendant did adduce in evidence an unsigned and undated ‘Agreement’, drafted some time in 2011, which makes reference to a trust ‘*privately communicated*’ by Fred McKeating Senior to Fred McKeating Junior. This document does not satisfy the requirements of the Statute of Frauds. These formality requirements do not extend to resulting or constructive trusts but the Defendant has not pleaded any case that any such trust arising by implication or operation of law exists in this case.

[34] Thirdly, even a Court were to determine that such a trust did exist, a trustee of land nonetheless enjoys a power of sale – see ss. 12 & 13 of the Trustee Act (NI) 1958. A trustee does not require the consent or agreement of beneficiaries prior to entering into a legal arrangement to dispose of trust property. If a beneficiary under



a trust is aggrieved at such a decision or claims that property was disposed of at an undervalue, *prima facie* his remedy is against the trustee for breach of fiduciary duty, not against the purchaser of the property.

[35] An application of these principles is sufficient to dispose of the Defendant's claim. The Defendant has not pleaded a cause of action against the Defendants to Counterclaim (or the Plaintiffs) which could ever give rise to a legal entitlement to have the 2006 transfers set aside. I therefore strike out the Counterclaim insofar as it seeks that particular relief.

[36] This leaves the Defendant's claim for damages. The first question which falls for consideration is whether the Defendant, in his claimed capacity as beneficiary of a trust, has standing to bring such a claim at all. The same issues arise in relation to the want of any pleaded case in relation to the existence of a trust but, having heard arguments on the issues, I propose to consider the legal position if such a trust relationship were pleaded.

[37] The learned authors of Lewin on Trusts, 20<sup>th</sup> Edition at 47-001, state the general principle:

*"Since trustees administer the trust fund as principals, not as agent for the beneficiaries, albeit in a fiduciary capacity on behalf of the beneficiaries, the trustees are normally the proper claimants in proceedings against agents and other third parties in actions based on breach of contract or tort, and other causes of action arising in the course of administration of the trust. Further, normally beneficiaries have no personal cause of action in contract or tort against the agents of the trustees, though sometimes beneficiaries may bring derivative claims which would otherwise be brought by the trustees, and sometimes a personal claim in tort is available to beneficiaries"*

[38] In *Roberts -v- Gill & Co.* [2010] UKSC 22, the Supreme Court considered the circumstances in which there may be a departure from the general rule, the requirement being one of 'special circumstances.' In Lord Collins' analysis:

*"The special circumstances which were identified in the earliest authorities as justifying a beneficiary's action were fraud on the part of the trustee, or collusion between the trustee and the third party, or the insolvency of the trustee, but it has always been clear that these are merely examples of special circumstances, and that the underlying question is whether the circumstances are sufficiently special to make it just for the beneficiary to have the remedy"*

[39] The Counterclaim pleaded in this case does not seek to bring a derivative action on behalf of the trust nor does it set out any special circumstances which exist which would permit a beneficiary to bring a personal claim on his own behalf. In the absence of this, the beneficiary of a trust cannot pursue a claim and therefore the Counterclaim cannot be said to disclose a reasonable cause of action. As Lord Walker observed in *Roberts v Gill & Co*:

*"He must plead the special circumstances entitling him to the court's indulgence. Those special circumstances are part of his cause of action."*

[40] Even making allowance for the fact that the Defendant is a litigant in person, he did formerly have the benefit of legal advice and the original Counterclaim was drafted by Counsel, and there is nothing in either pleading which could begin to satisfy the test of 'special circumstances.' Normally these relate to either the inability or unwillingness of the trustee to bring the claim in question. On the facts of the instant case, the opposite is true. The trustee, Fred McKeating Junior, did previously bring proceedings, raising many of the same issues, but compromised these in 2013.

[41] As a consequence, the Defendant has no standing to bring any of the claims and has not therefore disclosed a reasonable cause of action in respect of any of the claims for damages. The Counterclaim will therefore be dismissed in its entirety.

[42] For the purpose of completeness, I also propose to consider some of the arguments advanced by the Plaintiffs and Defendants to Counterclaim in relation to the causes of action as pleaded. I will consider each of these in turn:

**(1) Conspiracy**

[43] The tort of conspiracy requires an agreement, combination, understanding, or concert to injure, involving two or more persons. The tort can be committed by lawful means, where the real and dominant purpose of the combination is to injure the Plaintiff or where the means are unlawful, where an intended consequence of the combination was to injure the Plaintiff. This is a case where the allegation is one of unlawful means. In *Digicel (St Lucia) v Cable & Wireless* [2010] EWHC 774 (Ch), Morgan J stated:

*"The necessary ingredients of the conspiracy alleged are: (1) there must be a combination; (2) the combination must be to use unlawful means; (3) there must be an intention to injure a claimant by the use of those unlawful means; and (4) the use of the unlawful means must cause a claimant to suffer loss or damage as a result."*

[44] Each of these elements must be pleaded. The 'combination' is at the heart of the tort and to disclose a cause of action in conspiracy, particulars of this must be

given. Absent from the Counterclaim in this case is any pleading of how, when and by what means the combination is said to have come into being. At paragraph 9, the Defendant states:

*“The conspiracy began before this as Mr Barry Gilligan was director of other companies and already had knowledge of the site as Chairperson of Groundworks NI. Whatever the communications were in relation to his involvement, Ruskin, without notice to the McKeating family, sold the entirety of the development lands...for a considerable sum more than had been agreed with Clanmil, to Big Picture Developments Ltd, a company run by Mr Barry Gilligan.”*

[45] Further, at paragraph 18, the Defendant seeks to make connections between some of the Defendants to Counterclaim through their various business interests prior to and since the impugned transactions. The fact that some of the Plaintiff and the Defendants to Counterclaim had business connections does not suffice to prove a conspiracy by way of combination to use unlawful means. The importance of such an allegation being properly pleaded is evident from the decision of the Court of Appeal in England & Wales in *Elite Property Holdings v Barclays Bank* [2019] EWCA Civ 204.

[46] Loss or damage is an essential element of the tort:

*“a tortious conspiracy, like most other tortious acts, must have caused loss to the claimant, or the cause of action will be incomplete.”* per Lord Sumption in *JSC BTA Bank v Khrapunov* [2018] UKSC 19

[47] For the reasons set out above, the Defendant has sustained no loss as a result of the alleged conspiracy. Even if he had, on the basis of the existence of some special circumstances allowing him to pursue the claim, no reasonable cause of action is disclosed in conspiracy and it would have been struck out on this basis.

## **(2) Fraud**

[48] The tort of deceit, or fraudulent misrepresentation, requires proof of a false representation, made by a Defendant who either knows it to be untrue or is reckless as its truth, intending the Plaintiff to rely on it. When and in so far as the Plaintiff does rely on the representation, and suffers loss as a result, the Defendant is liable to him.

[49] The pleaded representations in the Counterclaim are that the Plaintiffs falsely asserted that Clanmil Housing was threatening not to complete the sale as a result of delays and that the part of the Lands transferred to Ruskin would be sold to Clanmil on the same day. The Defendant says that the Lands would never have been

transferred but for the representation that they would be developed by Clanmil and used for the purpose of social housing.

[50] At all material times, the first Plaintiff was acting for Ruskin, not for any of the other individuals sued in the Counterclaim. There is no case made that any of the first to sixth Defendants to the Counterclaim made any actionable representation.

[51] Had the representations in question been made to and relied upon by the Defendant, or had some special circumstances existed which otherwise gave the Defendant standing to pursue the claim, I would not have struck out the deceit claims as against the first Plaintiff and the seventh Defendant to Counterclaim. However, for the reasons already articulated, the Defendant does not enjoy such standing.

**(3) Breach of fiduciary duty**

[52] No facts have been pleaded in the Counterclaim as to why any of the Plaintiffs or the Defendants to Counterclaim owed a fiduciary duty to the Defendant, whether in his personal capacity or as a beneficiary of the alleged trust. A trustee owes fiduciary duties to the beneficiaries of a trust but no action has been taken against him. No reasonable cause of action in respect of breach of fiduciary duty has been disclosed in the Counterclaim and this would be struck out in any event.

**(4) Misrepresentation**

[53] An action in misrepresentation lies on the same basis as the claim in deceit, save that it is not necessary to show knowledge that the representation was false, or recklessness as to its truth. The same conclusions therefore flow in relation to this cause of action as do in respect of the deceit claim.

**(5) Negligence**

[54] No facts have been pleaded in the Counterclaim, which could found a claim that any of the Plaintiffs or Defendants to Counterclaim owed a duty of care to the Defendant. It is not pleaded, for instance, that there were any dealings between the Defendant and any of these parties prior to the impugned transactions. In neither pleading are any proper particulars of negligence given. No reasonable cause of action in this regard is disclosed and this cause of action would have been struck out in any event.

**(6) Breach of contract**

[55] No proper particulars are given in the Counterclaim of the claim for breach of contract but the only agreement which is referenced is the JV Agreement of July 2004. None of the parties to these proceedings owed any obligations pursuant to the JV Agreement and therefore any claim for breach of contract against the Plaintiffs or

the Defendants to Counterclaim is doomed to fail. No reasonable cause of action in respect of breach of contract is disclosed in the Counterclaim.

(7) *Conversion*

[56] The tort of conversion affords protection to property rights in respect of chattels. A chattel is to be distinguished from immovable property which is protected by the torts of trespass and nuisance. No chattels belonging to the Defendant have been interfered with and therefore any claim in conversion is incontestably bad in law and would be struck out.

*Henderson v Henderson*

[57] The rule in *Henderson v Henderson* [1843] 3 Hare 100 gives a Court the power to strike out a claim as an abuse of process in circumstances where the doctrine of *res judicata* does not strictly apply but an issue has been raised which could or should have been determined in earlier proceedings. The editors of Halsbury's Laws (at Volume 12A paragraph 1617) state:

*"The rule provides that a claimant is barred from litigating a claim that has already been adjudicated upon or which could and should have been brought before the court in earlier proceedings...the abuse in question need not involve the re-opening of a matter already decided in proceedings between the same parties, but may cover issues or facts which are so clearly part of the subject matter of the litigation and so clearly could have been raised that it would be an abuse of process of the court to allow new proceedings to be started in respect of them."*

[58] In 2009, the Defendant was sued by Kevin and Michael Stanley in respect of trespass to the lands which were transferred by Fred McKeating Junior to Ruskin in 2006. The Defendant was legally represented in these proceedings. It was clearly open to him to make the case that he was a beneficial owner of the lands, given the trust which was allegedly created in 2006. Such an assertion would have afforded the Defendant a defence to the trespass action. Alternatively, the Defendant could have made the case that Kevin Stanley was party to some fraud or conspiracy by which he had acquired the title to the Ruskin part of the Lands. Instead, the Defendant consented to the making of a permanent injunction against him restraining him from entering the lands. It is simply inconceivable that this course of action would have been taken had the Defendant enjoyed a viable and arguable defence.

[59] Had the Counterclaim disclosed any reasonable cause of action against the Plaintiffs or the Defendants to Counterclaim, I would have struck it out as representing an abuse of the process of the Court in line with the rule in

*Henderson v Henderson*. If the Defendant had a viable case that he was the beneficiary under a trust and thereby enjoyed some rights over the Lands, or a right to seek rescission of the transfers or damages in respect of the sale and purchase of the Lands on the basis of some fraud or conspiracy, it ought to have been raised in those proceedings some 12 years ago. Having been successful in his litigation in 2009, the fifth Defendant to Counterclaim ought not to have to face these allegations after this lapse of time. It is clearly an abuse of process to seek to advance these claims in a Counterclaim served in May 2021.

## **Conclusion**

[60] I therefore make an Order dismissing the Counterclaim. I do so on the basis of Order 18 rule 19(1)(a) in that the Counterclaim fails to disclose any reasonable cause of action. Had I not taken this course, I would have struck the Counterclaim out under rule 19(1)(d) as constituting an abuse of process.

[61] Whilst there was no application before the Court to strike out the Counterclaim on behalf of the second and third Defendants to the Counterclaim, the Court is nonetheless empowered by Order 18 rule 19 to strike out any pleading at any time, and I do so with respect to those Defendants to Counterclaim also.

[62] I will hear the parties on the question of costs and to make directions towards trial of the Plaintiffs' action.