

1 IN THE GRAND COURT OF THE CAYMAN ISLANDS

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CAUSE NO. 27 OF 2016

4 IN THE MATTER OF SECTION 132 OF THE REGISTERED LAND LAW, (2004 REVISION)

5 AND IN THE MATTER OF WEST BAY BEACH NORTH BLOCK 11D PARCEL 21H23

6 **Between:** THE REGISTRAR OF LANDS

7 Plaintiff

8 **And:** WESTERN PROPERTIES LTD.

9 First Defendant

10 NoMOSS LTD.

11 Second Defendant

12 **Appearances:** Ms. Claire Allen of the Attorney General's
13 Chambers, for the Plaintiff

14 Mr. Luke Stockdale & Ms. Anna Perry of Maples
15 and Calder, for the First Defendant

16 Ms. Joanne Verbiesen, Mr. Patrick McConvey,
17
18 and Mr. Peter Kendall of Walkers, for the Second
19 Defendant

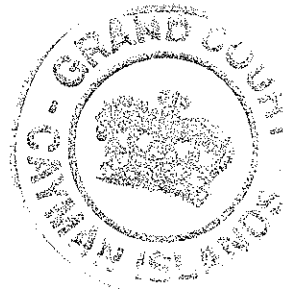
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22 **Before:** The Hon. Mr. Justice Robin McMillan, IN CHAMBERS

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24 **Heard:** 24 February 2016

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26 **Draft Judgment**
27 **Circulated:** 3 May 2016

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29 **Judgment Delivered:** 5 May 2016

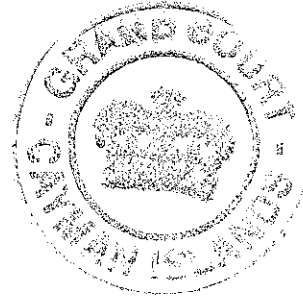
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1 **HEADNOTE**

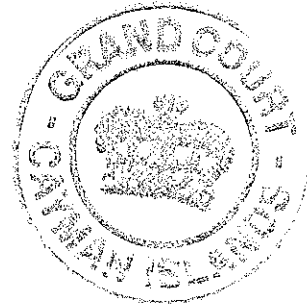
2 *Section 132 (1) of the Registered Land Law- Circumstances in which sufficient cause to order a*
3 *restriction may not arise- A restriction may be neither lawful nor appropriate where other*
4 *potential remedies are available- The proper exercise of discretion by the Registrar of Lands to*
5 *counter a potential abuse of the registration system.*

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8 **REASONS FOR JUDGMENT**



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10 **Introduction**

- 11 1. On 11 January 2016 the Registrar of Lands (“the Registrar”) (“the Plaintiff”) received an
12 application for an order for a restriction in relation to the parcel of land at West Bay
13 Beach Block 11D Parcel 21H23 (“the Property”) from Nomoss Ltd (“Nomoss”) (“the
14 Second Defendant”).
- 15 2. On 14 January 2016 correspondence was received on behalf of a purchaser of the
16 Property and the purchaser’s attorney filed an Official Stay and Search in preparation for
17 the transfer of title from Western Properties Ltd (“WPL”)(“the First Defendant”).
- 18 3. The Registrar sought to convene an urgent meeting in relation to the application.
19 However, the attorneys for Nomoss were unavailable.
- 20 4. On 9 February 2016 the Registrar was served with an application and affidavits filed in
21 the Grand Court on behalf of WPL seeking orders in relation to the restriction
22 application.
- 23 5. On 15 February 2016 the Registrar filed an application for an opinion from the Court
24 under section 146 of the Registered Land Law (2004 Revision) (“the Law”).
- 25 6. At the time of Court hearing no order for restriction had been made and the transfer of
26 title of the Property had not been completed.



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Case Stated

7. The Registrar seeks the opinion of the Court as to whether or not, upon the application of Nomoss for a restriction in the Proprietorship Section of the Land Register of the Property at West Bay Beach North Block 11D Parcel 21H23 owned by WPL, she should grant an order for restriction under section 132 of the Law.

8. The Registrar relies upon the First Affidavit of Judith Witter, Acting Registrar of Lands, sworn on 15 February 2016 and on the evidence filed by the Defendants.

9. Subsequently the First Defendant has filed the Second Affidavit of John Cullinane and the First Affidavit of Leslie T. Gladstone, who is the Bankruptcy Trustor of J. Douglas Jennings Jr and Peggy L. Jennings in the U.S. Bankruptcy Court.

10. For completeness, the First Defendant also filed evidence in separate matter, Cause No. 19 of 2016, which was ordered to stand as evidence in Cause No. 27 of 2016.

Relevant Law

11. Section 132 (1) of the Law states :

“132. (1) For the prevention of any fraud or improper dealing or for any other sufficient cause, the Registrar may, either with or without the application of any person interested in the land, lease or charge, after directing such inquiries to be made and notices to be served and hearing such persons as he thinks fit, make an order

1 *(hereinafter referred to as a restriction) prohibiting or restricting dealings with*
2 *any particular land, lease or charge.*

3 (2) *A restriction may be expressed to endure-*

4 *(a) for a particular period;*

5 *(b) until the occurrence of a particular event; or*

6 *(c) until the making of a further order, and may prohibit or restrict all*
7 *dealings or only such dealings as do not comply with specific conditions,*
8 *and the restriction shall be registered in the appropriate register.*

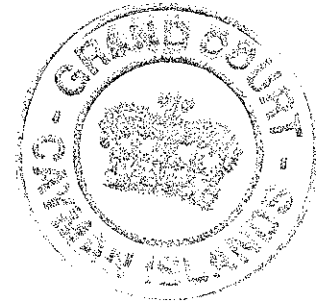
9 (3) *The Registrar shall order a restriction to be entered in any case where it*
10 *appears to him that the power of the proprietor to deal with the land, lease or charge is*
11 *restricted.”*

12 12. The Registrar has filed an application for a binding opinion from the Court under section
13 146 of the Law. Section 146 provides:

14 *“Whenever any question arises with regard to the exercise of any power or the*
15 *performance of any duty conferred or imposed on him by this Law, the Registrar may,*
16 *and shall if required to do so by an aggrieved party, state a case for the opinion of the*
17 *court; and thereupon the court shall give its opinion which shall be binding upon the*
18 *Registrar. “*

19 13. On 2 March 2016 following a hearing in this matter I formed the following opinion:

20 *“This is the Originating Summons of the Registrar of Lands requesting the opinion of the*
21 *Court in accordance with Section 146 of the Registered Land Law (2004 Revision). The*
22 *opinion sought relates to the application of the Second Defendant for a restriction in the*



1 *Proprietorship Section of the Land Register of the property at West Bay Beach North Block*
2 *11D Parcel 21H23 under Section 132 of the Registered Land Law (2004 Revision) and*
3 *whether or not to grant the registration under section 132 of the Law.*

4 *Having considered the matter, it is the opinion of the Court that it is neither lawful nor*
5 *appropriate in the circumstances to grant the restriction sought and that there is no*
6 *sufficient cause to do so."*

7 **The Findings of the Court**

8 14. I shall now set out my reasoning in arriving at this decision.

9 15. In approaching this issue, I accept the submission of the Plaintiff set out at paragraph 17
10 of the Plaintiff's submissions as follows:

11 *"Taking into account the construction of the Law and the limited relevant case law, the*
12 *Registrar respectfully submits that for a restriction order to be made that the following*
13 *must occur:*

- 14 *a. Firstly, the applicant must show their interest in land, being an interest*
15 *recognized by the Law; and*
16 *b. Secondly, the applicant must show a risk of fraud, improper dealing or any other*
17 *sufficient cause."*

18 16. In essential terms, the Second Defendant's claim is as follows:

- 19 a) Nomoss is a person interested in the Property and is therefore entitled to make an
20 application pursuant to section 132 of the Law by virtue of:
21 (i) the Pledge Agreement, which is a valid and binding security agreement
22 constituting an equitable charge; or

1 (ii) even if the Pledge Agreement is defective in form, it is in substance a
2 representation made by WPL, relied on by Nomoss to its detriment, and
3 thereby constitutes a proprietary estoppel that is sufficient to give rise to an
4 interest in the Property.

5 17. A copy of the Pledge Agreement is found attached to Colin Patterson's First Affidavit at
6 Exhibit "CP-1". Clause 3 of the Pledge Agreement states:

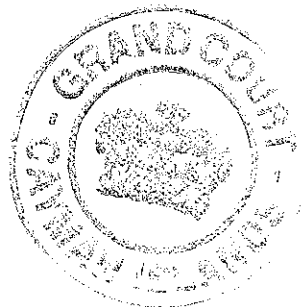
7 **"Pledge Agreement**

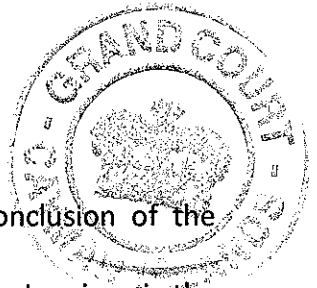
8 *For the purpose of securing the joint bank obligations owed to Cayman National Bank,*
9 *both by Western Properties, Ltd. and by Nomoss, Ltd., and to secure all advances, loans*
10 *and Investments by Nomoss, Ltd. in Great House Unit 23, Kings Reef, Ltd. or further*
11 *investments into Brittany Cove, Ltd., Western Properties, Ltd. does hereby assign all*
12 *ownership interest in Western Properties, Ltd., Brittany Cove, Ltd., Kings Reef, Ltd. and*
13 *Great House Unit 23 to Nomoss, Ltd. This Pledge Agreement and Assignment is based*
14 *upon the promise by Nomoss, Ltd. to timely remunerate all debt service payments to*
15 *Cayman National Bank and to all strata associations managing real property for which*
16 *Cayman National Bank has a lien/charge. "*

17 18. In Clause 2, dealing with definitions, the following is stated:

18 *"Pledge Collateral" means (i) all real property owned on the date of this Pledge*
19 *Agreement by Pledgor Western Properties, Ltd. and (ii) all ownership interest in Brittany*
20 *Cove, Ltd. and Kings Reef, Ltd. and (iii) all other assets owned by Western Properties, Ltd.*
21 *as of the effective date of this Pledge Agreement.*

22 *"Effective Date" means May 21, 2007.*





1 *"Safekeeping Agent" means Nomoss, Ltd."*

2 19. It is noteworthy however that only one signatory appears at the conclusion of the
3 document, that of J. Douglas Jennings ostensibly on behalf of WPL. Mr. Jennings is the
4 subject of U.S. bankruptcy proceedings.

5 20. However, there is no signature at all on behalf of Nomoss, and accordingly the First
6 Defendant contends that on its face this is not a valid agreement.

7 21. Notwithstanding this assertion, it is clear that when the restriction was sought from the
8 Registrar of Lands by letter of Walkers, Attorneys for the Second Defendant, dated 11
9 January 2016, the accompanying copy of the First Affidavit of Colin Patterson at
10 paragraph 4 described the document as *"a fully executed copy of a Pledge Agreement*
11 *dated 21 May 2007."*

12 22. Having reviewed the material in question, I accept the submission of the First Defendant
13 that there was no fully executed agreement identified by the Second Defendant, and in
14 those circumstances Mr. Patterson's evidence upon this specific point was obviously
15 misleading in its effect. I shall return to this matter at a later point.

16 23. In any event, on 17 May 2015 a Settlement Agreement was entered into. The Parties
17 were WPL, King's Reef Ltd., Brittany Cove Ltd. and Nomoss.

18 24. The First Defendant relies upon Clause 5. of that Settlement Agreement, found at page
19 71 of Exhibit "JC-1 attached to the First Affidavit of John Cullinane, which states:

20 *"5.1 This Agreement contains the entire understanding and agreement between the*
21 *Parties in relation to the subject matter of this Agreement and there are no*
22 *representations, understandings or agreements, oral, or written, which are not included*

1 *herein. Subject to the terms of this clause 5.1, this Agreement supersedes any prior*
2 *discussions, negotiations, agreements and understandings between the Parties regarding*
3 *the matters provided for herein.”*

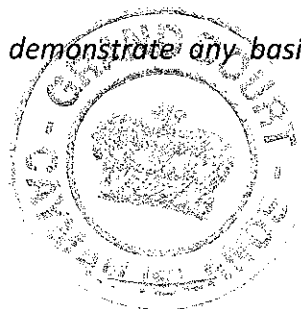
4 25. This Settlement Agreement in fact followed a winding up Petition, subsequently
5 discontinued, by the Second Defendant against the First Defendant. In that Petition, total
6 sums claimed pursuant to the Pledge Agreement had amounted to U.S. \$859,253.31,
7 inclusive of legal costs.

8 26. John Cullinane, a Director of the First Defendant since 22 May 2015, states the following
9 at paragraphs 11-16 of his Second Affidavit:

10 *“Under the terms of the Settlement Agreement NoMoss was required to provide the*
11 *directors of the Company with “verifiable evidence of the debt specified...including source*
12 *document evidencing the same” (clauses 4(a), 5(a) and 6(a) of the Settlement*
13 *Agreement).*

14 12. *Under the cover of letters to the Company dated 7 June 2015, NoMoss provided certain*
15 *documentation to Mr Egglshaw and I in purported satisfaction of its obligations under*
16 *clause 4(a) and 5(a) of the Settlement Agreement.*

17 13. *Following a detailed review of those materials (including a copy of the Alleged Pledge*
18 *Agreement), the directors of Western and Brittany Cove, mindful of their fiduciary duties,*
19 *concluded that such documentation did not amount to sufficient or verifiable evidence for*
20 *NoMoss’ claims except in relation to some invoices which were the subject of a specific*
21 *chain of communications, and therefore did not demonstrate any basis on which the*



1 directors of Western or Brittany Cove could accept the claims made by NoMoss in the
2 Debt Notices.

3 14. "In particular, Nomoss sought to rely on "a redacted statement of Nomoss Canadian bank
4 account" as evidence of payments purportedly made to and on behalf of Western and
5 Brittany Cove (the "Purported Bank Statement") (referred to in paragraph 38 (a) of the
6 First Affidavit of Mr. Colin Patterson dated 19 February 2016 ("Patterson First"). This
7 document appears to be no more than a spreadsheet and could not reasonably be relied
8 upon as evidence of such payments. This was raised with NoMoss/Walkers in a letter
9 from Maples and Calder to Walkers dated 17 June 2015 (exhibited at page 136 of Exhibit
10 JC-1):

11 "2.1 No documentation has been provided by your client which evidences the fact
12 that this "statement" is a statement of a bank account held by NoMoss Ltd.
13 There is no reference anywhere on the document to NoMoss Ltd. as the relevant
14 account holder. Please provide verifiable evidence of the same.

15 2.2 No evidence has been provided by your client which confirms the source of
16 this document. There is no reference on the document to the Canadian bank with
17 whom you state your client's account is held and therefore no way of the
18 directors verifying that this document is a copy of your client's bank statement.
19 Please provide verifiable evidence of the same."

20 (emphasis added)

21 15. To my mind, verifiable evidence means appropriate source documentation for, and
22 written or oral explanation of, transactions of the type being claimed, particularly in

1 *circumstances where large sums were allegedly being paid to a company with no*
2 *directors, or directors who had no knowledge of the background to the claim. In that*
3 *same letter the Companies therefore also made numerous additional specific requests for*
4 *verifiable evidence and explanations regarding the purported payments, including:*

5 15.1 *An explanation as to how the figure specified in each Debt Notice is broken down.*

6 15.2 *Full details of any account from which funds were transferred by or on behalf of*
7 *NoMoss to the Companies and, in each case, an explanation as to how that*
8 *account is connected with NoMoss, together with verifiable evidence (including*
9 *source documents) evidencing the same.*

10 15.3 *Any background correspondence between NoMoss and the Companies or any*
11 *other relevant documentation explaining the basis upon which the purported*
12 *transfers were made and the purpose and intention of the transfers.*

13 16 *As I explained in paragraphs 34 to 38 of Cullinane First, in spite of the directors'*
14 *clear requests for additional information from NoMoss and notwithstanding two*
15 *extensions of time that were granted to NoMoss to provide such information, the*
16 *only response received was in the form of one further document (which NoMoss*
17 *had already provided) and a letter of 1 July 2015 attempting to put the onus onto*
18 *the Companies to explain what was required from NoMoss. This was not*
19 *consistent with the terms of the Settlement Agreement."*



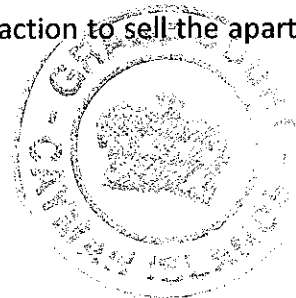
1 27. In light of this history, and upon consideration of the submitted evidence and
2 submissions considered at as a whole, I am unable to accept that the Second Defendant
3 had any arguable case at all in claiming as it now does "*payment of liabilities totaling US*
4 *\$702,038.63*" This claim is set out at paragraph 22 of the Second Defendant's Skeleton
5 Argument and at paragraphs 24 to 32 of the First Affidavit of Colin Patterson.

6 28. Following the rejection of the Second Defendant's claim by the independent directors of
7 the First Defendant, it is stated at paragraph 42 of the First Affidavit of John Cullinane
8 that a comprehensive explanation of the reasons for that determination was set out in a
9 letter from the First Defendant's Attorneys to the Second Defendant's Attorneys dated
10 15 July 2015.

11 29. It is in light of these various developments that the opinion of the Court has now been
12 requested.

13 30. The First Defendant submits that no formal challenge to the Settlement Agreement or
14 the letter of rejection had been made by the Second Defendant until the request made
15 to the Plaintiff first for a caution and then by letter dated 11 January 2016 for the
16 registration of a restriction. I understand that prior to that date a caution had been
17 unsuccessfully sought on 17 December 2015, but the Plaintiff had returned it on 11
18 January 2016.

19 31. The application for a caution and the subsequent application for a restriction were made
20 without any prior warning to the First Defendant and the position was only discovered by
21 the First Defendant on the day it was due to settle a transaction to sell the apartment in
22 question scheduled to complete on 19 January 2016.



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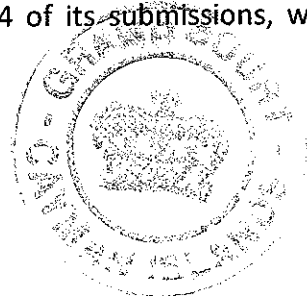
32. In effect, the First Defendant relies upon the lack of challenge to the Settlement Agreement or to the letter of rejection, the lack of notice to it of the application for a restriction, and the description of the Pledge Agreement as “fully executed” as all indicating that the Second Defendant has approached this matter with an absence of good faith.

33. Among the points stated in the Second Defendant’s Skeleton Argument is the comment at paragraph 5 (c) that a restriction acts as a form of interim injunction pending final resolution of the matter giving rise to the restriction:

“A restriction is a form of interim injunction pending final resolution of the matter giving rise to the restriction. It is not the Registrar’s obligation to fully and finally determine the substantive rights of the parties before a restriction can be granted. A restriction should therefore be granted where the applicant has shown that it has prima facie grounds for asserting a right to a restriction, which is a threshold that Nomoss has clearly reached in this case....”

34. With great respect, if a restriction were to be so recorded, in conceptual terms it would in effect be an interim injunction without an opportunity for the Registrar, or the Court for that matter, to consider both the balance of convenience in the circumstances of the case and whether as an essential safeguard it is appropriate for the party seeking the interim injunction to give an undertaking in damages.

35. The First Defendant addresses this issue in paragraph 24 of its submissions, where it states:



1 *“Even if the allegations made by Nomoss in its reply were true (which they are not), if*
2 *Nomoss wished to progress them, the appropriate way for it to do so is by commencing*
3 *an action based on a cause of action against WPL, coupled with an application for an*
4 *injunction, not by way of a request for a restriction.”*

5 36. At no point since 15 July 2015 has the Second Defendant commenced legal proceedings
6 in support of its claims either coupled with an injunction or without an injunction. No
7 proceedings are pending nor otherwise than in the context of the current Originating
8 Summons proceedings have proceedings even ostensibly been engaged in.

9 37. However, the Second Defendant does state at paragraph 28 of its Skeleton Argument
10 that following receipt of a *“revised tentative Ruling”* issued by the U.S Bankruptcy Judge
11 granting a motion for the substantive consolidation of the First Defendant within the
12 Jennings Estate in Chapter 7 Bankruptcy, the Second Defendant was concerned that the
13 First Defendant’s assets could be removed from this jurisdiction. Therefore it made
14 application for a caution.

15 38. It is in this context that the Court has now been asked to provide an opinion as to
16 whether there is sufficient cause for the Plaintiff to record an order of restriction.

17 39. In *The Attorney General of the Turks and Caicos Islands v. Richardson as Trustee in*
18 *Bankruptcy of Yellowstone Club World LLC [2013] UKPC 9*, Sir John Chadwick states at
19 paragraph 20 in relation to a similar statutory provision that the Registrar’s task *“is to*
20 *decide whether to make an order (and in what terms) and to enter that order in the terms*
21 *in which it has been made.”*



1 40. Sir John Chadwick further states at paragraph 33:

2 *"In relation to the first of those questions the appellants rely exclusively on section 132(1)*
3 *of the Registered Land Ordinance: it is not said that this is a case in which section 132 (3)*
4 *has any application. It is accepted that the power conferred by section 132 (1) is*
5 *discretionary: "...the Registrar may...make an order...prohibiting or restricting dealings*
6 *with any particular land..." (emphasis added). But it is pointed out that the discretionary*
7 *power may be exercised "for any... sufficient cause"; and that it may be exercised by the*
8 *Registrar of her own motion: "...without the application of any person interested in the*
9 *land.."*

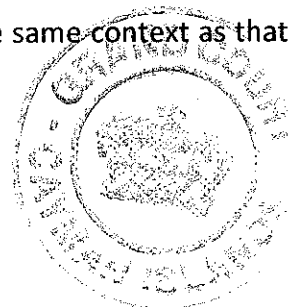
10 41. This general guidance is of some assistance to this Court in determining how it should
11 approach the question now raised for the provision of the Court's opinion.

12 42. I remind myself that I have not had the benefit of an exchange of pleadings in the case.

13 However, having reviewed this matter I must reiterate that in the opinion of this Court
14 the Second Defendant has no arguable case at all.

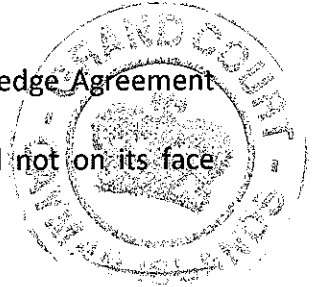
15 43. In any event even if this conclusion is incorrect, the further question would then arise as
16 to how the Plaintiff should properly exercise her discretionary power in the
17 circumstances.

18 44. Section 132 (1) provides that the Registrar's power may be exercised for the prevention
19 of any fraud or improper dealing or for any other sufficient cause. In this regard I accept
20 the submission of the First Defendant that these classes are *ejusdem generis* and that the
21 term "*other sufficient cause*" must be interpreted in the same context as that which has
22 immediately preceded it.



1 45. Accordingly I bear in mind that no formal legal challenge by way of legal proceedings has
2 been made either to the Settlement Agreement or to the letter of rejection of the claim
3 for an interest in land or arising from land.

4 46. I also bear in mind the description offered to the Registrar that the Pledge Agreement
5 was "fully executed", when in fact the document thus referred to did not on its face
6 qualify for that description.



7 47. In addition, I remind myself that a caution and then a restriction were only sought at the
8 time when a sale of the property in question became imminent, and at no time before
9 that.

10 48. Finally I remind myself of the Second Defendant's clear assertion that a restriction acts as
11 a form of interim injunction pending final resolution of the matter giving rise to the
12 restriction. This assertion is made despite the fact that that the normal safeguards in
13 respect of the granting of freezing orders would be entirely lacking and despite the
14 further fact that at the material time of the application no effort had been made to bring
15 about any legal resolution of the dispute whatsoever.

16 49. In summary, I consider the Second Defendant's application for the registration of a
17 restriction to be not only without any intrinsic merit but also to be entirely misconceived.

18 50. Furthermore I accept the submission of the First Defendant stated at paragraph 28 of its
19 Written Submissions as follows:

20 *"In summary, NoMoss' further evidence does not provide a basis for the entry of a*
21 *restriction and the Court should direct the Registrar accordingly. It is not the function of*
22 *the Registrar to adjudicate disputed transactions or complex issues of fact: either the*

1 *applicant can demonstrate an interest in land supported by documents or other cogent*
2 *evidence, or the request must be declined. It would make a mockery of the restriction and*
3 *registration system if unsupported and unproven allegations could improperly hold-up*
4 *legitimate transactions indefinitely."*

5 51. It is noteworthy that in *Nugent v. Nugent* [2015] Ch 121 at paragraph 33 B-C Morgan J
6 refers to the court's willingness "*to act to counter what it regarded as an abuse of the*
7 *registration system*".

8 **Conclusion**

9 52. For the various reasons as set above, the Court has formed the opinion that the Second
10 Defendant's application is neither lawful nor appropriate in the circumstances and that in
11 the exercise of the Plaintiff's discretion there is no sufficient cause to grant it.



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18 *Robin McMillan*

19 **The Hon. Justice Robin McMillan**
20 **Judge of the Grand Court**