

Neutral Citation No: [2022] NICH 7

Ref: McB11810

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

ICOS No: 2021/64632

Delivered: 29/04/2022

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION

Between:

PHILIP BOYD TRIMBLE
and
JAMES WILLIAM TRIMBLE

Plaintiffs

and

JOHN PATRICK CASSIDY

First Defendant

and

STEPHEN McKENNA

Second Defendant

Mr Brown Barrister-at-Law (instructed by Thompson Mitchell Solicitors) for the Plaintiffs
Mr A J S Maxwell Barrister-at-law (instructed by Roche McBride, Solicitors) for the First
Defendant
Rafferty & Donaghy Solicitors for the Second Defendant

McBRIDE J

Introduction

[1] This case considers the nature and extent of the protection afforded by section 21(2) of the Conveyancing and Law of Property Act 1881 (“the 1881 Act”) to a purchaser buying from a mortgagee or a fixed charge receiver.

Application

[2] By writ issued on 10 August 2021 the plaintiffs seek, *inter alia*, a declaration that they are the legal and beneficial owners of lands situate and known as Tullybroom Road, Clogher, Co Tyrone, BT6 0UW and contained within Folio 26673

Co Tyrone (“the lands”) and an order restraining the defendants from entering onto the said lands.

[3] The plaintiffs now apply for summary judgment under Order 14 of the Rules of the Court of Judicature (Northern Ireland) 1980 on the ground that the first defendant has no defence to their claim. The second defendant has already consented to judgment.

Representation

[4] The plaintiffs were represented by Mr Brown of counsel. The first defendant was represented by Mr A J S Maxwell of counsel. I am very grateful to all counsel for their clear, concise and well-researched skeleton arguments which were of much assistance to the court.

Background

[5]

- (a) The lands comprise 30 acres of agriculture land.
- (b) The first defendant was registered as owner of the lands on 11 December 2000.
- (c) On 11 January 2001 the first defendant deposited the land certificate in respect of the lands with the Northern Bank by way of security for monies advanced to him by the bank. A Notice of Deposit was registered on 14 October 2011.

The Mortgage Deed

- (d) On 14 August 2017 the first defendant entered into a mortgage with the Northern Bank. In consideration of the bank providing certain facilities to him, the first defendant charged the lands in favour of the bank. The relevant clauses of the mortgage include:

Clause 6 which stated as follows:

“It is hereby declared:

- (1) That the monies owing upon this security shall be deemed to have become due within the meaning of section 19 of the Conveyancing and Law of Property Act 1881 and section 4 of the Conveyancing and Law of Property Act 1911, immediately on demand for payment being made by the bank or the solicitor to the bank for the time being or upon the happening

of any other event upon the happening of which the power of sale is exercisable. And that such demand may be effectively made by notice in writing either left at or sent by post to the registered office for the time being of the mortgagor or left upon any part of the mortgaged property. And that every such demand sent by post shall be deemed to have been made on the day the demand was posted. And further that in addition to all other protections afforded by the statute every purchaser or other third party dealing with the bank shall be entitled and bound to assume without enquiry that some mortgage money is owing on the security hereof and the demand therefore has been duly made hereunder and the said mortgage money has accordingly become due.

- (2) That the powers of sale and of appointing a receiver conferred on mortgages by the Conveyancing and Law Property Act 1881 shall apply to these presents with this variation that the same shall be exercisable by the bank at any time after demand made by the bank as hereinbefore provided and notwithstanding that the notice required by section 20 of the said Act has not been given or either of the defaults therein mentioned made and ...
- (3) A receiver appointed by the bank under the powers hereinbefore contained shall, in addition, to the powers conferred to him by the Conveyancing and Law of Property Act 1881 have power (if the bank so directs):
 - (i) To enter upon and take possession of the mortgaged property ...
 - (ii) To sell the property ..."

Deed of Appointment

- (e) The first defendant fell into arrears and owed monies on foot of the mortgage. The Northern Bank then appointed Mr Pollock as fixed charge receiver by way of deed of appointment dated 3 April 2018, to sell the lands. The deed provided as follows:

"WHEREAS:

1. By the mortgage listed in this schedule hereto ("the Mortgage") and made between John Patrick Cassidy, the mortgagor and the bank, the property also listed in the schedule hereto ("the Property") was charged to the bank to secure the payment due to the bank of all the liabilities of the mortgagor to the bank.
2. The mortgagor has defaulted in payment of his liabilities to the bank.
3. The bank made demand for payment on the mortgagor on 12 March 2015.
4. The amount due and owing to the bank on foot of the mortgage remains unpaid.
5. The bank is desirous of appointing a receiver pursuant to the powers in that behalf contained in the mortgage inferred on mortgagees by virtue of the Conveyancing and Law of Property Act 1881 and the receiver has agreed to act as such.

NOW THIS DEED WITNESSES AS FOLLOWS:

The bank in exercise of powers conferred upon it by the mortgage and by the Conveyancing and Law of Property Act 1881 appoints the receiver to be the receiver of the property and all the income of the property, if any, and to exercise powers of a receiver given by the mortgage or by statute or otherwise."

The schedule refers to a mortgage dated 15 August 2017.

- (f) In autumn 2018 the lands were marketed for sale by the fixed charge receiver.
- (g) The plaintiffs decided to buy the lands and instructed their solicitors to act in relation to the purchase in or around November 2018.
- (h) Prior to purchase the plaintiffs' solicitors received a "title pack" from the fixed charge receiver's solicitors which included the deed of appointment.

Memorandum of Sale

- (i) The plaintiffs as purchasers and the fixed charge receiver as vendor entered into a memorandum of sale of the lands on 15 January 2019. The agreed sale price was £280,000; with a deposit of £28,000 and completion date of 31 January 2019 or earlier by agreement. The contract was signed by the plaintiffs on 8 January 2019 and by the vendor on 15 January 2019. The memorandum of sale contained a number of special conditions including clause 4 and 7. Clause 4 provided as follows:-

“Pursuant to the charge, the bank has regularly appointed the vendor as receiver of the property.”

Clause 7 provided as follows:

“The vendor is selling the property as receiver by virtue of the powers of sale contained in the charge and the provisions of the Land Registration (Northern Ireland) Act 1970 under the provisions of the charge and the purchaser shall not raise any requisition or objection on:

- (i) Whether due notice or any demand has been given or validly made; or
 - (ii) Whether the vendor’s power of sale is otherwise being properly or regularly exercised; or
 - (iii) The application of the proceeds of sale; or
 - (iv) Any matter or thing comprised in any document not in the possession of the vendors; but shall rely upon the protection afforded by statute.”
- (j) On 23 January 2019 the plaintiffs and the fixed charge receiver signed Land Registry Form 11 thereby effecting a transfer of the lands to the plaintiffs.
- (l) On 23 January 2019 the fixed charge receiver’s solicitors forwarded to the plaintiffs’ solicitors a number of documents including the executed Land Registry Transfer Form 11 and the mortgage deed.
- (m) The sale completed on 23 January 2019 and on 28 January 2019 the plaintiffs applied to register the transfer in the Land Registry.
- (n) On 4 February 2019 the first defendant purported to rent the lands to the second defendant and the second defendant moved his cattle on to the lands. As a result the plaintiffs were unable to make use of the lands.

- (o) In April 2019 the first defendant entered a caveat in the Land Registry thereby preventing the plaintiffs from being registered as the owners of the lands.
- (p) Letters of claim were sent by the plaintiffs' solicitors and thereafter a writ was issued on 10 August 2021. A statement of claim was served and a defence entered by the defendant.

Defence

- (q) In his defence the first defendant avers that the appointment of the fixed charge receiver was irregular as no valid demand for payment was made by the bank and accordingly no power to appoint a fixed charge receiver arose. In such circumstances the purported contract of sale dated 15 January 2019 and the conveyance dated 23 January 2019 are null and void and of no effect. As the registered owner he avers that he is entitled to remain in sole occupation of the lands.

Submissions of the parties

[6] Mr Brown on behalf of the plaintiffs submits that they are entitled to summary judgment on the grounds that the first defendant has no defence to their claim. In particular, they submit that the lands were conveyed to them by the fixed charge receiver who was validly appointed to sell the lands or alternatively in the event the appointment of the fixed charge receiver was irregular they are entitled to rely on the protection provided by section 21(2) of the 1881 Act, and accordingly their title is unimpeachable.

[7] Mr Maxwell on behalf of the first defendant submits that the contract for sale of the lands and the subsequent conveyance to the plaintiffs are only enforceable if, either, the plaintiffs can establish the fixed charge receiver was validly appointed or they can establish they can rely on the statutory protection provided in section 21(2) for purchasers buying from a mortgagee or fixed charge receiver.

[8] He submits that the fixed charge receiver was not validly appointed as there was no valid demand for payment under the mortgage as the demand referred to in the deed of appointment predated the date of the mortgage. He further submitted that this irregularity was apparent on the face of the deed of appointment and therefore the plaintiffs had notice of the irregularity and cannot rely on section 21(2) as it does not protect a purchaser with notice of the irregularity.

Relevant Order 14 Principles

[9] Order 14 is a summary procedure available when the defendant has "no defence to a claim included in the writ."

[10] Under Order 14 Rule 3, if the first defendant satisfies the court “that there is an issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial” then the court may refuse to grant summary judgment to the plaintiffs.

[11] In *Re Savage* [1991] NI 103/07 Carswell J held that:

“If the result of the action depends on an issue of pure law, even if complex or highly debatable, it should be fully investigated and determined under Order 14.”

[12] The live issues in this case are whether the appointment of the fixed charge receiver was irregular and if so whether the plaintiffs’ title in such circumstances is unimpeachable by reason of the provisions of section 21(2). Both Mr Maxwell and Mr Brown accepted that the determination of these issues depended on deciding issues of pure albeit complex law and agreed that it was appropriate for this court to investigate and determine the issues of law under the Order 14 procedure.

Relevant Statutory Provisions

The Conveyancing and Law of Property Act 1881

[13] The relevant provisions of the 1881 Act are sections 19, 20 and 21. Section 19(1) sets out the powers of a mortgagee. These include a power to sell when the mortgage money has been due and a power to appoint a receiver of the income of the mortgaged property when the mortgage money has become due. Section 19(2) provides that these powers can be varied or extended by the mortgage deed and in such circumstances the variation or extension shall “operate in the like manner and with all the like incidents, effects, and consequences, as if such variations or extensions were contained in this Act.”

[14] Section 20 sets out the conditions which must be satisfied before the power of sale is exercisable.

[15] Section 21 sets out the powers of a mortgagee exercising the power of sale and provides under section 21(1) that “a mortgagee exercising the power of sale conferred by this Act shall have power, by deed, to convey the property sold.”

[16] For the purposes of this case the most relevant provision is section 21(2) which provides as follows:

“Where a conveyance is made in professed exercise of the power of sale conferred by this Act, the title of the purchaser shall not be impeachable on the ground that no case has arisen to authorise the sale, or that due notice was not given, or that the power was otherwise

improperly or irregularly exercised; but any person damnified by an unauthorised, or improper, or irregular exercise of the power shall have his remedy in damages against the person exercising the power.”

Consideration

[17] It has been accepted by all the parties that the plaintiffs are entitled to succeed in their application if they can establish that either the fixed charge receiver was validly appointed, or if they can establish that they are entitled to rely on the protection provided to a purchaser from a mortgagee by the provisions of section 21(2) of the 1881 Act.

The appointment and powers of a fixed charge receiver

[18] The right to appoint a receiver derives from section 19(1)(iii) of the 1881 Act. This right however is limited to appoint a receiver of the income of the mortgaged property. By virtue of section 19(2) of the 1881 Act the statutory powers granted under it can be varied or extended by a mortgage deed and if the mortgage deed contains such variations or extensions then they will operate in the like manner and with all the like incidents, effects and consequences as if such variations or extensions were contained in the 1881 Act. Clause 6(3)(ii) of the mortgage deed provides that the bank has a power to appoint a fixed charge receiver to sell the lands. As a consequence of section 19(2) the bank has therefore a power to appoint a receiver to sell the mortgaged lands.

[19] The power to appoint a receiver to sell the lands arises in accordance with clause 6(2) of the mortgage deed. It provides such a power, “shall be exercisable by the bank at any time after demand made by the bank.” Clause 6(1) of the mortgage deed sets out the method by which such a demand for payment is to be made.

[20] Accordingly a fixed charge receiver can only be validly appointed if the bank makes a demand for payment under the mortgage deed from the borrower by a method set out in clause 6(1). In the absence of a valid demand under the mortgage no power to appoint a fixed charge receiver arises and the appointment of a fixed charge receiver would be irregular.

Was the Fixed Charge receiver validly appointed?

[21] The fixed charge receiver was appointed by means of the deed of appointment. The deed of appointment recites that the bank made a demand for payment on the defendant on 12 March 2013. The mortgage scheduled to the deed of appointment is dated 14 August 2017 and obviously this demand predates the date of the mortgage. Mr Maxwell therefore submits there was no valid demand under the mortgage and in the absence of a valid demand the right to appoint a receiver had not accrued to the bank and the appointment of the receiver was therefore irregular, invalid and

void. As the appointment of the fixed charge receiver was invalid any sale by him would similarly be void.

[22] The deed of appointment purports to appoint the receiver pursuant to the powers set out in the mortgage deed. Accordingly the bank must prove that it made a demand for payment under the mortgage from the first defendant. The only evidence before this court that the bank made such a demand is the reference in the deed of appointment to a demand being made on 12 March 2013. As this demand predates the date of the mortgage I find that there is no evidence before this court that a valid demand was made under the mortgage deed. If no valid demand for payment was made then the bank had no power to appoint a fixed charge receiver and any such appointment would be irregular. The appointment being void would mean that any purported sale under the void appointment would be made without lawful authority or any power to convey the property and therefore the purported conveyance would be void. As Fisher and Lightwood, Law of Mortgage 15th Ed at p 608 comment, "The validity of the acts of the receiver depend upon the validity of his appointment, so that if he is invalid he will be at risk against the mortgagor mortgagees trustee in bankruptcy or liquidator as appropriate and other interested parties such as other mortgagees."

[23] As this is an Order 14 application and as I am therefore taking the first defendant's case at its height, for the purposes of this application I intend to proceed on the basis that the appointment of the fixed charge receiver was irregular and invalid. It should be noted, however, that this is not a final or binding determination in respect of this question, particularly, as the bank is not a party to these proceedings; has not given evidence and has not made submissions on this point.

[24] If this case was to stand upon the validity of the appointment of the fixed charge receiver alone I would refuse to grant the Order 14 application.

[25] The plaintiffs however submit that notwithstanding any irregularity in the appointment of the fixed charge receiver they are nonetheless protected as bona fide purchasers without notice by virtue of the provisions of section 21(2) of the 1881 Act.

Can the plaintiffs avail of the protection provided by section 21(2) of the 1881 Act?

[26] Section 21(2) provides that when a conveyance is made "in professed exercise" of the power of sale under the 1881 Act the title of the purchaser shall not be impeachable on the ground that the power of sale was irregularly exercised.

[27] If the plaintiffs can come within the statutory protection provided by section 21(2), then notwithstanding any invalidity in respect of the appointment of the fixed charge receiver the conveyance of the lands to them is unimpeachable and the first defendant's only remedy is in damages against the bank.

[28] To invoke the protection of section 21(2) the plaintiffs must first show that the conveyance of the lands to them was made “in the professed exercise of the power of sale confirmed by the Act.”

[29] In *Walker and others v Stones and another* [2004] All ER 412 the trustees relied upon clause 15 of a deed of trust which exempted them from liability arising in “the professed execution of the Trust.” Sir Christopher Slade at p 440 when considering the interpretation of the word “professed” stated:

“The Shorter Oxford Dictionary (1983 Edition) includes among other definitions of the word ‘professed’ the meaning “alleged”, “ostensible.” I agree with the judge that clause 15 on its true construction, must apply so as to exonerate the trustees ... for anything done by them in the purported execution of the trust.”

[30] I consider that I should afford a wide meaning to the word “professed” to include “alleged” or “ostensible” i.e. stated or appearing to be.

[31] The first question to be determined therefore is whether the bank in the deed of appointment professed that the power to appoint a fixed charge receiver to sell the lands had arisen.

[32] Mr Maxwell submits that the bank in the recitals which appear on the face of the deed of appointment inform the reader that the power to appoint a fixed charge receiver to sell the land had not arisen as the recitals make it clear no demand had been made under the mortgage, (the only demand referred to being one that predated the mortgage which could not therefore be a valid demand) and what is therefore ostensible from the deed of appointment read as a whole, is that no power to appoint a fixed charge receiver to sell the lands had arisen.

[33] Secondly, he submitted that as it was clear on the face of the deed of appointment the power to appoint a fixed charge receiver to sell the lands had not arisen, the plaintiffs had actual notice of the irregularity in the appointment of the fixed charge receiver and therefore the purchasers cannot not rely on the protection provided by section 21(2) as it only provides protection to a purchaser “without notice.” In support of this contention Mr Maxwell relied on dicta of Sterling J in *Life Interest and Reversionary Securities Corporation v Hand-in-Hand Fire and Life Insurance Society* [1898] Ch D 230 at p 238 when he stated:

“The Conveyancing Act ... confers protection only on a purchaser who has obtained a conveyance **without knowledge of any irregularity.**”[my emphasis]

[34] I am satisfied that the appointment of the fixed charge receiver was made in professed exercise of contractual powers of sale conferred by the mortgage and the 1881 Act. This is what the deed of appointment expressly provides when it states:

“Now this deed witnesses as follows:

The bank in exercise of the powers conferred upon it by the mortgage and by the Conveyancing and Law of Property Act 1881 appoints the receiver to be the receiver of the property and all income from the property, if any, and to exercise the powers of a receiver given by the mortgage or by statute or otherwise.” [emphasis added]

[35] In addition the recitals state that the first defendant entered into a mortgage; he defaulted; a demand for payment was made and the amount due remains unpaid; and the bank is therefore desirous of appointing a receiver. I consider that these recitals support the view that the appointment of the fixed charge receiver was made in professed exercise of the power of sale conferred by the 1881 Act which provides the power to appoint a receiver arises when a demand for payment is made. I am therefore satisfied on its face the deed of appointment of the fixed charge receiver with power to sell the lands is made in ‘professed exercise of the power of sale conferred by the 1881 Act’.

[36] The second question which arises is whether a purchaser with notice of an irregularity can rely on the protection provided by section 21(2). In *Life Interest* at p 238 Sterling J held that this section of the 1881 Act confers “protection only on a purchaser who has obtained a conveyance without knowledge of any irregularity.”

[37] Notice can be actual or constructive. Constructive notice being knowledge that a person could or would have acquired if he had made all the usual and proper inquiries.

[38] In *Corbett v Halifax Building Society* [2003] 1 Weekly WLR 964 at para 26 Pumfrey J held:

“.... The purchaser is not protected if he has **actual knowledge** of the impropriety ... Thus, the completed sale by a mortgagee pursuant to a statutory power is vulnerable only if the purchaser has knowledge of, or participates in, an impropriety in the exercise of the power.”

Accordingly I consider section 21(2) does not provide protection to a purchaser who has actual knowledge or “blind eye” knowledge of the impropriety – see *Selwyn v Gorfit* [1888] 38 Ch D 273. In such circumstances a purchaser would be using the 1881 Act as an instrument of fraud which is something the court would not permit.

Accordingly in a case where a purchaser has actual notice of the irregularity the conveyance can be set aside by the court.

[39] In this case, contrary to Mr Maxwell's submission I am satisfied that the plaintiffs did not have actual knowledge of any irregularity in the appointment of the fixed charge receiver and his power to sell the mortgaged lands. I do not consider that it is obvious on the face of the deed of appointment that there was an irregularity in the appointment of the fixed charge receiver. The only way in which the irregularity could have been ascertained by the plaintiffs was if they had made further enquiries, namely reading the mortgage deed; ascertaining its date and cross-referencing this back to the date of the demand referred to in the recitals on the deed of appointment. There is no evidence the plaintiffs carried out such investigations and I am satisfied, therefore, that they did not have actual knowledge of any irregularity in the appointment of the fixed charge receiver.

[40] The next question which arises is whether the plaintiffs can be fixed with constructive knowledge of the defect such that they cannot avail of the section 21(2) protection.

[41] It is clear that the plaintiffs as purchasers could have acquired knowledge of the irregularity if they had carried out inquiries. In this case no such inquiries were conducted. The question which then arises is, "what standard of inquiry is required from a purchaser who is buying from a mortgagee, in light of the provisions of section 21(2)?"

[43] This question arose in the case of *Bailey v Barnes* [1879] 1 Ch 25. In that case L purchased the equity of redemption from EM. L had no actual notice of any propriety in the sale from B to HM (a successor in title of the EM) except that he had seen a valuation which appeared to show the purchase by HM was at an undervalue. L did not make any inquiries concerning the circumstances of the sale. Linley LJ held at p 8:

"The appeal then really turns on whether L is to be treated as having had notice of the invalidity of HM's title ... No doubt if he had been a suspicious or unwilling purchaser, he would very likely have made enquiries which would have induced him not to complete his purchase. But he was not suspicious in fact and he did not make such enquiries as a suspicious man would perhaps have made ... **The doctrine of constructive notice is based on good sense, and is designed to prevent frauds on ownership of property, but the doctrine must not be carried to such an extent as to defeat honest purchasers,** and although this limitation has sometimes been lost sight of, still the limitation is as important and is as well-known as the doctrine itself.

This will be seen both from well-known decisions and from the language of the Conveyancing Act 1882 section 3 which is now the authority to be regarded."

[42] He then went on to repeat comments made by Lord Carnwath in *R v Ware v Lord Egmont* as follows:

"The Conveyancing Act 1882, really does no more than state the law as it was before, but its negative form shows that **a restriction rather than extension of the doctrine of notice was intended by the legislature**. The third section runs thus:

'A purchaser shall not be prejudicially affected by notice of any instrument, fact or thing unless -

- (i) It is within his own knowledge, or would have come to his knowledge, if such enquiries and inspections had been made as ought reasonably to have been made by him.'

Can we say that Mr L or his solicitors "ought reasonably" to have made inquiries into the validity of the sale by B? **Ought here does not import a duty or obligation for a purchaser need make no inquiry**. The expression "ought reasonably" must mean ought as a matter of prudence, having regard to what is usually done by men of business under similar circumstances. **Light is thrown on the meaning of 'ought reasonably' by the Conveyancing Act 1881 section 21 sub-section 2 which relieves purchasers from mortgagees purporting to sell under powers of sale from the necessity of enquiring into the propriety or irregularity of the exercise of the power**. It is easy to see now that Mr L's solicitors might have been more suspicious and more cautious: but we are not prepared to say that they ought to have been so when he bought." [emphasis added]

The court held that L was not affected by constructive notice of the impropriety of the sale.

[43] Accordingly, I am satisfied that the effect of section 21(2) is that a purchaser from a mortgagee or fixed charge receiver is under no obligation to make inquiries and will not be fixed with constructive knowledge of irregularities in circumstances

where he has made no inquiries. He would only be fixed with such knowledge if there is fraud or *mal fides*. The purpose of section 21(2) is to simplify conveyancing by reducing the inquiries a purchaser is expected to make when buying from a mortgagee. Such a purchaser is only obliged to satisfy himself that the power of sale has arisen. He is not obliged to make inquiries which could become extremely complex into the detailed relationships between the mortgagee and the mortgagor during the currency of the mortgage. Indeed as Sterling J stated in *Life Interest* at p 238 "a purchaser without notice of any impropriety or irregularity would be well advised to abstain from making any such requisition due to the efficacy of the protection afforded to the purchaser by section 21(2)." This is the effect and purpose of section 21(2).

[44] Further, I am satisfied that the plaintiffs could not be fixed with constructive knowledge of any irregularity in the appointment of the fixed charge because of the provisions of clause 6 of the mortgage deed and clauses 4 and 7 of the memorandum of sale. In accordance with these provisions the purchasers were "bound to assume without enquiry the money was owing and demand had been made" and they were specifically prohibited from raising any requisitions or objection "on whether any demand had been validly given or whether the power of sale was being properly exercised" and were expressly entitled to rely on the statutory protection in section 21(2). I consider that these clauses put in about as plain a language as you can put it that the purchasers would be granted a good title notwithstanding any irregularity in the appointment of the fixed charge receiver.

[45] Therefore, I find the plaintiffs were not under a duty to make inquiries about the validity of the appointment of the fixed charge receiver and cannot be fixed with constructive notice of an irregularity as they are *bona fide* purchasers for value.

[46] In the present case I am therefore satisfied that the plaintiffs can rely on the protection of section 21(2) as they had neither actual nor constructive knowledge of any defect and their title is therefore unimpeachable.

Conclusion

[47] I am satisfied that the plaintiffs can rely on section 21(2) of the 1881 Act and their title to the lands is therefore unimpeachable and the first defendant's only remedy is in damages. Consequently I consider there is no defence to the plaintiffs' claim by the first defendant and, accordingly, I grant summary judgment under Order 14.

[48] I will hear counsel in respect of the relief sought and submissions in relation to whether any matter should be remitted to the Master for assessment.

[49] I will also hear counsel in respect of costs.