COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT
Common Law and Equity Division
2008/CLE/GEN/1106

IN THE MATTER of an Agreement for Sale dated 22nd day of May, A.D., 2007 made between Jonathan Forbes of the one part and Southern View Corporation of the other part ("the Agreement").

JONATHAN FORBES
Petitioner

AND

SOUTHERN VIEW CORPORATION
First Defendant

AND

BAHAMAS REALTY LIMITED
Second Defendant

Before: **The Hon. Madam Justice Rhonda P. Bain**

Appearances: **Mr. Elliott Lockhart with Ms. Gia Moxey for the Plaintiff**

Mr. Sean Moree for the First Defendant

29 January 2010, 8 February 2010,
22 December 2010,
8 June 2012 & 11 June 2012

No. 2

(1) This action began by way of an Originating Summons filed on 1 July 2008 by the Plaintiff.

(2) In the Originating Summons the Plaintiff prayed for the following–

(i) A Declaration that the Plaintiff has adduced a good and marketable title free from incumbrances to the property the subject of the Agreement.

(ii) An Order that the Plaintiff is entitled to one-half ½ of the deposit paid by the First Defendant in pursuance of the said Agreement.

(iii) An Order that the Second Defendant, as stakeholder, do pay to the Plaintiff and/or his attorneys, the sum of $62,500.00 in accordance with the terms of the said Agreement.

(iv) Further or other relief

(v) Costs

(3) The Originating Summons was supported by an Affidavit of Jonathan Forbes filed 1 July 2008. An Affidavit of Gregory Cottis was filed on behalf of the Defendants on 7 November 2008. A Supplemental Affidavit was filed by Gregory Cottis on 6 June 2012. Additionally the Defendants relied on the Affidavit of Patrick Joseph filed 23 May 2012. Mr. Cottis was the attorney who acted for the First Defendant in the proposed purchase and was retained specifically to conduct title searches and certify title in respect of the property.

(4) The Plaintiff and the First Defendant entered into an Agreement for Sale dated 22 May 2007 for the sale and purchase of a parcel of land situate on the southern end of Big Farmers Cay in the Exuma Cays comprising twenty (20) acres ("the property"). The purchase price was one million two hundred and fifty thousand dollars ($1,250,000.00) gross.

(5) By the terms of the Agreement for Sale, the First Defendant paid one hundred and twenty-five thousand dollars ($125,000.00) to the Second Defendant by way of deposit and part payment of the purchase price.

(6) Clause 6 of the Agreement for Sale provides –

> **"Within fourteen (14) days from the date hereof the vendor shall produce or cause to be produced to the Purchaser or his attorney all of the documents of title in the vendor's possession relating to the said hereditaments and such other information as the Purchaser or his attorneys shall reasonably require to deduce from a good root of title in accordance with the provisions of the Conveyancing and Law of Property Act a good and marketable title in fee simple free from incumbrance."**

(7) On 11 September 2007 counsel for the Plaintiff provided to the Second Defendant the following title documents –

(i) Copy of Crown Grant dated 8 June 1833 taken from page 133 of the Crown Grant Book "C" from the Department of Lands and Surveys granting twenty (20) acres of property in Big Farmers Cay to Smart Forbes.

(ii) A copy of Letters of Administration granted to Jonathan Forbes a great, great, great grandson of Smart Forbes on the 12 October 2005 in the Supreme Court Probate Side No. 247 of 2005.

(iii) An unstamped and unrecorded copy of a Deed of Assent dated 1 August 2007 from the Plaintiff (as Administrator of the Estate of Smart Forbes) to the Plaintiff. In the Deed of Assent the Plaintiff purports to convey the property from himself as Administrator to himself as heir-at-law.

The Second Defendant forwarded the aforementioned documents to Mr. Cottis.

(8) On 6 November 2007 Mr. Cottis acknowledged receipt of the documents received from the Second Defendant and stated –

> "As I hope you will appreciate, in the absence of a Certificate of Title from the Supreme Court, the above represents extremely limited documentation to connect your client to the subject property granted to a distant relative in the mid 1800's and certainly does not constitute good and marketable tile under Bahamian law. To this end, I am curious as to whether or not your client has made any effort to initiate a quieting (Quieting) of Title Action to confirm his purported inheritance. Please advise.
>
> In the meantime, I assume that your client has had to produce to the Supreme Court a Family Tree tracing his ancestry therein and in turn confirming him to be the heir at law. To this end, I would be grateful if you would provide me with a copy of such Family tree, together with certified copies of all relevant birth and death certificates pertaining to those reference therein, along with certified copies of any wills that may have been made by those concerned in relation to the disposition of their respective estates."

(9) Additionally Mr. Cottis requested –

(i) An amendment to the Schedule of the Conveyance of Assent,
(ii) A certified copy of the extract from page 133 of the Crown Grant Book "C".
(iii) Copies of the actual Crown Grant.
(iv) A certified copy of the Letters of Administration.

(10) On 12 March 2008 counsel for the Plaintiff from Lockhart & Munroe Chambers wrote to Mr. Cottis –

> **"I have seen your letter of 6 November 2007 and carefully considered the contents. In this regard I would propose the following -**
>
> **(i) That an application be made to the court pursuant to Section 4 of the Conveyancing and Law of Property Act Ch. 138, for a Declaration that the vendor has adduced a good and marketable title to the subject property. In this regard I am mindful of the court's determination in Probate action No 247 of 2009, where a grant was made to Jonathan Forbes (the Vendor) having found him to be the eldest great, great, great grandson of the said intestate "Smart Forbes", copy attached. In further support for such declarations the vendor shall rely on the decision in Ocean Estate v Pinder 1969 2 AC 19 where Lord Diplock on page 24 letter N stated:-**
>
> > **"In their Lordships' view the question of what documentary title a vendor is entitled to insist on forcing upon a purchaser has no relevance to the present action. At common law as applied in the Bahamas which have no adopted the English Land Registration Act, 1925, there is no such concept as an "absolute" title. Where**

questions of title to land arise in litigation the court is concerned only with the relative strengths of the titles proved by the rival claimants

(ii) An application pursuant to Section 21 of the Quieting Title Act Ch. 147 for a Certificate declaring that the said Jonathan Forbes is the heir of Smart Forbes. The Court having found as it did in (i) above the procedure might involve unwarranted expense and time."

(11) In response to this letter Mr. Cottis replied by fax to counsel for the Plaintiff again requesting a family tree tracing the Plaintiff's ancestry back to the Crown Grantee, Smart Forbes.

(12) Further Mr. Cottis wrote –

> **"As regard your proposal to seek a Declaration from the Supreme Court, as opposed to a Certificate of Title, I note that the argument for proceeding in such manner is based on the relative strengths of the titles proved by rival claimants, but I am unclear as to how such potential rival claimants would appear in the absence of advertisements, which of course is one of the primary components of a Quieting of Title action."**

(13) On 3 April 2008 by letter, counsel for the Plaintiff wrote to Mr. Cottis stating-

> **"With respect to the requisition set out in your letter of 6 November 2007 and our subsequent letter to you of 12 March 2008 it is our position that our client has adduced a good and marketable title to the property. In the circumstance we write to you to withdraw the said requisition."**

(14) That correspondence was followed by a fax dated 4 April 2008 wherein Mr. Cottis wrote to counsel for the Plaintiff stating, inter alia –

> **"Whilst I have indicated in prior correspondence a willingness to examine whatever documentation may exist to support your client's title, such documentation to date has been limited and certainly not sufficient to constitute good and marketable title. In accordance with Bahamian laws in the absence of a Certificate of Title or conveyance more than thirty years old dealing with both the legal and equitable estate in the subject property for valuable consideration.**
>
> **Accordingly, given that my client is anxious to complete this matter and there appears to be no additional documentation forthcoming in support of your client's**

> **title I would be grateful if immediate steps could be taken to secure a Certificate of Title of behalf of your client in order that we may complete this matter."**

(15) By letter dated 7 April 2008 counsel for the Plaintiff maintained their position that the Plaintiff had adduced a good and marketable title to the subject property. Further counsel stated that it was their position that the Plaintiff had complied with clause 10 of the Agreement for Sale. Pursuant to Clause 10 of the Agreement the Plaintiff forwarded the original conveyance executed by the Plaintiff to be held in escrow to their order pending receipt of the balance of the purchase price as set out in the completion statement which was attached. Further counsel for the Plaintiff wrote –

> **"In this regard please accept this letter as notice that should your client fail to pay the balance of the purchase price within 7 days from the date hereof we are instructed to forfeit the deposit pursuant to Clause 10 of the subject Agreement for Sale."**
>
> **We trust that further course of action does not become necessary."**

(16) Further in another correspondence dated 8 April 2008 Mr. Cottis stated that he visited the probate registry and reviewed the file. Further Mr. Cottis stated –

> "Following such review, I made enquiries today of the senior conveyancing practitioners in Nassau's three leading Firms, namely Higgs & Johnson, Graham Thompson & Co. and McKinney, Bancroft & Hughes. The consensus was as I have maintained from the outset that what has been produced to date certainly does not constitute good and marketable title under Bahamian Law. The Grant of Letters of Administration issued to your client and the documentation submitted in connection therewith merely support that the Supreme Court considered your client to be entitled to carry out administration of the Estate of the late Smart Forbes. Such Grant in no way confirms your client's entitlement to inherit the subject property, as to do so is to ignore the transfer of the said property according to the intervening estates, which would have to be administered in order to establish an unbroken chain of title. As you will note, I am not stating that your client may not be entitled to the subject property as the rightful heir at law, but the same would have to be confirmed by administration of each of the intervening estates under which he purportedly inherits."

(17) Further Mr. Cottis stated –

> "As previously indicated, my client has no desire to escape the Agreement for Sale and accordingly, I recommend that appropriate steps be taken forthwith to secure a Certificate of Title in the manner aforesaid."

(18) Mr. Cottis also requested the original Conveyance of Assent as amended.

(19) By letter dated 11 April 2008 counsel for the Plaintiff wrote to Mr. Cottis and confirmed, inter alia, their position with respect to the Notice of Completion remained as was stated in the letter of 7 April 2008.

(20) On 15 April 2008 Mr. Cottis wrote to counsel for the Plaintiff and advised that the Plaintiff had not established a good and marketable title. Counsel for the First Defendant invited counsel for the Plaintiff to make application for a Certificate of Title.

(21) Counsel for the First Defendant also advised that the 22 May 2007 Agreement was being lodged for record at the Registry of Record to put all parties on notice of the transaction.

(22) Counsel for the Plaintiff wrote to the Second Defendant on 15 April 2008 stating-

> **"Please be advised that the purchaser by letter dated 7th instant was put on notice to complete the captioned sale within seven (7) days of the date hereof, and have the deposit forfeited, pursuant to paragraph 14 of the Agreement for Sale dated 22 May 2007.**
>
> **To date we have not received the balance of the funds and as for the conditions set out in the aforementioned paragraph you are entitled to one-half of the deposit within the meaning half payable to ourselves as attorney for the vendor.**
>
> **We look forward to receiving the cheque in due course."**

(23) On 17 April 2008 Mr. Cottis wrote to the Second Defendant, inter alia –

> "Please be advised that the Vendor has not complied with the terms of the Agreement for Sale dated 22nd May 2007 under which you serve as stakeholder for the Deposit and, in the circumstances, you are hereby on Notice to continue to hold the Deposit in such

capacity, as our current instructions are to force completion of this transaction by means of specific performance, if need be."

(24) On 17 April 2008 counsel for the Plaintiff responded to Mr. Cottis and stated –

> **"With regard to your insistence for our client to obtain a Certificate of Title which in our view is not warranted, we consider the Agreement for Sale cancelled. The Agreement does not require our clients to obtain such a Certificate and hence your attempt at making the sale conditional therein is a unilateral change which we have not accepted.**
>
> **It is our position that our client has produced a good and marketable title to the property and as such is entitled to forfeit the deposit herewith.**
>
> **In the circumstance we have advised Bahamas Reality Limited that the sale has been cancelled and as such have requested the release of the deposit.**

Issues

(25) The issues to be determined by this court are:

(i) Whether the Plaintiff had deduced a good root of title to the property which was the subject of the Agreement for Sale between the Plaintiff and the First Defendant

(ii) Was the Defendant entitled to rescind the agreement?

(iii) Was the Plaintiff entitled to rescind and cancel the agreement and forfeit the deposit?

(iv) Was the Plaintiff in breach of clause 15 and clause 16 of the Agreement for Sale?

(v) Was there misrepresentation with respect to the description of the property?

Whether the Plaintiff had deduced a good root of title

(26) Counsel for the Plaintiff submits that they provided the First Defendant with a good and marketable title accompanied by a Deed of Assent to the Plaintiff as the alleged "heir-at-law" of Smart Forbes.

(27) The Plaintiff relied on the fact that the Plaintiff had obtained a grant of Letters of Administration in the estate of Smart Forbes as the eldest lawful great, great, great grandson of Smart Forbes and was authorized to administer the estate.

(28) Section 3(1) of the Conveyancing and Law of Property Act Chapter 138 provides–

> **"(4) A purchaser of land shall not be entitled to require a title to be deduced for a period of more than thirty years or for a period extending further back than a grant or a lease by the Crown or a Certificate of Title granted by the court in accordance with the provisions of the Quieting Titles Act, whichever period shall be shorter."**

(29) The Plaintiff alleged that Smart Forbes had obtained a grant from the Crown for the property on 8 June 1833. The Plaintiff executed a Deed of Assent assenting to the legal title. In this regard the Defendant requested the Plaintiff to produce a family tree with corresponding certificates evidencing the birth, marriage and death of the ancestors of Smart Forbes along with certified copies of wills, grants of probate or grants of Letters of Administration.

(30) In **Emmet's Notes on Perusing Titles and on Practical Conveyancing** by J. Gilchrist Smith it was stated –

> **"General Rules as to root of title. An instrument to be a good root of title "must be an instrument of disposition dealing with or proving on the face of it (without the aid of extrinsic evidence) the ownership of the whole legal and equitable estate in the property sold, containing a description by which the property can be identified and showing nothing to cast any doubt on the title of the disposing parties" (Williams, Vendor and Purchaser 4th ed Vol 1 p. 124)"**

(31) However the Plaintiff did not supply the Defendant with the following documents required by the First Defendant to deduce a good root of title -

(i) A family tree with corresponding certificates evidencing the birth, marriage and death tracing the Plaintiff's ancestry to confirm that he is in fact the heir-at-law of Smart Forbes.

(ii) Certified copies of any wills made by any person in relation to any of the intervening estates.

(iii) A certified copy of the extract from page 133 of the Crown Grant Book "C" and the Letters of Administration including the actual Crown Grant.

(32) The First Defendant contends that without the abovementioned requisitions being furnished the First Defendant could not verify that the Plaintiff had indeed a good and marketable title. Counsel for the First Defendant submits that the Plaintiff must prove that he is the heir at law of Smart Forbes.

(33) The Plaintiff maintained that it was not necessary to prove that the Plaintiff was the heir-at-law of Smart Forbes. Counsel for the Plaintiff submitted that the Plaintiff was able to sell the property as he had obtained Letters of Administration and was recognized by the court as the personal representative of the estate of Smart Forbes. Counsel submitted that Section 22 (1) of the Administration of Estates Act enables the Plaintiff to sell the property. Section 22 (1) provides –

> **"22. (1) A personal representative may sell the whole or any part of the estate of a deceased person for the purpose not only of paying debts but also (whether there are or are not debts) of distributing the estate among the persons entitled thereto, but before selling for the purposes of distribution, the personal representative shall, so far as practicable, give effect to the wishes of the persons of full age entitled to the property proposed to be sold, or in the case of dispute of the majority (according to the value of their combined interests) of such persons."**

(34) The Plaintiff obtained Letters of Administration on 12 October 2005 and executed an Assenting Conveyance on 26 October 2005 from Jonathan Forbes, Personal

Representative of the estate of Smart Forbes to Jonathan Forbes. In a letter to counsel for the Plaintiff dated 8 April 2008 Greg Cottis said –

> **"...The Grant of Letters of Administration issued to your client and the documentation submitted in connection therewith merely support that the Supreme Court considered your client to be entitled to carry out administration of the Estate of the late Smart Forbes. Such grant in no way confirms your clients entitlement to inherit the subject property, as to do so is to ignore the transfer of the said property according to the intervening estates, which would have to be administered in order to establish an unbroken claim of title. As you will note, I am not stating that your client may not be entitled to the subject property as the rightful heir at law, but the same would have to be confirmed by administration of each of the intervening estate under which he purportedly inherits."**

(35) Counsel for the Plaintiff submits that the root of title goes back to an 1833 Crown Grant which was granted to Smart Forbes. Smart Forbes died approximately one hundred and eighty years ago (at the date of the grant of the letters of administration).

(36) Counsel for the First Defendant submitted that the Plaintiff had to trace the beneficial ownership of the property during the intervening 172 years. Counsel admitted that the Plaintiff still had to prove who held the beneficial interest in the property and who would be the heir at law.

(37) In **Duncombe v Duncombe 1982 BHSJ No. 13** Smith JA stated –

> **"11. The law of The Bahamas relating to this matter is the same as that which existed in England after the passing of the Land Transfer Act 1897, an Act which our Real Estate Devolution Act closely follows. The law is succinctly set out in Williamson Real Property 20th edition (1906) p. 219, 220 as follows: -**
>
> > **"... subject to the liability for debts and expenses, the personal representatives are to hold the real estate as trustees for the persons beneficially entitled, who are to have the same power of requiring a transfer thereof as persons beneficially entitled to personal estate have of requiring a transfer of the same; so that the heir or devisee retains an equitable estate in the land exactly similar to**

> **the interest of the legatee of a specific chattel before the executor has assented to the bequest. This equitable estate vests immediately on the death of the ancestor or testator in the heir or devisee, and may be alienate by him inter vivos or by will, and will devolve on his death as part of his own estate, subject always to the ancestor's or testator's debts, etc. But the heir or devisee does not acquire any legal estate in the lands descended or devised until the personal representatives have conveyed the same to him by the usual means of conveyance, or in the case of lands devised have assented to the devise, when the lands will vest in the devisee at law without any further conveyance."**

> **"12. It is thus apparent that the beneficial interest of the heir-at-law in the land vested in him as an equitable estate upon the death of the ancestor and remained vested in the heir-at-law after the grant of letters of administration and could be alienated by him at any time but subject always to the ancestor's debts.**

(38) In determining the heir at law the court has to consider the laws of intestacy at the death of Smart Forbes. Counsel for the First Defendant submitted that this is the reason for the request for the family tree. It is imperative that the Plaintiff connect the links of the family chain to establish the heir at law. The heirship would have to be proven by documentary evidence, the marriage certificate and death certificate of Smart Forbes; birth certificates, marriage certificates and death certificates for the children of Smart Forbes; birth certificates, marriage certificates and death certificates for the grandchildren of Smart Forbes; birth certificates, marriage certificates and death certificates of the great grandchildren of Smart Forbes; birth certificates, marriage certificates and death certificates of the great, great grandchildren of Smart Forbes and birth certificates, marriage certificates and death certificates of the great, great, great grandchildren of Smart Forbes. Additionally the Plaintiff would have to provide copies of wills, if there were any, and copies of Letters of Administration for the heirs of Smart Forbes.

(39) The Plaintiff was unable to provide a date of death for Smart Forbes - the Letters of Administration stated that Smart Forbes died "approximately 180 years ago".

(40) This assumption must have been incorrect as 180 years ago would mean that Smart Forbes died sometime in 1825 and the Crown Grant was not granted to Smart Forbes until 8 June 1833.

(41) In 1833 if Smart Forbes died intestate all his real property would have devolved to his oldest lawful son. The law with respect to this devolution of the real estate of a person dying intestate was not changed until 2002 by the Inheritance Act.

(42) As a result therefore in ascertaining the heir of Smart Forbes it is imperative for the Plaintiff to show the family tree to determine the heir at law of Smart Forbes. Additionally the Plaintiff would also be responsible for making application to administer the estate of all the other persons having interest under Smart Forbes.

(43) The Plaintiff produced an Affidavit by Dorabelle Sturrup which was filed in the Supreme Court Registry on 13 May 2005, presumably in support of the application for Letters of Administration by the Plaintiff. In that Affidavit Mrs. Sturrup gave information with respect to Lewis Forbes. According to Mrs. Sturrup the purpose of the Affidavit was to establish lineage and heirship of the estate of Lewis Forbes. There is no information on who Lewis Forbes was or his connection to Smart Forbes or to the Plaintiff Jonathan Forbes. This Affidavit does not assist in proving that Jonathan Forbes was the heir at law of Smart Forbes.

(44) One cannot assume that for one hundred and seventy-two years since the death of Smart Forbes there was no interaction with the property. The Plaintiff has not applied for Letters of Administration in any of the intervening estates of the heirs at law and descendants of Smart Forbes. The Plaintiff has also not identified the descendants of Smart Forbes.

(45) The rules for ascertaining the heir at law have been well established. In the **New Law of Property by Alfred Taphan** it was stated -

> **"The vendor must have the history of all the land from the date of the root of title, giving an abstract of all the documents dealing with the land and all facts which have affected it down to the date of the contract for sale."**

(46) This Court finds that the requested requisitions by the First Defendant for –

(i) the additional documents to be furnished;

(ii) an abstract of title to be provided by the Plaintiff; and

(iii) additional steps proposed to be taken to ensure that title for the property was not defective (obtaining a Certificate of Title pursuant to Section 21 of the Quieting Titles Act)

were not unreasonable and were warranted in the circumstances to prove good and marketable title and failure to comply with the requisitions did indeed amount to a breach of the contract.

(47) Counsel for the Plaintiff submitted that there was no absolute title in The Bahamas and relied on the dicta of Lord Diplock, on behalf of the Judicial Committee of the Privy Council in **Ocean Estates Ltd. v Pinder 1969 2 AC 19** where it was stated at page 24 – 25 –

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

> **Real Property Limitation Act by effuxion of the 20 – year period of continuous and exclusive possession by the trespasser."**

(48) The court finds that this case is distinguishable. In the **Ocean Estate** case which was an action for trespass there were competing claims to the property by the Plaintiff who had documentary title and the Defendant who claimed a possessory title. In this action there were no competing claims. The obligation was for the Plaintiff to prove that he was in fact the heir at law of Smart Forbes and was entitled to the property and would be entitled to sell the property.

(49) Counsel for the Plaintiff submitted that the Plaintiff had executed a Deed of Assent to him pursuant to Section 25 of the Administration of Estate Act. Section 25 (1) of Administration of Estate Act provides –

> **"25. (1) A personal representative may assent to the vesting in any person who (whether by devise, bequest, devolution, appropriation or otherwise) may be entitled thereto, either beneficially or as a trustee or personal representative, of any estate or interest in real estate to which the testator or intestate was entitled or over which he exercised a general power of appointment by his will, and which devolved upon the personal representative."**

(50) A copy of an unexecuted Deed of Assent dated 26 October 2005 which was exhibited to the Affidavit of the Plaintiff did not state whether the assent was to the Plaintiff either beneficially or as a trustee or personal representative. Clause 5 of that document provided –

> "The Grantee has now requested the Personal Representative to convey to him all the said hereditaments <u>by way of inheritance</u> and more particularly described and set out in the schedule hereto which the Personal Representative has agreed to do."

(51) The conveyance to the First Defendant was executed by the Plaintiff on 7 April 2008. Recital D of the conveyance stated -

> "By a Conveyance by Assent dated 1st day of August A.D. 2007 and about to be lodged for recording in the Registry of Records in the said city of Nassau the Vendor as Personal Representative of the Estate of the Deceased conveyed the hereditaments inter alia to the Vendor in fee simple as heir at law of the Deceased."

(52) Counsel for the First Defendant submitted that there was no evidence produced to prove that the Plaintiff was the heir at law. Counsel maintained that the Letters of Administration was not granted to the Plaintiff as heir at law but as great, great, great, grandson of the Deceased.

(53) In his submissions counsel for the Plaintiff submitted that the court had already conducted an investigation when it issued the Letters of Administration to the Plaintiff. Counsel submitted that the application for Letters of Administration would have been equivalent to an action under Section 21 of the Quieting Titles Act. Counsel submitted that the application for Letters of Administration would have been advertised and that there was no objection filed to the grant.

(54) Counsel for the First Defendant maintained that the issue with respect to title would have been resolved if the Plaintiff had made application to the court pursuant to Section 21 of the Quieting Title Act. Section 21 of the Quieting Title Act provides –

> **"21. When a person domiciled in or claiming land in The Bahamas desire to establish any of the following facts which may affect a title to land that is to say that –**
>
> **(a)**
>
> **(b)**
>
> **(c)**
>
> **(d) he is the heir or one of the heirs of any deceased person,**
>
> **he may, if the court thinks fit, have any of such matters investigated and declared by a certificate in accordance with the provisions of this Act."**

(55) Section 22 of the Quieting Titles Act makes provision for investigation of title under Section 21 of the Quieting Titles Act. Section 22 of the Quieting Titles Act provide –

> **"22. (1) The application for an investigation under section 21 of this Act shall be by petition supported by an affidavit of the petitioner verifying the statements of the petition, and stating that his claim is not disputed or questioned by any person, or, if his claim is to his knowledge disputed or questioned, the facts in relation to such dispute or question, and that he is not aware of any other dispute or question, except what he has set forth.**
>
> **(2) The proceedings upon the petition shall be the same as nearly as may be as in cases under section 3 of this Act, and the certificate granted on the investigation shall be recorded in the same way, and may be proved by the like evidence, as in the case of a certificate of title referred to in section 3 of this Act.**
>
> **(3) The certificate when recorded shall be conclusive in favour of the person to whom it was granted and all persons claiming by, from, through or under him against the Crown and all persons whomsoever and shall be *prima facie* evidence in favour of all other persons as against the Crown and all persons whomsoever of the truth of the facts therein declared.**
>
> **(4) Every application under subsection (1) of this section shall be made to the court and shall be by petition in Form 2 of the Schedule.**
>
> **(5) The certificate granted under section 21 of this Act shall be substantially in the form of Form 5 of the Schedule, and shall be under the seal of the court and shall be signed by a judge thereof, and the certificate shall be recorded without any further proof thereof."**

(56) The Plaintiff declined to make application to the Supreme Court under Section 21 of the Quieting Titles Act. A Certificate of Title, if granted, would have been conclusive evidence in favour of the Plaintiff.

(57) The court holds that the Plaintiff did not deduce a good root of title. The Plaintiff has not proved that he is the heir at law of Smart Forbes. In order to prove that he is the heir at law the Plaintiff would have to give a detailed history of the family since the death of Smart Forbes. There is no dispute that the Plaintiff was granted Letters of Administration of the Estate of Smart Forbes but he was not granted Letters of Administration as the heir at law but only as the great, great, great, grandson of Smart Forbes.

Did the Plaintiff breach Clause 15 and Clause 16 of the Agreement of Sale

(58) Clause 15 of the Agreement for Sale provided -

> "15. The Vendor shall arrange at his cost for the property to be surveyed by a reputable surveyor to be agreed upon by the Purchaser and the Vendor shall insure that all survey monuments and pins identifying the legal boundaries of the property are properly installed and visible again at the Vendor's expense if need be."

(59) Counsel for the First Defendant submitted that the Plaintiff was in breach of clause 15 and that as a result the Plaintiff had repudiated the contract.

(60) Counsel for the Plaintiff forwarded an executed Conveyance under cover of a letter dated 7 April 2008. This Conveyance made reference to a plan attached. On receipt of the Conveyance Mr. Cottis wrote to counsel for the Plaintiff on 8 April 2008. –

> "As regards the survey plan attached to your conveyance, I note that under the Agreement for Sale your client was to obtain my client's agreement as to the surveyor to be used, as indeed was pointed out by way of reminder in my aforementioned letter dated 6 November 2007. Given that this was not done, my client will now have to engage his own surveyor to confirm the accuracy of such survey and indeed that appropriate Survey Markers are in place as required under the Agreement. The cost of such work will be at your client's expense."

(61) In response to the query about the survey counsel for the Plaintiff replied in a letter dated 11 April 2008 –

> "with respect to the survey, your client having refused to accept our client's title to the subject property which we contend is good and marketable, we saw no basis to further delay this transaction by seeking your client's agreement as to the surveyor. However should it be determined that the survey is defective our client undertakes to have the same corrected at his cost."

(62) As a result of this the First Defendant commissioned a survey by Mr. Patrick Joseph, a registered land surveyor. Mr. Joseph made reference to a plan prepared at the instance of the Plaintiff by Mr. Benjamin Ferguson a registered Land Surveyor. The appointment of Mr. Ferguson as the surveyor for the property was not agreed by the First Defendant.

(63) The court holds that the Plaintiff was in breach of Clause 15 of the Agreement for Sale.

(64) Counsel for the First Defendant also submitted that the Plaintiff did not comply with Clause 16 of the Agreement for Sale. Clause 16 provides -

> "16. Completion of this transaction is conditional upon the Vendor formally withdrawing his application to the Lands & Surveys Department of the Commonwealth of The Bahamas for the grant of Crown Land adjoining the said hereditaments such withdrawal to be evidenced by means of production to the Purchaser of copies of both his original application and a copy of his letter withdrawing such application as being acknowledged as having been received by the Lands & Surveys Department aforesaid and the undertaking in conjunction therewith in the event of completion that the Vendor will not subsequently resubmit or participate in any other application for such adjoining Crown Land without the prior written consent of the Purchaser, such undertaking to be regarded as a warranty which shall survive completion and be capable of specific enforcement by the Purchaser against the Vendor on the premise that damages will not be a sufficient remedy in the circumstances."

(65) In a reminder contained in a letter to counsel for the Plaintiff dated 8 April 2007 Mr. Cottis stated –

> "Under Clause 16 of the Agreement for Sale you will note that completion of this transaction is conditional upon certain confirmatory evidence being produced. To date the same has not been provided."

(66) Counsel for the Plaintiff did not respond to Mr. Cottis about his query. This query remains unsatisfied.

(67) As the Agreement for Sale was conditional upon the Vendor formally withdrawing his application to Lands & Surveys for the grant of Crown Land adjoining the said hereditaments and no evidence was produced pursuant to Clause 16 of the Agreement for Sale the Plaintiff was in breach of the Agreement for Sale.

Was the Plaintiff entitled to rescind and cancel the Agreement and forfeit the deposit

(68) Clause 10 of the Agreement for Sale provide for rescinding of the Agreement by the Vendor (Plaintiff). Clause 10 provides –

> "10. If the Vendor shall deduce such title to the said hereditaments as is provided for in this Agreement in accordance with the provisions hereof and shall be ready able and willing in accordance with such provisions to deliver the assurance hereinafter provided for and the Purchaser nevertheless fails to complete the purchase and pay the balance of the purchase price then and in that case the deposit shall (at the option of the Vendor but without prejudice to any of the Vendor's alternative remedies by way of damages specific performance or otherwise) be forfeited to the Vendor in complete liquidation of all damages caused by such failure whereupon this Agreement shall be canceled without further or other liability by either party to the other save the Purchaser shall return or cause to be returned to the Vendor or his Attorneys all documents of title and such other information as shall have been produced to the Purchaser or his Attorneys as hereinbefore provided."

(69) The Plaintiff by letter dated 7 April 2008 gave the First Defendant Notice to Complete the purchase within 7 days of 7 April 2008, failing which they were instructed to forfeit the deposit pursuant to Clause 10 of the Agreement for Sale.

(70) As the First Defendant did not complete within the required time. Counsel for the Plaintiff wrote to Mr. Kevin Cross of the Second Defendant on 15 April 2008 as follows –

> "Please be advised that the Purchaser by letter dated 7th instant, was put on Notice to complete the captioned sale within Seven (7) days of the date thereof, or have the deposit forfeited, pursuant to paragraph 14 of the Agreement for Sale dated the 22nd May, 2007.
>
> To date we have not received the balance of the funds and as per the conditions set out in the aforementioned paragraph, you are entitled to one half of the deposit with the remaining half payable to ourselves as Attorneys for the Vendor.
>
> We look forward to receiving the cheque in due course."

(71) By letter dated 15 April 2008 Mr. Cottis wrote to counsel for the Plaintiff and advised inter alia that they had "placed Bahamas Realty on notice that we do not consider the same to be forfeited accordingly no compliance should be afforded."

(72) In that same correspondence Mr. Cottis advised counsel for the Plaintiff that they were placing the Agreement for Sale on record at the Registry of Records to put third parties on notice as to the transaction.

(73) The court has to consider whether the Plaintiff was justified in sending the Notice to Complete and cancelling the Agreement. In a letter from counsel for the Plaintiff to Mr. Cottis dated 17 April 2008 counsel for the Plaintiff stated –

> "With regard to your insistence for our client to obtain a Certificate of title which in our view is not warranted, we consider the Agreement for Sale cancelled. The Agreement does not require our client to obtain such a certificate and hence your attempt at making the sale conditional thereon is a unilateral change therein we have not accepted."
>
> It is our position that our client has produced a good and marketable title to the property and as such is entitled to forfeit the deposit herewith."

(74) This was disputed by the First Defendant who submitted that the Plaintiff did not produce a good and marketable title. The court holds that the Plaintiff had not produced

a good and marketable title and therefore the Plaintiff was not entitled to rescind the agreement and retain the deposit made in this matter.

Was the Defendant entitled to rescind the Agreement

(75) Clause 11 of the Agreement for Sale provides –

> "11. If the Vendor shall fail to deduce such title to the said hereditaments as is provided for in this Agreement in accordance with the provisions hereof or shall fail to deliver the assurance hereinafter provided for then the Purchaser together with all interest earned thereon (if any) may (but without prejudice if the Purchaser so elects to any of the Purchaser's alternative remedies by way of damages specific performance or otherwise) require that the said deposit shall be returned to the Purchaser whereupon this Agreement shall be canceled without further or other said deposit shall be returned to the Purchaser whereupon this Agreement shall be canceled without further or other liability by either party to the other save the Purchaser shall return or cause to be returned to the Vendor or his attorneys all documents of title and such other information as shall have been produced to the Purchaser or his Attorneys as hereinbefore provided."

(76) In **Re Stone and Saville's Contract [1963] 1 WLR 163**, where requisitions by the purchaser remained unanswered, Buckley J. held that the contract had been effectively rescinded and that the purchaser was entitled to repayment of her deposit.

(77) It was held in that case that –

> **(1) that on the true construction of the correspondence, the contract between the parties was at an end and it could only be revived by a new contract which in fact had not been made and, accordingly, that if nothing else had been done, the purchaser was entitled to the return of her deposit.**
>
> **(2) That the purchaser had not debarred herself by taking out her summons in ordinary form from contending that the contract was at an end. She had not thereby elected to affirm the contract and she was entitled to the return of her deposit.**

(78) In **Pyrke v Waddingham [1852] 10 Hare 1** it was held that the court will not force any purchaser to accept property which contains doubtful title in a land transaction.

(79) The case went on to state –

> **"The rule rests upon this, that every purchaser is entitled to require a marketable title, by which I understand to be meant a title which, so far as its antecedents are concerned, may at all times and in all circumstances be forced on an unwilling purchaser ... and that this is the true rule to be applied in such cases is I think the more apparent from the repeated decisions that the Court will not compel a purchaser to take a title which will expose him to litigation or hazard."**

(80) Mr. Cottis, in correspondence to counsel for the Plaintiff invited the Plaintiff to resolve the issues with respect to title by making application for a Certificate of Title under the Quieting Titles Act. In this regard counsel for the Plaintiff proposed two methods of confirming that the Plaintiff was the heir at law of Smart Forbes. See letter dated 12 March 2008 from Elliott Lockhart to Mr. Cottis referred to in paragraph 10 above.

(81) Subsequently counsel for the Plaintiff maintained that they had produced a good root and title and gave the Defendant Notice to Complete.

(82) The Plaintiff in making application for a Certificate of Title would have been making the necessary steps to abide by the terms of Clause 6 of the Agreement for Sale, which was to produce a good and marketable title for the purchaser.

(83) In **Flexman v Corbett [1930] 1 CH. 672** Maugham J said –

> **"No intention to waive will be inferred where the purchaser continues to insist upon his objections or acts without prejudice to his right to acquire a good title."**

(84) There is sufficient evidence before the Court to show that the First Defendant on several occasions sought to bring to the attention of the Plaintiff and his counsel the need for certain requisitions to be furnished in order for the transaction to be completed, failure to do would lead to a repudiation of the contract as the requests were all in an attempt for the First Defendant to obtain good and marketable title free of the possibility of doubt and hazard.

(85) In **Tanap Investments (UK) Limited v Tozer and Others** Mummery J stated –

> **"It is common ground between parties that the defendants as vendors were under an obligation to deliver an epitome of all documents forming part of the title to the property.."**

(86) The vendor is under a duty to present to the purchaser an abstract of title that gives full clarity to the history and removes any doubt regarding the title of the property.

(87) In **Oakden v Pike (1865) 34 LJ CH 620** Kindersley VC said this in describing the ideal abstract a vendor should produce:

> **"a document which contains with sufficient clearness and sufficient fullness the effect of every instrument which constitutes part of the vendor's title."**

(88) **Halsbury's Laws of England**, Vol. 34 4th Edition at paragraph 11 states regarding abstract:

> **"An abstract of title is a summary of the documents by which any dispositions of the property have been made during the period for which title has to be shown, and of all the facts, such as births, marriages, deaths or other matters affecting the devolution of the title during the same period."**

(89) In **Chillingworth v Esche [1989] 14 AC.429** Sir Ernest Pollock MR stated the following regarding the deposit in land and property transactions:

> **"In all the circumstances of this case I think the deposit is recoverable by the purchasers. There was no provision made in the documents in which could justify the vendor in declining to return it. Though if he had by appropriate words made provision for that in the documents such a provision could have been upheld."**

(90) The court holds that as the Plaintiff did not produce a good and marketable title to the property the First Defendant was entitled to rescind the Agreement for Sale and keep the deposit.

Was there misrepresentation with respect to the description of the property

(91) The First Defendant had a survey of the property conducted by Patrick Joseph licensed Land Surveyor. An Affidavit by Patrick Joseph was filed on 23 May 2012. In the Affidavit Mr. Joseph stated inter alia -

> "4. "The root of titles provided by the Plaintiff is a Crown Grant dated the 8th June, 1833 ("the Crown Grant") from page 133 of Crown Grant Book "C" from the Lands and Surveys Department granting 20 acres of property in Big Farmers Cay to Mr. Smart Forbes, a copy of which I attach hereto and mark "PJ-2". I have researched the Crown Grant and compared it to the survey plan prepared by Ben Ferguson dated April, 2008 which I attach hereto and mark "PJ-3".
>
> 5. Mr. Ferguson's plan does not reflect the true meets and bounds of the Crown Grant as intended by the Crown's Surveyor, Mr. J.B. Burnside, during June, 1833. – August, 1871 surveys at the southern tip of Big Farmers Cay. Mr. Burnside listed the bearing and distance between the Crown Grant to John Smith (C-144) and Smart Forbes (C-133) as S 70 E- 20 cs. (See PJ-2). S 70 E is a quandrantal bearing with is used in certain countries. In The Bahamas we use whole circle bearings and when converted S 70 E amounts to N110 degrees. 20 cs means 20 chains. 1 chain is 66 feet, so 20 chains amounts to a distance of 1,320 feet. Accordingly, the northern boundary measurement should amount to N 110 degrees 00 minutes 00 seconds with a distance of 1,320 feet.
>
> 6. Mr. Ferguson listed the bearing and distance between the said Grants as N 103 degrees 14 minutes 20 seconds with a distance of 1084.54 feet (see PJ-2). The difference of the two meets and bounds is (bearing) N 06 degrees 45 minutes 40 seconds and (distance)235.46 feet. This difference also affects the adjoining

Crown Grant to John Smith. I produced plans showing the discrepancy between the survey of Mr. Benjamin Ferguson and the Crown Grant when hold both the western and eastern alignment respectively, which I attach hereto at "PJ-4".

7. I can say with certainty that the survey plan of Mr. Benjamin Ferguson dated April, 2008 showing the Crown Grant is incorrect, as evidenced by the difference in the meets and bounds, distance and bearings. I was advised by Mr. Gladestone Ferguson, who heads the mapping section at the Department of Lands and Surveys, that a re-survey of the said Crown Grant will be executed under the guidance of the Surveyor General.

(92) This evidence given by Mr. Joseph alleged that the survey of Mr. Ferguson represented a material misdescription of the property at Farmer's Cay, the subject of the agreement and contract between the Plaintiff and the First Defendant.

(93) At the hearing, Mr. Joseph was extensively cross examined on his Affidavit and his survey plan and the plan prepared by Benjamin Ferguson.

(94) Mr. Joseph in his evidence stating that Mr. Ferguson used quandrantal bearings to measure the property rather than whole circle bearings; the latter he testified to be the custom use in The Bahamas since the passing of the Land Surveyor Act and the Land Surveyor Regulations in 1975.

(95) In response to questions by the court on this measurement discrepancy Mr. Joseph testified as follows –

"The Court: **Now you have said, I think it is in your witness statement in your paragraph five.**

The witness: **Yes.**

The Court: **You said that Burnside this was the person who prepared the Crown Grant.**

The Witness: **Yes.**

The Court: **You listed the bearing distance between the Crown Grant to John Smith and Smart Forbes as South 70 East 20 chains.**

The Witness: **Yes.**

The Court: **South 70 East is a quadrantal bearing which is used in certain countries. It was used in The Bahamas.**

The Witness: **Right. Yes, years ago.**

The Court: **So what is the difference between the quandrantal bearing and the whole circle bearing.**

The Witness: **when you said northeast you are in the -- If you look at the quadrant they are divided into four. So northeast you will start from zero in the middle where the two lines intersect the northeast line and the northwest line and you will go that way. That is the northeast. If you are in the southeast section your bearing is measured from the middle going southeast this way. If you are in the third quadrant the bearing measuring from the middle going this way is the southwest quadrant. If your going in the fourth quadrant your bearing is the northwestern quadrant. That is how it is now. They made it simpler now. Everything is based from going from the north 10, 20, 30, 40, 50, 60, 70 and you right back to zero which makes it easier for everyone.**

The Court: **When did this change take place?**

The Witness: **This change came about in the early 70's when they had the Land and Surveyors Act or even earlier than that. They enforced whole circle bearing.**

The Court: **So that is part of the Act?**

The Witness: **Yes, that is part of the Act."**

(96) The Court continued with its questioning :

The Court : **Mr. Joseph. So you are saying the conversion is wrong?**

The Witness: **Yes.**

The Court: **So his conversion is wrong on the?**

The Witness: **On the Northern Line.**

The Court: **Is that only where the conversion is wrong?**

The Witness: **That is the main problem between the two grants. The sea, if you look at the seaside, right, Burnside probably the area was so rugged he never mentioned the distance that is why he quoted south 45 east and dead south. I can only suggest or believe that the coastline was so rugged he couldn't measure it.**

The Court: **But that's just your –**

The Witness: **Opinion.**

The Court: **I can't accept that. What is your authority that you tell me that. You have not seen the land so how you know the coastline is rugged?**

The Witness: **The Crown Grant plan shows the line are wiggly. That suggests the lines are rugged. I also looked at Google Map.**
...

The Court: **Mr. Joseph, according to the Land and Surveyors Act, "All surveys made under this Act shall be based for bearing and co-ordinate position on the Universal Transverse Mercator Projection to conform with the trigonometrical and traverse control points laid down by the Directorate of Overseas Surveys and the Surveyor General to supply the co-ordinate position."**
Is that what you are talking about when you tell me that you go from whole circle?

The Witness: **That is it.**

The Court: **Chapter 251. These are the Land and Surveyor Regulations and it is Regulation 7**
And just to confirm, Mr. Joseph, that prior to those regulations the method that Mr. Burnside used was the accepted practice then?

The Witness: **Yes.**

The Court : **So everything changed with the regulation?**

The Witness: **Yes.**

(97) Mr. Joseph alleged that there was a misdescription in the property being sold to the First Defendant by the Plaintiff.

(98) In **Lee v Rayson[1917] 1 Ch 613** Eve J said:

> **"I take that to mean that what the Court has to do in such a case as I have here to deal with is to decide whether the purchaser is getting substantially that which he bargained for, or whether the vendor is seeking to put him off with something which he never bargained for, and in arriving at a conclusion on this question the Court is bound to consider every incident by which the property offered to be assured can be differentiated from that contracted for. If the sum of these incidents really alters the subject-matter, then the purchaser can repudiate the contract; if, on the other hand, the subject-matter remains unaffected,**

> **or so little affected as to be substantially that which was agreed to be sold, then the purchaser must be held to his contract".**

(99) Counsel for the First Defendant submitted that such a change in the description of the property is a material misrepresentation and amounts to a misdescription of the property and as such can lead to a repudiation of the contract.

(100) In **Flight v Booth (1834) 131 ER 1160** it was held: -

> **"In this state of discrepancy between the decided cases, we think it is, at all events, a safe rule to adopt, that where the misdecription, although not proceeding from fraud, is in a material and substantial point, so far affecting the subject matter of the contract that it may reasonably be supposed, that, but for such misdescription, the purchaser might never have entered into the contract at all, in such case the contract is avoided altogether and the purchaser is not bound to resort to the clause of compensation. Under such a state of facts, the purchaser may be considered as not having purchased the thing which was really the subject of the sale; as in *Jones v Edney*, where the subject matter of the sale was described to be "a free public house" while the lease contained a brewery; in which case the misdescription was held to be fatal."**

(101) From the evidence before the court, it is clear that the Plaintiff's actions in providing a misdescription of the property would have led to a repudiation of the contract between the parties.

(102) In response to a question from the court Mr. Joseph indicated that in preparing his survey he relied on the Crown Grant. He did not actually conduct a survey by visiting the property and putting down survey markers. The survey by, Mr. Ferguson showed that he conducted a survey and put down survey markers.

(103) The court is not willing to accept the survey of Mr. Joseph over the survey of Mr. Benjamin Forbes. Without other evidence the court makes no finding on the alleged misrepresentation of the description of the property.

Conclusion

(104) As the Plaintiff makes application for declaration it is declared that –

1. The Plaintiff has not adduced a good and marketable title free from encumbrances to the property the subject of the Agreement for Sale.

2. The Plaintiff is not entitled to one half ½ of the deposit paid by the First Defendant pursuant to the agreement.

3. There is no order for the Second Defendant, or stakeholder to pay to the Plaintiff and/or his attorneys, the sum of $62,500.00.

4. The Originating Summons is dismissed with costs to the Defendants to be taxed if not agreed.

Dated this 15th day of March 2016

Rhonda P. Bain
Justice