

**COMMONWEALTH OF THE BAHAMAS  
IN THE SUPREME COURT  
COMMON LAW & EQUITY SIDE**

**2013/CLE/GEN/01915**

**BETWEEN:**

**COLINA INSURANCE LIMITED**

**PLAINTIFF**

**AND**

**LION MANAGEMENT COMPANY LIMITED**

**FIRST DEFENDANT**

**AND**

**THE BAHAMAS MORTGAGE CORPORATION**

**SECOND DEFENDANT**

**AND**

**CALEB DORSETT AND SHAMENE BAIN**

**THIRD PARTY**

**AND**

**TROY KELLMAN**

**FOURTH PARTY**

**AND**

**HANNA KELLMAN & CO. (A FIRM)**

**FIFTH PARTY**

**Before: The Honourable Mr. Justice Keith H. Thompson**

**Appearances: Messrs: Terry North and Ashley Williams of Alexiou, Knowles & Co. of Counsel for the Plaintiff;**

**Ms. Shirl Deveaux (Bahamas Mortgage Corp.) of Counsel for the Defendant.**

**Hearing dates:** 08<sup>th</sup> November, 2018  
14<sup>th</sup> May, 2019  
20<sup>th</sup> February, 2020  
20<sup>th</sup> July, 2020  
27<sup>th</sup> July, 2020

## **RULING**

- [1] This matter was commenced by a Specially Indorsed Writ of Summons, filed December 9<sup>th</sup>, 2013.
- [2] A re-amended Summons was filed on December 9<sup>th</sup>, 2015 by Bahamas Mortgage Corporation ("The Intervener"), which subsequently became the Second Defendant, and an order dated December 10<sup>th</sup>, 2015 was granted by Mr. Justice Ian Winder in the following terms:

**"IT IS ORDERED THAT:**

- (1) Leave is granted to the Intervener to be joined as a Defendant herein.
- (2) Leave is granted to the Intervener to file a Defence and Counterclaim herein and;
- (3) Paragraph 3 of the Order of this Court granted on 16<sup>th</sup> December, A.D., 2014 is hereby set aside, wherein it was adjudged and declared;

***"That the conveyance dated the 18<sup>th</sup> July, 2012 between the Plaintiff and Defendant and lodged for record in the Registry of Records of the Commonwealth of The Bahamas on the 20<sup>th</sup> March, 2013 and recorded in Volume 11814 at pages 333 to 340 as set aside."***

[3] By Summons filed April 07<sup>th</sup>, 2017, the Plaintiff made application to amend its Statement of Claim, obtaining an Order filed May 10<sup>th</sup>, 2017 in the following terms.

**“IT IS ORDERED THAT:**

- 1. The Plaintiff be at liberty to amend its Statement of Claim in the manner shown in ‘red’ on the draft Amended Statement of Claim annexed to the Plaintiff’s Summons filed herein on the 7<sup>th</sup> April,, 2017.**
- 2. The Second Defendant shall be at liberty to file and serve an Amended Defence and Counterclaim within fourteen (14) days after service of the Amended Statement of Claim, if required.**
- 3. The matter is hereby adjourned until Thursday, the 27<sup>th</sup> April 2017, at 2:00 p.m.”**

[4] This resulted in a “Third”, “Fourth” and “Fifth” party being joined to the action as follows:

**CALEB DORSETT AND SHAMENE BAIN**

**Third Parties**

**AND**

**TROY KELLMAN**

**Fourth Party**

**AND**

**HANNA KELLMAN & CO.**

**(A Firm)**

**Fifth Party**

[5] The Amended Statement of Claim provides;

COMMONWEALTH OF THE BAHAMAS

2013

IN THE SUPREME COURT

CLE/gen/01975

Common Law & Equity Division

B E T W E E N

**COLINA INSURANCE LIMITED**

Plaintiff

**AND**

**LION MANAGEMENT COMPANY LIMITED**

First Defendant

**AND**

**THE BAHAMAS MORTGAGE CORPORATION**

Second Defendant

**AND**

**CALEB DORSETT AND SHAMENE BAIN**

Third Parties

**AND**

**TROY KELLMAN**

Fourth Party

**AND**

**HANNA KELLMAN & CO.**

(a Firm)

Fifth Party

**AMENDED STATEMENT OF CLAIM**

1. The Plaintiff is a company incorporated under the laws of the Commonwealth of The Bahamas and carrying on business within the said Commonwealth at No. 308, Bay Street in the Island of New Providence and at several other branches in the said Commonwealth.
2. The First Defendant is another company incorporated under the laws of the said Commonwealth and carrying on business therein and

having its Registered Office at Hanna, Kellman & Associates, 3<sup>rd</sup> Floor, Columbus House, East & Shirley Streets, Nassau, Bahamas.

3. The shares of the First Defendant are beneficially owned by Rudolph Rolle.
4. The Second Defendant is a body corporate established by virtue of section 3 of The Bahamas Mortgage Corporation Act, Chapter 254 of the Statute Laws of the Commonwealth of the Bahamas. The Second Defendant's principal place of business is Russell Road, Nassau, New Providence, Bahamas. -By a Contract in writing made on or about the 6th February 2012, the Plaintiff agreed to sell to an entity known as Lion's Holdings Company Limited ALL THAT parcel of land being Lot No. 6 in Block No. 2 in the Estella Anne Tract situate in the Western District of the Island of New Providence ("the Property) for the price of \$175,000.00; the sale to be completed and purchase money paid to the Plaintiff sixty (60) days from the date of the Agreement. A deposit of \$10,000.00 (the deposit) was paid to the Plaintiff in accordance with the terms of the Agreement.
5. The Third Parties obtained a loan from the Second Defendant to purchase ALL THAT parcel of land being Lot No. 6 in Block No. 2 in the Estella Anne Tract situate in the Western District of the Island of New Providence ("the Property). A Mortgage dated the 14<sup>th</sup> July 2013 securing that loan was executed by the Third Parties over the said lot in favour of the Second Defendant. The same remains unstamped and unrecorded. -By an email sent to the Plaintiff on the 13<sup>th</sup> July 2012 by Troy Kellman ("Fourth Party"), the attorney acting for the Plaintiff and Lion's Holdings Company Limited, Fourth Party requested and the Plaintiff consented that the First Defendant be replaced as the Purchaser in lieu of Lion's Holdings Company Limited. A Conveyance of the property dated the 18<sup>th</sup> July 2012 was executed by the Plaintiff in favour of the First Defendant and delivered to Fourth Party in anticipation that the transaction would close shortly thereafter.
6. The Fourth Party is a Counsel and Attorney -at- law in the employ of the Fifth Party. Collectively, the Fourth and Fifth Parties on different

occasions acted on or on behalf of the Plaintiff, the First and Second Defendants, and the Third Parties in separate transactions involving the Property. As a result of the gross and unreasonable delay by the First Defendant in performing the Contract on its part after the completion date, the Plaintiff, by its attorneys, Alexiou, Knowles & Co., gave the First Defendant Notice in writing dated the 5th November 2013 requiring it to complete the said purchase and pay the balance of the purchase price to the Plaintiff within twenty one (21) days from the date of the Notice.

#### THE FIRST TRANSACTION

7. By a Contract in writing made on or about the 6<sup>th</sup> February 2012, the Plaintiff agreed to sell to an entity known as Lion's Holdings Company Limited ALL THAT parcel of land being Lot No. 6 in Block No. 2 in the Estella Anne Tract situate in the Western District of the Island of New Providence ("the Property) for the price of \$175,000.00; the sale to be completed and purchase money paid to the Plaintiff sixty (60) days from the date of the Agreement. A deposit of \$10,000.00 ("the deposit") was paid to the Plaintiff in accordance with the terms of the Agreement. The Notice expired on the 27th day of November 2013 by which date the First Defendant failed to complete the said purchase or pay the said purchase price to the Plaintiff.
8. By an email sent to the Plaintiff on the 13<sup>th</sup> July 2012 the Fourth Party, the attorney acting for the Plaintiff and Lion's Holdings Company Limited in the transaction, the Plaintiff requested that the First Defendant be replaced as the Purchaser in lieu of Lion's Holdings Company Limited. The Plaintiff consented to this request and a Conveyance of the property dated the 18<sup>th</sup> July 2012 ("the Conveyance") was subsequently executed by the Plaintiff in favour of the First Defendant and delivered to Fourth Party in anticipation that the transaction would close shortly thereafter. Accordingly, the Plaintiff became entitled to treat the First Defendant's failure to complete as repudiation of the Contract and by letter dated the 2nd November 2013 addressed to Fourth Party by the Plaintiff's attorneys,

~~Fourth Party was advised that the Plaintiff was treating the Agreement as cancelled and the deposit forfeited.~~

9. ~~As a result of the gross and unreasonable delay by the First Defendant in performing the Contract on its part after the completion date had passed, the Plaintiff, by its then attorneys, Alcxiou, Knowles & Co., (who had replaced the Fourth Party) gave the First Defendant Notice in writing dated the 5<sup>th</sup> November 2013 requiring it to complete the said purchase and pay the balance of the purchase price to the Plaintiff within twenty-one (21) days from the date of the Notice making time of the essence. In the premises, the Plaintiff is discharged from further performance of the Contract and is entitled to retain the deposit for its own use and benefit.~~
10. ~~The Notice expired on the 27<sup>th</sup> day of November 2013 by which date the First Defendant failed to complete the said purchase or pay the said purchase price to the Plaintiff. The Conveyance between the Plaintiff and Defendant dated the 18<sup>th</sup> July 2012 had been lodged for record in the Registry of Records on the 20<sup>th</sup> March 2013 by Fourth Party and was recorded in Volume 11814 at pages 333 to 340. Fourth Party concealed from the Plaintiff that he recorded the Conveyance.~~
11. ~~Accordingly, the Plaintiff treated the First Defendant's failure to complete as a repudiation of the Contract and by letter dated the 2<sup>nd</sup> December 2013 addressed to Fourth Party by the Plaintiff's attorneys, the Fourth Party was advised that the Plaintiff was treating the Agreement as cancelled and the deposit forfeited. By virtue of the Conveyance and the recording thereof, the Defendant ostensibly became and is shown as the fee simple owner of the property notwithstanding that the balance of the purchase proceeds were never paid to the Plaintiff.~~
12. ~~In the premises, the Plaintiff avers that it was discharged from further performance of the Contract and was entitled to retain the deposit for its own use and benefit.~~
13. ~~The Plaintiff subsequently conducted a search at the Registry of Records of the Commonwealth of the Bahamas and discovered that the~~

Conveyance had been lodged for record in the Registry of Records on the 20<sup>th</sup> March 2013 by the Fourth Party and was recorded in Volume 11814 at pages 333 to 340. The Fourth Party concealed from the Plaintiff and its attorneys that he had recorded the Conveyance.

14. By virtue of the Conveyance and the recording thereof, the First Defendant ostensibly became and is shown as the fee simple owner of the property notwithstanding that the balance of the purchase proceeds were never paid to the Plaintiff.
15. The Plaintiff before discovering that the Conveyance had been recorded had demanded the Fourth Party to return all of its original documents relating to the subject property. Due to the Fourth Party's failure or refusal to do so, the Plaintiff commenced action CLE/gen/01780 of 2013 ('Action 1780/13') on the 1<sup>st</sup> November 2013 against the Fourth Party for the recovery of the same. Judgment in Default of Appearance was entered against the Fourth Party for the delivery up to the Plaintiff of its original documents. To date the Fourth Party has failed to deliver the said original documents to the Plaintiff.
16. After entering the said Judgment against the Fourth Party in Action 1780/13, for the return of its original documents the Plaintiff instructed its attorneys, Messrs. Alexiou, Knowles & Co. ('AKC') to conduct a search at the Registry of Records of the aforesaid Commonwealth. In doing so, it was then discovered that the Conveyance had been recorded in the said Registry of Records and the Plaintiff instructed AKC to commence this Action to inter alia have the same.

#### THE SECOND TRANSACTION

17. On the 13<sup>th</sup> March 2013, the Second Defendant instructed the Fourth and Fifth Parties to investigate the title of the Third Parties and the First Defendant to the Property and to prepare a Mortgage over the same as security for a loan being extended by the Second Defendant to the Third Parties to purchase the same.
18. the Fourth and Fifth Parties delivered to the Second Defendant a Conveyance dated the 14<sup>th</sup> March 2013 made between the First



Defendant and the Third Parties. The Fourth and Fifth Parties acted for both parties. The Fourth and Fifth Parties additionally delivered to the Second Defendant a Mortgage dated the 14<sup>th</sup> March 2013 made between the Third Parties and the Second Defendant. The Fourth and Fifth Parties also delivered the Plaintiff's original title deeds including the Conveyance to the Second Defendant.

19. The Plaintiff avers that both the First and Second Transactions were fraudulently orchestrated and conducted by the fourth and Fifth Defendants as they knew or ought to have known that their actions and conduct amounted to fraud based on the matters.

#### **PARTICULARS OF FRAUD**

- (i) By delivery of the Conveyance knowing that no valuable consideration flowed from the First Defendant to the Plaintiff.
- (ii) Knowing that the implied escrow terms for the delivery of the Conveyance being in possession of the First Defendant and Fourth and Fifth Parties were not satisfied.
- (iii) Knowing that the First Defendant did not pay the agreed purchase price to the Plaintiff pursuant to the Agreement for Sale.
- (iv) Knowing that the First Defendant and Third Parties were not bona fide purchasers for value of the said property.
- (v) Knowing that the First Defendant failed to act in accordance with the Notice to Complete issued on the 16<sup>th</sup> July 2013.
- (vi) Wrongful retention and parting with possession of the Conveyance and the Plaintiff's other title deeds in circumstances where the Fourth and Fifth Parties knew that the sale was aborted by the failure of the First Defendant to pay the agreed purchase price.
- (vii) Knowingly and fraudulently having the Conveyance stamped and recorded without the valuable consideration being paid to the Plaintiff.

- (viii) Knowingly failed to pay the sum of \$175,000.00 to the Plaintiff and retaining the Conveyance with the intent to record the same and the Plaintiff's other title deeds.
21. In the prevailing circumstances, the Conveyance is null and void ab initio and of no legal effect.
1. The Fourth Party acted in breach of the implied escrow terms of the delivery of the Conveyance to him by allowing, assisting and encouraging the First Defendant to sign and execute the Conveyance dated the 13<sup>th</sup> March 2013 in circumstances where it knew or ought to know that the First Defendant had not paid the Plaintiff the purchase price pursuant to the terms of the Agreement for Sale and had not satisfied the implied escrow terms.
22. The Fourth Party by allowing and facilitating the Conveyance be signed by the First Defendant and Third Parties must have known that the same would purport to convey title to the Third Parties in circumstances where the purchase price was not paid to the Plaintiff or its attorneys.
23. In the prevailing circumstances, the Fourth Party acted in breach of his duty as an attorney and also breached the terms of the implied escrow delivery of the Conveyance to him and the terms of the Notice to Complete.
24. Occasioned by the aforesaid breaches of the First Defendant and the Fourth Party, the Plaintiff has suffered loss and damage.

**PARTICULARS OF LOSS**

- (i) The sum of \$175,000.00.
- (ii) Alternatively, the market value of the property as at the date hereof.
- (iii) Legal fees and expenses seeking return of its title deeds.
- (iv) Loss of opportunity to sell the property.
25. In the premises, the purported Conveyance dated the 14<sup>th</sup> March 2013 purportedly made between the First Defendant and the Third Parties and the Mortgage also dated the 14<sup>th</sup> March 2013 made between the

Third Parties and the Second Defendant are void insofar as the First Defendant had no title and interest to convey to the Third Parties at the material time and the Third Parties are not purchasers for value without notice.

**AND THE PLAINTIFF CLAIMS:**

As against the First Defendant:

- (1) A Declaration that it is discharged from further performance of the said Contract.
- (2) A Declaration that it is entitled to retain the deposit for its own use and benefit.
- (3) A Declaration that the Conveyance dated the 18<sup>th</sup> July 2012 is void and be set aside.
- (4) Damages. ~~Further and other relief.~~
- (5) Further and other relief ~~Costs.~~
- (6) Costs.

**AND THE PLAINTIFF CLAIMS against the First and Second Defendants, the Third Parties and the Fourth and Fifth Parties:**

- (1) An Injunction to prevent the Defendants and Parties and each of them, their servants and agents, from in any way or manner dealing with, selling, encumbering, mortgaging, charging, entering, contracting and trespassing on the property.
- (2) An Injunction to compel the Defendants and Parties their servants or agents, to immediately deliver to the Plaintiff and or its attorneys, Alexiou, Knowles & Co., all original title deeds relating to the Property or any copies of original title deeds in their possession until further order or determination by the Court.
- (3) A Declaration that the Conveyance made between the Plaintiff and the First Defendant is null and void and be set aside.
- (4) A Declaration that the Conveyance dated the 14<sup>th</sup> July 2013 made between the First Defendant and the Third Parties is null and void and the same be set aside.

- (5) A Declaration that the Mortgage dated the 14<sup>th</sup> July 2013 made between the Third Parties and the Second Defendant is null and void and the same be set aside.
  - (6) Further and other relief.
  - (7) Costs.
- 

[6] The Writ of Summons which was filed December 09<sup>th</sup>, 2013 was served on Hanna, Kellman & Associates, 3<sup>rd</sup> Floor Columbus House, Shirley Street on the Defendant,

Lion Management Company Limited on the 17<sup>th</sup> December, 2013 and Indorsed on 20<sup>th</sup> June, 2014 by Reservist Corporal 15 Stan Davis.

[7] No Defence has been filed by Lion Management Company Limited in this action.

[8] The Plaintiff obtained an Order dated 16<sup>th</sup> December, 2014 and filed January 28<sup>th</sup>, 2015 in the following terms:

- “1. That the Plaintiff is discharged from further performance of the contract between itself and the Defendant.**
- 2. The Plaintiff is entitled to retain the deposit of \$10,000.00 for its use and benefit.**
- 3. That the Conveyance dated 18<sup>th</sup> July 2012 made between the Plaintiff and Defendant and lodged for record in the Registry of Records of the Commonwealth of The Bahamas on 20<sup>th</sup> March, 2013 and recorded in Volume 11814 at pages 333 to 340 is set aside.**
- 4. That the Defendant do pay to the Plaintiff the costs of this application and the action to be taxed if not agreed.”**

[9] On August 28<sup>th</sup>, 2015 a Summons was filed by The Bahamas Mortgage Corporation (“BMC”) for the hearing of certain applications.

[10] On September 16<sup>th</sup>, 2015 an Amended Summons was filed by “BMC” for the hearing of the following application and declaration:

- “1. An application made by The Bahamas Mortgage Corporation (“BMC”) under Order 15 Rule 4 and Rule 6 (2)(b) of the Rules of the Supreme Court CH 53 and/or under the inherent jurisdiction of the Court that BMC be added/joined as a party to this action, on the grounds that:
  - (i) BMC ought to have been joined as a party by the Plaintiff; and**
  - (ii) There exists an issue which arises out of the Order of Mr. Justice Ian Winder dated the 16<sup>th</sup> day of December, 2014.****
- 2. An application pursuant to Order 32(6) of the Rules of the Supreme Court and/or under the inherent jurisdiction of the Court that the said Order dated the 16<sup>th</sup> day of December, 2014 be set aside on the same grounds as set out in paragraph 1 above. More specifically, that BMC is presently holding a mortgage over the property which is the subject of the said Order.**
- 3. A Declaration that the Mortgage dated the 14<sup>th</sup> March, 2013 from Caleb A. Corsett and Sharmene Bain to BMC be deemed valid.**
- 4. Any further or other relief this Honourable Court deems equitable and just.**
- 5. Costs.”**

[11] On December 09<sup>th</sup>, 2015 a Re-Amended Summons was filed by “BMC”. This Amended Summons sought the following:

- “1. Leave to be joined as a Defendant in this action.**
- 2. Leave for CALEB A. DORSETT and SHARMENE BAIN to be joined as Defendants in this action.**
- 3. An Order that the judgement entered in Default of Defence on the 16<sup>th</sup> December, 2014 by this Honourable Court be set aside on the ground that there is a serious issue to be tried and BMC has a good and arguable Defence to this action and that BMC be at liberty to defend the action by filing a Defence and Counter-Claim herein.**
- 4. Any further or other relief this Honourable Court deems equitable and just.**
- 5. Costs.”**

[12] “BMC” obtained an Order dated 10<sup>th</sup> December, 2015 and filed the same on February 16<sup>th</sup>, 2016. This Order provides;

- “1. Leave is granted to the Intervener to be joined as a Defendant herein.**
- 2. Leave is granted to the Intervener to file a Defence and Counter-Claim herein.**
- 3. Paragraph 3 of the Order of this Court granted on the 16<sup>th</sup> December A.D., 2014 is hereby set aside, wherein it was declared;**

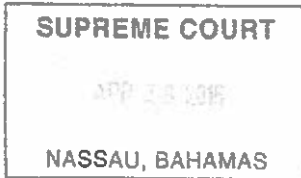
***“That the Conveyance dated the 18<sup>th</sup> July, 2012 between the Plaintiff and Defendant and lodged for record in the Registry of Records of the Commonwealth of The Bahamas on the 20<sup>th</sup> March, 2013 and recorded in Volume 11814 at pages 333 to 340 is set aside.”***

[13] The Second Defendant filed a Defence on the 29<sup>th</sup> April, 2016 which provides:



2<sup>nd</sup> Defendant joined by Order of Mr. Justice Ian Winder dated 10<sup>th</sup> December, A.D., 2015.

COMMONWEALTH OF THE BAHAMAS  
IN THE SUPREME COURT  
COMMON LAW & EQUITY DIVISION  
BETWEEN



2013  
No.: 01975

COLINA INSURANCE LIMITED  
Plaintiff

AND

LION MANAGEMENT COMPANY LIMITED  
First Defendant

AND

THE BAHAMAS MORTGAGE CORPORATION  
Second Defendant

**DEFENCE**  
**OF THE SECOND DEFENDANT**

1. The Second Defendant is a body corporate established by virtue of section 3 of The Bahamas Mortgage Corporation ACT CH. 254 of the Statute Laws of the Commonwealth of The Bahamas. It has its place of business at Russell Road in Nassau, New Providence, The Bahamas.
2. The Second Defendant admits paragraph 1 and 2 of the Plaintiff's Statement of Claim.
3. The Second Defendant neither admits nor denies paragraphs 3 and 4 of the Plaintiff's Statement of Claim.
4. Save that the Second Defendant admits that the Conveyance of the property dated the 18<sup>th</sup> July, 2012 was executed by the Plaintiff in favour of the Defendant and delivered to Mr. Kellman, paragraph 5 is neither admitted nor denied.
5. By letter dated the 16<sup>th</sup> July, 2013 Attorneys Alexiou, Knowles & Co., acting for the Plaintiff, acknowledged that Attorney Kellman had previously been the attorney acting

2<sup>nd</sup> Defendant joined by Order of Mr. Justice Ian Winder dated 10<sup>th</sup> December, A.D., 2015.

for the Plaintiff in the property sale transaction. Additionally, the Plaintiff instructed Attorney Kellman to prepare the sales agreement on its behalf by its letter dated the 6<sup>th</sup> February, 2012.

6. Save that the Second Defendant admits that the Plaintiff, by its attorneys, Alexiou, Knowles & Co., gave the First Defendant Notice in writing dated the 16<sup>th</sup> July, 2013 requiring it to complete the said purchase and pay the balance of the purchase price to the Plaintiff within twenty-one (21) days of the Notice, as alleged in paragraph 6 of the Plaintiff's Statement of Claim the Plaintiff is required to prove the gross and unreasonable delay by the First Defendant in performing the Contract on its part after the completion date.
7. The Second Defendant neither admits nor denies paragraphs 6, and 7 of the Statement of Claim.
8. Save that the Plaintiff is required to prove that the Plaintiff became entitled to treat the Defendant's failure to complete as repudiation of the Contract, and that the Plaintiff is discharged from further performance of the Contract, The Second Defendant neither admits nor denies paragraphs 8 and 9 of the Statement of Claim.
9. Save that the Plaintiff is required to prove that Mr. Kellman concealed from the Plaintiff that he recorded the Conveyance, paragraph 10 of the Statement of Claim is admitted.
10. Paragraph 11 of the Statement of Claim is admitted. In the absence of expressly stated escrow conditions regarding the said Conveyance which was delivered to the First Defendant by the Plaintiff, no escrow conditions existed with respect to the said Conveyance, and it is on this basis that the Second Defendant is of the view that nothing prevented the First Defendant from registering the Conveyance notwithstanding that the balance of the purchase price had not been paid by the First Defendant.
11. At the time that Attorneys Alexiou Knowles advised Attorney Kellman that his representation of the Plaintiff was terminated via letter dated 16<sup>th</sup> July, 2013, the Conveyance from the Plaintiff to the First Defendant had already been delivered to the First Defendant and registered in the Registry of Records on the 25<sup>th</sup> March, 2013. Thus,

2<sup>nd</sup> Defendant joined by Order of Mr. Justice Ian Winder dated 10<sup>th</sup> December, A.D., 2015.

at the time that the Conveyance was executed, delivered to the First Defendant and recorded by the First Defendant, Attorney Kellman was still acting for the Plaintiff.

12. Sometime in January, 2013, The First Defendant entered into a sales agreement with Caleb Dorsett and Shamene Bain (hereinafter called the "Third Parties") to sell the subject property for the sum of \$200,000. Attorney Kellman acted for both the First Defendant as Vendor and the Third Parties as Purchasers in the sales transaction.
13. On or about the 22<sup>nd</sup>, January, 2013, the Third Parties completed an application for a mortgage loan over the subject property by The Second Defendant.
14. By loan approval letter dated the 11<sup>th</sup> March, 2013, The Second Defendant approved the mortgage loan to the Third Parties.
15. Attorney Kellman who also acted for the First Defendant, the Second Defendant and the Third Parties subsequently prepared a report on title dated 14<sup>th</sup> March, 2013 which stated that there were no existing encumbrances, or onerous covenants or easements, and further that there was no outstanding amount due for Real Property Tax. His opinion was that the Third Parties had a good and valid documentary title to the property and that the Second Defendant can properly accept the title as security, and that the necessary Deeds in favor of the Third Parties had been executed and delivered by the First Defendant to the Third Parties.
16. At no time or at all did Attorney Kellman advise The Second Defendant that the balance of the purchase price due to the Plaintiff from the First Defendant for the property remained due and owing.
17. The deed of Conveyance dated the 14<sup>th</sup> day of July, A.D., 2014 between the First Defendant and the Third Parties was subsequently prepared by Attorney Kellman and duly executed by the parties and delivered to the Third Parties.
18. The mortgage deed dated the 14<sup>th</sup> day of July A.D., 2013 was subsequently prepared by Attorney Kellman and duly executed by the Third Parties and delivered to the Second Defendant.
19. Thus after the loan proceeds were advanced, renovations on the two storey building situated on the subject property commenced. The renovations were financed out of a

2<sup>nd</sup> Defendant joined by Order of Mr. Justice Ian Winder dated 10<sup>th</sup> December, A.D., 2015.

portion of the mortgage loan proceeds by the Second Defendant on behalf of the Third Parties. Renovations included exterior and interior construction works and were ongoing on the said building between March and August, 2013. Renovations included replacing all interior and exterior doors, and painting the interior and exterior structure, and removing all construction debris. The renovations were completed.

20. From March 2013 to date the subject property was in physical possession and occupation by the Third Parties.
21. Therefore, the Second Defendants are holding a mortgage over the subject property and have a good and proper documentary title to the subject property.

Dated the 28<sup>th</sup> April, A.D., 2016.

[14] Summonses were filed on diverse dates to serve Shamene Bain and Caleb Dorsette with various processes in this action pursuant to orders obtained including but not limited to both of them being joined as parties to this action. Likewise Troy Kellman and Hanna, Kellman (a Law Firm). The Court is therefore of the firm opinion that the Third, Fourth and Fifth Parties cannot cry fowl.

[15] Attorney Troy Kellman appeared before me in another matter and I questioned him as to why he never appeared in this matter despite having been served with every step taken by the Plaintiff and the Second Defendant. Mr. Kellman's response to the Court was:

**“My attorney told me not to appear.”**

[16] The Second Defendant filed a Statement of Claim on May 03<sup>rd</sup>, 2016 which provides:

2<sup>nd</sup> Defendant joined by Order of Mr. Justice Ian Winder dated 10<sup>th</sup> December, A.D., 2015.

COMMONWEALTH OF THE BAHAMAS  
IN THE SUPREME COURT  
COMMON LAW & EQUITY DIVISION  
BETWEEN

**SUPREME COURT**  
MAY 03 2016  
NASSAU, BAHAMAS

2013  
No.: 01975

COLINA INSURANCE LIMITED

Plaintiff

AND

LION MANAGEMENT COMPANY LIMITED

First Defendant

AND

THE BAHAMAS MORTGAGE CORPORATION

Second Defendant

AND

CALEB DORSETT & SHAMENE BAIN

Third Parties

AND

TROY KELLMAN

Fourth Party

AND

HANNA KELLMAN (a law firm)

Fifth Party

**STATEMENT OF CLAIM OF THE SECOND DEFENDANT**  
**(AGAINST THE FIRST DEFENDANT AND THE THIRD,**  
**FOURTH AND FIFTH PARTIES)**

1. The Second Defendant is a body corporate established by virtue of section 3 of The Bahamas Mortgage Corporation ACT CH. 254 of the Statute Laws of the Commonwealth of The Bahamas. It has its place of business at Russell Road in Nassau, New Providence, The Bahamas.

2<sup>nd</sup> Defendant joined by Order of Mr. Justice Ian Winder dated 10<sup>th</sup> December, A.D., 2015.

2. The First Defendant is a company incorporated under the laws of the said Commonwealth and carrying on business therein and having its Registered Office at Hanna, Kellman & Associates, Columbus House, East & Shirley Streets, Nassau, The Bahamas.
3. The shares of the First Defendant are beneficially owned by Rudolph Rolie.
4. The Third Parties are mortgagors (hereinafter referred to as "3P") who obtained a mortgage loan from the Second Defendant in order to purchase ALL THAT parcel of land being Lot No. 6 in Block No. 2 in the Estella Anne Tract situate in the Western District of the Island of New Providence, upon which a two storey commercial building is situated.
5. Caleb Dorsett, one of the Third Parties is an Attorney-at-Law whose chambers at all material times were situated in Columbus House, East & Shirley Streets, Nassau, The Bahamas, and was in close proximity to the law offices of Troy Kellman and Hanna Kellman, the fourth and fifth parties respectively (hereinafter referred to collectively as "45P").
6. The Fourth Party is an Attorney-at Law in the law firm of the Fifth Party. 45P acted for and on behalf of the First Defendant, the Second Defendant, and 3P.
7. By letter of instruction dated the 13<sup>th</sup> March, 2013, 45P were instructed by the Second Defendant to investigate the title of 3P and the First Defendant to the subject property, prepare a report on title, and to ensure that property taxes due were settled at the date of the mortgage. 45P was further instructed to obtain stamp duty exemption on behalf of 3P as first time home buyers, and a mortgage over the subject property from 3P to The Second Defendant.
8. 45P subsequently prepared a report on title dated 14<sup>th</sup> March, 2013 which stated that there were no existing encumbrances, or onerous covenants or easements, and further that there was no outstanding amount due for Real Property Tax. 45P's opinion was that the 3P had a good and valid documentary title to the property and that the Second Defendant can properly accept the title as security, and that the necessary Deeds in favor of 3P had been executed and delivered by the First Defendant to 3P.
9. 45P then delivered to the Second Defendant a duly executed Conveyance dated the 14<sup>th</sup> March, 2013 from the First Defendant as Vendor to 3P as Purchasers. 45P acted for both parties. 45P additionally submitted and delivered to the Second Defendant a duly executed Mortgage from 3P to the Second Defendant dated the 14<sup>th</sup> March, 2013. 45P acted for both the Mortgagors and the Mortgagee.
10. The mortgage loan granted by the Second Defendant to 3P was in the amount of \$237,500.00.

2<sup>nd</sup> Defendant joined by Order of Mr. Justice Ian Winder dated 10<sup>th</sup> December, A.D., 2015.

11. When the Second Defendant advanced the mortgage loan proceeds to 3P, part of the loan proceeds were paid to 45P as purchase price money for the property, and the balance was paid to Mr. Carrol Smith, a contractor, to commence extensive renovations on the two (2) storey building structure situated on the property.
12. On or about the 8<sup>th</sup> April, 2013, The Second Defendant advanced the sum of \$170,000.00 to 45P as attorneys for 3P being the mortgage loan proceeds to purchase the subject property from the First Defendant.
13. On behalf of 3P, between June and August, 2013, The Second Defendant advanced the sum of \$46,000 of the said mortgage loan proceeds to Mr. Carrol Smith of Smith's Enterprise to conduct renovations on the subject property which is an apartment building.
14. By letter dated the 2<sup>nd</sup> July, 2013, The Stamp Exemption Unit of the Treasury Department wrote to 45P regarding the status of the application for stamp duty exemption requesting that he provide certain additional information. In particular, that 45P provide documentary proof that the property is registered with the Property Tax Department and there were no property taxes owing on the property along with a copy of a recent appraisal report for the property. Further, that 45P was to advise whether Dorsett and/or Bain had owned property situated elsewhere in the country; and if so, to confirm the type of structure erected or proposed to be erected on the property and the usage. The response was required from 45P fourteen (14) days from the date of the said letter.
15. Subsequent to the said letter, the Second Defendant received no further or additional information or correspondence from 45P regarding whether or not they had complied with the requests of the said Stamp Exemption Unit letter.
16. By respective letters dated 20<sup>th</sup> September, 2013, and 21<sup>st</sup> November, 2013 the Second Defendant wrote to 45P advising that the stamp duty exemption request for the 3P remained outstanding, and that the Second Defendant awaited an urgent response so that Second Defendant would have an opportunity to meet the stamp duty exemption period deadline. The Second Defendant enclosed a copy of the requested appraisal report. 45P never responded to the said letters, and numerous attempts by the Second Defendant to contact 45P via telephone and otherwise proved unsuccessful.



2<sup>nd</sup> Defendant joined by Order of Mr. Justice Ian Winder dated 10<sup>th</sup> December, A.D., 2015.

17. As a result of the Second Defendant not being able to contact 45P, the stamp duty exemption period within which the application of the 3P could be considered expired; and the documents therefore remained unstamped and unrecorded and remain so to date.
18. 3P are unable to pay their outstanding one half portion of stamp duty on the Conveyance from the 1<sup>st</sup> Defendant and VAT which is now applicable. They are also unable to pay the outstanding stamp duty on the mortgage. The documents therefore remain unstamped and unrecorded.
19. 3P have since defaulted on the mortgage, and the Second Defendant is now seeking to realize its security by pursuing any and all remedies available to the Second Defendant
20. The Second Defendant relied on the opinion, assurances, and report on title on the subject property by 45P, and the duly executed and delivered and registered Conveyance from the Plaintiff to the 1<sup>st</sup> Defendant in making its decision to hold the subject property as mortgage security for the loan it advanced to 3P to purchase the property from the 1<sup>st</sup> Defendant.
21. At no time or at all did 45P advise The Second Defendant that the balance of the purchase price due to the Plaintiff from the First Defendant for the property remained due and owing
22. The exterior and interior construction works which were financed by The Second Defendant were ongoing on the said building between March and August, 2013 on behalf of 3P. Renovations included replacing all interior and exterior doors, and painting the interior and exterior structure, and removing all construction debris. The renovations were completed.
23. Therefore, in 2013 the Plaintiff would have had notice that the property was in physical possession and occupation by a third party and that reasonable enquiries by the Plaintiff would have revealed the interest of both the Second Defendant and 3P to the Plaintiff.
24. Furthermore, 3P are bona fide purchasers for valuable consideration without notice in these proceedings, and as a result of this the Second Defendant believes that it holds legitimate title to the property. That contrary to the claims of the Plaintiff the Mortgage to the Second Defendant is valid, and takes priority over any claim to title that the Plaintiff may have over the property.

**AND THE SECOND DEFENDANT CLAIMS:**

- (1) That the First Defendant, 3P and 45P return the proceeds of the mortgage loan granted to 3P in the amount of \$237,500.00 with interest to the 2<sup>nd</sup> Defendant.

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2<sup>nd</sup> Defendant joined by Order of Mr. Justice Ian Winder dated 10<sup>th</sup> December, A.D., 2015.

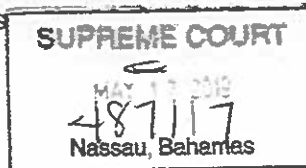
- (2) Alternatively, valid and proper title to the subject property.
- (3) Damages.
- (4) Interest on damages at such rate and for such period as the Court shall think fit.
- (5) Further or other relief.
- (6) Costs.

Dated the 28<sup>th</sup> April, A.D., 2016.

**[17] On May 17<sup>th</sup>, 2019 an Order was filed which provides;**

Second Defendant named by Order of Mr. Justice Ian Winder dated 17<sup>th</sup> December  
A.D. 2015

COMMONWEALTH OF THE BAHAMAS  
IN THE SUPREME COURT  
COMMON LAW & EQUITY DIVISION  
BETWEEN



2019  
No: 01975

COLINA INSURANCE LIMITED

Plaintiff /  
5th Defendant in the Counterclaim

AND

LION MANAGEMENT COMPANY LIMITED

First Defendant /  
4<sup>th</sup> Defendant in the Counterclaim

AND

THE BAHAMAS MORTGAGE CORPORATION

Second Defendant /  
Plaintiff in the Counterclaim

AND

CALEB DORSETT & SHAMENE BAIN

1<sup>st</sup> Defendants in the Counterclaim

AND

TROY KELLMAN

2<sup>ND</sup> Defendant in the Counterclaim

AND

HANNA KELLMAN

3<sup>RD</sup> Defendant in the Counterclaim

*KH J  
16/05/19*

ORDER

Second Defendant joined by Order of Mr. Justice Ian Winter dated 17 December  
A.D. 2015.

Before His Lordship the Honorable Mr. Justice Keith Thompson  
Dated this 14<sup>th</sup> day of May, A.D. 2019

UPON THE SUMMONS filed herein by the Plaintiff in the Counterclaim.

AND UPON HEARING Miss Shirl Deveaux of Counsel for the Second  
Defendant and Plaintiff in the Counterclaim; and Mr. E. Terry North accompanied  
by Mr. Ashley Williams of Counsel for the Plaintiff.

KAT  
16/05/19

IT IS HEREBY ORDERED THAT the Plaintiff in the Counterclaim is  
granted leave to enter:

1. Judgment in Default of Defence against the 1<sup>st</sup> Defendants in the  
Counterclaim; and
2. Judgement in Default of Appearance and Defence against the 2<sup>nd</sup>  
Defendant in the Counterclaim, and the 3<sup>rd</sup> Defendant in the  
Counterclaim.

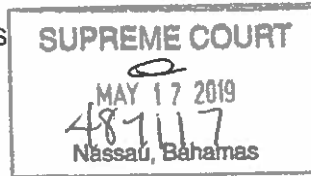
BY ORDER OF THE COURT

REGISTRAR

[20] Also on May 17<sup>th</sup>, 2019, a Judgement in Default of Defence was filed which  
provides;

Second Defendant joined by Order of Mr. Justice Ian Winder dated 10<sup>th</sup> December, A.D., 2015.

COMMONWEALTH OF THE BAHAMAS  
IN THE SUPREME COURT  
COMMON LAW & EQUITY DIVISION  
BETWEEN



2013

No.: 01975 ✓

**COLINA INSURANCE LIMITED**  
Plaintiff /  
5<sup>th</sup> Defendant in the Counterclaim

AND

**LION MANAGEMENT COMPANY LIMITED**  
First Defendant /  
4<sup>th</sup> Defendant in the Counterclaim

AND

**THE BAHAMAS MORTGAGE CORPORATION**  
Second Defendant /  
Plaintiff in the Counterclaim

AND

**CALEB DORSETT & SHAMENE BAIN**  
1<sup>st</sup> Defendants in the Counterclaim

AND

**TROY KELLMAN**  
2<sup>ND</sup> Defendant in the Counterclaim

AND

**HANNA KELLMAN**  
3<sup>RD</sup> Defendant in the Counterclaim

### JUDGEMENT IN DEFAULT OF DEFENCE

The 14<sup>th</sup> day of May, A.D., 2019.

No appearance having been entered by the 2<sup>nd</sup> Defendant in the Counterclaim nor the 3<sup>rd</sup> Defendant in the Counterclaim; and No Defence having been served by the 1<sup>st</sup> Defendants in the Counterclaim, nor the 2<sup>nd</sup> Defendant in the Counterclaim, nor the 3<sup>rd</sup> Defendant in the

Counterclaim it is this day adjudged that the said Defendants do pay the Plaintiff in the Counterclaim, the sum of \$237,500.00 and costs to be taxed.

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**REGISTRAR**

## **DISCUSSION AND DISPOSITION:**

- [21] The Plaintiff is a company incorporated under the laws of The Commonwealth of The Bahamas and carrying on business within the said Commonwealth at No. 308 East Bay Street on the Island of New Providence and at several other branches in the Bahamas.
- [22] The First Defendant is another company incorporated under the laws of The Commonwealth of The Bahamas and also carrying on business therein having its Registered Office at Hanna, Kellman & Associates, 3<sup>rd</sup> Floor, Columbus House, Nassau, Bahamas. The shares of the First Defendant are beneficially owned by Rudolph Rolle.
- [23] The Second Defendant is a body corporate established by Section 3 of The Bahamas Mortgage Corporation Act, Chapter 254 of the Statute Laws of The Commonwealth of The Bahamas. Its principal place of business is Russell Road, Nassau, New Providence, Bahamas.
- [24] The Third Parties, Caleb Dorsette an Attorney-at-Law and Shamene Bain, somehow managed to obtain a loan from the Second Defendant to purchase "ALL THAT parcel of land being Lot No. 6 in Block No. 2 in the Estella Anne Tract situate in the Western District in the Island of New Providence, being the very same land which was the subject of an agreement for sale to the First Defendant by the Plaintiff herein. That transaction was on track to be completed. However, as a result of certain seriously unethical behavior was not completed with the Plaintiff.
- [25] A mortgage dated 14<sup>th</sup> July, 2013, securing the loan from the Second Defendant was executed by the Third Parties over the same property the subject of the agreement for sale between the Plaintiff and the First Defendant.

[26] The Fourth Party, Troy Kellman is an Attorney-at-Law employed by the Fifth Party. The Fourth and Fifth Parties collectively acted on or on behalf of the First and Second Defendants and the Third Parties in separate transactions involving the subject property. There were in essence two transactions.

#### **THE FIRST TRANSACTION:**

[27] In the first instance the agreement for sale was made with an alleged company, which was not incorporated and therefore a second agreement was made between the Plaintiff and the First Defendant for the sale and purchase of the subject property for the price of \$175,000.00.

[28] The sales agreement provided for a \$10,000.00 deposit which was paid and the balance of the purchase price to be paid to the Plaintiff Sixty (60) days from the date of the Agreement.

[29] A conveyance of the subject property dated 18<sup>th</sup> July, 2012 was subsequently executed by the Plaintiff in favour of the First Defendant and delivered to the Fourth Party. It was anticipated that the transaction would be completed pursuant to the Agreement.

[30] The First Defendant unreasonably delayed closing of the transaction after the completion date had passed. As a result, the Plaintiff via its attorneys, Alexiou, Knowles & Co. who by then had replaced the Fourth Party as attorneys for the Plaintiff issued a notice in writing dated 5<sup>th</sup> November, 2013 to complete and pay the balance of the purchase price to the Plaintiff within Twenty-one (21) days from the date of the notice and making time of the essence.

[31] The notice to complete expired on the 27<sup>th</sup> November, 2013, the First Defendant having failed to complete the transaction or pay over the balance of the purchase price.



- [32] This failure was treated by the Plaintiff as a repudiation of the Agreement for sale and the Fourth Party and by direct extension, the Fifth Party were notified in writing that the Plaintiff was treating the Agreement as cancelled and the deposit forfeited.
- [33] Having done so, the Plaintiff considered itself discharged from further performance of the contract and considered itself entitled to retain the deposit.
- [34] In the background, a series of steps were taken by the Fourth and Fifth Parties which included the First and Second Defendants and the Third Parties.

## **SECOND TRANSACTION:**

- [35] The Second Defendant instructed the Fourth and Fifth Parties on the 13<sup>th</sup> March, 2013 to investigate the title of the Third Parties and the First Defendant to the property. These instructions were given to facilitate the approval and preparation of a mortgage over the subject land in favour of the Second Defendant for the purchase of the same by the Third Parties.
- [36] On the 14<sup>th</sup> March, 2013, the very next day, the Fourth and Fifth Parties delivered to the Second Defendant a duly executed conveyance dated 14<sup>th</sup> March, 2013 made between the First Defendant and the Third Parties. The Fourth and Fifth Parties acted on behalf of both parties.
- [37] Like a bolt of lightning, the Fourth and Fifth Parties also delivered to the Second Defendant a Mortgage dated 14<sup>th</sup> March, 2013 made between the Third Parties and the Second Defendant.
- [38] I hasten to point out that the Fourth and Fifth Parties at all material times had actual knowledge of the transaction with the Plaintiff when they willfully and knowingly facilitated yet another agreement for the sale of the subject property to the Third

Parties and the mortgage provider the Second Defendant for the consideration of \$200,000.00, \$25,000.00 more than the first transaction.

[39] Of particular interest is a letter from the Fourth and Fifth Parties dated March 14<sup>th</sup>, 2013 to the Second Defendant. In that letter Troy Kellman acknowledges the following;

- “1. Instructions from the Second Defendant dated 11<sup>th</sup> March, 2013.
2. The Third Parties executed a Mortgage with the Second Defendant dated 14<sup>th</sup> March, 2013 to secure advances in the amount of \$237,500.00.
3. The Third Parties executed a Conveyance between themselves and the First Defendant dated 14<sup>th</sup> March, 2013.
4. Copies of back title documents.

[40] The agreement for sale to the Third Parties was January, 2013. The request to the Fourth Party from the First Defendant was March 13<sup>th</sup>, 2013.

[41] The confirmation on a good and marketable title of the First Defendant is dated 14<sup>th</sup> March, 2013 and signed by none other than Troy Kellman the Fourth Party.

[42] On July 16<sup>th</sup>, 2013 (Tuesday) Alexiou Knowles wrote to Troy Kellman on behalf of the Plaintiff terminating his representation of the Plaintiff after Kellman had been pressed on several occasions in writing to complete the first transaction. Kellman never replied.

[43] Again on 13<sup>th</sup> August, 2013 Alexiou Knowles wrote to Kellman and got no response. This time a request for the return of the original title deeds was made.

[44] A Judgement in Default of Appearance was entered against "TROY KELLMAN" dated 10<sup>th</sup> December, 2013 and filed on even date and provides:

COMMONWEALTH OF THE BAHAMAS  
SUPREME COURT

2013

IN THE SUPREME COURT

DEC 10 2013

CLE/gen/01780

Common Law & Equity Side

NASSAU, BAHAMAS

B E T W E E N

COLINA INSURANCE LIMITED  
Plaintiff

AND

TROY LEVAN KELLMAN  
Defendant

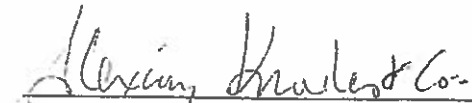
**JUDGMENT IN DEFAULT OF APPEARANCE**

NO APPEARANCE having been entered by the Defendant herein.

IT IS THIS DAY ADJUDGED:

- (1) That the Defendant do deliver up to the Plaintiff the Plaintiff's original Deeds and documents sent to the Defendant under the Plaintiff's letter to him of the 6<sup>th</sup> February 2012.
- (2) Alternatively, damages to be assessed.
- (3) Costs to be taxed if not agreed.

DATED the 10<sup>TH</sup> day of DECEMBER, A.D., 2013



**ALEXIOU, KNOWLES & CO.**  
Chambers, St. Andrew's Court  
Frederick Street Steps, Nassau, Bahamas  
Attorneys for the Plaintiff

[45] A Judgement in Default of Appearance and Defence dated the 14<sup>th</sup> May 2019 and filed 17<sup>th</sup> May 2019 was entered against the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants in the Counter-Claim and in default of Defence against the 1st, 2<sup>nd</sup> and Third Defendants in the Counter-Claim, wherein the Defendants in the Counter-Claim were ordered to pay to the Plaintiff in the Counterclaim (2<sup>nd</sup> Defendant in the main action), the sum of \$237,500.00 and costs to be taxed.

[46] By letter dated August 15<sup>th</sup>, 2015, the Conveyance which was stamped and recorded under circumstances which have been partially disclosed and which will be addressed later in this decision, the Acting Registrar General advised Alexiou Knowles & Co. via Mr. Terry North that the Conveyance which was recorded in Volume 11814 at pages 333 to 340 was duly removed from the register in compliance with the certified Supreme Court Order dated July 24<sup>th</sup>, 2015.

[47] The Plaintiff in the main action says that the issues in dispute are:

- “1. Whether the Conveyance dated 18<sup>th</sup> July, 2012 (“18<sup>th</sup> July Conveyance”), and recorded in Volume 11814 at pages 333 to 340 between the Plaintiff and First Defendant is void?**
- 2. Whether the Third Parties are bona fide purchasers for value without notice?**
- 3. Whether the Plaintiff or Second Defendant has better title to the property.**

[48] The Second Defendant has put forward a number of issues which it says are relevant.

- “1. Title of the subject passed to the First Defendant upon the registration of the Conveyance dated 18<sup>th</sup> July, 2012 and recorded in Volume 11814 at pages 333 to 340.**
- 2. No escrow conditions existed.**
- 3. No delivery as an escrow but delivery as a deed.**
- 4. Time limit to perform implied condition of escrow.**
- 5. Negligence on the part of the Plaintiff.**
- 6. 10% deposit was earnest money received by the Plaintiff.**
- 7. Notice to complete was not initiated in a timely manner.**
- 8. Time was not made of the essence promptly.**
- 9. Laches.**
- 10. Agreement for Sale was terminated more than a year after execution.**
- 11. The Third Parties were bona fide purchasers for value without notice.**
- 12. Knowledge of Attorney Troy Kellman must be imputed to the Plaintiff.**

13. **Knowledge of the Plaintiff is not knowledge of the First Defendant, although Attorney Kellman acted for both the Third Parties, the First Defendant and the Second Defendant.**
14. **The remedies for breach of the contract between the Plaintiff and First Defendant are to be pursued by the Plaintiff in the form of damages.**

[49] Regarding the above I am of the considered opinion that based on the evidence, the relevant issues as set out by the Second Defendant are 1, 2, 3, 11, 12 and 13. These can be subsumed in the three issues proffered by the Plaintiff.

- “1. **Whether the Conveyance dated 18<sup>th</sup> July, 2012 (“18<sup>th</sup> July Conveyance”), and recorded in Volume 11814 at pages 333 to 340 between the Plaintiff and First Defendant is void?**
2. **Whether the Third Parties are bona fide purchasers for value without notice? and**
3. **Whether the Plaintiff or Second Defendant has better title to the property.**

#### **THE LAW/DISCUSSION:**

#### **1, 2 & 3 - WHETHER TITLE TO THE SUBJECT PROPERTY PASSED TO FIRST DEFENDANT UPON THE REGISTRATION OF THE 18<sup>TH</sup> JULY, 2012 CONVEYANCE, and (ESCROW ARGUMENTS).**

[50] Assuming that all was in order, there would be no question as to whether title had been passed to the First Defendant. However, the facts and the evidence demand that fundamentals of contract law be visited. There was an agreement for sale of

the subject property. Initially the sale was between a company known as Lion's Holdings Limited. However, on Friday July 13<sup>th</sup>, 2012 Attorney Kellman wrote to Mr. Michael Ferguson advising that Lion's Holdings Limited was not an incorporated Company and requested that it be replaced with Lion Management Company Limited. This request was granted.

[51] On July 18<sup>th</sup>, 2012 the Conveyance between the Plaintiff and First Defendant was executed and forwarded to attorney Kellman with no expressed escrow conditions. In this regard, I draw attention to the Agreement for Sale. Para 3 thereof states the purchase price as \$175,000.00. Para 11 "A" and "B" in their own right as written would have created "escrow conditions". It provides:

**"UPON COMPLETION":**

- "(A) The Purchaser shall pay or cause to be paid to the Vendor's attorney the sum being the balance of the purchase price.**
  
- (B) Upon payment of the balance of the purchase price aforesaid the Vendor's attorney shall deliver to the Purchaser or his attorney (s) a proper assurance of the said hereditaments in favour of the Purchaser or his nominees duly executed and prepared by the Vendor but shall be in a form approved by the Purchaser's attorney, such approval not to be unreasonably withheld and a draft of which said assurance shall be submitted to such attorney at least seven (7) days before the completion date."**

[52] Paragraph 12 thereof also provides:



**“Upon completion of the purchase, the Purchaser shall be entitled to possession of the said hereditaments subject to the said restrictions and conditions set out hereafter.”**

[53] An Amended Defence and Counter-Claim was filed April 24<sup>th</sup>, 2017. It seeks to clarify and add certain details not contained in the initial Defence.

[54] Therefore in a nutshell the above paragraphs speak to “UPON COMPLETION.” There was no completion. Basic contract law tells us that there are at least seven (7) elements which must be present for there to exist a legally valid contract. They are:

- (a) Offer and Acceptance;
- (b) Intention to create legal relations;
- (c) Capacity;
- (d) Consideration;
- (e) Possibility of performance
- (f) Consent
- (g) Legality of object.

[55] It is also trite law that if anyone of the elements is missing, the contract is either void, voidable or unenforceable. Here we are dealing with a contract for the sale of land which firstly must be in writing and by deed under seal.

{56} In the instant case the obvious focus here is “CONSIDERATION.” The question is what is the position in the first transaction if consideration AS AGREED did not pass? The answer is that despite the period of time from contract to notice to complete and termination (acceptance of the repudiation by the First Defendant), consideration was lacking thereby, voiding the agreement. I hasten to point out that there were implied escrow conditions in the agreement for sale.

[56] In the case of **BAHAMAS LEISURE RESORTS LIMITED V. LION'S HOLDINGS CO. LTD., RUDOLPH ROLLE AND HANNA, KELLMAN & ASSOCIATES AND BRENSON ALVARDO BROWN AND ADON INVESTMENTS COMPANY LIMITED – 2015/CLE/GEN/01739** Mr. Justice M. Evans opined at paragraphs 20 and 21:

**“20. In addition to the above Counsel further submits that the Conveyance dated 3 April, 2012 was not delivered to the First Defendant. The law on the delivery of a deed as an escrow is set out in Halsbury Laws of England, Deed and Other Instruments (Volume 32 (2012) as follows:**

**“(iv) Delivery as an Escrow - 237- Escrow (conditional delivery).**

**An intended deed may, after due completion of the formalities required for execution as a deed, be delivered as an escrow (or scroll), that is as a simple writing which is not to become the deed of the party expressed to be bound by it until some condition has been performed. Thus a conveyance on sale or a mortgage or a surrender discharging a mortgage may be delivered in escrow so as to be binding on the grantor only if the grantee pays the consideration money or only if the grantee executes a counterpart or some other deed or document as agreed with the grantor.**

**Like delivery as a deed, delivery as an escrow may be made in words or by conduct although it need not be made in any special form or accompanied with any particular words. The essential thing in the case of delivery as an escrow is that the party should expressly**

or impliedly declare his intention to be bound by the provisions inscribed, not immediately, but only in the case of and upon performance of some condition then stated or ascertained. In the absence of direct evidence whether or not a deed of conveyance was delivered as an escrow, the fact that only part of the purchase price has been paid at the time of delivery justifies the inference that the deed was delivered as an escrow pending payment of the balance.”

Reliance was also placed on the dicta by the Court of Appeal in Alan Estates Ltd., v WG Stores Ltd and another – [1981] 3 All ER 481: “A deed delivered as an escrow takes effect from the satisfaction of the conditions and not from the date of its delivery as an escrow.””

21. “The Plaintiff submits that in light of the Defendants Concession that the conveyance dated 3 April 2012 is null and void, title remains with Bahamas Leisure and Resorts Limited. In this regard the Plaintiff relies on the dicta in Dennis Dean and another (Appellants) v Arawak Homes Ltd (Respondent) – [2014] 1 BHS J. No. 28;

“15 The question which the courts in The Bahamas had to address was which party had the better title to the disputed lands. The courts were principally concerned with a competition of documentary titles rather than a claim of adverse possession against a title holder. In Ocean Estates v Pinder [1969] 2 AC 19, 24-25, Lord Diplock stated: “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.**

[57] It is clear and unambiguous that escrow conditions existed in the first transaction. This being the case then title could not pass to the Second Defendant nor the Third Parties. It therefore means that the title, to the subject property being claimed by the Second Defendant is null and void and is still vested in the Plaintiff. In the case of *MACFOY V UNITED ATRIGA CO -. Ltd.* [1962] AC 152 at page 160 LORD DENNING opined:

**“If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”**

[58] The First Defendant had nothing to convey. This is a classic case of **NEMO DAT QUOD NON HABET**, which is defined in Black's Law Dictionary as;

**“No one gives what he does not have; no one transfers (a right) that he does not possess. According to this maxim, no one gives a better title to property than he himself possesses.”**

**4 and 11; THIRD PARTIES WERE BONA FIDE PURCHASERS FOR VALUE WITHOUT NOTICE.**

[59] Section 52 of the Conveyancing and Law of Property Act Chapter 138 provides:

**“PART 1X  
NOTICE**

**52. (1) A purchaser shall not be prejudicially affected by notice of any instrument, fact or thing unless –**

**(a) it is within his own knowledge, or would have come to his knowledge if such inquiries and inspections had been made as ought reasonably to have been made by him; or**

**(b) in the same transaction with respect to which a question of notice to the purchaser arises, it has come to the knowledge of this counsel, as such, or of his solicitor, or other agent, as such, or would have come to the knowledge of his solicitor, or other agent, as such, if such inquiries and inspections had been made as ought reasonably to have been made by the solicitor or other agent.**

**(2) This section shall not exempt a purchaser from any liability under, or any obligation to perform or observe, any covenant, condition, provision or restriction contained in any instrument under**

**which his title is derived, immediately or immediately; and such liability or obligation may be enforced in the same manner and to the same extent as if this section had not been enacted.**

**(3) A purchaser shall not by reason of anything in this section be affected by notice in any case where he would not have been so affected if this section had not been enacted.**

**(4) This section applies to purchases made either before or after the commencement of this Act.”**

[60] I take special note of (b) above. There is absolutely no doubt of Attorney Kellman having constructive notice of the incomplete First transaction. In fact he forwarded several e-mails to the Plaintiff advising that receipt of the balance of the purchase price was imminent. He then forwarded only a portion of that balance which was returned. Thus, not only did the First Defendant have notice but also the Second Defendant.

[61] In the Book **DART ON THE LAW OF VENDORS AND PURCHASERS 7<sup>TH</sup> EDITION VOL. 2** Page 879 it states:

**“Constructive notice may, perhaps be rather considered to consist in those circumstances under which the Court concludes either that notice MUST BE IMPUTED ON GROUNDS OF PUBLIC POLICY TO AN INNOCENT PERSON, or that the party has been guilty of such negligence in not availing himself of the means of acquiring it, as if, permitted, might be A CLOAK TO FRAUD, and which, therefore, the common interest of society require should, in its consequences, be treated as equivalent to actual notice. Sect. 3 of the Conv. Act 1982 –**

in enacting that a PURCHASER SHALL NOT BE PREJUDICIALLY AFFECTED BY NOTICE OF ANY INSTRUMENT, FACT OR THING, UNLESS IT IS WITHIN HIS OWN KNOWLEDGE, OR WOULD HAVE COME TO HIS KNOWLEDGE IF SUCH INQUIRIES AND INSPECTIONS HAD BEEN MADE AS OUGHT TO REASONABLY TO HAVE BEEN MADE BY HIM (same language as in the Bahamian Act.) has merely enunciated the principle above stated. (See Earl of Gainsborough v Watcombe Co. (1885) 54 L.J. Ch. 991.”

[62] In the Book **THE LAW OF MORTGAGES OF REAL ESTATE** by John Delatre Falcombridge, he states;

“Constructive Notice means that the circumstances surrounding the taking of a mortgage are such as to induce the Court to treat the Mortgagee who in fact has no actual notice of an earlier charge as if in fact he had actual notice.”

[63] Additionally, the case of **TRINIDAD ASPIATE CO. V CORYAT 1896 A.C. 587** makes it very clear that the recitals in a conveyance operate sufficiently enough to put a purchaser on enquiry. The principle emulating from this case is that: “a purchaser is not entitled to treat recitals in a deed as indisputable”; **LORD HOBHOUSE** in delivering the decision stated:

“Their Lordships have not been able to understand how there can be room for doubt in answering that question. There was the deed, plain for everybody to see. Whatever was in that deed the Plaintiff saw and knew. And the deed told him that in the year 1881 Dulcinore purchased the land, and took possession, and that she contracted to sell it to MaCartlry, and actually conveyed it to him, and received the purchase money. Knowing all this, the Plaintiff yet asserts that he had no notice of the grantee’s equity because the deed contains an

**erroneous recital of the mode in which that equity became vested in the grantor.**

**The Plaintiff seems to have imagined that he, a stranger to the deed, was entitled to treat the recitals as indisputable, and to insist that the grantee should not show the truth of the case if it was contrary to the recitals. He has treated the matter as though some representation had been made to him on the faith of which he had acted. He did not abstain from inquiry. He inquired carefully enough to ascertain that Nicola and not Marie was the owner of the land, and that Marie was not Nicola's heir, and to trace out the heir. And then having got the legal estate he thought he might safely proceed to eject the possessors. But he never inquired in the right and obvious quarter. He must have disregarded the fact disclosed by the deed that Dulcinore purchased and took possession in 1881, when Nicola was living, as the Plaintiff, who had searched out the heir, must have known. If he had made inquiry with reference to that fact and to the inference which it suggests, he would probably have voided the error which led him to bring this suit.**

**Their Lordships make this remark with reference to the tone of complaint which is taken on the ground that the Plaintiff has been deceived by the recitals in the deed; not as intimating that the case turns on the question whether the Plaintiff sought or ought not to have made further inquiry. On that question they only think it right to say that they are not prepared to agree that the existence of a register relieves one who is dealing with a vendor out of possession, from ascertaining the interest of one in possession, when that possession is in accordance with a registered deed. But they do not rest their judgment on that ground. They rest it on the plain and obvious ground that the Plaintiff had express notice that the Defendants were**



**transferee of Dulcinore's interest whatever it might be, and that an erroneous recital of her earlier title does not preclude her grantee from showing what interest really passed by her grant.**

**The consequence is that the Plaintiff's suit entirely fails; and as he has got the legal estate with notice of the Defendants' title, he is bound to convey it to them. The proper course will be to discharge the decrees below; to dismiss the Plaintiff's claim; to give the Defendants judgment on their counter-claim, and to order the Plaintiff to pay the whole costs of the suit in both Courts."**

[64] This authority speaks directly to the Second Defendant (The Plaintiff in the Counter-claim) and the Third Parties in the main action and confirms that neither the Second Defendant or the Third Parties could succeed in a claim of bona fide purchasers for value without notice.

[65] I hasten to point out that in the BAHAMAS LEISURE case (supra) Attorney Kellman also acted for all of the defendants under virtually identical circumstances as the instant case. Rudolph Ricardo Rolle and Hanna Kellman & Associates (A Law firm) were two of the defendants.

[66] In light of the authorities and in all the circumstances, the claims of the Plaintiff in the counter-claim entirely fail, as against the Plaintiff in the main action. In the circumstances therefore, I accede to the prayer of the Plaintiff in the main action as follows:

**"As against the First and Second Defendants; the Third Parties and the Fourth and Fifth Parties:**

**(1) A Declaration that the Plaintiff is discharged from further performance of the said Contract.**

- (2) A Declaration that the Plaintiff is entitled to retain the deposit for its own use and benefit.**
- (3) A Declaration that the Conveyance dated the 18<sup>th</sup> July 2012 is void and is hereby set aside.**
- (4) Damages (to be assessed).**
- (5) Costs to be taxed if not agreed against the First and Second Defendants, the Third Parties and the Fourth and Fifth Parties;**
  - (1) An injunction to prevent the Defendants and Parties and each of them, their servants, agents or assignees from in any way or manner dealing with, selling, encumbering, mortgaging, charging, entering, contracting and trespassing on the subject property.**
  - (2) An injunction compelling the First and Second Defendants, the Third Parties and the Fourth and Fifth Parties their servants, agents or assignees to immediately deliver to the Plaintiff and or its attorneys, Alexiou, Knowles & Co., all original title deeds relating to the subject property and any copies of the original title deeds in their possession.**
  - (3) A Declaration that the Conveyance made between the Plaintiff and the First Defendant is null and void and is hereby set aside.**

**(4) A Declaration that the Conveyance dated the 14<sup>th</sup> July 2013 made between the First Defendant and the Third Parties is null and void and is hereby set aside.**

**(5) A Declaration that the Mortgage dated the 14<sup>th</sup> July 2013 made between the Third Parties and the Second Defendant is null and void and is hereby set aside.**

**Costs to the Plaintiff to be taxed if not agreed.**

**I so Order.”**

**CLAIM OF THE SECOND DEFENDANT AS AGAINST THE FIRST, THIRD, FOURTH AND FIFTH DEFENDANTS IN THE COUNTERCLAIM:**

[67] The evidence in this matter is patently clear. Attorney Kellman at all material times knew and had intimate knowledge of the status of the first transaction. It would be an injustice not to deal with the Second Defendant’s claim as against the Fourth and Fifth Defendants and the Third Parties.

[68] Without repeating what has already been set out, I repeat the order of the 14<sup>th</sup> May, 2019 and filed 17<sup>th</sup> May, 2019 as against the First, Fourth and Fifth Defendants and the Third Parties.

1. That the First, Fourth and Fifth Defendants and the Third Parties return the proceeds of the Mortgage loan granted to the Third Parties in the amount of \$237,500.00 to the Second Defendant with interest at 10% per annum from the date said amount was received by the Fourth and Fifth Parties forthwith.

2. Costs to be paid to the Plaintiff in the Counterclaim by the Fourth Defendant in the Counterclaim/ (the First Defendant in the main action) and the First, Second and Third Defendants in the Counterclaim, to be taxed if not agreed.

### **BEHAVIOUR OF ATTORNEY KELLMAN AND HANNA, KELLMAN & CO.**

- [69] The evidence in this matter raises the question as to what or how should an attorney who conducts himself in the manner demonstrated by attorney Kellman be dealt with. When attorneys act in matters such as these, they sit in a position of trust. A vendor should have no fear of dishonest actions when handing over title documents in a conveyancing transaction.
- [70] Attorney Kellman drafted the agreement for sale in the first transaction, and had full knowledge of its contents. He also drafted the agreement for sale in the second transaction being fully aware that the first transaction was not completed.
- [71] Despite several requests and notices to complete, he never responded as he ought to have. What is even more damning, is the fact that not only was he served with various documents joining him personally and his firm but also judgments in default. There was still a deafening silence from him, the First Defendant, the Third Parties and the Fifth Party.
- [72] This behaviour is not acceptable and requires serious attention by the relevant authorities including the Bahamas Bar Association, as I am of the view that Kellman's actions were intentional and calculated. The Bar has a duty to the public at large to ensure that persons practicing law are trustworthy and not allowed to bring shame and disgrace to this honorable profession. The reputation of the profession must be protected at all costs.

[73] The Bahamas Bar Association (Code of Professional Conduct) Regulations Section 3 provides:

**“3.1 Every attorney shall in pursuit of the practice of his profession comply with and be subject to the Rules of Professional Conduct set out in the schedule.”**

**RULE 1  
INTEGRITY**

**“The attorney must discharge his duties to the Court, his client, members of the public and his fellow members of the profession with integrity.”**

**Commentary**

- 1. Integrity is the fundamental quality of any person who seeks to practice as a member of the legal profession. If the client is in any doubt as to his attorney’s trustworthiness the essential element in the true lawyer-client relationship will be missing. If the attorney is lacking in personal integrity his usefulness to his client and his reputation within the profession will be destroyed, regardless of how competent an attorney may be.**
- 2. Dishonourable or questionable conduct on the part of the attorney in either his private life or his professional activities will reflect adversely to a greater or lesser degree upon the integrity of the profession and the administration of law and**

**justice as a whole. If the conduct, whether within or outside the professional sphere, is such that knowledge of it would be likely to impair a client's trust in the attorney as a professional consultant, disciplinary action may be justified."**

[74] On my understanding of the Penal Code, this behaviour appears to be a criminal offence involving possible fraud. I therefore further order that a copy of this decision be forwarded by the Registrar to:

- (i) The Bahamas Bar Association for disciplinary action;
- (ii) The Director of Public Prosecutions for investigations concerning any breach of the Penal Code with the hope that this matter is in fact given the attention it ought to receive.

I so order.

Dated this 23<sup>rd</sup> day of February, A.D., 2021.



Keith H. Thompson

Justice