

COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law & Equity Division

2018/CLE/gen/00515

IN THE MATTER of contract dated the 12th January, A.D., 2018 and made between (1) Allen's Marine Enterprises Limited and (2) Curtis Boyd Coleman for the sale of a piece or tract of land comprising 9,829 square feet being part of a tract of land originally granted to Thomas Moss (Grant C-124) situate at Great Guana Cay, Exuma.

AND IN THE MATTER of the Conveyancing and Law of Property Act, Section 4

AND IN THE MATTER of the Rules of the Supreme Court Ord. 11, r8

BETWEEN

ALLEN'S MARINE ENTERPRISES LIMITED

First Plaintiff

AND

CURTIS BOYD COLEMAN

Defendant

Before Hon. Mr. Justice Ian R. Winder

Appearances: Norwood Rolle for the Plaintiff

V. Moreno Hamilton for the Defendant

3 March 2021

DECISION

WINDER, J

This is a Vendor and Purchaser's Summons brought by the Plaintiff (AMEL) pursuant to Section 4 of the Conveyancing and Law of Property Act seeking a declaration that it has shown the defendant (Coleman) a good and marketable title to property at Black Point Exuma.

Background

1. On 12 January 2018, by written agreement, AMEL and Coleman entered into an agreement (the Agreement) to purchase property in Black Point, Exuma (the Property) for the sum of \$45,000. The Property is described in the Agreement as:

ALL THAT piece or parcel of land comprising 9,829 square feet being a portion of the Thomas Moss original Crown Grant C-124 of Golden Grove Estates situated near the Settlement of Black Point on Great Guana Cay, Exuma one of the Islands of the Commonwealth of The Bahamas.

On or about 15 January 2018, in accordance with the Agreement, Coleman a resident of Florida USA, paid Jacob Allen Smith (Smith), AMEL's Director a \$10,000 deposit toward the purchase price of the Property.

2. On 22 February 2018, Coleman wrote to AMEL with requisitions regarding the Property. The letter was settled in part as follows:

We are in the process of completing our title searches in respect of the above matter and request the following requisitions on title.

(1) Kindly note we require a thirty (30) year good root of title to the property, therefore, we request copies of the following documents:

- Deed of Gift dated 5th August, 1965.
- Affidavit of Rev. Lawrence Adderley and Hartman Rolle dated 5th July, 1967 – Volume 9664 at pages 487 to 489.
- Affidavit of Mary Ann Smith dated 5th July, 1967 – Volume 9664 at pages 490 to 493.
- Affidavit of Mary Ann Smith dated 6th November, 2006 – Volume 9817 at pages 4 to 14.
- Affidavit of Joseph McPhee dated 6th November, 2006 – Volume 9817 at pages 55 to 60.
- Affidavit of Francis Smith dated 6th November, 2006 – Volume 9817 at pages 49 to 54.

- (2) Is the Vendor aware of any pending litigation in respect of the Property;
- (3) Please confirm that there are no outstanding real property taxes on the subject Property;
- (4) Evidence of Approval of Subdivision of Golden Grove Estates; and
- (5) Please confirm that your firm is holding all original deeds in respect of the transaction.

We reserve the right to raise additional title requisitions. We look forward to your early response.

3. By letter dated 2 March 2018 AMEL responded as follows:

Further to your letter dated the 22nd February 2018, as requested, we enclose herewith copies of the following documents:

- (a) Affidavit of Rev. Lawrence Adderley and Hartman Rolle dated the 8th June 2006 (mislabelled the 5th July 1967) – Vol. 9664 at pages 487-489;
- (b) Affidavit of Mary Ann Smith dated the 6th November 2006 – Vol 9817 at pages 4 to 14A;
- (c) Conveyance dated the 6th November 2006 Samuel Smith to Allen's Marine Enterprises Limited – Vol 9817 at pages 23 to 29;
- (d) Affidavit of Mary Smith dated the 8th June 2006 (mislabelled 5th July 1967) – Vol 9664 at pages 490 to 493;
- (e) Affidavit of Joseph McPhee dated the 6th November 2006 – Vol 9817 at pages 55 to 60; and
- (f) Affidavit of Frances Rolle (mislabelled Francis Smith) dated the 6th November 2006 – Vol 9817 at pages 49 to 54.

Kindly note that the Deed of Gift dated the 25th August 1965 is included in the Affidavit of Mary Ann Smith referred at (b) above.

The Vendor confirms that it is not aware of any pending litigation in respect of the subject property.

With respect to your requisition on evidence of Approval of Subdivision of Golden Grove Estates ("Golden Grove"), the Vendor states that Golden Grove is not subdivided as a subdivision and, at present, are being sold as parcels and not numbered lots.

In furtherance of that fact we refer you to sub-clause (a)(b) and (c) of Clause 7 and Clause 8 of the Agreement for Sale dated the 12th January 2018.

We confirm that we are not in possession of any of the original documents with respect to the captioned matter. The Vendor undertakes for the safe keeping of the original documents, subject to the usual clause, and to the provision of copies to the Purchaser at the Purchaser's expense.

4. By letter dated 16 March 2018, Coleman advised AMEL that he did not consider the title documents provided by AMEL to prove good and marketable title.

We refer to your letter dated the 2nd March, 2018. We have examined copies of the documents provided and our finding are as follows:

1. The execution of the deed dated 25th August, 1965 between Solomon Smith and Samuel Smith is not in the form as required by law as same was not attested as required by section 5(1) of the *Execution of Documents (Handicapped Persons) Act Chapter 67*.

“No document executed by a person who at the time when he signs it is a person to whom this Act applies, shall be of any force or validity whatsoever as against that person unless he shall have signed the document in the presence of an official attestor and the official attestor shall have attested his signature in accordance with the provisions of this section.”

Given that the document was not signed before an official testator, I cannot consider the document valid for the purposes of transferring the property.

2. Given that there is no documentary proof that Samuel Smith bought the parcel from the Moss family (clause 10 of the Affidavit of Mary Ann Smith dated 6th November, 2006), we have to then consider the recitals. The recitals given in the Affidavits of Mary Smith, Francis Smith and Joseph Smith dated the 6th November, 2006 cannot be accepted as fact unless they are at least 20 years old at the time of entering into a contract. Section 3(3) of the Conveyancing and Law of Property Act Chapter 138 states: “Recitals, statements and descriptions of facts, matters and parties contained in deeds, instruments, Acts or declarations, twenty years old at the date of the contract, shall, unless and except so far as they shall be proved to be inaccurate, be taken to be sufficient evidence of truth of such facts, matters and descriptions.”
3. Further, the parcel of land would require severance approval. The Planning and Subdivision Act 2010 states severance means the “division of not more than four new lots from an existing lot, the adding of land to an existing lot, the making of lot line adjustments. In addition, rights-of way and easements also require land severance approval”. Given that there is no severance approval in respect of the lot my client will not be held liable to the penalties in respect of developing the land which ultimately result in any building or construction being demolished.
4. The description given in the deed dated the 25th November, 1965 between Solomon Smith and Samuel Smith does not describe the land sufficiently to identify it which casts doubt on whether a purchaser can determine or identify exactly where the properties are located. The Law of Real Property by R.E. Megarry considers a good root of title to mean “a title is a document which describes the land sufficiently to identify it, which shows no disposition of the whole legal and equitable interest contracted to be sole, and which contains nothing to throw any doubt on the title.

On the basis of the above, we cannot accept the title as proving good and marketable thirty (30) years documentary title. We therefore refer to Clause 12 of the Agreement for Sale and request that the said deposit in reference to the matter be returned to the purchaser and the agreement cancelled.

...

5. AMEL contends that Coleman's rejection of the title to the property, as not being good and marketable, is a repudiation of the Agreement. AMEL commenced these proceedings, by Originating Summons dated 7 June 2018, seeking relief as follows:

...

By this summons [AMEL] seeks the determination of the Supreme Court on the following questions and the following relief, namely:

1. A Declaration that a good title to the said property has been shown in accordance with the said contract;
2. An Order that the Defendant may be ordered to pay the costs of and incidental to this application;
3. Such further or other order;
4. Costs.

This application is made under Section 4 of the Conveyancing and Law of Property Act (CAP 138)

...

6. Section 4 of the Conveyancing and Law of Property Act provides:

4(1) A vendor or purchaser of land in the Bahamas, or his representative respectively, may at any time or times and from time to time apply in a summary way to the court, in respect of any requisitions or objections, or any claim for compensation, or any other question arising out of or connected with the contract, (not being a question affecting the existence or validity of the contract) and the court shall make such order upon application as to it shall appear just, and shall order how and by whom all or any of the costs of an incident to the application shall be borne and made."

7. AMEL's Originating Summons is supported by the Affidavit of Jacob Allen Smith filed on 1 May 2018.

8. Clauses 10-12 of the Agreement provides as follows:

(10) Requisitions and objections (if any) in respect of the title or description of the said hereditaments or otherwise arising out of this Agreement shall be delivered in writing to the Vendor's Attorney within Fourteen (14) days from the delivery of all the said documents and other information.

(11) 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 will be ready, able and willing in accordance with such provisions to deliver the assurance hereinafter provided for and the Purchaser nevertheless fail to complete the purchase and pay the balance of the said purchase price, the Vendor may at any time after the Completion Date give to the Purchaser or his Attorney notice in writing requiring the Purchaser to complete with such period (not being less than Fourteen (14) days) as the notice shall prescribe time being of the essence and if the Purchaser shall not complete accordingly then and in that case the said deposit together with interest earned thereon 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 cause by failure whereupon this Agreement shall be cancelled without further or other liability by any party to the other save the Purchaser will return or caused to be returned to the Vendor or its Attorney all documents of title and such other information as shall have been produced to the Purchaser or his Attorney as hereinbefore provided.

(12) 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 may (but without prejudice if the Purchaser so elects to any of the Purchaser alternative remedies by way of damages specific performance or otherwise) require that the said deposit shall be returned to the Purchaser but without any interest whether earned or not thereon whereupon this Agreement shall be cancelled without further or other liability by any party to the other save the Purchaser will return or cause to be returned to the Vendor or its Attorney all documents of title and such other information as shall have been produced to the Purchaser or his Attorney as hereinbefore provided.

9. In support of his position that his deposit should be returned and the Agreement cancelled, Coleman filed an affidavit on 16 July 2019. Coleman confirmed the sale price for the property and the payment of the deposit of \$10,000 to Smith. Coleman says that on 4 April 2018 his attorneys issued a Notice to Complete to AMEL requesting the return of his deposit within fourteen (14) days. On 25 April 2018 Coleman wrote to AMEL in the following terms:

Given that the Vendor has not complied with our Notice to Complete issued on the 4th April, 2018, we hereby request that the Agreement be cancelled and the deposit paid thereunder be forwarded to us on behalf of the Purchaser."

On 23 July 2018 Coleman wrote demanding the return of his deposit and threatening legal action.

AMEL's case

10. AMEL says that they have produced an abstract of title for the Property which they sent to Coleman's attorney. The abstract provided as follows:

- i. *In or about the year 1910 Lemuel J. Smith entered into possession of four (4) tracts of land, including the land, the subject of this action and remained in possession until his death on the 13th November 1946. He cultivated the four tracts of land by planting and harvesting seasonal Bahamian crops and was assisted in these activities by his son, Solomon Smith. He sold parcels of this land by conveyances to H.G. Christie dated the 29 June 1937 and the 13th December 1938, which conveyances are recorded, respectively, in Book K. 14 at pages 264 to 266 and Book K. 14 at pages 464 to 465.*
- ii. *Upon the death of Lemuel J. Smith his son, Solomon Smith, succeeded him in possession of the four (4) tracts of land and he continued in quiet, uninterrupted and undisturbed possession up to the year 1965 when he executed a Deed of Gift in favour of his son, Samuel Smith.*
- iii. *Having received his conveyance in 1965, Samuel Smith entered into possession and remained in full free and undisturbed possession until the 6th November 2006 when he executed a conveyance in favour of Allen's Marine Enterprises Limited, the plaintiff herein.*

11. AMEL says that they have been in long undisturbed possession of the property based on the title documents shown to Coleman's attorney. Further, AMEL says that searches spanning over 100 years of history of the Property have not revealed a challenge to its ownership. Having been in possession, as per ***Asher v Whitlock [1865] L.R. 1 Q.B. 1*** and ***Perry v Clissold [1907] A.C. 73***, they contend that case law supports their stance that they are able to pass a good possessory and documentary title to the property.

12. AMEL relies upon the definition of a good root of title as outlined in ***Megarry & Wade: The Law of Real Property, 3rd edition***, at pages 586 to 587, which says:

"A good root of title is a document which describes the land sufficiently to identify it, which shows a disposition of the whole legal and equitable interest contracted to be sold, and which contains nothing to throw doubt on the title. Examples of documents which commonly serve as roots of title are:

- (i) a conveyance on sale;*
- (ii) a legal mortgage*
- (iii) –*
- (iv) a voluntary conveyance.*

They contend that the conveyance from Solomon Smith to Samuel Smith, by deed of gift, was in fact a voluntary conveyance, that is, a conveyance made without valuable consideration. In any event, AMEL submits that should Coleman seek to sell the property at any future date, he can rely on the title as presented as a good root of title, capable of being passed from him to any future purchaser.

13. AMEL contends that while there are exceptions to the concept that long undisturbed possession will allow the possessor to pass a good title, those exceptions are not applicable to the title to the Property. Reliance is again placed on ***Megarry and Wade's: The Law of Real Property, 3rd ed. (supra)***, at page 1024, where it states:

"long possession is not good enough. As between vendor and purchaser, a good title cannot be shown merely by proving adverse possession of land, for however long a period" as the true owner might have been (i) under a disability; or (ii) the Crown; or (iii) the reversioner or remainderman under a settlement; or (iv) the reversioner on a long lease."

Ocean Estates v Pinder [1969] 2 A.C. 19 is advanced to bolster the assertion that they have possession of the Property and can rightfully convey their interest therein:

"Where a person has dealt in land by conveying an interest in it to another person, there is a presumption, until the contrary is proved, that he was entitled to the estate in the land which he purported convey."

14. AMEL also relies on s. 3(3) of the *Conveyancing and Law of Property Act*, which reads:

"Recitals, statements and descriptions of facts matters and parties contained in deeds, instruments, Acts or declarations, twenty years old at the date of the contract, shall, unless and except so far as they shall be proved to be inaccurate, be taken to be sufficient evidence of the truth of such facts, matters and descriptions", those recitals would by 1985 become sufficient evidence of those facts unless positive evidence was produced to the contrary.

15. Section 3(4) of the *Conveyancing and Law of Property Act* requires a 30 year root of title search, says AMEL, to prove good title. They say that the conveyance between Solomon and Samuel, by itself, is more than fifty years old, Samuel having conveyed to AMEL in 2006.

16. Counsel for Coleman agrees that section 4 of the *Conveyancing and Law of Property Act* is applicable to this matter. However, they maintain that AMEL is in breach of the Agreement between the parties, and have not shown good and marketable title to the Property. Their skeleton arguments summarize the reasons for the alleged breach, namely:

- a) The Execution of the Deed dated August 25, 1965 between Solomon Smith and Samuel Smith is not in the form as required by section 5(1) of the Execution of Documents (Handicapped Persons) Act. Consequently, the Deed is not valid.
- b) There is no documentary proof that Solomon Smith bought the parcel from the Moss family before attempting to transfer the same to his son Samuel Smith.
- c) There is a reference in the Affidavit of Mary Smith, Francis Smith and Joseph Smith dated November 6, 2006 as to how Samuel Smith acquired the property, but the Affidavits cannot be accepted as fact because they were not at least twenty years old at the time that the Plaintiff and the Defendant entered into contract for the sale of the subject property (See s 3(3) of the Conveyancing and Law of Property Act)
- d) The parcel of land which is the subject of the action requires severance (See The Planning and Subdivision Act 2010)
- e) The Description given in the deed dated November 25, 1965 between Solomon Smith and Samuel Smith does not describe the land sufficiently to identify it which casts doubt on whether a purchaser can determine or identify exactly where the property is located.
- f) The Plaintiff and his attorneys failed to respond to the letters of the Defendant's Attorney and failed to complete within the time stipulated by the agreement for sales.

17. With reference to the issue of good and marketable title, Coleman relies on the case of *Barclays Bank plc v Weeks Legg & Dean (a firm) et al* (1998) 3 ALL ER 213. In *Barclays*, Millett LJ opined:

"A purchaser is entitled to be satisfied that his vendor is seized of the estate which he is purporting to sell, in this case the fee simple, and that he is in a position, without possibility or dispute or litigation to pass that fee simple to the

purchaser (See *Re Stirrup's Contract* (1961) 1 ALL ER 805 at 809, (1961) 1 WLR 449 at 454 per Wilberforce J.)

18. They also say that, where the title is less than perfect, the question is whether the risk is “*so remote or so shadowy as to be one to which no serious attention needs to be paid....*”. The test being ‘*would the court, in the action for specific performance at the instance of the vendors, force a title containing the alleged defect upon a reluctant purchaser*’ as per *Manning v Turner* (1956) 3 ALL ER 641 (1957) 1 WLR 91 at 94 per Stone V-C.

Law and Analysis

19. AMEL says that it is in possession of the Property and is willing to deliver possession to Coleman. The question then is, ‘has AMEL produced a good title to the Property?’ Ultimately, a good and marketable title to land is one which shows that the vendor and no one else is entitled to possession of the property. The process calls for the vendor to not only abstract but also produce copies of every deed following the root, which has affected the property over a thirty (30) year span. To make a title to real estate unmarketable, so that specific performance of a contract will not be enforced against the purchaser such as Coleman, there must be, on balance, a doubt as to its validity.

20. The Privy Council decision in *Bannerman Town, Millars and John Millars Eleuthera Association* [2018] UKPC 27 at paragraph 37 reiterated the relevant period of 30 years as prescribed in the CLPA for a good root of title to be shown:

“Section 3(4) of the Conveyancing Act recognizes and implements the common law principle and practice that a vendor may deduce and prove documentary title by reference to a good root of title of sufficient antiquity, prescribing 30 years as the generally applicable period for that purpose.”

21. Coleman’s attorneys say that in addition to their contention that AMEL has not been able to produce good title for all of the aforementioned reasons, AMEL also failed to complete the Agreement within the time stipulated. The Schedule in the Agreement

marks the completion date as forty-five (45) days from the date of its execution. As such they say this is another reason that Coleman is entitled to his claim for loss and damage.

22. In "*A Treatise on the Law of Vendor and Purchaser*", Vol I by T. Cyprian Williams, at pages 510-511, the learned author speaks to the completion of vendor and purchaser agreements, and the acts required by both parties as follows:

The acts to be performed on either side for completion.

Completion of the contract consists on the part of the vendor in conveying with a good title the estate contracted for in land sold and delivering up the actual possession or enjoyment thereof; on the purchaser's part it lies in accepting such title, preparing and tendering a conveyance for the vendor's execution, taking possession and paying the price. But the performance of either party's duty in this respect cannot be exacted by the other unless he himself be ready to fulfill his own part of the contract. Thus the vendor cannot require payment of the price and call upon the purchaser to take possession unless and until he have shown a good title and be ready and willing to execute a valid conveyance to the purchaser; nor can the purchaser oblige the vendor to convey and give up possession of the land himself accepting the title, tendering a conveyance for execution, and paying the price. And this is so, not only under open contract, but also where a day is fixed for completion in the ordinary way, time not being of the essence of the contract; either party being at liberty in such case to decline to complete the contract, notwithstanding that the day for completion arrive or be past, except on the terms of the other discharging his duty.

Let us first consider the purchaser's duties. The first step towards completion required of him is to accept the title, if the title shown on the abstract and proved by the documents and other evidence produced for verification of the abstract be a good title according to the contract. No formal act or notification of such acceptance is required; it takes place when the vendor's last answer to the purchaser's last outstanding requisition is received without objection. Such acceptance, however, is merely an acceptance of the title so put forward by the vendor; it does not preclude objection to the title on account of defects subsequently discovered from other sources than the information supplied by the vendor, as from searches or other inquiries made by the purchaser, provided of course that the title agreed to be taken were not so limited by special stipulation as to preclude such objection. Neither does acceptance of the title prevent objections as to matters which are properly matters of conveyance rather than of title ...And it may happen that an objection as to some matter of conveyance may be such as to justify the purchaser from refusing to complete the contract."

[Emphasis added]

23. The duty of the attorney for the purchaser is to ensure that, when examined, the title reflects property that the client can safely purchase without the probability, as opposed to the possibility, that it can be assailed with success. Coleman has rejected the title provided by AMEL, as such it has to be considered, in all the circumstances, whether his objections to the title proffered would warrant a reasonably prudent and careful purchaser acting on competent legal advice to do so.

24. I did not accept AMEL's argument, that its long undisturbed possessory title and documents were sufficient, without more, to result in the declaration sought, that they have shown good title in accordance with the Agreement.

25. Coleman could not be compelled to take a title in circumstances where valid concerns as to the efficacy of the 25 August 1965 conveyance, albeit in existence for in excess of 30 years have been raised. When these concerns were raised by the letter dated 16 March 2018, indicating that a good title was not shown, Coleman was not afforded the benefit of a response. Coleman then, on 4 April 2018, issued a notice to AMEL requiring it to complete the transaction within 14 days, by return of his deposit. On 29 April 2018, again with no response from AMEL in the 14 day period, Coleman sought to cancel the agreement and request the return of his deposit. That letter too went without a response. AMEL claims that the letter of 16 March 2018 was a repudiation of the contract.

26. I find that Coleman's several letters of 16 March 2018, 4 April 2018 and 29 April 2018 required a response from AMEL and it was unreasonable and unacceptable that they could go ignored. Admittedly, the initial correspondence of Coleman of 16 March 2018 took the position that the defects were unanswerable and was drafted in the nature of a cancelling of the contract rather than by way of further requisitions. In my view however, this ought to have been answered by AMEL, if indeed it could, despite the manner in which it was framed. I find that the issues/requisitions raised were valid

and not unreasonable and went to the real question of whether AMEL could show a good and marketable title. The issues/concerns were the following:

- a) The Execution of the Deed dated August 25, 1965 between Solomon Smith and Samuel Smith is not in the form as required by section 5(1) of the Execution of Documents (Handicapped Persons) Act. Consequently, the Deed is not valid.
- b) There is no documentary proof that Solomon Smith bought the parcel from the Moss family before attempting to transfer the same to his son Samuel Smith.
- c) There is a reference in the Affidavit of Mary Smith, Francis Smith and Joseph Smith dated November 6, 2006 as to how Samuel Smith acquired the property, but the Affidavits cannot be accepted as fact because they were not at least twenty years old at the time that the Plaintiff and the Defendant entered into contract for the sale of the subject property (See s 3(3) of the Conveyancing and Law of Property Act)
- d) The parcel of land which is the subject of the action requires severance (See The Planning and Subdivision Act 2010)
- e) The Description given in the deed dated August 25, 1965 between Solomon Smith and Samuel Smith does not describe the land sufficiently to identify it which casts doubt on whether a purchaser can determine or identify exactly where the property is located.

27. The conveyance from Solomon Smith to Samuel Smith is relatively short and it may be useful to set it out in full:

THIS INDENTURE made the 25th day of August in the year of Our Lord One Thousand Nine Hundred and Sixty-five BETWEEN SOLOMON SMITH of Black Point, Exuma, Bahamas, Farmer (hereinafter called the grantor) AND SAMUEL SMITH also of Black Point, Exuma, Bahamas eldest son of Grantor (hereinafter called Grantee)

WITNESSETH that in consideration of the sum of One Pound (£1) and natural love and affection paid to the Grantee the receipt whereof the Grantee hereby acknowledges, the grantor AS BENEFICIAL OWNER hereby conveys to the Grantee all that my tracts of land situate on Great Guana Cay, Exuma known as Golden Grove measuring Eighty (80) acres in all which I purchased from various persons said tracts being Simon Dames 20 Acres, Thomas Moss 20 Acres, Clarence Farrington 40 Acres TO HOLD to and to the use of the Grantee in fee simple. IN WITNESS WHEREOF the parties hereto have hereunto set their hands and seals the day and year first above written

Signed, sealed and delivered by the said SOLOMON SMITH (the Grantor) X

In the presence of *Mary Ann Smith*

The conveyance is said to have been signed by Solomon Smith with an [X]. It appears to have been witnessed by Mary Ann Smith the wife of Solomon Smith.

28. The conveyance was signed with an X, raising the inference on its face that it was signed by someone who was illiterate. Although section 5(1) of the Execution of Documents (Handicapped Persons) Act was not yet in force in 1965, its precursor the Illiterates Protection Act was. Section 4(1) of the Illiterates Protection Act provided that no document as defined by the Act (and the conveyance was such a document) shall be valid as against an illiterate person unless it shall be signed by him in the presence of an official attestator and attested by the official testator. Whilst there may be an adequate answer this concern raised by Coleman demanded a response.

29. The issues/concerns raised by Coleman as to the inadequacy of the description in the Solomon Smith conveyance is also a valid concern, which is evidenced on the face of the 25 August 1965 deed. The description merely speaks to Golden Grove, Great Guana Cay and identifies three tracts of 20 or 40 acres in several names. There is clearly an absence of certainty as to the description. It cites the name of Thomas Moss but this does not carry the specificity referred to in the Agreement where the Property was described as, *being a portion of the Thomas Moss original Crown Grant C-124 of Golden Grove Estates situated near the Settlement of Black Point on Great Guana Cay, Exuma*". Further, the Property agreed to be sold is identified as being located in Golden Grove Estates. Notwithstanding the name change, when questioned by Coleman AMEL stated:

"with respect to your requisition on evidence of Approval of Subdivision of Golden Grove Estates ("Golden Groves"), the Vendor states that Golden Groves is not subdivided as a subdivision and, at present, are being sold as parcels and not numbered lots."

This is certainly an issue which required clarification if AMEL were to show good and marketable title.

30. The issue of Golden Grove Estates also raised another concern advanced by Coleman, as to severance. The response as to selling in parcels as opposed to numbered lots suggest an attempt to work around the Planning and Subdivision Act (PSA). Section 4 of the PSA provides:

2. Interpretation. (1) In this Act —

...
“severance” means the division of not more than four new lots from an existing lot, the adding of land to an existing lot, the making of lot line adjustments. In addition, rights-of-way and easements also require land severance approval;

Section 36(1) and (2) provides:

36. Approval required for development.

(1) Notwithstanding the provisions of any other Act to the contrary, no person shall commence or carry out any development of land, except in accordance with the approvals required under this Act.

(2) Specifically, no person shall proceed to develop without having first applied for and obtained, if applicable — (a) Land Use Plan Amendment Approval by the Committee; (b) Zoning Bye-law Amendment by the Committee; (c) Minor Variance Approval by the Committee; (d) Notice of Zoning Compliance by the Director; € Site Plan Approval by the Committee; (f) Architectural Design Approval by the Committee for buildings or land that lie within the area defined in the First Schedule and in section 13(2); (g) Subdivision Approval by the Committee; or (h) Severance Approval by the Committee.

[Emphasis added]

The PSA was extended to Exuma by virtue of the PSA (Extension to Family Islands) Order 2012. Based upon the responses of AMEL as to the division of the property, the concern raised by Coleman was a valid one. Whilst there may be an appropriate answer to this concern, it was unreasonable for AMEL to ignore it.

Conclusion

31. The law of vendor and purchaser arrangements infers that a deposit is paid as a guarantee for the performance of an agreement for sale and where such an agreement is not completed through no fault of the purchaser, the vendor is not entitled to retain

the deposit where he has not shown a good and marketable title. In all the circumstances therefore, having regard to my findings, the suit for a declaration that Coleman has been shown a good title to the property must fail and Coleman's deposit returned. The Originating Summons of AMEL is dismissed with reasonable costs to Coleman, to be taxed if not agreed.

Dated this 15th day of November, 2021

A handwritten signature in black ink, appearing to read 'I. R. Winder', written in a cursive style.

Ian R. Winder

Justice