COMMONWEALTH OF THE BAHAMAS **2019**

IN THE SUPREME COURT **No. 01845**

Common Law and Equity Division

BETWEEN

DAVID WILSON

Plaintiff

AND

JULIAN BUTLER

1ST Defendant

AND

TAMMIKA G. BUTLER

2nd Defendant

BEFORE: **The Hon. Madam Justice J. Denise Lewis-Johnson MBE**

APPEARANCES: **K. Melvin Munroe of Counsel for the Plaintiff**

Dywan Rodgers of Counsel for the Defendants

DATES: **31st May 2022, 10th October 2024, 11th December 2025**

JUDGMENT

INTRODUCTION

1. By a Writ of Summons filed 30th December 2019 the Plaintiff (Purchaser) claimed the return of a deposit of $7,600.00 paid under an Agreement of Sale dated the 11th February 2019 executed between the Plaintiff and the First and Second Defendants (hereinafter called the Defendants who were the Vendors) for the purchase of Lot # 24, Block #2, Rolle's Court Subdivision, Malcolm Allotment. The Plaintiff claimed that the Defendants

did not produce a good and marketable title. The Plaintiff served a Notice to Complete on the Defendants on the 26th August 2019, the Defendants failed to complete, and the Plaintiff rescinded the Agreement and requested the return of the deposit.

2. The Defendants filed a Defence on the 10th March 2020 contending that they answered all requisitions properly raised and they produced a good and marketable tile. They served the Plaintiffs with a Notice to Complete on 2nd August 2019 that the Plaintiffs failed to complete and so they forfeited the deposit.

3. The property in dispute derives from the Last Will and Testament of Alpheus Clarke Rolle who devised two portions of property in Malcolm Allotment being 100 x 100 each to his sons James Rolle and John Rolle, and all other property to his daughter Iris Rolle. There was no plan or clear delineation of the property given to the sons and what was given to the daughter.

Plaintiff's Evidence

4. That the Plaintiff entered into an Agreement for Sale to purchase Lot No. 24 and paid the required deposit of $7,600.00.

5. That his attorney raised reasonable requisitions concerning the vendors' title and the Defendants did not satisfactorily answer those requisitions.

6. That relying on the advice of his attorney that the requisitions were not satisfactorily answered and good and marketable title not produced, he sought return of the deposit and termination of the Agreement.

7. That under cross examination he acknowledged that he was not knowledgeable in Bahamian land law but was relying on the advice of his attorney that she represented him well.

Defendants' Evidence

8. That the parties executed the Agreement for Sale on 11th February 2019 and the Plaintiff paid the required deposit.

9. That the Defendants provided the backing sheets to the title documents in February 2019 so the Plaintiff could commence their search; the plaintiff obtained financing and then raised 14 title requisitions on 24th April 2019, and they were all answered item by item on 27th June 2019;

10. That by further correspondence the Plaintiff asked for the lot within the 9.92-acre Malcolm Allotment tract to be identified. That in response the Defendants obtained and sent a current survey plan to identify the lot.

11. That Alpheus Rolle's Will gave Iris Rolle the "remaining" Malcolm Allotment land, subject to two 100-by-100-foot gifts to James Rolle and John Rolle. That Iris Rolle-Culmer conveyed the relevant property to the Defendants, and they built a duplex on the property which they occupied since 1995.

12. That there was no evidence that the two sons' gifts, or any third-party conveyance, conflicted with the lot being sold.

13. That the Deed of Assent, conveyance to the Butlers, and survey plan were sufficient to prove good and marketable title. That these documents go back 30 years.

14. That the Plaintiff's attorney agreed that Iris Rolle-Culmer received the residual estate and only requested a current survey plan.

15. That after the Plaintiff's attorney continued to reject title, the Defendants served their own notice to complete on 2nd September 2019 and the Plaintiff did not complete within the stipulated 14 days, so the Defendants treated the Agreement as rescinded and the deposit as forfeited.

16. That the property was later sold to another buyer using the same title material without title objections.

17. That under cross examination Attorney Gilbert A. Thompson accepted that there was no document identifying the precise lot at the beginning of the transaction. He said a survey plan was later produced.

18. That the Defendant's never produced a Surveyor's Affidavit.

19. That the property was never partitioned under the gift to the beneficiaries and that the gift to James Rolle and John Rolle were not specifically located on the 9.92-acre tract.

20. That it was the vendors' duty, rather than the purchaser's duty, to establish good and marketable title and that documentary title was essential for good and marketable title.

21. That he would not ordinarily rely on possessory title alone, and that it is not bank-acceptable unless regularized through a quieting of title action.

Correspondence between the parties

22. The Plaintiff's attorney raised requisitions on title on 24th April 2019. Requisitions were raised regarding documentary and factual assurances material to marketability - marketability of title, current valuation/tax printout, subdivision approval, a current survey plan and confirmation of visible boundary stakes/markers affidavits of citizenship, linkage of the property to the Deed of Assent dated 19 June 1981, various title documents (certificate of title, probate/grant), confirmation regarding existing mortgages/charges and their satisfaction at completion, and enquiries as to restrictive covenants, easements, judgments, pending litigation and planning approvals affecting the property/lot.

23. The Defendant's attorney replied via letter dated 27th June 2019 and in further correspondence (including emails of July 2019). The Defendant produced some materials- a tax certificate (20 May 2019), copies of a plan included in an appraisal report (not a current sworn survey plan delineating Lot No. 24), a Certificate of Title (1967), a Grant of Probate (1978), and confirmed the existence of a mortgage/charge to Scotiabank and stated that satisfactions would be obtained at completion.

24. Several answers were qualified, while others were not. The vendor noted that subdivision approval was not required because the subdivision predated the **Planning and Subdivision Act (2010).** There was no written proof that survey stakes/markers remained visible. Copies or certified copies of some historical documents (Deed of Assent) were not in the vendor's possession, and the vendor relied upon Conveyancing/Law of Property Act principles to allocate to the purchaser the cost of obtaining copies of documents not in the vendor's possession. Additionally, several matters were answered by stating "not to our knowledge."

25. In a letter dated 9th July 2019, the Purchaser's attorney reiterated its request for a current survey plan, further documentary proof linking the subject lot to the Deed of Assent, and certainty regarding boundaries and encumbrances.

26. On 14th July 2019, the Vendor's Attorney, in response to the Purchaser's request, indicated that there are no provisions in the AFS that require the following:
    a) That the Vendors provide a formal survey plan
    b) A stake/mark of the property
    c) The Deed of Assent relates to other properties of the Estate of Alpheus Clarke Rolle, and therefore, the Plaintiff is not entitled to an original of the document.
    d) The client should obtain a certified copy of this document, which should provide the explanation being sought.

27. The Vendors offered to obtain a Surveyor's Affidavit confirming that Rolle's Court lots lie within the larger Malcolm Allotment tract. It was reiterated that some of these documents were not in the Vendor's possession. Nevertheless, it was stated that copies would be obtainable at the Purchaser's cost, as provided under the **Conveyancing Law of Property Act.**

28. In a letter dated 23rd July 2019 the Purchaser's attorney pointed out the following:
    1) Clause 6, 8 and 9 of the Agreement for Sale dated 11th February, 2019
    2) The Deed of Assent of Alpheus Rolle (the testator) lists Iris Rolle (IR) as the sole Executrix of his Estate (this does not vest beneficial ownership of Malcolm Allotments property in Rolle).
    3) Having executed a Deed of Assent the Executrix have no further authority to deal with any real property under the Last Will and Deed of Assent.
    4) A quantification of "all remaining land" granted to Iris Rolle under the will, where Malcolm Allotment is expected to comprise, is required.
    5) The fact that the testator conveyed portions of the Malcolm Allotment property comprising 100 x 100 feet to each of his two sons James Rolle and John Rolle respectively. There is no evidence to support this transaction.

29. The Plaintiff's attorney claimed to reached an impasse with respect to the documentary proof required for title, served a Notice to Complete on 23rd July 2019. The Notice to Complete (citing Clause 11 as its authority), "making time of the essence" and giving the Vendor 14 days to deduce title and deliver the outstanding assurances.

30. The Vendor's response of 23rd July 2019, confirmed that the lot at Rolle's court comprised 9.92 acres and that the clients will attend to a service of the Surveyor's Affidavit. The Plaintiff's attorney responded on the same date, also confirming their need for a response regarding the title of Iris Rolle-Culmer. On July 30th, 2019, the Attorney for the Defendants noted that there was no additional reference in the Will of the testator. Following the distribution of the properties, each 100 x 100 feet, to James Rolle and John Rolle, the remaining portion was given to Iris Rolle Culmer in 1992. Further, the Vendors in the transaction built on the property in 1995 and have been in undisturbed possession of the property for more than 24 years. It was also noted that a Surveyor (already instructed) would be tasked with confirmation that the property is a portion of the 9.92-acre Malcolm Allotment tract.

31. On 8th August 2019, the Purchaser's Attorney wrote to the Vendor's Attorney, noting that the Notice to Complete had expired and inquired whether the Vendor was in a position to

satisfy the requisitions regarding the 9.92-acre tract property. The failure of which would result in the Notice to Complete being invoked and the requested deposit being returned.

32. There was additional email correspondence by the Vendor's Attorney on 18th, 20th, and 26th August 2019.

33. On 2nd August 2019, the Vendors served on the Purchaser a Notice to Complete requiring the Purchaser to complete the purchase within 14 days or risk forfeiture of the deposit. On the 26th August 2019, the Purchaser's Attorney then served a further Notice to Complete, giving a cure period expiring on 14th September 2019. The Purchaser invoked its 26th August Notice on 16th September 2019. On 19th September 2019 the Vendor's Attorney replied that, because the Purchaser had not completed, the Vendors treated the contract as rescinded and the deposit forfeited.

34. The Vendors refused to return the deposit when demanded. On 30th December, 2019, the Plaintiff commenced an action by way of Writ of Summons for an order of the return of the deposit.

The Issues

35. The following issues are to be determined.

1) Whether the Purchaser's requisitions were properly raised, and if so, were they adequately answered by the Vendor?

2) Whether the Vendor deduced a good and marketable title in accordance with the Agreement for Sale (AFS)?

3) Whether the Purchaser's Notice to Complete of 26th August 2019 was valid under Clause 11? If so, whether the Defendant cured the requisition on title as raised?

4) Whether the Defendants were ready willing and able to complete and thus were entitled to a claim of forfeiture under Clause 10?

5) Whether the deposit must be returned to the Plaintiff and is the Plaintiff entitled to damages?

Law and Discussion

36. **Section 3(4)** of the **Conveyancing and Law of Property Act (Ch. 138) (CLPA)** provides that - *"A purchaser of land shall not be entitled to require a title to be deduced for a period*

*of more than thirty years, or for a period extending further back than a grant or lease by the Crown or a certificate of title granted by the Court in accordance with the provisions of the **Quieting Titles Act**, whichever period shall be shorter."*

37. **Section 3(8) CLPA-** states *"On a sale of any property, the expenses of the production and inspection of all Acts, records, proceedings of courts, deeds, wills, probates, letters of administration and other documents, not in the vendor's possession, and the expenses of all journeys incidental to such production or inspection, and the expenses of searching for, procuring, making, verifying and producing all certificates, declarations, evidences and information not in the vendor's possession, and all attested, stamped, office or other copies or abstracts of, or extracts from, any Acts or other documents aforesaid, not in the vendor's possession, if any such production, inspection, journey, search, procuring, making, or verifying is required by a purchaser, either for verification of the abstract, or for any other purpose, shall be borne by the purchaser who requires the same; and where the vendor retains possession of any document, the expenses of making any copy thereof, attested or unattested, which a purchaser requires to be delivered to him, shall be borne by that purchaser."*

38. A purchaser is entitled to request and insist on a vendor providing good and marketable title, one which will not expose him to liability. The purchaser must be satisfied that the vendor has a good root of title to pass on the fee simple interest.

39. The court will address firstly the Defendants assertions that the Plaintiff's Statement of Claim failed to "give particulars of and specify what requisitions were properly raised and the Defendant failed to satisfy." This was raised by the Defendants in the context of meeting the required standard in pleadings. The Defendants state that the Plaintiff failed to properly plead and particularize the claim as is required by the English Rules of the Supreme Court (which was the relevant law at the time this action commenced). This failure prevents the Defendants from knowing the case to be met, the points of dispute and with precision the points in dispute. The court is of the view that Defendants ought to have raised this legal point prior to filing their numerous pleadings after the Plaintiff's Statement of Claim. With each of the Defendant's filed pleadings thereafter they took fresh steps, thereby waiving any irregularity found in the Statement of Claim or procedure of the Plaintiff. The Defendants cannot at his point rely on this irregularity to dismiss the Plaintiff's action, they waived the irregularities and participated in the action up to and including the trial.

40. Clause 8 of the AFS required the Defendants to answer requisitions on title properly raised by the purchaser or his attorneys and by clause 11, if the vendors fail to deduce the stipulated title or fail to deliver the required assurance, the purchaser may give written

notice making time of the essence; if the vendors nevertheless fail to complete within fourteen days, the deposit is to be returned and the agreement cancelled. The Defendants state that they answered all proper and reasonable requisitions raised and "established good and marketable title to the property." The issue here is whether the identification of the property being sold, the testamentary gifts of the two lots to James Rolle and John Rolle and the balance of property gifted to Iris Rolle-Culmer are specifically identifiable on the 9.92-acre tract of land at Malcolm Allotment owned by Alpheus Clarke Rolle.

41. The Court finds that the Defendants response to the requisitions left reasonable doubts about identity, boundaries, and the chain of title. The Defendants insistence on not providing a plan with clear boundaries, a plan clearly delineating the lots given to John Rolle, James Rolle, and the lot being sold and the balance of property held by Iris Culmer, would provide the certainty that the lot being sold was not encumbered and the boundaries could be identified. Such a plan would help establish documentary title and chain of title to the property that the Plaintiff requested. The Defendants failed to remove the uncertainty on the property identification and title. It was further determined that there was no partition of the land at the time of distributions of gifts(lots) under the Will, this would have brought clarity to the lot under sale.

42. The court finds that the testamentary gifts to James Rolle and John Rolle were not specifically identified on the Alpheus Clarke Rolle tract, the exact location and boundaries were not laid out, they were simple given a size of land 100 x 100 from a tract of land. The inability to specifically identify those two lots creates uncertainty as to what land remained with Iris Rolle-Culmer and ultimately what is being sold to the Plaintiff. There was no evidence of the partition (Deed of Partition) of the property bringing certainty to what was given to the James Rolle and John Rolle and thus uncertainty as to what remained; to ask what belonged to Iris Rolle-Culmer was a legitimate requisition by the Plaintiff. The lack of plans to the Deeds of Gift created a material uncertainty to the identification of the documentary title of the property being sold. While the court accepts that the vendors may have been in possession for 24 years and there could be a limitation on the right of a third party to bring an adverse action and its success may be unlikely, that possibility does not found a good root of title. The Vendors' being in possession for 24 years and not applying for a Certificate of Title under the Quieting of Titles Act, does not provided them a documentary root of title, its possessory and will not be accepted by a financial institution as good and marketable; this was accepted by the Defendants attorney under cross examination. The Vendor's attorney conceded to the fact that the testamentary gifts to John Rolle and James Rolle were not identified on the Alpheus Rolle tract and there was no partition of the property, albeit he did not agree that those points should affect title. The Court finds that identification of the property is critical to good title and the inability to

confirm what portion of Iris Rolle's property was being sold was material to establishing a good root of title.

43. The Court further considered the contents of the correspondence exchanged between the parties as it relates to the requisitions, as this would determine if the Defendants answered the requisitions raised and if they provided a good and marketable root of title. It is the Defendant's letter of the 30th July that was relied on as having answered the final requisition of title. The Defendants noted that the Vendors had been in undisturbed possession for 24 years, had built a duplex on the land and they were getting a surveyor's affidavit. The Plaintiff rejected this answer as satisfactory and requested the return of the deposit and the cancellation of the agreement. The Defendants disagreed, stating that they had answered the requisition and was ready to complete and thus were entitled to keep the deposit.

44. The Defendants referred the court to the statute of limitation as providing a level of qualified guarantee that any outstanding claim to ownership by third parties is barred. The Court as stated above does not find this position without being coupled with a Certificate of Title as meeting the material standard of a good and marketable root of title.

45. The case of **Ocean Estates Ltd. v. Norman Pinder (1969) 2 AC 19** relied on by the Defendants is one of trespass and can be distinguished from this case of a contractual dispute over good and marketable title for the sale of property between a vendor and purchaser. The court in **Pinder** found that the standard of title a purchaser is entitled to insist on in a conveyancing matter is much higher than the title required for trespass. In trespass a much wider evidence of ownership is considered to establish ownership and there by ground a claim in trespass on that property, the same does not apply as between a vendor and purchaser.

46. The Court finds that the Defendants as vendors have the burden of establishing a good root of title, providing documentary title is an essential element to this. Possession in and of itself does not establish a good root and marketable title. The Defendants did not produce a good and marketable title and therefore the Notice to Complete was not properly issued and they are not entitled to keep the deposit.

47. The purchaser is entitled to give notice to complete, when answers to requisitions are not forthcoming. It is clear from the evidence before the Court the parties were at an impasse, the Defendants claimed to have answered all requisitions and the Plaintiff claimed they failed to remedy the material title concerns within the contractual cure period of 14 days from the date of the Notice. The Plaintiff sought the return of the deposit. The Court finds that the Plaintiff's requisitions were clear and concise, the unresolved discrepancies on title by the Defendants amount to material defects in title. The survey plan produced by the Defendants was important evidence of identification however, it did not clarify the

identification and location issues of the gifts to John Rolle and James Rolle and the property being sold to the Plaintiff.

48. Finally, the Vendor's obligation to deduce title is statutory and entrenched in the common law. **Section 3(4) and Section. 3(8) of the CLPA** provides the scope of title inquiries and allocates the cost of producing documents not in the vendor's possession to the purchaser. The title must be free from the risk of litigation. The Defendant's averment that the title was accepted by another purchaser is not evidence that the title is good and marketable title, it is quite possible that a new purchaser was prepared to take a risk on title. This is all speculative and no evidence was led on this point.

49. **Section 3(4) CLPA** limits how far back a purchaser may require title to be traced as 30 years or to a Grant of Lease of Crown Land or a Possessory Certificate obtained under the **Quieting Titles Act**. Had the Defendants obtained a Certificate of Title there would be no issue of a good root of title, as they did not, the obligation to answer requisition and prove title is theirs.

50. There is no evidence that the Plaintiff is entitled to damages, while it was requested in the Writ of Summons the Plaintiff led no evidence to support and or prove this claim. The Court makes no award as to damages.

51. The Court finds that the Plaintiff properly exercised his right to serve Notice to Complete, it was in writing, specified the issue to be remedied, made time of the essence, stated the cure period of 14 days and it was served on the Defendants.

CONCLUSION

52. The Court having watched the demeanor of the witnesses, considered the relevant law and evidence, for the reasons stated above finds as follows:

    1) That the Defendants waived all irregularities in the Plaintiff's pleadings by taking fresh steps in filing pleadings thereafter.

    2) That the Defendants failed to deduce a good root of title or a good and marketable title to Lot No. 24 Malcolm Allotment in accordance with the Agreement of Sale dated 11th February 2019.

    3) That the Plaintiff validly served a Notice to Complete pursuant to Clause 11 of the Agreement for Sale on 26th August, 2019, making time of the essence and requiring the

Defendant to complete within fourteen days, and that the Defendant failed to remedy the outstanding title defects within that period.

4) That the Plaintiff's requisitions were properly and reasonably raised and were not adequately answered by the Defendants.

5) The Agreement for Sale is canceled.

6) The Defendant shall return the deposit of $7,600.00 to the Plaintiff.

7) The Defendant's claim to forfeit the deposit is dismissed.

8) Cost to the Plaintiff to be taxed if not agreed.

Dated this 29th day of September, A.D. 2026

The Hon. Madam Justice J. Denise Lewis-Johnson MBE