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IN THE PRIVY COUNCIL Appeal No.43 of 1961

ON APPEAL

FROM THE SUPREME COURT OF THE BAHAMA ISLANDS

B E T W E E N

GEORGE ALEXANDER SELKIRK Appellant

- and -

ROMAR INVESTMENTS LIMITED Respondent

CASE FOR THE APPELLANT RECORD

1. This is an appeal by leave of the Supreme Court of the Bahama Islands from a final Judgment of that Court (Scarr J.) dated the 28th April 1961 whereby it was ordered that Judgment be entered for the Defendant (the above-named Respondent) with costs in an action brought by the above-named Appellant on the Equity Side. The Appellant sought a declaration that the Respondent was not entitled to rescind an Agreement dated the 6th January 1959 (hereinafter called "the Contract") for the sale at a price of about £149,000 of more than 400 acres of land situated in the Island of New Providence and for specific performance of the Contract and ancillary relief. P.39 p.38 p.5 p.40

2. The principal question which arises on this appeal is whether a vendor of land who in breach of his duty failed to disclose to the purchaser special facts within his knowledge relating to his title to such land can (when such facts are discovered by the purchaser) rely on a provision in the contract which purports to confer on the vendor power to rescind the same by a notice in

RECORD writing on the ground that he is unable or unwilling to satisfy or comply with an objection or requisition respecting such facts.

3. The issue between the parties concerned
p.47 the title to a parcel of land of about 75 acres being part of the land comprised in the Contract.

p.40 4. By Clause 1 of the Contract the Appellant agreed that subject to the Respondent producing a good marketable title he would procure a Company to be incorporated in the Bahama Islands to purchase all the said land from the Respondent and that part of the purchase price should be satisfied by a mortgage. In pursuance of the Contract the Appellant caused the said Company to be incorporated.

5. The Contract constituted an "open contract" in that it contained no modification of the
p.40 Respondent's obligation to deduce a good marketable title; and (by Clause 2) the Respondent covenanted with the Appellant to convey the property in unincumbered fee simple.

p.42 Sub-clause 3 (3) of the Contract was in the following terms :-

> (3) Should any objection or requisition whatsoever be insisted on which the Vendor shall be unable or unwilling to satisfy or comply with he may (notwithstanding any attempt to remove or satisfy the same or any negotiation or litigation in respect thereof) by notice in writing to the Purchaser or his Solicitor rescind the contract upon the terms hereinafter mentioned in sub-clause (7) of this Clause and the

Purchaser shall thereupon return to the Vendor all papers belonging to the Vendor in his possession in connection with the sale. If the Purchaser within six days after receiving notice to rescind withdraws the objection or requisition the notice to rescind shall be withdrawn also

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6. The said 75 acres of land is truly described in the Contract as having been granted to Concepcion Canuta Kemp (hereinafter called "Concepcion") by a Grant dated the 12th July 1881 such Grant being a Crown Grant and the root of title thereto.

p.47
p.76

7. In pursuance of the Contract the Respondent by its Solicitor submitted to the Appellant's Solicitor its documents of title. The next link in the Respondent's chain of title after the said Crown Grant was a Conveyance dated the 16th March 1939 whereby one Maximo Edward Kemp (hereinafter called "Maximo") purported to convey the said 75 acres of land to The Honourable H. G. Christie. This Conveyance described Maximo as "the only son and heir at law of Concepcion Canuta Kemp deceased". By the Real Estate Devolution Act of the Bahama Islands (Chap. 219) which came into force on the 22nd June 1914 the title to land which was not vested at the time of the death of an owner in a person with a right to survivorship vested in the deceased owner's personal representative. At the date of the Contract this Conveyance was not yet twenty years old and therefore its recitals were not validated by Section 33 of the Conveyancing Law of Property Act of the Bahama Islands (Chap. 184). Accordingly by letter dated

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the 29th January 1959 the Appellant drew attention to this gap in the chain of title and called for the following evidence namely :-

"(a) evidence of the death of Concepcion Canuta Kemp;

(b) if Concepcion Canuta Kemp died intestate before 1913, then evidence that Maximo Edward Kemp is the only son and heir at law as claimed in the deed dated the 16th March 1939;

(c) if C.C. Kemp died intestate, production of the Will or a certified copy thereof;

(d) if C.C. Kemp died after the 22nd June 1914, evidence of administration or probate of her estate and a deed of assent vesting title in the heir at law or persons beneficially entitled thereto."

8. The Respondent had purchased the property comprised in the Contract in November 1958 from the Harrisville Company (a Company incorporated under the laws of the State of Rhode Island, one of the United States of America). For the purpose of bridging (in part) the gap in the chain of title offered by the Harrisville Company to the Respondent, the Harrisville
p.80 Company procured an Affidavit of one Maude Malcolm MacDonald dated the 17th September 1958 (over three months prior to the date of the Contract). This deponent swore that she knew and was well-acquainted with the late Concepcion Canuta Kemp the wife of Edward Kemp late of the City of Nassau and that

"(3) Both the said Concepcion Canuta Kemp and her husband Edward Kemp died before my father who died in the year 1909". RECORD

9. Under cover of a letter dated the 11th February 1959 the Respondent by its Solicitor tendered the said Affidavit of Maude Malcolm MacDonald dated the 17th September 1959 together with a further Affidavit dated the said 11th February 1959 by the same deponent in which she said (so far as may be material hereto) that the said Concepcion had one son only whose name was Edward Maximo Kemp. In such letter the Respondent's Solicitor referred to the said Affidavits by way of answer to the above requisitions (a) (b) and (c) set out in paragraph 7 of this Case and contended that the recitals in the said Conveyance by Maximo would be sufficient evidence of the truth on March 16th 1959 under the said Conveyancing and Law of Property Act; and further that the well-known dictum of Lord Esher in Re Harrison, Turner v. Hellard (1885) 30 Ch. Div. 390 at page 393 (a case on the construction of a Will) provided a guide to the question whether Concepcion Canuta Kemp died testate or intestate. p.55 p.80 p.82 p.55

10. By a letter dated the 6th April 1959 the Appellant's Solicitor withdrew certain requisitions on title which had been made in respect of the land agreed to be sold other than the said 75 acres but pointed out that the conveyance of the land to the Respondent had not yet been submitted for examination and suggested a meeting to discuss what should be done in regard to the said 75 acres. p.62

11. Under cover of a letter dated the 4th July p.63

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1959, the Respondent's Solicitor forwarded to the Appellant's Solicitor the Conveyance dated the 31st May 1959 from the Harrisville Company of 364.5 acres of land comprised in the Contract together with the Conveyance from the Harrisville Company of the said 75 acres of land which was dated the 27th February 1959. In the said letter the Respondent's Solicitor proposed a partial completion of the Contract and that completion of the sale of the said 75 acres should be deferred.

12. The parties were unable to agree the terms on which the Contract should be partially completed and after further negotiation the

p.69 Respondent's Solicitor, by letter dated the 24th August 1959, purported to rescind the Contract as to all the parcels of land if the requisitions and objections as regards the 75 acres of land were not withdrawn.

p.71 13. By letter dated the 31st August 1959 the Appellant's Solicitor informed the Respondent's Solicitor that although the Appellant did not wish to be put in a position where he must choose between losing his bargain and being forced to accept an imperfect title, he would be willing to complete if efforts to answer the requisitions and objections failed. The Respondent refused to consider this course and purported to rescind

p.73 the Contract by letter dated the 1st September

p.1 1959. The Writ in the Action was issued on the 3rd September 1959.

14. The Action came on for trial before The Honourable Mr. Justice Scarr on the 11th April 1961 and was continued on the 13th April 1961

when the learned Judge reserved his judgment. On the 28th April 1961 the learned Judge delivered his judgment in which he described the case as difficult. RECORD p.38

15. It was admitted or established by the evidence :-

(1) That the Contract was drawn by the Appellant's Solicitor in collaboration with the Respondent's Solicitor and that the power to rescind contained in sub-clause 3(3) of the Contract had not been included to meet any particular difficulty with regard to the title. p.25

(2) That the Respondent well knew of the defect in the title to the 75 acres of land at the time of the Contract and that efforts had been made to clear up the title before the date of the Contract. pp.12/18 and pp.32-35

(3) That the Harrisville Company was worried as to the title and for some considerable time before the sale to the Respondent it had been making inquiries about Concepcion; and that a firm of lawyers had been instructed to make searches in Montreal as to her death and the death of her husband and as to the existence of Probate of a Will of Concepcion; but that such searches had proved fruitless and the Respondent's Solicitor had been so informed. pp.12-18 pp.13-17 pp.14 and 17

16. The learned Judge held that the requisitions on title, which had been delivered on behalf of the Appellant was a very proper one and said :- p.28

"As I have said before, apart from the p.28

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"statements in the 1939 Deed, there was no "evidence that Maximo was the heir. More- "over, it was desirable to establish with "reasonable certainty whether Concepcion "had died before or after the 22nd June 1914, "i.e. the date the Real Estate Devolution "Act (Ch. 219) came into force. If the "death had occurred before that time, the "land would have vested directly in the heir "on an intestacy or directly in the devisee "in the case of a will, whereas on a death "after the Act the land would have vested in "the personal representative upon the making "of the appropriate grant pending which it "would have vested in the heir in the case of "an intestacy. See John v. John (1898) 2 Ch. "573 and Re Griggs (1914) 2 Ch. 547 C.A.

" It was also pertinent to ask and clearly "have it on record (since the 1939 Deed was "not as yet evidence) whether or not Concepcion "had died intestate".

17. It is submitted that although the learned

p.25 Judge correctly stated the law, he failed to apply the principles established by the authorities to which he referred to the facts of this case. Dealing with the general principles which are applicable to powers of rescission contained in contracts for the sale of land the learned Judge said :-

p.25 "Numerous cases have been cited by Counsel, "some of which I shall refer to later; but "putting it simply the law, which is now "well established, is this: A vendor of land "stands in a special relationship to his

"purchaser. He has an obligation to do "his reasonable best to ensure that the "purchaser gets title according to the "contract; and if he fails in that duty he "may well be precluded from taking advantage "of rescission clauses such as the one now "before the Court.

" The position has been put in differing "ways, but on the authorities it is clear that "a vendor must not exercise his power of "rescission capriciously, arbitrarily or un- "reasonably, or in bad faith; nor must he act "recklessly, that is to say without reasonable "regard to the rights of the purchaser to "obtain title. Some of the authorities in "support of this proposition are :- "Re Dames and Wood (1885) 29 Ch. D. 626, C.A., "at p. 630. Re Starr Bowkett Building Society "and Sibuns Contract (1889) 42 Ch. D., 375 C.A. "Re Des Reaux and Setchfield's Contract (1926) "Ch. 178 (mentioning and commenting upon) "Re Jackson and Haden's Contract (1906) 1 Ch. "412 C.A., and Duddell v Simpson (1866) 2 Ch. "App. 102 Merrett v. Schuster (1920) 2 Ch. 240 "and Baines v. Tweddle (1959) 2 All E.R. 724."

18. It is submitted that as the Respondent had entered into an open contract to give a good marketable title to the 75 acres of land when it knew that it could give only an imperfect title which involved a certain amount of risk, or alternatively, had no reason to believe that it could confer a good title, it was guilty of conduct which, while falling short of fraud or dishonesty, might be described as reckless; and that in accordance with at least two of the authorities

RECORD p.25 to which the learned Judge referred (i.e. Re Jackson and Haden's Contract (1906) 1 Ch. 412 and Baines v. Tweddle (1959) 1 Ch. 679) the Respondent was not entitled to rescind the p.42 Contract under the power conferred by sub-clause 3 (3) thereof merely because the Appellant wished to satisfy himself as to the facts which should have been disclosed before the Contract was signed.

19. It is also submitted that the learned Judge p.37 misdirected himself in holding that the cases of Glenton and Saunders to Haden (1885) 53 L.T. 434 and Willcott v. Peggie (1889) 15 App. Cas.42 afforded authority for the proposition that a vendor was under no obligation to give the reasons for exercising a power to rescind a contract when such reasons related to facts concerning the title which the vendor was (as in this case) under a duty to disclose at the time when the Contract was signed. The Respondent was under a duty to disclose every relevant circumstance relating to the known defect in the paper title.

20. At the date of the Contract the Respondent p.12 well knew that it did not have a good marketable title to the said 75 acres of land. The pp.12,13 14 & 15 Respondent's Solicitor relied (without any independent check) upon what he was told by the Solicitor for the Harrisville Company. The pp.12 & 14 Respondent's Solicitor could not recall making a search in the Nassau Registry for Concepcion's pp.12,13 and 14 death and he himself made no enquiries in Montreal where Concepcion was known to have resided. The Respondent's Solicitor said that he p.13 was satisfied that Maximo was Concepcion's heir as a result of "conversations" with the Solicitor

to the Harrisville Company.

21. It is submitted that these matters show the Respondent's "recklessness" at the time of the Contract within the meaning of the word as used in Re Jackson and Haden's Contract supra, Merrett v. Schuster supra and Baines v. Tweddle supra; but the learned Judge misdirected himself in failing to consider the effect of such recklessness upon the Respondent's right to make use of the special power to rescind. It is also submitted that learned Judge misdirected himself in holding that the principles on which the Case should be decided were affected by the fact that the Contract was originally drawn by the Appellant's Solicitor.

22. The Appellant submits that the decision of the Supreme Court was wrong and should be reversed and that Judgment should be entered for the Appellant in the terms of paragraphs (1) and (2) of the prayer to the Statement of Claim and for such further or other relief as may be appropriate in the circumstances of this case for the following among other reasons. p.5

R E A S O N S

(1) BECAUSE the Respondent entered into the Contract and thereby agreed to deduce a good marketable title recklessly that is to say either (a) knowing that he could or might not be able to establish any such title to the 75 acres of land, or (b) without any reason for thinking that he would be able to make such title. Accordingly the Respondent cannot rely upon sub-Clause 3 (3) of the Contract for the purpose of rescinding the

RECORD same;

(2) BECAUSE there were enquiries which the Respondent could and ought to have made in compliance with the requisition;

(3) BECAUSE the result of the enquiries made on behalf of the Respondent's vendor and communicated to the Respondent should have been communicated to the Appellant;

(4) BECAUSE the Respondent's purported rescission was arbitrary or unreasonable and the Appellant was and is entitled to accept such title to the property comprised in the Contract as has been disclosed.

HAROLD LIGHTMAN

A.C. SPARROW

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CASE FOR THE APPELLANT

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