Privy Council Appeal No. 43 *of* 1961

George Alexander Selkirk – – – – – – *Appellant*

v.

Romar Investments Limited – – – – – – *Respondent*

FROM

THE SUPREME COURT OF THE BAHAMA ISLANDS

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 11TH NOVEMBER 1963

Present at the Hearing:

VISCOUNT RADCLIFFE.

LORD MORTON OF HENRYTON

LORD EVERSHED

[*Delivered by* VISCOUNT RADCLIFFE]

This appeal from a judgment of the Supreme Court of the Bahama Islands challenges the right of the respondent company to exercise a power of rescission reserved to it under a contract for the sale of land made between itself and the appellant. The suit in which the judgment appealed from was given was instituted by the appellant on the Equity side of the Supreme Court for the purpose of obtaining a declaration to the effect that the respondent was not entitled to make the rescission and an order for the specific performance of the sale contract. The action was tried by Scarr J. and by his final judgment dated 28th April 1961 it was dismissed with costs. It is from that judgment that the appellant has appealed to this Board.

The contract in question was contained in a written Agreement dated 6th January 1959. It was an agreement for the sale of the unincumbered fee simple of four separate blocks of land, which the respondent undertook to convey to a limited company to be formed by the appellant and incorporated under the laws of the Bahama Islands. The total acreage of land involved was some 400 acres, and the purchase price stipulated for, which was to be precisely ascertained by measurement of the area before completion, amounted to something in the region of £150,000.

The contract consisted of thirteen separate clauses, several of which were broken down into sub-clauses. The vendor's power of rescission was contained in sub-clause (3) of clause 3, the first seven sub-clauses of which ran as follows:—

> " (1) The Vendor or its Solicitor shall submit the documents of title to the said hereditament to the Purchaser or his Solicitor within Seven days from the date hereof.
>
> (2) Requisitions and objections (if any) in respect of the title or description of the said hereditaments or otherwise arising out of the sale shall be delivered to the Vendor's Solicitor within Thirty days from the delivery of the title deeds and any further requisitions or objections arising upon any reply to a former requisition or objection shall be so delivered within Fifteen days from the delivery of such reply and every requisition or objection not so delivered shall be deemed to be waived and subject only to requisitions and objections so delivered the title shall be considered accepted.
>
> (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.

(4) The examination of the title of the Vendor to the said hereditaments by the Purchaser or his Solicitor shall be completed within Fifty-two days from the date of these presents and if upon completion of such examination the Purchaser or his Solicitor shall notify the Vendor in writing that the Purchaser or his Solicitor is satisfied that the Vendor has good marketable title to the said hereditaments the Vendor will proceed forthwith to survey the said hereditaments at his expense such survey to be completed within Sixty days after such written notification by the Purchaser or his Solicitor to the Vendor as aforesaid.

(5) The completion of the purchase and the payment of the balance of the purchase price shall take place after examination of the title of the Vendor to the said hereditaments by the Purchaser or his Solicitor and after completion of the survey of the said hereditaments by the Vendor One hundred and Eighty-two days from the date hereof or on such earlier date as may be mutually agreed upon (hereinafter referred to as " the completion date ") at the office at the Fifth Floor, Trade Winds Building, Bay Street in the City of Nassau of Mr. Foster Clarke, the Purchaser's Solicitor.

(6) On completion the Vendor will execute and deliver a proper assurance to the Company of the said hereditaments such assurance to be prepared perfected and stamped by and at the expense of the Vendor after approval thereof by the Purchaser's Solicitor and such assurance to have attached thereto a proper survey plan of the said hereditaments prepared by and at the expense of the Vendor.

(7) If the Vendor shall fail to produce a good marketable title to the said hereditaments approved of by the Purchaser's Solicitor or shall rescind the sale pursuant to the provisions of sub-clause (3) of this clause on or before the completion date the Vendor shall refund to the Purchaser the said deposit of the equivalent in Pounds Sterling of the sum of Forty thousand and Five hundred Dollars in the currency aforesaid hereinbefore referred to AND thereupon this Agreement shall be cancelled and the Purchaser relieved from all covenants on his part herein contained."

This sub-clause (3) upon which the action turns is a common form clause in contracts for the sale of land, in the sense that stipulations to this effect, though not necessarily in just the same form as that employed here, have long been inserted in such contracts. It has, as the learned trial judge said, " long been common form ". The contract now in question was in fact, contrary to the usual practice, prepared in draft by the solicitor for the purchaser, and it was his draft, tendered to the vendor's solicitor, which introduced the rescission clause into the agreement entered into by the parties.

Of the four blocks of property covered by the contract it is only the fourth item that is relevant to the present litigation, for it was a requisition with regard to proof of the title to this block that led to the respondent giving its notice of rescission. The block is described in some detail in the schedule in which the sale parcels are contained, and it is there described as a tract of land containing 75 acres situate in the Island of New Providence with certain geographical limits as there described, "the said tract of land having been granted to Concepcion Canuta Kemp by grant dated the twelfth day of July A.D. 1881 . . ., which said tract of land has such position shape boundaries marks and dimensions as are shown on the diagram or plan attached to an Indenture of Conveyance dated the fifth day of August A.D.1946 and made between the Honourable Harold George Christie of the one part and Austin Theodore Levy of the other part . . .".

The events that followed upon the signing of the contract are related in detail in the oral judgment of the learned judge and, for the purposes of this appeal, can be set out with brevity. It is not the custom in the Bahamas, apparently, to deliver abstracts of title in the course of proving title. Accordingly Mr. Sands, the vendor's solicitor, delivered to the purchaser's solicitor, Mr. Clarke, certain documents of title relating to the 75 acre block. Since the contract contained no special stipulation as to root of title, conveyancing law gave the purchaser the right to a root not less than 40 years old. One of the documents therefore was the Crown Grant of 1881 to Concepcion Canuta Kemp, which had been mentioned in the contract and served as the root required. The next title deed in chronological order was a conveyance made on 16th March 1939, whereby one Maximo Edward Kemp, described in the recitals as " the only son and heir-at-law of Concepcion Canuta Kemp deceased ", conveyed the property to a purchaser, the Honourable Harold George Christie. The title derived from Christie did not become a matter of dispute between the parties, but it is worth noting that he in his turn had sold and conveyed in 1946 to a Mr. Levy, that on the death of the latter his executrix had sold to a limited company, the Harrisville Company, and that this company had sold to the respondent, although the conveyance in implementation of that sale was not executed until 27th February 1959.

Plainly, these documents did not prove an unchallengeable devolution of title between Mrs. Kemp and Maximo Edward Kemp. First, there was the question whether she had died testate or intestate; secondly, there was the question who, if she had died intestate as to this land, was her heir-at-law; and, thirdly, it was relevant for proof of title to know whether she had died before or after the 22nd June 1914, upon which date the Real Estate Devolution Act (C.219) came into force, with the result that the real estate of a person dying thereafter vested in the first instance in his legal personal representatives instead of vesting, as theretofore, in his devisee or heir-at-law.

Apart from what was said or implied in the conveyance of 16th March 1939, the only evidence supplied by the vendor's solicitor in support of the title on these points was an affidavit sworn by a Mrs. Maude McDonald on the 17th September 1958 to the effect that she knew Mrs. Kemp and her husband, Edward Kemp, to have died prior to 1909. This, of course, went very little way towards proof of what might be in doubt: on the other hand, there was the fact, which must have been patent to both parties, that by virtue of section 3 (3) of the Conveyancing and Law of Property Act (C.184) the recitals in the 1939 conveyance to the effect that Maximo Edward Kemp was the only son and heir-at-law of Mrs. Kemp and was at the date of the conveyance seised in unincumbered fee simple in possession of the property conveyed would become by the 16th March 1959 sufficient evidence of those facts, unless positive evidence was produced to the contrary. A purchaser therefore who accepted a conveyance after March 1959 would be able to rely on proof of his title to this extent, if he wished to resell at any time thereafter with a good marketable title.

On receipt of these documents forwarded by Mr. Sands, Mr. Clarke wrote on the 29th January 1959, making requisitions with regard to the 75 acre block. " It will be necessary ", he said, " to obtain the following:—

(*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 testate, 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."

The requisition, said the learned judge, was a very proper one and their Lordships agree. It was proper that the purchaser's solicitor should seek to obtain for his client the best evidence that could be obtained in confirmation

of the title offered. The question at issue in this action however is not what it was reasonable or proper for the purchaser to ask for, but whether in the circumstances that existed by August 1959, when the vendor gave notice of the exercise of its power of rescission, there was anything in the situation or the conduct of the parties to preclude the vendor from taking advantage of a contractual right which, *ex facie*, the contract had undoubtedly secured to it. To decide this point it is necessary to set out a little more of what passed between the respective solicitors of vendor and purchaser and of what the evidence at the trial showed the situation of the vendor to have been; and then to inquire what is the nature of the legal principle that regulates the relations of vendor and purchaser in those circumstances.

The purchaser's requisition was never withdrawn. It is true that at the hearing before this Board his counsel stated that he was prepared to accept the vendor's title as shown by the title deeds and such evidence as had been produced before the notice of rescission, rather than lose his bargain altogether; but this appears to have been the first intimation of any such attitude on his part, it was not consonant with the relief claimed by him in the action, and their Lordships are bound to treat it as having no bearing on the real issue, which is whether or not the vendor was entitled to exercise the contractual right of rescission when it did.

Between the sending of the purchaser's requisition at the end of January 1959 and the delivery of the vendor's notice in the following August, there were numerous exchanges, oral and written, between the solicitors of the two parties, Mr. Sands trying to show that he had done all that was reasonable to prove his title and that it was acceptable, Mr. Clarke insisting on the necessity of evidence such as he had called for in his requisition. The only additional evidence that in fact was forthcoming was a fresh affidavit sworn on 11th February 1959 by the Mrs. McDonald who had previously deposed and two new affidavits sworn by the Honourable R. W. Sawyer and Mr. W. E. G. Pritchard respectively. All these were in the hands of the purchaser's solicitor by the first week in April. While they supplied considerable further confirmation of the fact that Mrs. Kemp had died sometime about the year 1909 and added evidence to the effect that she had had only one son, named Maximo Kemp or Edward Maximo Kemp, they fell well short of affording the full amount of proof that was called for by Mr. Clarke's outstanding requisition.

No death certificate of Mrs. Kemp ever was forthcoming. This was a difficulty which had faced Mr. Sands when he came to investigate title on the respondent's purchase from the Harrisville Company. This sale had taken place in November 1958, the vendor company on that occasion being represented by a Mr. Johnstone, a solicitor, who gave evidence on the trial of the present action. Mr Johnstone's activities in trying to establish the date of Mrs. Kemp's death and the existence or non-existence of a will of hers will be noticed later. For the moment it is sufficient to say that the respondent, on Mr. Sands' advice, did accept the title produced by Mr. Johnstone on the strength of the title deeds and the first affidavit of Mrs. McDonald which were offered to Mr. Clarke and took conveyance from the Harrisville Company on the 27th February 1959: while Mr. Clarke, for the appellant, refused to be satisfied in this way and expressed his requirements in a letter dated 1st April 1959 in the following words: ". . . The Affidavit by Maud M. McDonald to the effect (i) that Concepcion Canuta Kemp died before 1909 and (ii) that Maximo Edward Kemp is the only son of the said Concepcion Canuta Kemp is not sufficient evidence to support the contention that the said Maximo Edward Kemp is the heir-at-law of the said Concepcion Canuta Kemp. If corroborating evidence on these two points can be obtained from other sources and a declaration of the Court can be obtained to the effect that the said Maximo Edward Kemp is the heir-at-law of the late Concepcion Canuta Kemp and was entitled to convey the said land, then my client will be prepared to accept title."

Receipt of the two further affidavits by Mr. Sawyer and Mr. Pritchard, which were dispatched on the 3rd April, did not alter the attitude of Mr. Clarke on this point. Indeed the purchaser continued to insist up to and after receipt of the rescission notice that his requisitions must be satisfied, his

counsel, Mr. Adderley, who had taken over the conduct of affairs from Mr. Clarke, writing on the 31st August 1959 in reply to a letter from Mr. Sands dated 24th August, " My client . . . has instructed me to inform your clients that he will be prepared to complete within . . . [60 days]. . . if either the objections or requisitions with regard to the 75 acres are satisfied or if an order of the Court can be obtained to the effect that the title to the 75 acres is one which he must accept ".

The letter of 24th August from Mr. Sands, which is mentioned above, contained the vendor's effective notice of rescission of the contract under the terms of clause 3 (3). The clause gave a purchaser six days grace within which to withdraw his requisition, and, failing such a withdrawal, the contract was to become void and the purchaser's deposit to be returned to him. No notice of withdrawal was given by the purchaser. On the contrary, on the 3rd September he started the present action, claiming a declaration that the vendor was not entitled to rescind the contract and an order for its specific performance.

Now, on what can the appellant rest his claim to set aside the respondent's notice of rescission? It is plain enough that, so far as the terms of the contract go, the respondent is within its rights. Clause 3 (3) is as much a part of the various undertakings and stipulations that make up the total nexus of the parties' agreement as any other of its clauses, and it is in fact a stipulation that was included in the draft put forward by the purchaser. If a vendor, having stipulated for or been conceded such a right, is to be precluded from asserting it in any particular context, it must be by virtue of some equitable principle which enures for the protection of the purchaser; and it is not in dispute that Courts of Equity have on numerous occasions intervened to restrain or control the exercise of such a right of rescission in contracts for the sale of land, despite what, on the face of the contract, its terms seem to secure for the vendor.

It does not appear to their Lordships, any more than it did to the learned judge who tried the action, that there is any room for uncertainty as to the nature of the equitable principle that is invoked in these cases. It has frequently been analysed, and frequently applied, by Chancery judges, and, although the epithets that describe the vendor's offending action have shown some variety of expression, they are all related to the same underlying idea, and their variety is only due to the fact that, as each case is decided according to the whole context of its circumstances and the course of conduct of the vendor, one may illustrate more vividly than another some particular aspect of that idea. Thus, it has been said that a vendor, in seeking to rescind, must not act arbitrarily, or capriciously, or unreasonably. Much less can he act in bad faith. He may not use the power of rescission to get out of a sale " brevi manu ", since by so doing he makes a nullity of the whole elaborate and protracted transaction. Above all, perhaps, he must not be guilty of " recklessness " in entering into his contract, a term frequently resorted to in discussions of the legal principle and which their Lordships understand to connote an unacceptable indifference to the situation of a purchaser who is allowed to enter into a contract with the expectation of obtaining a title which the vendor has no reasonable anticipation of being able to deliver. A vendor who has so acted is not allowed to call off the whole transaction by resorting to the contractual right of rescission (see *Re Jackson and Haden's Contract* [1906] 1 Ch. 412. *Baines v. Tweddle* [1959] 1 Ch. 679.)

The appellant's argument before the Board concentrated upon the fact that the respondent had not before entering into the contract made known to him the existing deficiency of evidence with regard to the descent of title from Mrs. Kemp to Edward Maximo Kemp, the grantor under the 1939 conveyance. This non-disclosure, it was said, was a breach of that duty of frankness in respect of matters of title which the law requires a vendor of land to observe in his dealings with his purchaser. A vendor guilty of such a breach, it was said, was necessarily precluded from taking advantage of a right of rescission. But in their Lordships' opinion a case of rescission cannot be determined by any general proposition about the duty of disclosure. No doubt the law imposes upon a vendor of land certain obligations of disclosure with regard to

a matter so peculiarly within his own knowledge as his title to his own land. But the extent of those obligations and their consequences have to be measured in the light of the particular rights which in the instant case vendor or purchaser is seeking to assert. The present is not a case in which a vendor is resorting to the Court for an equitable remedy, such as specific performance, or is trying to force upon his purchaser a title unexpectedly less than the good marketable title which is called for by the law. On the contrary, he stands by his contractual right to rescind the contract and asks for nothing more. Again, the Court is not dealing here with a claim by a purchaser to avoid an existing contract or an executed conveyance on the ground of a material concealment or non-disclosure of want of title on the part of a vendor. Authorities or propositions of law which bear upon such situations have therefore no immediate relevance to what is now in issue, which is simply the question whether the respondent is to be held guilty of " recklessness ", in the legal sense, in not warning the appellant before the contract was signed that there were certain evidential gaps in the proof of its title that it was unlikely to be able to fill up.

Their Lordships are satisfied that recklessness is not to be attributed to the respondent for this omission. While there have indeed been instances in which a vendor has been deprived of the right of rescission for entering into his contract in circumstances in which he had no reasonable assurance that he could convey the whole title for which he was contracting, his disqualification arises out of his carelessness or lack of prudence in the particular circumstances and not out of a mere failure to disclose a defect of title, much less a defect in the evidence of title, which rendered the title that he had to offer less than complete. Had the law been otherwise, the decisions in *Duddell v. Simpson* (1866) 2 Ch. App. 102 and in *Deighton and Harris's Contract* [1898] 1 Ch. 458 could never have gone, as they did, in favour of the vendor.

A vendor's position, for this purpose, has to be ascertained as at the date when he enters into his contract: in this case, the 6th January 1959. The evidence shows that by then Mr. Sands knew that he had not got, and was not likely to be able to obtain, any death certificate of Mrs. Kemp or any conclusive evidence as to her intestacy. On the other hand, he had no knowledge of any outstanding title or claim to title to the property nor had he any reason to expect that one would appear: he had before him the fact that the property had been dealt with on purchase in 1939 and 1946 without, apparently, any stronger evidence being available on these points: and, lastly, there was the important consideration that by the time any purchaser could take a conveyance from the respondent the transfer of 16th March 1939 would be twenty years old and its recitals as to the status and title of Maximo Edward Kemp would have become by statute good presumptive evidence in favour of a vendor on any subsequent resale. It is true that he might properly have brought the title situation directly to the purchaser's mind by putting forward a special condition to cover the missing points of evidence; but it does not follow that just because he did not take this step the vendor's action in entering into the sale contract is to be characterised as reckless in its indifference to the rights or interests of the purchaser. In their Lordships' opinion it is impossible to characterise its conduct as marked by any such culpable indifference and they agree with the learned trial judge that the evidence did not support the purchaser's case on this head.

No doubt recklessness in entering into the contract may not be the only thing to be regarded when a vendor's right to exercise a contractual power of rescission is brought into question. It is the use of that right that is not to be arbitrary or without reason, and Courts have expressed themselves from time to time as being unwilling to allow a vendor to call the whole contract off in the face of some requisition to which he takes what is merely a capricious or fanciful objection. Some argument on these lines was advanced before the Board, but in their view such an argument has nothing to sustain it. Their general reading of the matter is that the vendor's solicitor, on receiving the relevant requisitions, showed no arbitrary or high-handed temper in replying to them, but on the contrary made a serious attempt to meet them and to allay the misgivings of Mr. Clarke, the purchaser's solicitor. The reasons

that led him in the end to resort to rescission were explained by him in his evidence at the trial, and they were as follows:—

> " One of the reasons leading to the notice to rescind was the insistence on a vendor and purchaser summons; but another reason was the fact that my clients felt that matters had dragged on long enough. We felt the requisitions had been answered. We felt the purchasers might be stalling for time. Further in view of the information I felt there was nothing further I could usefully do."

These are valid reasons. It is possible indeed to criticise the basis of some of them, and to argue that the requisitions had not in fact been fully answered and that there were other actions, by way of search and enquiry, to which the vendor's advisers might still have resorted. But a vendor has to be reasonable: he does not have to be beyond criticism before he can exercise his right of rescission. When account is taken not only of Mr. Sands' own knowledge but also of what he knew through Mr. Johnstone, the Harrisville Company's solicitor, it seems clear that by April 1959 he was quite entitled to come to the conclusion that there was not anything more that could usefully be done to find the missing evidence of title and that, if the purchaser persisted in his requisitions, the only thing to do was to call the whole contract off.

The findings of the trial judge on this aspect of the case appear to their Lordships to be wholly in favour of the respondent and, for convenience, they will quote in full the passage of his judgment that deals with the position as it was in April 1959.

> " We have seen that at the date the defendants entered into their contract with the plaintiff they were themselves engaged in purchasing from the Harrisville Company. A Mr. Geoffrey Johnstone an attorney of the firm of Messrs. Higgs and Johnson had the conduct of that sale for the Harrisville Company. I find that during the course of that sale Mr. Johnstone informed Mr. Sands of the considerable efforts his firm had made both in 1957 and later to try and perfect this title. I find that Mr. Johnstone searched the Registry of Records in Nassau for a death certificate in respect of Concepcion Canuta Kemp from the year 1900 to the 1940's without success, and that he also searched for the birth certificate of Maximo and a death certificate for Concepcion's husband. Further, and because there was a possibility of Concepcion's death in Canada (the clue to this is contained in the Montreal address in the 1939 deed) he had caused further searches to be made in Montreal for this century up to the year 1957 but without success. It was because of this failure that he, Mr. Johnstone, had procured the first affidavit of Mrs. McDonald and then, after a request from Mr. Sands and after making enquiries from these deponents both as to the date of Concepcion's death and her relationship with Maximo, the later affidavits. The important and material point in this case however is that Mr. Johnstone informed Mr. Sands of these matters. Mr. Sands' memory was unsatisfactory as to the exact nature of the conversations he had at this time with Mr. Johnstone, and indeed as to what searches he had made himself, putting it down to the fact, that he could not remember now exactly what had happened in 1959; but Mr. Johnstone's memory was quite clear. The position therefore when Mr. Clarke made his two-fold requisition on the 1st April was that Mr. Sands was already aware of the extensive searching carried out by Mr. Johnstone, or Mr. Johnstone's firm, and that such searching had been fruitless. Furthermore, he himself had interviewed the deponents to the two new affidavits he now submitted to the purchaser. These deponents were the Hon. Mr. Sawyer and Mr. Pritchard (Exhibits E and F) whose repute and integrity has not been in dispute, and I accept it that they were well known in Nassau as possessing fairly extensive knowledge of local family histories in the Bahamas, and that it was for this reason that Mr. Sands had sought them out and got Mr. Johnstone to obtain their affidavits.
>
> Turning again to the progress of events in this matter. In his letter of the 3rd April, Mr. Sands submitted that these further affidavits together with the existing affidavits answered the requisitions (save that

as regards the allegation of the 1939 conveyance not being a good root of title); he refrained from comment, perhaps wisely, in view of the other matters outlined in his letter.

Having regard to the foregoing circumstances and the knowledge of the title then possessed by Mr. Sands I hardly think it can be said that up to this stage he was acting unreasonably. He knew of the defects in title and was taking quite considerable steps to try and overcome them and to comply with the requisitions; and there was still no sign of any intransigence or arbitrariness ".

Nothing happened to affect the situation between that date and the date when notice of rescission was served. The appellant's solicitor continued to press his requisitions: and the vendor in the end decided to bring the matter to a conclusion. The trial judge, after reviewing the evidence in full detail, decided that the vendor, in serving its final notice, did not act capriciously or arbitrarily or in bad faith or without reasonable cause. For the reasons that have been given their Lordships regard this finding as correct and the only one that is consonant with the evidence.

Their Lordships will humbly advise Her Majesty that the appeal should be dismissed. The appellant must pay the respondent's costs.

(88787) Wt. 8052/97 75 12/63

In the Privy Council

GEORGE ALEXANDER SELKIRK

v.

ROMAR INVESTMENTS LIMITED

DELIVERED BY

VISCOUNT RADCLIFFE

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1963