



[2017] JMSC Civ. 21

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2012HCV06735

BETWEEN	GLENTON MCFARLANE	CLAIMANT
AND	HOPETON FERGUSON	DEFENDANT

IN CHAMBERS

Ms. Stacey Mitchell instructed by Frater, Ennis & Gordon for the Claimant

Mr. George Traile and Mrs. Diane Phillip-Traile instructed by Phillip, Traile & Co. for the Defendant

Heard: December 1, 2016 and February 10, 2017

Sale of Land by Vendor to Two Persons - Deed of Conveyance - Failure to Record Deed - Bona Fide Purchaser for Value Without Notice - Sections 66 and 74 of the Conveyancing Act - Sections 2, 6 & 7 of the Records Deeds, Will Letters Patents Act- Valid Sale - Rescission of Contract - Late Recording

CORAM: JACKSON-HAISLEY, J. (AG.)

[1] On the 14th day of July 1992, the Claimant Glenton McFarlane purchased one and a quarter acre of land in Rock Spring, Durham Trelawny from his aunt Phyllis McFarlane for the sum of \$5000.00. According to him, the land was family property and had been in the McFarlane family for generations. In fact it was on this land that he spent the formative years of his life. The vendor Phyllis McFarlane was not only his aunt but she was also the person who raised him and the only mother he has ever known. Although he has never farmed the

property himself, he asserts that other members of the McFarlane family had farmed the property for many years. At the time of the purchase he was a farmer living in the same community, but now he is a consultant engineer and resides in England. He gave his evidence from his home in England by video link.

[2] Although this property was unregistered and the purchase was by way of a Conveyance, initially he took no steps to register his interest. On the 30th day of March 2009 the vendor Phyllis McFarlane entered into an Agreement of Sale with the Defendant Hopeton Ferguson, a farmer of Rock Spring selling him a quarter of an acre of the same parcel of land for the sum of \$125,000.00. Sometime after he had paid the sum and signed the Deed of Indenture, his lawyer was contacted and advised that the property had previously been sold.

[3] It was not until the 14th day of February 2012 that the Claimant registered the Deed of Indenture in respect of the land. He is now seeking to assert his rights to the property and so on December 4, 2012 he filed a Fixed Date Claim Form, seeking a Declaration that he is the legal owner and entitled to possession of land situate at Rock Spring, Durham in the parish of Trelawny by virtue of a prior purchase of the land from Phyllis McFarlane evidenced by Conveyance dated the 14th day of July 1992, duly stamped and registered at Liber New Series No. 10228 Folio 53 on the 14th day of February 2012. Further, that the Defendant's subsequent agreement to "purchase" the said land dated the 30th day of March 2009 is hereby rescinded and is null and void and of nil effect and that the purchase price of \$125,000.00 according to the executed Agreement for Sale, paid by the Defendant has been duly refunded to the Defendant/Purchaser, but the Defendant has refused to deliver up possession of the said land.

[4] The specific orders sought are as follows:

- (i) A Declaration that he is the lawful owner of the said land;
- (ii) An Order for rescission of the Sale Agreement between the Defendant and Phyllis McFarlane dated 30.03.2009;
- (iii) An Order for delivery up of possession;

- (iv) An Order to amend the tax roll, valuation number 064-05-008-018 to remove the name of the Defendant there from; and
- (v) Costs.

- [5]** The Claimant's Application is supported by an Affidavit also filed on December 4, 2012. He indicates that by way of a Conveyance dated the 14th day of July 1992 and recorded on the 14th day of February 2012, he purchased and occupied the land owned by Phyllis McFarlane. The Conveyance is exhibited to his Affidavit. It reflects a purchase price of \$5000.00.
- [6]** In his Affidavit he indicates that he became aware of a purported purchase by the Defendant of a quarter acre of the said land from Phyllis McFarlane on the 30th day of March 2009, for the sum of \$125,000.00. Also exhibited to his Affidavit is a Deed of Indenture signed by Phyllis McFarlane on the 13th day of February, 2009 which reflects the sale of the land to the Defendant. On finding out about this purported sale he says he instructed his attorneys-at-law to communicate with the Defendant's attorney-at-law and to enquire about the alleged purchase and to request a status report of the said "purchase". This he says was done by his attorney-at-law and is evidenced by a letter, a copy of which is exhibited to his Affidavit.
- [7]** According to the Claimant, Phyllis McFarlane returned the money paid by the Defendant to him by way of a Manager's cheque payable to him, following which the Defendant's attorney-at-law wrote to the Defendant by letter dated the 6th day of January 2011, enquiring whether or not he would be willing to accept a return of the purchase price. The Claimant indicated that his attorneys-at-law also wrote to the Defendant seeking an amicable delivery up of possession failing which they would initiate a Court action. This letter is also exhibited to his Affidavit.
- [8]** The Claimant asserts his belief that having purchased the land in 1992 and taking possession thereof he has a prior right over a subsequent purchaser of the land from the same vendor, as the subsequent purchaser has only an equitable

interest which his prior interest would over reach whether or not the subsequent “purchaser” had notice thereof. Further, that the Defendant failed to satisfy himself that the land was owned by the vendor, neither did he exercise his right to rescind once he discovered that the vendor had no title to sell. Further, that the Defendant did not stamp the Agreement for Sale or register the Conveyance in accordance with the law.

[9] He also exhibits a Transfer Tax Receipt in the sum of \$1800.75 representing 7.5% of the purchase price for the land transferred from Phyllis McFarlane to him. This was signed on the 5th day of November 1992.

[10] During cross-examination the Claimant gave evidence that he did not personally live on the land but that he had a relative who was on the land. It was suggested to him that no relative of his ever occupied or farmed the land and he responded that from the 1900s the land was farmed officially and unofficially by the McFarlanes and that although he did not personally farm the land, traditionally whoever lived in the family house would farm the land.

[11] The Defendant filed an Affidavit in Response on July 8, 2013 and he asserts that on the 30th day of March 2009 he purchased from Phyllis McFarlane all that parcel of land, part of Rock Spring in the parish of Trelawny, containing by estimation one quarter of an acre, for the sum of \$125,000.00 and he has exhibited a copy of the Agreement of Sale. He indicates that after paying the full purchase price the vendor executed a Deed of Indenture, thereby transferring the land to him and he has also exhibited a copy of the said Deed. Further, that he was put in possession of the land by the vendor on or about the 1st day of April 2009 and that on the 4th day of December 2009 the vendor executed a Notice of Change of Possession of Land to Amend the Property Tax Roll to reflect the change in ownership and possession of the said land. A copy of the Notice of Change of Possession is exhibited to his Affidavit.

[12] The Defendant states further that before purchasing the said land he did all that was necessary as a prudent purchaser inclusive of but not limited to checking to

see if the land was vacant, checking the tax roll to see who was the owner of the land and checking the Island Record Office and that his checks revealed that the vendor was the owner and that the Claimant had not recorded his purchase. Further, that the land was vacant before he entered into the Agreement for Sale and remained so until he was put into possession and that he has been in open, continuous and undisturbed possession of the said land from about the 15th day of April 2009 to present, reaping the rents and profits arising there from, paying the taxes and exercising all acts of ownership. In addition, he indicates that he has also commenced the construction of a concrete dwelling house on the property.

- [13] He adds further that he went abroad on the Farm Work Programme on the 10th day of July 2009 and returned on the 18th day of November 2009 following which checks to his bank account at the Bank of Nova Scotia revealed that a sum of \$100,000.00 was lodged to his account without his authorisation and he has exhibited the relevant pages of his Jamaican Passport and his Nova Scotia bank book to support his assertion. He indicates that he made enquiries and discovered that this unauthorised lodgement was made by Patricia McFarlane, a relative of the vendor, and so he immediately withdrew the said money and returned it to Patricia McFarlane.
- [14] In cross-examination he indicated that his attorney-at-law made the necessary checks and that she told him that the paper work had to go to Montego Bay and if somebody bought the land before him it would stop right there. Further, that about two weeks later she called him and told him that nobody owned the land and so he took the papers to the tax office and paid the land taxes and he was told that nobody owned the land before him. He however indicated that he did not personally check with the Island Records Office.
- [15] He claims further that there is no privity of contract between the Claimant and himself and that he is a bona fide purchaser for value without notice.

SUBMISSIONS ON BEHALF OF THE CLAIMANT

- [16]** Counsel for the Claimant submitted that with respect to unregistered land, it is the Deed or Conveyance instrument that effectively transfers ownership of property from a vendor to a purchaser and that in light of the provisions of sections 66 and 74 of the Conveyances (Voluntary) Act, (presumably she meant the Conveyancing Act), the Conveyance between the vendor and the Claimant dated the 14th day of July 1992 was valid by virtue of it complying in every respect with the form of a conveyance instrument being duly executed, acknowledged and, albeit sometime later, also recorded. Further, that notwithstanding the date of recording there is no question that the Conveyance as it then was on the 14th day of July 1992 was effective in passing title of the property to the Claimant.
- [17]** In relation to the question of how to treat with a bona fide purchaser for value without notice, she contended that although a bona fide purchaser of a legal estate for value takes priority over any pre-existing equitable interest which is not registrable as a land charge, provided they did not have actual, constructive or imputed notice of their existence, this principle is rebuttable. On that point she relied on sections 6 and 7 of the Record of Deeds, Wills and Letters Patents Act (RDWLPA).
- [18]** She submitted further that both the Conveyances (Voluntary) Act (presumably she meant the Conveyancing Act) and the RDWLPA make the recording of the Deed or Conveyance Instrument a condition to the effectiveness of a conveyance for the sale at first instance with the sale at second instance. She pointed out that section 6 of the RDWLPA provides that where a purchaser fails to record his interest and a subsequent bona fide purchaser for value without notice records his interest then the first purchaser's interest is void. Further, that since there is no evidence that the Defendant has recorded his interest, the protection the principle affords is inapplicable to him.

[19] Counsel relied on an Australian case, **Thomas v NAB Limited & Anors** [1999] **QCA** 525 which involved the determination of priorities in equity regarding the assignment of a debt and which supported the principle that notice or lack thereof does not affect the validity of the interest passed and that notice only becomes relevant in determining competing interests. Further, that the RDWLPA sets out the circumstances which must exist for the principle to prevail where competing interests are concerned which is that the subsequent purchaser must “duly prove and record their deed within the time prescribed”. As a result of the failure of the Defendant to record the Deed, she submits that the Claimant is and continues to be the rightful owner of the property and so on the 30th day of March 2009 the vendor did not have good title to pass to a subsequent purchaser.

[20] Counsel asked the Court to find that a refund was in fact made to the Defendant and that this followed a letter sent to the Defendant by the attorney-at-law with carriage of the sale between the Claimant and the vendor indicating the mistake of the subsequent sale and a willingness to refund the purchase price. Further, that the Court should find that the Defendant had knowledge of the Claimant's interest and that the sale to him was a mistake. She relied on the case **Re Sea View Gardens Claridge v Tingey** [1996] 3 All ER 935 where the Court held that although the Defendant had not known of an error in the transfer of property he had contributed to the mistake in registering himself as proprietor of the disputed plot. Counsel asked the Court to find that the Defendant herein knew of the mistake and rejected the steps taken to rectify the mistake and has retained both the land as well as the sum refunded and so neither law nor equity could avail him. Further, that the Defendant's possession is therefore immaterial and in these circumstances cannot be used to oust the Claimant's right to ownership. Even more significant, she contended is that the Defendant has not taken any steps to record his Indenture in accordance with law.

SUBMISSIONS ON BEHALF OF THE DEFENDANT

- [21] Counsel for the Defendant submitted that the relevant law is contained in sections 2, 6, and 7 of the RDWLPA and that the issues to be determined have to be viewed in the context of the general intention of the Act and that sections 2 and 6 of the Act are mandatory and require the recording of deeds within a statutory period of ninety days from the date or dates of the deeds. According to counsel, this legislation is aimed at preventing an unscrupulous vendor from reselling the same parcel of land and provides statutory protection for the first vendee providing he complies with the requirement. Further, that if the vendee does not record the deed within this period two consequences follow, the first being that the vendee's deed is void against all other bona fide purchasers for value and the second is that it renders the unrecorded deed defective and prevents the passing of any estate or interest in land to the first vendee.
- [22] Reliance was placed on the case **Harris v Johnson, McLaren & Williams** 1971 J.L.R. 375 to support the position that where the vendee does not record the deed within the required time, although he can still do so under the Act this must be done before the vendor enters into a second sale. Further, that the Court in the **Harris** case held that the Deed although not recorded within the requisite time was nevertheless good and a perpetual bar against the vendor's estate as there has been no second sale between the date of the Deed and its recording. Further, that although section 7 of the Act is a saving clause it can only be invoked by a first vendee where the vendor has not contracted with a purchaser for a second sale. The Defendant also relied on another case, **Hepsy Dixon v Effie Fredrick** 12 J.L.R. 1495 where the Court of Appeal enunciated this position:

"In our view, the clear intent of the sections relevant to the issue in this case (in particular the saving clause) is to prevent a vendor selling the same land twice but if it happened that a second sale was made, the vendee of the first sale was unprotected if he did not perfect his deed before the second sale took place. This is a chance he takes if he omits to prove and record his deed in accordance with the provisions of sections 2 and 6".

[23] Counsel for the Defendant submitted further that the fact that the Claimant failed to record his Deed within the ninety day period but rather some nineteen years later, means that no estate or interest passed to him and same remain vested in the vendor who could then resell the land. In addition, he submitted that there would have been nothing to alert the second purchaser of any encumbrance and this was the risk the Claimant ran and the very mischief that the Act sought to remedy. He asked the Court to find that the late recording by the Claimant is void and of no effect as the vendor had not only entered into a second sale but the Claimant had knowledge of this sale and of the Defendant's occupation of the property.

[24] In addressing the issue of whether the Defendant was a bona fide purchaser for value counsel submitted that the Defendant having made inspections and inquiries, including inspecting the register at the Island Records Office and the Inland Revenue Department and observing that the land was vacant, he has discharged the burden of the caveat emptor principle.

[25] He further submitted that the Claimant's claim for an order for Rescission of the Sale Agreement has no basis in law as there is no privity of contract between the Claimant, the Defendant and the vendor and that it was the Claimant's omission that enabled the vendor to enter into a second sale with the Defendant.

ISSUES

[26] The seminal question that I have to resolve is who is the legal owner and entitled to possession of the land in question. In order to determine that issue I have to resolve other issues which are as follows:

1. Whether there was a valid sale to the Defendant;
2. Whether the Claimant can seek rescission of the contract;
3. Whether the principle "bona fide purchaser for value without notice" is applicable to the Defendant;

4. Whether or not the Claimant's Deed is void in light of his failure to record it before a second sale; and
5. Whether the recording of the Deed of Indenture by the Claimant on February 14, 2012 is a proper recording.

LAW

[27] The relevant law in respect of the issues to be resolved are the RDWLP Act and the Conveyancing Act.

Section 66(1) of the Conveyancing Act provides that:

“Every conveyance shall by virtue of this Act be effectual to pass all the estate, rights, title, interest, claim and demand, which the conveying parties respectively have in, to or on, the property conveyed, or expressed or intended so to be, or which they respectively have power to convey in, to or on, the same.”

Section 74 provides that:

“All deeds and other conveyances whatsoever, at any time made before the year 1711, and duly executed, acknowledged or proved, and recorded, although no valuable consideration be therein inserted, and all deeds and other conveyances whatsoever thereafter made for valuable consideration of any lands, tenements, or hereditaments within this Island (excepting such as have or shall be made by infants during their infancy, and persons of non-sane memory, during the time they continue so) shall be valid and effectual to pass and convey such lands, tenements, and hereditaments and they are hereby declared to have passed and to be conveyed as fully to all intents and purposes as any real estate in England might or could have passed by a fine levied with proclamations or by a common recovery suffered of such lands, tenements or hereditaments, any law, custom, or usage to the contrary thereof in anywise notwithstanding.”

Section 2 of the RDWLP Act provides as follows:

“(1) A deed made in due form of law and within three months after the date thereof acknowledged by the party or parties that grant the same or proved by the oath of one sufficient witness or more in accordance with law, and, recorded at length in the Record Office within the said three months, shall be valid to pass the same without livery, seisin, attornment, or any other act or ceremony in the law whatsoever.

(2) No deed made after the year 1681 without such acknowledgment or proof and recording, shall be sufficient to pass away any freehold or inheritance, or to grant any lease for above the space of three years.”

Section 6 provides that:

“All and every deed or deeds which shall be made or executed within this Island for any lands, tenements, or hereditaments whatsoever shall be duly proved or acknowledged, and recorded, within ninety days after the date or dates of such deed or deeds, otherwise to stand void and of no effect against all other purchasers or mortgagees bona fide for valuable consideration of the said lands, tenements or hereditaments, who shall duly prove and record their deeds within the time prescribed by this Act from the dates of their respective deeds.”

Section 7 provides that:

“If any vendee or mortgagee of any lands, tenements or hereditaments shall hereafter omit to prove and record his deed within the time, and pursuant to the form, prescribed by this Act, but shall at any time afterwards do the same, no second sale or mortgage being made by the first vendor or mortgagor, his heirs, or assigns, the same shall nevertheless be good to the said vendee or mortgagee, his heirs or executors, and a perpetual bar against the first vendor or mortgagor and his heirs, anything in this Act, or any other enactment, to the contrary notwithstanding.”

[28] The RDWLPA is an Act that first came into operation in 1681, over three hundred years ago and predates the Conveyancing Act which came into effect on the 1st day of December, 1889. In order to grasp a full understanding of the provisions of the RDWLPA I found it necessary to examine similar provisions elsewhere. The Registration of Deeds Act 1897 of New South Wales has provisions which are similar to the Jamaican RDWLPA. Like Jamaica New South Wales distinguishes between the Old System Title Land and the Torrens System Title Land. Whereas under the Torrens System, the registration of a title confers indefeasibility of title, under the Old System it is the instrument that is registered. Under that system deeds take effect according to the priority of registration and not according to the dates of their respective deeds. In the 1964 version of the “Law of Vendor and Purchaser” the author examined the object and purpose of the Registration of Deeds Act 1897 of New South Wales and indicated it to be as follows:

“...to afford an effectual remedy against the mischief arising, to purchasers for a valuable consideration from the subsequent discovery of secret or concealed dealings by requiring an instrument affecting land to be registered, under the peril that it is not found on the register, a subsequent bona fide purchaser for value without notice (at the time of purchase) will obtain priority over it by prior registration of his instrument. The purpose of registration under the Registration of Deeds Act is to give public notice of an interest which is claimed, to establish priorities between claimants, and to enable a person, proposing to enter into a dealing in respect of certain property, to determine the rights of all parties claiming an interest in that property, and to determine the exact limits of that interest.”

[29] The Jamaican legislation is wider and provides not only for the registration of deeds but also for the registration of wills, letters and patents. The object and purpose appear to be the same. This is evidenced in decisions of the Jamaican Court of Appeal such as **In re Estate Habib Murad** [5 J.L.R.] 142 where the Court of Appeal pronounced on the object of section 2. Although the primary instruments under consideration in that case were a will and a deed of renunciation, the purpose of the Act was said to be the same in respect of all such instruments requiring recording. The object of the Act as stated by Savay., J was in these terms:

“...I have come to the conclusion that the object of section 2 is to prevent deeds affecting freeholds being recorded after three months of execution.”

Savay J. went on to say that a deed of renunciation is a deed...and on being recorded the executor shall be relieved and discharged of the said trust.

[30] In a more recent decision of the Court of Appeal in 1997 of **Blue Haven Enterprises Limited v Dulcie Ermine Tully et al** (1997) 34 J.L.R. 143 the Court of Appeal examined the scope of the RDWLPA and expressed at page 151 of the judgment that:

“...the Act requires the registration of a conveyance passing the legal estate in unregistered land....section 2 of the Act provides that deeds recorded within three months after execution is (sic) valid to pass freehold with-out livery, seisin, attornment or any other act or ceremony.”

[31] The fact that both the Conveyancing Act and the RDWLPA must be read in conjunction was reflected in a decision of Vickers J (Ag.) made at the turn of the 19th century in **Sinclair v Coke (1899)**, **S.C.J.B., Vol. 7, p. 257** where the Resident Magistrate interpreted the provisions of Act 33, Car 2 which is similar to the RDWLPA, to mean that since the deed was not recorded within three months from the date of execution it was defective and invalid and did not pass any estate or interest in the land. The Court of Appeal indicated that it seems that the Resident Magistrate overlooked several other enactments of equal importance for example 10 Anne, c 12, s. 3 (similar to provisions of the Conveyancing Act) which provides that all deeds and other conveyances for valuable consideration should be effectual to pass and convey lands. The Court of Appeal opined that the combined effect of these enactments appears to be that for a conveyance of land to be valid and effectual in law, it must be by deed and that the question whether a deed has been proved and recorded within the period of three months prescribed by the statute of Car. 2 becomes important for valuable consideration. It was observed that the requirements of this statute are satisfied either by proof or by enrolment within three months and that the deed in question, having been proved, was therefore a valid conveyance within the meaning of the statute.

ANALYSIS

WHETHER THERE WAS A VALID SALE TO THE DEFENDANT

[32] The first issue that I have to grapple with is whether or not there was in fact a valid sale to the Defendant. The facts in respect of this aspect of the case are in dispute so I have to determine on a balance of probabilities which version I accept. According to the Claimant the money paid by the Defendant was returned and this is evidenced by a Manager's Cheque dated July 20, 2010 and a letter from the Defendant's attorney-at-law to him dated July 9, 2010 asking if he would be willing to accept a return of the purchase price. Counsel for the Claimant has asked me to find that there was a refund of the purchase price and to give due weight to the letter and the refund. It should be noted that there is no proof that the Manager's Cheque was ever given to the Defendant or that it was

ever negotiated by him or at all. There is also no indication that the Defendant responded to his attorney-at-law in a positive way or at all or that the Defendant's attorney-at-law agreed that the purchase price should be returned.

[33] The Defendant indicated that he had gone on the Farm Work programme and on his return on November 18, 2009, he noticed the sum of \$100,000.00 in his bank account. He exhibits a copy page of his account with Scotia Bank bearing the date November 12th and reflecting a lodgement in the sum of \$100,000.00 followed by withdrawals on the same day amounting to \$102,000.00. Counsel for the Claimant has suggested that there is some inconsistency with respect to his evidence as the dates of the deposit and withdrawal do not coincide with his evidence. On an examination of the bank book page it is noted that the deposit was done on November 12 and so were the two withdrawals. There is no year indicated on the page. I find there is an inconsistency as he is saying he returned from Farm Work on November 18 following which he noticed the deposit and did the withdrawal but the date of the deposit and withdrawal predate the date he returned to the island. I have considered the inconsistency and it seems there is some inaccuracy in his recollection. I did not find it to be a deliberate misrepresentation of the facts.

[34] He indicated that after making enquires he withdrew the sum and returned it to Patricia McFarlane, the person he was told had done the lodgement and who was a relative of the vendor. It is to be noted that there is no evidence that Patricia McFarlane was acting on the instructions of the vendor. The most that can be deduced from all of this is that there was an attempt on the part of someone to refund a part of the money paid. However I accept that this money was returned by the Defendant. There is actually no significant challenge to this evidence by the Claimant. It is to be noted that this attempted refund took place over a year after the Agreement of Sale had been entered into and the Deed of Indenture signed and that the sum returned did not amount to the full purchase price. Although the Claimant has asked the Court to accept his account as to what happened, the account presented by the Claimant is based on hearsay and

is not within his personal knowledge, whereas the Defendant has given evidence of facts within his knowledge. I accept his account that he returned the money lodged to his account over a year after he had entered into this Agreement of Sale and find as a fact that there was no refund of the full purchase price.

[35] The Claimant has asked me to consider whether returning the purchase money was a recognition by the vendor that she has no good title to sell. However there is really no proof that it was the vendor that attempted this refund and further this belated act was not sufficient to rescind the sale. There was also no acceptance by the Defendant of this refund and moreover it was not even the full purchase price that was attempted to be refunded. In all the circumstances, I am of the view that there was no proper refund of the purchase price.

[36] In Stoneham's "The Law of Vendor and Purchaser" (1964) p. 11 paragraph 16 it is clearly set out that for a variation of an agreement to be valid, there must be an absolute, unconditional, and unqualified acceptance of the terms of the offer, that is to say, it must be an unequivocal acceptance of the terms proposed, without the introduction of a new or different term. In the instant case I do not find there to be any acceptance of any variation of the agreement by the Defendant.

[37] The Defendant has exhibited not only an Agreement of Sale signed by both vendor and purchaser and witnessed in respect of the land but also a Deed of Indenture, also signed and witnessed by a Justice of the Peace, a Transfer Tax Receipt and a Notice of Change of Possession of Land in favour of the Defendant. No challenge has been mounted to the validity of any of these documents.

[38] The provisions of the Conveyancing Act are only applicable to unregistered land and unlike the case of registered land where no interest passes until registration, in respect of unregistered land, a deed or contract for sale vests an interest in the purchaser. This is evident in the provisions of section 74 of the Conveyancing Act which provide that a deed made for valuable consideration shall be effectual to

pass an interest in property from the vendor to the purchaser. This seems to be the case regardless of whether or not the deed is recorded.

[39] It is in fact section 2(2) of the RDWLPA that provides for the registration of a deed and stipulates that no deed without such acknowledgment or proof and recording, shall be sufficient to pass away any freehold or inheritance, or to grant any lease for above the space of three years.

[40] Taking into account my findings of fact in respect of this issue and the provisions of the law as mentioned above I am of the view that the sale to the Defendant was a valid sale.

WHETHER THE CLAIMANT CAN SEEK RESCISSION OF THE CONTRACT

[41] The only provision dealing with rescission by the vendor in the Agreement of Sale can be found at paragraph “e” under the head “Special Conditions”. It only provides for rescission by the vendor as a result of a default of the purchaser, in which case the deposit shall be refunded. There appears to be no provision for rescission where the vendor is not at fault.

[42] A contract can be rescinded where the party wishing to rescind makes it clear that he refuses to be bound by its provisions. The right to rescind a contract is subject to limitations such as where the representee has affirmed the contract, where there is a lapse of time, where restitution in integrum is no longer possible or where rescission would impact the rights of a third party. Rescission is always the act of the defrauded party. (See Cheshire, Fifoot and Furmston’s Law of Contract, 12th edition, pages 286-294). Even if the vendor herein were the one seeking rescission it would not be available to her as she is not the defrauded party.

[43] In this case it is a third party who is seeking rescission and not the vendor. The doctrine of privity of contract is applicable and recognises that a non-party cannot bring an action on the contract. The Claimant was not a party to the agreement of sale and so it is trite that he cannot seek rescission.

WHETHER THE PRINCIPLE “BONA FIDE PURCHASER FOR VALUE WITHOUT NOTICE” IS APPLICABLE TO THE DEFENDANT

- [44] In order to qualify as a bona fide purchaser for value without notice, the Defendant must have given valuable consideration and must have acted in good faith. He must also have acquired some legal estate in land and he must have had no notice of the Claimant’s interest whether actual, constructive or imputed. These requirements are set out by James. LJ in **Pilcher v Rawlins** L.R. Ch. App. 259. The defence of bona fide purchaser for value without notice is said to be an absolute, unqualified and unanswerable defence, and an unanswerable plea to the jurisdiction of the court.
- [45] The person who asserts that he is a bona fide purchaser for value without notice has the burden of proving all the elements of his plea. The evidence provided by the Defendant is that he checked to see if the said parcel of land was vacant, checked the tax roll at the Tax Office and also checked the Islands Record Office. His checks revealed that it was the vendor who was the owner of the land. He struck me as forthright and credible. There is no significant challenge to his assertion that he had taken all necessary steps and made all checks to ascertain the true position with respect to the land. There is no evidence that the Defendant was aware of the Claimant’s interest in the property and in fact the evidence is that there was a lawyer involved in the transaction, albeit acting for both vendor and purchaser and that he was advised by his lawyer that the land was clear. Up to that time the Claimant had not registered his interest and so there would have been nothing to find at the Island Records Office. He also indicates that he saw no signs of anyone in possession of the land. I accept on a balance of probabilities that in all the circumstances the Defendant was a bona fide purchaser for value without notice.
- [46] At common law if a subsequent purchaser can establish that he was a bona fide purchaser of the legal estate for valuable consideration without notice of the

equitable interest which was earlier in time the order of priority based on the doctrine of order of creation will be disturbed.

[47] The order of creation rule recognises that estates and interest prima facie rank in the temporal order in which they are created. The maxim is that *Qui prior est tempore, potior est jure*: he who is earlier in time is stronger in law. As between rival claimants to interests in land, priority is accorded to the person whose interest was first created. Where the equities are equal the first in time prevails. (See Owusu's Commonwealth Caribbean Land Law). However it is pointed out at page 258 that statutory provisions have made considerable inroads into the doctrine of priorities and it will be seen that registration of an instrument can disturb the natural order of creation rule and even postpone a purchaser who would otherwise be accorded priority, by virtue of his legal estate, to an equitable owner who has had his interest registered. Under the RDWLPA instruments take priority not according to their respective dates but according to the priority of the registration.

WHETHER OR NOT THE CLAIMANT'S DEED IS VOID IN LIGHT OF HIS FAILURE TO RECORD IT BEFORE THE SECOND SALE

[48] In order to determine who is the legal owner of the property in question I have to consider whether the Claimant's Deed is void in light of his failure to record it before the second sale. This is what the Defendant's attorneys-at-law have suggested is the result of a failure to record before the second sale. On a strict interpretation of sections 66 and 74 of the Conveyancing Act it would appear that all deeds made for valuable consideration of any land shall be valid and effectual to pass and convey such lands. It would mean that both Deeds could have been deemed to be valid and to pass and convey the land in question and so the conveyance made to the Claimant on the 14th day of July 1992 would have been effective in passing title of the property to him as at that date. However the provisions of the RDWLPA seem to qualify this position and so the failure to

register does not make the instrument invalid however registration becomes important when a question of priority arises between competing instruments.

[49] Pursuant to section 6, a deed becomes void if the vendee fails to record it within 90 days and there is a second purchaser who records his deed within 90 days. This section was no doubt created bearing in mind the existence of unscrupulous vendors who would seek to sell a property twice, sometimes within a short space of time. The effect of section 6 is that a subsequent disposition of the same property once registered will rank in priority to the unregistered disposition even though the later may be first in time. Therefore if the deed is not recorded within 90 days it is not binding on the world, but is only valid on the parties to the agreement. If the deed is recorded outside of the 90 days it is valid against the world except against anyone who can show better title. To use the words of the statute it would stand void and of no effect against a bona fide purchaser for value who shall prove and record his deed within the 90 days. It is only in those circumstances that the first purchaser's title becomes void.

[50] This is supportive of the principle of according priority based on registration. This is so since the Act is seeking to protect the bona fide purchaser for value who records his interest in order to gain protection from the unscrupulous vendor. However he cannot obtain that protection if he does not record his interest within the 90 day period. It is noted that section 10 of the RDWLPA actually provides for criminal charges to be laid against a vendor who executes a second deed of conveyance or sale of the same land.

[51] The decision of the Court of Appeal in **Pinnock v Williams** 1915 S.C.J.B. Vol. 9, p.451 which was an appeal in the form of a special case, is supportive of the position stated above. The judge in the lower court decided that based on the omission of the defendant to record a conveyance to her son in 1905, the same was void under statute 4 Geo. 2,c5s.5, as against a mortgage made bona fide and without notice of a previous sale to the defendant and duly recorded within 90 days and that the plaintiff, as purchaser was entitled to possession from the

defendant. The question submitted for the opinion of the Court was whether the statute in conjunction with other rules of law had the effect indicated by the judge or whether the statute would give the defendant an indisputable title. The 5th section of that statute is identical to section 6 of the RDWLPA. The learned judge traced the history of the statute and pointed out that a similar law to this has been in force in the older British West Indian Colonies and that:

“... a prior conveyance not recorded within the time prescribed by this Act is void against a subsequent conveyance taken in good faith and recorded within the time limit....In all these Acts except those of Antigua and Maryland, it is expressly enacted that the non-registration of the deed shall not render it void against the grantor, or his heir, or those claiming under him as volunteers, but the unregistered deed will be postponed to a deed subsequently executed, but previously recorded, if the purchaser setting up the deed be a purchaser for valuable consideration...The prior conveyance in the case now under consideration being unregistered, and the subsequent conveyance by way of mortgage for valuable consideration having been registered within the time limit, the only question for consideration is, whether the mortgage was taken... in good faith.”

- [52] Section 7 extends the time for the recording of the Deed to in excess of 90 days providing that there is no second sale. This interpretation of section 7 was also considered in the cases relied upon by the Defendant. In the 1971 case of **Harris v Johnson et al** (supra) the Court held that as there was no second sale between the date of the deed of conveyance and the recording, the sale by the executor was good. In fact at page 379 it was expressly stated that by the very provisions of s. 7, the sale of the land having been in fact recorded afterwards (it does not matter when) was nevertheless good.
- [53] Similarly in the case **Hepsy Dixon v Effie Fredrick** (supra) the Court considered an appeal from the Grand Court of the Cayman Islands and held that in view of the clear provisions of s. 7 the trial judge was right in holding that the 1950 deed was saved by the fact that it had been recorded prior to the second purported sale. At page 1496 of the judgment Edun JA enunciated that though there had been an omission to prove and record the first conveyance within 90 days after the date of such deed, so long as there was no second sale before the date of

recording the first sale was nevertheless good to the said vendee. None of these two cases addressed the question of the effect of a subsequent purchaser who also fails to record his deed within the prescribed time.

- [54] In order to determine this I find it necessary to examine what are the components of a sale that would cause the first purchaser's deed to become void. It is to be noted that section 7 is described as a saving clause. A saving clause as defined in online edition of the Black's Law Dictionary is as follows:

“A saving clause in a statute is an exception of a special thing out of the general things mentioned in the statute ; it is ordinarily a restriction in a repealing act, which is intended to save rights, pending proceedings, penalties, etc., from the annihilation which would result from an unrestricted repeal.

- [55] The aim of the saving clause is not to change the meaning of sections 2 and 6 but rather to provide an additional protection to a purchaser who fails to record within the stipulated time but does so after the 90 day period. It seems the time within which to record is indefinitely extended once there is no second sale. A second sale must therefore be viewed within the context of section 6 which provides for the circumstances under which a second purchaser can trump the rights of the first purchaser. That condition pursuant to section 6 is that he must record within 90 days.
- [56] In Owusu's Commonwealth Caribbean Land law at page 259 it is emphasized that the provision that an unregistered document shall be void and deemed fraudulent against a subsequent purchaser for valuable consideration who registers his interest first appears in all territories (to include Jamaica, St. Vincent and the Grenadines, Antigua, Bahamas, Grenada and Trinidad and Tobago) where there is in force a system of registration of instruments and that the effect of these provisions is that they will apply to upset the natural order of creation rule or the bona fide purchaser rule under certain circumstances.
- [57] This interpretation was also reflected in the decision of the Jamaican Court of Appeal in **Rudolph Ruddock v Luther Harrison** (1967) 10 JLR, a remarkably

similar case. This was a case in which the Respondent sought to recover damages for trespass from the Appellant where in 1955 he had acquired four acres of land from the vendors and entered into possession thereof under a conveyance which was not recorded until 1963. In 1959 the Appellant bought one acre of the same four acre parcel from the same vendors and recorded his conveyance in 1964. The Resident Magistrate found in favour of the Respondent indicating that if the Appellant's conveyance had been recorded prior to the time the Respondent recorded, section 7 of the Record of Deeds, Wills and Letters Patent Law would have operated to save it. As however it was recorded over a year later the fee simple had passed to the Respondent. The Court of Appeal although upholding the decision of the Resident Magistrate held that he was wrong in his conclusion as to the effect of s. 7 of the Act. Moody J.A. observed at pages 78 and 79 of the judgment the following:

“Neither the respondent nor the appellant recorded his conveyance within the 90 days prescribed by law, and consequently in each case was not “sufficient to pass away any freehold” of land there under. While s. 7 may serve to be sufficient to pass the freehold where the deed is recorded after 90 days yet, if there has been a second sale of the same land within that time, this protection become inoperative. I do not agree that as a matter of law, the fee simple passed under Exhibit 1 to the respondent. In my judgment s. 7 does not operate to protect a second purchaser of the land who records his conveyance after the prescribed time of 90 days” (emphasis mine)

- [58] This decision supports the position that in order for the second purchaser to take precedence over the first purchaser he must have recorded his deed within 90 days. The use of the word “sale” seems to contemplate a sale which has been perfected through recording of the deed within 90 days. The failure of the Defendant in the instant case to record his deed within 90 days or at all means that he cannot avail himself of the provisions of section 7. This is actually consistent with the intention of the Act which is to encourage recording
- [59] The Claimant on the other hand sought to protect his interest and recorded almost twenty years later albeit with notice of interest of the Defendant. It seems to me, though unfortunate it may be, that in the light of the Defendant's failure to

record in these circumstances, his only remedy would lie against the vendor's estate. This is rather unfortunate in light of the fact that he had a lawyer acting for him with respect to this transaction.

WHETHER THE RECORDING OF THE DEED OF INDENTURE BY THE CLAIMANT ON FEBRUARY 14, 2012 IS A PROPER RECORDING

[60] The next question I have to consider is whether the late recording by the Claimant of the Deed was a proper recording in the circumstances where the Defendant has not registered his interest.

[61] Although the Defendant has been in possession of the land and has in fact started to build on the land and had his name put on the tax roll, he has not registered his instrument. In looking at the effect of registration with notice of prior unregistered interest at paragraph 868 of Stoneham's "Law of Vendor and Purchaser" it is indicated that where a purchaser has paid his money and afterwards receives notice of an unregistered interest, he may complete the sale by taking title and will obtain priority by registering before the other instrument is registered.

[62] It would appear that the RDWLPA has a similar interpretation to the New South Wales legislation and that the late recording of the deed would not be irregular. The second purchaser had the option of registering his Deed but failed to do so. Based on the provisions of section 7 the time for the first purchaser to record was indefinitely extended in these circumstances. His late recording would be a proper recording and would represent the perfection of his Deed.

DISPOSITION

The Orders made are as follows:

1. A Declaration that the Claimant is the lawful owner of the land situate at Rock Spring, Durham in the parish of Trelawny and registered at Liber New Series No. 10228, Folio 53;

2. That the Defendant deliver up possession of the land;
3. That the Tax Roll Valuation number 064-05-008-018 be amended to remove the name of the Defendant there from; and
4. Costs to the Claimant to be agreed or taxed.