

COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
Common Law & Equity Division
2014/CLE/gen/01934

BETWEEN

IVA PRISCILLA DEAN
(nee STRACHAN)

Plaintiff

AND

OCEAN POINT ESTATES LIMITED

First Defendant

AND

NEVILLE VISCOUNT KNOWLES

Second Defendant

AND

JEAN LAWLEES, THE PERSONAL REPRESENTATIVE
OF JEROME WASHINGTON KNOWLES, DECEASED

Third Defendant

Before Hon. Chief Justice Ian R. Winder

Appearances: Damian Gomez, KC with Norwood Rolle for the Plaintiff
Nadia Wright for the First Defendant

4 March 2020, 1 March 2021, 19 July 2021, 6 November 2021 and 9 January 2022

JUDGMENT

WINDER, CJ

This is the plaintiff's (Dean's) claim as against the first defendant (Ocean) for declarations as to her ownership of Polly Cay, a cay situated in the Exuma Cays. She also seeks damages and an order for the recovery of possession of Polly Cay.

Background

1. Dean claims ownership/possession of Polly Cay by virtue of a conveyance dated 8 July, 1998 from her uncle Allan Strachan. She also claims that her family, the Strachan family, have possessory title to the property, having occupied it, she says, for more than 200 years. Upon her purchase from Allan, Dean did not proceed to have her conveyance recorded in the Registry of Records until 4 February, 2011. Dean says that in 2012 she discovered that Polly Cay was listed for sale online. It was shortly after viewing the online listing that she found out that Polly Cay had allegedly been conveyed to Ocean.

2. Ocean, an International Business Company, says that it is the owner of Polly Cay having purchased it for valuable consideration. Polly Cay was conveyed to Ocean in October 2009. The conveyance was subsequently lodged for record in the Registry of Records on 16 November, 2009.

3. In her Writ of Summons filed on 25 November, 2014 Dean claims:

...

5. In the 1800's Benjamin Strachan and his family farmed and raised livestock on various cays and parcels of land in the Exuma Cays, in The Bahamas which they accessed by travelling by boat. This was their way of life which was passed down through the generations including Alfred Strachan, one of the sons of Benjamin Strachan.

6. Alfred Strachan (also referred to herein as "Mr. Strachan") and his family, in or about the late 1800's or early 1900's commenced the farming and raising of livestock on Polly Cay (hereinafter called "Polly Cay"), in the Exuma Cays along with other parcels of land and cays that do not form a part of this action. At that time the family mostly lived in Williams Town, Exuma and travelled via a boat owned by Mr. Strachan between Polly Cay and the other Exuma Cays where they also farmed and raised livestock. This was their livelihood and the way they supported their families.

7. Hardworking and industrious, Mr. Strachan and his family did quite well from their farming and other works. However, the price paid by such work was that Mr. Strachan and much of the older generation of his family were not formally educated and could not read or write.

8. On the 16th day of November, A.D., 1915, a Crown Grant was granted to Mr. Strachan, for Polly Cay, and recorded in the Registry of Records in the City of Nassau on the 4th day of January, A.D., 1928 in Book T-11 at page 565.

9. Mr. Strachan and his family continued to use Polly Cay as they had done prior to the said Crown Grant.

10. On the 4th day of November, A.D., 1959, Mr. Strachan died intestate with no wife or living issue. His brother James Strachan had six (6) children, including Allan Strachan and Theophilus Strachan. Theophilus Strachan is the Plaintiff's father, making her the grandniece of Mr. Strachan.

11. On the 29th day of October, A.D., 1997, Letters of Administration was granted in the estate of Mr. Strachan to Allan Strachan, the eldest surviving nephew of Mr. Strachan.

12. The Bond for Making Return into the Registry and Paying Duties Form that was filed in the application for Letters of Administration by Allan Strachan, listed Polly Cay as being real property owned by the late Alfred Strachan.

13. On the 18th day of November, A.D., 1997, an Assenting Conveyance in the Estate of Mr. Strachan was granted to Allan Strachan and recorded in the Registry of Records in the City of Nassau on the 30th day of June, A.D., 1998 in Book 7240 at pages 601 to 605.

14. After the death of Mr. Strachan, the Strachan Family continued to farm and cultivate Polly Cay well into the 2000's or thereabouts without molestation. They planted melons, potatoes, peas and corn and raised livestock such as goat sheep and pigs. At this time most of the elderly family members were not able to continue the family tradition and the younger generation had moved away.

15. However, while the family did not continue its farming, family members, such as Mr. Raymond Sears who continued to carry tourists and local visitors on boat cruises, fishing tours and pleasure cruises throughout the Exuma Cays, kept watch on Polly Cay for the Strachan family. As he had also worked on Polly Cay and he was familiar with the same.

16. On the 8th day of July, A.D., 1998, Allan Strachan conveyed Polly Cay to the Plaintiff. The Conveyance was subsequently recorded in the Registry of Records in the City of Nassau on the 4th day of February, A.D., 2011, in Book 11296 at pages 322 to 327.

17. In or around the early part of 2002 the Plaintiff decided to sell Polly Cay. She advertised the same and engaged in negotiations with potential buyers but was not successful in her sale attempts at that time.

THE FRAUD

18. On the 8th day of September, A.D., 1928, it is purported that Mr. Strachan conveyed Polly Cay to Jerome Washington Knowles (hereinafter called "Mr. Knowles"). ...

19. The Conveyance was purportedly signed by Mr. Strachan with the marking of an "X" at the execution clause. As Mr. Strachan was uneducated and illiterate he was unable to properly sign his name and could only make his mark in that manner. However, the "X" that appears on the purported Conveyance does not match that on other documents which Mr. Strachan is known to have executed.

...

26. On the 9th day of February, A.D., 1935, Mr. Knowles purported to convey Polly Cay to Mr. Cyril Theophilus Knowles and this purported conveyance was recorded in the Registry of Records...

27. On the 26th day of January, A.D., 1989, Cyril Theophilus Knowles died testate. ...he devised all his real and personal property to his wife Myrtle Edna Knowles.

...

28. On the 8th day of August, A.D., 2007, Myrtle Edna Knowles died testate. In her Last Will and Testament she devised the remainder of her estate to the Second Defendant. ...

...

39. The Plaintiff asserts to the best of her knowledge information and belief that Polly Cay has always been in the ownership of Alfred Strachan or the Strachan family and that the property has always been used by the Strachan family for both farming and raising livestock and that Polly Cay has never been sold to or owned by anyone other than the Strachan family.

40. As a result of the actions of the Defendants, the Plaintiff has suffered loss and damage as stated below.

PARTICULARS OF FRAUD AS AGAINST THE FIRST DEFENDANT

41. The First Defendant has wrongfully and with intent to injure the late Alfred Strachan by the following:

(a) Continuing the fraud on the Mr. Strachan and his beneficiaries and predecessors in title which commenced with the actions of Mr. Knowles.

(b) Knowing, or fitted with constructive notice of, the true ownership of Polly Cay, entering into a fraudulent Conveyance for the purchase of Polly Cay.

(c) Failing and/or refusing to conduct a proper title search of the property including the full and proper review and consideration of all title documents to Polly Cay in its purported purchase of Polly Cay.

...

44. And the Plaintiff claims against the First, Second and Third Defendants damages for Fraud.

Particulars of Loss or Damage

45. As a consequence of the aforesaid fraud, the Plaintiff has suffered and continues to suffer the following loss and damage:

(i) Loss of Polly Cay.

TRESPASS

46. The Plaintiff's claim is for damages for trespass and damage to the Plaintiff's land at Polly Cay on or about the 16th day of October, A.D., 2009, by the First Defendant, its servants or agents,.

47. No part of Polly Cay consists of a dwelling home.

48. Further or in the alternative, if, (which is denied) Mr. Strachan executed the aforesaid purported Conveyance of Polly Cay to Mr. Knowles the Plaintiff asserts and will assert at the hearing of this matter that the transaction as a whole is an Unconscionable Bargain.

...

AND THE PLAINTIFF CLAIMS as against all the Defendants jointly and severally:

- (i) A Declaration that the Plaintiff was at all relevant and material times and still is the lawful and beneficial owner of Polly Cay.
- (ii) Damages for Fraud.
- (iii) Or alternatively, a declaration that the transaction was an Unconscionable Bargain.
- (iv) Damages for Unconscionable Bargain.
- (v) A declaration that the First Defendant holds and the Second and Third Defendant held Polly Cay on constructive trust for the Plaintiff.
- (vi) Rescission of the Conveyance dated 8th day of September, A.D., 1928.
- (vii) An Order that the Defendants execute all such documents and do all such acts and things as may be necessary to re-transfer Polly Cay to the Plaintiff.
- (viii) An Injunction restraining the Defendants whether by themselves, their servants and/or agents from disposing of Polly Cay.
- (ix) Possession of land known as Polly Cay.
- (x) Mesne profits from the 16th day of October, A.D., 2009 until possession is delivered up.
- (xi) General Damages.
- (xii) Costs.

...

4. Ocean's Amended Defence, filed on 29 October 2015, provides:

...

2. The First Defendant avers that the Plaintiff's purported causes of action against the First Defendant or any of the Defendants in the Action are statute barred by virtue of sections 5 and 12 of the Limitation Act for the following reason:

(i) By a Conveyance dated 8th September 1928, title to Polly Cay was conveyed from the late Alfred Strachan to Jerome Knowles. The said Conveyance was recorded at the Registry of Records...

(ii) At paragraph 16 of her Statement of Claim, the Plaintiff avers that on the 8th July 1998, Allan Strachan conveyed Polly Cay to her and that the same was recorded in the Registry of Records in the City of Nassau on 4th February 2011...

(iii) At the time of the Plaintiff's purchase of Polly Cay from Allan Strachan, the Plaintiff conducted or ought to have conducted a search of the Registry of Records in the City of Nassau to ensure that she was receiving good title. In so doing, the Plaintiff would have or ought to have discovered that in 1928 Polly Cay was in fact conveyed from the late Alfred Strachan to Jerome Knowles removing the same from the estate of the late Alfred Strachan.

(iv) As the Conveyance from Alfred Strachan to Jerome Knowles was recorded at the Registry of Records putting the world on notice, the Plaintiff had actual or constructive notice on or before 8th July 1998 that title to Polly Cay had been conveyed from Alfred Strachan to Jerome Knowles.

(v) Hence, the Plaintiff's pleaded causes of action accrued at the latest on 8th July 1998, approximately 16 ½ years before the Plaintiff commenced legal proceedings.

...

7. In any event, the First Defendant avers that if in the event Polly Cay was listed as property of the late Alfred Strachan, no title was vested in the Estate of late Alfred Strachan as alleged by the Plaintiff for the following reasons;

(i) that by a Conveyance to Jerome Washington Knowles from Alfred Strachan dated 8th September 1928 (the 1928 Conveyance) the late Alfred Strachan divested himself of any interest in Polly Cay;

(ii) the 1928 Conveyance was recorded... at the Registry of Records;

(iii) by a Conveyance dated 9th February, 1935 (the 1935 Conveyance) Jerome Washington Knowles conveyed Polly Cay to Cyril Theophilus Knowles. ...

(iv) hence, the Personal Representative of the Estate of the late Alfred Strachan had notice of or ought to have known that no title remained vested in the Estate of the said Alfred Strachan as he had divested himself completely of Polly Cay as stated in (i) and (ii) above;

...

9. As to paragraphs 14 to 17 of the Statement of Claim, the First Defendant puts the Plaintiff to strict proof of the allegations contained therein and for the reasons stated at paragraph 6 (i) to (iv) above, denies that the Estate of the late

Alfred Strachan was seised of any title in Polly Cay at the time of the 1997 Assenting Conveyance.

10. As to paragraph 18 to 36 of the Statement of Claim, relating to the allegation of fraud, the First Defendant asserts that it is a bona fide purchaser for value without notice and denies any knowledge of fraud as alleged or at all. The Plaintiff is put to strict proof of her allegations of fraud. Further, the First Defendant avers the following regarding its purchase of Polly Cay;

(i) It retained the services of Graham Thompson who conducted a diligent title search of Polly Cay against the parties named in the chain of title commencing with the document constituting the root of title more specifically set out below on the First Defendant's behalf.

(ii) The Vendor's Attorney, Dupuch & Turnquest, had adduced title to Polly Cay commencing with a Conveyance dated 9th February, 1935 (the 1935 Conveyance) between Jerome Washington Knowles and Cyril Theophilus Knowles recorded in Book T13 at pages 137 to 138, which constituted a good root of title in accordance with section 3(4) of the Conveyancing and law of Property Act of The Bahamas.

(iii) That the originals of the Crown Grant and the 1928 Conveyance were produced to the First Defendant's Attorneys at the completion together with all of the other documents of title in the Vendor's chain of title.

(iv) That in any event, the First Defendant had no reason to believe, neither was it aware of nor could it have been aware of any fraud as alleged by the Plaintiff or at all.

(v) Further, in 1997 at the earliest, the Personal Representative of the Estate, of the late Alfred Strachan, in applying for Letters of Administration ought to have known after a diligent search that the said Estate of the late Alfred Strachan was not seised of title as title had been conveyed since 1928. Paragraph 6 (i) to (iv) of the Defence is repeated.

...

21. Save that Polly Cay was conveyed to Mr. Knowles by Mr. Strachan, paragraph 51 is denied.

22. Paragraph 52 of the Statement of Claim is denied. The Plaintiff is put to strict proof that the 1928 Conveyance was not executed by the late Alfred Strachan.

23. If in paragraph 53, the Plaintiff is intending to allege fraud by the First Defendant, such allegation is denied.

24. As to paragraph 54 of the Statement of Claim, the First Defendant repeats paragraphs 6 and 9 above of the Defence

25. As to the relief claimed by the Plaintiff, the First Defendant avers that the Plaintiff is not entitled to any of the relief sought in (i) through to (xiii) of the Prayer for Relief in the Statement of Claim.

...

5. In advance of trial, Dean applied to discontinue her claim against the named Second and Third Defendants. The Court acceded to the application on 11 April, 2019. The trial of this action therefore, proceeded against Ocean as the sole defendant to Dean's claim.

6. At the hearing, Dean was the only witness to give evidence in her case. Efraim Sade (Sade), one of Ocean's principals, gave evidence on Ocean's behalf. Both witnesses were subject to cross-examination on their witness statements which stood as their evidence in chief. Despite indications beforehand by both sides that they would call handwriting analysis experts at the trial, and notwithstanding having obtained leave to do so, neither side tendered an expert witness.

Evidence of Dean

7. Dean's evidence was that she has legal title to Polly Cay, which was acquired through her lineage to Alfred Strachan (Alfred). Dean repeats her version of the history of the property since the Crown grant on 16 November, 1915 to Alfred. Allan applied for Probate of Alfred's estate and Letters of Administration were granted on 29 October 1997. In her evidence in chief Dean says:

"At the date of my Conveyance I was personally aware of the following:

- a. The irrefutable root of title (i.e. the Crown Grant to Uncle Alfred);*
- b. My family had been in physical possession of Polly Cay for over 200 years and the same continued after the Crown Grant;*
- c. Positive reports that there was no evidence of trespass on the property from persons who consistently checked on it on our behalf;*
- d. Uncle Alfred never indicated or mentioned that there had been any purported sale of Polly Cay to Mr. Knowles, or otherwise and he along with my family continued our possession and use of the same;*

e. By all accounts the property had remained in my family, which is why it was included in the probate application of Uncle Alfred's estate, and I knew that my Uncle Allan had received the property from Uncle Alfred's estate;

f. Unlike the First Defendant, my acceptance of the title of Uncle Alfred was supported by my background knowledge and familiarity with the property and its history. The First Defendant had no such information to rely on.

8. Dean says that Ocean did not do its due diligence before purchasing Polly Cay:

Unlike my family and I, [Ocean] did not have a 200 plus year history of possession or an intimate knowledge of possession, use and condition of Polly Cay at the date it was purported to be conveyed to [Ocean] in October 2009. Having no such information or background knowledge to rely on, the First Defendant ought to have conducted a full and proper review. If such a search had been conducted, even within a 30 year title being given by the seller, the First Defendant would have discovered the 1997 Assenting Conveyance to Uncle Allan, the 1998 Conveyance from Uncle Allan to me, and possibly the 2000 Affidavit of Raymond Sears.

Evidence of Sade

9. Sade stated in his examination-in-chief:

1. *That I am a businessman and fifty percent shareholder of Ocean Point Estates Limited.*
2. *That I first visited the Polly Cay property in 2004 and the property was overgrown with bushes and had no signs of occupation by anyone. Also, there were no fruit trees or vegetable or livestock on Polly Cay. ...*
3. *That during the time that I was visiting Polly Cay in the early part of the year 2000 my business partner, Mr. Eyal Ben Zvi and I became serious about purchasing the Cay due to the fact that it was undisturbed and pristine. And in 2007 we were in talks with the Second Defendant and agreed to have the property surveyed. ...*
4. *That I would have visited Polly Cay at least four (4) times up to the time of purchase in October 2009 and there was never any signs of anyone's occupation of the island.*
5. *That I verily believe that the Plaintiff's claim is disingenuous and she has no legal, possessory, prescriptive or other right to the Polly Cay property.*
6. *That the documentary chain of title before this Honourable Court is clear and it is also clear that Allan Strachan failed to conduct a title search to verify whether the Polly Cay property was still part of the Estate of Alfred Strachan and subsequently executed a Conveyance of Assent for the Polly Cay property then 8 months later sold the same to the Plaintiff.*

7. *That the Plaintiff's claim is misguided and has caused great hardship and loss of business for the First Defendant.*

...

Dean's submissions

10. Counsel for Dean submits that she chose not to pursue the allegations of fraud and unconscionable bargain averred in her pleadings, by producing no evidence of the same. Instead Dean's submissions focused on her family's historical possession of Polly Cay At paragraphs 14 and 15 of her submissions:

14. The Plaintiff claims that she and her predecessors in title have been in exclusive continuous uninterrupted possession of the subject property since it was granted by the Crown to her predecessors in 1915. This averment is not denied by the Defendant. Further, it is not disclosed on the pleadings that the Defendant or any of its predecessors were ever in possession of the subject land and what, if anything, they did when they were in possession.

15. The Plaintiff having pleaded and shown that she and her predecessors had attained a possessory title prior to the commencement of these proceedings ought to be declared the owner.

11. Counsel for Dean takes issue with Sade's evidence which they say was inconsistent relative to when he first visited the property. In his evidence in chief he stated that he first visited Polly Cay with his business partner, Eyal Ben Zvi, in 2000. However, under cross examination he stated that his first visit was in 2004. They say that no evidence was presented that Dean's possession of the property was with the permission or consent of Ocean. Dean's possessory title was not lapsed 'by discontinuance' and the paper title revived (*Trustees, Executors & Agency Co. Ltd. v Short (1888) 13 AC 793*).

12. Dean relies on the Privy Council decision in *Ocean Estates Ltd v Pinder [1969] 2 AC 19* which considered trespass per the Real Property Limitation Act (now the Limitation Act 1995). The Board opined the following on the issue of limitation:

"...It follows that as against a Defendant [in the instant case a Plaintiff] whose entry upon the land was made a trespasser a Plaintiff [Defendant] who can prove any documentary title to the land is entitled to recover possession of the land unless debarred under the Real Property Limitation Act by effluxion of the 20 year period of continuous and exclusive possession by the trespasser."

[Emphasis added]

13. Section 25(1) of the Limitation Act 1995 upon which Dean relies, provides:

“25. (1) At the expiration of the period prescribed by this Act for any person to bring an action to recover land, the estate or interest of that person in the land shall vest in the person who is then in adverse possession of the land with the meaning of section 24.” [Emphasis added]

14. In speaking to her possession of Polly Cay, Dean further submitted that a title would vests in a trespasser as a matter of law. The Court of Appeal case of ***Keith Rolle and Dorothea Avril Rolle v Raymond Meadows SCCivApp No. 128 of 2020*** was submitted by counsel for Dean. The Court stated:

“The vesting of title in the trespasser operates as a matter of law and does not require a grant of a Certificate of Title under the Quieting Titles Act or any action for declaratory relief in an ordinary action in the Supreme Court. If in an action for trespass or possession the court finds as a fact that the Defendants were in exclusive possession for twelve years immediately preceding the commencement of the action the court can find that the Plaintiffs title and right to possession has been defeated.”

Unlike Dean, they say, Ocean has never pleaded that they ever possessed the land and each party must plead the material facts upon which they intend to rely (Rules of the Supreme Court Order 18, rule 6).

Ocean's submissions

15. Counsel for Ocean points to the fact that Dean discontinued proceedings against the Second and Third Defendants who are predecessors in title of Ocean to Polly Cay. In doing so, it is submitted that an inference can be made that Dean is not able to prove her claims.

16. Section 10 of The Registration of Records Act (RA) is relied on by Ocean. They say that Dean's conveyance which was lodged for recording on 4 February, 2011 lacks priority in time to Ocean's which was lodged first, on 16 November, 2009. Section 10 of the RA provides:

“10. If any person after having made and executed any conveyance, assignment, grant, lease, bargain, sale or mortgage of any lands or of any goods or other effects within The Bahamas, or of any estate, right or interest therein, shall afterwards make and execute any other conveyance, assignment, grant, release, bargain, sale or mortgage of the same, or any part thereof, or any estate, right or interest therein; such of the said conveyances, assignments, grants, releases, bargains, sales or mortgages, as shall be first lodged and accepted for record in the Registry

shall have priority or preference; and the estate, right, title or interest of the vendee, grantee or mortgagee claiming under such conveyance, assignment, grant, release, bargain, sale or mortgage, so first lodged and accepted for record shall be deemed and taken to be good and valid and shall in no wise be defeated or affected by reason of priority in time of execution of any other such documents: Provided that this section shall not apply to any disposition of property made with intent to defraud.

17. Ocean asserts that it is a bona fide purchaser for value without notice in the circumstances and reliance was placed on the Limitation Act section 41(4) and (5):

(4) Nothing in this section shall enable any action —

(a) to recover, or recover the value of, any property; or

(b) to enforce any charge against, or set aside any transaction affecting, any property, to be brought against the purchaser of the property or any person claiming through such purchaser in any case where the property has been purchased for valuable consideration by an innocent third party since the fraud or concealment or, as the case may be, the transaction in which the mistake was made took place.

(5) A purchaser is an innocent third party for the purposes of this section —

(a) in the case of fraud or concealment of any fact relevant to the plaintiff's right of action, if such purchaser was not a party to the fraud or, as the case may be, to the concealment of that fact and did not at the time of the purchase know or have reason to believe that the fraud or concealment had taken place; and

(b) in the case of mistake, if such purchaser did not at the time of the purchase know or have reason to believe that the mistake had been made.

18. Dean's factual possession of Polly Cay is questioned by Ocean. They submit that her own evidence shows that there was not continuous, uninterrupted possession of the land for 12 years. Without this, they submit that Dean does not establish a possessory title to the land.

Law, Analysis & Conclusion

19. As plaintiff, Dean has the burden of proving her case on a balance of probabilities. Dean claims that neither she nor her family have ever relinquished possession of Polly Cay by selling it or being dispossessed by Ocean. Despite representations to the court that handwriting and/or forensic analysis experts would give evidence regarding the conveyances this never materialized. In any event, Dean advanced no cogent evidence or otherwise to support the allegations of fraud and unconscionable bargain as set out in her statement of claim.

20. What remains therefore is a contest of two competing titles. The Courts approach to reconciling competing titles to property was firmly set out by the Judicial Committee of the Privy Council in the celebrated case *Ocean Estates Ltd v Pinder*. That approach called for a determination of which party has the better title. Lord Diplock, writing for the Board, stated:

At common law as applied in the Bahamas, which have not adopted the English Land Registration Act, 1925, there is no such concept as an "absolute" title. Where questions of title to land arise in litigation the court is concerned only with the relative strengths of the titles proved by the rival claimants. If party A can prove a better title than party B he is entitled to succeed notwithstanding that C may have a better title than A, if C is neither a party to the action nor a person by whose authority B is in possession or occupation of the land. It follows that as against a defendant whose entry upon the land was made as a trespasser a plaintiff who can prove any documentary title to the land is entitled to recover possession of the land unless debarred under the Real Property Limitation Act by effluxion of the 20-year period of continuous and exclusive possession by the trespasser.

21. As it relates to a documentary title, both parties have conveyances claiming to own Polly Cay. Dean claims that the Cay was conveyed to her because of her family lineage while Ocean claims to be strangers to the land before its purchase. Both conveyances purport to derive from Alfred Strachan. Ocean's conveyance being derived ultimately from an inter vivos conveyance from Alfred Strachan while Dean's emanates from the estate of Alfred Strachan through an administrator.

22. In any event, both sets of documents are recorded in the Registry of Records. The title documents of Dean are dated earlier in time than those of Ocean. However, Ocean's title documents were the first in time to be recorded in the Registry of Records. The statute dictates that the title recorded first in time should prima facie be the accepted title.

23. It appears clear, having regard to the registration of the conveyances that Ocean also has a valid claim that it is a bona fide purchaser for value without any notice of Dean's claim to an interest in Polly Cay. Dean's conveyance would not have come to the attention of Ocean based on the available records when a title search would have been conducted for Ocean by its attorneys. One would have expected Dean however, to have discovered

that a recorded conveyance from Alfred Strachan was lodged for record some 60 years after her acquisition from Allan.

24. In all the circumstance I am satisfied, on balance, that Ocean is the documentary title holder with a better documentary title than Dean. I was not persuaded by Dean's assertion that Ocean did not come into possession of Polly Cay on its purchase in 2009. The documentary title shows that Alfred Strachan had divested himself of any interest in Polly Cay since 1928. With the allegations of fraud no longer alive it cannot be doubted that Ocean has the better title, as the validity of their documentary title has essentially gone unchallenged.

25. Further, and ultimately fatal to Dean's claim to a good documentary title is the unchallenged evidence that Ocean obtained its title through a chain which included Alfred Strachan's Crown grant. Ocean pleads that its attorneys conducted their due diligence by producing the statute based title search going back at least 30 years, showing good root of title, which was passed to them when they purchased Polly Cay. I am satisfied that once Alfred Strachan conveyed the land to Jerome Washington Knowles, which I find on balance that he did, Polly Cay was no longer available for Allan Strachan to convey to Dean. It is a general principle in law that 'no one can transfer what he does not own', captured in the Latin maxim as '*nemo dat quod non habet*'.

26. I am now required to determine whether as a fact, Dean had been in exclusive possession of Polly Cay for the twelve years immediately preceding the commencement of the action, in which case Ocean's title and right to possession has been defeated. (See ***Rolle et al v Meadows***)

27. Factual possession is a necessary if not the predominant element that must be proven in the determination of who possesses the better title to land as per ***Ocean Estates v Pinder***. The factual possession required is qualified as 'complete and exclusive physical control' over the land, which must be 'open, not secret; peaceful, not by force; and adverse, not by consent of the true owner' (***Buckinghamshire CC v Moran [1990] Ch 623***, per Slade J and ***JA Pye (Oxford) Ltd v Graham*** [2003] 1 AC 419, per Lord Browne-Wilkinson). It has been considered and prescribed in ***Lord Advocate v Lord***

Lovat (1880) 5 App Cas 273 as mandating that the possession be 'open, notorious and unconcealed'. The acts of possession must be such that it would be noticed by the documentary owner, reasonably careful of his own interests (***Re Riley and the Real Property Act [1965] NSW 994***).

28. Having seen and heard Dean and observed her demeanor as she gave her evidence, I was not satisfied that her evidence was reliable. I was not satisfied, on her evidence, that she or any of her relatives possessed Polly Cay in an open, notorious and unconcealed way leading up to the filing of this action. Dean's own evidence was that she lives in New Providence and had not visited the cay since 2004. Dean conceded that there are no physical structures placed on the Cay by her or anyone and that any farming and livestock harvesting had long since ceased on Polly Cay.

29. Sade's evidence, which I accept, was that Polly Cay was overgrown and there was no evidence of any occupation. Sade's physical inspection of the land in 2004, some ten years prior to these proceedings, did not yield any evidence that the Cay was occupied and/or in the possession of Dean or anyone else prior to Ocean's purchase. The aerial photo provided in his evidence supports this averment. A survey map of Polly Cay was likewise a part of the evidence and also revealed no structures on the property.

30. I am satisfied that having regard to the state of Polly Cay, Ocean would be a bona fide purchaser for value without notice of any interest claimed by Dean. In the English case of ***Pilcher v Rawlins (1871) LR 7 Ch. App 259***, James LJ stated:

"I propose simply to apply myself to the case of a purchaser for valuable consideration, without notice, obtaining, upon the occasion of his purchase, and by means of his purchase deed, some legal estate, some legal right, some legal advantage; and, according to my view of the established law of this Court, such a purchaser's plea of a purchase for valuable consideration without notice is an absolute, unqualified, unanswerable defence, and an unanswerable plea to the jurisdiction of this Court. Such a purchaser, when he has once put in that plea, may be interrogated and tested to any extent as to the valuable consideration which he has given in order to shew the bona fides or mala fides of his purchase, and also the presence or the absence of notice; but when once he has gone through that ordeal, and has satisfied the terms of the plea of purchase for valuable consideration without notice, then, according to my judgment, this Court has no

jurisdiction whatever to do anything more than to let him depart in possession of that legal estate, that legal right, that legal advantage which he has obtained, whatever it may be. In such a case a purchaser is entitled to hold that which, without breach of duty, he has had conveyed to him.”

31. Even if Dean and her family members through whom she claimed had sufficient factual possession, at some point prior to purchase by Ocean, I am satisfied that such factual possession had long been abandoned or lapsed, in the result that the property reverted to the documentary title holder, Ocean. (See *Trustees, Executors & Agency Co. Ltd. v Short (1888) 13 AC 793*).

32. In the circumstance therefore, I do not find, on balance, that Dean has proven that it has ousted the documentary title of Ocean. I am satisfied that Ocean has the better documentary title to Polly Cay and a bona fide purchaser for value without notice of any interest being claimed by Dean. Dean has not demonstrated the necessary adverse possession to set up a possessory title to Polly Cay. Dean's claim is therefore dismissed with costs to Ocean to be taxed if not agreed.

Dated this 15th day of September 2022

A handwritten signature in black ink, appearing to read 'I R Winder', with a large, stylized flourish extending to the right.

Ian R. Winder
Chief Justice