1988 S. H. No. 64018

IN THE SUPREME COURT OF NOVA SCOTIA
TRIAL DIVISION

BETWEEN:

INTER LAKE DEVELOPMENTS LTD.

Purchaser

- and -

JAMES WILLIAM SLAUENWHITE

Vendor

HEARD: at Halifax, Nova Scotia, before the Honourable Mr. Justice John M. Davison, in Chambers on Tuesday, April 12th, 1988

DECISION: May 5th, 1988

COUNSEL: G. Douglas Sealy, Esq., for the Purchaser
J. Patrick Morris, Esq., for the Vendor

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DAVISON, J.:

This is an application pursuant to section 3 of the Vendors and Purchasers Act, R.S.N.S., 1967, c. 324, requesting a determination as to whether an objection to title conveyed by the Purchaser to the Vendor is a valid objection.

The sections of the Vendors and Purchasers Act which are relevant for determination of the issue before me are:

> **1 In the completion of a contract of sale of land the rights and obligations of the vendor and the purchaser shall, subject to any stipulation to the contrary in the contract, be regulated by the following rules:**

> (a) recitals, statements and descriptions of facts, matters and parties contained in statutes, deeds, instruments, conveyances or statutory declarations, any of which are more than twenty years old at the date of the contract, unless and except in so far as they are proved to be inaccurate, shall be sufficient evidence of the truth of such facts, matters and descriptions;
>
> ...
>
> 3 A vendor or purchaser of any interest in land or his representative may, at any time and from time to time, apply in a summary way to a judge or an ex officio master of the Supreme Court [Judge or Local Judge of the Trial Division of the Supreme Court] in respect of any requisition or objection or any claim for compensation, or any other question arising out of or connected with the contract and the judge [Judge] or ex officio master [Local Judge] may make such order upon the application as appears just, and refer any question to a referee or other officer for inquiry and report.

The parties hereto entered an Agreement of Purchase and Sale on the 16th day of September, 1987, with respect to property known as "Pine Point, Molega Lake, Queens County". The solicitor for the Purchaser raised a number of objections to title but only one remains and that relates to the fact that a chain of paper title can be traced to 1947 but beyond that there appears to be a gap in the chain of title as recorded at the Registry of Deeds in the County of Queens.

More specifically, I am advised as follows:

1. The lands in question were conveyed in 1885 to one Joseph Hanley.

2. It is suggested that there exists a deed dated May 12th, 1914, from Joseph Hanley to one Elijah Henley conveying lands of which the property under search forms a part. This deed has not been located but is referred to in another deed by which the property was conveyed in 1947.

3. The 1947 deed is said to be from the executors of the Estate of Elijah Henley, deceased, to William Slauenwhite who is the father of the Vendor under the terms of the Agreement of Purchase and Sale. This deed is dated August 30th, 1947, and was registered at the Registry of Deeds for the County of Queens and contains the following reference:

> **And being the same lot of land which was conveyed to the said Elijah Henley by Deed from Joseph Hanley dated 12th May, 1914.**

As pointed out by Mr. Justice Hallett in **Know v. Veinote (1982), 54 N.S.R. (2d) 666,** it has been the practice in Nova Scotia to conduct searches of title which go back at least forty years and this practice relates to the extended limitation period under the Limitation of Actions Act, R.S.N.S. 167, c. 168. Notwithstanding the practice, the solicitor for the Purchaser raised his objections to title after he read an article by C. W. MacIntosh, Q.C. in Vol. 14 of the Nova Scotia Law News, (December, 1987). Mr. MacIntosh, who is a recognized expert in conveyancing law in the Province of Nova Scotia, makes the point that many lawyers confuse the requirement

to ascertain a sixty year chain of title with the forty year search required to extinquish claims under the Limitation of Actions Act. After referring to authorities in the United Kingdom and Canada, Mr. MacIntosh concludes with these remarks:

> **The practice by some solicitors of commencing a search 40 years back from the present appears to be founded on an assumption that the Limitations of Actions Act had set this as a standard. This is not the case. The traditional search period of 60 years was developed to protect against the possibility of double claims of title and to establish a standard, short of a chain continuous from a grant from the Sovereign, which would be recognized as one which a purchaser would not be able to reject. The reasons for the 60 year search are as valid today as they were in 1749.**

In his article, Mr. MacIntosh refers to a number of authorities of our court including **Stevens v. MacKenzie (1979), 41 N.S.R. (2d) 91** and **Dooks v. Rhodes (1982), 52 N.S.R. (2d) 650.**

The Vendor takes the position that the reference in the 1947 deed to the missing deed of 1914 is a reference contemplated by section 1(a) of the Vendors and Purchasers Act and renders the missing deed inconsequential. The solicitor for the Vendor says that by reason of the terms of the Limitation Act, only the Crown would have a right which still continues following the expiration of 40 years.

The one issue before me is whether the Purchaser's objection to title was valid. A determination of this point doesn't rest on the effect of the Statute of Limitations. There is no evidence of possessory title before me and according to the authorities in this country, possessory title can only be presumed if there exists paper title for a period of 60 years.

The remaining question is whether the facts, with respect to the 1914 deed as set forth in the 1947 deed, are sufficient to extend paper title back to 1914.

I have not been referred to nor do I know of any authority where section 1(a) of the Vendors and Purchasers Act has been judicially considered.

In **Gunn v. Turner (1906), 13 O.L.R. 158**, the court had before it an action for specific performance of an agreement for the sale of lands and at issue was whether the Defendant could produce a good title to the lands. In the course of his judgment, Teetzel, J. commented that the Plaintiff should have applied to the court under the Vendors and Purchasers Act R.S.O. 1897, c. 134. His decision was subsequently affirmed by the Divisional Court. At issue was a deed which was more than 20 years old which contained a recital that the grantee was the administrator of his father's estate and that the land

was conveyed to him in satisfaction of the discharge of a debt due to his father. It was held that this recital, being a recital in a deed 20 years old, was sufficient evidence of the truth of the facts therein stated in the absence of proof to the contrary.

Similarly in **Bolton** v. **London School Board** **(1878), 7 Ch.D. 766,** a recital was found to be sufficient evidence of proof of the fact. The headnote is representative of the decision of the court and it reads in part as follows:

> **Under the Vendor and Purchaser Act, 1874 (37 & 38 Vict. c. 78), s.2, a recital in a conveyance more than twenty years old, that the vendor was seised in fee simple, is sufficient evidence of that fact, and no prior abstract of title can be demanded except so far as the recital shall be proved to be inaccurate; and in such cases a forty years' title is not required.**

This latter case was referred to in The Modern Law of Real Property, (10th ed), by Cheshire at 334 as authority for the proposition that the burden lies on the purchaser to show that recitals in deeds older than 20 years are inaccurate.

It is my ruling that the recital as set forth in the 1947 deed should be accepted for the truth of the information therein contained in the absence of evidence to contrary and that it is sufficient to establish paper title beyond 60 years. As the Purchaser's objection to title is restricted to the

fact that the 1914 deed was not recorded, it is invalid.

If the parties cannot agree as to costs, I will hear them on that issue.

J.

Halifax, Nova Scotia
May 5, 1988