[2014] UKPC 24
Privy Council Appeal No 0022 of 2013

JUDGMENT

Dennis Dean and another (Appellants) *v* Arawak Homes Ltd (Respondent)

From the Court of Appeal of the Commonwealth of The Bahamas

before

Lord Mance
Lord Wilson
Lord Reed
Lord Carnwath
Lord Hodge

JUDGMENT DELIVERED BY

Lord Hodge

ON

29 July 2014

Heard on 8 May 2014

Appellant	*Respondent*
Carlton A Martin	Thomas Roe QC
Rouschard C Martin	Neville L Smith
(Instructed by Martin Martin & Co)	Sharlyn R Smith
	(Instructed by MA Law (Solicitors) LLP)

LORD HODGE:

1. This appeal concerns a conflict between documentary titles to land in the island of New Providence in The Bahamas. The appellants ("Mr and Mrs Dean") purchased plots of land in 1998 and 1999 in a subdivision formerly known as Pinewood Gardens and now as the Sir Lynden Pindling Estates. Mr and Mrs Dean instructed the clearing of the land and commenced its development. The respondents ("Arawak") raised an action of trespass against Mr Dean in 2002 (action no. 1883 of 2002). In 2008 Arawak raised an action against Mr and Mrs Dean seeking possession of specified lots of land (action no. 727 of 2008).

2. Arawak's title to the disputed land, which it acquired in 1983 by assignation of the equity of redemption, is no longer in issue. Arawak traced its title to titles dating from 1925 and 1942. The principal question in the litigation was whether Mr and Mrs Dean had a better documentary title.

3. Mr and Mrs Dean based their title on a certificate of title which the Supreme Court of The Bahamas granted to Thaddeus Johnson on 28 January 1985 under sections 3 and 17 of the Quieting Titles Act 1959 ("QTA"). Mr Johnson had claimed to have been in open and undisturbed possession of the land since 1935. Section 19 of the QTA provides:

> "Subject to the provisions of section 27 of this Act and notwithstanding the provisions of any other Act or law, on and from the date of the certificate of title the same shall be –
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> (a) conclusive as to the accuracy of the contents thereof (including any schedule thereto and any plan annexed thereto) and binding on the Crown and all persons whomsoever: and
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> (b) conclusive evidence that every application, notice, publication, proceeding, consent and act which ought to have been made, given, taken or done before the granting of the certificate of title, have been properly, duly and sufficiently, made, given, taken and done."

Section 27 of the QTA provides:

> "If in the course of any proceedings under this Act any person acting either as principal or agent fraudulently, knowingly and with intent to deceive makes or assists or joins in or is privy to the making of any material false statement or representation, or suppresses, withholds or conceals, or assists or joins in or is privy to the suppression, withholding or concealing from the court of any material document, fact or matter of information, any certificate of title obtained by means of such fraud or falsehood shall be null and void except against a *bona fide* purchaser for valuable consideration without notice."

4. Mr Dean, or Mr and Mrs Dean together, acquired title to the disputed lands (a) through three conveyances dated 26 March, 24 April and 3 December 1998 from Bahamas Variety Company (1989) Limited ("BVC"), which had obtained title from Thaddeus Johnson on 12 June 1992 and (b) through a conveyance dated 16 February 1999 from Mrs Mergil Chisholm Johnson, the widow of Thaddeus Johnson, as personal representative of her husband who had died on 4 September 1992. Mr and Mrs Dean were thus able to show links in title back to the certificate of title which Thaddeus Johnson obtained in 1985. But there were three complications.

5. First, on 29 January 1985, which was the day after he obtained the certificate of title from the court, Thaddeus Johnson conveyed by sale all of the land covered by the certificate of title to C.B. Bahamas Limited ("CB"). CB recorded its title in the Registrar General's Department. Under section 10 of the Registration of Records Act 1928 (as amended), documents have priority by date of lodging in the registry.

6. Secondly, in February 1985 CB commenced legal proceedings for trespass against Arawak (action no. 355 of 1985) and in May 1985 Arawak commenced proceedings against Thaddeus Johnson, CB and Eleazear Ferguson, who had also obtained a certificate of title, seeking a declaration that the certificates of title had been obtained by fraud (action no. 510 of 1985). On 11 April 1986 Gonsalves-Sabola J gave judgment in the first of those actions (no. 355) in which he declared that (i) as between CB and Arawak the certificate of title granted to Thaddeus Johnson in respect of blocks 155, 156 and 157 of "Nassau Village Subdivision" was ineffective to constitute a root of title to CB and (ii) CB was not a *bona fide* purchaser for valuable consideration without notice of the said blocks of land in terms of s 27 of the QTA. The judge had before him the record of the application to quieten the title and heard evidence from, among others, Mr Johnson. He found that Mr Johnson, who was a man of humble means, had acted throughout the application on behalf of a Mr Robinson, who controlled CB. He held that CB could not rely on the certificate of title because Mr Johnson's application was based on an outdated plan from 1926 which did not portray the existing circumstances on the ground. He held that that was a misrepresentation of a material kind which was covered by s 27 of the QTA. CB, through Mr Robinson and others, had knowledge of the fraud and also of Arawak's interest in and development of the land. CB was not entitled to pursue its claim for trespass. But the judge stated that he was

not making a ruling on the validity of Mr Johnson's title as he was not a party to the action and no order was sought against him.

7. On 18 June 1992 the Court of Appeal (Henry P, Melville and Campbell JJA) upheld the judgment of Gonsalves-Sabola J and issued their written reasons for that decision on 5 October 1992. Melville and Campbell JJA both confirmed from their consideration of the evidence that Mr Johnson was Mr Robinson's cat's paw and that a survey of the disputed land in 1972, which showed that it was virgin bush, discredited Mr Johnson's assertion that he had cultivated it for many years and gave further support to Arawak's allegation of misrepresentation.

8. The action raised by Arawak against Thaddeus Johnson, CB and Eleazear Ferguson (no 510 of 1985) did not go to trial until 2011. By then, Neville Johnson was a defendant as the personal representative of his deceased father. In an order dated 8 November 2011 Adderley J, having considered affidavit evidence, declared that both the certificate of title of 28 January 1985 in favour of Thaddeus Johnson and his conveyance to CB were null and void. This judgment, which nullified Thaddeus Johnson's title, post-dated the proceedings in the actions which are the subject of this appeal.

9. Thirdly, on 1 September 1992 Thaddeus Johnson conveyed to Mildred Farquharson the lands within block 119 of the "Nassau Village Subdivision" which his widow later purported to convey to Mr and Mrs Dean (para 4 above).

The current proceedings

10. On 16 September 2002 Arawak commenced proceedings in the Supreme Court of The Bahamas against Mr Dean (no. 1883 of 2002) seeking a declaration that he was not entitled to enter onto certain plots of the disputed land (in block 119 of "Nassau Village Subdivision"), an order for possession of that land, an injunction against Mr Dean, and damages. Mr Dean claimed title to those plots by virtue of the conveyance from Thaddeus Johnson's widow in 1999 (para 4 above) and also a proprietary beneficial interest in the plots as he claimed that Arawak had allowed him to spend $300,000 in building two duplexes without protest. But at trial Mr Dean's counsel conceded that Arawak had the better title to the land, leaving for determination only the issue of proprietary estoppel. On 20 September 2010 Allen SJ gave judgment after hearing the evidence of the parties. She referred to the outcome of action no. 355 of 1985 and rejected Mr Dean's evidence that he had developed the plots in the mistaken belief that he owned the land. She held that he knew that he did not own that land and that he built on the land when he knew that Arawak was successfully asserting its right of possession against others. Thereafter, on 5 November 2010 she assessed damages in the sum of $459,998.80.

11. On 6 May 2008 Arawak raised proceedings in the Supreme Court (no. 727 of 2008) against Mr and Mrs Dean seeking an injunction for the removal of the buildings and prohibiting the defendants from entering other parts of the disputed lands, and

orders for possession of the disputed lands and damages. On 21 October 2010, after a trial in which the evidence was not in dispute but was presented in an agreed bundle of documents which included the judgments in action no. 355 of 1985, Sir Michael Barnett CJ issued his judgment. In para 14 of his judgment he recorded:

> "It is also common ground that on the 29th January 1985 (the day after the Certificate was granted) Thaddeus Johnson conveyed to C B Bahamas Ltd all of the land the subject of the Certificate of Title granted to him. Ostensibly, by that conveyance Mr Johnson had divested himself of all interest in the property and after that date had nothing to convey to Bahamas Variety."

He also recorded as common ground the findings of Gonsalves-Sabola J and the Court of Appeal in action no. 355 of 1985 that Mr Johnson had deliberately and fraudulently suppressed material information when he obtained the certificate of title. The Chief Justice observed that those judgments were in the public domain when Mr and Mrs Dean bought the disputed land and as was the conveyance from Mr Johnson to CB. He held (para 25) that, although the court had not set aside the certificate of title, neither Mr and Mrs Dean nor BVC could be regarded as *bona fide* purchasers for valuable consideration without notice of the fraud by Mr Johnson. The Chief Justice made a declaration that Arawak was the lawful owner of the relevant plots and left over for further submissions the questions of the injunction and whether damages would be an adequate remedy.

12. In 2012 the Court of Appeal heard consolidated appeals in actions no. 1883 of 2002 and no. 727 of 2008. In a judgment dated 9 March 2012, the Court of Appeal (Blackman, John and Conteh JJA) held that Arawak had a better documentary title to the land. The Court also rejected the claim by Mr and Mrs Dean that they had some form of proprietary interest in the property through proprietary estoppel by reason of their investment in building on certain of the plots of the disputed land. The Court reduced the award of damages which Allen SJ had made because it held that Arawak was entitled to interest for five years rather than the eight years which she had awarded.

13. On 10 January 2013 the Court of Appeal granted Mr and Mrs Dean final leave to appeal to the Board.

Discussion

14. The legal representatives of Mr and Mrs Dean advanced twenty-one grounds of appeal. The Board considers that on a proper analysis the appeal raises five principal issues, namely,

i) Whether, because of the relativity of title to land, Mr Johnson's conveyance to CB is irrelevant to the conflict of documentary titles;

ii) Whether the judgment against CB in action no. 355 of 1985 is binding on Mr and Mrs Dean or any other person in the chain of title;

iii) Whether the Court of Appeal failed to determine Mr and Mrs Dean's defence that they were *bona fide* purchasers for value without notice of a defect in title;

iv) Whether Mr and Mrs Dean can claim proprietary estoppel;

v) Whether they have a possessory title.

The grounds of appeal also challenged the quantification of damages. But counsel did not make any substantive submissions to support that challenge.

(i) Relativity of title

15. The question which the courts in The Bahamas had to address was which party had the better title to the disputed lands. The courts were principally concerned with a competition of documentary titles rather than a claim of adverse possession against a title holder. In *Ocean Estates v Pinder* [1969] 2 AC 19, 24-25, Lord Diplock 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."

16. If the certificate of title in favour of Mr Johnson had been valid, the conveyance to CB would have been directly relevant to the competition of documentary titles. It would have caused Arawak's title to prevail in a question with Mr and Mrs Dean. This is because of the general principle of *nemo dat quod non habet*: no one can transfer what he does not own. Mr and Mrs Dean claimed their title through (i) BVC and (ii) Mrs Johnson. But, on the hypothesis that Mr Johnson's certificate of title was a good

title, neither BVC nor Mrs Johnson could have obtained good documentary title because of Mr Johnson's prior conveyance to CB. Once Mr Johnson had conveyed the land to CB, he had nothing to give BVC and BVC in turn had nothing to give Mr and Mrs Dean. The same is the case in relation to Mrs Johnson. If CB's title was invalid for reasons other than the nullity of Mr Johnson's certificate of title, Mrs Johnson's conveyance to Mr and Mrs Dean of the plots in block 119 would have been undermined by Mr Johnson's prior conveyance of those plots to Mildred Farquharson. Arawak was entitled to plead *ius tertii* against Mr and Mrs Dean by reference to the conveyance to CB and, if CB's title were impugned, the conveyance to Mrs Farquharson. See Megarry and Wade, "The Law of Real Property" (8th ed. 2012) paras 4-001, 4-004 and 4-010. In short, title to the disputed land did not devolve from Mr Johnson to Mr and Mrs Dean.

(ii) The relevance of the judgment in action no.355 of 1985

17. In any event, Arawak won the battle of documentary titles because Mr Johnson was not able to give anybody a good title. The courts were able so to conclude either by concession in one action or because in the other action the courts, without objection, looked at the decision of Gonsalves-Sabola J in action no.335 of 1985 as part of the agreed evidence.

18. Allen SJ in action no.1883 of 2002 did not rely on the decision of Gonsalves-Sabola J but on the prior conveyances to either CB or Mildred Farquharson, the principle of *nemo dat quod non habet* and counsel's unavoidable concession that Arawak had a better title. See para 10 above.

19. It is clear from Gonsalves-Sabola J's judgment that he was dealing with an action *in personam* and that his decision did not bind Mr Johnson, who was not a party to the action. But his decision was presented to the Chief Justice as part of the agreed evidence in the agreed bundle of documents in action no. 727 of 2008. See para 11 above. That evidence was before the Court of Appeal in the consolidated appeals. It provided a basis for the findings (i) that Mr Johnson had acted fraudulently and (ii) that the judgments of Gonsalves-Sabola J and the Court of Appeal in action no.355 of 1985 prevented subsequent purchasers from Mr Johnson from being able to claim protection as *bona fide* purchasers for value.

20. In the Board's view there is therefore no substance in the submission that the courts fell into error by treating the judgments in action no.355 of 1985 as judgments *in rem* which were binding on Mr and Mrs Dean. They did not treat the judgments in that way. Section 121 of the Evidence Act 1996, which sets out circumstances in which a prior judgement is conclusive proof as to issues decided between the parties, has no bearing on this case. Nor does the fact that action no.355 of 1985 concerned only some of the plots of the disputed land make any difference. There was evidence before the courts in action no 727 of 2008 that Mr Johnson acted fraudulently in obtaining the certificate of title which covered all the disputed land.

21. Although the certificate of title which Mr Johnson obtained in 1985 had not been declared a nullity in an action to which any predecessor in title of Mr and Mrs Dean was a party until the judgment in action no. 510 of 1985 in 2011 (para 8 above), the evidence of Mr Johnson's fraud, which was led in action no 355 of 1985, was properly before the courts below in the actions which are the subject of this appeal. That entitled the Court of Appeal to observe that the certificate of title had been obtained through fraud. As a result, Mr and Mrs Dean had to show that they were *bona fide* purchasers without notice. This they failed to do.

(iii) Whether the Court of Appeal failed to deal with the defence of bona fide purchaser

22. The Court of Appeal cannot be criticised for not addressing the defence that Mr and Mrs Dean were *bona fide* purchasers for value without notice because that defence was not before them. Mr and Mrs Dean between them lodged four sets of defences in action no.727 of 2008. The later defences did not raise this plea and the earlier defences which did were not lodged in the appeal bundle.

23. In any event the plea is clearly without substance. Section 57(1) of the Conveyancing and Law of Property Act 1909 which was then in force (now section 52 of that Act) provided:

> "A purchaser shall not be prejudicially affected by notice of any instrument, fact or thing unless –
>
> (a) it is within his own knowledge, or would have come to his knowledge if such inquiries and inspections had been made as ought reasonably to have been made by him; or
>
> (b) in the same transaction with respect to which a question of notice to a purchaser arises, it has come to the knowledge of his counsel, as such, or of his solicitor, or other agent, as such, or would have come to the knowledge of his solicitor, or other agent, as such, if such inquiries and inspections had been made as ought reasonably to have been made by the solicitor or other agent."

The extent of the constructive knowledge of a purchaser thus depends upon an objective assessment of what inquiries and inspections he or someone on his behalf should have made.

24. Bahamian conveyancing practice involves title searches in the Registrar General's Department back to a root title at least thirty years before the transaction. It

also involves personal searches in the Supreme Court's records for relevant judgments against the people who provide the links in title or who appear to have interests in the property. Allen SJ at para 54 of her judgment, a passage which the Chief Justice endorsed in his judgment, stated:

> "In order to get a good and marketable title, such title must begin with a root at least thirty years old and the risk is on the purchaser, who must satisfy himself by a full investigation of the title, before completing the purchase. It goes without saying that a *bona fide* purchaser who is giving value for his title would reasonably be expected to investigate the title by doing the usual and proper inquiries before paying for it. Had this been done, [Mr Dean], or any legal counsel working on his behalf, would have discovered the conveyances and Court orders affecting the subject land and would know that the vendor could not pass legal title to the subject land in 1999."

Allen SJ concluded that Mr Dean had constructive knowledge of the state of the title of the land (block 119) when he purportedly bought it in 1999.

25. Similarly, the Chief Justice held in relation to the rest of the disputed land:

> (i) that the judgments of Gonsalves-Sabola J and the Court of Appeal in action no.355 of 1985 were in the public domain and could have been discovered by any reasonable search by Mr and Mrs Dean or their attorney in their investigation of the title of BVC and Mr Johnson; and
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> (ii) that the conveyance by Mr Johnson to CB would also have been discovered by such a search.

He also held (in para 25) that, notwithstanding that the court had not then set aside the certificate of title, neither Mr and Mrs Dean nor BVC could be regarded as *bona fide* purchasers for valuable consideration without notice of the fraud by Mr Johnson.

26. The Board concludes that, while the Court of Appeal did not address the defence, Mr Martin has provided no basis for challenging the obviously correct conclusions of Allen SJ and Sir Michael Barnett CJ on this issue.

(iv) Proprietary estoppel

27. Mr and Mrs Dean claim that they built on the disputed land believing it to be their own and that Arawak knew that they were building on the land but did nothing

until they raised the legal proceedings in 2002 and 2008. But this plea is undermined by the finding of fact by Allen SJ (in para 56 of her judgment) in which she stated:

> "Moreover, having heard the Defendant's [Mr Dean's] evidence and observing his demeanour, I do not believe he held any mistaken belief that he owned the subject land. In fact I find that he knew he did not own the land when he took possession."

Allen SJ then set out her reasons for that conclusion which included the evidence of a Mr Andrew Pinder, Arawak's site supervisor, and Mr Bismarck Coakley that Mr Dean attempted to hide the construction of the duplexes by maintaining the height of the bush and by failing to display building permits on the site. She accepted the evidence of Mr Stafford Coakley that the land had been marked out in accordance with the Pinewood Gardens Subdivision plan and not the "Nassau Village" subdivision plan as Mr Dean had asserted. She also recorded that Mr Dean admitted that he knew that Arawak was developing the sub-division and that it had mounted legal challenges against people claiming possession of land in the same area. Further, there was evidence, which Allen SJ accepted, that Arawak was active when it discovered that someone was building on its land. Mr Pinder gave evidence that he had been confronted and assaulted in 2002 when he sought to inspect land close to the land on which Mr Dean had laid foundations. When Mr Bismarck Coakley saw Mr and Mrs Dean's building works in 2002 he referred the matter to Arawak's legal department. Arawak obtained an interim injunction on 16 September 2002.

28. Based on her assessment of this evidence and Mr Dean's lack of credibility, Allen SJ concluded (a) that it would not be unconscionable or unjust for Arawak to assert its right to possess the lots on which the duplexes had been built, and (b) that Mr Dean had no equity to satisfy in his claim to recover the value of the sums expended on building on the site. The Court of Appeal agreed with her findings of fact and quoted from the speech of Lord Cranworth LC in *Ramsden v Dyson* (1866) LR HL 129, 141:

> "[I]f a stranger builds on my land knowing it to be mine, there is no principle of equity which would prevent my claiming the land with the benefit of all the expenditure made on it. There would be nothing in my conduct, active or passive, making it inequitable in me to assert my legal rights."

29. In the face of those concurrent findings of fact, the Board sees no basis for a plea of proprietary estoppel.

(v) Possessory title

30. Mr and Mrs Dean also sought to argue that they had a possessory title to the disputed land by virtue of a combination of their own occupation since 1998 and 1999 and the prior occupation of their predecessors in title, Mr Johnson and BVC, amounting to adverse possession for more than twelve years. There are two difficulties with this submission, each of which is fatal. First, the point was not pleaded or argued in the courts below. Secondly, there was no evidence of possession by their predecessors in title. Mr Johnson's assertion of possession by cultivation of the land as the basis of his application for the certificate in title was undermined by the evidence in action no. 355 of 1985, which Gonsalves-Sabola J accepted, of the survey in 1972 which showed the disputed land to be virgin land. There was no evidence of possession by Mr Johnson after he applied for the certificate of title or of any acts of possession by BVC. Indeed, it was Mr and Mrs Dean's case that they had cleared and developed the land. There was no evidence of adverse possession before 1998 which Arawak had to refute.

Conclusion

31. Arawak wins the battle of documentary titles and is not subject to proprietary estoppel. The Board will humbly advise Her Majesty that the appeal should be dismissed.